



Intellectual Property Law (6th edn)

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p. 303 10. Moral Rights

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Abstract

This chapter focuses on moral rights conferred by the Copyright, Designs and Patents Act 1988 on the authors of certain works to protect their non-pecuniary or non-economic interests. It begins by describing the nature of and rationales for grant of moral rights as well as a number of criticisms made about such rights. This is followed by a detailed consideration of the moral right of attribution or right of paternity, the right to object to false attribution, and the right of integrity. This discussion identifies when such rights arise (including the requirement of assertion of the attribution right), when the moral rights are infringed, and exceptions to such rights. The chapter also considers how far such rights can be waived.

Keywords: moral rights, right of attribution, right of paternity, assertion, false attribution, right of integrity, derogatory treatment, honour, reputation, waiver

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1 Introduction

Once a work qualifies for copyright protection, two distinct categories of right may arise. In addition to the economic rights that are granted to the first owner of copyright, the 1988 Act also confers moral rights on the authors of certain works.¹

Moral rights² protect an author's non-pecuniary or non-economic interests.³ That is, they 'protect the personal relationship between the author and his work as his intellectual creation and therefore, in a sense, an emanation of his personality.'⁴ The Copyright, Designs and Patents Act 1988 (CDPA 1988) provides authors and directors with the right to be named when a work is copied or communicated (the right of attribution), the right *not* to be named as the author of a work that they did not create (the right to object against false attribution), and the right to control the form of the work (the right of integrity). The moral rights recognized in the United Kingdom are more limited than the rights granted in some other jurisdictions, where, for example, authors are provided with the rights to publish or divulge a work, to correct the work, to object to the alteration or destruction of the original of a work, to object to excessive criticism of the work, and to withdraw a work from circulation on the ground that the author is no longer happy with it (because, for example, it no longer reflects the author's world view or because the person to whom the economic rights in the work have been assigned has failed to exploit it).

p. 304 Infringement of a moral right in the United Kingdom is actionable as a breach of a statutory duty⁵ and will result in an award of damages. The moral rights of integrity and attribution recognized under the 1988 Act last for the same time as the copyright in the ↵ relevant work. The right to object to false attribution is less extensive, lasting for only 20 years after the author's death.⁶ After the author's death, moral rights usually are exercised by their heirs,⁷ but in some countries may be enforced by executive bodies such as the Ministry for Culture.

The moral rights in the 1988 Act were introduced to give effect to Article 6bis of the Berne Convention,⁸ which requires that members of the Berne Union confer on authors the right of attribution and integrity.⁹ More specifically, it states that:

Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work, and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honour or reputation.

Instead of replicating Article 6bis verbatim, the British legislature chose to introduce a series of detailed statutory provisions, each of which contains a number of conditions, limitations, and exceptions.¹⁰ This has led commentators to suggest that the manner in which Article 6 has been implemented in the United Kingdom is 'cynical, or at least half-hearted'.¹¹ Given that failure to give effect to Article 6bis does not represent a ground of complaint to the World Trade Organization (WTO),¹² it is unlikely that much will come of these criticisms.

p. 305 While moral rights have received a considerable amount of support,¹³ particularly from creators, they have also been subject to a degree of criticism.¹⁴ At a general level, ↵ moral rights have been criticized for the fact that they are founded upon a romantic image of the author as an isolated creative genius who in creating a work imparts their personality upon the resulting work. Under this model, moral rights enable the author to maintain the 'indestructible creational bond' that exists between their personality and the work.¹⁵ The notion of the romantic author, which became unfashionable in the second half of the twentieth century, has

been criticized because it presents an unrealistic image of the process of authorship. In particular, it has been criticized for the fact that it fails to acknowledge the collaborative and intertextual nature of the creative process.¹⁶

Another criticism made about moral rights focuses on what is perceived as their foreign or alien nature.¹⁷ More specially, it has been suggested that moral rights, which have their origin in continental copyright systems,¹⁸ cannot readily be absorbed or transplanted into a common law system.¹⁹ Any attempt to do so will not only fail but will also upset the existing copyright regimes.

Moral rights have also been criticized on the basis that they represent an unjustified legal intervention in the working of the free market. Such arguments highlight the fact that moral rights typically secure authors' interests at the expense of entrepreneurs, disseminators, and exploiters of copyright.²⁰ Given this, it is not surprising that while authors' groups argue for further entrenchment of the rights (so that they are inalienable), the entrepreneurial interests lobby for further restrictions on the rights and their subjugation to voluntary market transactions.²¹ Another criticism made of moral rights is that they prioritize private interests over the public interest. More specifically, it has been suggested that moral rights may inhibit the creation and dissemination of derivative creations, such as multimedia works and parodies.²² For example, if an author were to use their moral right of integrity to prevent the publication of a parody of their work, this would conflict with the right to free expression, and thus with broader public interests.²³

With these initial points in mind, we now turn to look at the moral rights that are recognized in the United Kingdom.

p. 306 2 Right of Attribution (or Paternity)

The right of attribution or (as the statute prefers) the right of paternity is perhaps the best-known of all of the moral rights recognized in the United Kingdom. In essence, the right of attribution provides the creators of certain types of work with the right to be identified as the author of those works.²⁴ While the right of attribution cannot be assigned, as we will see, it can be waived. The moral right of attribution lasts for the same period of time as the copyright in the relevant work.

The right to be named as author of a work carries with it a number of symbolic, economic, and cultural consequences.²⁵ The reason for this is that the name of the author performs a number of different roles. It facilitates: the management of intellectual works (through indexes, catalogues, and bibliographies);²⁶ the channelling of royalties (e.g. from the public lending right scheme); the interpretation of the work (insofar as it provides a psychological or biographical history of the author); the celebration, reward, and sustenance of authorial talent or genius;²⁷ and the construction of the individual as the creator of an intellectual *oeuvre*. In many cases, the right to be named as author of a work will be unnecessary because it is in the interests of all of the parties concerned in the exploitation of the work to attribute it. Where this is not the case, however, the right of attribution is potentially a very important right.

Before looking at the right of attribution in more detail, it should be noted that an author may be able to rely on a number of mechanisms other than the right of attribution to ensure that they are named as author. Publishing contracts, for example, will often contain terms dealing with attribution that may be enforced

against a publisher²⁸ and possibly also against third parties who knowingly induce such breaches. In some circumstances, such a term might be implied into a contract.²⁹ The right to be named as author of a work may also be ensured by other means such as union power and industry standards.³⁰ The law of reverse passing off might also be used to prevent another person from falsely claiming that they are the author of a work.

2.1 Subsistence of the Right of Attribution

In order for the right of attribution to arise, it is necessary to show two things: that the work in question is the type of work to which the right applies; and that the right of attribution has been asserted.³¹ We will deal with each of these requirements in turn.

p. 307 2.1.1 Relevant works

The right of attribution is granted to the creators of only a limited number of works. More specifically, the right is recognized only in relation to original literary, dramatic, musical, and artistic works, and in films. In the case of literary, dramatic, musical, and artistic works, the right is granted to the author of the work. In the case of films, the right of attribution is granted to the director.³²

Within these general categories, a number of specific types of work do not give rise to a right of attribution. The right of attribution does not arise in relation to works made for the purpose of reporting current events; nor does it apply to contributions to a newspaper, magazine, or periodical, or an encyclopaedia or similar work.³³ These exceptions, which are difficult to reconcile with the Berne Convention, reflect government concessions to the lobbying power of the newspaper and other publishing industries. The objections were informed by fears that the need to name the author of a work would interfere with the prompt delivery of news. It was also feared that enabling an author of a news story to be named would undermine the image of the news as being objective and neutral.

The CDPA 1988 also states that the right of attribution does not apply to computer programs,³⁴ computer-generated works,³⁵ typefaces,³⁶ or works protected by Crown or similar copyright.³⁷ No satisfactory policy-based justification has been given for denying authors of computer programs or typefaces a right of attribution.

