AHRB Copyright Conference
University of London, Birkbeck College
June 28-29, 2004

Leslie Kim Treiger-Bar-Am
St John's College, Faculty of Law, University of Oxford
leslie.treiger@law.ox.ac.uk

THE MORAL RIGHT OF INTEGRITY: A FREEDOM OF EXPRESSION

A INTRODUCTION

The moral right of integrity allows authors to prevent certain modifications to their artworks. The right is maintained by the author even where the ownership of the copyright in her work has passed out of her hands. An example often used to illustrate the complexities of the right is the moustache that Marcel Duchamp painted on a replica of Da Vinci's Mona Lisa.

The integrity right has been enacted as section 80 of the UK Copyright, Designs and Patents Act 1988 ('Act'). The Act provides that an author, defined to include an artist or film director,[1] has the right to prevent treatment that 'amounts to distortion or mutilation of the work or is otherwise prejudicial to the honour or reputation of the author or director.'[2] The right is conceived of as an intellectual property right. By contrast, the aim of this paper is to develop the characterisation of the integrity right of integrity in UK law as a human right of expression, and to situate it within the doctrine of freedom of expression.

In section B of this paper, other characterisations of the right will be distinguished. Unlike the reputation right protected in the law of defamation, the integrity right protects not how others perceive the author, but the author's intrinsic autonomy of expression. Similarly, where it is labeled a personality right, the integrity right is inaccurately portrayed as protecting the author's persona, ie the image of the author as perceived by others. Other difficulties with the personality theory will be discussed. I submit that the right is a personality right only insofar as expression is indeed integral to personality.

In section C, the integrity right will be shown to reflect theoretical developments supporting authors' rights of expression, from the Renaissance through to today. The postmodern critique of authors' rights and the author construct will be countered.

---

* I extend deep gratitude to Dr Michael Spence for his insightful and critical comment in the development of this analysis.

[1] Act s9.

[2] Act s80(2)(b). The reference to s80 throughout will refer to Chapter IV and other relevant sections such as s103 of the Act.

Section D of this paper will situate the integrity right directly within the doctrine of freedom of expression. It will be seen that the rationales offered for the integrity right parallel those offered for the freedom of expression. It is on the autonomy rationale that the freedom of expression caselaw bases its protection of speakers against the distortion of their expression. That caselaw will be explored.

The integrity right can then be seen as arising out of freedom of expression principles, and as such, it is submitted that it ought to be interpreted accordingly. Understood as a freedom of expression, a s80 claimant would not need to show injury. Neither reputational injury nor emotional or other harm to personality interests ought be required to state a claim under s80. Injury is surely present, as indeed it must be insofar as infringement of s80 is a breach of statutory duty: it is injury to the author's autonomy of expression. A further implication of viewing s80 as a freedom of expression is that a modifier's defence of freedom of expression may be viewed as *within* the s80 doctrinal framework, rather than outside of it, as it has often been viewed with respect to copyright.

B OTHER CHARACTERISATIONS DISTINGUISHED

1 Reputation Right?

S80 implemented into UK law Article 6*bis* of the Berne Convention for the Protection of Literary and Artistic Works ('Berne Convention'). At the Revision Conference of Rome in 1928, at which a moral rights provision was introduced to the Berne Convention, the phrase 'honour or reputation' was used to describe the prejudice against which the integrity right protects. That phrase was a compromise between the participating civil law and common law countries. The civil law countries, with traditions of moral rights, preferred terms such as 'spiritual', 'moral' and 'personal', and reference to the 'character' of the author. The common law countries, led by the UK, objected to those terms as too vague under their legal systems. The phrase 'honour or reputation' was used so that common law countries could meet their obligations under the Berne Convention through laws of defamation and passing off, without the need to introduce a new cause of action into their domestic laws.[3]

Some continue to characterise the right in the UK Act as a right of reputation. For example, in *Pasterfield v Denham* [1999] FSR 168 the court cited approvingly one of Laddie's characterisations of s80 as protecting reputation, akin to the law of defamation.[4] Commentators often take this approach.[5] The term 'derogatory' in the statute is

[3] S. Ricketson, "Is Australia in Breach of its International Obligations with respect to the Protection of Moral Rights?", 17 *Melbourne University Law Review* 462 (1990), 474.
[4] at 181; see Laddie Prescott Vitoria, *The Modern Law of Copyright and Designs* (3d edn, London: Butterworths, 2000), 13.19.
[5] W. Cornish and D. Llewelyn, *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights* (5th edn, London: Sweet and Maxwell, 2003), 11-75, 11-81; *Halsbury Statutes* (4th edn vol 1 2000 reissue, London: Butterworths, 2000), 478 (General Note); S. Stokes, *Digital Copyright: Law and Practice* (London: Butterworths, 2002), 4.26; D.

sometimes understood with its ordinary language meaning of depreciatory. Rather, the term 'derogatory' can be seen to reflect its root 'derogate', as in taking away from, or deletion.[6] On its legal definition in the statute, 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'. Throughout the analysis I use the term 'distortion' as a short form rather than 'derogatory treatment', to avoid this confusion.

Yet if the right were a reputation right then courts would be required to make aesthetic evaluations: does Duchamp's placing of a moustache on the Mona Lisa defame Da Vinci by rendering the image aesthetically inferior, or improve Da Vinci's reputation by improving the image? Even if a court were to find that the modification is an aesthetic impoverishment of the artwork, it could be argued that the wide modern publicity that Duchamp's work gave to the Mona Lisa has improved Da Vinci's reputation.

The link between the aesthetics of the modification and the author's reputation was made expressly in the pre-1988 case of *Carlton Illustrators v. Coleman & Co Ltd* [1911] 1 KB 771. In *Carlton*, evidence was given that the alterations were such as would damage the plaintiff's reputation as an artist because they were aesthetically of inferior quality.[7] The argument of the plaintiff's expert in the *Pasterfield* case seems to have been based on this notion of 'derogatory.'[8] Cornish writes of 'aesthetic prejudice.'[9]

The dangers of a court undertaking an aesthetic evaluation were discussed by the House of Lords in *George Hensher Ltd v Restawile Upholstery (Lancs) Ltd* [1976] AC 64 (HL), and by Justice Holmes in *Bleistein v Donaldson Lithographing Co* 188 US 239 (1903). It is difficult for such evaluations to be 'objective.'

Vaver, "Authors' Moral Rights and the Copyright Law Review Committee's Report: W(h)ither Such Rights Now?", 14 *Monash University Law Review* (December 1988) 284, 288. In US commentary, see K.A. Kelly, "Moral Rights and the First Amendment: Putting Honor Before Free Speech?", 11 *University of Miami Entertainment & Sports Law Review* 211 (1994), 216, 232; G.J. Yonover, "The 'Dissing' of Da Vinci: The Imaginary Case of Leonardo v. Duchamp: Moral Rights, Parody and Fair Use", 29 *Valparaiso University Law Review* 935 (1995), 937, 1000. For views that the right may be treated as akin to the law of defamation, see G. Dworkin and R.D. Taylor, *Blackstone's Guide to the Copyright, Designs, and Patents Act 1988* (London: Blackstone, 1989), 86; Ricketson supra n.3 at 474; B. Sherman and L. Bently, *Intellectual Property Law* (Oxford: Oxford University Press, 2001), 249. Actions pursuant to defamation laws have been said to provide a rough parallel to the integrity right, N. Netanel, "Alienability Restrictions and the Enhancement of Author Autonomy in United States and Continental Copyright Law", 12 *Cardozo Arts & Entertainment Law Journal* 1 (1994) at 40. See infra other characterisations of the right by many of these authors.

[6] The Oxford English Dictionary, http://dictionary.OED.com (Oxford University Press 2004).

[7] At 778, 780-1.

[8] At 180, 181. See also *British Phonographic Ind Ltd v Mechanical-Copyright Protection Society Ltd (no 2)*, Copyright Tribunal, 1 Nov 1991 at 108.

[9] W.R. Cornish, "Moral Rights under the 1988 Act", 12 *E.I.P.R.* 449 (1989) at 451.

Relatedly, a modification may be found to insult or excessively criticise a work or its author. Is the moustached Mona Lisa an insult to the image or to Da Vinci? 'Derogatory' sometimes takes on the sense of insult.[10] It is an author's reputational interest that is said to be protected by the integrity right on this characterisation.[11] Moral rights in France include a right against excessive criticism.[12] Some commentators in common law jurisdictions support it.[13] Yet treating the integrity right as rendering insult actionable is dangerous as well, as a threat to freedom of expression.[14] English law generally is hesitant to create liability for insults or excessive criticism, as the court wrote in *Berkoff v Burchill* [1996] 4 All ER 1008 at 1013.

