Damned if You Do, Damned if You Don't: When Can an Art Gallery Make Changes to an Artwork?

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Abstract

Contemporary art is often challenging and confronting. Some works are considered objectionable or offensive and as a result not able to be shown in their original form. This paper considers the question of whether, and in what circumstances, an art gallery can make changes to such artworks in order to exhibit them. While the issue is not a new one, it is one that confronted the Museum of Old and New Art ('MONA') in 2014 in relation to an exhibition entitled *Southdale/C'Mona*. The issue is particularly relevant to galleries such as MONA, whose brief is to show challenging and confronting art. This paper seeks to highlight the difficulties that confront such galleries when they try to reconcile their concerns alongside the protections afforded to artists under moral rights laws set out in the *Copyright Act 1968* (Cth). The MONA scenario is used as a case study throughout the paper to illustrate the discussion.

I INTRODUCTION

Contemporary art can be challenging and confronting.[1] As a result, galleries and museums often take risks in displaying such art. So in what circumstances can a gallery make changes to an artwork? Is the ability to deal with the artwork limited in any way? And what happens if the artist objects? These issues confronted the Museum of Old and New Art ('MONA') in Hobart, Tasmania in relation to one of its recent exhibitions, *Southdale/C'Mona*. While that situation did not proceed to litigation, it is used here as a case study for discussing the potential impact of moral rights law in Australia on this and similar disputes. The

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[1] Much has been written on challenging and confronting art. While generally beyond the scope of this article, see Kieren Cashell, *Aftershock: The Ethics of Contemporary Transgressive Art* (I.B. Tauris, 2009); Anthony Julius, *Transgressions: The Offences of Art* (Thames & Hudson, 2002). This latter work provides an historical overview of art which has tested and pushed society's norms

issue is particularly relevant to galleries such as MONA, whose brief is to show challenging and confronting art.[2]

The right of integrity is one aspect of an artist's moral or personal rights that exist separately from an artist's economic rights. Moral rights are a recent addition to Australia's copyright laws and seek to give creators additional protections. One of the key moral rights is the right of integrity – the right to object to derogatory treatment of an artistic work – that is, treatment that is prejudicial to an artist's honour or reputation. This paper interrogates the question: does an art gallery risk breaching the right of integrity if it alters an artwork in response to public concern? The question is discussed with reference to Australian law and includes discussion of the United States (US) statutory regime and relevant case law. The paper is divided into four parts. Part II sets out some background on the case study scenario. Part III deals with the substantive law in Australia and the US outlining various aspects of the legislation and relevant case law. Part IV of the paper considers how that law might apply to the case study.

II MONA & THE BÜCHEL INSTALLATION

In June 2014 MONA exhibited *Southdale/C'Mona* (the Büchel installation), a large installation artwork by Swiss artist Christoph Büchel.[3] Büchel has exhibited his large-scale installations throughout the world.[4] His installations are often provocative and occasionally act as pieces of interactive performance art because the audience or viewers are (often unwittingly) part of the work. For example, in 2011 Büchel installed a work in a London art gallery entitled the *Piccadilly Community Centre*.[5] It operated as a functioning community centre and was not immediately identifiable as an art installation. At the time commentators theorised that the work was a critique on Conservative party ethos. In

[2] Amanda Lohrey, 'High Priest, Amanda Lohrey on David Walsh and Tasmania's Museum of Old and New Art' *The Monthly* (2011) 78, 81. Here, Walsh noted that MONA 'welcomes confrontation and would be quite happy for people to picket the museum'.

[3] MONA is located at Berriedale in Hobart, Tasmania. Installation art is a term used to describe art that is created and installed in a specific site, for example in an art gallery space.

[4] Hauser & Wirth, *Christoph Büchel* <http://www.hauserwirth.com/artists/3/christoph-Büchel/biography/>.

[5] Adrian Searle, *Piccadilly Community Centre: Broken Britain invades Westminster* (31 May 2011) The Guardian <http://www.theguardian.com/artanddesign/2011/may/30/piccadilly-community-centre-christoph-Büchel>.

2010 his installation of a sex club at an art venue in Vienna also caused controversy.[6]

The Büchel installation transformed MONA into a shopping centre; intended to challenge and confront viewers' understanding of their surroundings. At first, no artist was identified. Superficially, it appeared as if the MONA site had indeed been turned into a shopping complex.[7] The 'ruse' was exposed shortly after the opening.[8] University of Tasmania Art Program Director Mr John Vella, noted that 'Büchel is making the statement that everything seen as edgy risks ending up becoming franchised'.[9] While intended to challenge viewers and their ideas about commercialisation and commodification, one particular aspect of the Büchel installation raised concerns: this was a stand with associated signage, ostensibly offering DNA testing under the banner, 'Are you of Aboriginal descent?' ('the DNA stand').

Shortly after the opening, the Tasmanian Aboriginal Centre expressed concern over the lack of consultation and stated that, had it been consulted, it would have warned MONA against putting the DNA stand on display.[10] MONA responded by removing the DNA stand from exhibition.[11] In a subsequent blog post, MONA's owner, David Walsh, apologised for any offence that had been caused.[12] Justifying the initial inclusion of the DNA stand, Walsh said that the installation was designed to challenge audiences' views, specifically on the impact of 'colonisation/invasion of Tasmania by Europeans'.[13] Walsh also highlighted that Büchel wanted the work to be exhibited in its entirety

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[6] Karin Wolfsbauer (adapted from German by Robert Brookes), *Swiss artist sparks controversy in Vienna* (2 March 2010) <http://www.swissinfo.ch/eng/swiss-artist-sparks-controversy-in-vienna-/8403804>.