2.1.2 The requirement of assertion

The right of attribution does not arise until it has been asserted.³⁸ Even if it has been asserted, in an action for infringement of the attribution right, the courts take into account any delay in asserting the right when considering remedies.³⁹ The imposition of the requirement of assertion is said to be justified because Article 6*bis* merely requires members of the Union to confer on authors the right 'to claim' authorship.⁴⁰ However, it has been suggested that such an interpretation is unsustainable given that Article 5(2) of the Berne Convention requires that an author's 'enjoyment and exercise of these rights shall not be subject to any

formality'.⁴¹ Because the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) does not require that Article 6bis of Berne be implemented, the merits of these arguments are unlikely to be tested before the WTO.

p. 308 In general, the right can be asserted in one of two ways. First, when copyright in a work is assigned, the author or director includes a statement that asserts their right to be identified.⁴² Second, the right may be asserted by an instrument in writing signed by the author or director. The form of assertion has an important impact on the extent to which third parties are bound to comply with the right.⁴³ If the first mode of assertion is chosen, it binds the assignee and anyone claiming through them, whether or not they have notice of the assertion. If the second mechanism is employed, however, the assertion binds only those who have notice of the assertion. The former is consequently the more effective mode of assertion. There seems to be no reason why an author or director should not use both methods or make a number of assertions.

Two additional modes of assertion exist in relation to artistic works.⁴⁴ First, the right will have been asserted if the artist is identified on the original, copy, frame, mount, or other attachment when the artist or the first owner of copyright parts with possession of the original.⁴⁵ Such an assertion binds anyone into whose hands the original or copy comes (including borrowers and purchasers), whether or not the identification is still present or visible.⁴⁶ If the work is exhibited in public thereafter, the artist should be named. Second, the right may be asserted by the inclusion of a specific statement to that effect in a licence that permits copies of the work to be made.⁴⁷ This kind of assertion binds the licensee and anyone into whose hands a copy made in pursuance of the licence comes, whether or not they have notice of the assertion.⁴⁸

2.2 Infringement

The attribution right provides that, when the work is dealt with in certain ways, authors and directors have the right to be identified as author of the work. In order for the right of attribution to be infringed, it is necessary to show that:

- (i) the author has not been properly identified;
- (ii) the work has been dealt with in circumstances under which attribution is required; and
- (iii) none of the defences or exceptions applies.

2.2.1 Nature of the identification

For the attribution right to be infringed, it is necessary to show that the author has not been properly identified as an author. Merely thanking a person for 'preparing materials' was held not to have identified that person's authorship.⁴⁹ In order to be properly identified, the name of the author must appear in or on each copy of the work in a clear and reasonably prominent manner.⁵⁰ Where it is not appropriate for the name of the author to appear on each copy of the work, the name must appear in a manner that is likely to bring their identity to the notice of a person acquiring a copy of the work.⁵¹ So long as the name becomes apparent during its use, there does not seem to be any need for the author to be named in a way that can be ascertained prior to acquisition of the copy.⁵² Thus an author of a book might be named on the inside of

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the work. Where a performance, exhibition, showing, broadcast, or cable transmission is involved, the author has the right to be identified in a manner likely to bring their identity to the attention of a person seeing or hearing the communication. Where the relevant work is a building, the identification should be visible to persons entering or approaching the building.⁵³

If, in asserting the right of attribution, the author specifies that a pseudonym, initials, or some other form of identification such as a symbol be used (as the musician Prince required between 1993 and 2000), then that form of identification should be adopted.⁵⁴ Otherwise, any reasonable form of identification may be used. It is not clear whether the attribution right gives rise to a right of anonymity, which may be valuable in raising public curiosity about the work and in protecting the author from vilification or criticism. However, it seems unlikely from the wording of the provisions that if an author were to make it clear that they wanted the work to be published anonymously, this would be treated as the particular form of identification that had to be used.

2.2.2 Circumstances under which attribution is required

The right to be identified as author or director of a work arises only when the work is dealt with in certain ways. While the particular circumstances in which the right arises vary depending upon the type of work in question, in all cases the right applies whether the act is carried out in relation to the whole work or a substantial part thereof.

An author of *literary or dramatic work* has the right to be identified whenever copies of the work are published commercially, or the work is performed in public or broadcast.⁵⁵ This means, for example, that the author of a play has the right to be named when copies of the play are sold in bookshops or the play is performed in public. Similarly, the writer of a film script has the right to be named when videos are sold to the public or the film is broadcast on television (but not, it seems, on rental copies).⁵⁶ The right applies equally to adaptations of the work—so the author of a French novel has the right to be named on copies of an English translation.

Songwriters are treated slightly differently. The author of the music or lyrics of a song has the right to be named on commercial publication of copies of the song—such as the issue of songbooks, sound recordings, or films containing a recording of the song. However, the right of attribution given to the author of a song does not extend to circumstances under which the song is performed in public or broadcast.⁵⁷ This limitation, often dubbed the ‘disc jockey exception’, was introduced so that DJs and broadcasters would not have to name the songwriters when songs are broadcast or played at clubs. It thus allows them to continue the current practice whereby only the name of the recording artist is mentioned.⁵⁸

Where a right of attribution relates to an *artistic work*, the artist has the right to be identified where the work is published commercially, is exhibited in public, or where a visual image of it is broadcast or included in a cable transmission. If an artwork is filmed, the artist should be identified when copies of the film are issued to the public or if the film is shown in public. The 1988 Act also specifies that the creator of a building, sculpture, or work of artistic craftsmanship should be named where ‘copies of a graphic work representing it, or of a photograph of it’ are issued to the public.⁵⁹ The author of a work of architecture has the right to be identified on the building as constructed. If a series of buildings are made, however, the architect needs to be identified on only the first building to be constructed.

The director of a *film* has the right to be identified whenever the film is publicly shown, broadcast, or included in a cable service. The director also has the right to be named on copies of the film, but not (it seems) where the films are rented.

2.2.3 Exceptions

A number of exceptions and qualifications are placed upon the scope of the right of attribution by the 1988 Act. The right of attribution is constrained by section 79(3), which provides that if the employer or copyright owner authorized reproduction, etc. of the work, then the right does not apply.⁶⁰ It has been suggested that this exception can be explained on the basis that, because an employer has paid for the creation of the work, it should have complete freedom to exploit it. It is also said that the employer should not be required to keep detailed records of who contributes to a collaborative work.⁶¹ Insofar as the right of attribution plays a role in the establishment of an author's or artist's reputation, the link between authorship and livelihood is less important when the creator is employed.

The 1988 Act also provides that the right of attribution will not be infringed where the act in question amounts to fair dealing for the purpose of reporting current events by means of a sound recording, film, or broadcast.⁶² The Act provides too that the attribution right is not infringed where the work is incidentally included in an artistic work, sound recording, film, or broadcast.⁶³ Exceptions also exist where the work is used for the purposes of examinations, parliamentary or judicial proceedings, and government inquiries.⁶⁴ It should be noted that while section 30A permits use of a work for 'caricature, parody or pastiche' without requiring 'sufficient acknowledgement' (on the basis that this would undermine a parody), no exception is provided to the moral right of attribution, with the effect that, in practice, parodists will take a risk of acting unlawfully if they do not make the authorship of the parodied work clear.

Further exceptions to the right of attribution exist in relation to works that lie at the interface between design law and copyright law. The defences to infringement of copyright granted by section 51 (and formerly also section 52) of the 1988 Act also apply to infringement of the attribution right. Consequently, if a person makes an article to a design document, there is no need to name the author of the design.

p. 311 2.2.4 Waiver

Finally, it should be noted that an author can waive their right of attribution.⁶⁵ Waiver of the right of attribution, which is relevant for activities such as 'ghostwriting', is discussed in more detail later in this chapter in the context of the integrity right.

3 Right to Object to False Attribution

The right to object to false attribution is the oldest of the United Kingdom's statutory moral rights.⁶⁶ Re-enacted in section 84 of the CDPA 1988, this right is effectively the flip side of the attribution right: the right of attribution provides authors with the right to be named on works that they have created, whereas the right to object to false attribution provides individuals with the right *not* to be named on works that they have *not* created.⁶⁷ Unlike the right of attribution, the right to object to false attribution applies whether or not the

claimant is an author. The right to object to false attribution applies to persons⁶⁸ wrongly named as the authors of literary, dramatic, musical, or artistic works, or as the directors of films.⁶⁹ The right of false attribution lasts for only 20 years after the death of the person who is falsely said to be the author.

