

DEAD LOSS: DAMAGES FOR POSTHUMOUS BREACH OF THE MORAL RIGHT OF INTEGRITY

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This article considers whether damages may be awarded for the posthumous breach of an author's moral right of integrity, which endures for 70 years post-mortem and, in many common law countries, protects authors against certain conduct in respect of a work which is prejudicial to their honour or reputation. While remedies for infringement ostensibly include damages, this article interrogates whether death defeats the moral right by denying significant damages due to a number of obstacles, principally the apparent conundrum that the dead cannot suffer loss. Has Parliament legislated a puzzle by giving the dead rights that are practically ineffectual? The problem is significant because non-nominal damages mark and deter wrongs, justify the expense and risk of litigation, and support the role of posthumous moral rights and remedies in protecting the public's interest in cultural heritage. The article explains the impediments to posthumous damages awards and advocates reform to facilitate them and enhance the efficacy of post-mortem moral rights.

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I INTRODUCTION

[I]t is a somewhat strange form of compensation which is neither received by the person entitled to be compensated nor even awarded to him or her in his or her own right. Money can do little to ease the path of a departed soul.¹

This article explores the remedy, principally under Australian law, of damages for the posthumous breach of an author’s moral right of integrity. In Australia, the moral right of integrity is conferred by the *Copyright Act 1968* (Cth) and prohibits certain acts done in relation to an author’s copyright work or film which are ‘prejudicial to the author’s [or maker’s] honour or reputation’.²

The author’s moral right of integrity extends for 70 years after their death,³ thus usually enduring longer in death than in life. The author’s legal personal representative may exercise the author’s moral rights after the author’s death.⁴

¹ *Andrews v Freeborough* [1967] 1 QB 1, 26 (Winn LJ).

² *Copyright Act 1968* (Cth) ss 195AJ (literary, dramatic or musical work), 195AK (artistic work), 195AL (cinematographic film). Moral rights are also afforded to performers but are not discussed in this article. Similarly worded rights of integrity are found in many other common law countries such as Canada and the United Kingdom: see, eg, *Copyright Act*, RSC 1985, c C-42, s 28.2(1); *Copyright, Designs and Patents Act 1988* (UK) c 48, s 80.

³ *Copyright Act 1968* (Cth) ss 33, 195AM(2).

⁴ *Ibid* s 195AN(1).

Remedies for infringement include ‘damages for loss resulting from the infringement’.⁵ Yet, while a suite of remedies is available for breach of moral rights, including injunctions, declarations and apologies,⁶ this article focuses on damages. The critical issue explored in this article is whether substantial damages can be awarded for posthumous breach of the moral right of integrity.⁷ Declarations and apologies have little utility to the dead. Injunctions are useful in preventing a breach, and mandatory injunctions may restore damaged works. However, after harm has occurred, substantial damages may be required to justify the expense and risk of litigation, mark the wrong and signal the serious consequences of posthumous moral rights infringement. Without substantial damages awards, posthumous moral rights may effectively be hollow.

The author argues that the primary purpose of moral rights is generally accepted to be the protection of an author’s personality as expressed in his or her works.⁸ However, this is incoherent in the case of the dead. While an author’s personality may, after death, still be discernible in his or her works, the dead, being dead, have no personal interests which can be harmed, and they cannot suffer loss. The most sensible justification for a posthumous moral right of integrity is the protection of the public’s interest in its cultural heritage.⁹ Both posthumous rights and remedies complement this purpose. However, this objective may be frustrated by a number of obstacles to posthumous damages awards.

Most damages awards are compensatory. The Act permits ‘damages for loss’.¹⁰ This suggests that moral rights damages are also intended to be compensatory, prompting the confounding question of whether the dead can

⁵ Ibid s 195AZA(1)(b).

⁶ Ibid s 195AZA(1).

⁷ This article proceeds on the assumption that there has been a posthumous breach of the right of integrity. For a discussion of the potential difficulties in establishing a post-mortem cause of action for breach of the integrity right see Jani McCutcheon, ‘The Honour of the Dead—The Moral Right of Integrity Post-Mortem’ (2014) 42 *Federal Law Review* 485. In Australia, this also means that the infringement was unreasonable: ibid ss 195AR–195AS, 195AXD–195AXE.

⁸ See below Part III.

⁹ Ibid.

¹⁰ *Copyright Act 1968* (Cth) s 195AZA(1)(b).

suffer a 'loss'.¹¹ How can the deceased be harmed without experiencing that harm? Can the deceased even 'exist' as a subject of harm? Even under the most liberal interpretation of 'loss', the dead cannot be compensated, because they are dead. They do not exist as a subject, they no longer have protectable interests, and they can neither experience prejudice to their reputation or honour or other consequential loss, nor be 'made whole' by an award of damages. Likewise, aggravated damages are misaligned with posthumous damages, because the dead cannot be aggravated. This article examines whether analogies can be made with torts that are actionable per se, which sometimes generate non-nominal damages in the absence of obvious loss. It also contemplates cases where damages for lost amenities have been awarded on an objective basis to unconscious plaintiffs, despite them not experiencing harm. And it examines cases where third parties have been awarded damages, notwithstanding that they have not personally suffered loss. These analogies are ultimately fragile, due primarily to the significant differentiating factor of the author's death. The result is that compensatory damages are incongruous in a posthumous moral rights scheme. If the dead cannot suffer loss, has Parliament legislated a puzzle by giving them rights that are, practically, ineffectual? Does death fetter the efficacy of posthumous moral rights by denying significant damages due to the apparent conundrum that the dead cannot suffer loss?

A further impediment to posthumous compensatory damages is the difficulty of establishing a causal link to the loss under the current statutory structure. Loss must '[result] from the infringement'.¹² Infringement occurs when a work is subjected to derogatory treatment,¹³ which requires conduct that is '*prejudicial to the author's honour or reputation*'.¹⁴ While it isn't necessary to demonstrate actual prejudice to reputation or honour to establish a cause of action,¹⁵ it may be necessary to receive damages. While an objective conception of reputation could permit actual prejudice to the reputation of

¹¹ As Roeder notes, 'it seems sounder to reason that, the creator being dead, he cannot be damaged by any injury to his honor or reputation': Martin A Roeder, 'The Doctrine of Moral Right: A Study in the Law of Artists, Authors and Creators' (1940) 53 *Harvard Law Review* 554, 575.

¹² *Copyright Act 1968* (Cth) s 195AZA(1)(b).

¹³ *Ibid* s 195AQ(2).

¹⁴ *Ibid* ss 195AJ–195AL (emphasis added).

¹⁵ McCutcheon, 'Honour of the Dead', above n 7, 490.

the dead, the dead cannot be *harmed* by an injury to them; thus, there cannot be a loss. Because honour is subjective, posthumous prejudice to honour is impossible.

If compensatory damages appear impossible, this leaves non-compensatory damages as a possible basis for posthumous awards. These also face impediments, but less serious than those posed by compensatory damages. Restitutionary damages would be limited to rare instances when the wrongdoer benefits from a breach of the integrity right. Exemplary damages complement posthumous moral rights because they punish the living rather than compensating the dead, function as a deterrent against wrongs and protect the public interest in preserving cultural heritage. However, exemplary damages generally require the defendant to show contumelious disregard for the plaintiff's rights, a high standard of wrongdoing which will still leave many moral rights breaches uncondemned.¹⁶

The existing posthumous moral rights scheme thus militates against the primary objective of posthumous moral rights, which this article suggests is the protection of the public interest in private works. There *is* a loss when the works of authors are harmed after their death, but it is suffered by society, not the author. After the author's death, the focus must be on the work, not the author's interests. This article therefore advocates statutory reform that severs the link between the author's honour and reputation and the loss, and relaxes the exemplary damages standard of contumelious disregard in order to expand posthumous damages awards beyond exceptionally serious cases.

This article is structured as follows. Part II briefly outlines the relevant statutory provisions. Part III explores the background to the introduction of moral rights in Australia, and the purpose of posthumous moral rights. Part IV discusses the possibility of compensatory damages for infringement of the deceased author's moral right of integrity. Part V explores the posthumous implications of the causative requirement of conduct which is 'prejudicial to honour or reputation'. Part VI considers the possibility of non-compensatory damages as a posthumous award for infringement of the deceased author's right of integrity. Part VII suggests reforms which may enhance the possibility of substantial, non-nominal posthumous damages awards. Part VIII summarises the main points of discussion and conclusions.

¹⁶ See *Gray v Motor Accident Commission* (1998) 196 CLR 1, 7 [14] (Gleeson CJ, McHugh, Gummow and Hayne JJ) ('*Gray*').

II RELEVANT STATUTORY PROVISIONS

A *The Moral Right of Integrity and Its Post-Mortem Reach*

The author of a copyright work has ‘a right of integrity of authorship in respect of the work’,¹⁷ which is ‘the right not to have the work subjected to derogatory treatment.’¹⁸ Derogatory treatment means ‘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’,¹⁹ or ‘the doing of anything else in relation to the work that is *prejudicial to the author’s honour or reputation*’.²⁰ It is not an infringement of the integrity right if the defendant establishes the derogatory treatment was reasonable in all the circumstances.²¹

The moral right of integrity endures until copyright ceases to subsist in the work,²² which is 70 years after the death of the author in the case of published works,²³ and 70 years after the first act of publication in the case of works unpublished at the author’s death.²⁴ Moral rights cannot be transmitted by will.²⁵ After the author’s death, ‘the author’s moral rights ... may be exercised and enforced by his or her legal personal representative’,²⁶ who is likely to be the author’s executor.²⁷

¹⁷ *Copyright Act 1968* (Cth) s 195AI(1).

¹⁸ *Ibid* s 195AI(2).

¹⁹ *Ibid* s 195AJ(a).

²⁰ *Ibid* s 195AJ(b) (emphasis added).

²¹ *Ibid* ss 195AR–195AS, 195AXD–195AXE. It is also a defence under ss 195AW–195AWB if the author consented to the infringement, but in the context of this article, this would be limited to rare instances where the author, while living, consented to posthumous infringements.

²² *Ibid* ss 195AM(2)–(3). The exception is the case of films and performances, where the integrity right expires with the author/performer’s death: at ss 195AM(1) (films), 195ANA(3) (performances).

²³ *Ibid* s 33(2).

²⁴ *Ibid* s 33(3).

²⁵ *Ibid* s 195AN(3).

²⁶ *Ibid* s 195AN(1).

²⁷ For a discussion of the identity and role of the legal personal representative, which is beyond the scope of this article see Jani McCutcheon, ‘Death Rights: Legal Personal Representatives of Deceased Authors and the Posthumous Exercise of Moral Rights’ [2015] *Intellectual Property Quarterly* 242.

B Remedies Include Damages

The relief that a court may grant for infringement of a moral right includes ‘damages for loss resulting from the infringement’.²⁸ In exercising its discretion as to the appropriate relief to be granted, the court may take into account a number of considerations.²⁹ Some are irrelevant to the integrity right,³⁰ or may prove problematic in a posthumous context.³¹

Any damages recovered by the author’s legal personal representative ‘devolve as if they formed part of the author’s estate and as if the right of action in respect of the doing of the act had subsisted, and had been vested in the author, immediately before his or her death.’³²

III THE PURPOSE OF POSTHUMOUS MORAL RIGHTS

A Background

Remedies should accord with the purpose of the right, since the remedial response to a wrong ‘has to be completed in every case from the policies and

²⁸ *Copyright Act 1968* (Cth) s 196AZA(1)(b). The Act also provides for other relief that may be granted: at s 195AZA(1)(a) (an injunction), s 195AZA(1)(c) (a declaration that the moral right of the author has been infringed), s 195AZA(1)(d) (an order that the defendant make a public apology for the infringement), s 195AZA(1)(e) (an order that the false attribution of authorship, or derogatory treatment, of the work be removed or reversed).

²⁹ *Ibid*. The relevant factors include: at s 195AZA(2)(a) (‘whether the defendant was aware, or ought reasonably to have been aware, of the author’s moral rights’), s 195AZA(2)(c) (‘the number, and categories, of people who have seen or heard the work’), s 195AZA(2)(d) (‘anything done by the defendant to mitigate the effects of the infringement’), s 195AZA(2)(e) (‘if the moral right that was infringed was a right of attribution of authorship — any cost or difficulty that would have been associated with identifying the author’), s 195AZA(2)(f) (‘any cost or difficulty in removing or reversing any false attribution of authorship, or derogatory treatment, of the work’).

³⁰ See *ibid* s 195AZA(2)(e), which states that ‘if the moral right that was infringed was a right of attribution of authorship — any cost or difficulty that would have been associated with identifying the author’.

³¹ *Ibid* s 195AZA(2)(b) considers ‘the effect on the author’s honour or reputation resulting from any damage to the work’, which could clearly be problematic in a post-mortem context unless an objective concept of honour or reputation can be employed. See below Part V, where this is discussed further.

³² *Ibid* s 195AZA(6).

values underlying the recognition of the primary duty'.³³ But what is the purpose of *posthumous* moral rights? Is it the same as the purpose of *inter vivos* moral rights? Do posthumous damages complement that purpose? The deliberate conferral of posthumous rights suggests that Parliament intended *some* interest to be protected beyond the author's death, but *whose* interests do posthumous moral rights protect, and what is the nature of those interests?

The purpose of Australian moral rights escaped detailed or robust analysis in the various stages leading up to their introduction in 2000. Moral rights originated in 19th century France³⁴ and were first included in the *Berne Convention for the Protection of Artistic and Literary Works* ('*Berne Convention*')³⁵ at the 1928 Rome Conference.³⁶ The addition of moral rights was requested by several civil law countries,³⁷ and was originally met with some resistance by their common law counterparts, who considered moral rights unfamiliar, if not positively alien.³⁸ Australia was not fully compliant with its obligations under the *Berne Convention* until it enacted the current suite of moral rights in 2000.³⁹ Following the Rome Conference, Australia's existing legal framework was considered sufficient to meet the *Berne Convention* commitments,⁴⁰ and this was echoed in the 1959 Copyright Law Review Committee's Report ('Spicer Report').⁴¹ Gradually, Australia's compliance with

³³ Peter Birks, 'The Concept of a Civil Wrong' in David G Owen (ed), *Philosophical Foundations of Tort Law* (Clarendon Press, 1995) 31, 51, quoted in Jason N E Varuhas, 'The Concept of "Vindication" in the Law of Torts: Rights, Interests and Damages' (2014) 34 *Oxford Journal of Legal Studies* 253, 276.