Most problematic for the purposes of the instant analysis, reputation surrounds how one is perceived by others. Reputation is extrinsic. Similarly, the right is said to protect the standing of the author in the eyes of the community, the admiration and recognition he receives.[15] I submit that s80 is more intrinsic to the person. That intrinsic interest can be called the autonomy of expression.

---

[10] Cornish and Llewelyn, supra n.5, at 11-76 n94; C. Gatley, *Gatley on Libel and Slander* (10th edn, London: Sweet and Maxwell, 2004), 21.38.

[11] R.J. DaSilva, "Droit Moral and the Amoral Copyright: A Comparison of Artist's Rights in France and the United States", 28 *Bulletin of the Copyright Society* 1 (1980), 32.

[12] *Ibid*. The extent to which the French moral right protects authorial reputation is in dispute, see *ibid*; P.E. Geller, "Copyright History and the Future: What's Culture Got To Do With It?", *Journal, Copyright Society of the USA* 209 (2000), 232; R. Sarraute, "Current Theory on the Moral Right of Authors and Artists Under French Law", 16 *American Journal of Comparative Law* 465 (1968), 479-80; S. Teilmann, "His Own Unaided Work", *AHRB Copyright Research Network Workshop* 5 February, 2004, Birkbeck College, London. www.copyright.bbk.ac.uk/contents/publications/workshops/theme1/steilmann.pdf.

[13] R. Kwall, "Copyright and the Moral Right: Is an American Marriage Possible?", 38 *Vanderbilt Law Review* 1 (1985), 7-8; C.A. Marvin, "The Author's Status in the United Kingdom and France: Common Law and the Moral Right Doctrine", 20 *International and Comparative Law Quarterly* 675 (Oct 1971), 693; M.A. Roeder, "The Doctrine of Moral Right: A Study in the Law of Artists, Authors and Creators", 53 *Harvard Law Review* 554 (1940), 572.

[14] DaSilva supra n.11 at 46; M. Spence, "Intellectual Property and the Problem of Parody", 114 *Law Quarterly Review* 594 (October 1998), 612.

[15] *Copinger and Skone James on Copyright* (vol 1, London: Sweet and Maxwell, 1999), 11-45; Gatley supra n.10 at 21.38 n27; J. Hughes, "The Philosophy of Intellectual Property", 77 *Georgetown Law Journal* 287 (1988), 350; Netanel supra n.5 at 24, 50, n124, n258. Such characterisations are among others offered by some of these authors, as seen below.

Other difficulties with conceiving of the integrity right as a protection of reputation as in the law of defamation have been noted. See P. Kearns, *The Legal Concept of Art* (Oxford: Hart Publishing, 1998), 86, 198 (art is not a fact which can be

The identification of the reputational interest has not been exclusive, however. Not all courts adjudicating claims pursuant to s80 have required proof of reputational harm. *Morrison Leahy Music Ltd v Lightbond Ltd* [1993] EMLR 144 did not require prejudice and *Tidy v Trustees of the Natural History Museum* [1995] 39 IPR 501 ChD required distortion *or* prejudice, but not both.[16]

Other interests have been named. Where reputation is understood to be at the crux of the integrity right, views differ as to whether the right protects professional reputation or personal reputation as a human being.[17] Sometimes the interest protected by the integrity right is identified as the author's emotions, which is then rejected as too subjective a standard.[18] Another frequent characterisation of the interest protected is the author's personality.

2 Personality Right?

The integrity right is frequently said to protect the 'intimate bond' between author and artwork,[19] their 'unseverable personal connection.'[20] Yet defining the nature of that connection is difficult and obtuse. It has been termed 'metaphysical', and the presence of the author's personality in his work has been called 'mystical.'[21] There are numerous further difficulties with this characterisation; I will discuss four.

First, personality theories associate the integrity right with *persona*. Kwall and Netanel use this language directly.[22] Persona is the external manifestation of an individual, the

---

falsified); Ricketson supra n.3 at 480 (duration); Roeder supra n.13 at 567 ('technical' problems regarding injunctions and special damages).

[16] This in contrast with *Pasterfield v Denham* [1999] F.S.R. 168 and *Confetti Records v Warner Music UK Ltd* [2003] E.C.D.R. 31.

[17] Compare *Pasterfield v Denham* [1999] F.S.R. 168, 182 (reputation of artist as artist); Kwall supra n.13 at 13, 15 (professional reputation); Laddie supra n.4 at 13.19 ('reputation' signifies professional reputation and 'honour' signifies integrity as a human being); Ricketson supra n.3 at 474 (general reputation, not capacity as author); Yonover supra n.5 at 967 n193 citing House Report on the US Visual Artists Rights Act (professional reputation).

[18] *Pasterfield v Denham* [1999] F.S.R. 168, 182; Laddie supra n.4 at 13.19. Commentators reject author's feelings as a standard, but nevertheless point to emotions in the analysis of the right: Kwall supra n.13 at 25, but see Kwall supra n.13 at n33 ('shame or embarrassment'); Netanel supra n.5 at 23-4, but see Netanel supra n.5 at 38 and n190 (reputation and feelings), 415 (describing his own discomfort and anguish at having his words conveyed in distorted form); Sherman and Bently supra n.5 at 249 (treating together integrity, self-perception and feelings).

[19] Sarraute supra n.12 at 465.

[20] Netanel supra n.5 at 5-6, 23.

[21] DaSilva supra n.11 at 53; Vaver supra n.5 at 286.

[22] R.R. Kwall, "Preserving Personality and Reputational Interests of Constructed Personas Through Moral Rights: A Blueprint for the Twenty-First Century", 2001

perception of the individual in the eyes of the community. Spence and Waldron call the integrity right a right of self-presentation.[23] While these authors may mean something close to what I call self-expression -- Spence distinguishes the integrity right from others' perception of the author -- I find the term 'presentation' troubling. The phrase seems to presume that the author intends to present herself to others through her work, which she may not intend to do.

Netanel uses this notion of self-presentation in this way, when he writes that expression

> is part of the projection of oneself – of choosing which aspect or conception of one's identity one wishes to *present to others.* To convey one's words … is to define oneself publicly. It is to seek to make oneself *understood* as one wishes to be.[24]

Similarly, Hughes describes the integrity right as protecting the public's identification of and recognition of the author.[25] These characterisations recall the right of reputation protected in the law of defamation: the protection of how others perceive the author. Yet the integrity right protects a right more inherent and intrinsic to the person, namely her autonomy of expression. It will be seen below that these authors characterise the right as a right of autonomy of expression as well.[26]

This same distinction arises within the freedom of expression doctrine as well. Raz and Gardner justify the freedom of expression as protecting the individual's identification in the public sphere with an idea, and the resultant validation or invalidation of life choices. The interest protected then is recognition by others.[27] By contrast, I take the view that the freedom of expression may be justified on deontological grounds, apart from its consequential effects on listeners.[28]

University of Illinois Law Review 151 (2001); N. Netanel, "Copyright Alienability Restrictions and the Enhancement of Author Autonomy: A Normative Evaluation", 24 *Rutgers Law Journal* 347 (1993), 403.

[23] M. Spence, "Justifying Copyright", in D. McClean and K. Schubert, eds., *Dear Images: Art, Copyright and Culture* (London: Ridinghouse, 2002), 399; J. Waldron, "From Authors to Copiers: Individual Rights and Social Values in Intellectual Property", 68 *Chicago-Kent Law Review* 842 (1993), 876.

[24] Netanel supra n.22 at 401 (emphasis added).

[25] J. Hughes, "The Personality Interest of Artists and Inventors in Intellectual Property", 16 *Cardozo Arts & Entertainment Law Journal* 81 (1998), 343-4.

[26] See Section D1(a).

[27] J. Raz, "Free Expression and Personal Identification" (1991) 11 *Oxford Journal of Legal Studies* 303, 311; J. Gardner, "Freedom of Expression", in G. Chambers and C. McCrudden, eds., *Individual Rights and the Law in Britain* (Oxford: Clarendon Press, 1994), 211. See also *Procunier v Martinez,* 416 U.S. 396, 427 (1974)(Marshall, J., concurring)(self-expression as a basic human desire for 'recognition').

[28] See Section D1(b), and especially n117.

A second difficulty is that on a personality theory, integrity right protection may be conditioned upon a work being demonstrably *personal*. Copyright on the authorship norm in Europe is said to protect only works that display some imprint of personality.[29] Ginsburg would differentiate the kind of copyright protection offered for works of high authorship which display the author's personal imprint and works of information which do not.[30] Yet Anglo-American copyright standards do not require an imprint of personality; neither on the UK originality standard nor on the US standard.

