

Money Heist: The Hypothetical Moral Rights of Salvador Dali

Devanshu Sajlan[†]

Civil Judge/Metropolitan Magistrate, Delhi Judicial Services, Tis Hazari Courts, New Delhi – 110 054, Delhi, India

Received: 20th August 2020; accepted: 29th June 2021

This article is premised on a hypothetical scenario related to the Netflix show ‘Money Heist’. The underlying theme of Money Heist is to portray victory of Robin-Hoods over a fascist regime. In this backdrop, the Article envisages the following hypothetical scenario (which has been analysed on the principles of law related to moral rights): *the show makers, in order to metaphorically highlight the aforesaid ideology of the show, depict a painting of Hitler falling from the wall, while the characters are busy celebrating their victory over the police force. Salvador Dali, the painter of the said painting, watches this show and is upset by the use of his painting for a political comment. He decides to file a suit alleging violation of his moral rights due to the use of his painting for a political propaganda.* In order to analyse this hypothetical issue, the legislative history of Berne Convention has been carefully scrutinised. In addition, various international case laws have been discussed in relation to (i) facts involving alteration to the context of an artwork; (ii) the correct test to be applied to establish prejudice to honour or reputation of an artist; and (iii) the scope of protection afforded by article 6bis.

Keywords: Moral Rights-Alteration to Context, Subjective-Objective Test, Legislative History-Article 6bis, Berne Convention

The life of the Professor revolved around one idea: Resistance. His grandfather, who had fought against the *fascists* in Italy, taught him the song – and he taught it to us.¹ The world is currently enchanted with the Netflix show ‘Money Heist’. While the show’s underlying theme is the thrilling portrayal of planned robberies, the show also portrays various other subtler themes. One such theme, which struck a chord with the audience worldwide, is the idea of resistance against fascist regimes.² World over, fans of the show are humming the Italian folk song *Bella Ciao*, used repeatedly in the show, which was once used as a symbol of resistance against fascism during the World-War II.³

A hypothetical scenario related to Money Heist, which leads to a legal issue in relation to moral rights is being envisaged in this article. Let us visualise that we are living in the Second World War era. Somehow, miraculously, we have Netflix and colour TVs and everybody is watching Money Heist on their TV sets. The characters in Money Heist have just hoodwinked the police force yet again and are proudly singing *Bella Ciao*. While the scene is about to end, the camera shifts its focus to a painting on the wall which is none other than Salvador Dali’s ‘The Enigma of Hitler’ (Fig. 1).⁴ In order to metaphorically highlight the ideology of the show, i.e. victory of

Robin-Hoods⁵ over a fascist regime, the show makers display the painting falling from the wall while the characters are busy laughing and singing *Bella Ciao*. Salvador Dali watches this show and is upset by the use of his painting for a political comment. He decides to file a suit in a court of law alleging that his moral rights in the painting have been violated by the use of his painting for a political propaganda. Would he succeed in his claim?

Salvador Dali: Political Thoughts

One may wonder why Salvador Dali is chosen for this hypothetical scenario. Well, the answer lies in the frequent use of Dali masks in Money Heist. One of the most fascinating aspects of the show is the constant use of Salvador Dali masks as a disguise by



Fig. 1 — Salvador Dali: The Enigma of Hitler (1938)
Source: <https://www.dalipaintings.com/the-enigma-of-hitler.jsp>

[†]Email: devanshu.sajlan26@gmail.com

the robbers (Fig. 2). As the show gathered immense popularity, Salvador Dali masks captured the imagination of the youth and the fandom of these masks spread like wildfire. As of today, the Salvador Dali masks have become a symbol of resistance against fascist regimes and are a regular feature in street protests globally.⁶

Salvador Dali is one of the most popular and admired artists the world has ever seen.⁷ He belonged to the school of art which propagated the views and ideas of the ‘Surrealism Movement’.⁸ His paintings depict various surrealist themes, for example, symbolic images like melted clocks, and ants, which were repeatedly used by him to portray an image of time devouring itself, and as a reference to death and decay, respectively.⁹

While it is a treat to view his paintings, the search for Dali’s link with anti-fascist movements, unfortunately, yields disturbing results. Salvador Dali, whose masks have become a symbol of resistance today, was criticised vehemently for being a supporter of the fascist regime of Francesco Franco, once even congratulating Franco for his actions aimed “at clearing Spain of destructive forces”!¹⁰ Moreover, he was removed from the Surrealist movement for being guilty of counter-revolutionary activity involving the celebration of fascism under Hitler.¹¹

History bears witness to the fact that Hitler and Franco were like birds of a feather flocking together and that Nazism and fascism had many essential similarities.¹² There is also a lot of existing research which highlights that fascist regimes thrived by ensuring concentration of wealth in the hands of a few capitalists as a *quid-pro-quo* for their monetary support to fascist regimes.¹³ Therefore, Dali critics may argue that it is quite evident that an ardent supporter of Franco and Hitler cannot possibly be aligned with the anti-capitalist and anti-fascist ideas in all seriousness (something which Money Heist makers have portrayed).



Fig. 2 — Robbers wearing Dali masks as a disguise in Money Heist
Source: https://miro.medium.com/max/700/0*XPWHV9G7V4galPRr

However, while the members of Surrealism movement projected him to be a ‘Hitlerite’ or a fascist, Salvador Dali, on his part, did not wish to take any sides and wanted to remain *apolitical*:

... I did not want to be called anything *but Dali*. But...public opinion was slinking around me, demanding of me...that I make up my mind at last, *that I become Stalinist or Hitlerite. No! No! No!and a thousand times no!* I was going to continue to be as always and until I died, Dalinian and only Dalinian! *I believed neither in the communist revolution nor in the national-socialist revolution*, nor in any other kind of revolution.¹⁴(emphasis added)

Therefore, Salvador Dali, if alive today, may not have been particularly happy with any form of association with any kind of revolution/movement/political comment. It is evident that he had a firm belief to remain *apolitical*. In the aforesaid background and hypothetical scenario, the legal issue highlighted above with respect to moral rights of an author is analysed, i.e. whether an author of an artistic work can object to the use of his artwork in a context for which he had not created the artwork or which is against his personal beliefs.