[7] The name 'Southdale' being a reference to the Southdale Centre in the US, which opened in 1956 was the first indoor shopping centre of its kind and was designed by Victor Gruen (and envisaged as a community centre which would bring residents together for a range of reasons of which shopping was just one aspect). Later, Gruen would become disillusioned with the way in which his 'utopian experiment' was used to promulgate the very issues he had been trying to address.

[8] Jennifer Crawley, 'MONA art gets a malling', *The Mercury* (online) 21 June 2014) <http://www.themercury.com.au/news/tasmania/mona-art-gets-a-malling/story-fnj4f7k1-1226961881585>.

[9] Ibid.

[10] ABC News, 'MONA removes Aboriginal DNA test exhibit from art installation' *ABC News* (online) 25 June 2014 <http://www.abc.net.au/news/2014-06-25/mona-removes-aboriginal-dna-test-exhibit/5548838>.

[11] Ibid.

[12] David Walsh, *A letter of apology to Tasmanian Aboriginal people (and anyone else we have offended* (24 June 2014) MONA Blog <http://monablog.net/2014/06/24/a-letter-of-apology-to-tasmanian-aboriginal-people/>.

[13] Ibid.

and had been unwilling to allow MONA to remove aspects of the installation prior to it going public.[14] It was not clear in the post whether these 'aspects' included the DNA stand. Ultimately, it appears that the parties settled the matter as no litigation ensued and the exhibition ran its course. Interestingly, Büchel has previously been successful in protecting his moral rights in the United States. In the mid-2000s, the artist was commissioned by the Massachusetts Museum of Contemporary Art ('MASS MoCA') to create an installation to be called, *Training Ground for Democracy.* This case is discussed in Part III of this paper and serves as a useful comparison between Australian and US moral rights law.

The freedom to make and show art, controversial or otherwise, is certainly not absolute. Making and showing challenging and confronting art may expose both artists and galleries to legal sanction. Melbourne artist Paul Yore was recently charged (and subsequently cleared) of child pornography offences in relation to an installation artwork at the Lindon Gallery in Melbourne.[15] Police excised a number of images from his artwork, which were later used as evidence in the prosecution.[16] In *Pell v The Council of the Trustees of the National Gallery of Victoria*[17], then Archbishop of Melbourne George Pell, applied for an injunction against the National Gallery of Victoria to stop it from displaying an artwork by Andres Serrano entitled *Piss Christ*. He claimed the exhibiting of the artwork breach public obscenity laws.[18] While the court application ultimately failed, the National Gallery of Victoria nonetheless decided to remove the artwork from public display.

The issues arising from the removal of the DNA stand from the Büchel installation at MONA confirms that these matters continue to be of concern for artists and galleries. Although issues may arise under a variety of legal regimes, this article is concerned with the moral rights

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[14] David Walsh, *A letter of apology to Tasmanian Aboriginal people (and anyone else we have offended* (24 June 2014) MONA Blog <http://monablog.net/2014/06/24/a-letter-of-apology-to-tasmanian-aboriginal-people/>. See also a further blog post by Elizabeth Pearce which revisits the situation, Elizabeth Pearce, *Making fun: Mona and Büchel* (9 September 2014) MONA Blog <http://monablog.net/2014/09/09/making-fun-mona-and-buchel/>.

[15] *Johnson v Yore* (Unreported, Magistrates Court of Victoria, Case No D12709566, 1 October 2014).

[16] Ibid [3-4]. The police executed a search warrant at the gallery and cut out the images using a Stanley knife. Although not noted in the written decision, the Magistrate expressed concern about the cutting out of images from the artwork and whether it went beyond the terms of the warrant. It also raises real issues as to whether it constituted a breach of the artist's moral rights, see Rowena Orr SC and Georgie Coleman, *Collage as child pornography and the limits to the right to freedom of expression – Case note*, (23 February 2015) *Arts Law Centre of Australia* < http://www.artslaw.com.au/articles/archive/2015/02/>.

[17] [1998] 2 VR 391.

[18] Specifically a breach of s 17(1)(b) of the *Summary Offences Act 1966* (Vic) which prohibits writing, drawing or displaying 'an indecent or obscene figure of representation'.

regime under the *Copyright Act 1968* (Cth) ('*Copyright Act*').[19] Under this legislation, civil litigation may arise in the context of artists asserting moral rights against art galleries and those galleries may also seek to assert a defence to such a claim. This article will examine the statutory regime including defences, and more broadly the implications this may have on artists' freedom of creative expression.

III MORAL RIGHTS PROTECTION

In his blog post, MONA owner David Walsh stated that the artist, Büchel, 'holds the intellectual property for the exhibition'.[20] This is a reference to a number of rights Büchel has pursuant to the *Copyright Act*, which includes moral rights.[21]

A *International moral rights law*

Moral rights are recognised internationally by the Berne Convention, which sets out international principles for the protection of literary and artistic works.[22] This legal acknowledgement has its antecedents in philosophical thought that creators have personal rights in their creative product that goes beyond a proprietary or economic right.[23] These personal rights are seen as part of the creator's personality or 'personhood'.[24] Protection of these personal rights promotes both 'self-expression and human development'.[25] Most importantly for the purposes of this paper, Article 6bis of the Berne Convention states that the author has the right to 'object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor [sic] or reputation'.[26] Moral rights protections were enshrined in the Berne Convention at the 1928 conference held in Geneva.