The right is infringed by a person who issues copies of a work to the public, or exhibits in public an artistic work, on which there is a false attribution (rather than by the person who makes the false attribution). The right can also be infringed by a person who performs, broadcasts, or shows the work and who knows that the attribution is false. Section 84(5) also provides for infringement where certain commercial acts are done with the knowledge that the attribution is false.⁷⁰

Whether a work has been attributed to the wrong person depends on 'the single meaning which the ... work conveys to the notional reasonable reader'.⁷¹ There is no need for the complainant to prove that the attribution actually caused them any damage.⁷² Examples of situations in which the right has been violated include the attribution to a member of the public of a newspaper article written by a journalist, but based on conversations between the two,⁷³ and a newspaper parody of a politician's diaries (see Fig. 10.1).⁷⁴ ↵

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On the historic day Tony Blair made his Commons debut as Prime Minister, Alan Clark found himself in the ignominious position of sitting on the Opposition benches. PETER BRADSHAW imagines how the great diarist would record the event

It's wonderful to be back in the old place

Tuesday 6th May

Albany

Well, the Tory political landscape is a smoking ruin.

But as the dawn comes up, and Blair's Messerschmitts drone away over the horizon, I am delighted to report that the smart shops and elegant terraces of Kensington and Chelsea are unscathed. The only vote I seem to have lost is that of Michael Winner, the film director, who cut up rather rough over my comments about his house in this Diary.

We are in a mess, though, and every revolting little BBC functionary and Guardian scribbler with a colleague or homosexual "partner" on the New Labour benches is gloating.

Little Major has mumbled something about the show being over and it being time to leave the stage. This apparently was a phrase he learned at his father's knee as the old boy, wearing smeared make-up and floppy-toed clown shoes, hid in his dressing room with the lights off while the angry audience demanded their money back.

We have now started a spastic "leadership contest", which has about as much political significance as the election of a refreshments secretary in a suburban golf club. Heseltine is *hors de combat*, and while he was delirious with pain-killers on his hospital bed, his lady wife Anne typed out his withdrawal statement, then gripped his writing hand and wrote out his signature underneath. I'm not sure how he took the news of his standing down.

Clarke is standing for the collaboration with Kohl faction, Michael Howard is running on his iron-fist-in-the-iron-glove ticket, apparently with fresh-faced, apple-cheeked young Hague as his supporter, an arrangement toasted over champagne earlier this evening.

No one seems to be begging me to stand.

Wednesday 7th May

Albany

Morning

Hague has dumped.

His clique of admirers encouraged him to think of himself as the Young Pretender, and he is believing this publicity wholeheartedly. So the engagement is broken off.

Now Dorrell is courting the bore vote and Redwood's candidacy is gravely damaged by the support of The Times.

A complete shower. I am going to the Commons.

House of Commons
Evening

Extraordinary.

In the Commons I saw what appeared to be a crocodile of schoolchildren in the Central Lobby, moving unimpeded into the Chamber. When I complained, someone explained that this was the New Labour intake, all polytechnic lecturers, media folk and trades union press officers, with their electronic pagers dutifully turned off, and the person at their head barking instructions was little Mandelson — although what *he* knows about Parliament could be written on the back of a stamp.

It is *marvellous* to be back in the House; I simply can't believe it has been five years, although it was *very* strange to see the sides reversed. I couldn't get used to the through-the-looking-glass effect — I felt dizzy and disorientated and had a slight nose bleed.

We were in opposition when I first arrived in '74, when Ted Heath was Leader and it was a disagreeable shock to see that he is *still here*. Sir Edward Heath, Father of the House, still pompous and slow-witted — visibly bridling when Gwyneth Dunwoody, in her speech proposing dear Betty Boothroyd as Speaker, called him "Mr" Heath.

Later I was strolling towards the Strangers Bar, whistling a lively air, when I came across a *very* pretty girl in tears. "What's the matter?" I asked. The dear little thing gulped and pouted and said: "It's my first day. I'm lost..." I twinkled. "Like Alec d'Urberville." "Never mind," I said, proffering a hanky. "It's easy for a secretary to get lost on her first day." She turned on me, her beautiful eyes flashing angrily. "I am the New Labour Member for Watford!" she shouted, and ran off down the corridor.

But she still has my handkerchief — an excuse to get back in touch!

How have I existed out of this place?

Fig. 10.1 'Alan Clark's Secret Political Diary', *Evening Standard* (May 1997)

Source: *Evening Standard*

- p. 313 ↪ In another decision, an author's work was held to be falsely attributed when it was attributed to the author after having been substantially added to by another person without the author's consent.⁷⁵ On this basis, it seems that a replica of a painting that included the signature of the original artist could be said to be falsely attributed, since the replica painting would not be solely made by the original artist.⁷⁶ In the case of artistic works, the right to object to false attribution is extended by a special provision to circumstances in which the work has been altered, even if that alteration amounts only to deletion of part of the work. This would be the case, for example, if a detail were to be cut from a broader canvas and sold as an unaltered original.⁷⁷ The right would also be infringed where a black-and-white drawing was colourized.⁷⁸

The right to object to false attribution of authorship is supplemented by various non-statutory causes of action, such as the action for passing off or defamation. Under the former, a person can complain where a work is misrepresented as being by the claimant, when it is in fact the work of the defendant.⁷⁹ In *Ridge v. English Illustrated Magazine*,⁸⁰ the defendant published a story that they attributed to the plaintiff, a well-known author, which in fact had been written by a grocer's assistant from Bournemouth. The court instructed the jury to find the publication to be defamatory if 'anyone reading the story would think that plaintiff was a mere commonplace scribbler'.⁸¹ The jury awarded £150 in damages.

4 Right of Integrity

The right of integrity is one of the most important of the innovations in the CDPA 1988. The moral right of integrity lasts for the same time as the copyright in the relevant work. The right of integrity is the right to object to derogatory treatment of a work, or any part of it. The basis for this authorial prerogative is that the artist, through the act of creation, has embodied some element of their personality in the work, which ought to be protected from distortion or mutilation.⁸² In some cases, this carries with it the corollary that the

- p. 314 ↪ artist feels some degree of responsibility for the work.⁸³ The desire to protect the reputation of authors was also a factor used to support the right.

4.1 Subsistence of the Right

As with the other moral rights recognized under the 1988 Act, the right of integrity is given to the author of a literary, dramatic, musical, or artistic work, and the director of a film.⁸⁴ It is not given to computer programs or to computer-generated works.⁸⁵ With respect to computer programs, the exclusion is justified on the basis that it might be necessary to alter, debug, improve, or modify a program to render it suitable to achieve its purpose. The integrity right does not apply to a work made for the purpose of reporting current events,⁸⁶ to publications in newspapers, or to collective works of reference such as encyclopaedias.⁸⁷ In the latter case, the relevant publishers were keen to retain their power to edit or otherwise alter any submissions without having to consult contributing authors.⁸⁸

4.2 Infringement of the Right

In order for the right of integrity to be infringed, an author or director must be able to show that:

- (i) there has been a 'derogatory treatment' of the work;

- (ii) the work has been dealt with in circumstances under which the author is protected from derogatory treatment;
- (iii) none of the exceptions apply; and
- (iv) the right has not been waived or the action consented to by the author.

4.2.1 Derogatory treatment

In order for an author or director to show that the right of integrity has been breached, it is necessary to show that there has been a 'derogatory treatment' of their work. Before looking at the meaning of 'derogatory', it is necessary to explore what the Act means when it refers to a 'treatment' of the work.

p. 315 (i) *Treatment* 'Treatment' of a work means any 'addition to, deletion from, alteration to or adaptation of the work'.⁸⁹ The concept of the work that is employed here is that of an autonomous artefact, which is born out of, tied to, or related to neither other works nor its environment. Moreover, the work has its own internal integrity or logic (a beginning, middle, and end; a foreground, middle ground, and background; line, shade, and colour).⁹⁰ For a treatment of the work to take place, it seems that the defendant must interfere with the internal structure of the work.⁹¹ This idea of treatment, it seems, would cover a situation such as that in *Noah v. Shuba*,⁹² in which 17 words were added to the claimant author's medical guide. It would also cover situations in which a portion of a painting was cut from its original canvas and exhibited, a song was chopped up and inserted into a megamix,⁹³ a drawing was reproduced in reduced size or recoloured,⁹⁴ or a black-and-white film was 'colourized'.⁹⁵ In these cases, the internal composition or structure of the work is changed.

