Perez v Fernandez: Australia’s First Decision on the Moral Right of Integrity

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This article examines the recent Federal Magistrates Court decision of Perez v Fernandez, Australia’s first case on the moral right of integrity. While not an in-depth consideration of the moral right of integrity, Perez gives some useful insights and raises some questions. This article will closely analyse and critique the decision, compare it to approaches to the moral right of integrity in the UK and Canada, and identify the useful contributions Perez makes to the fledgling Australian moral rights jurisprudence.

INTRODUCTION

As one of only a few Australian moral rights cases, the first case to consider the moral right of integrity, and a rare moral rights victory, Perez v Fernandez (2012) 260 FLR 1; [2012] FMCA 2 is significant and welcome. The right of integrity in common law jurisdictions has been the subject of little judicial guidance, but much academic commentary. That discussion has focussed on the requirement that the defendant’s conduct “be prejudicial” to the author’s “honour or reputation”, how the concept of “honour” should be interpreted, and how evidence of prejudice can be established.¹ Perez provides guidance on some of these issues, but unfortunately does not explicitly address major issues concerning the meaning of honour, which remain to be considered by future courts.

FACTS

Perez concerned allegations of infringement of both copyright and the moral right of integrity by the respondent’s modification of the applicant’s song, Bon, Bon. The applicant, Mr Perez, is described in the judgment as an internationally-renowned performing artist known as “Pitbull”. A corporate record label “Mr 305 Inc” is associated with him, and he is also known among his fans as “Mr 305”. Bon, Bon was released in November 2010 in the US on Mr Perez’s album “Armando”. The respondent, Mr Fernandez, is a Perth DJ and promoter who runs the Suave website, which was created for the purposes of promoting events organised by Mr Fernandez. The critical act at issue was Mr Fernandez’s modification of Bon, Bon by deleting the Spanish words “je, je, je, je, je, mira que tu estas rica”² at the start of the song and mixing in a recording (the audio drop) of the following words spoken by Mr Perez: “Mr 305 and I am putting it down with DJ Suave”. The reference in the audio drop to “Mr 305” is to Mr Perez, and “DJ Suave” is a reference to Mr Fernandez.

¹ The first case, Meskenas v ACP Publishing Pty Ltd (2006) 70 IPR 172; [2006] FMCA 1136, concerned the mis-attribution of authorship of a portrait artist but not the right of integrity. Ogawa v Spender [2006] FCAFC 68 concerned a claim that a Federal Court judge infringed the appellant’s moral right of integrity when the judge referred to email correspondence from the appellant in the course of his reasons for judgment. The Full Court held that the judge was entitled to judicial immunity and thus the claim was not substantively considered or determined. Rutter v Brookland Valley Estate Pty Ltd [2009] FCA 702 was a copyright infringement case which included a moral rights claim for lack of attribution. Not strictly a moral rights case, Schott Musik International GmbH & Co v Colossal Records of Australia Pty Ltd (1996) 71 FCR 37 (aff’d (1997) 75 FCR 321) concerned the now repealed s 55(2) of the Copyright Act 1968 (Cth) which provided that there is no entitlement to a compulsory licence for a record “in relation to a record of an adaptation of a musical work if the adaptation debases the work”.


³ Which according to google translate means “heh, heh, heh, heh, see that you’re rich”.
In December 2010, Mr Fernandez uploaded a copy of the modified song on to the Suave website, and for approximately one month it was streamed whenever any person visited the Suave website. He also played the modified song in the nightclubs where he worked as a DJ. The audio drop was provided to Mr Fernandez in 2008 in connection with his arrangement and promotion of planned Australian concerts by Mr Perez, which were subsequently cancelled. The court considered it clear “that Mr Fernandez has a continuing grievance with Mr Perez resulting from the failed tour, and a sense of entitlement to leverage off Mr Perez’s reputation”, which explained his conduct (Perez at [56]). Mr Perez sought both compensatory and additional damages for copyright infringement, including aggravated damages for moral rights infringement. The court held that Mr Fernandez breached Mr Perez’s copyright and the moral right of integrity, and awarded $10,000 in damages for infringement of moral rights, but no additional damages for copyright infringement.

The right to integrity of authorship is the right not to have the author’s work or performance subjected to “derogatory treatment”, which is defined as “the doing, in relation to the work, of anything that results in a material distortion of, the mutilation of, or a material alteration to, the work that is prejudicial to the author’s honour or reputation” or “the doing of anything else in relation to the work that is prejudicial to the author’s honour or reputation”.

In Perez the court accepted with little discussion that the modifications made to the song “must be regarded as a ‘distortion’ or ‘alteration’ (if not a ‘mutilation’) of the work, which is material” (at [84]). A broad approach to this element of the right of integrity is consistent with its expansive ambit, which encompasses “the doing of anything else in relation to the work”. The true control in the provision, however, is the requirement of prejudice to honour or reputation.

**MEANING OF “IS PREJUDICIAL”**

The statute requires that the defendant’s conduct “is prejudicial” to either honour or reputation. It has been argued that “prejudicial” requires only a propensity or capacity to harm, rather than evidence of actual harm. In Perez, the court agreed with this approach, stating (at [97]):

> The Copyright Act does not require that Mr Perez’s reputation has been prejudiced. All that is required is that the respondent’s act in relation to the work “is prejudicial”. That statutory language is derived from Article 6bis of the Berne Convention, which requires Australia to afford authors the right to object to derogatory treatment “which would be prejudicial to their honour or reputation”.