Signatories to the Berne Convention, including Australia, are obliged to make domestic law in accordance with these principles but have latitude

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[19] *Copyright Act 1968* (Cth) ('*Copyright Act*').
[20] Walsh, above, n 12.
[21] *Copyright Act*, Part IX.
[22] *The Berne Convention for the Protection of Literary and Artistic Works*, opened for signature 14 July 1967, 1161 UNTS 3 (entered into force 10 October 1974) ('Berne Convention') art 6bis.
[23] Robert Bird, 'Protecting Moral Rights in the United States and the United Kingdom: Challenges and Opportunities under the U.K.'s New Performances Regulations' (2006) *Boston University International Law Journal* 213, 218.
[24] Ibid.
[25] Ibid.
[26] Berne Convention, above, n 22, art 6bis.

in determining the detail of those laws.[27] Accordingly, the moral rights protection an artist could obtain in one country is not necessarily duplicated in another country. As a result, it is necessary to analyse the specific test for protection under each member state's moral rights laws.

B *The Moral Rights Scheme in Australia*

Moral rights protections became part of Australian law in 2000.[28] Moral rights include a right of attribution and the concomitant right not to have work falsely attributed.[29] An artist has the right of integrity of authorship of his or her work, which is defined as 'the right not to have the work subjected to derogatory treatment'.[30] This right of integrity can be infringed directly by a person who subjects another's artwork to derogatory treatment.[31] It is also infringed by a person authorising the derogatory treatment, or by allowing the treated work to be communicated to the public.[32]

In relation to artistic works specifically, derogatory treatment is defined in the *Copyright Act* section 195AK as:

> (a) the doing, in relation to the work, of anything that results in a material distortion of, the destruction or mutilation of, or a material alteration to, the work that is prejudicial to the author's honour or reputation; or (b) an exhibition in public of the work that is prejudicial to the author's honour or reputation because of the manner or place in which the exhibition occurs; or (c) the doing of anything else in relation to the work that is prejudicial to the author's honour or reputation.[33]

For the purposes of considering MONA and the Büchel installation, it is s 195AK(a) that is most relevant. The essential elements require:

1. the doing of *anything* in relation to an artistic work that

2. results in a *material* distortion or material alteration to that work, and

3. is *prejudicial* to the artist's *honour or reputation* (emphasis added).

In respect of the Büchel installation, the doing of *anything* could include the removal a part of the installation such as the DNA stand. The second element requires that the distortion or alteration must be *material*, that is, distortion or an alteration that is relevant, substantial or significant.[34]

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[27] Ibid, art 6[bis] (3).
[28] *Copyright Amendment (Moral Rights) Act 2000* (Cth).
[29] *Copyright Act*, ss 193, 195AE.
[30] Ibid, ss 195AI.
[31] Ibid, s 195AQ. Derogatory treatment is further defined in s195AK.
[32] Ibid.
[33] Ibid, s 195AK.
[34] Peter Butt and David Hamer (eds), *LexisNexis Concise Australian Legal Dictionary* (LexisNexis Butterworths, 4th ed, 2011), 370.

Accordingly, the doing of *anything* must be relevant, substantial or significant. In relation to the Büchel installation, the removal of the DNA stand may be material but it may, or may not have been, prejudicial. It is possible, for example, that an alteration is substantial but in a way that is not prejudicial. For example, a change may be considered to be beneficial (though the question of who and how this is determined remains open). The question of whether a material alteration is prejudicial can only be ascertained by considering the third element. This third element, prejudice to honour or reputation, is the most complex aspect or element and is the subject of analysis in this paper.

The scheme also includes defences to such claims.[35] In particular, section 195AS(1) of the *Copyright Act* states that 'a person does not [infringe the right of integrity] if the person establishes that it was reasonable in all the circumstances to subject the work to the treatment.'[36] Defences are considered below.

C *Defining 'artistic works'*

Under Australian law, copyright subsists in original literary, dramatic, musical or artistic works (and also in other subject matter such as films, television and sound broadcasts).[37] Moral rights are recognised under Part IX of the *Copyright Act* in original literary, dramatic, musical and artistic works and in cinematograph films. The relevant category here is 'artistic works'. The definition of 'artistic work', set out in s 10(1) of the *Copyright Act,* is exhaustive and refers to either a painting, sculpture, drawing, engraving or photograph, or a building or model of a building. It is not necessary for any of these forms of artistic work to be of particular artistic quality.[38] Contemporary art, particularly art that seeks to shock, may involve forms that are innovative such is the case in regards to installation artworks, which do not fit the traditional view of what we, the average viewer, consider to be art. The term 'installation' is not referred to in the *Copyright Act* so there may be a threshold issue as to whether installation artworks are protectable as sculptures. 'Sculpture' is further defined to include casts or models made for the purpose of sculpture.[39] What constitutes a 'sculpture' was considered in the New Zealand case of *Lincoln Industries Ltd v Wham-O Manufacturing Co.*[40]

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[35] *Copyright Act*, s195AT.
[36] Ibid, s 195AS.
[37] Ibid, s 32. See Part IV generally.
[38] Ibid, s 10.
[39] Ibid s 10.
[40] [1984] 1 NZLR 641 ('*Wham-O'*).

In *Wham-O*, copyright protection was sought for models used in the manufacture of ride-on mowers. It was claimed the models were protectable as sculptures. In the New Zealand Court of Appeal, Davison CJ noted that the statutory definition of 'sculpture' (which is identical to the Australian provision) was inclusive and allowed for broader dictionary definitions to be considered.[41] In considering these, his Honour noted that the term 'sculpture' was not fixed and was subject to significant growth and change, both in its form and its content.[42] Sculpture was a branch of visual arts that concerned itself with expression in three dimensions.[43] While this definition is broad, there continues to be doubts as to whether installations as a whole are protectable, as opposed to their composite parts.[44] Despite these issues, for the purposes of this paper, it is assumed that the Büchel installation is capable of protection as a sculpture, although it is acknowledged that this is a controversial issue.