In England, *University of London Press v Universal Tutorial Press* [1916] 2 Ch 601, 608 sets the originality standard to require that the author is the origin or source of the work, ie that the work was not copied. The UK standard for originality does not require a personal connection between author and artwork – except to the degree that it is the author's time, labour and effort as origin. Sherman writes that all three of the UK formulations of the requirement are 'variations on the theme that the source … of the work must be the individual involved…. There must be something of the creator in the final product which can be said to be distinctively his or hers.'[31]

Nor does US law require a showing of *personal* expression. US law rejected a sweat-of-the-brow standard, and required 'some minimum degree of creativity', *Feist Publications, Inc v Rural Telephone Service Co,* 499 US 340, 345 (1991). Yet the Supreme Court set this standard 'without requiring any manifestly personal input.'[32] Even on Justice Holmes' standard in *Bleistein v Donaldson Lithographing Co*, 188 US 239, 250 (1903), it is *individuality* that is protected rather than *personality*. While Holmes used the terms 'personality' and the author's 'personal reaction', those terms and the standard can be taken to mean individuality rather than emotional or personal imprint.[33]

Similarly, in the literary property debates in 18c England, Francis Hargrave, counsel in *Becket v Donaldson*, wrote: 'a literary work *really* original, like the human face will always have some singularities, some lines, some features, to characterise it.'[34] Copinger

---

[29] Copinger and Skone James, supra n.15, at 4-03; Dworkin and Taylor supra n.5 at 95, 100; P. E. Geller, "Must Copyright be Forever Caught between Marketplace and Authorship Norms?", in B. Sherman and A. Strowel, eds., *Of Authors and Origins* (Oxford: Clarendon Press, 1994), 172.

[30] J.C. Ginsburg, "Creation and Commercial Value: Copyright Protection of Works of Commercial Value", 90 *Columbia Law Journal* 1865 (1990).

[31] B. Sherman, "From the Non-original to the Ab-original: A History", in Sherman and Strowel supra n.29 at 119. See *Express Newspapers Plc v Liverpool Daily Post* [1985] F.S.R. 306.

[32] Geller supra n29, at 172; see also Hughes supra n.25 at 120 nn148-9.

[33] Hughes supra n.15 at 352.

[34] F. Hargrave, *An Argument in Defence of Literary Property* (2nd edn London: 1774), cited in B. Sherman and L. Bently, *The Making of Modern Intellectual Property Law: The British Experience, 1760-1911* (Cambridge: Cambridge University Press, 1999), 52; also cited in M. Rose, "The Author as Proprietor", in Sherman and Strowel supra n.29 at 48.

in the first edition of his book in 1870 wrote: 'The order of each man's words is as singular as his countenance.'[35] Again, it is individuality that is protected.

Likewise, s80 states no requirement that works bear an imprint of personality. The integrity right is a right of expression, protecting the self insofar as the source of the work is the self. The expression is *by* the self, not necessarily *of* the self.

These legal standards cohere with both the nature of creativity and the freedom of expression. Artworks may very well not be personally expressive of their creators. TS Eliot wrote that a poem is not an expression of personality but an escape from it.[36] Still other artists 'take it as a challenge to produce works that betray no trace of their own personal involvement', such as with Duchamp's ready-mades.[37] Moreover, in the freedom of expression doctrine it is not a precondition of protection that the speaker show imprimatur of personality in her speech. On US doctrine, such a requirement would be suspect as not content-neutral.

Third, upon a personality theory the integrity right protects an intaking rather than an outpouring. Personality theory conceives of the author's personality being incorporated into the art object,[38] and the artwork being incorporated into the personality of the author, on Radin's theory.[39] Netanel has applied Radin's theory to justify moral rights.[40]

Yet expression is an outpouring rather than an intaking, as Jim Harris has written.[41] The term *ex*pression shows that it refers to an outward unfolding: the OED defines 'express' as to press out, emit, exude.[42] The freedom of expression doctrine protects not private

---

[35] cited in Sherman and Bently supra n.34 at 53 (full citation omitted).
[36] Geller supra n.29 at 180.
[37] *Ibid*; Hughes supra n.25 at 112.
[38] DaSilva supra n.11 at 11 (artworks are infusions of authorial creative personalities); Geller supra n29 at 178 (extensions of authors' selves); Marvin supra n.13 at 678 (emanations of artistic personality); Roeder supra n.13 at 557, 572, 578 (projections into the world part of authorial personality); Sarraute supra n.12 at 466, 473. Hughes reviews problems of applying personality theory to moral rights, yet his is a personality theory. Hughes supra n.15 at 342-3; Hughes supra n.25.

Personality is sometimes twinned with privacy. E. Damich, "The Right of Personality: A Common Law Basis for the Protection of the Moral Rights of Authors", 23 *Georgia Law Review* 1 (1988), 39, 61; J. Merryman and A. Elsen, Law, *Ethics and the Visual Arts* (vol 1, 2d edn, Philadelphia: University Pennsylvania Press, 1987), 145. The privacy aspects of the personality characterisations will be distinguished infra, see text at n84.
[39] M.J. Radin, *Reinterpreting Property* (Chicago: University Chicago Press, 1993).
[40] Netanel supra n.5 at 78; Netanel supra n.22 at 363. Damich also makes this connection with moral rights, Damich supra n.38 at 83 & n135.
[41] J.W. Harris, *Property and Justice* (Oxford: Clarendon Press, 1996), 222, 296. I would however depart from Harris' characterisation of the alternative of expression and outpouring as *personality*-imprinting.
[42] O.E.D. supra n.6.

expression in isolation, but expression in communication.[43] So too s80 protects expression once published, ie once communicated, with the statutory publication requirement.

Fourth, personality theory sounds in property. The incorporation of personality into an object is said to render the object constitutive of personhood, and hence to support a property claim. As the subject is said to extend her personality into the object, that object becomes chattel.[44] Likewise, persona is characterised on a personality theory as it is protected in property, through publicity rights.[45] Reputation is sometimes understood as a right in property as well: Geller places reputation on a continuum with objects that authors would be entitled to protect as extensions of themselves.[46]

Yet s80 is not comfortably characterised as a property right. Alienability is one of the main indicia of property.[47] S80 is inalienable, as is the integrity right in most jurisdictions. Also unlike property rights, the duration of s80 is limited.[48] Thus s80 is not suited to a property characterisation.

Where the integrity right is seen to protect expression, it is understood to protect the author's conduct, rather than the artwork as an object, a chattel. Intellectual property law is said to have moved from a conception of the protection of action to protection of a thing, with the commodification of intangibles in the modern period. Rose, and Sherman and Bently have noted this trend.[49] Kant distinguished between the right to the book as a corporeal artifact, and the right to the discourse.[50] The interpretation of s80 proposed in

---

[43] *US v O'Brien*, 391 US 367, 376 (1968); *Texas v Johnson*, 491 US 397, 404 (1989); F. Schauer, *Free Speech: A Philosophical Enquiry* (Cambridge: Cambridge University Press, 1982), 98.

[44] Netanel supra n.5 at 11.

[45] T. Frazer, "Appropriation of Personality", 99 *Law Quarterly* Review 292 (1983), 307; R. Post, Rereading Warren and Brandeis: Privacy, Property, and Appropriation", 41 *Case Western Reserve Law Review* 647 (1991). Persona is also protected by misappropriation of name and likeness, which may be seen as more of a privacy right. Yet s80 is not a privacy right, see text at n84.

[46] Geller supra n.29 at 178. See also Kelly supra n.5 (calling the moral right a protection of reputation and in property). A reputation for whiteness has been called property in the early American south, C.I. Harris, "Whiteness as Property", 106 *Harvard Law Review* 1707 (1993), and goodwill has been named as one meaning of the reputation right, R. Post, "The Social Foundations of Defamation Law: Reputation and the Constitution", 74 *California Law Review* 691 (1986).

[47] A.M. Honore, *Ownership, in Oxford Essays in Jurisprudence* (AG Guest ed 1st ser, Oxford: Clarendon Press, 1961), 107, 118-9.

[48] Act s86.

[49] M. Rose, "The Author in Court: *Pope v Curll*", 10 *Cardozo Arts & Entertainment Law Review* 492 (1992); Sherman and Bently supra n.34 at 4, 47, even while cautioning against too strict a divide between action and thing, at 50.

[50] I. Kant, *Metaphysics of Morals in Practical Philosophy* (Camrbidge: Cambridge University Press, 1996), 6:290.

this paper may be seen as a throwback to the earlier view of intellectual property as action.[51] Yet below we will see that s80 may be placed even more directly into the freedom of expression doctrine itself.

C TRENDS SUPPORTING THE AUTHOR'S RIGHT OF EXPRESSION

This section will discuss the theoretical trends supporting rights of expression. The postmodern critique of that trend, positing that author's rights are based on a fiction, will be countered.