Alteration to the Context - Legislative History of Moral Rights

Moral Rights of an author in an artistic work stem from the fact that the work is a reflection of the personality of its creator.¹⁵ It has been universally recognised that “works of the mind are...representative in character of their authors’ personalities [and] to say the author “lives in his work” is not an entirely metaphorical expression”.¹⁶

The International Law in relation to moral rights is encapsulated in Berne Convention for the Protection of Literary and Artistic Works, 1886 (Berne Convention). Article 6bis of the Berne Convention, which prescribes the scope of moral rights available with an author, artist, etc., is:

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

As provided in Article 6bis, an author can object to following treatment of his work by anybody: (1) distortion; or (2) mutilation; or (3) other modification of the work; or (4) other derogatory action in relation to the work.

The first question that needs to be answered is whether Article 6bis covers cases of only physical alteration to an artistic work (for example: breaking a sculpture) or it would also cover alteration to the context of an artistic work (for example: altering the underlying message of the work without any physical alteration). The answer to this query lays in the phrase 'other derogatory action in relation to the work'. Since the phrase in itself is broad and ambiguous, *travaux préparatoires* of Article 6bis of the Berne Convention can be resorted to as a supplementary means of treaty interpretation in order to understand the true scope of this phrase.¹⁷

Till 1948, Article 6bis did not contain the aforesaid phrase. At the Brussels Revision Conference in 1948, the phrase 'or other derogatory action in relation to' was added to Article 6bis (1).¹⁸ The record of the Brussels Conference states that the revision to Article 6bis was done after the recommendation of the Moral Rights Sub-Committee that Article 6bis should cover cases which do not, strictly speaking, constitute either a distortion or a mutilation of the work, but which are nonetheless prejudicial to the author's interests.¹⁸ Therefore, Article 6bis encompasses those cases as well which do not fall within the domain of physical alteration, i.e. which do not qualify either as a distortion, mutilation or other modification of the work.

Accordingly, keeping in mind the use of broad phraseology in Article 6bis, i.e. 'in relation to the work', as opposed to alteration to the work, it can be argued that cases which involve an alteration to the context of an artistic work are covered by Article 6bis. This interpretation is also supported by the UK Patent Office which has taken a stance that the use of a photographic image to promote a product to which the author has ethical objections is an example of infringement of the moral right of integrity.¹⁹

Alteration to the context – Case Law

To support the aforesaid argument, let us analyse a few case laws. Use of artistic work for a political propaganda was held to be a violation of the spirit of the work in the French case of *Pontoreau v Association Front National*.²⁰ In this case, certain paintings were bought out of public fund which did

not sit well with a right-wing group. The said right-wing group reproduced these paintings in order to criticise this government action as they were of the firm view that such a purchase amounted to gross wastage of public money. The reproduction of the paintings in order to propagate an electoral propaganda was held to be against the spirit of these artistic works and a violation of the right of respect guaranteed to these artworks.²¹

Let us further take the example of an Australian case law. In *Perez v Fernandez*,²² the famous performing artist, Mr. Perez (also known as Pitbull) alleged violation of his moral rights by a certain Mr. Fernandes (also known as DJ suave).

However, before the said case law is discussed, it is imperative to first discuss the relevant provision under Australian law which discusses moral rights. Prior to 2000, the moral rights provision of the Australian Copyright Law defined derogatory treatment in the following manner:

*(a) the doing, in relation to the work, of anything that results in a material distortion of, the mutilation of, or a material alteration to, the work that is prejudicial to the author's honour or reputation.*²³ (emphasis added)

It is pertinent to note here that this clause only covered the instances of a distortion, mutilation or an alteration to the work as opposed to the broader phrase used in Article 6bis, i.e. 'derogatory action in relation to'. An Amendment Bill was moved in 1999 pursuant to which sub-clause (b) was added to the definition of derogatory treatment:

*(b) [T]he doing of anything else in relation to the work that is prejudicial to the author's honour or reputation.*²⁴ (emphasis added)

The Revised Explanatory Memorandum to this bill specifically stated that the said amendment is necessary in order to cover those cases where a work is used in an *inappropriate context* and prejudices the author's honour or reputation.²⁵ It was further stated in the Revised Explanatory Statement that the said bill is being introduced in order to give full and proper effect to Australia's obligations under Article 6bis of the Berne Convention.²⁶

The material deduction from the aforesaid discussion is as follows: the fact that Australia decided to amend its existing law to cover 'alteration to context' is a clear indication of the fact that prejudicial alteration to the context of an artistic work is indeed covered within the scope of Article 6bis.