D *The Key Issue: Prejudice to Honour or Reputation*

Prejudice involves harming or injuring another's rights.[45] In relation to s 195AK(a), this prejudice may be to either an artist's honour or reputation (or both). But what do these words mean? And does the term 'honour' add anything to the notion of 'reputation'? There is a difference of opinion in answering these questions. Adeney suggests that the concept of honour 'extend[s] the protection offered by the right of integrity beyond the area of reputational harm'.[46] Adeney sets out two reasons why this must be the case. First, honour refers, in the English language, to a 'sense of self-worth' and is separate to an understanding of the term 'reputation'. This means that the protection offered by the right of integrity is wider than just reputational protection.[47] Second, where there is any doubt in interpreting the language used in the Berne Convention, the convention

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[41] Ibid [51-60].
[42] *Wham-O* [1984] 1 NZLR 641.
[43] Ibid.
[44] Ian McDonald, 'Current and Emerging Copyright Issues for the Visual Arts' (2001) 19 *Copyright Reporter* 32, 34-5. McDonald notes the UK case of *Creation Records Ltd v News Group Newspapers Ltd* (1997) 39 IPR 1 where it was held that placing or arranging objects and people (in this instance, around a swimming pool) did not constitute a sculpture for the purposes of the UK copyright legislation. In rejecting the proposition that the arrangement was a sculpture, Mr Justice Lloyd did not comprehensively engage with the point, other than to state that 'I do not regard this as seriously arguable. I do not see how the process of assembling these disparate objects together with the members of the group can be regarded as having anything in common with sculpture…'. However, in this author's opinion it is likely that the inclusion of animate objects (such as people) in an ephemeral arrangement explains the result and the broader issue raised by McDonald remains open.
[45] Ibid 450.
[46] Elizabeth Adeney, 'The moral right of integrity: the past and future of 'honour'' (2005) *Intellectual Property Quarterly* 111, 134.
[47] Ibid 121.

itself requires that the original French language text be considered.[48] The French definition of honour places a 'greater emphasis on the notion of personal dignity' than the English definition.[49]

Lim supports this analysis and identifies two meanings when considering the dictionary definitions of 'honour' – one which allows for an objective assessment of an author's standing in the community (not dissimilar the concept of reputation), and the other, which allows for a subjective assessment that the author has of him or herself.[50] This subjective assessment includes such aspects as personal beliefs, values, traits or views that the author holds. Lim argues that this latter meaning is the relevant definition of the term 'honour' for the purposes of s 195AK.[51] Lim argues that this better reflects Parliament's intention that the right of integrity extend protections to artists beyond those already afforded under defamation laws.[52] Adeney also highlights the subjective element in determining whether there is prejudice to 'honour', but notes that it is subservient to objective considerations.[53] Adeney argues that the Berne Convention is structured in such a way that it places an 'emphasis on the defendant's act - distortion, mutilation, modification - rather than on the effect on the author'.[54] As Adeney argues, any assessment is done in the abstract (because *actual* prejudice is not necessary). This makes the subjective aspect of the test less important than the objective aspect.[55]

In considering how a legal test would be framed, Lim suggests a subjective/objective test as applied by the Canadian courts.[56] For example, in *Snow v Easton Shopping Centre*[57] the Court considered evidence that supported the subjective element (being the author's own complaints), as well as evidence that supported the objective element (being expert evidence on the issue).[58]

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[48] Ibid.
[49] Ibid 121-2.
[50] Dennis Lim, 'Prejudice to Honour or Reputation in Copyright Law' (2007) *Monash University Law Review* 323, 295. Lim refers to definitions in both the Macquarie and Oxford dictionaries.
[51] Ibid 296.
[52] Ibid, See footnote 38 referring to the Second Reading Speech on the Copyright Amendment Bill 1997, where reference was made to the fact that Australia's laws of defamation (amongst others) provided incomplete coverage of Australia's obligations under the Berne Convention.
[53] Adeney, above n 47, 125-6.
[54] Ibid 127.
[55] Ibid. This is a point reinforced by the fact that moral rights protections continues after the death of the author, see Berne Convention Art 7(1).
[56] Lim, above n 51, 299.
[57] (1982) 70 CPR (2d) 105.
[58] Ibid.

Other commentators have taken a different view. Loughlan argues that the test for breach of the right of integrity is an objective one.[59] This is because during the 1928 Berne Convention proceedings, common law jurisdictions, such as Australia, only accepted inclusion of the terms 'honour or reputation' as they considered these concepts already protected under Australian defamation law.[60] In order to make out a defamation claim, the complainant must establish that there has been damage to their reputation.[61] Reputational damage may be established if a substantial and reasonable section of the community, having been exposed to the defamatory matter, would have a negative response to the plaintiff.[62] Can such test be used to determine a breach of the moral right of integrity? Loughlan argues that using something analogous to the 'relevant community' test from defamation law would accord with Australia's intentions at the 1928 conference on the Berne Convention.[63] Accordingly, the test for prejudice to honour or reputation would be whether the 'relevant community' would consider that there is prejudice to the artists' honour or reputation.[64] This relevant community would be made up of a 'substantial and respectable group' of which the artist is part.[65] However, it is submitted that the test also incorporates an artist's own subjective views and opinions as the artist is a member of the community and likely to hold similar views or beliefs. Accordingly, similar results might result from the application of either test. However, this author prefers the analysis of Adeney and Lim and subsequent articulation of a subjective/objective test as it reflects the proposition that moral rights are personal rights vesting in the artist and the laws protecting the right of integrity in Australia intended to go further than the existing protections for reputation alone.