1 Socio-economic and Theoretical Trends

Historical socio-economic trends can be seen as supporting the rise of expression rights. Developments in the world of commerce and the professions led to the increasing impetus for legal protection of authors. In the Renaissance, the individual creator began to obtain privileged status in Europe.[52] Later, printing allowed authors to promote themselves as creators.[53] With the increase in the business of publishing and distributing, and the decline of patronage, writers came to see themselves as members of a professional class.[54]

Legal developments also supported the rise of expression rights. Copyright's roots in censorship are well known.[55] Yet the legal trend has another aspect as well. Parallels may be seen between the development of the doctrines of copyright and freedom of expression, discussed below.[56] The rise of copyright reflects the increase in the protection of individual rights generally.[57]

The rise of the notion of the creative, expressive individual may also be seen in aesthetic-philosophical currents. Renaissance humanism brought a glorification of man's creativity.[58] With Enlightenment values, respect grew for each individual's freedom to

---

[51] Compare R.H. Rotstein, "Beyond Metaphor: Copyright Infringement and the Fiction of the Work", 68 *Chicago-Kent* Law Review 725 (1993), 730-31 (critiquing this shift from action to object, but calling for a return to action as perceived in the audience).
[52] M.C. Beardsley, *Aesthetics From Classical Greece to the Present: A Short History* (Tuscaloosa and London: University of Alabama Press, 1966) (reprint New York: The Macmillan Co.), 123.
[53] Geller supra n.12 at 222-24 (citations omitted). See also DaSilva supra n.11 at 8-9 on the historical background to the right in France.
[54] B. Kaplan, *An Unhurried View of Copyright* (New York: Columbia University Press, 1967), 22, and generally 1-37 on the history of copyright.
[55] Rose supra n.34 at 30; Sherman and Bently supra n.34 at 11; see also M. Rose, *Authors and Owners: The Invention of Copyright* (Cambridge Massachusetts and London: Harvard University Press, 1993), 9-30.
[56] See section D1.
[57] Geller supra n.29, at 226.
[58] Beardsley supra n.52 at 26, 139.

develop information and insight, and to communicate it to others.[59] In the Romantic period, the notion of creative expression further developed.[60]

The concept of creative expression thus extended further back than the Romantic age; and it also has expanded since the Romantic period. Two changes will be noted. First, for the Romantics creation was the expression of the innermost self of the individual. The biography of the author and artist was paramount.[61] Today creative expression does not necessarily entail expression of the artist's self. We have seen that s80 does not require that to gain protection works must be personal or bear the imprint of their author's personality.

The concept of expression expanded not only as to content, but as to subject as well. A second change is that over time, the Romantic notion of the creative genius expressing himself in art was expanded to conceive of all individuals expressing themselves. In the Romantic period, the artist was 'the paradigm case of the human being, as agent of original self-definition.'[62] Today this notion may be said to have been universalised.[63]

Both expansions can be seen in Hargrave's position in *Donaldson v Becket* and Justice Holmes' decision in *Bleistein*, which set forth standards of protection for individuality, not personality. Also the beginnings of the universalisation of the conception of individual expression can be seen there. Rose interprets Hargrave's position as shifting the focus of copyright law from the composition to the writer.[64] I would argue that this interpretation may be applied to Holmes' standard as well: that the standard evoked in *Bleistein* does not downplay the author, as Jaszi sees it,[65] but rather universalises it. I would agree with Kaplan writing that Holmes' 'insistence on individuality … [has] an echo in it of the Romantic gospel.'[66] Indeed the uniqueness of individual expression can be seen as a Romantic conception.[67] Yet Holmes' standard did not adopt the Romantic's notion of creative genius imprinting his personality on his artwork. Today, creative

---

[59] Geller supra n.29 at 162-3.
[60] Beardsley supra n.52 at 247-8, citing Wordsworth and Hugo; Geller supra n.12 at 222-24; Geller supra n.29 at 167; Sherman and Bently supra n.34 at 35. On developments from the Renaissance through the Enlightenment and Romantic period, see also M. Salokannel, "Film Authorship in the Changing Audiovisual Environment", in Sherman and Strowel supra n.29 at 57-8.
[61] Beardsley supra n.52 at 249.
[62] C. Taylor, *The Ethics of Authenticity* (Cambridge Massachusetts: Harvard University Press, 1991), 62.
[63] *Ibid*.
[64] Rose supra n.34, at 48-49.
[65] P. Jaszi, "Toward a Theory of Copyright: The Metamorphoses of 'Authorship'" (1991) *Duke Law Journal* 455, 482.
[66] Kaplan supra n.54 at 35 (footnote omitted).
[67] S. Lukes, *Individualism* (Oxford: Basil Blackwell, 1973), 17.

expression no longer surrounds just the creative genius. The idea of the expressive being has been universalised and democratised.[68]

The democratisation in copyright's legal standard reflects the democratisation of creative expression in society. Walter Benjamin has shown that with the mechanical reproduction of art the masses accessed and absorbed art. As readership increased, so too more readers became writers.[69] Enhanced access breeds enhanced expression. With the internet, that process is enhanced dramatically.[70] The universalisation and democratisation of creative expression could arguably justify expanding the scope of authors and works given s80 protection.[71]

2 The Myth-of-Authorship Myth, Rejected

In tracing the theoretical currents in the development of the notion of autonomy of expression, the postmodern critique of that development and its support for authors' rights will be recalled and countered.

(a) The author as non-fiction

Postmodernism[72] critiques the author as a fiction.[73] Some postmodern thought would deconstruct the self generally. Yet we have seen that the concept of the individual's creative expression has roots much further back than the Romantic age and has continued to develop further since that period. The concept of the self has been developed over the course of centuries.[74] It is the postmodern critique of the self that can be seen as the

---

[68] Hughes relates the democratisation of copyright protection to 'the rise of liberalism and a society of autonomous, equal citizens', supra n.25 at 119.
[69] W. Benjamin, "The Work of Art in the Age of Mechanical Reproductions" (transl H Zohn) in H. Arendt, ed., *Illuminations* (New York: Harcourt Brace and World, 1968), x.
[70] Geller supra n.12 at 263.
[71] G. Tedesky, "Intellectual Property and Personal Rights", 19 *Mishpatim* 392 (1980) (Hebrew), and S. Stromholm, *Right of Privacy and Rights of the Personality: A Comparative Survey* (Working Paper prepared for the Nordic Conference on Privacy organised by the International Commission of Jurists) (Norstedt Stockholm: 1967), 124-5, have suggested that the distortion of words ought be actionable generally. Analysis of the scope of s80 coverage and protection is beyond the scope of this paper.
[72] The critiques may be said to derive from structuralism and poststructuralism, as well as deconstruction. See J.V. Harari, "Critical Factions/Critical Fictions" in J.V. Harari, ed., *Textual Strategies: Perspectives in Post-Structuralist Criticism* (London: Methuen, 1980); Jaszi supra n.65 at 456-7. The various schools of thought will not be developed in the instant analysis, but will be referred to generally as 'postmodern'.
[73] The view may be traced from Foucault's 'What is the Author?' to Barthes' 'Death of the Author'. D. Saunders, "Dropping the Subject", in Sherman and Strowel supra n.29 at 99 n14, notes the differences in their approaches.
[74] R.C. Solomon, *A History of Western Philosophy since 1750: The Rise and Fall of the Self* (Oxford and New York: Oxford University Press, 1988).

anomaly, rather than the support of it. The protection of the author may be seen as a part of the growing defence of human and individual rights. The integrity right reflects the rise in the concept of the self and the individual.[75]

Foucault wrote that the author's name indicates the status of a discourse within a society and a culture, rather than passing to a real and exterior individual who produced it.[76] By contrast, it is the argument of this paper that that real individual must be located and defended. As Rose writes, we are not ready to depart from the idea of the author that our culture holds dear, and certainly not the notion of self that postmodernism would discard.[77]

(b) Creativity not in isolation

A further postmodern critique of authorship argues that creativity is not attributable to an *individual* 'author'. The integrity right and copyright are said to be based on a vision of creation in privacy, as a Cartesian subject 'thinking and feeling in solitude' and then to publication.[78] This vision of creation from privacy is consistent with the theory of subject-object creation of artworks discussed above, with the artwork seen as the external embodiment of the author.[79]

Rather, the critics argue that the creative process is interrelational. Intertextuality means that authors rely on earlier authors and texts.[80] Woodmansee writes that creative works rely on a communicative network, are the result of teamwork, and are steeped in or react to tradition.[81] The author construct is critiqued as unsuitable in an increasingly complex world of group, corporate and collaborative creativity.[82]

Yet the protection of s80 does not depend upon the individual creating in isolation. The inter-relational nature of much creativity is a challenge for courts to determine who is

---

[75] DaSilva supra n.11 at 9; Geller supra n.29 at 222-4; Rose supra n.34 at 30; Saunders supra n.73 at 107 (socio-economic trends, and the development of the subject and individual rights, 'overlapped fortuitously'). On the rise of individualism, see Lukes supra n.67 at 47-51; C. Taylor, *Sources of the Self* (Cambridge: Cambridge University Press, 1989), 11, 195-6.