The definition of treatment that is used in the United Kingdom is narrower than that which is employed in Article 6bis of the Berne Convention, which requires that the author be able to object to 'any ... derogatory action' in relation to a work. The broader definition used in Berne seems to acknowledge that a treatment of a work can take place even though the composition or structure of the work is not altered. Importantly, it suggests that a treatment of a work can take place where the meaning and significance of the work is affected. It has been suggested, for example, that the mere act of placing a work in a new context, such as the hanging of a religiously inspired artistic work alongside a piece of erotic art, probably would not amount to a treatment of a work under UK law. It would, however, amount to a treatment of the work under the Berne Convention.⁹⁶

p. 316 In the absence of much case law, we can only speculate as to which of the following scenarios would be considered to be a 'treatment' under UK law: placing two written works side by side in a bound volume? Changing the title of a work? Placing a book in an offensive or vulgar dust jacket?⁹⁷ Placing a caption on the frame of a painting? Placing a caption beside a painting?⁹⁸ Placing a ribbon around the neck of a sculpture of a goose? Placing a sculpture designed for a particular location in a different location? Performing a song's lyrics to a different tune or adding different words to a song's music?⁹⁹ Performing a tragedy in such a manner that it seems like a farce?¹⁰⁰ Adding recordings ↵ of the claimant's music to a film of which they did not approve?¹⁰¹ Interrupting a film for advertising breaks?¹⁰²

In these cases, the internal composition or structure of the work is changed. In *Harrison v. Harrison*,¹⁰³ Judge Fysh QC observed:

‘Treatment’ of a work is ... a broad, general concept; *de minimis* acts apart, it implies a spectrum of possible acts carried out on a work, from the addition of say, a single word to a poem to the destruction of the entire work. Where does one draw the line otherwise?¹⁰⁴

The types of activity that will be considered to be a ‘treatment’ are further restricted by the fact that treatment is defined to exclude translations of literary and dramatic works, and arrangements or transcriptions of musical works involving no more than a change of key or register.¹⁰⁵ It is unclear why moral rights are deemed to be inappropriate here. One rather implausible explanation is that such acts never affect the internal structural or composition of a work.¹⁰⁶ Another possible explanation is that these activities would amount to adaptations of the work and, as such, require the consent of the copyright owner.¹⁰⁷ However, it is clear that an inaccurate translation may have a negative impact upon an author of a literary work.¹⁰⁸ It may be that, in order to minimize the incompatibility between UK law and Article 6bis, the courts might treat an inaccurate or poor-quality translation as if it were not a ‘translation’ at all, thus falling outside the scope of the exclusion.¹⁰⁹

(ii) ‘Derogatory’ Once it has been shown that there has been a treatment of the work, it is then necessary to show that the treatment was ‘derogatory’. Section 80(2)(b) of the 1988 Act states that a treatment is derogatory if it amounts to a ‘distortion’ or ‘mutilation’ of the work, or if it is otherwise prejudicial to the honour or reputation of the author.¹¹⁰

As yet there is little indication of what the 1988 Act means when it talks about the ‘distortion’ or ‘mutilation’ of a work.¹¹¹ In *Tidy v. Natural History Museum*, the submission that the treatment was a ‘distortion’ was treated as an alternative to the submission that it was ‘otherwise prejudicial’.¹¹² The same approach was taken in *Delves-Broughton v. House of Harlot*,¹¹³ in which the (then) Patents County Court found cropping of a photo to be a distortion and thus an infringement of the photographer’s moral right, even though it was not prejudicial to the honour or reputation of the author (although it is worth noting that neither party had legal representation in the latter case, so it must be regarded as of limited authority). The more prevalent view however, is that, in order for a work to be distorted or mutilated, the action must be prejudicial to the honour or reputation of the author.¹¹⁴

The question of what the phrase ‘prejudicial to honour and reputation’ means was considered in the Canadian case *Snow v. The Eaton Centre*.¹¹⁵ Michael Snow, a sculptor of international repute, created a work entitled *Flight-Stop*, which he sold to a shopping complex in Toronto called the Eaton Centre. The work comprised 60 geese flying in formation. The Eaton Centre tied ribbons around the necks of the geese as a Christmas decoration. Snow argued that this was prejudicial to his honour and reputation (the Canadian Copyright Act being in similar terms to the British 1988 Act). Snow was adamant that his naturalistic composition was made to look ridiculous by the addition of the red ribbons, which he likened to the addition of earrings to the Venus de Milo. Snow’s views were shared by a number of well-respected artists and experts. Although the Eaton Centre produced another artist to deny the claim, the Ontario High Court ruled for Snow and ordered that the ribbons be removed. In so doing, the Court indicated that, so long as it was not irrational, the author’s word on the matter would be sufficient. More specifically, O’Brien J said that the words ‘prejudicial to honour and reputation’ involved a certain subjective element or judgement on the part of the author, so long as it was reasonably arrived at.

In ascertaining what is meant by the phrase ‘prejudicial to the honour or reputation of the author’, as used in the 1988 Act, British courts have shown little inclination to follow the emphasis in the *Snow* case. In *Tidy v. Trustees of the Natural History Museum*,¹¹⁶ the cartoonist Bill Tidy gave the gallery of the Natural History Museum the right to exhibit a series of black-and-white cartoons of dinosaurs that he had drawn. Tidy claimed that his right to integrity in the drawings had been violated when, in putting the cartoons in a book, the gallery reduced the size of the cartoons from 420 mm × 297 mm to 67 mm × 42 mm and added coloured backgrounds to the black-and-white originals. Tidy complained that the reduced cartoons had less visual impact, that the captions were unreadable, and that the process led to the inference that he had not bothered to redraw the cartoons so as to ensure that they were suitable for publication in a book. In the High Court, Rattee J refused Tidy’s application for summary judgment for breach of his right of integrity, explaining that he was far from satisfied that the reductions amounted to a distortion of the drawings. The Judge also suggested that, in order to find that the gallery’s treatment of the cartoons was prejudicial to Tidy’s honour, it was necessary to have evidence as to how the public perceived the defendant’s acts. Referring to *Snow*, Rattee J said that he would have to be satisfied that the view of the artist was one that is reasonably held, which ‘inevitably involves the application of an objective test of reasonableness’.¹¹⁷ Without further evidence, Rattee J said that he could not see how he could draw such a conclusion.

A county court judge has recently gone further and argued that, for a treatment to be derogatory:

what the plaintiff must establish is 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.¹¹⁸

Applying that test, the Judge took the view that certain colour variations between the original and the artwork in question (the design of a brochure), the omission of trivial matter, and the reduction in size were not derogatory. The Judge added that while the changes to peripheral matters were of the kind that ‘could well be the subject of a Spot the Difference competition in a child’s comic’, it would be wrong to elevate such differences to a ‘derogatory treatment’.¹¹⁹

In a third UK case, *Confetti Records v. Warner Music UK Ltd*,¹²⁰ Lewison J held that the claimant, Andrew Alcee (a member of the ‘Ant’ill Mob’), had not made out a sufficient case for a finding of derogatory treatment where his garage track ‘Burnin’, which comprised an insistent instrumental beat accompanied by the vocal repetition of the word ‘burning’, had been superimposed with a rap by another garage act, ‘The Heartless Crew’ (the words of which were difficult to make out). The defendant accepted that this was a treatment, so the crucial issue was whether it was derogatory. The claimant had argued that it was, first, because the rap contained references to violence and drugs, by using phrases such as ‘mish man’, ‘shizzle [or sizzle] my nizzle’, and ‘string dem up one by one’, which was, according to the claimant, an ‘invitation to lynching’. Alternatively, it was argued that the rap affected the ‘coherence of the original work’. Lewison J rejected the claimant’s argument. First, he stated that the fact that the words were difficult to decipher militated against them being derogatory. Second, he noted that the meaning of the words, which he described as being ‘in a foreign language’, could be determined only by way of expert evidence and no such evidence had been offered. Third, Lewison J took the view that ‘string dem up’ was not necessarily an ‘invitation to lynching’ and could be heard as merely advocating the return of capital punishment. Most importantly, however, he

rejected the claimant's argument because the claimant had failed to provide evidence of his honour or reputation. In the absence of such evidence, even by the complainant himself, the Judge was not prepared to infer prejudice. Lewison J was confirmed in this view by the fact that the Ant'ill Mob itself utilized the imagery of gangsters. As regards the claim based upon the effect of the rap on the coherence of the song, Lewison J seems to have been strongly influenced by indications that the song was written as a background for rapping and that the Ant'ill Mob's own mixes added rapping over the whole track.

p. 319 Despite these decisions, it is still unclear how derogatory treatment will be construed in the United Kingdom. In particular, 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. Under UK law, one would expect that the notion of reputation used in this context would be similar to that which is employed in defamation law.¹²¹ If this were the case, one would expect that the question of whether or not conduct was prejudicial to an author's reputation should be judged from the viewpoint of right-thinking members of society (that is, objectively).