In summary, assessment of whether these has been a breach of s 195AK(a) requires the application of the three elements set out above. Clearly the third element of prejudice to honour or reputation is the fundamental element in determining whether there has a breach. In considering this element, there needs to be an analysis of the artist's

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[59] Patricia Loughlan, 'The Right of Integrity: What is in that Word Honour? What is in that Word Reputation?' (2001) 12(4) *Australian Intellectual Property Journal* 189.

[60] Ibid 194. See the work of Ricketson. Note that Adeney reproduces the transcript of the Australian delegate to the 1928 proceedings on the Berne Convention in her article (above n 46, 119). In relation to the right of integrity, the delegate said it, '… [it is] probably already the subject of adequate protection…'

[61] LexisNexis Butterworths, *Halsbury's Laws of Australia*, vol 10 (at 7 October 2015), 145 Defamation, 'Introduction' [145-1].

[62] Loughlan, above n 59, 197. Loughlan notes that in defamation law the reference to community is not to the general community, but rather to a sub-community or 'relevant community'.

[63] Ibid 196.

[64] Ibid 196-197.

[65] Ibid 197.

subjective response, followed by an objective test (which can be determined via expert evidence).

There has been limited judicial consideration of a breach of moral rights in Australia.[66] The Federal Court decision of *Perez v Fernandez* is the only case to date that has considered the moral right of integrity.[67]

E *Perez v Fernandez*

Mr Perez was a recording artist and brought proceedings against a former business associate, Mr Fernandez. Amongst other things, Mr Perez asserted that his moral right of integrity was infringed in relation to alleged alterations to the 'Bon, Bon Song', which he wrote and recorded.[68] Mr Fernandez substituted a line of the song, replacing it with an audio drop made by Mr Perez for the purpose of promoting a tour. Mr Fernandez used the audio drop to suggest a positive association between the parties.[69] The alteration occurred without permission and Mr Fernandez's website published the song for a period of just over one month and was heard by anyone who visited the website during that time.[70] Federal Magistrate Driver accepted evidence given on behalf of Mr Perez (by his business advisor) that went to 'clarifying the manner in which Mr Perez's honour and reputation had been damaged'.[71] This evidence was that: other artists would pay to collaborate with Mr Perez; Mr Perez was 'concerned and upset by the distortion of the [his song] and the use made of it by Mr Fernandez'[72]; and that during that time, Mr Perez collaborated with other musicians and (due to Mr Fernandez's actions) was no longer able to offer any exclusive relationship with those musicians. As a result, Mr Perez lost potential financial gain.[73]

The above evidence was accepted as evidence of harm.[74] Clearly, aspects of this evidence were subjective. Driver FM also accepted that the rap/hip hop genre relied heavily on artist's reputation and associations or collaborations between artists was also important.[75] Further, the conduct was carried out against a backdrop of animosity between the parties that was the result Mr Perez's failed Australian music tour. Driver FM also

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[66] See, eg, *Meskenas v ACP Publishing Pty Ltd* [2006] FMCA 1136.
[67] *Perez v Fernandez* (2012) 260 FLR 1.
[68] *Perez v Fernandez* (2012) 260 FLR 1 [31].
[69] Ibid [28], the audio recording had been provided by Mr Perez to Mr Fernandez as part of a music tour which ultimately did not proceed. The failed tour was the subject of other court proceedings between the parties in the NSW Supreme Court.
[70] Ibid [34].
[71] Ibid [61].
[72] Ibid [60].
[73] Ibid [61].
[74] Ibid [67].
[75] Ibid [68].

noted that Mr Fernandez had showed flagrant disregard for the rights of Mr Perez.[76]

The replacement of a song line with the un-related audio drop was held to be a material distortion, alteration or even a mutilation for the purposes of s 195AJ.[77] In finding that this conduct was prejudicial to the author's honour or reputation, Driver FM found that the unauthorized use of the audio drop was prejudicial per se.[78] Driver FM went on to note that even if this were not the case, the evidence of Mr Perez's business advisor satisfied the Court that the conduct was prejudicial to his reputation and caused him anger and distress.[79] While Driver FM referred only to 'reputation', it is submitted that such consideration was effectively consideration of prejudice, not just to reputation, but also to 'honour and reputation'.

Driver FM treated the terms 'honour' and 'reputation' (for the most part) as elements of reputation only. However, in highlighting the subjective concerns of the artist, namely the feelings of anger and distress, there appears to be judicial acceptance that the terms differ. In addition, it is submitted that Driver FM did, in fact, apply the subjective/objective test in considering whether the artist suffered prejudice to his honour. For example, Driver FM accepted evidence that Mr Perez was both 'concerned and upset' by the distortion of his song (thereby arguably acknowledging the subjective aspect of 'honour'). Driver FM also accepted that the genre placed great importance on artistic associations in building both an artistic and commercial reputation (thus applying an objective test to the artists' subjective concerns). The Court also found that Mr Fernandez had no defence pursuant to s 195AS of the *Copyright Act*.

F *The Moral Rights Scheme in the US – Visual Artists Act (VARA)*

Signatories to the Berne Convention have flexibility in framing their own domestic laws in respect of international obligations. The next part of this paper considers US moral rights protections. This jurisdiction is particularly relevant as Büchel's artworks was also the subject of dispute in the US, manifesting in the case of *Massachusetts Museum of Contemporary Art Foundation v Büchel*.[80] Consideration of the US regime and that case can assist in determining how litigation might have played out in respect of MONA and the Büchel installation. The

[76] Ibid [76].
[77] Ibid [84].
[78] *Perez v Fernandez* (2012) 260 FLR 1 [87].
[79] Ibid.
[80] *Massachusetts Museum of Contemporary Art Foundation v Büchel*, 593 F.3d 38 (1st Cir. 2010) (*'MoCA v Büchel'*).

discussion below demonstrates that artists possess moral rights under both Australian and US legislation, albeit, to varying degrees.