Coming back to the case law of *Perez v Fernandez*,²⁷ in 2008, an Audio Drop was sent to Mr. Fernandes, who was involved in organising a music tour in Australia, from Pitbull for the promotion of the said music tour. In the said Audio Drop, Pitbull can be heard saying the following words: Mr 305²⁸ and I am putting it down with DJ Suave.^{29,30} Later on, DJ Suave combined the aforesaid Audio Drop with a MP3 Copy of the famous song *Bon Bon* of Pitbull, in such a manner as to cause the Audio Drop to be mixed at the beginning of the *Bon, Bon* Song.³¹ Pitbull contended the said alteration of the original song violated his moral rights.³²

The Australian Court agreed with Pitbull and observed that the combination of the Audio Drop with *Bon, Bon* makes it appear as if Pitbull had referred to DJ suave in the original song composed by him.³³ The Court further held that the said mixing of the song amounted to putting the words performed by Pitbull in an entirely different context (“*Mr 305 and I am putting it right down with DJ Suave*”), thereby making it appear that DJ Suave was a subject of the song.³⁴ However, while the context of the Audio Drop was changed by combining it with the *Bon Bon* song, the court held that since DJ Suave combined two recordings, it amounted to a distortion or alteration of the work and hence found DJ Suave to be in violation of Section 195 AJ (a) (the physical alteration clause) as opposed to Section 195 AJ (b) (the alteration to context clause).³⁴ I am of the view that even if DJ Suave would not have physically altered the recording but would have used the Audio Drop for any other purpose except for promotion of the 2008 Australia Music Tour, he would still have been liable under Section 195 AJ (b) (the alteration to context clause).

In another example from Italy where a musician, known for being an environmentalist, was allowed to prohibit an assignee of the copyright in his songs from selling cassettes containing his songs in conjunction with environmentally harmful detergent, thereby leading to the recognition of his right to prevent his work from being associated with any subject matter that he disagrees with.³⁵

In light of the aforesaid discussion, the hypothetical legal issue as highlighted in the introduction is being analysed. If the jurisdiction in which Salvador Dali files the law suit is a signatory to the Berne Convention, he should ideally succeed in his argument that alteration to the context of his painting by using it for a political comment amounts to a derogatory treatment of his artwork.

Can There be violation of Moral Rights without prejudice to Honour and Reputation?

Once an artist has succeeded in establishing that a particular treatment of his artistic work amounts to a distortion, mutilation, or any other derogatory action in relation to the work, what is the next step? Is a distortion enough in itself to violate moral rights of an artist or is it necessary to prove prejudice to honour or reputation?

The phrase used in Article 6bis is ‘*which would be prejudicial to his honour or reputation*’ and hence there should not be much dispute regarding the interpretation that there is a need to establish prejudice to reputation or honour before violation of moral rights can be proved. In the jurisdictions where the wording of Article 6bis has been retained, the inference that prejudice to honour or reputation is a *sine qua non* for establishing violation of moral rights has been readily drawn by courts without much dispute.

In India, the earlier version of moral rights provision did not require prejudice to reputation or honour in case of a distortion or mutilation or any other modification.³⁶ The legislature felt that such a provision was in excess of the requirement of Berne Convention and hence the said provision was amended to make prejudice to reputation or honour mandatory for violation of moral rights.³⁶ Pursuant to such amendment, courts in India have constantly interpreted the said provision to require prejudice to honour or reputation. To illustrate, it was recently observed by the Hon’ble Delhi High Court that:

The words in Section 57(1)(b) of the Act “or other act in relation to the said work” have to be read in the context of what follows immediately thereafter i.e. “which. would be prejudicial to his honour or reputation”. Thus, other act in relation to the work within the meaning of Section 57(1)(b) of the Act, has to be a work which renders the creation of the author prejudicial to the honour or reputation of the author. The words distortion, mutilation and modification in Section 57(1)(b) of the Copyright Act have to be understood as making the work look, appear, be seen, as something different from what the author had created and in which creation the honour and reputation of the author vests. The principle is that the work should not be rendered imperfect, affecting the honour and reputation of the Architect.³⁷ (emphasis added)

Therefore, courts in India have decisively held that any alteration to an artistic work must be in the context of prejudice to honour or reputation. The wording of Article 6bis has also been retained in its essence in other jurisdictions like Canada³⁸ and Australia.³⁹

On the other hand, United Kingdom's (UK) provision on moral rights uses the phrase "treatment of a work is derogatory if it amounts to distortion or mutilation of the work *or is otherwise prejudicial* to the honour or reputation" (emphasis added).⁴⁰ The words 'or is otherwise' are ambiguous as they are subject to two possible interpretations. Some courts in UK have interpreted the phrase to mean 'or',⁴¹ while others have interpreted it to mean 'and'.⁴²

A case law which supports the aforesaid phrase to mean 'or' is *Emma Delves-Broughton v House of Harlot*.⁴³ Emma was a photographer who had produced a photograph of a fashion model in which the model was depicted in a forest.⁴⁴ The said photograph was used by House of Harlot on its own website after removing the forest background and reducing the size of the photograph.⁴⁵ The Court held that the removal of forest background amounted to distortion of the work while holding at the same time that it did not prejudice the artist's honour or reputation.⁴⁶ Despite holding that no prejudice to honour or reputation was caused, the Court still held House of Harlot to have violated Emma's moral rights purely on the basis that House of Harlot had distorted the photograph produced by Emma:

I am satisfied that the changes which have been made do *amount to distortion of the work*. I would not say that it was mutilation and *I would not say that it was prejudicial to the honour or reputation* of the author or director, but I am satisfied that it amounts to distortion of the photograph in question and that the treatment of the work is therefore derogatory.⁴⁶ (emphasis added)

However, in *Confetti Records v Warner Music*⁴⁷, another UK Court held that Article 6bis is clear in its interpretation that an author can *only* object to a distortion if it prejudices his honour or reputation and the framers of UK legislation did not intend to alter the scope of moral rights in this respect.⁴⁸ It was further observed that "...in the compressed drafting style of the United Kingdom legislature, the word "otherwise" itself suggests that the distortion or mutilation is only actionable if it is prejudicial to the author's honour or reputation."⁴⁸

While contradictory interpretations exist on this issue, it is the latter interpretation which should be adopted for the following reasons:

Firstly, as per the *travaux préparatoires* of Article 6bis, i.e. Records of the Conference Convened in Rome, 1928, the objective of moral rights provision was always to protect the 'right to respect' of the author.⁴⁹ Therefore, a mere distortion, which does not impact the reputation of the author, was not intended to be within the ambit of protection of moral rights. Further, the treaty drafters were conscious of the fact that the law must not protect 'excessive sentimentality on the part of the scholar'⁴⁹ and hence in order to limit the scope of this right, the phrase 'which is prejudicial to his moral interests'⁵⁰ was proposed (which later became prejudicial to his honour or reputation to make the limitation more intelligible).⁵¹ Accordingly, it is obvious that authors cannot be over-sensitive and allege violation of their moral rights due to any small alteration of their work and they must establish prejudice to their honour or reputation due to the said alteration.