While 'reputation' is a familiar concept in British law, the same cannot be said for 'honour'. If 'honour' is taken to refer to what a person thinks of themselves (and is thus similar to the Roman law concept of *dignitas*), it would seem that prejudice to honour might well involve a strong subjective element.¹²² This distinction might be important where a defendant parodies the claimant's work in such a way that a member of the public would not believe the parody to be the claimant's work, so would be unlikely to find that the claimant's reputation was harmed.¹²³ Nonetheless, the claimant might feel offended.

4.2.2 Circumstances under which the author is protected from derogatory treatment

The right of an author or a director to object to, or prevent, the derogatory treatment of their work arises only when the work or copies thereof are dealt with in certain ways (s. 80). While these acts vary according to the category of work involved, basically they arise where someone communicates, disseminates, or otherwise renders the derogatory treatment available *to the public*. As a result of this requirement, the right to integrity is not a right to prevent destruction of the work itself.¹²⁴

In relation to *literary, dramatic, and musical works*, the right to object to derogatory treatment may be invoked when a derogatory treatment of the work is published commercially, performed in public, or communicated to the public. It is also triggered when copies of a film or sound recording embodying the derogatory treatment are issued to the public.¹²⁵ In turn, with an *artistic work*, the right may be invoked against a person who publishes commercially or exhibits in public a derogatory treatment of the work. The right is also triggered where someone communicates to or shows in public a film including a visual image of a derogatory treatment of the work.¹²⁶ Further acts are specified in relation to works of architecture, sculpture, and works of artistic craftsmanship.¹²⁷ In relation to *films*, the right of integrity is infringed whenever a derogatory treatment of the film is shown in or communicated to the public, or when copies of a derogatory treatment of the film are issued to the public.¹²⁸

In addition, it should be observed that certain acts may amount to a secondary infringement of the right of integrity.¹²⁹ This will occur where, in the course of business, a person possesses, sells or lets for hire, offers or exposes for sale or hire, exhibits in public, or distributes an article that they know or have reason to know is

p. 320 an infringing article. In this context, an ‘infringing article’ means a work or a copy of a work that has been subjected to a derogatory treatment and has been, or is likely to be, the subject of any of the infringing acts in section 80. Secondary infringement takes place only if the dealing prejudicially ↵ affects the honour or reputation of the author. If the treatment itself is derogatory, it seems likely that the dissemination of the treatment will prejudice the honour or reputation of the author.

4.2.3 Exceptions and defences

A number of exceptions are placed upon the right of integrity by the 1988 Act. It is notable that there are no defences for fair dealing or for the design–copyright interface. Some commentators have therefore suggested that the defences are ‘unduly narrow’.¹³⁰ In particular, objection is made that there is no transformative use exception, for example, relating to parody.¹³¹ Many other legal systems subject the moral right of integrity to a ‘reasonableness’ defence.¹³²

In the case of works created by employees,¹³³ the right of integrity does not apply to anything done by or with the authority of the copyright owner except in two particular situations.¹³⁴ The general rule, then, is that an employer can deal publicly with derogatory treatments of an employee’s work. In these circumstances, the authorial prerogative gives way to the demands of the employer for control.¹³⁵ This means, for example, that artists who work for a design firm will not be able to use their right of integrity where their artworks are modified either by their employer or by other employees. Similarly, an employee who drafts a report will not be able to restrain publication of a version that is rewritten on behalf of the employer.

The exceptions to this general position relate to circumstances in which the author/employee has been, or is to be, identified. Although the law privileges the needs of the employer and the copyright holder, those needs do not extend as far as continuing to name the employee where the work has been modified. Consequently:

The right ... does not apply to anything done in relation to such a work by or with the authority of the copyright owner unless the author or director—

- (a) is identified at the time of the relevant act, or
- (b) has previously been identified in or on published copies of the work ...¹³⁶

However, even in these cases, the right of integrity is not infringed if there is ‘sufficient disclaimer’—that is, if there is a clear and reasonably prominent indication that the work has been subjected to treatment to which the author or director has not consented.¹³⁷

p. 321 ↵ There are also special defences to infringement of the moral right of integrity. In particular, the right is not infringed by anything done for the purpose of avoiding the commission of an offence (such as under the Obscene Publications Act 1959 or the Public Order Act 1986), complying with a duty imposed by or under an enactment, or (in the case of the BBC), ‘avoiding the inclusion in a programme broadcast by them of anything which offends against good taste or decency or which is likely to encourage or incite crime or to lead to disorder or to be offensive to public feeling’.¹³⁸ In the case of a work of architecture, the right is limited. Where an architect is identified on a building that is subject to derogatory treatment, the architect is given the right to have their identification as architect removed from the building.¹³⁹

4.2.4 Waiver

Although the moral right of integrity, like the other moral rights, cannot be assigned, section 87 of the 1988 Act ensures that they can be waived by way of agreement in writing. Such a waiver can be specific or general and relate to existing or future works. It has been said that most 'objective observers would acknowledge that such wide waiver provisions, both in theory and in practice, erode significantly, indeed drive a coach and horses through the moral rights provisions'.¹⁴⁰ This is because the industries that exploit copyright works tend to oblige authors and artists to enter standard-form contracts that require them to waive the integrity rights. Even the requirement that waiver be in writing, which provides authors with some residual protection, is compromised by section 87(3), which states that the general law of contract and estoppel applies to informal waiver.

4.3 Alternative and Related Forms of Relief

If an argument based upon the moral right of integrity fails (or is dubious), an author may fall back on protection under common law or contract.¹⁴¹ If a work is presented as being that of the author, but has been substantially altered, that representation could be defamatory. Thus, in *Humphries v. Thompson*,¹⁴² a newspaper that serialized a story, but changed the names of the characters and omitted and added other text, was found by the jury to have defamed the author by damaging her literary reputation. Similarly, in *Archbold v. Sweet*,¹⁴³ an author successfully claimed that his reputation had been injured by the publication of a further edition of his work that contained a number of errors. The new edition would have been understood by the public to have been prepared by the author.¹⁴⁴

p. 322 Similarly, there are many situations in which an author may be able to rely on contract rather than moral rights to object to derogatory treatment of their work. In *Frisby v. BBC*,¹⁴⁵ the claimant had written a play for the BBC and the BBC had deleted the line 'my friend Sylv told me it was safe standing up ...' on the ground that it was indecent.¹⁴⁶ The complex contractual arrangement prohibited the BBC from making 'structural', as opposed to 'minor', alterations to the script. The Court decided that the contract was a licence and considered whether the alteration was structural or minor. The claimant alleged that it was essential to, and even the climax of, the play; in contrast, the BBC claimed that it was a minor deletion. Goff J granted the injunction, saying that the author 'prima facie would appear to be the best judge' of the significance of the line.¹⁴⁷

Notes

¹ See E. Adeney, *The Moral Rights of Authors and Performers: An International and Comparative Analysis* (2006); G. Davies and K. Garnett, *Moral Rights* (2010); W. Cornish, 'Moral Rights under the 1988 Act' [1989] *EIPR* 449; R. Durie, 'Moral Rights and the English Business Community' [1991] *Ent L Rev* 40; J. Ginsburg, 'Moral Rights in a Common Law System' [1990] *Ent L Rev* 121; Copinger (18th edn), ch. 11; Laddie et al. (5th edn), ch. 38.

² The term 'moral rights' is derived from the French *droit moral*.

³ J. Ginsburg, 'Moral Rights in a Common Law System' [1990] *Ent L Rev* 121, 121. This does not mean that they cannot be used to secure economic benefits. The estate of French painter Maurice Utrillo has benefited considerably from the grant of the right to use Utrillo's name in relation to certain paintings: see J. Merryman, 'The Moral Right of Maurice Utrillo' (1993) 43 *Am J Comp L* 445; A. Dietz, 'The Artist's Right of Integrity under Copyright Law: A Comparative Approach' (1994) 25 *IIC* 177.

⁴ *Funko Medien v. Bundesrepublik Deutschland*, Case C-469/17, EU:C:2018:870, [AG58].

⁵ CDPA 1988, s. 103.

⁶ UK law also describes a further right, that of privacy in photographs, as a 'moral right': CDPA 1988, s. 85. Breach of confidence may provide something akin to a divulgation right: see e.g. *Prince Albert v. Strange* (1849) 2 *De G & Sm* 652, (1849) 1 *MacG CC* 25 (preventing unauthorized disclosure of previously unpublished artwork on grounds of common law copyright and breach of confidence).