This approach may not be correct. First, the Australian legislature rejected the opportunity to adopt the Berne Convention wording “would be” and inserted “is” (implying actual harm). Second, dictionary definitions of “prejudicial” do not necessarily support this

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4 The parties were engaged in proceedings in the NSW Supreme Court in which Mr Fernandez unsuccessfully claimed against Mr Perez for an alleged breach of contract arising from the cancelled concerts.
5 Copyright Act 1968 (Cth), ss 195AJ(a) (works), 195AK (artistic works), 195AL (films), 195ALB (performances).
6 Copyright Act 1968 (Cth), ss 195AJ(b), 195ALB.
7 Copyright Act 1968 (Cth), s 195AJ(a).
9 Lim, n 2 at 293.
10 This was the view of the Canadian Federal Court in Prise de Parole Inc v Guérin, Éditeur Ltée (1995) 66 CPR (3d) 258 at 265, which stated that the right of integrity “does not require the plaintiff to prove prejudice to his honour or reputation”, suggesting that actual harm need not be demonstrated. See Lim, n 2 at 293.
11 See also Adeney, “Moral Right of Integrity: Past & Future of ‘Honour’”, n 2 at 129. Nevertheless, Driver FM clearly considered that prejudice had been established, finding that Mr Perez’s reputation did not suffer any “lasting damage” (Perez at [107]).
12 And similar wording adopted in other countries which implies future harm: see Adeney, “Moral Right of Integrity of Authorship”, n 8 at 183-189 for a discussion of the wording adopted in other countries.
construction. The Macquarie Dictionary (4th ed, 2005) defines “prejudicial” as “causing prejudice or disadvantage; detrimental”, and then defines “prejudice” as “prejudiced, prejudicing; to affect with a prejudice”. Other dictionaries provide similar definitions. Cases interpreting a similar UK provision also require proof of prejudice in fact. It is therefore arguable that the fact of having been prejudiced must be established before a cause of action crystallises. If Parliament did intend the provision to cover conduct which could prejudice, the Copyright Act 1968 (Cth) should be amended to more clearly reflect that objective.

However, the need to establish that prejudice has occurred does not necessarily require actual evidence of economic or other quantifiable damage. Nor should it, since very few authors would be in a position to prove such damage, and in many cases an author’s honour or reputation may have been prejudiced without the author suffering any economic loss. This is clearly, and fortunately, supported by Perez, where the court accepted that Mr Perez’s attorney “was not … in a position to give evidence which quantifyed the loss suffered by Mr Perez” (at [60]) and said: “all that is required is proof that Mr Fernandez’s act in respect of the Bon, Bon Song was prejudicial to Mr Perez’s honour or reputation, not that Mr Perez suffered damage” (at [96]; emphasis added) (see also at [95]: “An action for infringement of moral rights is actionable as a breach of statutory duty without proof of damage”). In summary, Perez takes a broad approach to the concept of prejudice.

**EVIDENCE OF PREJUDICE IN PERRY**

The focus in Perez was harm to Mr Perez’s reputation caused by the audio drop’s false association with Mr Fernandez. The court noted that “celebrities place a great store on their reputation and are quick to take action to protect it” (at [63]), referred to the modified Bon, Bon as “harmful to its author’s reputation” (at [1]), and compared moral rights “with the reputational interests protected by an action in defamation” (at [100]). It also acknowledged the “clear parallels between the two laws (noting that defamation protects reputation, whereas moral rights protect both ‘honour and reputation’)” (at [101]). A familiarity with defamation law did explain, at least in part, Australia’s agreement to the form of Art 6bis adopted here, rather than the more expansive and less conditional articulations of the moral right of integrity adopted in other civil law jurisdictions. However, while there may be parallels between the right of integrity as defined in Art 6bis and the tort of defamation, the conceptual foundations of moral rights are significantly different.

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13 Oxford Dictionaries Online defines “prejudicial” as “harmful to someone or something; detrimental” and “prejudice” is defined as “harm or injury that results or may result from some action or judgement”; Oxford English Dictionary (online, 2000) defines “prejudicial” as “[c]ausing prejudice; of a harmful tendency; detrimental or damaging (to rights, interests, etc)” and “prejudice” as “[t]o affect adversely or unfavourably as a consequence of some action”.

14 Copyright, Designs and Patents Act 1988 (UK), 80(2)(b), provides that 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” (emphasis added).

15 Although Lim, n 2 at 292, cites a definition which does.

16 See Pasterfield v Denham [1999] FSR 168 at 182: “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” (emphases added). Tidy v Trustees, Natural History Museum (1995) 39 IPR 501 at 504, where an application for summary judgment for breach of the UK moral right of integrity was refused without evidence of prejudice: “without having the benefit of evidence relating to the effect of the reproduction on [the author’s] reputation in the minds of other people and the benefit of cross-examination of any witnesses giving evidence on that point”; Harrison v Harrison [2010] FSR 25 at [58]: “The claimant must …establish that [the] treatment has been ‘derogatory’ as defined” (emphasis added).

17 See Sainsbury M, Moral Rights and Their Application in Australia (2003) pp 55-56, which states that an author may only object “where prejudice to his or her honour or reputation can be demonstrated” (emphasis added). Although presumably injunctive relief would be available to prevent a threatened act of derogatory treatment: see, eg Morrison Leedh Music Ltd v Lightbond Ltd [1993] EMLR 144, where an interlocutory injunction was granted restraining the release of “the Bad Boys Megamix” (a medley of snippets of various Wham! songs), on the basis that it was capable of being a distortion or mutilation amounting to derogatory treatment under Copyright, Designs and Patents Act 1988 (UK), s 80.


19 See Adeney, “Moral Right of Integrity: Past & Future of ‘Honour’”, n 2 at 117-120.
Mr Perez relied on an affidavit made by his US attorney and manager, Ms Martinez, who had a long professional and personal association with Mr Perez, and who managed his “day to day legal and commercial operations”. It is not clear what particular evidence Ms Martinez gave, however, his Honour did say her “affidavit establishes to my satisfaction that the association with Mr Fernandez is one which Mr Perez himself strongly considered to be prejudicial to his reputation” (at [87]). This clearly points to Mr Perez’s subjective belief as to the harm caused to his reputation. However, it seems there was no objective third party evidence of how Mr Perez was perceived following the streaming of the modified *Bon, Bon*. While a notice disputing facts was filed by the respondent, none of the disputed facts were relevant to the moral rights claim.\(^{20}\) Notably, it was an agreed fact that Mr Perez was “an internationally-renowned performing artist” (at [4]). This may have relieved Mr Perez’s evidentiary burden of establishing the extent of his reputation (in particular, in Australia, where the prejudice must occur),\(^{21}\) however, it did not necessarily establish how and why it had been prejudiced.