Secondly, if two interpretations are possible, then the one that does not violate the international law should be adopted as it is a settled position of law that an act of Congress ought never to be construed to violate the law of nations (international law) if any other possible construction remains.⁵² The relevant international law, i.e. International Covenant on Civil and Political Rights, provides that the right to freedom of expression shall not be restricted, save when it is necessary for the respect of reputation of others.⁵³ Therefore, declaring a mere distortion of the work as derogatory, that is not prejudicial to the author's reputation, violates the international law norms by unduly restricting the right to freedom of expression.⁵⁴

Coming back to the hypothetical legal issue which is the subject of this Article, Salvador Dali would necessarily have to prove prejudice to his honour or reputation before he can establish violation of his moral rights.

Prejudice to Honour or Reputation – Personal or Professional?

What is the true ambit of reputation or honour that can be alleged to have been violated? Does Article 6bis cover only the right of reputation of the author as reflected through the work in his professional capacity or does it also cover prejudice to an author's reputation in his private capacity? In order to find an answer to this question, let us again look at the preparatory work

of Article 6bis. The General Report prepared at the Brussels Revision Conference stated that:

The author has to be protected not only in his capacity as a writer but also in the role he plays on the literary stage...[therefore] he could object to any other derogatory action that would be liable to *harm the person* through distortion of his work.⁵⁵ (emphasis added)

Therefore, the preparatory work of Article 6bis indicates that it also covers situations in which the author's honour or reputation as a person, and not just as an artist, is prejudiced by the treatment of the work.

However, there are contrary opinions on this point. For example, a UK Court in *Pasterfield v Denham*⁵⁶ held that honour or reputation *as an artist* is required to be prejudiced for violation of moral rights and “[i]t is not sufficient that the author is himself aggrieved by what has occurred”.⁵⁷ In this case, the artists were designers who were commissioned by the Plymouth City Council to design some artwork in order to promote a tourist attraction in the city (Plymouth Dome).⁵⁸ The designers created the requisite work which included a cut-away drawing of the interior of the dome and were subsequently commissioned to update the original artwork.⁵⁹ However, the updated cut-away drawing of the interior of the dome was substantially altered in print by the City Council, including change in colouring of the artwork, and omission of various features around the edges of the artwork.⁶⁰ The designers filed a law suit for violation of their moral rights in the cut-away drawing contending that the aforesaid changes have reduced the ‘vibrancy and excitement’ of the original drawing, thereby amounting to a derogatory treatment of the artwork.⁶¹

The Court disagreed and observed that the colouring changes “...do not come anywhere near...the gross differences between a black and white film and a colourised version of the same film”,⁵⁷ and that the said changes are not enough to prejudice the honour or reputation of the designer.⁵⁷ Before coming to this conclusion, the Court, while laying down the position of law, observed that prejudice to honour or reputation *as an artist* is required to be shown for violation of moral rights of an artist.⁵⁷

Moving on, USA is also a member of the Berne Union.⁶² The legislative history of 106 A, Visual Artists Rights Act, 1990 (USA's moral rights provision) also supports the aforesaid view which was laid down in *Pasterfield*:

*The best approach to construing the term 'honor or reputation...is to focus on the artistic or professional honor or reputation of the individual as embodied in the work that is protected.*⁶³

However, such a view does not appear to be correct. David Vaver, a renowned legal scholar in the field of intellectual property law, has previously opined that since an author's personal reputation is ordinarily indivisible from an author's artistic reputation, the moral rights provision should encompass the author's personal reputation as well.⁶⁴ Such an approach will also be consistent with the Berne Convention which, as highlighted above, clearly seeks to protect the personal reputation of the author in addition to his artistic reputation conveyed through his work.

Further, it should not be forgotten that an artistic work is an expression of the artist's own personality.⁶⁵ Now, if he said ‘expression of personality’ is projected in a different manner by changing the context of the artwork, the personality will also naturally suffer and hence the law must provide a remedy in such a scenario.

Let us now return to the hypothetical legal issue which is the subject matter of this Article. In light of the aforesaid discussion, it can be concluded that Salvador Dali would be justified in contending that though his artistic reputation has not been prejudiced in this case, portrayal of his work in a political context has damaged his reputation as a person.

Standard of Proof – Objective or Subjective?

In the aforesaid sections of this article, we have reached a conclusion that prejudice to honour or reputation is necessarily required to be proved and that the said proof can encompass prejudice to either personal reputation or artistic reputation. Moving on, what is the standard of proof required in this regard? Is the author's subjective satisfaction that his reputation or honour has been prejudiced enough or is he required to lead evidence to objectively prove that his reputation has been prejudiced in the public opinion?

Let us begin analyzing this issue by looking at the provisions of Berne Convention. The Berne Convention expressly states that, in questions of doubt, the French text of the Convention is to be taken as authoritative.⁶⁶ The authoritative French text of Article 6bis includes the words “*préjudiciable à son honneur ou à sa réputation*” (prejudicial to *his* honour

or to *his* reputation).⁶⁷ The repetition of the preposition in the French text indicates a clear distinction between the two nouns.⁶⁸ The said interpretation, indicating a clear distinction between the two nouns, was accepted to be correct by various countries at the Brussels Conference wherein the said countries indicated that they saw reputation and honour as distinct concepts.⁶⁹ Therefore, under Article 6bis, ‘honour’ is a distinct concept from reputation and should be construed accordingly.