The US sought to conform to its Berne Convention obligations by enacting moral rights protection under 17 U.S. Code § 106A, known as the *Visual Artists Rights Act of 1990* (VARA). Under that legislation the author of a work of visual art has a right to, amongst other things to:

> prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation, and any intentional distortion, mutilation, or modification of that work is a violation of that right.[81]

However, VARA offers limited protection as it only applies to visual artists and is limited to paintings, drawings, prints or sculptures which exist in a single copy.[82] Further, such works do not include any works 'made for hire'.[83] This effectively excludes artworks made in the course of employment, or a work specially commissioned.[84] The protection is limited to the life of the artist.[85] There is no specific mention of installation artworks and the US Copyright Office expressly discourages applicants from describing their artworks as such when applying for copyright registration.[86] While copyright exists upon creation of a work, in the US it is also possible to apply to have works registered.[87]

The protection under VARA can be broken into two limbs. The first limb relates to threatened conduct, while the second limb deals with actual conduct.[88] In regards to threatened conduct, an artist must establish that the conduct *would be* prejudicial to their honour or reputation. Whereas, in an action alleging actual conduct, the artist must show that the conduct distorts, mutilates or modifies the work. Strangely, the wording of this provision does not refer to prejudice to the artist's honour or reputation.[89] However, this apparent anomaly was addressed in *MASS MoCA v Büchel,* where it was held that prejudice was required in cases of final injunctive relief and the award of damages.[90]

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[81] 17 U.S. Code § 106A(a)(3)(A).
[82] 17 U.S. Code § 101 – Definitions.
[83] Ibid.
[84] Ibid.
[85] 17 U.S. Code § 106A(d).
[86] US Copyright Office, Compendium of US Copyright Office Practices, 3rd Edition (22 December 2014). Available at <http://copyright.gov/comp3>.
[87] Ibid.
[88] 17 U.S. Code § 106A(a)(3)(A).
[89] Ibid.
[90] See the section on *MASS MoCA v Büchel* below for further discussion of this point.

G *A Comparison of Australian and US legislation*

Unlike the Australian provisions, the VARA protections are only available to visual artists. In addition, the VARA provisions do not expressly require that any distortion is *material*. However, in practical terms, VARA does require materiality because it expressly states that there be prejudice to honour or reputation. If prejudice is established, it is difficult to see how the distortion would not also be material. VARA protects against a threatened act that *would be* prejudicial. Again, this difference is not legally substantive. In Australia, injunctive relief may be awarded against any threatened derogatory acts.

The 2010 case of *MASS MoCA v Büchel* exemplifies the way in which US courts differ in determining prejudice in this context to that of their Australian counterparts.[91] During the mid-2000s Büchel was involved in discussions and plans to exhibit an installation, entitled 'Training Ground for Democracy'.[92] The installation was extremely large and involved museum staff constructing various components.[93] Despite the size and expense of the installation there was no formal agreement setting out the parties' obligations in respect of its construction and subsequent display. At some point before the installation was finished the professional relationship broke down. Although Büchel's involvement ceased, the museum continued to carry out work.[94] MASS MoCA brought legal proceedings seeking a declaration that it could exhibit the unfinished work.[95] The artist filed a counterclaim seeking an injunction to stop the exhibition of the work and asserted that MASS MoCA infringed his moral right of integrity through various acts; including continuing to carry out work on the installation (despite the artist's objections), partly covering the work with tarpaulins, and allowing the incomplete (and therefore distorted) work to be publicly exhibited.[96] Some of MASS MoCA's work on the installation was in direct contravention of the artist's instructions and resulted in a number of modifications to the work that the artist did not approve of, as evidenced by an exchange of emails between MASS MoCA and the artist.[97]

This paper focuses on the Court's consideration of the right of integrity as framed in the VARA provisions, although the case was also significant in determining that moral rights protection also cover unfinished artworks.

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[91] *MoCA v Büchel*, 593 F.3d 38 (1st Cir. 2010)
[92] Ibid 43-46.
[93] Ibid.
[94] Ibid.
[95] Ibid 46.
[96] Ibid 56-57. This notion of 'distortion' relates to the changes to the artist's design and intention due to the MASS MoCA staff continuing to work on the pieces and the fact that the work would be exhibited in an unfinished state.
[97] Ibid.

In considering the provisions wording the Court noted there was uncertainty as to whether establishing prejudice was necessary to both limbs of the provision.[98] The Court preferred the interpretation that prejudice to honour or reputation was a necessary qualifier for both limbs.[99] In this regard, the Court relied on the legislative background to VARA and its antecedents in the Berne Convention.[100]

In considering 'prejudice to the artist's honour or reputation' (the third element outlined by this paper), the Court noted that none of these terms are expressly defined under VARA.[101] To determine whether this element was made out, the Court examined the *actual* modifications made to the work and the *reputation* of the artist.[102] In respect of the latter, the Court stated that the focus should be on the 'artist's reputation in relation to the altered work of art'.[103] This supports the notion that the test for prejudice under VARA has a strong subjective element. The Court also considered evidence given by experts that the changes to the work by the gallery were detrimental to the artist. This confirms that the subjective element is subject to an objective analysis. The Court upheld the appeal, finding that there was sufficient evidence of infringement of the artist's right of integrity.

