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The Inadequacy of UK Moral Rights Protection: A Comparative Study on the Waivability of Rights and Recontextualisation of Works in Copyright and Droit D'auteurs Systems

Jonas Brown-Pedersen*

ABSTRACT

The paper examines two aspects of UK moral rights protection, namely the waiver of rights provided for under section 87(2) of the Copyright, Designs and Patents Act 1988 ('CDPA') and the protection of copyright works from recontextualisation, in a comparative study. The jurisdictions compared are the UK, Canada, and the Nordic Countries. The paper argues that UK protection of authors' moral rights are insufficient, chiefly due to the operation of section 87(2) CDPA and the lack of protection against recontextualisation ('the spirit of the Convention'). The purpose of comparison is to furnish alternative solutions existing under the same international framework as the CDPA. In concluding, the paper finds that comparing the copyright law system of the UK to the Canadian hybrid system and the Nordic droit d'auteurs systems reveals a scale from least to most substantial protection of moral rights, with a greater emphasis on protection of the spirit of the work in droit d'auteurs jurisdictions, as illustrated by Swedish case law.

INTRODUCTION

International copyright law is, at its very core, a philosophical compromise. This is no surprise: it is likely that all large, multilateral treaties are a result of some sort of compromise between the philosophical schools followed by different Member States, owing to the State-specific nature of law. These differences may turn out to have little practical significance, or, as in the case of the 1886 Berne Convention

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for the Protection of Literary and Artistic Works ('the Berne Convention'), the practical significance may be substantial. This in itself manifests in the protection of the moral rights of attribution (*droit de paternité* or the 'right of paternity') and the right of integrity (*droit de respect*) in Article 6bis of the Berne Convention. Moral rights, often referred to as *droits moraux*, originated in the civil law systems of Germany and France, and do not sit easily within the common law system of UK copyright.[1] Therefore, moral rights were not introduced into UK law until the enactment of the Copyright, Designs and Patents Act 1988 ('CDPA'), despite their inclusion in the Berne Convention at Rome in 1928.[2]

This paper submits that the protection afforded to moral rights by the CDPA is inadequate for two reasons: (1) because the waiver of moral rights provided for in section 87(2) CDPA has the effect of distinguishing the moral rights of the author in practice, thus violating Article 6bis of the Berne Convention on its correct interpretation; and (2) because the protection of the right of integrity does not cover recontextualisation, ie the displaying of a work in a new context which renders it prejudicial to the author's honour or reputation. Both of these aspects of moral rights protection will be analysed in a comparative perspective, contrasting the UK approach with the approaches of the mixed jurisdiction of Canada, and the civil law jurisdictions of the Nordic countries, defined as including Norway, Sweden, Denmark, Finland, and Iceland. These jurisdictions are chosen because they represent, in the opinion of the author, good examples of their respective legal traditions. The Nordic countries are representative of the *droit d'auteurs* systems of continental Europe, while the hybrid system of Canada falls in between the two extremes, which lends itself well to comparison. Only Canadian federal law will be analysed, as, per the Canadian Constitution Act section 91(23), copyright law is under the exclusive jurisdiction of the Federal Parliament. The Nordic countries will be analysed together due to their high degree of similarity of legislation, philosophy, and practical approach in the area of moral rights.[3] Significant differences will be commented upon where they arise.

As regards structure, the paper will first define moral rights in a general sense and provide a short historical and philosophical background that is

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[1] Silke von Lewinski, *International Copyright Law and Policy* (OUP 2008) para 3.54.

[2] Gillian Davies and Kevin Garnett (eds), *Moral Rights* (2nd edn, Sweet & Maxwell 2016) para 3-005.