While ‘Honour’ has various different definitions, one such definition, linked to dignity, pertains to the “sense of self-worth or dignity that is undermined or challenged by contemptuous treatment”.⁷⁰ Since honour involves the consideration of author’s dignity, which is considered to be a ‘subjective concept’⁷¹, it can be argued that analysis of prejudice to honour would involve subjective analysis on the part of the author.⁷² Therefore, the way authors think about themselves can be argued to be taken into account while considering prejudice to honour or reputation.

At the same time, it is imperative to note that the proposal to incorporate broader terms like ‘spiritual’ or ‘personal’ interests in Article 6bis was turned down at the Brussels Conference,⁷³ and the said rejection must be understood to mean that Article 6bis requires an element of objective analysis in relation to violation of moral rights.⁷⁴ In fact, UK had specifically noted in its objection to the incorporation of the aforesaid terms that they were ‘too vague’,⁷⁵ which clearly shows that the intention was to have an objective test to determine violation of moral rights. Moreover, as discussed earlier in this Article, the treaty drafters were of the opinion that the law must not protect excessive sentimentality on the part of the author.⁷⁶ Therefore, while honour involves an element of subjectivity, there must be some degree of objectivity involved in analyzing prejudice to honour or reputation in order to prevent protection of excessive sentimentality on the part of the author.

The aforesaid interpretation was accepted by a Canadian court in *Snow v Eaton Centre Ltd*,⁷⁷ in which it was observed that the words ‘prejudicial to his honour or reputation’ involve “a certain subjective element or judgment on the part of the author so long as it is *reasonably arrived at*”.⁷⁸ Therefore, the Court combined the subjective and objective tests by adding the phrase ‘reasonably arrived at’.⁷⁹ In this case, the plaintiff artist had produced a sculpture known as ‘flight stop’ which represented Canadian geese.⁸⁰ The

said sculpture was bought by the defendant shopping centre and ribbons were put around the necks of geese as part of Christmas celebration and advertisement.⁸¹ The Court agreed with the subjective belief of the artist that his naturalistic composition was made to look ridiculous by the addition of ribbons.⁸² While relying on the author’s subjective belief, the Court also observed that “the plaintiff’s opinion is shared by a number of other well respected artists and people knowledgeable in his field.”⁸³ Therefore, the Court balanced the subjective and objective analysis of prejudice to honour or reputation.

Moving on, the term ‘reasonably arrived at’, as used in *Snow*, was defined by another Canadian Court in *Prise de Parole Inc. v Guerin*⁸⁴ to mean an objective evaluation of the prejudice based on public or expert opinion.⁸⁵

Moreover, in UK, in *Tidy v Trustees of the Natural History Museum*⁸⁶, the phrase ‘reasonably arrived at’ was also understood to involve an objective test of reasonableness:

[B]efore accepting the plaintiff’s view that the reproduction in the book complained of is prejudicial to his honour or reputation, I have to be satisfied that that view is one which is reasonably held, which inevitably involves the application of an *objective test of reasonableness*.⁸⁷ (emphasis added)

On the other hand, there are case laws in which no objective evidence was sought. For example, in *Perez*⁸⁸, discussed earlier in this article, the Court relied on the evidence tendered by Pitbull’s attorney, Ms. Martinez, and held that:

- (i) Ms. Martinez’s testimony to the effect that Pitbull was concerned and upset by the distortion of the *Bon, Bon* song can be accepted;⁸⁹
- (ii) the reference to DJ Suave in the altered version of the song, which had not been authorised by Pitbull, should be regarded as prejudicial to him *per se*;⁹⁰ and
- (iii) otherwise also, Ms Martinez’s affidavit is satisfactory to the effect that the association with DJ Suave is something which Pitbull *himself strongly considered to be prejudicial to his reputation*, and which caused him anger and distress.⁹¹

Therefore, it is evident that the Court considered Pitbull’s subjective belief of prejudice to his reputation to be satisfactory and did not require any objective evidence to be provided in the form of public opinion.

Let us take an example from India as well. In *Amar Nath Sehgal v Union of India*⁹², Amar Nath Sehgal, a sculptor, was approached by the Government of India, to design a mural to be installed in Vigyan Bhavan.⁹³ He duly produced the mural which was installed in the entrance lobby of Vigyan Bhavan in 1962.⁹⁴ However, it was removed and dumped in the Government store room in 1979.⁹⁵ Deeply hurt by such treatment of his mural, Amar Nath Sehgal filed a suit contending that destruction of his work prejudiced his reputation by reducing the volume of his creative corpus.⁹⁶ The Court accepted this contention and held that destruction of a work of art is an extreme form of mutilation, which affects the reputation of the author prejudicially by reducing the volume of the author's creative corpus.⁹⁷ It is pertinent to note that no evidence was led to the effect that dumping of the mural in a store room lowered the estimation of Amar Nath Sehgal in public eye. The Court accepted the artist's subjective belief that by causing reduction in his creative corpus, the government prejudiced his reputation, and hence it appears that court followed the subjective test.

In light of the aforesaid discussion, it is evident that there is no settled position of law in relation to this issue currently. However, keeping the drafting history of Article 6bis in mind, the combination of subjective and objective test appears to be more in line with the intention behind Article 6bis.⁹⁸ Therefore, courts worldwide should adopt the approach according to which an author's subjective self-estimation of prejudice to honour or reputation is accepted if there is some objective evidence to corroborate the same.