It was the respondent’s cross-examination of Ms Martinez which elicited some evidence as to how Mr Perez’s “honour and reputation had been damaged”, namely the loss of “exclusivity” in 2010 in that he could not now offer another artist or DJ with “a higher value to his name the opportunity to come and be a guest or do a remix of the *Bon, Bon* song”, the fact that major artists would pay for appearances with Mr Perez for “as little as eight bars”, and the clarification “that the losses suffered from the false association with Mr Fernandez were referable to money not made, and in this sense were unquantifiable” (at [60]-[62]).\(^{22}\)

The court did not comment specifically on these examples of “damage”. In particular, it was not explained why the addition of the audio drop, which, (a) was not a *creative* act of collaborative remixing, (b) was unauthorised, and (c) was an act done by a Perth DJ on a website which did not apparently attract much overseas traffic, would necessarily prevent authorised creative collaborations and re-mixes of the song with other artists in America or elsewhere.\(^{23}\) It may have been more persuasive to argue that Mr Fernandez’s treatment had perhaps “tainted” the song, thus making it less attractive as a vehicle for paid creative guest appearances or re-mixes, although it is still not clear what exposure the modified song had in Mr Perez’s operational commercial environment. It was also not explained why a slight, unauthorised, and non-creative modification of the song by a Perth DJ would necessarily diminish the aspect of Mr Perez’s goodwill which allowed him to command payment for guest appearances. Since the real complaint here may be the false association itself, it is arguable that passing off or breach of s 18 of the *Australian Consumer Law* may have afforded Mr Perez a stronger right to claim damages for loss of opportunity to charge a licence fee for the misleading endorsement contrived by Mr Fernandez, irrespective of the effect such endorsement had on Mr Perez’s reputation. And copyright infringement clearly gave him the right to claim a notional licence fee for the unauthorised reproduction and communication of *Bon, Bon*. However these alternative bases of loss are significantly different to the loss caused by prejudice to reputation. The court held that Mr Fernandez’s conduct was prejudicial to Mr Perez’s honour or reputation in two ways:

(a) first, because persons listening to the altered song for the first time through the Suave website would mistakenly assume it was the original song, referring to Mr Fernandez; and

(b) second, because some listeners would be aware of the failed concert tour and the litigation between the parties and would see the insertion of the audio drop by Mr Fernandez as a “ruse”.

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\(^{21}\) Adeney, *Moral Rights of Authors & Performers*, n 2, [18.68].

\(^{22}\) As noted, the inability to quantify the loss should not hamper the author’s cause of action, although it may affect damages.

\(^{23}\) Note that, while the *prejudice* must occur in Australia, there seems no territorial limit to the damage that may result from that prejudice. Thus lost opportunities outside of Australia as a result of prejudice occurring in it, would seem to be admissible evidence of harm.
First basis of prejudice

As to the first basis of prejudice, the court said (at [86]):

> there will have been a class of listeners, who upon listening to Bon, Bon for the first time through the Suave Website, will have presumed that the altered section formed part of the authentic, original work. In other words, they would have presumed that Mr Fernandez was indeed a subject of the song, and that Mr Perez had written and performed it about him … associations between artists and DJs in the hip-hop/rap genre are highly significant. Artists go to great lengths to choose whom they associate with, and these associations form a central part of their reputation.  

On this point, the court also said (at [98]):

> As is evident from the Martinez affidavit, issues concerning the reputation and honour of an artist in the rap/hip-hop genre in which Mr Perez creates are highly attuned:
> (a) an artist’s honour and reputation depends on whom he or she associates with, and is a driver of artistic (and with it commercial) success. The artist goes to great lengths to control whom he or she associates with;
> (b) given that evidence, the distortion of Mr Perez’s work, such as to create a false association, should be regarded as prejudicial to his honour and reputation as an artist per se;
> (c) that it is in fact prejudicial is made clear by the circumstances of Mr Perez’s relationship with Mr Fernandez: it is not necessary for the applicants to lead evidence from members of the public as to the way the work would be received;
> (d) that the treatment of the work was prejudicial may be presumed [emphases added].

Of most interest is the court’s preparedness to presume prejudice, apparently without third party evidence as to how relevant members of the community would regard the effect of Mr Fernandez’s conduct, or why it was prejudicial to Mr Perez’s reputation. As discussed below, this is a departure from established precedent in Canada and the UK. This comparatively generous attitude to the evidence of prejudice may have been explained by his Honour’s interpretation of “prejudicial” to include a propensity to harm. His Honour also referred to the approach to damages in Meskenas v ACP Publishing Pty Ltd (2006) 70 IPR 172 at [39], which relied on UK authority suggesting that a false attribution of authorship leads to a presumption of damage. Of course, Mr Fernandez did not falsely attribute authorship of Bon, Bon to himself, and if these UK authorities did influence Driver FM in his approach to presumptive prejudice, he may have wrongly conflated the prejudice of a false attribution with that of a false association, which are different messages.

The first basis on which prejudice was presumed in Perez was that “because artists go to great lengths to control who they associate with” (at [98]), a distortion of the artist’s work creating a false association would necessarily cause prejudice. However, this is questionable. Logically, this would mean that any false association added to a work would necessarily be prejudicial. While all false associations may be misleading, some could actually enhance reputation and honour. Indeed, had the audio drop been played in association with the planned concerts as anticipated, one could not have imagined Mr Perez arguing that the association with Mr Fernandez was harmful to his reputation. Clearly in 2008 Mr Perez considered Mr Fernandez worthy of association, at least for the purposes of the planned concerts. It is not apparent from the judgment that there was objective evidence as to why an association with Mr Fernandez would necessarily be harmful to Mr Perez’s reputation, such as opinion evidence as to Mr Fernandez’s relatively low standing in the Australian DJ community and Mr Perez’s comparatively high standing. The thrust of the judgment, which was presumably based on

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24 See also Perez at [68]: “I accept … that the rap/hip hop genre is one in which an artist’s commercial and artistic associations really matter. Success in building a reputation, developing a fan base, selling records, attracting people to concerts, and ultimately entering into lucrative commercial sponsorships and endorsements depends in large measure on the other artists and brands the artist is seen to associate with. It is also a genre which has been closely linked to ‘DJ-ing’. Association between artists and DJs continue to play an important role in promoting and building audiences for rap/hip hop music.”