[3] ibid para 19-001.

necessary for understanding the core content. It will then present Article 6bis of the Berne Convention and elaborate on its interpretation and the implications of these. Thereafter, the paper will analyse: (1) the waivability of moral rights within the above jurisdictions, starting with the UK; and (2) the protection of recontextualisation in the same manner. Finally, the paper will conclude that the protection afforded to the moral rights of authors is inadequate in both respects. To conclude, this paper will also suggest that a likely successful reform of UK moral rights can be achieved by borrowing the interpretation of Article 6bis of the Berne Convention from the legislation and case law of the *droit d'auteurs* countries.

I. WHAT ARE MORAL RIGHTS?

Defining 'Moral Rights'

Moral rights may be defined as:

> [T]he non-pecuniary interests of authors (…) secur[ing] the bond between authors and their works; (…) safeguard[ing] the expression of the author's personality through his work by giving recognition and protection to his creative integrity, reputation and personality.[4]

This definition is rather broad and encompasses several important notions: (1) that the work carries with it the author's personality in some form; (2) that, as a consequence of (1), there exists a personal bond between the author and the work; (3) that the work is a product arising from a creative process; and (4) that the state of the work has a direct effect upon the integrity and reputation of the author. To understand the reasoning behind these notions, we must look to the historical and philosophical origins of moral rights.

[4] ibid para 1-001.

The History and Philosophy of Moral Rights through a Comparative Perspective

While it is outside the scope of this paper to present a detailed history of moral rights, a short overview will provide context to the forthcoming discussion.[5] Stig Strömholm argues that the history of moral rights is intimately connected to the societal standing and resources of authors and creators as a group.[6] As such, it is not surprising that the philosophy of moral rights was largely developed in 18th century Germany. It coincided with the pre-romantic and romantic periods in art and literature, and the *Sturm und Drang*-movement, which is credited with shifting the emphasis from mimesis to intellectual creation.[7] This lays the necessary philosophical groundwork for asserting moral rights as 'the expression of the author's personality'.[8] In the same time period, German philosophers Immanuel Kant and Friedrich Hegel formulated the theories of *monism* and *dualism,* respectively. Monism advocates that moral and economic rights exist as an inseparable unit in copyright, while dualism proclaims that moral and economic rights exist separately. The practical significance of this is noticeable in the alienability and duration of rights.[9] These, however, are not issues pertinent to the analysis of this paper.

It is important to note that, because moral rights developed in the continental European countries, civil and common law countries have fundamentally different approaches to the basic issue of regulating intellectual property. Common law jurisdictions employ the system of copyright, in which the overarching goal is the protection, and economic exploitation, of the work.[10] This is often rationalised in public interest terms, as in the US[11] – although it is important to note that the UK has no unifying theory of copyright law. On the other hand, civil law jurisdictions generally employ a system of author's rights, referred to as the *droit d'auteurs* systems, the main goal of which is the protection

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[5] For a deeper history of moral rights, see Stig Strömholm, *Le Droit Moral de L'Auteur en Droit Allemand, Francais et Scandinave avec un Aperçu de L'Évolution Internationale: Etude de Droit Comparé* (Vols I, Norstedt 1967); (Vols II:1, Norstedt 1967); (Vols II:2, Norstedt 1973).

[6] Stig Strömholm, 'Droit Moral – The International and Comparative Scene from a Scandinavian Viewpoint' (2002) Scandinavian Stud L 217, 224.

[7] ibid 222.

[8] Davies and Garnett (n 2) para 1-001.

[9] ibid para 3-001.

[10] ibid para 2-002.

[11] US Constitution, art I § 8.

of authors. This fundamental philosophical difference is often, correctly, perceived to be the root of the UK's problems in incorporating moral rights.

Moral rights were introduced in German copyright statutes during the late 19th and early 20th century. This was around the time that claims by authors and creators slowly entered the sphere of France's private law, as is evident from the case law of French courts, though this begins in the early 19th century.[12] For the purposes of this paper, it suffices to state that the theories of moral rights gained ground in continental Europe during the early 20th century, and became a central part of copyright protection in many Member States to the Berne Convention.