[76] M. Foucault, "What is an Author?", in Harari supra n.72 at 147.

[77] Rose supra n.55 at 142.

[78] See Geller supra n.29 at 179 (footnote omitted); Sarraute supra n.12 at 466, 471.

[79] Netanel supra n.22 at 354.

[80] See Rose supra n.34 at 55 (current literary thought emphasises that texts permeate and enable each other). Also reading requires earlier texts, Rotstein supra n.51 at 737.

[81] M. Woodmansee, "On the Author Effect: Recovering Collectivity", in M. Woodmansee and P. Jaszi, eds., *The Construction of Authorship: Textual Appropriation in Law and Literature* (Durham and London: Duke University Press, 1994), 17. See also Benjamin supra n.69, at 223; Sherman and Bently supra n.34 at 29, 37-38, 57 n46 (citation omitted).

[82] See Hughes supra n.25 at 91 (citations omitted). Kaplan supra n.54 at 117; yet Kaplan sees a place for moral rights, *ibid* at 78, 120.

responsible for, and has rights over, which creative expression. That is an issue for the method of case resolutions, rather than a theoretical problem for the right of expression. The challenges and difficulties of method do not defeat the theory of the integrity right.

Moreover, regardless of the extent of their isolation in creation, we have seen that s80 protects works only once published. Whether or not there is such a thing as private art, with the real work of art existent only in the mind of the author,[83] is irrelevant. Throughout this analysis, the term 'expression' is used to signify communicated expression. Justifications of the integrity right on the basis of privacy[84] are thus inapposite.

Another postmodern critique on this point is that every work is copied, nothing original, and therefore that no 'author' ought enjoy protection of expression.[85] The debate as to originality will not be entered here. It will be assumed for the purposes of the instant analysis that there is some originality that gives meaning to its requirement under the law.[86] A primary author's creation, or transformation of what came before, must be protected – as must the transformative work of the modifier find protection. The postmodern critique is important then in setting the limits on authorial rights: the defences to s80 must be read liberally, allowing for transformative use.[87]

(c) Monopoly on *presentation* of meaning

Third, the postmodern critique argues that authors' rights create a monopoly on meaning. Foucault wrote in *What is an Author?* that the author is 'the ideological figure by which one marks the manner in which we fear the proliferation of meaning'.[88] In the critics' view, the integrity right allows the 'authorship function' to act as a creation of stable meanings in the control of an individual producer rather than readers.[89]

Here I agree with the postmodern view that meaning is created by readers, and hence that a proliferation of meanings is possible. Yet s80 does not create a monopoly on meaning.

---

[83] Beardsley supra n.52 at 323-324, discussing Croce and Collingwood.
[84] See eg Geller supra n.29 at 160; Hughes supra n.15 at 289, 355-58; and cites supra at n38.
[85] See eg J. Litman, "The Public Domain", 39 *Emory Law Journal* 965 (1990); Rotstein supra n.51 at 737, 756; Saunders supra n.73 at 99-100 citing T. Eagleton, *Literary Theory: An Introduction* (Minneapolis: University of Minnesota Press, 1983), 138 ('There is no such thing as literary "originality", no such thing as the "first" literary work: all literature is intertextual').
[86] See supra text at nn31-35.
[87] See infra text at n136.
[88] Foucault supra n.176 at 159.
[89] Jaszi supra n.65 at 497. But see J. Hughes, "'Recoding' Intellectual Property and Overlooked Audience Interests", 77 *Texas Law Review* 923 (1999) (on the utility for readers of stable meanings).

S80 protects only the author's *presentation* of her artwork.[90] Hence I would dispute Spence's characterisation of the problem of unauthorised use as changing the meaning of a work.[91] I also disagree with Hughes' drawing upon the interpretive stance of Original Intent analysis in US constitutional jurisprudence, where the intent of the framers is examined to determine the meaning of the Constitution.[92] Rather, meaning is not a single entity that can be changed, but is diverse and subject to change at each of its readings. A proper interpretation of s80 must allow the proliferation of meanings, and a broad defence under the Act is necessary to protect those other meanings.

Meanings may be diverse, then, and also collective. As Coombe writes, as human selves in human communities, we are constituted by and constitute ourselves with shared cultural symbols.[93] Thus where a work has become part of our cultural language and social fabric, the creation of a monopoly over its use must be avoided.[94] A modification to a primary work that has become a cultural text must be defended, as discussed below with respect to public fora in the freedom of expression doctrine.

(d) Authorial intent

Relatedly, in tandem with deconstruction of the (self and the) author as a myth, the postmodern critique would reject the importance of authorial intent. In 1946, Wimsatt and Beardsley, in The Intentional Fallacy, argued for the distinction between a work, its author's intentions, and its reader's responses.[95] An author's intent, they argued, is not what the art object means. Authorial intent met with further rejection in the work of Barthes, who advocated liberating the text by refusing to fix a meaning to it.[96] Movements in literary criticism developed by extending the role of the text itself as the source of the work's meaning, and then the role of the reader (or audience, viewer).[97]

---

[90] 'Presentation' as used here does not signify an author's concern to present her artwork for the recognition of others, as discussed supra text at nn22-25.
[91] Spence supra n.23 at 399.
[92] Hughes supra n.15 at 347. See discussion of Original Intent in L.K. Treiger, "Protecting Satire Against Libel Claims: A New Reading of the First Amendment's Opinion Privilege", 98 *Yale Law Journal* 1215 (1989), n86.
[93] R.J. Coombe, "Objects of Property and Subjects of Politics: Intellectual Property Laws and Democratic Dialogue", 69 *Texas Law Review* 1853 (1991), 1864. Coombe also writes of the politics of control over meaning, *ibid* at 1861; see also Waldron supra n.23 at 885.
[94] Spence supra n.14 at 610-11 (where a text has become shorthand for a range of meaning for which no adequate alternative means of expression exists, collective meanings are created).
[95] W.K. Wimsatt, Jr, and M.C. Beardsley, "The Intentional Fallacy", *Sewanee Review*, LIV (1946), 468-8, reprinted in R.B. West, Jr. ed., *Essays in Modern Literary Criticism* (New York: Rinehart, 1952), 174-89.
[96] R. Barthes, "Death of the Author", in *Image, Music, Text* (transl S. Heath, London: Fontana Press, 1977), 147; Roland Barthes," From Work to Text", in *ibid*.
[97] See R. Chartier, "Figures of the Author", in Sherman and Strowel supra n.29 at 8, for a description of movements in literary criticism which develop a sociology of readers and

Yet even Beardsley, a frontrunner in naming the Intentional Fallacy with respect to *interpretation* and *evaluation* of artworks, recognises that intent plays an important role in *defining* an artwork. Beardsley 'see[s] nothing wrong in limiting the class of artworks to things that have been intentionally produced.'[98] Language as a means of communication requires 'the assumption that knowledge of speakers' intentions is both desirable and available.' [99] So too with art the existence of an author – an intentional agent – must necessarily be inferred by the reader for the text to have meaning.[100] Whereas authors do not control the interpretation of their work and hence its meaning, they do set forth 'the basic vocabulary of signs – words, sounds and images – that serves as frame of reference for the work's meaning.'[101]

S80 does not fall afoul of Beardsley's rejection of authorial intention in defining what an artwork means. S80 does not require ascertaining what an artwork means, nor describing, interpreting, or evaluating it, in Beardsley's terms. Rather, s80 protects the presentation of the artwork in a manner true to the artist's intention, for its accurate description, interpretation and evaluation by others. The reader has a role in s80, namely in the objective interpretation of an author's subjective intent, and as an interested party, but does not have the right to control the presentation. As in the freedom of expression doctrine, if only the listener were entitled to determine a work's presentation, the law would be seen to allow a heckler's veto.[102]

---

an 'aesthetic of reception'. Beardsley describes art theoretical developments taking a similar course, Beardsley supra n.52, at 338, 364-5 (Formalism, Art for Art's Sake, New Critics, Dewey). See infra at n116 on the three semiotic elements of Author, Text and Reader.

[98] M.C. Beardsley, *Aesthetics: Problems in the Philosophy of Criticism* (2d edn, Indianapolis and Cambridge, Hackett Publishing, 1981), xix. Beardsley defines art as 'an arrangement of conditions intended to be capable of affording an experience with marked aesthetic character.' See also G. Dickie, *Art and the Aesthetic: An Institutional Analysis* (Ithaca and London: Cornell University Press, 1974), 46 (art is a concept which 'necessarily involves human intentionality'); N. Zangwill, "Art and Audience", *The Journal of Aesthetics and Art Criticism* 57:3 (Summer 1999) 315, 315 (authorial intention enables distinctions to be made between art and non art).

[99] A. Sheppard, *Aesthetics* (Oxford and New York: Oxford University Press, 1987) at 103; *ibid* at 160-1 n7 (citing analyses of intention in relation to action, in relation to language, and in application to art).