25 Being the right not to have authorship of the work falsely attributed: Copyright Act 1968 (Cth), s 195AC.

26 Citing Laddie et al, The Modern Law of Copyright and Designs (4th ed, Butterworths, UK, 2004) at [39.59]: “It has been held that where a claimant is a professional author, particularly one with a significant reputation, a false attribution is calculated to place his reputation and goodwill at risk of substantial damage and that damage may be presumed.”
the evidence of Ms Martinez, rather than an objective source, is that Mr Fernandez is a significantly “lower value” collaborator than those Mr Perez normally associates with.

Second basis of prejudice

The critical aspect of the judgment is that prejudice “is made clear” because of the “particular circumstances of Mr Perez’s relationship with Mr Fernandez” (at [98]; emphases added), namely the failed concert tour and the animosity resulting from it. In those circumstances, it would not be too difficult for the magistrate to stand in the shoes of members of the public who were aware of this animosity and presume prejudice. This was the second kind of prejudice identified by the court, and for the reasons outlined above, the more persuasive (at [88]):

there will have been an alternative class of listeners who were more intimately aware of both Mr Perez’s music and Mr Fernandez. This class is likely to have been alert to Mr Fernandez’s ruse. Persons in this class are also likely to have been aware of the circumstances of the failed Australian tour, and the fact that Mr Fernandez is suing Mr Perez in the NSW Supreme Court in relation to it. These are matters which Mr Fernandez has sought to publicise for himself. Listeners in this class will know the significance of Mr Perez’s associations as an artist, and will understand the alterations to the song made by Mr Fernandez to be mocking Mr Perez’s reputation [emphasis added].

The court clearly inferred that there was a class of persons who were aware of both of the parties, the failed tour, and Mr Fernandez’s sense of grievance. There seemed to be no third party evidence from any member of that class, and one wonders how large the class would have been. Further, the court does not articulate how this class would specifically interpret the audio drop in light of those circumstances, and why the use of the audio drop in those circumstances would necessarily mock Mr Perez’s reputation. It is more likely that such a class would see Mr Fernandez as a disgruntled, petulant, indeed pathetic “small player” seeking his revenge, “taunting” Mr Perez, and “leverage[ing] off Mr Perez’s reputation” (at [56]) as he had hoped to do in connection with the concerts. However, why would that mock Mr Perez’s reputation? What is the slur cast on Mr Perez? He seems more a victim in these circumstances. Perhaps it could be argued that Mr Fernandez paints Mr Perez as a “deal breaker” (which may or may not be true). It would have been preferable for the Magistrate to more clearly explain how Mr Fernandez’s conduct harmed Mr Perez’s reputation.

While objective evidence from members of the public was unnecessary, at least to establish this second type of prejudice, Perez does not suggest that such evidence would never be needed or that prejudice can always be presumed. Here prejudice was dependent on the particular circumstances of the parties’ relationship. Thus it would be dangerous to regard Perez as suggesting that any modification of a work which creates a false association is prejudicial per se (as suggested in the first kind of prejudice identified by the court). The court will still need evidence of why the false association necessarily harms honour or reputation. However, Perez suggests that the evidentiary burden on the plaintiff is moderate, and that the court is prepared to make some assumptions and inferences in the absence of expert or other third party evidence. This clearly assists future applicants, at least in the Federal Magistrates Court. It also accords with that court’s objective, as a lower level Federal Court, to reduce complex and expensive litigation.27 This is particularly important in the context of moral rights litigation, where the author’s objective is rarely compensation for serious economic loss, and significant damages are rarely awarded, therefore enhancing the practical risks of moral rights litigation.28 Essentially an injured author (or his or her legal personal representative) must be willing to pay for a largely symbolic vindication of their claim. Thus if the evidentiary burden is too great, the real practical ability to prosecute a claim will be outside of the reach of all but the rich offended author.

27 “The Court was established to provide a simple and accessible alternative to litigation in the Federal Court of Australia … The FM Act directs the Court to operate informally and to use streamlined procedures.” Objectives of the Federal Magistrates Court, http://www.fmc.gov.au/html/introduction.html.

28 Note the concern expressed by Michael Fysch QC in Harrison v Harrison [2010] FSR 25 at [10] as to the plaintiff’s “disturbing” legal costs of £163,205.44 which had accumulated in relation to a claim with a “modest commercial value".
COMPARATIVE APPROACHES TO EVIDENCE OF PREJUDICE IN OTHER JURISDICTIONS

In other jurisdictions, a lack of corroborative third party evidence has prevented a finding of infringement of moral rights, or an award of damages. 29 In this respect, Perez is an interesting counterpoint.

Canadian decisions

In Canada in Snow v Eaton Centre Ltd 70 CPR (2d) 105, the Ontario High Court of Justice granted an injunction ordering the removal of ribbons from the plaintiff’s sculpture of 60 geese suspended from a shopping centre ceiling. The ribbons were added as part of a Christmas display. The report is brief and a number of questions remain. O’Brien J stated (at 106) that the words “‘prejudicial to his honour or reputation’... involve a certain subjective element or judgment on the part of the author so long as it is reasonably arrived at”. He noted that the plaintiff’s adamant “belief that his naturalistic composition has been made to look ridiculous” was shared by “other well respected artists and people knowledgeable in his field”. Presumably there was some evidence before the court which permitted this last finding, although it is not clear from the report whether that evidence was presented directly by those parties, and what the particular content of the evidence was. In those circumstances, the judge “was satisfied [that] the plaintiff’s concern [the treatment] will be prejudicial to his honour or reputation is reasonable in the circumstances” (at 106). The suggestion is that the court would not have come to the same conclusion in the absence of that evidence.