As a result of this, four moral rights were proposed at the 1928 revision conference in Rome: the right of attribution; the right of integrity; the right of divulgation; and the right to withdraw from circulation.[13] Of these, only the rights of attribution and integrity were adopted, due to objections raised by the common law countries against the other two rights. Since then, there have been several revisions of Article 6bis, and it is currently subject to a rather significant concession made to the common law countries, contained in the latter half of Article 6bis, section 2. Against this conceptual backdrop, the paper turns to Article 6bis of the Berne Convention.

II. ARTICLE 6bis OF THE BERNE CONVENTION

The Text of Article 6bis

The text of Article 6bis of the Berne Convention reads:

> (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.
> (2) The rights granted to the author in accordance with the preceding paragraph shall, after his death, be maintained, at least until the expiry of the economic rights, and shall be exercisable by the persons or

[12] See *Billecocq v Glendaz* Tri Civ Seine 1814 (unreported) in Strömholm (n 5).

[13] Adolf Dietz, 'The Moral Right of the Author: Moral Rights and the Civil Law Countries' (1994) 19 Colum–VLA JL & Arts 199, 200, 203.

institutions authorised by the legislation of the country where protection is claimed. However, those countries whose legislation, at the moment of their ratification of or accession to this Act, does not provide for the protection after the death of the author of all the rights set out in the preceding paragraph may provide that some of these rights may, after his death, cease to be maintained.

(3) The means of redress for safeguarding the rights granted by this Article shall be governed by the legislation of the country where protection is claimed.

Comment on Interpretations and Implications

The focus of this paper is to make the less-than-subtle point that there is, in UK law, a substantial gap between the *lex ferenda* and the *lex lata* as regards moral rights protection in the UK. Therefore, the interpretation of Article 6bis of the Berne Convention is vital to the discussion. The essence of this paper's argument is that the *lex ferenda* proposed here includes provision for the non-, or limited, waivability of moral rights and a wider, more substantial right of integrity, under the premise that Article 6bis can and should be interpreted in such a way. The question turns on two points: (1) whether Article 6bis(1) should be interpreted as making moral rights non-waivable, or at least waivable subject to certain restrictions; and (2) if the right to integrity contained in the same section should be interpreted so as to include protection against recontextualisation of works. Although the CDPA protects four rights as moral rights, the rights of false attribution and privacy of certain photographs will not be the focus of this paper, as they do not exclusively protect authors and are not included as moral rights within Article 6bis.

This paper argues that there are several factors in favour of the limited or non-waivability of moral rights. First, the strong philosophical grounding of moral rights as intimately connected to the personality of the author suggests that they should be non-waivable. Second, the text of the Article 6bis(1), with the phrase '(…) and even after the transfer of said [economic] rights', implies that they are to operate notwithstanding the waiver or assignation of economic rights. Lastly, the practical reality of the commercial relationship between author and publisher argues in favour of non-waivability, or at least a restriction on waivers. This will be seen in the UK part of section III below.

The right to integrity has been interpreted differently across the States party to the Berne Convention, as we will see in section IV. The reason for this is that the right of integrity is ambitious in scope, and was intended to cover a multitude of acts and results. The right has two parts, the first being protection of the form of the work, ie the physical structure of the work itself, and the second being the spirit of the work, which can be defined, for the sake of this analysis, as the context of the work.[14] The objective of this paper is partly to argue that the UK interpretation of the phrase 'or other derogatory action in relation to' as it is enacted in section 80 CDPA, is too narrow, and offers inadequate protection to works covered under the article as it confines protection to the form, ignoring the spirit of the work. As Ricketson and Ginsburg note, there is no reason why recontextualisation should not be protected under Article 6bis(1),[15] and recontextualisation is, in fact, often protected under the right of integrity in the legal systems of continental Europe. The comparative sections below will demonstrate why, and how.