Let us now apply the combination of subjective and objective test in the hypothetical legal scenario of this Article. Dali may contend that the use of the painting in a political context has prejudiced his honour or reputation as the same goes against his personal belief to remain apolitical. However, the said testimony in itself should not be enough and he should also be required to lead some objective evidence to the effect that any third person watching Money Heist would reasonably assume that the show makers have sought permission from Dali to use his painting in the show for a political comment.

Conclusion

Through the aforesaid discussion, I have endeavoured to show that artists convey a message through their artwork and any alteration to the context of such a message ought to be covered by the moral rights regime of all countries. Any alteration to the

context of an artwork may raise an assumption in the minds of public that the artist associates herself/himself with the altered message being conveyed and hence such a treatment can be prejudicial to his/her honour or reputation. In addition, while establishing prejudice to reputation or honour, prejudice to reputation both as an artist and as a person should be considered in order to be consistent with the objectives of the Berne Convention. Lastly, while 'honour' is a subjective concept, the legislative history of Berne Convention indicates that the intention was to include an element of objectivity in the analysis of prejudice to honour or reputation. Therefore, there is a need to consider a combination of objective and subjective test in this regard where the subjective belief of the author is required to be corroborated with some objective evidence.

References

- 1 'What have we done', Money Heist, Part 1, Episode 13, Netflix, 9 November 2017, <https://www.netflix.com/title/80192098> (accessed on 20 July 2020).
- 2 Srihari P, The Money Heist phenomenon: Decoding how Netflix's Spanish drama became a global favourite, *Firstpost*, 10 April 2020, <https://www.firstpost.com/entertainment/the-money-heist-phenomenon-decoding-how-netflixs-spanish-heist-drama-became-a-global-favourite-8244381.html> (accessed on 1 August 2020). Bock P, Spanish hit series "La Casa de Papel" captures Europe's mood a decade after the crash, *New Statesman*, 24 August 2018, <https://www.newstatesman.com/culture/tv-radio/2018/08/spanish-hit-series-la-casa-de-papel-captures-europe-s-mood-decade-after> (accessed on 1 August 2020).
- 3 Saeed S, Why it is impolite to play 'Money Heist' song 'Bella Ciao' in Italy, *The National*, 13 April 2020, <https://www.thenational.ae/arts-culture/music/why-it-is-impolite-to-play-money-heist-song-bella-ciao-in-italy-1.1005390> (accessed on 2 August 2020). Serra I, Teaching Italy through its music. The meaning of music in Italian Cultural History, *Italica*, 88 (1) (2011) 94-114, www.jstor.org/stable/23070860 (accessed on 19 August 2020).
- 4 For an interpretation of this painting, Greeley R A, Dali's Fascism; Lacan's Paranoia, *Art History*, 24 (4) (2001) 465-492, 477-478. Shanes E, *The Life and Masterworks of Salvador Dali* (Parkstone International), 2012, 194-195. The 'Enigma of Hitler' recalls the meeting between the English Prime Minister Chamberlain and Hitler. Reference to Chamberlain can be seen through Chamberlain's umbrella which hangs from a tree in the painting. Hitler can also be seen in the painting through a postage stamp size mini portrait of Hitler lying on a large bowl in the centre of the painting. As the name of the painting suggests, the painting was interpreted by a section of the society as an expression of Dali's fascination with Hitler and to be a subtle way of honouring him. However, whatever may be the popular perception about this painting, Dali saw the said painting in a completely different light:
- 5 ... [A] very difficult painting to interpret, whose meaning still eludes me. It constituted a condensed reportage of a series of dreams obviously occasioned by the events of Munich. This picture *appeared to me to be charged with a prophetic value*,