³⁴ For an overview of European moral rights and their rationale see Roeder, above n 11.

³⁵ *Berne Convention for the Protection of Artistic and Literary Works*, opened for signature 14 July 1967, 828 UNTS 222 (entered into force 29 January 1970).

³⁶ Cate Banks, 'Lost in Translation: A History of Moral Rights in Australian Law 1928–2000 (Part 1)' (2007) 11 *Legal History* 197, 205.

³⁷ See Sam Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886–1986* (Kluwer, 1987) 459–61 [8.96]–[8.97].

³⁸ *Ibid* 461–2 [8.98]. For a discussion of the discomfort the introduction of moral rights to the *Berne Convention* engendered in common law countries see Banks, above n 36, 201–2.

³⁹ See *Copyright Amendment (Moral Rights) Act 2000* (Cth).

⁴⁰ Banks, above n 36, 204–5.

⁴¹ Copyright Law Review Committee, *Report of the Committee Appointed by the Attorney-General of the Commonwealth to Consider What Alterations Are Desirable in the Copyright Law of the Commonwealth*, Parl Paper No 235 (1959) 90 [489]–[490].

the *Berne Convention* was questioned,⁴² and pressure to introduce moral rights grew.⁴³ Australia ultimately came late and somewhat reluctantly to the relatively exotic and highly contested moral rights.⁴⁴ One of the reasons for the narrow recommendation against the introduction of moral rights by the Copyright Law Review Committee in 1988 was that there was no identifiable theoretical basis for moral rights in a common law legal system.⁴⁵

It is difficult to identify a clearly expressed purpose underlying Australia's moral rights, particularly because their introduction was deeply contentious, and the nature and rationale of moral rights was not well understood. At minimum, the purpose was to comply with Australia's obligations under the *Berne Convention*.⁴⁶ However, the purpose of moral rights can be identified by the nature of the rights themselves, the harms they guard against and the interests they serve. Three major purposes can be identified: the protection of personality interests; the protection of economic interests; and the protection of social interests. Each will be discussed in turn.

B *Protection of Personality Interests*

Moral rights are consistently classified as personal rights,⁴⁷ which are generally inalienable.⁴⁸ This theory regards copyright works as an extension, and

⁴² Sam Ricketson, 'Is Australia in Breach of Its International Obligations with Respect to the Protection of Moral Rights?' (1990) 17 *Melbourne University Law Review* 462.

⁴³ This pressure was attributable to work on moral rights carried out by the Australia Council and the Australian Copyright Council: Symposium, 'National Symposium on Moral Rights, 29–30 November 1979, Sydney Opera House' (1979) *Australian Copyright Council* 1; Sylvia Martin and Paul Bick, *Moral Rights for Artists: A Report Prepared for the Australian Council* (1983) ('Bick Report'); Peter Banki, Susan Bridge and Catriona Hughes, 'Moral Rights' (Bulletin No 50, Australian Copyright Council, 1984); Copyright Law Review Committee, 'Protection of Moral Rights of Authors and Artists' (Discussion Paper, 1984). See generally Banks, above n 36, 211–17.

⁴⁴ See Ricketson, 'Is Australia in Breach of Its International Obligations,' above n 42.

⁴⁵ Copyright Law Review Committee, *Report on Moral Rights* (1988) 10 [11].

⁴⁶ Commonwealth, *Parliamentary Debates*, House of Representatives, 31 October 2000, 21 715 (Daryl Williams, Attorney-General); Explanatory Memorandum, Copyright Amendment (Moral Rights) Bill 1999 (Cth) 1, 11 [41].

⁴⁷ See, eg, Australian Law Reform Commission, *Copyright and the Digital Economy*, Report No 122 (2013) 43 [2.13] ('[t]hese are personal rights centred around the author or creator of material and are independent of the author's economic rights'); Copyright Law Review Committee, *Report of the Committee Appointed by the Attorney-General*, above n 41, 3 [5] ('[t]hese sorts of rights are generally designated "moral rights" or rights of personality to

representative of, their author's personality, even when the copyright in that work has been assigned to a third party.⁴⁹ The purpose of moral rights is primarily to protect that personality interest by controlling certain acts done in relation to works which invade that interest. The integrity right provides

distinguish them from the economic rights'); Roeder, above n 11, 554 ('[t]he doctrine ... purports to protect the personal rights of creators, as distinguished from their merely economic rights'), 564 ('[m]oral rights are personal rights; they are not based on any theory of property'); Explanatory Memorandum, Copyright Amendment (Moral Rights) Bill 1999 (Cth) 1 ('[m]oral rights differ from the bundle of rights that constitute copyright in a work in that they are personal and not economic rights'); Roberta Rosenthal Kwall, "Author-Stories": Narrative's Implications for Moral Rights and Copyright's Joint Authorship Doctrine' (2001) 75 *Southern California Law Review* 1, 15 (creative works reflect authors' individual personalities), 24 ('moral rights laws are concerned primarily with safeguarding an artist's dignity as an individual and as an author'); Cyril P Rigamonti, 'Deconstructing Moral Rights' (2006) 47 *Harvard International Law Journal* 353, 355 ('[t]he orthodox theory of moral rights is that authors of copyrightable works have inalienable rights in their works that protect their moral or personal interests'); Henry Hansmann and Marina Santilli, 'Authors' and Artists' Moral Rights: A Comparative Legal and Economic Analysis' (1997) 26 *Journal of Legal Studies* 95, 102-4; Adolf Dietz, 'Legal Principles of Moral Rights in Civil Law Countries' (1993) 11(3) *Copyright Reporter* 1, 4 [12].

⁴⁸ *Copyright Act 1968* (Cth) s 195AN(3).

⁴⁹ See, eg, Copyright Law Review Committee, *Report of the Committee Appointed by the Attorney-General*, above n 41, 4 [8] ('moral rights have their origin in the concept that a created work is seen as an extension of the creator's personality. Accordingly, both the work and the creator's relationship to the work must be respected and recognised'); *Perez v Fernandez* (2012) 260 FLR 1, 15 [81] (Driver FM) ('Perez') ('[moral rights] give protection to the investment of the author's personality in his or her creation'), 18 [100] ('[m]oral rights attach to the personality of the author'); Roeder, above n 11, 557 ('[w]hen an artist creates ... he projects into the world part of his personality'), 566 ('[t]he moral right protects the creator's personality'), 572 ('[t]he creative work of an artist or writer is not a mere manufactured product; it is a projection of the personality of the creator'); André Françon and Jane C Ginsberg, 'Authors' Rights in France: The Moral Right of the Creator of a Commissioned Work to Compel the Commissioning Party to Complete the Work' (1985) 9 *Columbia Journal of Art and the Law* 381, 381 ('[m]oral rights safeguard the author's "personality" interest in his work'); John Henry Merryman, 'The Refrigerator of Bernard Buffet' (1976) 27 *Hastings Law Journal* 1023, 1027 ('[d]istortion, dismemberment or misrepresentation of the work mistreats an expression of the artist's personality, [and] affects his artistic identity, personality, and honor'); Ralph E Lerner and Judith Bresler, *Art Law: The Guide for Collectors, Investors, Dealers, and Artists* (Practising Law Institute, 2nd ed, 1998) 943, quoted in Cambra E Stern, 'A Matter of Life or Death: The *Visual Artists Rights Act* and the Problem of Postmortem Moral Rights' (2004) 51 *UCLA Law Review* 849, 853 (moral rights historically derive from the 'belief that an artist, in the process of creation, injects some of his or her spirit into the art and that, consequently, the artist's personality, as well as the integrity of the work, should be protected and preserved').

the author with some means of ensuring that their intended creative message remains uncorrupted.

While there is logic in protecting the personal interests of living authors, ascribing a personality interest to the dead is less coherent. While the dead clearly have moral *rights*, can the dead have interests? If not, it seems anomalous to grant posthumous rights without interests to protect. Philosophers are noisy on this point, as discussed further below. Our intuitive response is that a person who no longer exists cannot possibly have interests, which correspondingly cannot be harmed. Feinberg accepts ‘the orthodox jurisprudential’ account of harm as ‘invaded interest’,⁵⁰ and argues that ‘it is only in virtue of having interests that people can be harmed, and ... the only way to harm any person is to invade his interests.’⁵¹ Indeed, Feinberg argues that ‘what is incapable of having interests is incapable of having rights.’⁵² This would apparently preclude moral rights for the dead *but for* Parliament’s deliberate conferral of those rights. Somewhat presciently, Feinberg goes on to state that ‘[i]f, nevertheless, we grant dead men rights against us, we would seem to be treating the interests they had while alive as somehow surviving their deaths.’⁵³ Feinberg recognises that ‘[t]here is the sound of paradox in this way of talking’, and that ‘the idea of an interest’s surviving its possessor’s death is a kind of fiction.’⁵⁴ Thus, it must be with posthumous moral rights. We must *imagine, fictionalise*, the survival of the interest. It is a conceit, but given that the interests of the dead can no longer be protected after their death, what is the purpose of the conceit?

C Protection of Economic Interests

Moral rights also clearly protect economic interests.⁵⁵ Derogatory treatment of a work resulting in the alteration of a song, a botched ‘restoration’ of an artwork, or an editorial butchering of a novel may lead to reduced or lost sales

⁵⁰ Joel Feinberg, ‘Harm and Self-Interest’ in P M S Hacker and J Raz (eds), *Law, Morality and Society: Essays in Honour of H L A Hart* (Clarendon Press, 1977) 285, 285.

⁵¹ *Ibid* 302.

⁵² Joel Feinberg, ‘The Rights of Animals and Unborn Generations’ in William T Blackstone (ed), *Philosophy and Environmental Crisis* (University of Georgia Press, 1974) 43, 57.

⁵³ *Ibid*.

⁵⁴ *Ibid*.

⁵⁵ See generally Hansmann and Santilli, above n 47.

of the author's works, or reduced exhibition or performance, or other commercial exploitation, of the author's work.⁵⁶ However, again, the dead, being dead, have no interests, including economic interests. If the author's beneficiaries own the *copyright* in the work, they may be able to take action against the alleged moral rights infringer for damage to the value of the copyright⁵⁷ caused by the derogatory treatment, if the infringer invades an exclusive economic right.⁵⁸ In this case, the author's moral rights may not need to be utilised to protect interests which copyright already protects, and in any event, the court would need to prevent double recovery.⁵⁹

D Protection of Societal Interests

The protection of broader public interests has not always been identified as a moral rights rationale.⁶⁰ However, when introducing Australia's moral rights, the Attorney-General recognised 'the importance to Australian culture' of works and 'of those who create them'.⁶¹ This suggests that a broader objective of moral rights is to foster respect both for creators, and for the works themselves,⁶² in order to protect Australian culture. We all benefit from the creative expression of authors. Without a right of integrity prohibiting the distortion of that creative expression, less of it may be created, and more of it

⁵⁶ In life, foreseeable pecuniary losses could also include reduced commissions, but any further commissions are clearly factually impossible after death.

⁵⁷ *International Writing Institute Inc v Rimila Pty Ltd* (1994) 30 IPR 250; *Polygram Records Inc v Raben Footwear Pty Ltd* (1996) 35 IPR 426.

⁵⁸ This will not always be the case when the moral right of integrity is infringed, since it does not depend on a reproduction, communication to the public, publication, or the like having occurred.

⁵⁹ This is because any damages recovered by the author's legal personal representative for moral rights infringement devolve to the estate (and thus to the beneficiaries): *Copyright Act 1968* (Cth) s 195AZA(6).

⁶⁰ See, eg, the majority report of the Copyright Law Review Committee, *Report of the Committee Appointed by the Attorney-General*, above n 41, 16 [25]: 'The legislation contemplated here is for the benefit of a very small section of the community'.

⁶¹ Commonwealth, *Parliamentary Debates*, House of Representatives, 8 December 1999, 13 026 (Daryl Williams, Attorney-General).

⁶² See Edward J Damich, 'The *Visual Artists Rights Act* of 1990: Toward a Federal System of Moral Rights Protection for Visual Art' (1990) 39 *Catholic University Law Review* 945, 950: 'Protecting irreplaceable works from irreversible physical changes presents the most compelling case for moral rights protection.'

may be corrupted. Thus, the protection of *society's* interest in its cultural heritage is an important objective of moral rights,⁶³ if not the most important objective.⁶⁴ Some moral rights statutes expressly acknowledge this goal.⁶⁵

The material modification caused by an altered song, a mutilated art work, or a corrupted novel not only result in material loss in the sense of a transformed work, but loss to the cohesion and integrity of the work and 'loss' of the original authorial message. The knowledge that was disseminated by the author has become corrupted. This may clearly trouble the author while living, but after the author's death it correspondingly constitutes a social loss. The moral right of integrity 'promotes the public's interest in knowing the original source of a work and understanding it in the context of the author's original meaning and message.'⁶⁶ In the words of John Merryman:

there is more at stake than the concern of the artist ... There is also the interest of others in seeing, or preserving the opportunity to see, the work as the artist intended it, undistorted ... We yearn for the authentic, for contact with the work in its true version ...⁶⁷

Similarly, Hansmann and Santilli point out:

works of art often become important elements in a community's culture: other works of art are created in response to them, and they become common reference points ... The loss or alteration of such works would therefore be costly to

⁶³ See, eg, Roeder, above n 11, 575; David Vaver, 'Authors' Moral Rights and the Copyright Law Review Committee's Report: W[h]ither Such Rights Now?' (1988) 14 *Monash University Law Review* 284, 287–9; Sheldon W Halpern, 'Of Moral Right and Moral Righteousness' (1997) 1 *Marquette Intellectual Property Law Review* 65, 81.