III. WAIVABILITY OF MORAL RIGHTS

The United Kingdom

Despite the fact that moral rights protection was introduced during the Rome revision of the Berne Convention in 1928, the UK did not specifically provide for any moral rights regime in domestic law until 1988. The CDPA protects two moral rights: (1) the right of attribution; and (2) the right of integrity. It is drafted in a very detailed, technology-specific fashion,[16] and its Chapter IV on moral rights is no exception. Sections 79 and 81 of the CDPA also provide long and detailed lists of exceptions to the rights of attribution and integrity. In its entirety, Chapter IV created what has been referred to as 'the sickly children of the Berne parent'.[17]

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[14] Makeen F Makeen, 'Egypt' in Gillian Davies and Kevin Garnett (eds), *Moral Rights* (2nd edn, Sweet & Maxwell 2016) para 27-013.

[15] Sam Ricketson and Jane C Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* (2nd edn, OUP 2006) para 10.24.

[16] Gerald Dworkin, 'The Moral Right of the Author: Moral Rights and the Common Law Countries' (1994) 19 Colum–VLA JL & Arts 229, 245-246.

[17] Gillian Davies and Kevin Garnett (eds), *Moral Rights* (Sweet & Maxwell 2010) 80.

Scholars have listed many shortcomings on the part of the UK in the field of moral rights. This paper submits that the primary shortcoming is the possibility of waiving one's moral rights completely, provided for in section 87 CDPA. Together with the common law doctrine of implied waiver these serve to practically distinguish moral rights. While it is true that section 87(2) states that the waiver must be by a signed instrument in writing, section 87(4) also expressly states that nothing in Chapter IV shall serve to exclude the operation of 'contract or estoppel in relation to an informal waiver'. The logical conclusion to draw from this, is that an author could, in addition to waiving his or her rights formally, also be held to have waived his or her moral rights by contract or estoppel, without the contract satisfying the formality requirements of section 87. This seems to be the legislative intent of the CDPA, as is evident from the Parliamentary debates.[18]

In practice, the waiver has the effect of barring authors from retaining their moral rights in most cases where the author is the weaker party in a commercial relationship (as is often the case, for example, with unknown authors of literary works wishing to be published), as the publishing company will assert pressure on the author to give up his or her rights.[19] While the section 87 waiver does not necessarily always violate the Berne Convention, it facilitates such violations and provides a weak level of protection to moral rights. In this sense, it has been described as 'completely against the spirit of the Berne Convention'.[20]

There is less authority on the operation of informal waiver in copyright scenarios, but it still represents a significant weakening of the Berne moral rights for the same reasons as above, possibly leading to outcomes in violation of the Berne Convention obligations.[21] Having concluded that there are flaws in the operation and availability of section 87 of the CDPA, what does this mean? Arguably, the best way to assess the appropriate standard for which to aim is through comparison against other jurisdictions.

Canada

The federal Canadian legal system is a hybrid. It is predominantly a common law system, with the civil law jurisdiction of Quebec influencing its legal philosophy

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[18] HL Deb 25 February 1988, Vol 493, col 1337.

[19] Davies and Garnett (n 2) para 10-033.

[20] HC Deb 28 April 1988, Vol 132, cols 569-570.

[21] Sheila McCartney, 'Moral Rights under the United Kingdom's Copyright, Designs and Patents Act of 1988' (1990) 15 Colum–VLA JL & Arts 205, 243.

and substantive law.[22] In copyright terms, this means that Canada has a significant *droit d'auteurs* tradition, with a history of moral rights philosophy dating back to the late 19th century.[23] As a result, Canadian legislators, unlike their UK colleagues, accepted that the introduction of Article 6bis meant that their domestic law would have to be amended after the Convention's entry into force. The Copyright Amendment Act 1931 inserted a short provision into the Canadian Copyright Act 1921, which simply stated that authors should have 'the right to claim authorship over the work', and to 'restrain any distortion, mutilation or other modification of the work (…)'.[24] The amendment was silent on most matters, including the remedies available for infringement, and the provision was generally criticised for being unclear and 'useless in practical application'.[25] However, the overall image presented by the Canadian history on moral rights is markedly more enthusiastic than other common law jurisdictions.[26]