In Prise de Parole Inc v Guérin, éditeur Ltée (1995) 66 CPR (3d) 257, the defendants cut the plaintiff’s novel by a third of its original size, omitted plot elements, and changed the order of events. The author sued for infringement of his moral right of integrity. The court accepted the defendant’s conduct left the work “distorted, mutilated or otherwise modified” (at 265), and accepted the author’s subjective evidence that he was “shocked and distressed by this” but said “the evidence has not shown that, objectively, as required by s 28.2(1) of the Act, his work was modified to the prejudice of his honour or reputation” (at 266), which “requires an objective evaluation of the prejudice based on public or expert opinion” (at 265; emphasis added). The author gave evidence as to his reputation, including the receipt of literary grants, an invitation to attend a literary festival in France, guest lectures at schools, and publication of his photograph on the front page of the premiere arts journal in Ontario. However, the court noted that the author had not been “ridiculed or mocked by his colleagues or the newspapers and that he had not personally heard any complaints” following the defendant’s conduct, nor had his invitations to speak at schools reduced (at 265). Thus the author had not shown that “objectively … his work was modified to the prejudice of his honour or reputation”.

Comparing this decision to Perez, one can note the lack of objective evidence in Perez as to the effect of the defendant’s conduct on Mr Perez’s reputation, in particular the lack of any evidence that Mr Perez had been “ridiculed or mocked”. However, Prise de Parole perhaps too enthusiastically imports legal principles and evidentiary conditions more familiar to defamation law, when “the section gives rights greater than those based on libel or slander”. 30 Perez would certainly suggest that the evidentiary burden in Australia is not as high as that in Prise de Parole.

Finally, in Boudreau v Lin (1997) 75 CPR (3d) 1, a professor revised a student’s coursework paper, and published it under his own name without the student’s knowledge or authority. Without discussion, 31 the court found that a breach of integrity had occurred. However, no damages were

29 Although these cases have been understandably criticised for failing to clarify whether the need to objectively corroborate prejudice applies to reputation or to honour (or both): see Lim, n 2 at 297.

30 Snow v Eaton Centre Ltd (1982) 70 CPR (2d) 105 at 106.

31 Presumably the court considered the breach obvious: see Lim, n 2 at 304. Presumably, prejudice should be able to be inferred in obvious cases, eg, a graphic pornographic alteration of a famous children’s drawing.
awarded for the breach because “[t]here is no evidence before me that the infringement of the plaintiff’s moral rights has caused any loss to the plaintiff’s reputation” (at 14; emphasis added).\(^{32}\)

### UK decisions

In the UK in *Harrison v Harrison* [2010] FSR 25, the author of a “how-to” guide for the avoidance of aged care fees complained about a series of modifications made in the second edition of the guide by another person. Judge Michael Fysh QC said (at [66]):

> If all a claimant can find to support his case for derogatory treatment is a miscellany of arguable trivia, that is not enough. Still less cogent is for a claimant to amass a mound of extracted trivia and submit absent relevant evidence, that the vice lies in its cumulative effect upon a reader. That seems to me impractical and largely to rob the section of its utility.

The “relevant evidence” the court seemed to require was objective evidence from readers which supported the author’s complaint. Michael Fysh QC was unimpressed by the author’s claimed examples of prejudice, which were a “miscellany of arguable trivia”, unclear, and sometimes contradictory (“arguable”). He seemed to find the author’s evidence frankly unpersuasive and suggests that he would need third party evidence to convince him otherwise. The alterations were clearly not so serious as to be obviously prejudicial. The court went on to say (at [64]):

> [The author] has put forward his honour and reputation for scrutiny in this part of his claim. This is not easy to assess. Furthermore, there is no evidence about this matter... There is no evidence even of the kind that one might find in a County Court passing off case. Doing the best I can, the words which spring to mind to categorise [the author’s] professional honour or reputation are “very modest”.

This requires objective evidence regarding the extent of the author’s reputation. *Perez* does seem to tactically disapprove of the suggestion in *Harrison* that, at minimum, “passing off” evidence is needed, although in *Perez* the author’s world renown was a perhaps strategically important agreed fact.

In *Confetti Records v Warner Music UK Ltd* [2003] EMLR 35, the plaintiff claimed that his moral right of integrity had been infringed when the defendant added rap words which apparently contained references to violence and drugs to the plaintiff’s musical work, which, the court said (at [151]): led to the faintly surreal experience of three gentlemen in horsehair wigs examining the meaning of such phrases as “mish mish man” and “shizzle (or sizzle) my nizzle”. In contrast to *Perez*, Lewison J said in dismissing the claim (at [157]):

> the fundamental weakness in this part of the case 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] himself made no complaint about the treatment of “Burnin” in his witness statement. Mr Shipley invites me to infer prejudice. Where the author himself makes no complaint, I do not consider that I should infer prejudice on his behalf.

Clearly the cases can be distinguished in that some evidence of harm to reputation was given in *Perez*, even if it was untested against any objective standard. In summary, *Perez* represents a far more liberal approach to the plaintiff’s evidentiary burden than comparable cases in other common law jurisdictions.

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\(^{32}\) This is puzzling since the logical basis for complaint would be the harm to the student’s honour, given that his reputation could not be affected in the circumstances (since he was not named in the published paper, and his coursework paper would not have been publicly available). The court makes no reference to the plaintiff’s injured honour and it is not clear whether the court was only mandating objective evidence for reputational harm, or whether it required the same for injured honour.

\(^{33}\) It would be dangerous to regard *Harrison* as authority for suggesting that a series of minor flaws could never prejudice an author’s honour or reputation, since it is quite conceivable that each individual flaw may appear, in isolation, de minimis, however the overall, indeed “cumulative” effect, may be to degrade the work or its authorship.
PREJUDICE TO "HONOUR"

The meaning of "honour" has been discussed by many commentators.34 It seems clear that "honour" has a separate meaning to "reputation".35 This is apparent from its deliberate inclusion – in disjunctive form – in both the Berne Convention and the legislative text (if it means the same as reputation, why include it?), and the reasonable assumption that in enacting a moral rights provision expressly prohibiting prejudice to honour, Parliament did not intend to enact a "deliberate tautology"36 by merely duplicating the tort of defamation.37 The major issue is whether "honour" invites a subjective or objective standard, or both. A person's honour can be assessed objectively by reference to community standards (eg, a person may be considered "honourable" by the community and that "honour" may have been diminished), but may also be something that is measured personally by reference to the author's own feelings and sense of self (eg, a mutilated artwork may be regarded as an affront to the author's honour as an artist). Where the more objective measure of honour is prejudiced, clearly there will be overlap between reputational harm and harm to honour.