⁶⁴ For example, during the *Berne Convention* negotiations, the Polish delegation claimed at the 1948 Brussels Conference that 'the necessity for the protection of the moral rights is not motivated only by the interests of the authors, but first and foremost by the interests of the community': Elizabeth Adeney, *The Moral Rights of Authors and Performers: An International and Comparative Analysis* (Oxford University Press, 2006) 142 [7.35].

⁶⁵ See the United States statutes discussed in Brian Angelo Lee, 'Making Sense of "Moral Rights" in Intellectual Property' (2011) 84 *Temple Law Review* 71, 98–9 nn 119–25. For example, the *California Art Preservation Act* Cal Civ Code § 987(a) (1988) explicitly recognizes 'a public interest in preserving the integrity of cultural and artistic creations'. The same can be said for the *Massachusetts Art Preservation Act*, Mass Gen Laws ch 231 § 85S(a) (1985).

⁶⁶ Roberta Rosenthal Kwall, *The Soul Of Creativity: Forging A Moral Rights Law for the United States* (Stanford University Press, 2010) 57.

⁶⁷ Merryman, above n 49, 1041.

the community at large, depriving that community ... of a widely used part of its previously shared vocabulary.⁶⁸

It is the protection of society's interests in authors' works that makes sense of posthumous moral rights. Laws granting rights to the dead cannot protect the interests of the dead for the benefit of the dead, but they can control the conduct of the living for the benefit of the living. The moral right of integrity has a dual character. During the author's lifetime, the right protects the creator's personal interest in the work, while incidentally benefitting society through safeguarding that work.⁶⁹ With the demise of the author, the purpose of cultural preservation becomes more important.⁷⁰ The proceedings of the *Berne Convention* conferences clearly reflect the important role played by posthumous moral rights in protecting 'not only the historic personality of the author but also his work as a cultural monument.'⁷¹

This is sensible and necessary. Works may be harmed in the post-mortem decades, and indeed may be more vulnerable in that period due to the death of the person most interested in them. Works also become significantly more valuable, due to the impossibility of the deceased producing any further works. If substantial damages for post-mortem harm were unavailable, a cornerstone of moral rights protection may be defeated. But the essential question remains: are posthumous damages available? Parts IV, V and VI explore this issue.

IV QUESTIONS CONCERNING POSTHUMOUS LOSS

Remedies for moral rights infringement include 'damages for *loss* resulting from the infringement'.⁷² Since there is no express restriction on posthumous damages, they are ostensibly available. However, numerous questions are

⁶⁸ Hansmann and Santilli, above n 47, 106.

⁶⁹ See Roeder, above n 11, 575: 'The basis of the moral right, however, is not pecuniary but is of a dual nature, protecting both the creator and the integrity of the culture'; *Sehgal v Union of India* [2005] FSR 39, 844 [56] (High Court of New Delhi).

⁷⁰ Roeder, above n 11, 575: 'The real reason ... for protection of the moral right after the creator's death lies in the need of society for protection of the integrity of its cultural heritage'.

⁷¹ World Intellectual Property Organisation, *Records of the Intellectual Property Conference of Stockholm: June 11 to July 14, 1967* (1971) vol 2, 893 [1161.1] (Mr Ioannou).

⁷² *Copyright Act 1968* (Cth) s 195AZA(1)(b) (emphasis added).

raised by the reference to ‘loss’ in the statutory language. This Part explores those questions and their heightened significance in a posthumous context. What is meant by ‘loss’? What kind of loss can be caused by the posthumous breach of the integrity right? Does the meaning of ‘loss’ change after the death of the author? Does the reference to ‘loss’ exclude non-compensatory damages? Perhaps the most important question is whether loss must be subjectively experienced, or is an objective loss sufficient? If loss must be experienced, must the *rights holder* experience it, or is it enough if another party suffers? What is the relevance to moral rights of damages awards made in tort and contract in the absence of loss, or the absence of unexperienced loss? *Who* is the relevant rights holder when the integrity right is infringed posthumously — the author or the author’s legal personal representative? Does it matter that the rights holder cannot benefit from the damages, and that a third party receives them? The following discussion will explore and try to resolve some of these questions.

A *The Meaning of ‘Loss’*

Dictionary definitions suggest loss is a ‘detriment or disadvantage from failure to keep, have, or get’.⁷³ Part III above identified possible forms of loss resulting from posthumous moral rights infringement, including the paradigmatic pecuniary loss and the more abstract loss resulting from corrupted works. Damages may also compensate for injury to goodwill and reputation,⁷⁴ but whether the reputation of the deceased can be injured is explored below in Part V.⁷⁵

It has been said that ‘the idea of “loss” is pretty indeterminate’⁷⁶ and ‘contains large normative and evaluative elements as well as factual ones.’⁷⁷ The difficulty and undesirability of searching for a bright line definition of ‘loss’

⁷³ Colin Yallop et al (eds), *Macquarie Dictionary* (4th ed, 2005) 846. A similar definition was adopted by Cooper J in *Demagogue Pty Ltd v Ramensky* (1992) 39 FCR 31, 47.

⁷⁴ *Perez* (2012) 260 FLR 1, 18 [102] (Driver FM).

⁷⁵ Damages may also clearly assuage the plaintiff’s injured feelings: see *ibid* 18–19 [104], 19 [106]. But posthumously, the dead can have no injured feelings, and the injured feelings of the legal personal representative would appear to be irrelevant.

⁷⁶ Andrew Tettenborn, ‘What Is a Loss?’ in Jason W Neyers, Erika Chamberlain and Stephen G A Pitel (eds), *Emerging Issues in Tort Law* (Hart Publishing, 2007) 441, 454.

⁷⁷ *Ibid* 456.

permits a liberal interpretation of it, even suggesting that its meaning could shift depending on whether the infringement occurs before or after the author's death. However, whether that interpretive flexibility is sufficiently elastic to extend to compensating the dead is highly contentious, as the following discussion demonstrates.

B Does 'Loss' Mandate Compensatory Damages?

How we interpret 'loss' is important, because it may colour what form of damages are available. If 'damages for loss' mandates *compensatory* damages, this may exclude exemplary damages; an issue taken up in Part VI.

No Australian court has clarified the rationale of moral rights damages or the meaning of 'loss'. In Australia's first moral rights case, *Meskenas v ACP Publishing Pty Ltd*, Raphael FM stated (without explanation) that the purpose of moral rights remedies is restitutionary,⁷⁸ and erroneously conflated moral rights and copyright damages. This was corrected in *Perez v Fernandez* ('*Perez*'),⁷⁹ Australia's only decision on the integrity right. In *Perez*, Driver FM referred to damages as 'compensation',⁸⁰ and injury being 'compensated'⁸¹ and 'compensable'.⁸² His Honour held that aggravated damages may be awarded for moral rights infringements,⁸³ which are considered to be compensatory.⁸⁴ However, his Honour also claimed that moral rights damages 'cover the same field' as additional damages in copyright, which include non-compensatory damages.⁸⁵

The reference to 'damages for *loss*' could suggest that damages are compensatory, designed to redress some harm that has been suffered. If loss is

⁷⁸ (2006) 70 IPR 172 187 [34] ('*Meskenas*'). *Meskenas* concerned the right of false attribution and the right not to be falsely attributed. The possibility and relevance of restitutionary damages for moral rights infringement is briefly discussed below in Part VI.

⁷⁹ (2012) 260 FLR 1, 18 [100] (Driver FM): 'the basis for compensation is not the same.'

⁸⁰ *Ibid* 14 [80].

⁸¹ *Ibid* 16 [91].

⁸² *Ibid* 18 [102].

⁸³ *Ibid* 18–19 [104].

⁸⁴ Robert Stevens, *Torts and Rights* (Oxford University Press, 2007) 85. See also *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118, 149 ('*Uren*'), where Windeyer J stipulated that 'aggravated damages are given to compensate the plaintiff when the harm done to him by a wrongful act was aggravated by the manner in which the act was done'.

⁸⁵ (2012) 260 FLR 1, 14 [80] (Driver FM). For further discussion, see below Part VI.

detriment, it implies that a net loss must be identified by comparing the plaintiff's position before and after the violation of the right.⁸⁶ This reflects the general common law principle that damages aim to compensate the plaintiff by placing him or her, as nearly as possible, in the position in which he or she would have been but for the wrong.⁸⁷

If damages for moral rights infringement *are* compensatory, then posthumous infringements raise difficult issues. The first question is *whose* position must be compared before and after infringement? *Who* is compensated for posthumous infringements? Ordinarily the rights holder would be the relevant 'victim' seeking compensation, but in this case the victim is dead. After the author's death, as mentioned, the statute empowers the legal personal representative to exercise the *author's* rights and seek remedies. The legal personal representative does not therefore hold the author's moral right of integrity, but rather the separate right to exercise that right and to seek a remedy. The legal personal representative is essentially custodian of the author's moral rights. Therefore, while the *claimant* is the deceased author's legal personal representative, the relevant right that is infringed is the *author's* moral right. But how do we compensate the dead? As Posner and Sunstein bluntly recognise, '[t]he dead person cannot be compensated — she is dead.'⁸⁸ Even in life, compensatory damages can never literally restore the victim to his or her pre-loss position, since it would require undoing the injury, difficult even with purely monetary losses. But there is a deeper problem with a posthumous award of damages — a dead person can never be restored to a former position. There simply is no victim to be restored.

C *Must Loss Be Experienced?*

There is another, perhaps insoluble, difficulty with posthumous compensatory damages. If all conceptions of loss require the subjective *suffering* of that loss, then even the most pliant idea of loss cannot facilitate posthumous damages. After death, 'loss' cannot be *experienced* by the (deceased) author. This raises important questions: to what extent can losses which are not experienced be

⁸⁶ Stevens, above n 84, 59: 'Although loss is not limited to financial loss, in principle it requires proof that the claimant was factually worse off as a result of the infringement of the right'.

⁸⁷ *Robinson v Harman* (1848) 1 Ex 850, 855; 154 ER 363, 365 (Parke B).

⁸⁸ Eric A Posner and Cass R Sunstein, 'Dollars and Death' (2005) 72 *University of Chicago Law Review* 537, 558.

compensated? Can something be a loss if it has no impact on the rights holder?

The question of whether the dead can be harmed or suffer loss has received much philosophical attention.⁸⁹ Like all intriguing philosophical or ethical questions, opinions are divided and the arguments involve dense metaphysical debate beyond the scope of this article. Some commentators argue for various reasons that the dead can suffer harm.⁹⁰ Often, to avoid the unassailable reality that the dead are dead, these arguments claim that there are different *constructions* of the person — ‘extended notion[s] of self’⁹¹ — which can be harmed by post-mortem events. The law, of course, needs to work with less theoretical — or constructed — conceptions of personhood.

The argument that the dead cannot suffer harm is usually supported by two reasons — first, those who cannot experience loss cannot suffer it, and second, because the dead no longer exist, there is no longer any subject to be harmed.⁹² Both arguments seem perfectly applicable to dead authors. Has Parliament then legislated an ineffectual right, the breach of which cannot be compensated by damages?

It is tempting to look to other areas of the law where damages have been awarded in the apparent absence of either objective loss, or experienced loss, for assistance in solving this mystery.

1 *Vindictory Torts*

‘Vindictory torts’, or dignitary torts, such as assault, battery, defamation and false imprisonment, are aimed at vindicating important interests.⁹³ Signifi-

⁸⁹ See, eg, Feinberg, above n 50; Ernest Partridge, ‘Posthumous Interests and Posthumous Respect’ (1981) 91 *Ethics* 243; George Pitcher, ‘The Misfortunes of the Dead’ (1984) 21 *American Philosophical Quarterly* 183; Barbara Baum Levenbook, ‘Harming Someone after His Death’ (1984) 94 *Ethics* 407; Don Marquis, ‘Harming the Dead’ (1985) 96 *Ethics* 159; Joan C Callahan, ‘On Harming the Dead’ (1987) 97 *Ethics* 341; Floris Tomasini, ‘Is Post-Mortem Harm Possible? Understanding Death Harm and Grief’ (2009) 23 *Bioethics* 441; David Papineau, ‘Can We Be Harmed After We Are Dead?’ (2012) 18 *Journal of Evaluation in Clinical Practice* 1091; Christopher Belshaw, ‘Harm, Change, and Time’ (2012) 37 *Journal of Medicine and Philosophy* 425.

⁹⁰ Feinberg, above n 50; Levenbook, above n 89; Papineau, above n 89.

⁹¹ Belshaw, above n 89, 431.

⁹² See Callahan, above n 89, 347; Partridge, above n 89.

⁹³ Normann Witzleb and Robyn Carroll, ‘The Role of Vindication in Torts Damages’ (2009) 17 *Tort Law Review* 16; see especially at 16 n 3 citing Andrew Tettenborn (ed), *The Law of Damages* (LexisNexis, 2003) [1.44]; Varuhas, ‘The Concept of “Vindication”’, above n 33.

cantly, these torts are actionable per se (“TAPS”), and substantial, non-nominal damages can be awarded based on the injury to the interest in and of itself, irrespective of whether the plaintiff is physically, financially or psychologically harmed.⁹⁴ Since these torts may result in substantial damages in the absence of factual harm, they would seem, at first glance, to be a natural fit for protecting the moral rights of the dead.

TAPS tend to protect *exceptionally* important interests in dignity, liberty, autonomy and physical integrity.⁹⁵ The moral right of integrity protects an author’s interests in creative integrity and autonomy, and authorial dignity.⁹⁶ The interests are at least strongly analogous to those protected by TAPS. *Perez* suggests that, like TAPS, moral rights infringement is actionable per se ‘without proof of damage’,⁹⁷ requiring only that the defendant’s conduct ‘was prejudicial to [the plaintiff’s] honour or reputation, not that [the plaintiff] suffered damage’,⁹⁸ an approach echoed in other jurisdictions.⁹⁹ Because the impugned act need only be of a ‘prejudicial’ character, there need only be a *propensity* to prejudice, which can be judged objectively. With this objective

⁹⁴ Varuhas, ‘The Concept of “Vindication”’, above n 33, 255.

⁹⁵ *Ibid* 254, 261–2.