[100] S. Knapp and W.B. Michaels, "Against Theory", in WJT Mitchell, ed., *Against Theory: Literary Studies and the New Pragmatism* (Chicago and London: University of Chicago Press, 1985), 16-7.

[101] Netanel supra n.22 at 405.

[102] *Redmond-Bate v DPP* (2000) H.R.L.R. 249 at 18; G. Gunther and K.M. Sullivan, *Constitutional Law* (13th edn, Westbury New York: Foundation Press, 1997), 1085-91.

D FREEDOM OF EXPRESSION DOCTRINE

In this section the integrity right will be situated within the freedom of expression doctrine. First the justifications for the integrity right will be reviewed. It will be seen that the rationales offered for the integrity right parallel the rationales for the freedom of expression doctrine. Following the discussion of rationales, caselaw will be examined.

1 Rationales

(a) Integrity right norms

The integrity right is centrally justified on the authorship norm. Geller calls it a right to 'exercise continuing control over self-expression.'[103] Netanel writes that it promotes 'author sovereignty and control over the process of creating and communicating intellectual works,' which Netanel terms an 'autonomy-of-expression function.'[104] Spence calls the integrity right an expression right,[105] and a right of autonomy.[106] Also from a critical standpoint, the integrity right is characterised as an author's right of autonomy: Jaszi describes legal constructs of authorship as 'prerogatives of the autonomous individual.'[107]

In adjudicating claims pursuant to s80, similar principles have been upheld. Cases considering complaints of modifications to artworks before the Act also have upheld norms of autonomy of expression. The court in *Joseph v National Magazine Co Ltd*[108] in a passage widely quoted, wrote that: 'the plaintiff was entitled to write his own article in his own style, expressing his own opinions.' In *Frisby v British Broadcasting Corp*,[109] and in *Pasterfield*,[110] the courts were concerned to preserve the integrity of authorial intent.

Moral rights are also analysed on marketplace norms.[111] Moral rights are identified as affording authors and artists, generally in a weak bargaining position, a bargaining

[103] Geller supra n.29 at 159-160. The authorship norm is central to justifications for copyright as well. Geller *ibid* at 166; Ginsburg supra n.30 at 1892. It is the argument herein that s80 can be situated within the freedom of expression doctrine, yet its relation to copyright is not rejected.
[104] Netanel supra n.22 at 382 & 382 n161; Netanel supra n.5 at 23-4.
[105] Spence supra n.14 at 609.
[106] Spence supra n.23 at 399.
[107] Jaszi supra n.65 at 502.
[108] [1959] Ch. 14, 20.
[109] [1967] Ch. 932, 951.
[110] *Pasterfield v Denham* [1999] F.S.R. 168, 182. See also *Carlton Illustrators v. Coleman & Co Ltd* [1911] 1 K.B. 771.
[111] See eg H. Hansmann and M. Santilli, "Authors' and Artists' Moral Rights: A Comparative Legal and Economic Analysis", 26 *Journal of Legal Studies* 95 (1997).

chip.[112] The integrity right is further identified with 'truth-in-marketing legislation', for instance by the European Commission and by Vaver: as with trademarks, the public is entitled to be told the truth about a work's authorship and to have the work in the form in which the author intended it to reach the public.[113] By contrast, it is submitted that the integrity right must be distinguished from the trademark function protecting goodwill. The analysis of the integrity right on a marketplace norm frames the right as essentially a protection of authorial reputation,[114] which has been rejected in the instant analysis.

This rationale ought not be understood as the central rationales for the integrity right. Unlike copyright, it must be recognised that moral rights arise not from the Statute of Anne and the marketplace theories that have been associated with its injunction for the encouragement of learning. Rather, moral rights arise from the authors' rights tradition on the Continent – and as is discussed throughout this paper, from Anglo-American principles of freedom of expression.

The other rationale for the integrity right offered commonly as an alternative to the authored-centred norm, is that of cultural heritage and preservation.[115] This rationale justifies the right for the social good it brings. Yet the cultural heritage and preservation that the integrity right brings are by-products of the primary norm of that individual right.

It is submitted that it is an author-centred rationale that is the best fit for the integrity right (in the Dworkinian sense). The nature of that author-centred rationale need not surround the author's personality interest, nor the author's reputational interest. Rather, it will be seen that is akin to the autonomy rationale for the freedom of expression.

(b) Freedom of expression norms

The rationales offered for the integrity right parallel the rationales offered for the freedom of expression generally. Each of the integrity right rationales focuses on a different element of the semiotic indicators of Reader, Text, and Author.[116] The cultural heritage

---

As to copyright justifications on marketplace norms, see *Twentieth Century Music Corp v Aiken*, 422 U.S. 151 (1975) (Stewart, J.); Geller supra n.29, at 159, 164.

[112] P. Banki, "The Moral Rights Debate in Australia", *in* P. Anderson and D. Saunders, eds., *Moral Rights Protection in a Copyright System* (Brisbane: Griffith University, 1992), 11 (moral rights are about money, putting authors in a better bargaining position); Vaver supra n.5 at 288.

[113] Follow Up to the Green Paper on Copyright and Related Rights in the Information Society COM(96)568 final, 20 November 1996, at 27, cited in Stokes supra n.5 at 68; Vaver supra n.5 at 287-8.

[114] Vaver supra n.5 at 288.

[115] DaSilva supra n.11 at 48-51 (on the California Act); Kwall supra n.13 at 16; Netanel supra n.5 at 46 and n230; Vaver supra n.5 at 287, 289.

[116] G. Dickie, *Introduction to Aesthetics: An Analytic Approach* (New York and Oxford: Oxford University Press, 1997), 121: 'There are three basic items in the artistic situation: (1) the artist, (2) the art the artist creates, and (3) the audience that experiences the work.' My use of 'Text' focuses on the textual (or visual or musical) aspect of the work, as

rationale centres on the Reader, arguing for the protection of artwork for the sake of the reading and viewing public's tradition. The cultural preservation rationale centres on the Text, arguing for the protection of artworks themselves as objects.[117] The chief concern of the marketplace rationale is lending support for the Reader and Text. The authors' rights rationale centres on the Author. While the former rationales are consequentialist, the autonomy rationale is deontological.[118]

The central three freedom of expression rationales justify the right on the basis of democracy, truth, and autonomy.[119] These rationales similarly centre on the Reader, Text, and Author. On the democracy rationale the freedom of expression is protected for the circulation of ideas so as to foster an educated governing electorate, composed of Readers.[120] On the truth rationale, the freedom of expression allows for competition in the marketplace of ideas so that the truth, as the best Text, will emerge.[121] On the autonomy rationale, freedom of expression supports the expressive autonomy of the Author, namely the individual speaker's choice and control.[122] While the democracy and truth rationales are consequentialist, the autonomy rationale is deontological.

The integrity right protects authors' choice and control over the form and content of expression, namely authorial autonomy. As we will see below, the rationale used by courts in freedom-of-expression cases upholding rights to control the form and content of expression is the autonomy rationale.

---

contrasted with the act of creating it by the Author or the act of interpreting it by the Reader. My use of 'text' is to be distinguished from its use by Barthes, From Work to Text, supra n.96 at 163 (a text is created not in the act of writing but in the act of reading). It is perhaps closer to the legal sense of 'work' as the individual product, see Jaszi supra n.65 at 471 n60 and his distinguishing it from Foucault's use of the term as a translation from the French 'oeuvre' referring to the body of literary production attributed to a particular 'author'.

[117] See supra text at nn38-46.

[118] The terms 'deontological' and 'consequentialist' are used here to contrast the two in the sense of process, ie a deontological rationale justifies the thing for itself, and a consequentialist rationale justifies the thing for the sake of its results. I do not take the position that only a deontological system is an ethical one; I do not deny that a system of ethics can involve and even be based upon consequentialist goals.

[119] *R v Home Secretary of State for the Home Department*, *ex p Simms* [1999] 3 W.L.R. 328, 337, [1999] 3 All E.R. 400, 408 *per* Lord Steyn.

[120] Hughes has referred to the analogues between the integrity right on the cultural heritage rationale and the freedom of expression on the democracy rationale. Hughes supra n.15 at 364.

[121] *Abrams v US*, 250 U.S. 616, 630 (1919)(Holmes, J., dissenting); *Whitney v California* 274 U.S. 357, 375 (1927)(Brandeis, J., concurring).

[122] *Board of Educ, Island Trees Union Free School Dist No 26 v Pico,* 457 U.S. 853, 866 (1982)(fostering self-expression); C.E. Baker, Human Liberty and Freedom of Speech (New York and Oxford: Oxford University Press, 1989), 49-59; Schauer supra n.43 at 67-72; R. Dworkin, Freedom's Law (Cambridge Massachusetts: Harvard University Press, 1996), 201 and R. Dworkin, Taking Rights Seriously (London: Duckworth, 1978), 198.