The preponderance of commentary supports (albeit sometimes cautiously in the absence of judicial clarification) a construction of "honour" which permits consideration of the author's subjective response to the defendant's conduct,38 although consideration of the author's subjective feelings is clearly not mandatory.39 The single government source separately discussing honour confirms the relevance of a subjective response.40 A subjective recognition of honour also respects the civil law origins of the right of integrity, and the principles upon which it rests, namely the notion that

34 See, eg Loughlan, n 2; Lim, n 2; Adeney, "Moral Right of Integrity: Past & Future of 'Honour'", n 2; Adeney, Moral Rights of Authors & Performers, n 2, [18.65].
35 See Lim, n 2 at 293-294; Adeney, "Moral Right of Integrity of Authorship", n 8 at 188. See also Attorney-General’s Dept and Dept of Communications & the Arts, Proposed Moral Rights Legislation for Copyright Creators, Discussion Paper, 1994, p 45 [3.49] (the only government source which separately discusses honour): "the term 'honour' is generally associated with personal integrity and how a person considers he or she is perceived. 'Reputation', on the other hand, is associated more, in the defamation context, as relating to a person's professional, business or personal standing in the community".
36 Adeney, "Moral Right of Integrity of Authorship", n 8 at 188.
37 In the Second Reading Speech for the Copyright Amendment Bill 1997 (Cth), Attorney-General, Daryl Williams, said that, "Personal honour and reputation are already protected by the laws of defamation", and referred to Australia’s “fragmentary and incomplete coverage by Australian law of the Berne convention moral rights obligations”: Australia, Debates, House of Representatives, 18 June 1997, p 5548 (Daryl Williams).
38 See, eg Adeney, "Moral Right of Integrity: Past & Future of 'Honour'", n 2 at 125-126: "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" (citing Bently and Sherman); "the reference to 'honour' indicates that more subjective factors are to be taken into account, involving a consideration of the way that authors think about themselves and their artistic integrity" (citing Ricketson); and notes "This perception of subjective content is clearly correct in the light of the definitions given to the word in French, the authoritative language of the Berne Convention. The constant reference in these definitions to a sense of moral dignity emphasises the subjective elements of the word". Adeney, "Moral Right of Integrity of Authorship", n 8 at 188, also argues that the repeated references in the legislation to "the integrity of authorship [i]nevitably ... carries the connotation that it is the authorship which is to be kept intact rather than, at first instance, the work", which suggests that the interests of the author must be considered. See Loughlan, n 2 at 191, for the contrary view that honour should be determined exclusively by reference to an objective standard.
39 See Adeney, "Moral Right of Integrity: Past & Future of 'Honour'", n 2 at 127 (argument that the wording of Art 6bis of the Berne Convention suggests evidence of subjective response is unnecessary to a finding of infringement): "the integrity provision of Art.6bis is structured in such a way as to place emphasis on the nature of the defendant's act – distortion, mutilation, modification – rather than on the effect on the author. Issues of authorial harm are raised only in order to classify the act itself. The inquiry is abstract – whether the defendant’s actions would be prejudicial to the honour or reputation of the author, in other words whether the defendant’s actions have the propensity to harm honour. This reduces the importance of evidence of subjective response. Of course, evidence of actual, subjectively-perceived harm is relevant in the classification of the act, but it is by no means necessary to a finding of infringement."
40 Discussion Paper, n 35, p 45 [3.49]: "The term 'honour' is generally associated with personal integrity and how a person considers he or she is perceived. 'Reputation', on the other hand, is associated more, in the defamation context, as relating to a person's professional, business or personal standing in the community."
the creative act personally connects the author with the work, which thereby becomes an extension of the author’s personality.\textsuperscript{41} This again is reflected in the Second Reading Speech, where the Attorney-General said:

But this bill is not just about fulfilling international obligations. More importantly, it is about acknowledging the great importance of respect for the integrity of creative endeavour. At its most basic, this bill is a recognition of the importance to Australian culture of literary, artistic, musical and dramatic works and of those who create them.\textsuperscript{42}

It seems clear that Parliament intended some subjective input from the author into the question of moral rights infringement. The issue, however, is what role the author’s subjective response should play in determining the issues. Should we employ a purely subjective test, a purely objective test, or should there be some compromise between the author’s subjective view and objective considerations? If so, what should that compromise be? A purely subjective test has largely been rejected by commentators.\textsuperscript{43} The perceived dangers are that such a test could have potentially “far-reaching consequences”,\textsuperscript{44} giving possibly hypersensitive authors considerable power to restrain uses of their works, “dictate the outcome of a case”,\textsuperscript{45} or abuse their moral rights.\textsuperscript{46} It is also argued that the signatories to the Berne Convention never intended to enact a purely subjective test, cognisant of the dangers of authorial “chicanery”.\textsuperscript{47} The UK and Canadian cases referred to above demonstrate a clear tendency to require objective evidence of prejudice, though they often blur whether this is to honour or reputation, or both. Other cases from those jurisdictions regard evidence “that the author is himself aggrieved by what has occurred”,\textsuperscript{48} as insufficient, and require “the application of an objective test of reasonableness”;\textsuperscript{49} and evidence supporting “[the author’s] own personal reaction”.\textsuperscript{50}

**Consideration of Prejudice to “Honour” in Perez**

Unfortunately, *Perez* does not resolve any of the questions as to the meaning of honour, or how prejudice to honour should be assessed or proven. Nor does it discuss “honour” clearly as a concept separate to reputation (this criticism also applies to most if not all the UK and Canadian cases discussed above). Indeed, in several instances, Driver FM refers to “honour and reputation” (at [61], [98](a), (b), [101]). His Honour did refer to the Attorney-General’s Second Reading Speech (cited above), and to a recent report describing moral rights as one of the four principles underpinning Australian copyright law.\textsuperscript{51} He also said that moral rights were introduced to: “give protection to the investment of the author’s personality in his or her creation. Moral rights draw their jurisprudential force from civil law traditions and a number of international copyright and human rights conventions to which Australia is a party” (at [81]).