⁷ The rights pass on death to the person nominated by testamentary disposition, or else to the person to whom copyright is being passed; otherwise, they are to be exercised by personal representatives: CDPA 1988, s. 95(1). As an exception, the right against false attribution passes to the author's personal representatives: CDPA 1988, s. 95(5).

⁸ While various moral rights existed in the United Kingdom prior to 1989, it was widely believed that the protection was not sufficient to meet the criteria in the Berne Convention. The Gregory Committee, [219]–[226], had been reluctant to introduce such rights in 1956, anticipating difficulties in their drafting. The Whitford Committee, [51]–[57], impressed by the form of their implementation in Dutch law, recommended their adoption in 1977. See G. Dworkin, 'Moral Rights and the Common Law Countries' (1994) 5 *AIPJ* 5, 11; E. Adeney, *The Moral Rights of Authors and Performers: An International and Comparative Analysis* (2006), ch. 13.

⁹ These were introduced at the Rome Conference in 1928. See Ricketson and Ginsburg, [3.28], 108, [10.07], 590–4; Adeney, *The Moral Rights of Authors and Performers*, ch. 6. Article 6bis was, in many ways, a compromise. Durie tells us that the terms 'honour and reputation' were introduced in place of 'moral interests of the author' to satisfy objections of the common law jurisdictions: R. Durie, 'Moral Rights and the English Business Community' [1990] *Ent L Rev* 40; Ricketson and Ginsburg, [10.36], 614. Most importantly, Art. 6(3) leaves Union countries free to determine the conditions under which the rights are exercised.

¹⁰ CDPA 1988, Ch. IV. The criticisms are that the provisions do not implement Berne; do not improve the position of authors; are, in practical terms, ineffective; and neglect the essential characteristics of moral rights.

¹¹ J. Ginsburg, 'Moral Rights in a Common Law System' [1990] *Ent L Rev* 121, 129.

¹² Cornish has suggested that the express recognition of moral rights might lay the foundation for less meagre treatment in future—particularly by penetrating judicial attitudes: W. R. Cornish, 'Moral Rights under the 1988 Act' [1989] *EIPR* 449.

¹³ Although TRIPS requires member states to comply with Arts 1–21 Berne, it is notable that the agreement says that 'members shall not have rights or obligations under this Agreement in respect of the rights conferred under Art. 6bis of that Convention'.

¹⁴ G. Dworkin, 'Moral Rights and the Common Law Countries' [1994] *AIPJ* 5, 34 (opposition to moral rights has at times bordered on the hysterical).

¹⁵ A. Dietz, 'The Artist's Right of Integrity under Copyright Law' (1994) 25 *IIC* 177, 182.

¹⁶ P. Jaszi, 'On the Author Effect: Contemporary Copyright and Collective Creativity' (1992) 10 *Cardozo AELJ* 293.

¹⁷ For a discussion of tension along such 'comparative' lines, see I. Stamatoudi, 'Moral Rights of Authors in England: The Missing Emphasis on the Role of Creators' [1997] *IPQ* 478. For a less caricatured approach, see G. Dworkin, 'Moral Rights and the Common Law Countries' (1994) 5 *AIPJ* 5, 6.

¹⁸ For the French and German histories, see D. Saunders, *Authorship and Copyright* (1992), chs 3 and 4. For a statement of the position in France, see P. Dulian, 'Moral Rights in France through Recent Case Law' (1990) 145 *RIDA* 126. For an exhaustive (if dated) account, see S. Stromholm, *Le Droit moral de l'auteur en droit allemand, française et scandinave* (1966).

¹⁹ While historically, there have been those who have wished to confine copyright to the protection of an author's pecuniary interests, they have not in general succeeded. The Engravings Act of 1735, for example, was directed, in part, to protecting an engraver against 'base and mean' imitations. See *Gambart v. Ball* (1863) 14 *CB (NS)* 306, 143 *ER* 463 (submission that Engravings Act could not be relied on to prevent photography on grounds that the Act's sole purpose was protection of reputation and quality, which was not diminished in a photograph, was rejected).

²⁰ Moral rights have been characterized as limits on the 'right of the owner of the copyright to do what he likes with his own': *Preston v. Raphael Tuck* [1926] *Ch* 667, 674.

²¹ G. Dworkin, 'Moral Rights and the Common Law Countries' (1994) 5 *AIPJ* 5 36.

²² G. Pessach, 'The Author's Moral Right of Integrity in Cyberspace: A Preliminary Normative Framework' (2003) 34 *IIC* 250.

²³ See *Confetti Records v. Warner Music UK Ltd* [2003] *EMLR* (35) 790, [161] (declining to 'read down' the integrity right to give effect to Art. 10 ECHR).

²⁴ Cf. the information protected by rules on 'rights-management information' discussed in Chapter 13, section 5, pp. 400–1. See J. Ginsburg, 'Have Moral Rights Come of (Digital) Age in the United States?' (2001) 19 *Cardozo AELJ* 9; S. Dusollier, 'Some Reflections on Copyright Management Information and Moral Rights' (2003) 25 *Colum JL & Arts* 377.

²⁵ For experimental analysis of how such attribution is 'valued', see C. Buccafusco, C. Sprigman, and Z. Burns, 'What's a Name Worth?' (2013) 93 *Boston U L Rev* 1.

²⁶ See R. Chartier, 'Figures of the Author', in Sherman and Strowel, ch. 1.

²⁷ A link is frequently drawn between the right to be named and the ability to gain a reputation and make an income as an author or artist: see *Tolnay v. Criterion Film Productions* [1936] 2 *All ER* 1625.

²⁸ *Ibid.*

²⁹ *Miller v. Cecil Film Ltd* [1937] 2 *All ER* 464.

³⁰ See D. Read and D. Sandelson, 'Credit Where Credit's Due' [1990] *Ent L Rev* 42.

³¹ The requirement of assertion and the rules governing who is bound by an assertion have the effect that the attribution right occupies a grey area between property rights and rights *in personam*. In many cases, third parties will be bound by the attribution right, whereas an author who was forced to rely on contract law might not succeed.

³² For such works created prior to 1 August 1989, see CDPA 1988, Sch. 1, para. 23(2)–(3) (the right applies: except in the case of a film made before that date, and other works the author of which died before that date or the author of which had assigned the copyright before that date).

³³ CDPA 1988, s. 79(6).

³⁴ TRIPS Art. 10 states that computer programs shall be protected as literary works under the Berne Convention. Thus while TRIPS Art. 9 does not require that members apply Art. 6*bis*, it seems (somewhat counter-intuitively) that Art. 10 requires that Art. 6*bis* be applied as regards computer programs.

³⁵ Perhaps on the ground that such works do not fall within Berne, i.e. a Union for the protection of the rights of authors: Berne Art. 1.

³⁶ CDPA 1988, s. 79(2). Typefaces are probably within the scope of Art. 2(7), which requires members to protect such works by copyright only if they do not offer protection as designs and models.

³⁷ CDPA 1988, s. 79(7). Perhaps justified because of Berne Art. 2(4).

³⁸ CDPA 1988, s. 78(1).

³⁹ CDPA 1988, s. 78(5).

⁴⁰ The requirement of assertion also helps to overcome some of the problems that may arise in tracing authors.

⁴¹ See J. Ginsburg, 'Moral Rights in a Common Law System' [1996] *Ent L Rev* 121, 128.

⁴² This may be difficult because the author need not be a party to such an assignment, e.g. where they are not first owner. But, in such circumstances, if there is an assertion, it does not seem to matter that the author was not party to the assignment.

⁴³ CDPA 1988, s. 78.

⁴⁴ See 491 Hansard (HL), 10 December 1987, cols 346–56.

⁴⁵ CDPA 1988, s. 78(3)(a).

⁴⁶ CDPA 1988, s. 78(4)(c).

⁴⁷ CDPA 1988, s. 78(2)–(3).

⁴⁸ CDPA 1988, s. 78(4)(d).

⁴⁹ *Sawkins v. Hyperion Records* [2005] 1 *WLR* 3281.

⁵⁰ CDPA 1988, s. 77(7).

⁵¹ CDPA 1988, s. 77(7)(a).

⁵² Cf. Copinger (18th edn, 2021), [11–20] (arguing that identification needs to be outwardly apparent).

⁵³ CDPA 1988, s. 77(7)(b).

⁵⁴ CDPA 1988, s. 77(8).

⁵⁵ CDPA 1988, s. 77(7)(a).