The Court's consideration of the elements of the VARA provisions, in particular the prejudice element, is instructive. It applied a similar test to that seen in Australia and demonstrated in *Perez v Fernandez*. The MASS MoCA also failed in its defence. It claimed its conduct was well intentioned, however this was deemed irrelevant to the question of whether there was prejudicial conduct to the artist's honour or reputation. So what defences can be made in response to a claim of prejudicial conduct in relation to an artwork? The following section will consider this question in relation to both Australian and US legislation.

H *Defences*

The moral rights provisions give artists certain protections; however there are a number of exceptions or defences that limit the scope of the protection. There are specific defences in relation to works, which are buildings, or which are attached to buildings, which allows demolition or renovation without infringing moral rights legislation. It is also possible

[98] *MoCA v Büchel*, 593 F.3d 38 (1st Cir. 2010), 53.
[99] Ibid 54-55.
[100] Ibid.
[101] *MoCA v Büchel*, 593 F.3d 38 (1st Cir. 2010), 53.
[102] Ibid.
[103] Ibid.

to consent to an infringing act.[104] Any consent must be in writing and must be 'genuinely given'.[105]

In Australia, the *Copyright Act* also sets out a *reasonableness* defence in s 195AS, which states that, 'a person does not [infringe the right of integrity] if the person establishes that it was reasonable in all the circumstances to subject the work to the treatment.'[106] This defence places the onus upon an infringer to provide evidence as to why the treatment was reasonable. The reasonableness of the treatment is measured using a range of factors set out in s 195AS(2).[107] These include factors such as the nature, purpose, manner and context of the work; the existence of any industry practices or codes of practice in relation to the creation of the work, and whether the work was made in the course of employment.[108] The reasonableness of any treatment is also subject to 'whether the treatment was required by law or was otherwise necessary to avoid a breach of any law'.[109]

In *Perez v Fernandez* there were no extenuating circumstances that enlivened the reasonableness defence. In fact, Mr Fernandez's explanation for his conduct confirmed the *un*reasonableness of his actions as it was done to either promote himself or mock the artist.[110]

In the US, VARA also provides for a number of exemptions or defences.[111] It allows for a waiver of moral rights that operates in a similar way that consent does under Australian law.[112] VARA also sets out a number of exceptions to a claim of infringement of the right of integrity including works that have been affected by the passage of time or changes due to the nature of the materials used.[113] Conservation work will also be exempt unless it has been carried out with gross negligence.[114] Finally, any reproduction, depiction or portrayal of a work will be excluded from any claim of infringement.[115]

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[104] *Copyright Act,* s 195AWA.
[105] Ibid s 195AWA(2).
[106] Ibid s 195AS.
[107] Ibid.
[108] *Copyright Act,* s195AS(a)-(i).
[109] Ibid s195AS(2)(h).
[110] *Perez v Fernandez* *2012) 260 FLR 1, [89].
[111] Although note that VARA does not provide any protection to artist's in respect of works created in the course of employment, per 17 U.S. Code § 201(b).
[112] 17 U.S. Code § 106A(e). Note, that there is no waiver right in the *Copyright Act*.
[113] Ibid 106A(c)(1).
[114] Ibid 106A(c)(2).
[115] Ibid 106A(c)(3).

IV LEGAL ISSUES IN THE MONA & BÜCHEL INSTALLATION DISPUTE

Did the removal of a portion of the Büchel installation by MONA equate to a breach of the right of integrity under s 195AK(a) of the *Copyright Act* in Australia? Removing a portion of the work certainly fulfils the first element ('doing *anything* to an artistic work').

Did the removal of the DNA stand constitute a material alteration and therefore an infringement of the second element? An artist could argue that any alteration, no matter how minor, will materially change their artwork. However, such a claim cannot have much weight where it has not been assessed against some sort of objective analysis. Determining whether there has been a material change to the artwork is caught up with determining whether the third element, prejudice to the artist's honour or reputation, is made out. This article argues the artist's viewpoint is relevant, though not determinative. Accordingly, the artist's subjective view will be tested in light of objective evidence.

The discussion of both *Perez v Fernandez* and *MASS MoCA v Büchel* illustrate how the test can be applied. In *Perez v Fernandez* the objective standard was the particular musical genre of music under consideration (specifically the importance of artist collaboration). In *MASS MoCA v Büchel* it was evidence given by various art experts. That expert evidence confirmed the artist's subjective opinion that the gallery's conduct was detrimental to the artwork.

Why might MONA's act of removing the DNA stand be prejudicial to the author's honour or reputation? In his blog post, Walsh noted that the artist wanted the installation to be shown in its entirety and had resisted earlier attempts to modify the installation.[116] This suggests there is subjective evidence that, in the artist's view, the installation was a lesser work without the DNA stand. To satisfy the objective element, there would also need to be evidence by recognised art critics and/or art experts that removing such a part from the whole did derogate from his vision. Some of this opinion can be gleaned from the responses to Walsh's MONA blog post apologising for any offence caused.[117] While some of the online responses applauded MONA for acting quickly to deal with the concerns, other posts suggested that MONA had given in to criticism too easily and

[116] Walsh, above n 12.
[117] Ibid. See posts of various authors in response to the blog post. There were more than 30 responses to the apology. Responses were mostly posted from 24 June 2014 to 22 September 2014, with a post logged on 14 June 2015 (blog checked on 9 September 2015).

that it was censoring art.[118] Potentially, any commentary provided by art experts in regards to this issue could inform the objective limb of the test. Whether or not evidence by Walsh himself or those who commented on the blog post could be considered expert opinion is largely an evidentiary issue based on examination of art education and expertise.[119] For example, members of the MONA curatorial staff would most likely be considered experts given they have some form of art education and/or expertise.