⁹⁶ A staunch proponent of moral rights has argued that ‘[f]undamentally, moral rights laws seek to vindicate damage to the human spirit, an interest that transcends the artist’s concern for property or even reputation’: Roberta Rosenthal Kwall, ‘Preserving Personality and Reputational Interests of Constructed Personas through Moral Rights: A Blueprint for the Twenty-First Century’ (2001) *University of Illinois Law Review* 151, 152.

⁹⁷ (2012) 260 FLR 1, 17 [95] (Driver FM).

⁹⁸ *Ibid* 17 [96]–[97].

⁹⁹ See, eg, the Canadian case *Prise de Parole Inc v Guérin, Éditeur Ltée* (1996) 104 FTR 104, 114 [24], where Denault J stipulated: ‘s 28.2(1) does not require the plaintiff to prove prejudice to his honour or reputation; rather, it must be proved that the work was distorted, mutilated or otherwise modified “to the prejudice of the honour or reputation of the author”.’ United States courts have followed suit when safeguarding the moral rights protected in the *Visual Artists Rights Act of 1990*, 17 USC § 106A (1990). See, eg, *English v BFC & R East 11th Street LLC* (SD NY, No 97 Civ 7446 (HB), 2 December 1997) slip op 8 (Baer J), *affd English v BFC Partners*, 198 F 3d 233 (2nd Cir, 1999), where the court accepted that a moral rights violation cannot be cured by monetary damages and that the court should presume irreparable injury once the plaintiffs establish a prima facie claim. This approach is also codified in some jurisdictions. *Texto Refundido de la Ley de Propiedad Intelectual, Regularizando, Aclarando y Armonizando las Disposiciones Legales Vigentes Sobre la Materia* [Consolidated Text of the Law on Intellectual Property, Regularizing, Clarifying and Harmonizing the Applicable Statutory Provisions] (Spain) art 135 [World Intellectual Property Organisation trans]: ‘Moral prejudice shall afford entitlement to indemnification even where there is no evidence of economic prejudice.’ See also *Copyright Act 2007* (Israel) s 56.

model, it is arguable that, by extension, no harm need be *experienced* by the author, and the author's death loses significance.

Perez was decided in relation to a living, sentient, author.¹⁰⁰ There are at least two reasons why, despite the integrity right being actionable per se, this may not lead to substantial *posthumous* damages, even borrowing heavily from torts law. The first, perhaps crucial, point is again to distinguish interests from rights. The TAPS are actionable per se, and substantial damages are awarded, because of the *interests* they protect. The right is then afforded in order to protect the interest, but it is distinct from the interest, being 'simply the form of a norm'.¹⁰¹ As mentioned earlier, the dead cannot have interests.

The second reason is that even if the integrity right is analogous to TAPS and actionable per se, this may not lead to substantial *posthumous damages* without proof of damage — a separate issue. As Varuhas notes, even with TAPS, the measure of damages will vary depending on the seriousness of the particular wrong and the extent to which it interferes with the protected interest.¹⁰² An important consideration in TAPS cases which may reduce or preclude substantial damages is whether the claimant *experienced* the interference with the interest.¹⁰³

2 Damages for Loss of Amenities of Unconscious Plaintiffs

Damages for loss of amenities¹⁰⁴ of unconscious plaintiffs have parallels to damages for the dead, reflected by the fact that those in a persistent vegetative

¹⁰⁰ (2012) 260 FLR 1.

¹⁰¹ Varuhas, 'The Concept of "Vindication"', above n 33, 271.

¹⁰² *Ibid* 272.

¹⁰³ For a discussion of claiming damages where the claimant was unaware of his or her false imprisonment see *Murray v Ministry of Defence* [1988] 1 WLR 692, 703 (Lord Griffiths); *R v Bournemouth Community and Mental Health NHS Trust; Ex parte L* [1999] 1 AC 458, 475 (Lord Woolf MR). Varuhas argues that:

Given loss of liberty in itself is an established head, and the gist of the action is interference with liberty rather than infliction of harm, the better view is that damages should be more than nominal albeit that "damages might be diminished if the plaintiff was unconscious of the imprisonment" as the claimant will have suffered no negative emotional effects ...

Varuhas, 'The Concept of "Vindication"', above n 33, 276 n 145, quoting *Weldon v Home Office* [1990] 3 WLR 465, 469 (Ralph Gibson LJ); *Meering v Grahame-White Aviation Co Ltd* (1919) 122 LT 44, 53–4 (Atkin LJ).

¹⁰⁴ 'Loss of amenities' is the name 'commonly and conveniently (but not ... very happily)' given to the non-economic consequences of the 'destruction or diminution of a faculty' which

state are often referred to as ‘the living dead’.¹⁰⁵ Pertinently for present purposes, unconscious plaintiffs, like the dead, cannot experience the effects of their lost amenities.

When discussing objective losses which do not impact on living plaintiffs due to some mitigating factor such as insurance, Tettenborn argued that ‘it is ... not self-evident that, when we talk about a plaintiff suffering loss, the phrase “suffering loss” must be synonymous with “feeling the ultimate effect of a wrong” ... there is nothing logically incoherent in separating a loss from its effects.’¹⁰⁶ This, of course, depends on the head of damage and the particular type of loss. Some, like pain or suffering, need to be experienced to constitute a loss, and this would evidently preclude posthumous pain and suffering caused by prejudice to honour or reputation. Other kinds of losses can, however, be objectively identified.

For this reason, in numerous jurisdictions an unconscious plaintiff will be denied damages for pain and suffering, but allowed damages for loss of amenity of life.¹⁰⁷ In *Wise v Kaye*,¹⁰⁸ although the victim’s injury left her in a permanent coma, the court awarded her damages for loss of amenity. Upjohn LJ commented:

for my part I am unable to see why the plaintiff while living is prevented from so claiming merely because she is wholly ignorant of the grave loss she has suffered and her chances of recovery are negligible. The injury to her has been done; *the damage has been suffered*. Her ignorance of either is immaterial ... It is difficult to see why, in general, damages for such injury should be affected by ignorance unless the ignorance prevents the head of damage arising as in the case of pain and suffering.¹⁰⁹

deprives the injured person of the ‘ability to participate in normal activities and thus to enjoy life to the full and to take full advantage of the opportunities that it otherwise might offer’: *Teubner v Humble* (1963) 108 CLR 491, 506 (Windeyer J).

¹⁰⁵ See, eg, *Wise v Kaye* [1962] 1 QB 638, 655 (Upjohn LJ) (‘her life is a living death’), 644 (Sellers LJ) (‘[n]o one could be nearer to death and survive, it would seem’).

¹⁰⁶ Tettenborn, ‘What Is a Loss?’, above n 76, 451.

¹⁰⁷ See Boyce P Wanda, ‘Problems Arising in Compensating Unconscious Plaintiffs for Loss of Amenities of Life: A Comparative Survey’ (2005) 38 *Comparative and International Law Journal of South Africa* 113.

¹⁰⁸ [1962] 1 QB 638.

¹⁰⁹ *Ibid* 660 (emphasis added).

In *Lim Poh Choo v Camden and Islington Area Health Authority*,¹¹⁰ damages for loss of amenity of life were awarded to the unconscious plaintiff ‘for the fact of deprivation — a substantial loss, whether the plaintiff is aware of it or not.’¹¹¹ Similarly, in *H West & Son Ltd v Shephard*,¹¹² a majority of the House of Lords compensated loss of amenity because ‘[t]he fact of unconsciousness does not ... eliminate the actuality of the deprivations of the ordinary experiences and amenities of life’.¹¹³

These cases adopt an objective approach, which compensates for the ‘actuality of the deprivations’,¹¹⁴ if not the subjective experience of it. Ignorance of the loss is disregarded. There are none more ignorant than the dead, and this approach could accordingly accommodate objective loss caused by the mistreatment of a work, even if unexperienced.

Awarding damages for loss of amenity to unconscious plaintiffs is, however, contentious, and across the common law, the cases are inconsistent.¹¹⁵ In 1978, the United Kingdom Pearson Commission suggested abolishing non-pecuniary damages for the unconscious plaintiff.¹¹⁶ In *Skelton v Collins*,¹¹⁷ the Australian High Court refused to award damages to an unconscious plaintiff for loss of amenity.¹¹⁸ As mentioned above, awards for unexperienced loss in TAPS cases are also controversial,¹¹⁹ and may lead to little more than nominal

¹¹⁰ [1980] AC 174.

¹¹¹ *Ibid* 188 (Lord Scarman).

¹¹² [1964] AC 326.

¹¹³ *Ibid* 349 (Lord Morris).

¹¹⁴ *Ibid*.

¹¹⁵ See generally Wanda, above n 107.

¹¹⁶ United Kingdom, Royal Commission on Civil Liability and Compensation for Personal Injury, *Report* (1978) vol 1, 92 [398].

¹¹⁷ (1966) 115 CLR 94. The High Court approved an award of non-substantial damages of £1500: at 96, 104 (Kitto J).

¹¹⁸ *Ibid* 103 (Kitto J): ‘what ought to affect the quantum of damages is not the actuality of the deprivations but their value.’ His Honour echoed the dissent of Lord Peace in *H West & Son Ltd v Shephard* [1964] AC 326, 365: ‘where there is little or no consciousness of deprivation there can be little or no damages’.

¹¹⁹ Varuhas, ‘The Concept of “Vindication”’, above n 33, 273–4. See also the texts referred to in Carel J J M Stolker, ‘The Unconscious Plaintiff: Consciousness as a Prerequisite for Compensation for Non-Pecuniary Loss’ (1990) 39 *International and Comparative Law Quarterly* 82, 92 n 35.

damages, or a modest award, if the plaintiff was not aware of the commission of the tort.¹²⁰

And in all of these cases, the plaintiff was living, albeit unconscious. In other words, there was still a subject. There has been no case awarding damages with respect to an objective injury occurring after death. Indeed, in *Wise v Kaye*,¹²¹ death would apparently have been an important distinguishing fact, with Sellers LJ reasoning that to deny damages for loss of amenity on an objective basis would treat the comatose victim ‘as if she were dead’, and that as long as the victim was alive, damages were to be awarded as to a living person.¹²²

There is a final difficulty, which is caused by the dual limb of the statutory cause of action in Australia. The first limb of the integrity right requires some mistreatment of the work or something done in relation to it.¹²³ If this were the only criterion, then objective loss would be easier to establish. As with loss of amenities in most jurisdictions, only an objective loss would be required, and whether the plaintiff feels the effect of that loss would be immaterial. However, something more is required by the right of integrity. To complete the cause of action, the mistreatment of the work needs to be ‘prejudicial to’ the author’s honour or reputation.¹²⁴ The implications of this are discussed further in Part V, which discusses causation.

The above discussion suggests that claims for substantial posthumous damages based on the objective actuality of the loss, rather than the subjective experience of it, are precarious.

D *Loss Experienced by Third Parties*

There is a separate issue raised by the fact that ‘loss’ cannot be experienced by the (deceased) author. If only *experienced* loss can be compensated, must it be necessarily experienced by the rights holder? If yes, then compensatory

¹²⁰ *Murray v Ministry of Defence* [1988] 1 WLR 692, 703 (Lord Griffiths); *R v Bournemouth Community and Mental Health NHS Trust; Ex parte L* [1999] 1 AC 458, 475 (Lord Woolf MR); *Weldon v Home Office* [1990] 3 WLR 465, 469 (Ralph Gibson LJ); *Meering v Grahame-White Aviation Co Ltd* (1919) 122 LT 44, 53–4 (Atkin LJ).

¹²¹ [1962] 1 QB 638.

¹²² *Ibid* 654.

¹²³ *Copyright Act 1968* (Cth) ss 195AJ–AL.

¹²⁴ *Ibid*.

damages appear impossible, because clearly, the deceased author can no longer experience loss. Importantly, the loss contemplated by the statute is not expressly limited to the *author's* loss. Is third party loss therefore relevant? In particular, is the *social* loss that most persuasively explains posthumous moral rights compensable?

Parliament deliberately enacted a provision facilitating damages for injury to a moral right in the absence of the moral rights holder, and permitting a third party (the legal personal representative) to make a claim.¹²⁵ Therefore, the statute clearly contemplates the possibility of damages being recovered by a right-holder not personally experiencing loss, just as executors may do when recovering on behalf of the deceased's estate.

As argued above in Part III, posthumous moral rights reflect broader interests than those of the rights holders, and it is sensible to protect them, since interference with works can impact non-authorial interests. The integrity right prevents the social loss flowing from diminished cultural heritage.¹²⁶ And that loss is experienced by members of society. This suggests that the statute can accommodate the broader loss to *society* that may occur when the integrity of a work is compromised.

However, there are two problems. The first difficulty is that 'society' has no standing to bring an action. This could only be overcome by regarding the legal personal representative as a representative not only of the author, but of that social interest. This is a tenable argument, since the legal personal representative is a member of society, and suffers the same social loss as other members of society. However, it is an awkward construction, because the right is clearly articulated as the *author's* right, merely exercised by the legal personal representative.

The second difficulty is that the compensatory damages model assumes a victim that can be 'made whole', or benefit from, a compensatory award of damages. If society suffers the loss, there is no compensation for that loss if the damages flow to the author's beneficiaries,¹²⁷ who effectively receive a windfall. To truly compensate society, the damages would need to flow to the state as its representative. However, windfalls did not concern the House of Lords in *H West & Son Ltd v Shephard*:

¹²⁵ Ibid s 195AN(1).

¹²⁶ Roeder, above n 11, 575.

¹²⁷ *Copyright Act 1968* (Cth) s 195AZA(6). This provision provides that the damages go to the author's estate and are to be distributed according to the author's will.

it can be of no concern to the court to consider any question as to the use that will thereafter be made of the money awarded. It follows that if damages are assessed on the correct basis there should not then be a paring down of the award because of some thought that a particular plaintiff will not be able to use the money.¹²⁸

We may also argue that the damages are not really a windfall for the beneficiaries. Had the author been alive and sued and recovered, those damages would be a part of the author's estate.