Of course the rationales for both doctrines do not operate in stark opposition: With the freedom of expression, the individual right is in the public interest.[123] Generally this recalls the debate as to utilitarianism/natural rights.[124] Also for copyright rationales it has been shown that the two systems cannot be contrasted starkly: The civil law system includes incentive rationales, and the Anglo-American copyright system includes individual rights rationales.[125] So too the author's individual right of integrity is also in the public interest.

(c) The conjunction

The conjunction between copyright and the freedom of expression has been made. The function of copyright to promote expression has been noted in the oft-cited case *Harper & Row, Publishers, Inc v Nation Enter*, 471 US 539 (1985), calling copyright 'the engine of free expression…'[126] The historical roots of copyright and freedom of expression show that the two are in tandem.[127] The conjunction of the two is particularly strong where freedom of expression is understood on the democracy rationale.[128]

Some scholars have suggested conceptualising copyright as within the freedom of expression doctrine, with references to moral rights as well. Hughes suggests free speech requires that speech be guaranteed some integrity, with expression remaining unadulterated. Hughes continues: 'It follows that if intellectual property is expression, it merits the same guarantee.'[129] Waldron refers favourably to possible arguments for copyright based on autonomy arguments from freedom of expression: 'The choice of when and how to express oneself seems particularly strategic in the overall determination of the shape and character of one's life.'[130] Netanel sees 'the common theoretical underpinning that correlates the author's claim to continuing control with the inalienable

[123] R. Dworkin (1996) supra n.122 at 201; Schauer supra n.43 at 48.
[124] R. Dworkin (1978) supra n.122 at 198-200. On the coexistence of norms, see J.L. Coleman and J.G. Murphy, *The Philosophy of Law: An Introduction to Jurisprudence* (Boulder and London: Westview Press, 1990), 88-9.
[125] Geller supra n.29 at 165; J.C. Ginsburg, "A Tale of Two Copyrights: Literary Property in Revolutionary France and America", in Sherman and Strowel supra n.29, at 135; A. Strowel, "Droit d'auteur and Copyright: Between History and Nature", in Sherman and Strowel *ibid*, at 235.
[126] 471 U.S. at 558.
[127] Geller supra n.29 at 164; P. Samuelson, "Copyright, Commodification, and Censorship: Past as Prologue – But to What Future?" in N.W. Netanel and N. Elkin-Koren, eds., *The Commodification of Information* (The Hague: Kluwer Law International, 2002), 68; Waldron supra n.23 at 857 n47.
[128] N.W. Netanel, "Copyright and a Democratic Civil Society", 106 Yale L.J. 283 (1996), 288.
[129] Hughes supra n.15 at 359 (citation omitted).
[130] Waldron supra n.23 at 876.

political right of free speech.'[131] The instant analysis develops the justification for and understanding of the integrity right from within freedom of expression jurisprudence.

While in tandem with the freedom of expression, copyright also threatens it. Copyright's exclusive entitlement to copy and disseminate expressive works stands in tension with freedom of expression principles.[132] Courts often find that the values of freedom of expression are adequately protected within copyright doctrine – due to copyright's limited duration, the idea/expression dichotomy, and the fair use, or fair dealing defence.[133] Yet as copyright's scope has been extended, scholars have increasingly called for limitations to copyright *from outside* the copyright doctrine, namely from principles of freedom of expression.[134] In *Ashdown v Telegraph Group Ltd*, the UK Court of Appeal recognised that where the right of freedom of expression conflicts with the protection afforded by the 1988 Act, the court is bound to accommodate the right of freedom of expression, which may trump the copyright.[135]

Similarly, while the integrity right is in tandem with the freedom of expression, it also threatens it.[136] Rights of freedom of expression may well present themselves on both sides of an integrity right claim. The rights of expression of the modifier-defendant thus need to be taken into account, and balanced with the primary author's integrity right of expression.

Under the instant analysis, it is submitted that the right should be considered *from within* the freedom of expression doctrine. Of course then freedom of expression principles will enter the analysis -- for both the plaintiff and the defendant. A modification which would transform the primary work and reflect the modifier's own autonomy of expression, would find a defence pursuant to freedom of expression principles. S80 contains no fair dealing defence (although the Act provides for numerous exceptions, in s81). This is not necessarily a weakness or error of the provision where it is understood that the doctrine does not require a mechanism apart from the extension of freedom of expression principles.

---

[131] Netanel supra n.22 at 413. See M. Spence (Clarendon Series) (forthcoming), situating copyright within expression theory. See also N. Netanel (forthcoming).
[132] P. Goldstein, "Copyright and the First Amendment", 70 *Columbia Law Review* 983 (1970); Spence supra n.14 at 609.
[133] *Eldred v Ashcroft*, 537 U.S. 186 at 219-221 (2003).
[134] N.W. Netanel, "Recent Developments in Copyright Law: From the Dead Sea Scrolls to the Digital Millennium", 9 *Texas Intellectual Property Law Journal* 19 (2000) at 35 & n133, and citations therein; N.W. Netanel, "Locating Copyright within the First Amendment Skein", 54 *Stanford Law Review* 1 (2001).
[135] [2002] Q.B. 546, paras 45, 58.
[136] Kelly supra n.5; G.J. Yonover, "Artistic Parody: The Precarious Balance: Moral Rights, Parody, and Fair Use", 14 *Cardozo Arts & Entertainment Law Journal* 79 (1996), 93, 114-6.

2 **Caselaw on Non-Distortion**

In the following analysis, caselaw will be drawn from the UK, US and European Court of Human Rights ('ECHR'). Of course ECHR precedents are legally relevant to UK law. Reliance on the 'Anglo-American tradition' of freedom of expression can be found in *Derbyshire County Council v Times Newspapers Ltd* [1993] 1 All ER 1011, where the court wrote that arguments of American constitutional cases are already a recognised part of English law, in its free expression principle. UK courts thus may look to both sides of the Atlantic. A general comparative approach will be adopted.

(a) *Ashdown, Barnette, Hurley*

The Court of Appeal in *Ashdown v Telegraph Group Ltd* wrote: 'The prime importance of freedom of expression is that it enables the citizen freely to express his ideas and convey information…. in a form of words of his or her choice.'[137] The Court appears to have relied on the autonomy rationale. In *Ashdown* the Court cited also the holding in *Jersild v Denmark*, where the ECHR 'recall[ed] that Article 10 [of the European Convention for the Protection of Human Rights and Fundamental Freedoms ('the Convention')] protects not only the substance of the ideas and information expressed, but also the form in which they are conveyed.'[138] S80 upholds the same principle.

The First Amendment of the US Constitution has protected a speaker's choice and control over expression against distortion. In *West Virginia State Board of Educ v Barnette*, 319 US 624 (1943), the US Supreme Court found unconstitutional a state regulation requiring children in public schools to salute the American flag. The individuals' right to autonomy[139] was safeguarded against the state's compulsion to declare a belief, or to utter what is not in one's mind.[140] In *Miami Herald v Tornillo*, 418 US 241 (1974), the US Supreme Court held that a paper could not be compelled by state law to print a political figure's reply to a press critique.[141]

In *Hurley and S Boston Allied War Veterans Council v Irish American Gay, Lesbian and Bisexual Group of Boston*, 515 US 557 (1995), a unanimous Supreme Court ruled that the

---

[137] [2002] Q.B. 546 at para 31. The court also looked to the public's interest in the receipt of information: the reader on occasion will have a protected interest in receiving information in a particular *form*, at para 43.

In *Ashdown*, the Court considered the claimants' copyright claim only as a property claim and not as an expression claim, *ibid* at para 39. The conflict presented was property v expression rather than expression v expression. See discussion of *Pruneyard* infra text at nn149-150.

[138] Series A No 298 (1995) 19 E.H.R.R. 1, para 31.

[139] 319 U.S. at 631 ('self-determination').

[140] 319 U.S. at 633-34.

[141] Netanel writes of the 'right to express one's ideas in the manner of one's choosing, in terms of both content and form of presentation', citing *Cohen v California*, 403 U.S. 15 (1971). Netanel supra n.22 at 413. See also *Serra v US GSA*, 847 F.2d 1045 (2d Cir. 1988).