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\textsuperscript{41} See generally, Verginis, n 2.

\textsuperscript{42} Australia, *Debates*, House of Representatives, 8 December 1999, p 13026 (Daryl Williams, Attorney-General).


\textsuperscript{45} Adeney, “Moral Right of Integrity: Past & Future of ‘Honour’”, n 2 at 126.


\textsuperscript{48} *Pasterfield v Denham* [1999] FSR 168 at 181.

\textsuperscript{49} *Tidy v Trustees, Natural History Museum* (1995) 39 IPR 501 at 504.

\textsuperscript{50} *Ritchie v Sawmill Creek Golf & Country Club Ltd* (2003) 27 CPR (4d) 220 at [53].

\textsuperscript{51} Copyright Council Expert Group, Copyright Symposium 2011, *Directions in Copyright Reforms in Australia*, p 1 “Preamble”, states that one of the four principles underpinning copyright law is: “The related importance of conferring on human creators and performers personal rights to ensure reasonable attribution for their creations and to prevent unreasonable derogatory treatments of their creations.”

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*Perez v Fernandez: Australia’s first decision on the moral right of integrity*
These references to an author-work connection and the civil law origins of moral rights suggest that the court regards honour as an aspect of protectable authorial personality, separate from authorial reputation, although it is interesting that, in the context of a cause of action so closely linked to the personality interests of the author (at [100]), Mr Perez’s failure to personally give evidence of prejudice did not disadvantage him. The court made a number of references to prejudice to the honour or reputation of Mr Perez “per se”: “the distortion of Mr Perez’s work, such as to create a false association, should be regarded as prejudicial to his honour and reputation as an artist per se” (at [98](b)). While this could be considered a reference to Mr Perez’s honour in isolation from his reputation, it is more likely that his Honour was simply clarifying that a breach of moral rights is actionable per se without proof of damage, or that in the particular circumstances of the parties’ relationship prejudice could be presumed. The court also said (at [87]):

I accept that the fact that the reference to Mr Fernandez in the altered version of the song had not been authorised by the author should be regarded as prejudicial to him per se. Were it to be suggested otherwise, Ms Martinez’s affidavit establishes to my satisfaction that the association with Mr Fernandez is one which Mr Perez himself strongly considered to be prejudicial to his reputation, and which caused him anger and distress (emphasis added).

This statement could be seen to discuss honour as a separate element of the right of integrity, if we construe the reference to “him per se” as a reference to Mr Perez as an author and without any exterior measure, followed by the separate consideration (“were it to be suggested otherwise”) of prejudice to reputation, which is measured by criteria exterior to the author. The reference to “anger and distress” seems also to be a reference to honour, given that those feelings are strictly irrelevant to damaged reputation. Again, however, this could also simply be a reference to presumed prejudice (“per se”), or in the alternative proven prejudice (based on Ms Martinez’s affidavit evidence). His Honour also found that Mr Perez was “concerned and upset by the distortion of the Bon, Bon Sound Recording and the use made of it by Mr Fernandez” (at [60]), and that Mr Fernandez “intended to cause Mr Perez artistic, reputational and commercial harm” (at [69]). He also referred to the “distress caused to Mr Perez as an artist”, the “need to provide vindication to Mr Perez as an artist” (at [106]), and to Mr Perez’s compensable “injured feelings” (at [91], [104]). However, Mr Perez may well have been “concerned and upset”, and his feelings injured, about the damage to his reputation caused by Mr Fernandez’s conduct, so these are not clear separate references to honour.

Despite the reference to “artistic” harm and to Mr Perez’s capacity “as an artist”, there was apparently no evidence as to authorial integrity, eg, that the deleted part of the song was particularly artistically significant, that the change made the song worse, or that Mr Fernandez interfered with Mr Perez’s authorial vision. The change made to Bon, Bon, in terms of quantum, was relatively minor, and the substantial message of the song remained untouched. Certainly, given the weight attached to reputation prejudice, Perez is not authority for the proposition that simply changing a few

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52 Driver FM rejected the respondent’s invitation to infer from Mr Perez’s failure to give evidence that the evidence would not have assisted him (Perez at [60]).

53 These last two constructions are supported by Perez at [96], [97] (his Honour clarifying that it is not necessary to demonstrate that Mr Perez suffered damage), at [98](c) (“that it is in fact prejudicial is made clear by the circumstances of Mr Perez’s relationship with Mr Fernandez; it is not necessary for the applicants to lead evidence from members of the public as to the way the work would be received”) and at [98](d) (that “the treatment of the work was prejudicial may be presumed”).

54 It is the court that referred to the deleted words as “a prominent part” of the song (Perez at [84]) and said that in light of Mr Perez’s ability to command payment for guest appearances for as little as eight bars of music “the length of time for which the Audio Drop plays within the Mixed Bon, Bon Version is significant, and substantial within the context of creating a commercially, and artistically, valuable association” (at [62]).

55 In Confetti Records v Warner Music UK Ltd [2003] EMLR 35 at [156]; [2003] EWHC 1274 (Ch), Lewison J did not respond to the claim that “the treatment was derogatory because all coherence of the original work has been lost as a result of the superimposition of the rap” (emphasis added). This conduct could clearly offend the authorial honour and integrity of an author, however it seems clear in Confetti that even if the authorial vision of the author had been rendered “incoherent”, the lack of evidence of harm to honour or reputation was fatal and itself determined the issue.
lines of a musical work is necessarily prejudicial, as suggested in some commentary, and as could likely be the case in France. The particular facts of Perez were very important. It was the misleading false association created by the new line, and its effect on the commercial reputation, rather than the artistic honour, of Mr Perez, that was germane, rather than the fact of the alteration itself or any interference with authorial vision. In other words, this was less about Mr Perez commanding respect for his work in his capacity as an author, and more about him commanding respect for his goodwill in his professional capacity. It is the strength of the case for reputation prejudice which makes Perez a poor test case on the concept of honour.