⁵⁶ Although the practice of renting copies of films in plain packaging is common, this does not depend upon the absence of a right of attribution in relation to rental; in such cases, the director of a film, or the author of other works included therein, will usually be identified in the film credits.

⁵⁷ CDPA 1988, s. 77(2), (3).

⁵⁸ WPPT, Art. 5, confers moral rights on the performers of ‘performances fixed in phonograms’. See Chapter 13, section 2.4, pp. 376–7.

⁵⁹ CDPA 1988, s. 77(4).

⁶⁰ CDPA 1988, s. 79(3).

⁶¹ Laddie et al. (5th edn), [38.22].

⁶² CDPA 1988, s. 79(4)(a). This corresponds with CDPA 1988, s. 30(2)–(3), which requires ‘sufficient acknowledgement’ in cases of fair dealing for reporting current events by other means, such as in newspapers. The effect is that the fair-dealing defences parallel the moral rights provisions: fair dealings for which acknowledgement is required, but not provided, are likely to be infringements of both the copyright and the author’s moral right.

⁶³ CDPA 1988, s. 79(4)(b).

⁶⁴ CDPA 1988, s. 79(4A) (as inserted by SI 2014/1372, Sch., para. 4). The right of attribution applies to cases that would not infringe copyright because they amount to cases of fair dealing for purposes of criticism or review. However, because a finding of fair dealing requires ‘sufficient acknowledgement’ of the author, most cases of fair dealing will not infringe the moral right of attribution. See also E. Adeney, *The Moral Rights of Authors and Performers: An International and Comparative Analysis* (2006), 401, [14.44].

⁶⁵ CDPA 1988, s. 87(2).

⁶⁶ CDPA 1988, s. 84(6), re-enacts CA 1956, s. 43, which, in turn, was an expansion to literary, dramatic, and musical works of the Fine Art Copyright Act 1862, s. 7(4): Gregory Committee, [225]; CDPA 1988, Sch. 1, para. 22.

⁶⁷ For discussion of whether the Berne Convention implicitly requires recognition of such a right, see Ricketson and Ginsburg, 601, [10.19] (suggesting that Berne does not cover the case in which an author is seeking to deny rather than establish their authorship).

⁶⁸ *Clark v. Associated Newspapers* [1998] 1 All ER 959, 964. According to Lightman J, at 965, the section confers a personal or civic right.

⁶⁹ The provision does not contain the usual exceptions for computer programs or computer-generated works, so that while the author of a program has no right to be named, a person who is not the author of a program has the right not to be named as its author.

⁷⁰ CDPA 1988, s. 84(5), (6) (possessing or dealing with a falsely attributed copy of the work in the course of business or, in the case of an artistic work, dealing with it in business as the unaltered work of the artist when in fact it was altered after leaving their possession, knowing or having reason to believe that there is false attribution).

⁷¹ *Clark v. Associated Newspapers* [1998] 1 All ER 959, 968.

⁷² *Ibid.*, 965.

⁷³ *Moore v. News of the World* [1972] 1 QB 441 (finding false attribution in a newspaper article entitled ‘How my love for the Saint turned sour by Dorothy Squires’, written in the first person by journalist on basis of conversations with Squires). It is not altogether clear whether the work was falsely attributed because Squires had not written the words or because she had not spoken them. In light of the changes in the 1988 Act, which confer copyright on spoken words, it seems that a verbatim account of a speech by a journalist should not be treated as having been falsely attributed to the speaker.

⁷⁴ *Clark v. Associated Newspapers* [1998] 1 All ER 959, [1998] RPC 261.

⁷⁵ *Noah v. Shuba* [1991] FSR 14 (finding no false attribution of 17 words added to passage extracted from the plaintiff's work, since these words did not constitute a work, but that there was false attribution of the extract as a whole as attributed solely to the plaintiff). In effect, the plaintiff succeeded in protecting his right to endorse the defendant's services, and thus this indicates a potential usefulness in the context of 'personality merchandising'.

⁷⁶ *Preston v. Raphael Tuck* [1926] Ch 667 (replica with no signature would not be falsely attributed).

⁷⁷ CDPA 1988, s. 84(6) (introduced in response to a complaint of this sort by the English painter Landseer). For discussion of the extent of such alterations, see *Carlton Illustrators v. Coleman* [1911] 1 KB 771 (alteration must be material in the sense that it might affect the credit and reputation of the artist).

⁷⁸ *Carlton Illustrators v. Coleman* [1911] 1 KB 771 (a case in which colour was taken to be a very important element).

⁷⁹ See Chapters 32–34. Passing off requires a claimant to demonstrate not merely a misrepresentation, but also the existence of goodwill and likelihood of damage. It is broader than s. 84 in that s. 84 relies on a single meaning, whereas a misrepresentation can be established in passing off in circumstances under which a substantial or large number of consumers are likely to be misled. See *Clark v. Associated Newspaper* [1998] 1 All ER 959.

⁸⁰ [1911–16] MacG CC 91 (KB, with special jury).

⁸¹ Ibid., 92. See also *Marengo v. Daily Sketch* (1948) 65 RPC 242 (a cartoonist known as 'KIM' succeeded in a passing off action against another cartoonist using the name 'KEM'); *Samuelson v. Producers Distributing* [1932] 1 Ch 201 (passing off by giving film similar title to play).

⁸² A. Dietz, 'The Artist's Right of Integrity under Copyright Law' (1994) 25 IIC 177, 181. See also B. Ong, 'Why Moral Rights Matter: Recognising the Intrinsic Value of Integrity Rights' (2003) 26 Colum JL & Arts 297.

⁸³ This was the case, e.g., with Stanley Kubrick's reaction to copycat violence (and the resulting media coverage) that followed the release of the film that he directed, *A Clockwork Orange* (1971).

⁸⁴ CDPA 1988, s. 80(1). For such works created prior to 1 August 1989, see Sch. 1, para. 23(2)–(3) (the right applies except in the case of a film made before that date, and other works the author of which died before that date or the author of which had assigned the copyright before that date). Colourization of pre-1989 black-and-white films would not infringe the moral right of integrity. However, insofar as the film consists of photographs of which the director is the author, colourization might incur liability on the basis of 'false attribution' under CDPA 1988, s. 84(6): cf. *Carlton Illustrators v. Coleman* [1911] 1 KB 77 (on Fine Art Copyright Act 1862, s. 7). This last caveat would not apply to films made after 1956.

⁸⁵ CDPA 1988, s. 81(2).

⁸⁶ CDPA 1988, s. 81(3).

⁸⁷ CDPA 1988, s. 81(4).

⁸⁸ See Copinger (18th edn, 2021), [26–95].

⁸⁹ CDPA 1988, s. 80(2)(a).

⁹⁰ *Pasterfield v. Denham* [1999] FSR 168, 180.

⁹¹ No indication is given as to the degree of significance to be attached to changing the ‘meaning’ rather than the structure, sequence, and organization of the work: Laddie et al. (5th edn), [38.28] (actual physical treatment not as important as message).

⁹² [1991] FSR 14.

⁹³ *Morrison v. Lightbond* [1993] EMLR 144.

⁹⁴ In *Tidy v. Trustees of the Natural History Museum* (1998) 39 IPR 501, 503, neither party disputed that a reduction was an alteration.

⁹⁵ *Huston v. Turner Entertainment* (1991) 23 IIC 702 (French *Cour de Cassation*) (injunction granted to prevent television broadcast of colourized version of film *The Asphalt Jungle*). See B. Edelman, ‘Applicable Legislation Regarding the Exploitation of Colourized Films’ (1992) 23 IIC 629; J. Ginsburg, ‘Colors in Conflicts’ (1988) 36 *J Copyright Soc’y USA* 810.

⁹⁶ See G. Davies and K. Garnett, *Moral Rights* (2nd edn, 2016), [8.023]; E. Adeney, *The Moral Rights of Authors and Performers: An International and Comparative Analysis* (2006), 406, [14.63] (referring to the ‘treatment’ concept as ‘unexpectedly narrow’ in that it does not cover ‘non-transformational uses of the work, such as its use in a particular context’). Thus playing electro-industrial music to inmates of a prison in order to ‘torture them’ would not breach the integrity right: a scenario suggested by S. Michaels, ‘For Torture Services: Band Bill US for Use of Music at Guantanamo’, *The Guardian* (8 Feb. 2014).

⁹⁷ *Mosely v. Staley Paul & Co.* [1917–23] *MacG CC* 341 (such action was held to be defamatory).

⁹⁸ *Pasterfield v. Denham* [1999] FSR 168, 180.