- as announcing the medieval period which was going to spread its shadow over Europe. Chamberlain's umbrella appeared in this painting in a sinister aspect, identified with the bat, and affected me as extremely anguishing at the very time I was painting it... (emphasis added)
- 6 Salvador D & Chevalier H, *The Secret Life of Salvador Dali* (Dial Press, New York), 1942, 360.
 - 7 Mafara D, Netflix's Money Heist: Modern Robin Hoods (7 April 2020) <https://gesteofrobinhood.com/2020/04/07/netflixs-money-heist-modern-robin-hoods-derrick-mafarra/> (accessed on 31 July 2020). Singh R, Why Money Heist (*La casa de Papel*) is so popular? *Policy Wise*, 20 April 2020, <https://policywise.in/2020/04/20/why-money-heist-la-casa-de-papel-is-so-popular/> (accessed on 31 July 2020).
 - 8 Vassanelli E, Money Heist' and protests: An Insight into politics and modern popular culture, *The Political Economy Review*, 13 April 2020, <https://medium.com/the-political-economy-review/money-heist-and-protests-an-insight-into-politics-and-modern-popular-culture-5e631bb974> (accessed on 2 August 2020).
 - 9 For a brief glimpse of the famous artwork of Salvador Dali, Shanes E, *The Life and Masterworks of Salvador Dali* (Parkstone International), 2012, 61-247. Dali S, The Museum of Modern Art, <https://www.moma.org/artists/1364> (accessed on 31 July 2020).
 - 10 <https://www.thedaliuniverse.com/en/salvador-dali/surrealism> (accessed on 19 August 2020) (Surrealism, is the name given to the cultural movement in visual arts and literature, that flourished in Europe between World Wars I and II. The movement represented a reaction against what its members saw as the destruction wrought by rationalism which had shaped history, art and politics; it was characterized by unexpected juxtapositions in ordinary scenes that challenge the viewer's imagination). Jorn A, Kurczynski K, & Henriksen N, Wonder, admiration, enthusiasm, *October*, 141 (2012) 59-69, 65, www.jstor.org/stable/41684277 (accessed on 19 August 2020).
 - 11 <https://www.thedaliuniverse.com/en/salvador-dali/symbols> (accessed on 31 July 2020).
 - 12 Xiphias Press, *The Universal Mind: The Evolution of Machine Intelligence and Human Psychology* (Xiphias Press, San Diego, CA), 2016, <https://books.google.co.in/books?id=Dvb0DAAAQBAJ> (accessed on 19 August 2020).
 - 13 Ades D, *Dali and Surrealism* (Harper & Row), 1982, 106.
 - 14 Elewomawu R A, Fascism and Nazism: The similarities and differences examined, *International Journal Advances in Social Science and Humanities*, 6 (1) (2012) 1-7.
 - 15 Bel G, Against the mainstream: Nazi privatization in 1930s Germany, *Economic History Review*, 63 (1) (2010), 34-55.
 - 16 Salvador D & Chevalier H, *The Secret Life of Salvador Dali* (Dial Press, New York), 1942, 360.
 - 17 *Guide to the Berne Convention for the protection of literary and artistic works (Paris Act, 1971)* (WIPO, Geneva), 1978, 41-42. Hughes J, The personality interest of artists and inventors in intellectual property, *Cardozo Arts & Entertainment Law Journal*, 16 (1998) 81.
 - 18 Records of the Conference convened in Rome, 1928, *Berne Convention for the Protection of Literary and Artistic Works from 1886 to 1986* (the International Bureau of Intellectual Property, Geneva), 1986, 171 ["Rome Records"].
 - 19 Article 32, United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, *Treaty Series*, 1155, 344, 13, <https://www.refworld.org/docid/3ae6b3a10.html> (accessed on 15 August 2020).
 - 20 Records of the Conference convened in Brussels, 1948, *Berne Convention for the Protection of Literary and Artistic Works from 1886 to 1986* (the International Bureau of Intellectual Property, Geneva), 1986, 190 ["Brussels Records"]. Strauss W, The moral right of the author, *Cardozo Arts & Entertainment Law Journal*, 4 (1955) 506, 507.
 - 21 © *The way ahead: A strategy for copyright in the digital age* (Intellectual Property Office), October 2009, 27.
 - 22 (2002) 192 RIDA 448.
 - 23 Adeney E, *The Moral Rights of Authors and Performers: An International and Comparative Analysis* (Oxford University Press, Oxford), 2006, 184.
 - 24 (2012) FMCA 2 (10 February 2012).
 - 25 Copyright Act 1968 (Australia), Section 195 AJ (a).
 - 26 Copyright Amendment (Moral Rights) Bill 1999 (Australia).
 - 27 Revised Explanatory Memorandum, Copyright Amendment (Moral Rights) Bill 1999, 10 (Australia). Adeney E, Defining the Shape of Australia's Moral Rights: A Review of the New Laws, *Intellectual Property Quarterly*, 4 (2001) 291-325, 303.
 - 28 Revised Explanatory Memorandum, Copyright Amendment (Moral Rights) Bill 1999, 1 (Australia).
 - 29 (2012) FMCA 2 (10 February 2012).
 - 30 Mr. 305 is understood to be a reference to Pitbull.
 - 31 DJ Suave is a reference to Mr. Fernandez.
 - 32 *Perez v Fernandez* (2012) FMCA 2 (10 February 2012), [28].
 - 33 *Perez v Fernandez* (2012) FMCA 2 (10 February 2012), [31].
 - 34 *Perez v Fernandez* (2012) FMCA 2 (10 February 2012), [42].
 - 35 *Perez v Fernandez* (2012) FMCA 2 (10 February 2012), [65].
 - 36 *Perez v Fernandez* (2012) FMCA 2 (10 February 2012), [84].
 - 37 Hansmann H and Santilli M, Authors' and Artists' Moral Rights: A Comparative Legal and Economic Analysis, *Journal of Legal Studies*, 26 (2007) 95, 115.
 - 38 *Amar Nath Sehgal v Union of India* 2005 ILR (2005) 1 Del 236, [34].
 - 39 *Raj Rewal v Union of India* 2019 SCC OnLine Del 8716, [24].
 - 40 Copyright Act 1985 (Canada), Section 28.2 (1).
 - 41 Copyright Act 1968 (Australia), Sections 195 AJ, 195 AK.
 - 42 Copyright, Designs and Patents Act 1988 (UK), Section 80 (2) (b).
 - 43 *Emma Delves-Broughton v House of Harlot* [2012] EWPC 29 (18 May 2012), [24].
 - 44 *Confetti Records v Warner Music*, [2003] E.C.D.R.31, [150]. Griffiths J, Not Such a 'Timid Thing' - The UK's Integrity Right and Freedom of Expression, in Griffiths, J and Suthersanen, U (eds), *Copyright and Free Speech: Comparative and International Analyses* (Oxford University Press, Oxford), 2005, 218-219 ["Griffiths"].
 - 45 [2012] EWPC 29 (18 May 2012).
 - 46 *Emma Delves-Broughton v House of Harlot* [2012] EWPC 29 (18 May 2012), [4].
 - 47 *Emma Delves-Broughton v House of Harlot* [2012] EWPC 29 (18 May 2012), [7].
 - 48 *Emma Delves-Broughton v House of Harlot* [2012] EWPC 29 (18 May 2012), [24].
 - 49 [2003] E.C.D.R.31.
 - 50 *Confetti Records v Warner Music*, [2003] E.C.D.R.31, [150].
 - 51 Rome Records, p. 171.
 - 52 Rome Records, p. 171-172.
 - 53 Rome Records, p. 171-172. Ricketson Sam & Jane C Ginsburg, *International Copyright and Neighbouring Rights:*