Nevertheless, this is one of the arguments for the prohibition on defaming the dead.¹²⁹ The primary justification for denying the deceased their day in court is not only the inherently personal nature of the right of action for defamation, but the perceived difficulty of deciding who should receive damages for defamation of a deceased. Damages for defamation are a 'mixture of inextricable considerations'¹³⁰ which include not only 'reparation for the harm done to the appellant's personal and (if relevant) business reputation and vindication of the appellant's reputation',¹³¹ but 'consolation to [the plaintiff] for a wrong done'¹³² and 'for the personal distress and hurt caused',¹³³ which 'forms a large element in the damages'.¹³⁴ The difficulty of separating reparation and consolation means they 'are frequently considered together',¹³⁵ and explains the prohibition on defaming the dead. The dead are inconsolable. It is the difficulty of untying injury to feelings and injury to

¹²⁸ [1964] AC 326, 349 (Lord Morris).

¹²⁹ The common law position has now been codified in the legislation of all states and territories except Tasmania: *Civil Law (Wrongs) Act 2002* (ACT) s 122; *Defamation Act 2005* (NSW) s 10; *Defamation Act 2005* (Qld) s 10; *Defamation Act 2005* (SA) s 10; *Defamation Act 2005* (Vic) s 10; *Defamation Act 2005* (WA) s 10; *Defamation Act 2006* (NT) s 9.

¹³⁰ *Uren* (1966) 117 CLR 118, 150 (Windeyer J). See also *McCarey v Associated Newspapers Ltd* [No 2] [1965] 2 QB 86, 104 (Pearson LJ): '[c]ompensatory damages, in a case in which they are at large, may include several different kinds of compensation to the injured plaintiff.'

¹³¹ *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44, 60 (Mason CJ, Deane, Dawson and Gaudron JJ) ('*Carson*').

¹³² *Uren* (1966) 117 CLR 118, 150 (Windeyer J).

¹³³ *Carson* (1993) 178 CLR 44, 60 (Mason CJ, Deane, Dawson and Gaudron JJ).

¹³⁴ *Broome v Cassell & Co Ltd* [1972] AC 1027, 1125 (Lord Diplock).

¹³⁵ *Carson* (1993) 178 CLR 44, 60 (Mason CJ, Deane, Dawson and Gaudron JJ).

reputation which makes it ‘inappropriate to provide the relatives of a defamed deceased with the deceased’s *solatium*.’¹³⁶

Moral rights can be distinguished from the law of defamation. It may well be murky and abstract to think about the deceased being defamed, and the concern about the difficulty in separating hurt feelings from other more objective aspects of loss and injury flowing from a ruined reputation is understandable. With defamation of the dead, it is hard to escape the result that even if there is some diminution of the deceased plaintiff’s residual reputation, it really does not matter anymore because the only person with a real interest in that reputation is dead. Likewise, it is not possible to salve the injured feelings of those who can no longer feel. But in the case of moral rights infringement, there is a unique, additional consideration — the injured work. That harm has an impact, irrespective of whether the author is alive or dead. Let us assume that a painting is mutilated while an author lives. Let us now assume that the same act occurs five minutes after the author dies. Why, in principle, should there be substantial damages in the former case, and nominal damages five minutes later? There can be a moderated midpoint which recognises the lack of a personal impact on the now deceased author, but correspondingly acknowledges the disturbance to the work and its broader social impact.

V CAUSATION: ‘LOSS RESULTING FROM THE INFRINGEMENT’

This Part considers the significance of the causative condition requiring that loss ‘[result] from the infringement’,¹³⁷ and questions whether it is necessary to establish posthumous prejudice to reputation or honour to receive a posthumous award of damages.

The moral right of integrity is infringed when a work is subjected to derogatory treatment,¹³⁸ which results from certain acts¹³⁹ that are ‘*prejudicial to*

¹³⁶ Australian Law Reform Commission, *Unfair Publication: Defamation and Privacy*, Report No 11 (1979) 56 [105] (emphasis in original).

¹³⁷ *Copyright Act 1968* (Cth) s 195AZA(1)(b).

¹³⁸ *Ibid* s 195AQ(2).

¹³⁹ Namely, ‘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’ or ‘the doing of anything else in relation to the work’: *ibid* ss 195AJ(a)–(b).

the author's honour or reputation.¹⁴⁰ Damages are recoverable 'for loss resulting from the infringement'.¹⁴¹ The right is activated without proof of actual injury to honour or reputation.¹⁴² However, when it comes to an award of *damages*, there must be a loss, and it must result from conduct which is 'prejudicial to the author's honour or reputation'.¹⁴³ Part III identified objective losses in the form of distorted or destroyed works, which may be experienced by society. But can it be said those losses result from conduct which is 'prejudicial to the author's honour or reputation'? While only conduct with a prejudicial character is required, and not factual prejudice, the question is whether the defendant's conduct can only have a prejudicial character with respect to a sentient author. If the deceased's honour or reputation can *never* be prejudiced due to the non-existence of the deceased, then how can the defendant's conduct have a 'prejudicial' character? The only way around this is to argue that the statute must be interpreted as requiring conduct which *would be* 'prejudicial to the author's honour or reputation', *if he or she were alive*. This may excessively stress the language. The alternative is to contend that posthumous prejudice to reputation or honour is possible. The following discussion demonstrates the weakness of that argument.

A Posthumous Prejudice to Reputation

Whether posthumous prejudice to reputation is possible will depend on the conception of a post-mortem reputation, and whether reputation can be prejudiced posthumously. In the absence of the author, this would necessitate an objective concept of reputation. The meaning of reputation in the right of integrity and the concept of reputational prejudice has not been carefully considered by either the courts or academe. Questions abound, and the answers to them will moderate the potential for posthumous damages. What is the meaning of 'reputation' in the moral right of integrity? Since the inclusion of prejudice to *reputation* clearly evokes the tort of defamation,¹⁴⁴ do we import defamation law to help unravel this concept? How helpful would

¹⁴⁰ *Ibid* (emphasis added).

¹⁴¹ *Ibid* s 195AZA(1)(b) (emphasis added).

¹⁴² See above Part IV. See also the discussion in McCutcheon, 'Honour of the Dead', above n 7, 490 and the authorities cited therein.

¹⁴³ *Copyright Act 1968* (Cth) ss 195AJ(a)–(b).

¹⁴⁴ *Perez* (2012) 260 FLR 1, 18 [100] (Driver FM).

that be, given the already hazy concept of reputation in defamation?¹⁴⁵ Does the reputation inhere in the author personally, or in the author's works, or both? Is reputation judged objectively or subjectively, or both? How is prejudice to reputation valued and compensated? Is the concept of reputation in the moral right of integrity fluid, necessarily shifting according to the life or death of the author?

There are more questions than answers here. However, if we do borrow from the competing concepts of reputation in defamation law, some could prevent posthumous prejudice. This is because reputation can be considered as relational, something which is *mediated* between the plaintiff and society.¹⁴⁶ Robert Post has sketched three distinct concepts of reputation: reputation as property, reputation as honour, and reputation as dignity.¹⁴⁷ Post's conception of reputation as honour is a form of reputation:

in which an individual personally identifies with the normative characteristics of a particular social role *and in return personally receives from others* the regard and estimation that society accords to that role.¹⁴⁸

This suggests an interaction between society's regard of the plaintiff, and the plaintiff's regard of self. Remove the deceased plaintiff from that equation, and this concept of reputation necessarily collapses. If this notion of reputation is imported into moral rights remedial theory, then posthumous prejudice to reputation may be impossible.

However, as mentioned, there are various contested theories of reputation within and outside defamation law, and it is far from clear whether, and to what extent, perspectives on reputation from defamation law should transfer to moral rights. While reputation might be both about how others see the plaintiff, and the plaintiff's subjective response to that perception, it is theoretically possible to bifurcate the two and regard reputation solely as that which is perceived by society. Again borrowing from defamation, the potential for reputation to endure past death seems implicit in Lord Denning's classic description of reputation in defamation law:

¹⁴⁵ See Lawrence McNamara, *Reputation and Defamation* (Oxford University Press, 2007) 2–6; Robert C Post, 'The Social Foundations of Defamation Law: Reputation and the *Constitution*' (1986) 74 *California Law Review* 691, 692: 'Reputation ... is a mysterious thing'.

¹⁴⁶ David Rolph, *Reputation, Celebrity and Defamation Law* (Ashgate Publishing, 2008) 5.

¹⁴⁷ Post, above n 145, 707–19.

¹⁴⁸ *Ibid* 699–700, quoted in Rolph, above n 146, 24 (emphasis added).

A man's 'character', it is sometimes said, is what he in fact is, whereas his 'reputation' is what other people think he is. If this be the sense in which you are using the words, then a libel action is concerned only with a man's reputation, that is, with what people think of him; and it is for damage to his reputation, that is, to his esteem in the eyes of others, that he can sue, and not for damage to his own personality or disposition.¹⁴⁹

It is tempting to conclude that while others continue to 'think' of the deceased, even if dead, then the deceased can have a reputation.¹⁵⁰ Indeed, reputation may be all that remains after death. The enduring fame of countless deceased authors challenges the contention that 'reputation naturally vanishes when a person dies.'¹⁵¹ This suggests that prejudice to reputation can be objectively demonstrated as a 'loss' in the absence of the author. It has been asserted that 'whether an artist is living or dead is irrelevant to the effect that altering one of the artist's artworks would have on the artist's reputation',¹⁵² a claim which clearly proceeds on the assumption that an artist's reputation can subsist after death.

But for present purposes, the more important question is not whether reputation can be objectively perceived, but whether the dead can suffer a loss when it is injured. A deceased person has no *interest* in his or her reputation. He or she cannot be *harmed* by an injury to it. Nor does it seem sensible to suggest that *society* can be harmed by the injury to a deceased author's reputation. If one's interest in his or her reputation is a personal interest, presumably it must die with that person. This is another reason why the dead

¹⁴⁹ *Plato Films Ltd v Speidel* [1961] AC 1090, 1138 (emphasis altered).

¹⁵⁰ This also explains why a corporation can maintain a reputation. At common law, a corporation can maintain an action for defamation of its trading or business reputation: *South Hetton Coal Co Ltd v North-Eastern News Association Ltd* [1894] 1 QB 133. The uniform defamation Acts now significantly narrow the circumstances in which corporations may sue for defamation: *Defamation Act 2005* (NSW) s 9; *Defamation Act 2005* (Qld) s 9; *Defamation Act 2005* (SA) s 9; *Defamation Act 2005* (Tas) s 9; *Defamation Act 2005* (Vic) s 9; *Defamation Act 2005* (WA) s 9.

¹⁵¹ Lisa Brown, 'Dead but Not Forgotten: Proposals for Imposing Liability for Defamation of the Dead' (1989) 67 *Texas Law Review* 1525, 1531. Indeed, there are bold assertions that '[t]he posthumous continuance of moral rights may be justified as necessary to protect the artist's reputation, which lives on after her death': Eric M Brooks, "'Tilted" Justice: Site-Specific Art and Moral Rights after US Adherence to the *Berne Convention*' (1989) 77 *California Law Review* 1431, 1439. Brooks added that '[t]he posthumous continuance of moral rights protects the artist's reputation, which lives on, from injury': at 1480.

¹⁵² Lee, above n 65, 90.

cannot be defamed.¹⁵³ The personal interest in the deceased's reputation evaporates on death. The bar on posthumous action is explained by the personal nature of the interest:

it is only reasonable and fitting that one who has been assaulted or slandered should be the sole judge of whether it is proper to raise action therefor ... It signifies that the claim is personal to himself, and such as no other can take up.¹⁵⁴

The same applies with respect to deceased authors. As Damich points out, while, as French theorist Desbois suggests, an author's work continues to embody her personality after her death, the author's personal interest in her work cannot survive her death.¹⁵⁵ If the reputational interest reflected in the moral right of integrity is a personal interest and vanishes on the death of the author (as appears more likely), then even if a post-mortem reputation can objectively exist, damages for loss would seem misconceived if there is no longer any interest in that reputation to protect.

B *Posthumous Prejudice to Honour*

The moral right of integrity speaks of prejudice to honour *or* reputation. The use of the conjunction suggests that honour should be considered separately from reputation,¹⁵⁶ although this approach has not been followed in the case law.¹⁵⁷ The meaning of honour in the right of integrity has been the subject of

¹⁵³ *Civil Law (Wrongs) Act 2002* (ACT) s 122; *Defamation Act 2005* (NSW) s 10; *Defamation Act 2006* (NT) s 9; *Defamation Act 2005* (Qld) s 10; *Defamation Act 2005* (SA) s 10; *Defamation Act 2005* (Vic) s 10; *Defamation Act 2005* (WA) s 10.

¹⁵⁴ *Bern's Executor v Montrose Asylum* (1893) 20 R 859, 873 (Lord Young).

¹⁵⁵ Edward J Damich, 'The Right Of Personality: A Common Law Basis For The Protection Of The Moral Rights Of Authors' (1988) 23 *Georgia Law Review* 1, citing Henri Desbois, *Le Droit d'Auteur En France* (Dalloz, 3rd ed, 1978) 569–70.

¹⁵⁶ See Dennis Lim, 'Prejudice to Honour or Reputation in Copyright Law' (2007) 33 *Monash University Law Review* 290, 293–4; Elizabeth Adeney, 'The Moral Right of Integrity: The Past and Future of "Honour"' [2005] *Intellectual Property Quarterly* 111, 122; McCutcheon, 'Honour of the Dead', above n 7.

¹⁵⁷ See the examples discussed in Lim, above n 156; McCutcheon, 'Honour of the Dead', above n 7. See also *Perez* (2012) 260 FLR 1; *Harrison v Harrison* [2010] FSR 25.

academic commentary only.¹⁵⁸ Like ‘reputation’, ‘honour’ is replete with potential meanings that span the subjective and objective, the personal and social, and which frequently blur with (the many) notions of reputation. Honour may include what an author thinks about herself, what she believes others think of her, or what others objectively think of her. The meaning of honour will clearly affect whether it could be posthumously prejudiced. If honour is objectively determined by how others view the honour of the author, then, like a posthumous concept of reputation, the author’s death loses significance. However, the reputation limb in the right of integrity would then have nothing to do. For that reason, honour is generally considered to have a subjective quality;¹⁵⁹ something that inheres in the author him or herself and requires self-perception. If honour is dependent on self-awareness, then how is mistreatment of a work prejudicial to the honour of the *dead* — the quintessentially unaware?¹⁶⁰ Actual prejudice to authorial honour seems impossible, given the highly personal nature of a subjective concept of honour. Again, such a personal interest must dissipate on death.