The current applicable Canadian law on moral rights and copyright in general, is the Copyright Act of Canada 1921, heavily amended by the Copyright Amendment Acts of 1988 and 1997, and the Copyright Modernization Act 2012.[27] The rights of attribution and integrity are protected, and it is sufficient for the purpose of this section to note that the provisions largely follow Article 6bis of the Berne Convention.[28]

Sections 14.1(2) and 17.1(2) of the Copyright Act of Canada 1921 provide for waiver of moral rights in works and performances, respectively. Authors may choose to waive their rights in whole or in part, in writing or verbally. The waiver need not be express, but where a party alleges that the author has impliedly waived his or her right, there is a high evidentiary threshold to overcome.[29] The aptly named scholar Professor Vaver has expressed his view on the matter in direct terms, which the author considers to be the correct analysis: 'Moral rights exist on the books, but in reality all they may have accomplished is the insertion of an extra paragraph in the transfer and sale agreement between the purchaser and the

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[22] Dworkin (n 16) 243.
[23] Davies and Garnett (n 2) para 3-007.
[24] Copyright Amendment Act SC 1931, c 8, inserting s 12(5) of the Copyright Act 1921.
[25] Harold G Fox, 'Some Points of Interest in the Law of Copyright' (1946) 6 UTLJ 100, 126.
[26] Davies and Garnett (n 2) para 25-001.
[27] ibid para 25-003.
[28] Dworkin (n 16) 243.
[29] *Auchinachie v Vogel* 2007, CarswellOnt 866 Ont SCJ.

artist'.[30] In conclusion, the Canadian law on waiver substantively mirrors the UK law, with the same consequences likely. This leaves the civil law jurisdictions to provide us with an alternative approach.

The Nordic Countries

The Nordic countries are all recognised as *droit d'auteurs* systems, closely linked to the continental French and German approach to moral rights. It is safe to state that Nordic legislation on moral rights is uniform, at least to such an extent that they may be analysed together.[31] The Copyright Acts of the Nordic countries were enacted around the same time during the early 1960s, as a direct result of a collaborative legislative project initiated by the Swedish Government in 1938. Consequently, their provisions correspond with each other as regards to content. For practical purposes, reference will be made to the Norwegian Copyright Act 1961 ('NCA').[32] The Nordic Copyright Acts recognise the rights of attribution and integrity, contained in section 3. The interpretation of the right of attribution is not material to this paper, but the right of integrity will be elaborated upon in section IV.

Section 3 of the NCA also provides for express and implied waiver of both rights. Importantly, for the purpose of this paper, the waiver must be '(…) avgrenset efter art og omfang' (limited in character and scope). This ensures that the central elements of the right of integrity are not waived, as changes to the work that are prejudicial to the author's literary, scientific or artistic reputation or individuality may often fall outside the scope of the allowed waiver.[33] In addition, section 3 NCA also states that the author cannot waive his or her right to anonymity and his or her right to demand an express statement in or on the work where prejudicial changes have been made, making it clear that the original author is not responsible for the changes.

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[30] Dworkin (n 16) 245.

[31] Johan Axhamn, 'The Nordic Countries' in Gillian Davies and Kevin Garnett (eds), *Moral Rights* (2nd edn, Sweet & Maxwell 2016) para 19-001.

[32] Norwegian name: Lov 12 mai 1961 nr. 2 om opphavsrett til åndsverk m.v. For reference, the other Nordic Copyright Acts are the Swedish 'Lag (1960:729) om upphovsrätt till litterära och konstnärliga verk', and the updated Danish 'Bekendtgørelse af lov om ophavsret (LBK nr 1144 af 23/10/2014)'.

[33] Axhamn (n 31) para 19-030.