- The Berne Convention and Beyond* (Oxford University Press, Oxford), 2006 [10.07]-[10.09] [“Ricketson and Ginsburg”].
- Lim D, Prejudice to Honour or Reputation in Copyright Law, *Monash University Law Review*, 33 (2007) 290, 309 [“Dennis Lim”].
- 54 *Alexander Murray v Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804), [18].
- 55 Article 19 (3) (a), UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, 999, 178 <https://www.refworld.org/docid/3ae6b3aa0.html> (accessed on 15 August 2020).
- 56 Griffiths, 224. Leslie Kim Treiger-Bar-Am, The Moral Right of Integrity: A Freedom of Expression, in Fiona Macmillan and Kathy Bowrey (eds), *New Directions in Copyright* (Edward Elgar), 2005, 158.
- 57 Brussels Records, p.180. Ricketson and Ginsburg, [10.27]. Dennis Lim, 295.
- 58 [1999] F.S.R. 168. Griffiths, 217-218. Dennis Lim, 308.
- 59 *Pasterfield v Denham* [1999] F.S.R. 168, 182.
- 60 *Pasterfield v Denham* [1999] F.S.R. 168, 170.
- 61 *Pasterfield v Denham* [1999] F.S.R. 168, 171.
- 62 *Pasterfield v Denham* [1999] F.S.R. 168, 172.
- 63 *Pasterfield v Denham* [1999] F.S.R. 168, 180.
- 64 Berne Convention Implementation Act 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1988).
- 65 H. R. Rep. No. 101-514, 101st Cong., 2d Sess. 15, reprinted in, 1990 U.S.C.C.A.N. at 6925. *Carter v Helmsley-Spear, Inc.*, 861 F. Supp. 303 (S.D.N.Y. 1994). Cross John T, Reconciling the “Moral Rights” of Authors with the First Amendment Right of Free Speech, *Akron Intellectual Property Journal*, 1 (2) (2007) 185, 259.
- 66 Vaver D, Authors Moral Rights in Canada, in *International Review of Industrial Property and Copyright Law*, 1983, 356.
- 67 Rome Records, 171.
- 68 Article 37, The Berne Convention for the Protection of Literary and Artistic Works, 9 September 1886, as revised at Paris on 24 July 1971 and as amended 28 September 1979, 102 Stat. 2853, 1161 U.N.T.S. 3, <http://www.wipo.int/clea/docs/en/wo/wo001en.htm>.
- 69 Adeney E, The moral right of integrity: The past and future of “honour”, *Intellectual Property Quarterly*, 1 (2005) 111, 122.
- 70 Adeney E, The moral right of integrity: The past and future of “honour”, *Intellectual Property Quarterly*, 1 (2005) 122.
- 71 Adeney E, The moral right of integrity: The past and future of “honour”, *Intellectual Property Quarterly*, 1 (2005) 124. Dennis Lim, 293.
- 72 Adeney E, The moral right of integrity: The past and future of “honour”, *Intellectual Property Quarterly*, 1 (2005) 121.
- 73 Mattson D J, Clark S.G, Human dignity in concept and practice, *Policy Sci*, 44 (4) (2011) 303, 309-310. Adeney E, The moral right of integrity: The past and future of “honour”, *Intellectual Property Quarterly*, 1 (2005) 124-126. R v Kapp, [2008] 2 S.C.R. 483, [22] (Canada).
- 74 Adeney E, The moral right of integrity: The past and future of “honour”, *Intellectual Property Quarterly*, 1 (2005) 124-126. Dennis Lim, 295-297.
- 75 Brussels Records, 190. Ricketson and Ginsburg, [10.11]. See further Dennis Lim, 310.
- 76 Dennis Lim, 310.
- 77 Brussels Records, p. 190.
- 78 Rome Records, p. 171.
- 79 (1982) 70 C.P.R. (2d) 105.
- 80 *Snow v Eaton Centre Ltd* (1982) 70 C.P.R. (2d) 105, [5].
- 81 Dennis Lim, 300-301.
- 82 *Snow v Eaton Centre Ltd* (1982) 70 C.P.R. (2d) 105, [2]. Vaver D, Principles of Copyright: Cases and Materials, WIPO, 76, https://www.wipo.int/edocs/pubdocs/en/copyright/844/wipo_pub_844.pdf (accessed on 25 July 2020) [“David Vaver: Cases and Materials”].
- 83 *Snow v Eaton Centre Ltd* (1982) 70 C.P.R. (2d) 105, [3]. Vaver D, Cases and Materials, 76.
- 84 *Snow v Eaton Centre Ltd* (1982) 70 C.P.R. (2d) 105, [6]-[8].
- 85 *Snow v Eaton Centre Ltd* (1982) 70 C.P.R. (2d) 105, [6].
- 86 [1995] F.C.J. No. 1583.
- 87 *Prise de Parole Inc. v Guerin* [1995] F.C.J. No. 1583, [26].
- 88 (1995) 39 IPR 501.
- 89 *Tidy v Trustees of the Natural History Museum* (1995) 39 IPR 501, 504.
- 90 (2012) FMCA 2 (10 February 2012).
- 91 *Perez v Fernandez* (2012) FMCA 2 (10 February 2012), [60].
- 92 *Perez v Fernandez* (2012) FMCA 2 (10 February 2012), [87].
- 93 *Perez v Fernandez* (2012) FMCA 2 (10 February 2012), [87].
- 94 2005 ILR (2005) 1 Del 236.
- 95 *Amar Nath Sehgal v Union of India* 2005 ILR (2005) 1 Del 236, [6].
- 96 *Amar Nath Sehgal v Union of India* 2005 ILR (2005) 1 Del 236, [7].
- 97 *Amar Nath Sehgal v Union of India* 2005 ILR (2005) 1 Del 236, [8].
- 98 *Amar Nath Sehgal v Union of India* 2005 ILR (2005) 1 Del 236, [31].
- 99 *Amar Nath Sehgal v Union of India* 2005 ILR (2005) 1 Del 236, [56].
- 100 Dennis Lim, 309-313.