VI NON-COMPENSATORY DAMAGES

In a posthumous context, the above discussion suggests that the compensatory damages model is, at the very least, awkward. It consistently confronts the stark fact that the dead, being dead, cannot be compensated. The superimpo-

¹⁵⁸ See, eg, Patricia Loughlan, ‘The Right of Integrity: What Is in that Word Honour? What Is in that Word Reputation?’ (2001) *Australian Intellectual Property Journal* 189; Adeney, ‘The Moral Right of Integrity’, above n 156, 129; Elizabeth Adeney, ‘The Moral Right of Integrity of Authorship: A Comparative View of Australia’s Proposals to Date’ (1998) 9 *Australian Intellectual Property Journal* 179; Lim, above n 156; McCutcheon, ‘Honour of the Dead’, above n 7.

¹⁵⁹ See, eg, Thomson Reuters, Staniforth Ricketson and Chris Creswell, *The Law of Intellectual Property: Copyright, Design and Confidential Information* (at 19 November 2014) [10.110]; Adeney, ‘The Moral Right of Integrity’, above n 156, 125, quoting Lionel Bently and Brad Sherman, *Intellectual Property Law* (Oxford University Press, 2001) 249: ‘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’. Adeney notes, ‘[t]his 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’: at 26.

¹⁶⁰ For a discussion of the issues that arise with posthumous honour see generally McCutcheon, ‘Honour of the Dead’, above n 7.

sition of torts models permitting the compensation of the unconscious plaintiff and unharmed third parties is problematic. There seems to be an impenetrable causative obstacle to the necessary link between loss and prejudice to honour or reputation.

However, there are other damages models, particularly exemplary and restitutionary damages, which are not necessarily dependent on loss being suffered by the rights holder, but which respond to the defendant's wrong. As such, they seem perfectly well suited to damages in the absence of experienced loss. There is an important preliminary question, however. Does the statutory limitation to 'damages for loss'¹⁶¹ exclude non-compensatory damages? If those words are construed literally and narrowly, then Parliament may have unintentionally restricted the ambit of moral rights damages,¹⁶² limiting the opportunity to utilise a model that puts wrongs, rather than losses, at the forefront.

There are several reasons why non-compensatory damages are, or should be, available for breach of moral rights. The first is that '[a]lthough common law damages are often concerned with compensating a claimant, they can (and do) have different goals ... "damages" means nothing more specific than a monetary award given for a wrong.'¹⁶³ Second, the court apparently has a general discretion as to the appropriate relief for moral rights infringement. The Act '*includes*' the listed remedies¹⁶⁴ and sets out a number of statutory factors¹⁶⁵ to be considered by the court when '*exercising its discretion* as to the appropriate relief'.¹⁶⁶ Third, the exclusion of non-compensatory damages would contradict authority suggesting that such damages are available for moral rights infringement, discussed below. Finally, if the reference to 'loss'

¹⁶¹ *Copyright Act 1968* (Cth) s 195AZA(1)(b).

¹⁶² This may be curable by deletion of the words 'for loss' from the provision. See, eg, the Canadian provision which empowers the court to grant 'all remedies by way of injunction, damages, accounts, delivery up and otherwise that are or may be conferred by law for the infringement of a right': *Copyright Act*, RSC 1985, c C-42, s 34(2). Under the *Copyright, Designs and Patents Act 1988* (UK) c 48, s 103(1) provides simply that an infringement of a moral right 'is actionable as a breach of statutory duty owed to the person entitled to the right'.

¹⁶³ James Edelman, *Gain-Based Damages: Contract, Tort, Equity and Intellectual Property* (Hart Publishing, 2002) 5.

¹⁶⁴ *Copyright Act 1968* (Cth) s 195AZA(1) (emphasis added).

¹⁶⁵ *Ibid* s 195AZA(2).

¹⁶⁶ *Ibid* (emphasis added).

does mandate compensatory damages, such a narrow basis for recovery could subvert the purpose of posthumous moral rights. It is doubtful that Parliament carefully considered the import of the words ‘for loss’, nor did it intend, by the adoption of those words, to eliminate all non-compensatory damages.

A *Restitutionary Damages*

As mentioned, in *Meskenas v ACP Publishing Pty Ltd*,¹⁶⁷ Raphael FM stated that the purpose of moral rights remedies is restitutionary.¹⁶⁸ This was clearly not a carefully considered view, and it is doubtful that Raphael FM meant that remedies should (only) be calibrated according to a defendant’s wrongful gain. Indeed, these instances would be rare. Perhaps Raphael FM was simply acknowledging that moral rights remedies rarely compensate *pecuniary* loss. There is no need to limit remedial purposes to restitution. The right of integrity is not concerned with wrongful gains, but with interference with the plaintiff’s right to maintain the integrity of his or her work. Since moral rights infringements are likely to be infinitely varied in their purpose and effect, remedial responses to those infringements should be equally expansive.

B *Exemplary Damages*

In *Uren v John Fairfax & Sons Pty Ltd*,¹⁶⁹ Windeyer J stated that ‘exemplary damages ... are intended to punish the defendant, and presumably to serve one or more of the objects of punishment — moral retribution or deterrence.’¹⁷⁰ If there is no coherent basis for compensatory, aggravated or restitutionary damages for post-mortem infringements, what, if any, role could exemplary damages play?

It has been suggested that existing remedies cover the field so comprehensively that exemplary damages are superfluous, and that appropriate remedial orders can be made based on restitutionary, compensatory or aggravated damages models.¹⁷¹ However, the above discussion has demonstrated the

¹⁶⁷ (2006) 70 IPR 172.

¹⁶⁸ *Ibid* 187 [34].

¹⁶⁹ (1966) 117 CLR 118.

¹⁷⁰ *Ibid* 149.

¹⁷¹ See, eg, Kit Barker, ‘Private and Public: The Mixed Concept of Vindication in Private Law’ in Stephen G A Pitel, Jason W Neyers and Erika Chamberlain (eds), *Tort Law: Challenging*

possibility of a profound damages gap which may only be filled by exemplary damages.¹⁷² With no possible basis for awarding damages, there may be nothing to restrain potential defendants from causing harm.

While the compensatory rationale for damages is entrenched, and proponents may cling to it, there is no singular function performed by damages. One function may be to compensate, but another important function is to deter wrongful conduct.¹⁷³ The deterrent effect of exemplary damages supports the educative effect anticipated when moral rights were introduced.¹⁷⁴

The utility of the exemplary damages model in a posthumous context is that the defendant is being ‘punished’ for the fact of the infringement, rather than ‘compensating’ a victim who cannot be compensated. Since the focus of exemplary damages is on the defendant’s conduct, not on the plaintiff’s reaction to it,¹⁷⁵ they seem to solve the problem of compensating in the absence of a subject to compensate.¹⁷⁶ While the deceased’s reaction can never be assessed, the defendant’s conduct can be.

Orthodoxy (Hart Publishing, 2013) 75; James Edelman, ‘In Defence of Exemplary Damages’ in Charles E F Rickett (ed), *Justifying Private Law Remedies* (Hart Publishing, 2008) 225; *Kuddus v Chief Constable of Leicestershire Constabulary* [2002] 2 AC 122, 157 (Lord Scott): ‘there is ... no longer any need for punitive damages in the civil law’.

¹⁷² Other scholars have argued for a continuing role for exemplary damages: see, eg, James Edelman, ‘In Defence of Exemplary Damages’, above n 171; Jason N E Varuhas, ‘Exemplary Damages: “Public Law” Functions, Mens Rea and Quantum’ (2011) 70 *Cambridge Law Journal* 284, 284–5.

¹⁷³ *Uren* (1966) 117 CLR 118, 149 (Windeyer J).

¹⁷⁴ See Attorney-General Daryl Williams’ second reading speech, where he stated that ‘the main impact of the new legislation will, it is hoped, be to build upon good existing industry practice and, where necessary, to raise awareness in an educative way of the need to respect the creativity of authors and artists’: Commonwealth, *Parliamentary Debates*, House of Representatives, 18 June 1997, 5549.

¹⁷⁵ *Gray* (1998) 196 CLR 1, 7 [15] (Gleeson CJ, McHugh, Gummow and Hayne JJ): ‘In considering whether to award exemplary damages, the first, if not the principal, focus of the enquiry is upon the wrongdoer, not upon the party who was wronged’. Their Honours continued that ‘the conduct of the wrongdoer is central to ... [the] inquiry: for exemplary damages are concerned to punish the wrongdoer and deter others from like conduct, not to compensate the party that was wronged’: at 12 [31].

¹⁷⁶ Exemplary damages also explain the basis for advocacy of ‘lost life’ or hedonic damages recognising the loss to the decedent in wrongful death cases: see, eg, Andrew J McClurg, ‘Dead Sorrow: A Story about Loss and a New Theory of Wrongful Death Damages’ (2005) 85 *Boston University Law Review* 1; Meredith A Wegener, ‘Purposeful Uniformity: Wrongful Death Damages for Unmarried, Childless Adults’ (2009) 51 *South Texas Law Review* 339;

As mentioned above, it is not clear whether a court has power under the existing statutory scheme to award aggravated or exemplary damages for moral rights infringement. In *Perez*, Driver FM held that ‘compensation for moral rights infringements ... covers the same field as would an award of additional damages [in copyright infringement]’.¹⁷⁷ Additional damages are awarded on principles that correspond to those governing awards of aggravated and exemplary damages at common law.¹⁷⁸ They may be granted if the court is satisfied that it is proper to do so, having regard to:

- (i) the flagrancy of the infringement; and
- (ia) the need to deter similar infringements of copyright; and
- (ib) the conduct of the defendant after the act constituting the infringement or, if relevant, after the defendant was informed that the defendant had allegedly infringed the plaintiff’s copyright; and
- (ii) whether the infringement involved the conversion of a work or other subject-matter from hardcopy or analog form into a digital or other electronic machine-readable form; and
- (iii) any benefit shown to have accrued to the defendant by reason of the infringement; and
- (iv) all other relevant matters ...¹⁷⁹

Meskenas had earlier suggested that both punitive and aggravated damages could be awarded for moral rights infringement.¹⁸⁰ Canadian courts have regarded punitive damages for moral rights infringements as ‘common

Joni Hersch and W Kip Viscusi, ‘Saving Lives through Punitive Damages’ (2010) 83 *Southern California Law Review* 229; Frank Cross and Charles Silver, ‘In Texas, Life Is Cheap’ (2006) 59 *Vanderbilt Law Review* 1875; Posner and Sunstein, above n 88.

¹⁷⁷ (2012) 260 FLR 1, 14 [80]; see also at 17 [92]: ‘the considerations relevant to an award of additional damages are those bearing on the award of damages for breach of moral rights’. Driver FM continued that ‘the Court may have regard for the range of damages it would award under s 115(4) for infringement of the copyright’: at 19 [106]. Given this view, it is suggested that the many references in *Perez* to damages being ‘compensation’ and loss being ‘compensable’ (discussed above) are simply useful descriptions for an award of damages and cannot suggest that damages are exclusively compensatory.

¹⁷⁸ *Autodesk Inc v Yee* (1996) 68 FCR 391, 394 (Burchett J).

¹⁷⁹ *Copyright Act 1968* (Cth) s 115(4)(b).

¹⁸⁰ (2006) 70 IPR 172, 188 [37] (Raphael FM).

sense'.¹⁸¹ In *Weiss v Prentice Hall Canada Inc*,¹⁸² had the Court been unhampered by a CAD\$6 000 jurisdictional limit, it may 'have trained [its] sights somewhat higher ... and considered the question of punitive or even exemplary damages'.¹⁸³ The Court did, however, hold that damages can be assessed 'by way of a reasoned consideration of the effect on the [p]laintiff *and on the public* of the wrongful acts of the [d]efendants'.¹⁸⁴ And some United States moral rights statutes expressly provide for punitive damages.¹⁸⁵

The obvious lack of additional damages in the suite of moral rights remedies casts doubt on the assertion in *Perez* that 'compensation for moral rights infringements ... covers the same field' as additional damages.¹⁸⁶ The lack of an equivalent provision in the *Trade Marks Act 1995* (Cth) has precluded additional damages for trade mark infringement:

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 extending that remedy to exemplary damages.¹⁸⁷

Whether these comments made in relation to a robust *proprietary* trade mark right should extend to the personal realm of moral rights is questionable. Indeed, additional damages are particularly apt with respect to moral rights infringements, as Driver FM recognised in *Perez*.¹⁸⁸ In any event, exemplary damages may be available under *Paramount Pictures Corporation v Hasluck's* 'necessary implication' condition,¹⁸⁹ at least in a post-mortem context, if the fact of the author's death makes them the only workable damages remedy, and

¹⁸¹ *Dolmage v Erskine* (2003) 23 CPR (4th) 495, 530 (Searle DJ) (Ontario Superior Court of Justice).

¹⁸² (1995) 66 CPR (3rd) 417 (Ontario Court (General Division)).

¹⁸³ *Ibid* 439 (Harris DJ).

¹⁸⁴ *Ibid* 428–9.

¹⁸⁵ See, eg, *California Art Preservation Act*, Cal Civ Code § 987(e)(3) (1995) which states that if punitive damages are awarded, the court shall 'select an organization or organizations engaged in charitable or educational activities involving the fine arts in California to receive any punitive damages.'

¹⁸⁶ (2012) 260 FLR 1, 14 [80] (Driver FM).

¹⁸⁷ *Paramount Pictures Corporation v Hasluck* (2006) 70 IPR 293, 301 [36] (French J). Note that this has now been remedied by the *Intellectual Property Laws Amendment (Raising the Bar) Act 2012* (Cth) sch 5 pt 3 s 29.

¹⁸⁸ (2012) 260 FLR 1, 14 [80].