While the waiver of moral rights is allowed in all jurisdictions surveyed, the Nordic model is of a seriously limited character in comparison to the UK and Canadian model. The case law on the subject is insubstantial, but the legislation is clear enough on the subject for this paper to conclude that the Nordic model of a limited waiver connected only to certain aspects of moral rights provides a higher level of protection for authors. It certainly has the potential to avoid the possibility of commercial circumvention present in Canada (and, by extension, the UK), described by Professor Vaver above.

IV. THE RIGHT OF INTEGRITY AND RECONTEXTUALISATION

The right of integrity is a broad right, which covers a great many different actions and results. Highlighting its importance, it has been described by Strömholm as 'the bastion of moral right[s] (…)'.[34] It is interpreted differently across different jurisdictions. While the interpretation in each of the jurisdictions discussed here is touched upon, a more detailed analysis of the right is outside the scope of this paper. We will here concentrate on describing the right of integrity, and analysing its interpretation as regards the recontextualisation of original works.

The United Kingdom

The right of integrity is provided for in section 80 CDPA, entitled 'Right to object to derogatory treatment of work'. In essence, the author of any literary, dramatic, musical or artistic work, or the director of a film can object to the derogatory treatment of their work. The terms 'treatment' and 'derogatory' are described in section 80(2) of the CDPA; section 80(2)(a) provides that 'treatment' under the act is 'any addition to, deletion from or alteration to or adaption of the work, other than' translations and arrangements of dramatic or literary works or transcriptions of musical work constituting minor changes. Section 80(2)(b) states that a treatment is 'derogatory' where it 'amounts to distortion or mutilation of the work or is otherwise prejudicial to the honour or reputation of the author or director (…)'. Whether treatment is 'prejudicial to the honour or reputation of the author' is decided by a test of objective reasonableness,[35] and it is not enough that the

[34] Strömholm, 'Scandinavian Viewpoint' (n 6) 240.

[35] *Tidy v Trustees of the Natural History Museum* EIPR D-81 [1996].

author him or herself is of this opinion.[36] This places the threshold for holding a violation of the right of integrity higher than that of Canada, as shown below. It is submitted that when defining treatment in section 80(2)(a), the UK Parliament did not properly account for the wording of Article 6bis of the Berne Convention, and defined 'treatment' in a too narrow sense.

It will be remembered that Article 6bis(1) contains the phrase 'or other derogatory action in relation to the work' in its description of the right of integrity. This was clearly done to include actions that do not fit the narrow definition of physically altering the copyrighted work, but which may be just as damaging or objectionable. Any such action will fall outside the scope of the CDPA right of integrity.[37] In this respect, the UK falls short of its obligations under the Berne Convention, and the protections the UK provides are open to criticism on this ground.

Canada

The Canadian right of integrity is similar in content to the UK right, with sections 14 and 28 of the Copyright Act of Canada 1921 giving authors the right to object to distortion, mutilation or other modification of the work that is 'prejudicial to the author's honour or reputation'. It is worth noting here that the 'honour or reputation' requirement is similarly worded in UK and Canadian law, but interpreted somewhat differently, as Canadian law applies a test mixing subjective and objective criteria, whereas UK law subjects the same requirement to a purely objective test.[38] This lowers the evidentiary burden somewhat for the author, and correspondingly strengthens the protection given to authors under the right. However, it does not make the Canadian integrity right entirely different from its UK counterpart.

As in UK law, recontextualisation is not protected under Canadian law, as section 28.2(3) of the Copyright Act 1921 provides for several actions which do not constitute an infringement. This includes common recontextualisations such as changing the location of the work and the physical means for displaying it. The likely result of this is that recontextualisation in most cases would not be covered under Canadian law, despite Article 6bis, in the author's opinion, providing for

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[36] *Pasterfield v Denham* [1999] FSR 168.
[37] Dworkin (n 16) 249-250.
[38] cf *Snow v The Eaton Centre* 1982, 70 CPR 105 with *Pasterfield v Denham* [1999] FSR 168.

just that. Once again, a review of civil law jurisdictions is required to find stronger protection of moral rights.