⁹⁹ In *Confetti Records v. Warner Music UK Ltd* [2003] EMLR (35) 790, the defendants had ‘rapped’ over the claimant’s ‘track’ (which comprised an insistent instrumental beat accompanied by the vocal repetition of the word ‘burning’). The defendant accepted that this was a treatment, but the judgment of Lewison J leaves unstated what was ‘treated’: the musical work by the addition of the rap, or the literary work comprising the repetition of a single word? A more thorough analysis would have been helpful.

¹⁰⁰ Ricketson and Ginsburg, 603, [10.22].

¹⁰¹ *Shostakovich v. Twentieth-Century Fox Film Corp.*, 80 NYS (2d) 575 (Supreme Court, 1948) (failed). Apparently, the claim was successful in France: *Société le Chant de Monde v. 20th Century Fox* (Cour d’appel, Paris, 13 Jan. 1953) *DA* 1954 16 80, cited in R. Durie, ‘Moral Rights and the English Business Community’ [1991] *Ent L Rev* 40, 42.

¹⁰² T. Collova, ‘Les interruptions publicitaires lors de la diffusion de films à la television’ (1990) 146 *RIDA* 124.

¹⁰³ [2010] *EWPC* 3, [2010] FSR (25) 604.

¹⁰⁴ *Ibid.*, 620, [60].

¹⁰⁵ CDPA 1988, s. 80(2)(a).

¹⁰⁶ See G. Dworkin, ‘Moral Rights and the Common Law Countries’ (1994) 5 *AIPJ* 22, 22.

¹⁰⁷ See P. Goldstein, ‘Adaptation Rights and Moral Rights in the UK, the US and the Federal Republic of Germany’ (1983) 14 *IIC* 43.

¹⁰⁸ See e.g. the French case of *Leonide Zorine v. Le Lucernaire* [1987] *ECC* 54.

¹⁰⁹ There is authority that suggests that a ‘translation’ must be accurate: *Wood v. Chart* (1870) *LR* 10 *Eq* 193, 205; *Lauri v. Renad* [1892] 3 *Ch* 402.

¹¹⁰ CDPA 1988, s. 80(1), (2).

¹¹¹ In *Tidy v. Natural History Museum* (1998) 39 *IPR* 501, 503, it was accepted that a reproduction in reduced size is not a mutilation.

¹¹² *Ibid.*, 504.

¹¹³ [2012] *EWPC* 29, [24] (Douglas Campbell QC).

¹¹⁴ *Confetti Records v. Warner Music UK Ltd* [2003] *EMLR* (35) 790, [149]–[150]; *Pasterfield v. Denham* [1999] *FSR* 168, 182; E. Adeney, *The Moral Rights of Authors and Performers: An International and Comparative Analysis* (2006), 408–9; Laddie et al. (5th edn), [13.27]; Copinger (18th edn), [11–48]; Ricketson (1987), [8.107] (otherwise concepts of distortion and mutilation could lead to problems because they appear to be ‘highly subjective’). See also *Snow v. The Eaton Centre* (1982) 70 *CPR* (2d) 105 (Canada) (‘I am satisfied that 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’). If this is right, then it is possible that highly distorting treatments, such as parodies, which might not be prejudicial to the author’s reputation, do not infringe the integrity right. An alternative view is that distortions and mutilations are to be treated as prejudicial per se and that prejudice need be proved only for lesser cases of ‘treatment’: *Delves-Broughton v. House of Harlot* [2012] *EWPC* 29 (though Copinger (18th edn, 2021), [11.48], counsels that ‘the case should not be overly relied on’). The two views largely depend on differing interpretations of the words ‘or otherwise’, but also reflect disagreement as to interpretation of the Berne Convention itself: see Ricketson and Ginsburg, 609–10, [10.32], but note Adeney’s categorical view that the qualification that the act must have a prejudicial effect on the honour or reputation of the author applies to distortions and mutilations: E. Adeney, *The Moral Rights of Authors and Performers: An International and Comparative Analysis* (2006), [6.52], [14.72].

¹¹⁵ (1982) 70 *CPR* (2d) 105 (Canada).

¹¹⁶ [1996] *EIPR* D–86, (1998) 39 *IPR* 501 (reductions of cartoons). See also Laddie et al. (5th edn), [38.31] (court unlikely to treat author’s own reaction as determinative).

¹¹⁷ *Tidy v. Trustees of the Natural History Museum* [1996] *EIPR* D–86, (1998) 39 *IPR* 501.

¹¹⁸ *Pasterfield v. Denham* [1999] *FSR* 168, 182.

¹¹⁹ *Ibid.*, 182.

¹²⁰ [2003] *EMLR* (35) 790.

¹²¹ Ricketson (1987), [8.110]; Ricketson and Ginsburg, 592–3, [10.09], 594–6, [10.11], 606, [10.27] (explaining that these terms were preferred to the wider concept of ‘moral or spiritual interest of the author’).

¹²² Laddie et al., [38.30] (honour refers to integrity as a human being); Ricketson and Ginsburg, 606, [10.27].

¹²³ Copinger (18th edn, 2021), [11–51].

¹²⁴ Such a right has been accepted in the US Visual Artists Rights Act of 1990. At the Brussels Revision of Berne, one of the *vœux* adopted said that countries should introduce such a prohibition: see Ricketson and Ginsburg, 605, [10.26].

¹²⁵ CDPA 1988, s. 80(3)(a), (b). These are identical to the occasions on which an author has a right to be identified under CDPA 1988, s. 77(2); no differentiation is made for songs as in CDPA 1988, s. 77(3).

¹²⁶ CDPA 1988, s. 80(4)(a).

¹²⁷ CDPA 1988, s. 80(4)(c).

¹²⁸ CDPA 1988, s. 80(6).

¹²⁹ CDPA 1988, s. 83.

¹³⁰ Laddie et al. (5th edn), [38.43].

¹³¹ Many parodies might be said not to prejudice the honour or reputation of the author, because the audience would understand that the parodic variation had been created by a third party. Prejudice caused to an author from the critical quality of the parody is, strictly speaking, not relevant to infringement of the right, which protects only against prejudice that results from the treatment being thought to be the work of the author. The proposed new parody exception in CDPA 1988, s. 30A, applies only to economic rights. Even if an author is able to identify relevant prejudice, resort could be made by the defendant parodist to freedom of expression norms (under Art. 10 ECHR).

¹³² Australia, Copyright Act 1968, s. 195AS; Israel Copyright Act 2007, s. 50. Under US law, 'fair use' operates as a defence to an action for infringement of the artists' moral rights recognized under the US Visual Artists Rights Act.

¹³³ CDPA 1988, s. 82. The same rules apply to works in which Crown or parliamentary copyright subsists and works in which copyright originally vested in an international organization under CDPA 1988, s. 168.

¹³⁴ The provision refers to the circumstance under which works vested in the director's employer by virtue of CDPA 1988, s. 9(2)(a). The Rel. Rights Regs amended the provisions on film authorship and ownership without altering the reference in CDPA 1988, s. 82(1)(a).

¹³⁵ See G. Dworkin, 'Moral Rights and the Common Law Countries' (1994) 5 *AIPJ* 5, 27.

¹³⁶ CDPA 1988, s. 82(2).

¹³⁷ CDPA 1988, s. 178.

¹³⁸ CDPA 1988, s. 81(6).

¹³⁹ CDPA 1988, s. 80(5).

¹⁴⁰ G. Dworkin, 'Moral Rights and the Common Law Countries' (1994) 5 *AIPJ* 5, 28; R. Durie, 'Moral Rights and the English Business Community' [1990] *Ent L Rev* 40, 48, calls this 'the greatest compromise in the Act'.

¹⁴¹ For a general review of the common law analogues to moral rights, see G. Dworkin, 'Moral Rights: The Shape of Things to Come' [1986] *EIPR* 329.

¹⁴² [1905–10] *MacG* CC 148.

¹⁴³ (1832) 5 *Car & P* 219, 172 *ER* 947. See also *Springfield v. Thame* (1903) 89 *LT* 242.

¹⁴⁴ See also *Ridge v. English Illustrated Magazine* [1911–16] *MacG* CC 91.

¹⁴⁵ [1967] *Ch* 932.

¹⁴⁶ The defence under CDPA 1988, s. 81(6)(c), means that the claimant in *Frisby* would still have to rely on contract.

¹⁴⁷ *Frisby v. BBC* [1967] *Ch* 932, 951.

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