¹⁸⁹ *Paramount Pictures Corporation v Hasluck* (2006) 70 IPR 293.

to utilise their deterrent rationale. Finally, recalling the court's general discretion as to the appropriate relief for moral rights infringement,¹⁹⁰ and the inclusive list of remedies,¹⁹¹ a court could grant non-compensatory damages.

If, as suggested in *Perez*, moral rights damages '[cover] the same field' as additional damages,¹⁹² then we can apply the principles relating to additional damages. While additional damages are a sui generis model,¹⁹³ they may be awarded on principles that correspond to those governing awards of aggravated¹⁹⁴ and exemplary damages at common law.¹⁹⁵ However, 'additional damages for copyright infringement are not limited to the circumstances in which aggravated and exemplary damages are recoverable in tort',¹⁹⁶ although they are approached cautiously.¹⁹⁷ In all cases, 'the abiding question in considering an award of additional damages is the statutory question "whether the court is satisfied that it is appropriate to do so".'¹⁹⁸

In *Perez*, Driver FM noted that the discretion to award additional damages is 'broad and unfettered', requiring no 'arithmetic nexus with the amount of compensatory damages awarded.'¹⁹⁹ Importantly, for post-mortem infringements, Driver FM clarified that '[t]he objective is independent of compensa-

¹⁹⁰ *Copyright Act 1968* (Cth) s 195AZA(2).

¹⁹¹ *Ibid* s 195AZA(1). By the same token, however, the wording in the *Trade Marks Act 1995* (Cth) s 126 is similar: '[t]he relief that a court may grant in an action for an infringement of a registered trade mark includes ...'

¹⁹² (2012) 260 FLR 1, 14 [80] (Driver FM).

¹⁹³ *Facton Ltd v Rifai Fashions Pty Ltd* (2012) 287 ALR 199, 206 [36] (Lander and Gordon JJ), citing *Autodesk Inc v Yee* (1996) 68 FCR 391.

¹⁹⁴ For example, additional damages have been awarded for hurt feelings resulting from copyright infringement: see, eg, *Milpurrurru v Indofurn* (1994) 54 FCR 240; *Monte v Fairfax Media Publications Pty Ltd* [2015] FCCA 1633 (7 August 2015) where the reproduction of a photograph caused the applicant embarrassment and pain because it drew attention to the fact that his wife operated an escort business, which was not previously known to her family and children.

¹⁹⁵ *Autodesk Inc v Yee* (1996) 68 FCR 391, 394 (Burchett J).

¹⁹⁶ *Dynamic Supplies Pty Ltd v Tonnex International Pty Ltd [No 3]* (2014) 312 ALR 705, 715 [42] (Yates J) ('*Tonnex*'), citing *Luxottica Retail Australia Pty Ltd v Grant* (2009) 81 IPR 26, 37 [39] (White J).

¹⁹⁷ *Tonnex* (2014) 312 ALR 705, 715 [43] (Yates J), citing *Polygram Pty Ltd v Golden Editions Pty Ltd* (1997) 76 FCR 565, 577 (Lockhart J).

¹⁹⁸ *Tonnex* (2014) 312 ALR 705, 715 [44] (Yates J).

¹⁹⁹ (2012) 260 FLR 1, 13 [75].

tion of the copyright owner²⁰⁰ and noted that additional damages may respond to ‘contempt for the rights of the copyright owner’.²⁰¹ Notably, the objectives of an award of additional damages include deterrence,²⁰² and an element of penalty is an accepted factor in the remedy.²⁰³ Further, while additional damages are ‘additional’ to other damages, they may be awarded to complement nominal damages.²⁰⁴

An important issue is whether the principles governing exemplary damages at common law should necessarily be imported into moral rights jurisprudence. This is significant because the chief limitation of common law exemplary damages is their rarity, at least under existing standards: ‘Exemplary damages are awarded rarely. They recognise and punish fault, but not every finding of fault warrants their award. Something more must be found.’²⁰⁵ The threshold is high: ‘the remedy is exceptional in the sense that it arises (chiefly, if not exclusively) in cases of *conscious* wrongdoing in *contumelious disregard* of the plaintiff’s rights’.²⁰⁶

Certainly, *Meskenas* adopted the common law language of exemplary damages, refusing to award punitive damages because such damages would reflect the ‘contumelious disregard’ of *Meskenas*’ rights, which had already been covered under the additional damages award for copyright infringement.²⁰⁷

Contumelious disregard requires an ‘insulting manifestation of contempt in words or actions’, including ‘contemptuous or humiliating treatment’.²⁰⁸ In a moral rights context, there will be instances when the defendant’s conduct clearly meets this threshold (the wilful destruction of an iconic artistic

²⁰⁰ Ibid. See also Supplementary Explanatory Memorandum, Copyright Amendment (Parallel Importation) Bill 2002 (Cth) 4 [3], describing the deterrence factor in s 115(4)(b)(ia) as: ‘[t]he remedy of additional damages is not a compensatory remedy.’

²⁰¹ *Perez* (2012) 260 FLR 1, 14 [77].

²⁰² *Copyright Act 1968* (Cth) s 115(4)(b)(ia).

²⁰³ *Autodesk Inc v Yee* (1996) 68 FCR 391, 394 (Burchett J).

²⁰⁴ *Tonnex* (2014) 312 ALR 705, 717 [52] (Yates J); *Aristocrat Technologies Australia Pty Ltd v DAP Services (Kempsey) Pty Ltd* (2007) 157 FCR 564, 572 [54] (Black CJ and Jacobson J); *Allam v Aristocrat Technologies Australia Pty Ltd* (2012) 95 IPR 242, 314–16 [403]–[414].

²⁰⁵ *Gray* (1998) 196 CLR 1, 6 [12] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

²⁰⁶ *Ibid* 9 [20] (emphasis added); see also 28 [85] (Kirby J).

²⁰⁷ (2006) 70 IPR 172, 188 [37] (Raphael FM).

²⁰⁸ *Macquarie Dictionary*, above n 73, 319.

masterpiece, for example). This would be analogous to an award of additional damages in copyright infringement for flagrancy. This standard would exclude many moral rights infringements that, while serious, fall short of it. However, while conscious wrongdoing in contumelious disregard of another's rights 'describes at least the greater part of the relevant field' of exemplary damages,²⁰⁹ it does not completely occupy it. It arises '*chiefly*, if not exclusively',²¹⁰ in such cases. And while exemplary damages may be awarded rarely, 'they have been awarded in very different kinds of cases ... [a]nd the examples could be multiplied.'²¹¹ Indeed, '[b]ecause the kinds of case in which exemplary damages might be awarded are so varied, it may be doubted whether a single formula adequately describes the boundaries of the field in which they may properly be awarded.'²¹² This hints at some room to evolve the doctrine in the context of posthumous moral rights infringement, particularly in conjunction with the apparent, broad remedial discretion the court enjoys. This may be necessary if exemplary damages are to play a significant role in posthumous moral rights infringement. If the objective is to open up a more general basis for substantial damages in the absence of compensatory damages, it may be necessary to recalibrate the contumelious disregard standard, at least in the moral rights context. This may require some modification of the common law punitive damages doctrine as it applies to moral rights infringement, and some cherry picking of features which are consonant with post-mortem moral rights infringement.

The deterrence objectives of exemplary damages also support their post-mortem award.²¹³ We may argue that if the deceased no longer has a relevant protected interest, due to his or her death, then a damages model which deters interference with that non-existent interest is problematic. However, a deterrence model is particularly relevant to the post-mortem sphere because it better explains how posthumous moral rights protect *social* interests in the

²⁰⁹ *Gray* (1998) 196 CLR 1, 7 [14] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

²¹⁰ *Ibid* 9 [20] (emphasis added).

²¹¹ *Ibid* 6 [12].

²¹² *Ibid* 7 [14].

²¹³ These objectives are also reflected in additional damages for copyright infringement. *Copyright Act 1968* (Cth) s 115(4)(b)(ia) was designed to prompt a consideration of 'the context of the broader impact on similar conduct and the award of additional damages in relation to that conduct': Supplementary Explanatory Memorandum, Copyright Amendment (Parallel Importation) Bill 2002 (Cth) 4 [3].

preservation of cultural products by deterring the wider social harm that can be caused by moral rights infringement.²¹⁴ Since the dead cannot complain, it is reasonable to assume that defendants may be more reckless with the works of the dead than the living, and may need a more potent corresponding disincentive to infringe. Exemplary damages can provide this educative effect, anticipating and discouraging infringement by teaching ‘a wrongdoer that tort does not pay.’²¹⁵ In this sense exemplary damages ‘blend together *the interests of society* and of the aggrieved individual, and are not only a recompense to the suffering, but also a punishment to the offender and an example to the community.’²¹⁶ This is not to say that exemplary damages are a perfect mechanism for restraining harm to works. But in the absence of any other damages, they are more effective than nothing, and they may be the only way that a plaintiff can be compensated for the costs of bringing the litigation. Nor should we be too concerned about enormous damages awards. Most moral rights damages awards (which are rare in themselves) have been moderate.

VII REFORM SUGGESTIONS

The above discussion demonstrates that compensatory posthumous damages are at best unwieldy, at worst impossible. Both posthumous exemplary and restitutional damages seem possible, but may be so rarely awarded that they cannot function as a general basis for posthumous damages. If there are insuperable obstacles to substantial damages for posthumous moral rights infringements, and such damages are necessary for an effective posthumous moral rights scheme, then our system needs modification.

²¹⁴ For example, in the Canadian case *Vaillancourt v Carbone* [1999] RJQ 490 (Cour Supérieure du Québec), CAD\$150 000 in punitive damages were awarded when a culturally valuable work was destroyed.

²¹⁵ *Broome v Cassell & Co Ltd* [1972] AC 1027, 1130 (Lord Diplock). See also *Gray* (1998) 196 CLR 1, 27–8 [84]–[85] (Kirby J); *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1985) 155 CLR 448, 470 (Brennan J).

²¹⁶ *Florida Cent & P R Co v Mooney*, 24 So 148, 150 (Fla, 1898), quoted in Thomas B Colby, ‘Clearing the Smoke from *Phillip Morris v Williams*: The Past, Present and Future of Punitive Damages’ (2008) 118 *Yale Law Journal* 392, 462.

A Statutory Clarification of Posthumous Damages

Legislative intervention is needed to better clarify the statutory basis for damages for the dead. A compensatory model must be retained for the benefit of living authors. However, since the dead cannot suffer loss, only a compensatory model aimed at compensating *society's* loss is coherent. In the absence of community standing to take action, the statute must be interpreted to permit the legal personal representative to effectively claim on behalf of society. The difficulty with causation must be overcome by interpreting the statute to read that the defendant's conduct would be prejudicial had the author been alive. The author's beneficiaries may technically gain a windfall unless the damages are diverted to the state after the claimant's expenses are recuperated. The statute could be tinkered with to try to ameliorate some of these awkward obstacles.

However, the preferable option is to supplement a compensatory model with a quasi-exemplary model which condemns the defendant's wrong and deters others. The *Copyright Act 1968* (Cth) must stipulate that damages are not limited to compensatory 'damages for loss', and should expressly reflect the preponderance of case law suggesting that aggravated, exemplary and restitutionary damages are available. This could be achieved by explicitly including an additional damages formula analogous to the model of the *Copyright Act 1968* (Cth). Like the copyright model, this would be a *sui generis* model that can evolve in its own moral rights landscape. In particular, it could include a bespoke provision recognising the effect of the defendant's conduct *on the work*,²¹⁷ thus adopting the essential feature of exemplary damages most apposite in a posthumous context, without necessarily importing the exceptional contumelious disregard standard.

B Severance of the Honour or Reputation Limb

It is tempting to think we can overcome the difficulties discussed in this article by modifying the statutory basis for damages as explained above. However, these actions in themselves will not ameliorate the problem. This is because the problem is also caused by the structure of the integrity right and its requirement of *authorial* prejudice to honour or reputation when the

²¹⁷ Complementing *Copyright Act 1968* (Cth) s 195AZA(2)(b), which considers 'the effect on the author's honour or reputation resulting from any damage to the work'.

author is no longer with us. Unlike, for example, the French model,²¹⁸ the common law countries adopt a binary prototype requiring both mistreatment of the work *and* prejudice to honour or reputation.

As has been argued, a public welfare objective best explains posthumous moral rights, which protect the public's interest in the *works* of authors. That public objective is thwarted by a structure which insists on prejudice to the honour or reputation of the (private) dead. Therefore, we need to sever the link to authorial honour or reputation. The focus should be on mistreatment of the work, rather than denigration of the author. This better supports the posthumous purpose of moral rights, which is to protect works, not authors. Authors are only authors because they produce works. Abuse of the work may incidentally prejudice the author's honour or reputation, but it should not be an essential element of the right. It also results in superfluity with defamation during the author's lifetime, and, as has been demonstrated, simply muddies the water after death. Under this reconstituted model, harm to the work would then both trigger the right of action and establish damage. Damages could be quantified by considering the loss in value of the *work*.²¹⁹ It also cures the causation problem, because the loss results from derogatory treatment of the work, which can be objectively assessed, rather than prejudice to the author's honour or reputation.

How should this new severed right be expressed? We could adopt the French model, where the moral right of integrity protects the author's right to 'respect' for the work.²²⁰ The effect of the defendant's conduct on the author is irrelevant, with the effect on the *work* the central consideration.

It is also tempting to look to France because it is the birthplace of moral rights, and there is clear precedent for awarding posthumous damages. It is beyond the scope of this article to conduct a thorough analysis of all European moral rights decisions in which posthumous damages have been awarded. However, in France, F600 000 were awarded for the posthumous infringement

²¹⁸ *Code de la Propriété Intellectuelle* [Intellectual Property Code] (France) art L 121-1 [author's trans].

²¹⁹ See Tettenborn, 'What Is a Loss?', above n 76, 461: 'the analysis becomes similar to that obtaining in the case of straightforward theft or destruction of a physical asset: the plaintiff is entitled to the value of the interest destroyed (ie the value of the goods), without the need to argue what further effects there may have been on her'.