Thus it is no surprise that Perez is silent on the need to objectively verify the subjective response of the author. Insofar as the court considered Mr Perez’s subjective evidence about his feelings, it did not consider, nor apparently deem necessary, evidence from Mr Perez’s peers or any other representative member of the community about whether Mr Perez’s feelings were reasonable in the circumstances. The statement in Perez (at [98]) that it was unnecessary to lead “evidence from members of the public as to the way the work would be received” does not clarify the issue, since that evidence is separate to evidence about whether members of the public regarded Mr Perez’s subjective response to be reasonable. However, it is likely that the same evidence which led the court to conclude that prejudice to reputation could be presumed (ie, the particular circumstances of the parties’ relationship and the failed concert tour) would also demonstrate the reasonableness of Mr Perez’s subjective responses. Since Mr Perez’s honour was not really at issue, it is still an open question as to whether corroborative evidence of the reasonableness of the author’s response is necessary, or whether damages are recoverable for injured honour alone, in the absence of evidence of reputational harm. Perez does suggest, however, that a purely objective test should not be employed to determine prejudice to honour. The arguments for a purely objective test sit awkwardly with the several references in Perez to the injured feelings of Mr Perez, and the references to him as an artist (at [106]), rather than a “reasonable author” in the relevant field.

In summary, we need a deeper judicial consideration of the issue of honour as a separate element of the moral right of integrity before the Australian approach can be gleaned, and it is hoped that future claimants will plead their case more overtly in the alternative, and that future courts will consider those claims separately.

Perez on damages for breach of moral right of integrity

Section 195AZA(1)(b) of the Copyright Act provides that remedies for infringements of moral rights include “damages for loss resulting from the infringement” (emphasis added). The kind of loss which is compensable is not clarified by the section. In particular, it is not clear whether loss must be economic or whether it refers to a much broader concept of loss, and if so, how broad? Notably, and perhaps surprisingly, Pt IX of the Act has no equivalent to s 115(4), which expressly permits recovery for “additional damages” for copyright infringement, which are broadly of a non-pecuniary nature and comparable to aggravated or exemplary damages at common law. The glaring absence of such a provision in Pt IX could suggest that Parliament did not intend the reach of s 195AZA(1)(b) to be so long. The Federal Court has held that “where a statute creates a remedy by way of damages for breach of a proprietary right, then absent specific provision or necessary implication, it should not be read as

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56 See, eg Australian Copyright Council, “A case involving the moral right of integrity”. 29/02/2012: “on the basis of the Perez case, even a line or two added to the start of the song was held to be prejudicial” (http://www.copyright.org.au/news-and-policy/details/id/2047).

57 The French moral right of integrity confers on the author a right to “respect” for work, with no requirement of prejudice, where the author is the ultimate arbiter, and where a lack of respect can be demonstrated by a change to the work which the author finds unacceptable (see generally Lucas A, Kamina P and Plaisant R, International Copyright Law & Practice, s 7[1][i][i]-[ii]). The most extreme case example is probably Turner Entertainment Co v Huston (CA, Versailles, civ ch, 19 December 1994), in which the heirs of film director John Huston successfully restrained the screening of a colourised version of his black and white film The Asphalt Jungle.

58 See Loughlan, n 2 at 195.

extending that remedy to exemplary damages”. However, moral rights are clearly not proprietary rights, and non-pecuniary damages should by necessary implication be available under s 195AZA(1)(b). Otherwise, many of the injuries moral rights are designed to protect, including injury to authorial honour and to feelings, may not be compensable. Thus the very broad construction that Driver FM gives to s 195AZA(1)(b) in Perez is correct.

His Honour refused to award additional damages for copyright infringement, but said “compensation for moral rights infringements … covers the same field as would an award of additional damages” (at [80]) and can compensate “injured feelings, and vindication of the artist, by way of an award of aggravated damages” (at [104]), in addition to “damage to goodwill and reputation enjoyed by the author” (at [102]). Driver FM did seem to have learned from some of the earlier mistakes of Raphael FM in Meskenas, and kept his consideration of heads of damage under moral rights and copyright separate (Perez at [99]-[100]).

While Perez clarifies that compensation is available for injured feelings (at [91]), it remains unclear whether that compensation would be forthcoming for prejudice to honour only. The court’s reference to “compensation for injured feelings, and vindication of the artist” (at [104]) suggests that it would be, although there is still a question as to whether prejudice to honour would need to be objectively proven. Finally, Perez suggests that the prejudice threshold is relatively low, a point little discussed in previous case law on the moral right of integrity. In this case, the prejudicial effect was not “long-lasting” but it was sufficiently “serious” (at [107]).

CONCLUSIONS

In summary, the following conclusions can be drawn from Perez:

- the words “is prejudicial” mean a propensity towards prejudice, rather than prejudice in fact;
- it is unnecessary to establish actual proof of quantifiable loss;
- in certain circumstances, prejudice to honour or reputation may be presumed, in which case prejudice need not be objectively verified. It is not clear what the burden of proof is in cases where the facts do not so easily permit presumptions of prejudice to be made;
- the author’s subjective response to injury to reputation is relevant, and it is implied that the author’s subjective response to injury to honour is also relevant;
- it is not clear whether, in the absence of harm to reputation, injury to honour only is compensable, or compensable only with corroborative objective evidence;
- the remedies for breach of moral right include compensation for a very broad concept of loss, including aggravated damages, compensation for injured feelings and harm to goodwill; although it is not clear whether the injured feelings must be referrable to objectively established prejudice, either to reputation or to honour; and
- prejudice must be “serious” but need not be long-lasting.

As one of only a few moral rights cases in Australia, and the first considering the moral right of integrity, Perez is a welcome addition to the paucity of authority on Australia’s untested moral rights. Despite being a lower court decision, as a very rare moral rights victory, Perez will likely be scrutinised by stakeholders in other common law jurisdictions. It should be regarded with some care, however, due to its particular facts, and due to its failure to deliberate deeply on some of the more contentious issues relating to the moral right of integrity.

61 Although it would be desirable to amend s 195AZA(1)(b) to reflect and clarify its proper scope.
62 Here Driver FM referred to Laddie, Prescott and Vitoria, The Modern Law of Copyright and Designs (2011) [13,57], which considers that “where appropriate, an author or director may also claim compensation for injured feelings”.