The artist may also have argued that the removal of the DNA stand was prejudicial to his honour or reputation as it implied that the artwork (and by extension the artist) was racist. If the question of prejudice to honour were in issue, there would need to be subjective evidence from the artist. If the question were only whether there is prejudice to reputation, there would need to be objective evidence provided in relation to that.

In order to establish a reasonableness defence under section 195AS of the *Copyright Act,* it is necessary to measure MONA's conduct against the range of factors, including the nature, purpose, manner and context of the work. MONA presents itself as a gallery that exhibits challenging and confronting artworks and does not shy away from social and political controversy. The *Southdale/C'Mona* installation was devised specifically for MONA and, as is evident from Walsh's blog post, had involved a lengthy process of collaboration and discussion between the artist and MONA staff.[120]

Although there was nothing to indicate whether the Tasmanian Aboriginal Centre had legal concerns regarding the installation, MONA could have argued it prompted the gallery to consider its legal position in regards to breaching anti-discrimination laws. Can this argument satisfy the requirements for the defence of reasonableness in Australia? If the alleged derogatory treatment was done to avoid a subjectively perceived risk of an anti-discrimination claim, is that enough to fulfil the requirements of s 195AS(1)?

To answer this question, we first need to consider whether the concerns expressed were likely to amount to a claim that the display of the DNA stand would breach s 18C(1) of the *Racial Discrimination Act 197*5 (Cth) ('*RDA'*). The provision makes it:

> unlawful for a person to do an act, otherwise than in private, if: (a) the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or group of people; and (b) the act is done

[118] Ibid.
[119] See *Evidence Act 2001* (Tas) s 79.
[120] Walsh, above n 12.

> because of the race, colour or national or ethnic origin of the other person.[121]

The provision is controversial and has been the subject of much public debate.[122] In determining whether there has been a breach of s 18C(1), the focus is on the particular person, or group of persons, who claim offence (or insult, humiliation or intimidation) as a result of the act.[123]

It is possible that members of the Tasmanian Aboriginal Centre were, or were likely to be offended, insulted, humiliated or intimidated as a result of the inclusion of the DNA stand. However, s 18D of the *RDA* provides for various defences or exceptions to a claimed breach of s 18C, including whether the act is reasonable and done in good faith in the performance, exhibition or distribution of an artwork.[124] Arguably, MONA exhibited the Büchel installation reasonably and in good faith and therefore would not be liable to any claims pursuant to s 18C. On one view MONA could not reasonably have considered that it needed to remove the DNA stand in order to avoid a breach of another law such as s 18C. However, on a practical view, it was reasonable for MONA to conduct itself in this manner to avoid exposure to potential litigation as well as avoiding causing offence to the Aboriginal community. It has been suggested that s 18C encourages self-censorship because of this desire to avoid a claim.[125] An associated problem is that there is no Australian bill of rights so that freedom of expression is only protected in a piecemeal way (for example, as set out in s 18D of the *RDA*). A more detailed discussion of s 18C and its possible impact on artistic expression is beyond the scope of this paper. It is possible that the lack of human rights protections in Australia (such as an explicit right to freedom of expression) may undermine piecemeal protections, such as moral rights protections in the *Copyright Act*. Suffice to say the area is potentially fraught, particularly in relation

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[121] *Racial Discrimination Act 1975* (Cth) *('RDA')*, s 18C(1).

[122] It was successfully used against newspaper columnist, Andrew Bolt, in relation to various newspaper articles he had written which imputed that fair-skinned people were identifying as aboriginal in order to benefit financially or politically (*Eatock v Bolt and Anor* [2011] FCA 1103).

[123] Ibid. As a result of the Bolt case there were calls for the provisions to be repealed or at least amended. Although the Federal Government initiated the process, it was ultimately withdrawn, see Emma Griffiths, *Government backtracks on Racial Discrimination Act 18C changes; pushes ahead with tough security laws* (6 August 2014) ABC <http://www.abc.net.au/news/2014-08-05/government-backtracks-on-racial-discrimination-act-changes/5650030>.

[124] *RDA*, s18D(a).

[125] See comments of the Freedom Commissioner, Tim Wilson, 'Charlie Hebdo v 18C: no contest', *The Australian* (online), 19 January 2015 < http://www.theaustralian.com.au/opinion/charlie-hebdo-v-18c-no-contest/story-e6frg6zo-1227188897696> .

to any artistic expression that has the concomitant aim of shocking or unsettling its audience.

V CONCLUSION

In 2014, an art installation by Christoph Büchel was shown at MONA in Hobart, Tasmania. It became the incentive for the writing of this paper when MONA made changes to the artwork. While no litigation came out of these alterations, it did present an opportunity to explore various legal issues. Using the Büchel installation as a point of reference, this paper has considered the question of whether an art gallery has the right to make changes to artworks. Specifically the paper has focused on how the moral right of integrity in Australian copyright law and its defences might operate in particular circumstances. Additional context has been provided by consideration of the moral rights regime and case law in the US, which also involved Büchel.

This article concludes that art galleries and museums have to manage the competing demands of an artist's moral rights against a range of other legal and ethical constraints. As a result, galleries capacity to manage exhibitions is complex with the interplay of various laws obscuring rather than illuminating the various parties' obligations and rights. In the author's view, this complexity encourages art galleries to take a conservative approach when dealing with challenging art and has the potential flow on effect of discouraging artists to take risks when creating works. Ultimately, we, the art consumer, will be the poorer. There is scope for further research on how various laws, including s 18C, may have the unintended consequence of limiting freedom of expression.