²²⁰ *Code de la Propriété Intellectuelle* [Intellectual Property Code] (France) art L121-1 [author's trans].

of director John Huston's and co-author Ben Maddow's moral rights,²²¹ €20 000 in damages was awarded for the infringement of deceased sculptor Giacometti's right of disclosure when a gallery wrongfully sold two zinc lithographic plates;²²² €8000 was awarded for the modification of a deceased artist's theatre festival logo;²²³ and €4000²²⁴ and €5000²²⁵ were awarded for failure to attribute Alberto Korda, the deceased author of the iconic Che Guevara photograph, and for making unauthorised changes to the photograph.

It may seem incongruous that the French judiciary does not agonise over awarding damages for the dead. The likely explanation is the significantly different character of the French moral right of integrity, which, as mentioned, requires a lack of respect for the work and ignores the effect on the deceased author's honour or reputation. France also has a different posthumous legislative structure, with moral rights passing to the author's heirs or some other nominated person,²²⁶ although those persons must adhere to the author's will.²²⁷

We may want a higher threshold than the French model, which imports a subjective standard that has been criticised for the extensive control it confers

²²¹ *Turner Entertainment Co v Huston*, Cour d'appel de Versailles [Versailles Court of Appeal], 615/92, decision n° 68, 19 December 1994 reported in (1995) [Lon Sobel trans, 'Recent Cases' (1995) 16(10) *Entertainment Law Reporter* 3] ('*Huston*'). In comparison, in another French case involving a posthumous claim for infringement of the moral right of integrity, only nominal damages of €1 were awarded because the plaintiff conceded that the loss was 'purely symbolic': *Hugo v Plon SA*, unreported, Cour d'Appel de Paris [Paris Court of Appeal], 31 March 2004. Note that the defendant ultimately prevailed in subsequent appeals. In *Huston*, it is not clear whether the damages award was influenced by the fact that one co-author, Ben Maddow, was living, and whether the award would have been different had Mr Maddow also been deceased at the time the claim was commenced. It is certainly clear that the Court made no mention of Huston's death or its relevance.

²²² Tribunal de Grande Instance de Paris [High Court of Paris], 06/05762, 4 April 2008.

²²³ Cour d'appel d'Angers [Angers Court of Appeal], 06/02169, 5 September 2006.

²²⁴ Cour d'appel de Paris [Paris Court of Appeal], 07/16456, 10 September 2008.

²²⁵ Tribunal de Grande Instance de Paris [High Court of Paris], 04/09872, 19 March 2008.

²²⁶ *Code de la Propriété Intellectuelle* [Intellectual Property Code] (France) art L121-1 expressly declares the moral rights of paternity and integrity as perpetual and transmissible upon death to the author's heirs, and adds that they may be exercised by third parties that are appointed in the author's will.

²²⁷ Elisabeth Logeais, 'Post-Mortem Exercise of Copyright in French Law: Old Debates, New Issues' (1991) 2 *Entertainment Law Review* 185, 186 n 5, quoting Henri Desbois, *Le Droit d'Auteur en France* (Daloz, 3rd ed, 1978) 569 [466].

on authors.²²⁸ I suggest using the existing statutory language and modifying it slightly, but to significant effect, to read:

Derogatory treatment means ‘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’,²²⁹ or ‘the doing of anything else in relation to the work’²³⁰ that is prejudicial to *the work*.

This would eliminate the considerable contention surrounding the meaning of reputation and honour in the integrity right. Argument would be limited to the meaning of ‘prejudicial’ in the context of the work itself, with dictionary definitions suggesting it means ‘causing prejudice or disadvantage; detrimental’.²³¹ Prejudice to the work could cause harm to honour or reputation, but does not require it. It is a higher threshold than the French standard of ‘respect’.

This severance structure is not foreign to us. The now repealed s 55(2) of the *Copyright Act 1968* (Cth) provided that the compulsory licensing provisions of s 55(1) did not apply in relation to a record of an adaptation of a musical work if the adaptation ‘debases’ the *work*. The only noteworthy case on s 55(2), *Schott Musik International GmbH & Co v Colossal Records of Australia Pty Ltd* (‘*Schott*’),²³² clarified that in construing debasement, the relevant consideration was the effect of the adaptation on the work and not the ‘honour or reputation’ of the author.²³³

The severance model also legitimately questions the contemporary relevance of a requirement of prejudice to honour or reputation. Those words were included in the text of the *Berne Convention* at the Rome Conference in 1928 as a convenient compromise to placate common law countries.²³⁴ This reflected a xenophobic response to the alien civil law character of moral rights, which persisted for decades.²³⁵ The words ‘moral interests’ in the

²²⁸ See above n 227.

²²⁹ *Copyright Act 1968* (Cth) s 195AJ(a).

²³⁰ *Ibid* s 195AJ(b).

²³¹ *Macquarie Dictionary*, above n 73, 1123.

²³² (1996) 71 FCR 37, affd (1997) 75 FCR 321.

²³³ *Schott* (1996) 71 FCR 37, 42 (Tamberlin J).

²³⁴ Ricketson, *The Berne Convention*, above n 37, 461–2 [8.97]–[8.98].

²³⁵ See, eg, Copyright Law Review Committee, *Report of the Committee Appointed by the Attorney-General*, above n 45, 10 [11] (‘[t]he theoretical basis for moral rights protection in a

original Italian proposal²³⁶ were replaced by the words ‘honour or reputation’ because ‘the British delegation found the former expression too vague and incapable of conveying any clear meaning in British law’.²³⁷ When introduced in the *Berne Convention*, the phrase was seen to codify the perceived existing protection offered by more familiar laws, especially defamation, and therefore seemed a reasonable concession. This compromise ultimately meant that the moral rights encapsulated in the *Berne Convention* are ‘far from being a full-blooded provision on moral rights.’²³⁸ I would go further, and suggest that it resulted in an amalgam of defamation and moral right which is unworkable in a posthumous context. This hybridisation causes the problems identified in this article (and others)²³⁹ *without justification* — what is the compelling reason for linking to honour or reputation? These questions were simply not considered at the time. Now there is probably greater understanding and acceptance of the civil law theories underlying moral rights, and moral rights are recognised as one of the four fundamental principles of Australian copyright law.²⁴⁰

Moral rights have consistently been resisted or rejected due to concerns about authorial control, chilled speech and the subjective hypersensitivity of authors.²⁴¹ But they have been rarely litigated,²⁴² as foreshadowed when the

common law based system has not been identified’, 15 [24] (‘[moral rights] will be a totally new concept in the Australian common law system’), 20 [35]: ‘the concept is unusual’. The Committee continued at 27 [50]: ‘The majority considers that proponents have underestimated the “foreignness” of the moral rights concept to those used to a common law system ... Laws which impose limitations on a person’s use of his or her personal tangible property that are based upon another individual’s perception of interest in that property are alien to our legal system’.

²³⁶ Ricketson, *The Berne Convention*, above n 37, 460 [8.96].

²³⁷ *Ibid* 461–2 [8.98].

²³⁸ *Ibid* 467 [8.102].

²³⁹ See, eg, McCutcheon, ‘Honour of the Dead’, above n 7.

²⁴⁰ The ‘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’: see Copyright Council Expert Group, ‘Directions in Copyright Reforms in Australia’ (Paper presented at the 2011 Copyright Symposium, Australian Maritime Museum, Sydney, 13–14 October 2011) 1 <http://www.copyright.org.au/acc_prod/ACC/News_items/Directions_in_Copyright_Reform_in_Australia.aspx?WebsiteKey=8a471e74-3f78-4994-9023-316f0ecef4ef>.

²⁴¹ Lim, above n 156, 309–10; Adeney, ‘The Moral Right of Integrity’, above n 156, 115–16; Adeney, *The Moral Rights of Authors*, above n 64, 584–5 [18.65]; Robert C Bird, ‘Of Geese, Ribbons, And Creative Destruction: Moral Rights And Its Consequences’ (2011) 90 *Texas*

rights were introduced.²⁴³ These suggested reforms are hardly going to open floodgates. Further, the rights, however expressed, are tempered by the safeguard of the reasonableness defence, which should accommodate tolerable speech and guard against unreasonable claims of harm to works.

In summary, a modified quasi-exemplary damages model premised on prejudice to the work, combined with a reasonableness defence, is a robust, logical and workable model that balances the majority of interests at play.

VIII CONCLUSION

The express and deliberate post-mortem reach of the moral right of integrity suggests that Parliament wanted those rights to function posthumously, and the statute expressly contemplates that damages may be awarded with respect to posthumous breaches. It is flawed logic to introduce rights, then stand by and argue that it is immaterial whether those rights are protected or not because the rights holder is dead. Why confer the rights in the first place?

Despite the elasticity suggested by the idea of 'loss' being 'essentially indeterminate' and incapable of definition,²⁴⁴ stretching the compensatory damages model to compensate the dead is ungainly. The dead can neither be injured nor compensated, and they have no personal interests to protect. In its disregard of the victim and its deterrence rationale, exemplary damages are more relevant, but under existing doctrine operate chiefly, if not only, in exceptional cases demonstrating 'conscious wrongdoing in contumelious

Law Review 63, 68; Jon A Baumgarten, 'On the Case Against Moral Rights' in Peter Anderson and David Saunders (eds), *Moral Rights Protection in a Copyright System* (Griffith University, 1992) 87, 88. See also Copyright Law Review Committee, *Report on Moral Rights*, above n 45, 26 [47].

²⁴² Since 2000, only a handful of cases have engaged with moral rights. *Meskenas* (2006) 70 IPR 172 and *Perez* (2012) 260 FLR 1 have most comprehensively considered moral rights. Other cases have touched on them: *McCausland v Surfing Hardware International Holdings Pty Ltd* [2013] NSWSC 902 (9 July 2013); *Corby v Allen & Unwin Pty Ltd* (2013) 297 ALR 761; *Rutter v Brookland Valley Estate Pty Ltd* (2009) 81 IPR 549; *Adams v Quasar Management Services Pty Ltd* (2002) 56 IPR 385.

²⁴³ See the second reading speech of Attorney-General Daryl Williams, where he stated that '[e]xperience in other countries suggests — and the government envisages — that enforcement of moral rights through the courts will be an exceptional occurrence': Commonwealth, *Parliamentary Debates*, House of Representatives, 18 June 1997, 5549.

²⁴⁴ Tettenborn, 'What Is a Loss?', above n 76, 456.

disregard of the plaintiff's rights'.²⁴⁵ These limitations compromise the efficacy of posthumous moral rights, because a right without a remedy is a hollow thing:

If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it; and indeed it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal.²⁴⁶

The fact that damages have been awarded to the living without proof of obvious loss does not lead inexorably to the conclusion that damages should be available to the dead. However, posthumous damages are justified on other bases. While there may be no meaningful *authorial* loss to compensate, posthumous moral rights perform an instrumental function, regulating the prevention of social harm caused by the mistreatment of works. In this context, the personal rights of the deceased author are used as a convenient, if flawed, mechanism to protect social interests and to deter harm to works. Whether this model is the most efficient means of regulating such behaviour is a legitimate question. Public law may be superior to private law in protecting against public harm. Ultimately, the number of problems which beset posthumous moral rights suggests that *sui generis* legislation specifically crafted to better protect the public interests that posthumous rights continue to safeguard may be required.²⁴⁷ A posthumous *private* law action by a representative of the deceased (who may not even necessarily be close to the deceased) funnelling damages to the author's beneficiaries seems an inefficient method of protecting *public* interests. A model imposing duties rather than conferring rights, and giving society standing to take action for a breach of those rights, may be more apposite in a post-mortem context.²⁴⁸

²⁴⁵ *Gray* (1998) 196 CLR 1, 9 [20] (Gleeson CJ, McHugh, Gummow and Hayne JJ), 28 [85] (Kirby J); *Whitfield v DeLauret & Co Ltd* (1920) 29 CLR 71, 77 (Knox CJ). See also *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1985) 155 CLR 448, 471 (Brennan J).

²⁴⁶ *Ashby v White* (1703) 2 Ld Raym 938, 953; 92 ER 126, 136 (Holt CJ) (citations omitted).

²⁴⁷ See McCutcheon, 'Death Rights' above n 27; McCutcheon, 'Honour of the Dead', above n 7.

²⁴⁸ A thorough exploration of alternative models for the more optimal protection of these public interests is warranted, but beyond the scope of this article. For some discussion on this point see McCutcheon, 'Death Rights', above n 27.

Working with the existing system, the current damages models leave us too doctrinally bereft to permit recovery of the substantial damages which predicate workable posthumous moral rights. And if a public welfare objective best explains posthumous moral rights, then a structure which insists on prejudice to the honour or reputation of the (private) dead, rather than prejudice to the *works* those authors created while alive, may always thwart that objective. Therefore, reform is necessary. This article recommends statutory reform which enlarges the basis for posthumous damages and dissolves the link between the affront to the work and the author's honour or reputation.

There are a number of tort and contract cases where damages have been awarded without apparent loss,²⁴⁹ or without the suffering of it. These cases are inconsistent and controversial, difficult to explain, and a coherent rationale is often plainly missing.²⁵⁰ However, many of these cases are decided clearly on public policy grounds. Thus, when the fact that a plaintiff may be insured is disregarded, this is designed to foster sensible commercial decisions to take out insurance in order to minimise risk. In loss of life cases, damages assist the survivors of the wrongly killed victim. When unconscious plaintiffs are awarded damages for their lost amenities, perhaps this may be explained simply because of the court's desire to achieve a 'just and convenient result' and to avoid 'the anomaly of the defendant otherwise escaping scot-free'.²⁵¹ Similar concerns apply to posthumous moral rights infringements, where in all cases we are, after all, confronted with the defendant's *liability*. Substantial damages should be available to symbolise public respect for the works of authors and signify the community's condemnation of the defendant's wrong.

²⁴⁹ Tettenborn, 'What Is a Loss?', above n 76, 450–2. See also Kit Barker, "'Damages without Loss': Can Hohfeld Help?' (2014) 34 *Oxford Journal of Legal Studies* 631.

²⁵⁰ Barker, 'Vindication in Private Law', above n 171; Tettenborn, 'What Is a Loss?', above n 76, 447–8.

²⁵¹ Tettenborn, 'What Is a Loss?', above n 76, 454.