The Nordic countries

The definition of the right of integrity in Nordic jurisdictions, as in s 3 NCA,[39] differs from the Canadian and UK approach. An action is only an infringement of the right if it is prejudicial to the author's literary, scientific or artistic reputation or individuality, meaning that (1) the infringing action need not be derogatory, defamatory or the like;[40] and (2) that because of the individuality requirement, the infringement can include acts which constitute 'improvements' on the work in question.[41] Note that this is assessed objectively.[42] This right of integrity is, *prima facie*, considerably more generous towards authors than its UK or Canadian counterparts, but what does this mean with regards to recontextualisation of works?

Plainly, recontextualisation of a work, where this is prejudicial to the author's reputation or individuality, is an infringement of his or her right of integrity. Two Swedish cases from the Stockholm Courts showcase the Nordic approach. In the first case, the Court held that the inclusion of a religious song in a film scene showing an intimate couple was an infringement of the author's right, as it impinged upon his artistic individuality.[43] The second case regarded the exhibiting of the claimant's artwork next to highly pornographic photographs, which was held by the Stockholm District Court to amount to a context that prejudiced the author's reputation or individuality.[44] While the test for determining whether the author's reputation or individuality has been infringed is objective, it is noteworthy that the Stockholm courts have, in the above cases, taken an approach where the author's subjective interpretation of the infringement has been accorded some weight.

Upon analysis of the above material, the conclusion on recontextualisation must be that the Nordic approach, here represented by the Swedish interpretation in case law, offers a more substantial level of protection for authors. This

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[39] See Norwegian Copyright Act 1961.
[40] Strömholm, 'Scandanavian Viewpoint' (n 6) 240.
[41] ibid 241.
[42] ibid 243.
[43] NIR 1971 s 219.
[44] NIR 1974 s 187.

protection of the spirit, in addition to the form of the work, can rightly be described as a more whole-hearted incorporation of the Berne Convention's Article 6bis.

CONCLUSION

As noted at the outset of this paper, the incorporation of international obligations into domestic law is not without its troubles, be they conceptual, practical or merely political in nature. The UK's incorporation of the Berne Convention's Article 6bis in the CDPA has certainly demonstrated this in several ways, both as regards waiver of moral rights and the narrow interpretation given to the right of integrity under the CDPA. The common theme, manifest throughout the comparison, is the tendency of civil law jurisdictions to provide more generous versions of the same moral rights, and for Canada to situate itself in between these two extremes. This is not surprising, given the philosophical history of moral rights, but it is interesting given the fact that the UK has a strong international obligation to provide moral rights protection to nationals of Berne member states. The above analysis demonstrates that the UK is currently not fulfilling these obligations to the best of its ability. In the words of McCartney, the rights provided for are '(…) well below the Berne Convention standard'.[45]

The results of our comparison perpetuate the prevailing view among legal scholars, namely that the copyright systems are hesitant to provide full protection of rights that they perceive to be foreign and alien. This is reinforced by the fact that the UK, Canada and the Nordic countries appear to be a sliding scale from the lowest to the highest level of protection. Evidently, the hybrid system of Canada makes the process of adapting to *droit d'auteurs* rules easier.

The hesitancy demonstrated by the UK legislature when enacting the CDPA created sub-standard rights that are not in compliance with Article 6bis, and that in order to correct this, any hesitancy must be done away with. In proposing a *lex ferenda* for the UK to aspire to, the author would look to the *droit d'auteurs* systems of continental Europe – simply because, when incorporating *droit d'auteurs* rights into a copyright system, the right path to upholding international obligations under the Berne Convention is taking an interpretative cue from the conceptual experts.

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[45] McCartney (n 21) 245.