First Amendment would not allow a state law to compel a private body to undertake an expressive activity. In that case GLIB, an organisation of gay, lesbian and bisexual individuals of Irish descent, petitioned for the right to march in Boston's St Patrick's Day parade, organised by the Veterans Council. GLIB had obtained a state court order requiring their inclusion in the parade, pursuant to the state public accommodation statute. The US Supreme Court reversed. The Supreme Court's ruling upheld the principle of autonomy: 'under the First Amendment, … a speaker has the autonomy to choose the content of his own message.'[142] One who chooses to speak may also decide what not to say.[143]

This principle supports the integrity right's protection against distortion of expression, whereby the speaker -- or the speaker's art -- would be forced to say something against the will of the author. Just as in s80, the Court rejected forced modification or alteration of one's message.[144] The Court found that the state law required speakers to 'modify the content of their expression', which the 'general rule of speaker's autonomy forbids.'[145]

Yet in *Hurley*, only the Council stated a claim pursuant to the freedom of expression. GLIB did not raise the First Amendment argument before the Supreme Court, but rather relied on the public accommodation/discrimination argument. Public accommodation requirements are limited in their application to expressive activity.[146] In *Hurley* the parade organisers were found to engage in expressive activity. The counterweight of expressive activity on the other side of the conflict was not found. GLIB's associational activity was found to be insufficiently expressive.[147] Had the First Amendment claim been raised by GLIB, the case would have presented autonomy of expression arguments on both sides. The analysis of *Hurley* then would have been more similar to s80 claims under the instant analysis, where the modifier's freedom of expression must be protected as well.

(b) Other lines of cases

School cases have similarly shown that a speaker, namely the school or the government, may 'take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted'. *Rosenberger v Rector and Visitors of University of Virginia*, 515 US 819, 833 (1995)(citation omitted). A similar principle was upheld in the school cases of *Hazelwood School District v Kuhlmeier,* 484 US 260 (1988), and *Downs v Los Angeles Unified School District*, 228 F.3d 1003 (2000).

---

[142] 515 U.S. at 573. See also *ibid* at 574 (citing the 'principle of autonomy to control one's own speech'); *ibid* at 576 ('the speaker's right to autonomy over the message').
[143] *Ibid* at 573.
[144] *Ibid* at 577, 581.
[145] *Ibid* at 578.
[146] Relying on *Hurley* for this principle, see *Boy Scouts of America v Dale*, 530 U.S. 640, 695 n22 (Stevens, J., dissenting)('the simple act of joining the Scouts – unlike joining a parade – is not inherently expressive').
[147] 515 U.S. at 566.

These cases are to be distinguished from the principle whereby students' speech is protected in a school forum where the speech is not the school's (and also perhaps not likely to be attributed to the school, but this consideration is secondary, as is discussed below). In English law, the Education (No. 2) Act 1986, s.43 upheld this principle. The cases discussed herein are also to be distinguished from US caselaw upholding the students' right to receive ideas, as in the *Pico* line of school cases finding a school's removal of optional library books an unconstitutional violation of the student's right.[148]

The same principle was upheld by the Court in *PruneYard Shopping Center v Robins*, 447 US 74 (1980). The US Supreme Court sustained a state law requiring the proprietors of shopping malls to allow visitors to solicit signatures on political petitions, where the owners' rights of expression were found not to be burdened.[149] The principle was upheld that the expression of speakers, ie shopping centre owners, could not be compelled. Shopping centre cases can be seen to present a conflict between the expression rights of both parties. On such an analysis, the interest of the primary author in a s80 claim is analogous to the interest of the shopping centre owner. The shopping centre owner argues that forcing her to allow leafleters in the centre would compel her to express the views of the leafleters. So too with s80 the primary author argues that the distortive modification compels her expression of that distorted message.

In addition to the analysis of expression v expression, the shopping centre cases present a conflict of property v expression. *PruneYard* supports the principle that a property right may need to give way to an expression right.[150] In *Appleby v UK* (2003) 37 EHRR 38 (App No 44306/98), the ECHR found that the protection of the freedom of expression may require regulation of property rights. In that case the applicants had tried to set up stalls to collect signatures on a petition in a shopping mall, but were refused permission by the property owner. The ECHR ruled that effective exercise of the freedom of expression did not only require the state not to interfere, but might require positive measures of protection, including a regulation of property rights.

On expression v expression analysis, the interest of the primary author in a s80 claim is analogous to the interest of the shopping centre owner. By contrast, on property v expression analysis, the interest of the primary author is analogous to the interest of the leafleters. Just as the shopping centre owner may be required to allow leafleters, so too the purchaser of an artwork may be required to allow its author to dictate which modifications to the work are acceptable. The main analysis in this paper, however, is

---

[148] 457 U.S. 853.

[149] The requirement was set by the California court's interpretation of a state law. The US Supreme Court did not disavow its earlier rulings that the First Amendment did not require shopping center owners to allow leafleters. The state's enhanced protection of the speech right, greater than that found under the First Amendment, was allowed by the Supreme Court.

[150] *Pruneyard*, 447 U.S. at 80-81 (a state, in the exercise of its police power, may adopt reasonable restrictions on private property that are not a taking without due process and do not violate other federal constitutional provisions).

the conflict between the expression rights of the primary author and the expression rights of the modifier.

(c) Collective expression and context; attribution and disavowal

With regard to collective expression and context, *Hurley* upheld a principle similar to that which I submit is the correct understanding of s80. But *Hurley* and many of the other cases discussed above must be distinguished from s80 analysis with regard to attribution, identification, and the possibility for disavowal.

On *Hurley*'s reasoning, the protection of the individual continues even where her expression is in a group. The Court recognised that in expressive activity such as a parade, marchers make a collective point, yet simply by combining voices the petitioner did not lose protection.[151] So too with s80, in combining creative activity with others the express-or does not lose the right to protection of her own contribution to the creative activity, as discussed above.[152]

Relatedly, in *Hurley* the Court accepted that contextual alteration of expression can amount to its distortion. In a parade, various 'units' of expressive messages function together. The Court ruled that a speaker could not be forced to accept the distortion of its expression by another's expression which 'affects' it.[153]

So too with s80, an author may find her expression distorted by the presentation of her work in a context with which she disagrees. S80 ought to enable her to prevent such distortion. While the language of s80 has been interpreted as not necessarily protecting the primary author in a situation of contextual distortion,[154] I submit that the provision should be understood to do so. According to the language of Article 6*bis*, contextual distortion may be an 'other derogatory action'.

Yet the Court in *Hurley* found that attribution and identification were important factors in determining whether expression was distorted. In *Hurley* the Court underscored that GLIB's participation 'would likely be perceived' as acknowledged and perhaps supported by the Council.[155] The Court further noted the inability of the parade organisers to disavow the message presented by GLIB.[156] The Court highlighted that compelling a speaker's adoption or presentation of another's expression was unconstitutional where it was likely that members of the public would identify the speaker with the message of the other, and where the speaker could not effectively disavow himself of the other's message. Similarly, the Court cited an earlier decision invalidating coerced access to the

[151] 515 U.S. at 568-569.
[152] Text at nn80-84.
[153] 515 U.S. at 572.
[154] See eg Laddie supra n.4 at 13.18.
[155] 515 U.S. at 575.
[156] 515 U.S. at 579-580.

envelope of a private utility's bill as the utility would be forced either to appear to agree with the leaflet or to respond.[157]

The same position was taken in *PruneYard*, but with different factual findings and therefore a different outcome. The Court found in *PruneYard* that the solicitations would not likely be identified with the shopping centre proprietor and the latter could disavow any connection with the message simply by posting signs in the area where the leafleters stood.

In both cases, then, the Court would not allow a speaker to be compelled to express a particular message against the speaker's will. This principle is similar to that of s80. Yet in both cases, the Court held that attribution to the speaker of the modified expression would be necessary for a finding of distortion. By contrast, s80 supports a primary author's right to prevent a distortion even where the modified work is not attributed to the primary author, and even where not identified or identifiable with the primary author.

I take issue with the provisions in the Act that allow for exceptions, qualifications and defences to remedies where a disclaimer is made.[158] It is the argument of this paper that the integrity right protects against distortions of expression not for the sake of protecting the recognition of the author in the public eye, the public perception of the author, the primary author's reputation. Rather, the integrity right protects the author in her expression for its own sake, ie for the sake of the author's autonomy of expression. It is submitted that contextual distortion ought be seen as potentially distorting an author's expression, but that attribution and identification need not necessarily be present for distortion to be found.

Justice Powell's concurrence in *PruneYard* recognised that a lack of attribution did not justify compelling a speaker's message. Compelling the owner to disavow a message was compelling speech where the owner had, under the First Amendment, the right *not* to speak:

> To require the owner to specify the particular ideas he finds objectionable enough to compel a response would force him to relinquish his "freedom to maintain his beliefs without public disclosure."[159]

In Powell's view, the right *not* to disavow a message holds even where others would not identify the speaker with a message: '[T]he right to control one's own speech may be burdened impermissibly even when listeners will not assume that the messages expressed on private property are those of the owner.'[160] Powell could concur with the Court's decision, however, insofar as the shopping centre had become a public forum, as will be discussed below.

---

[157] at 575, citing *Pacific Gas & Electric Co v Public Utilities Comm'n of Cal*, 475 U.S. 1 (1986)(plurality opinion).
[158] Ss 80(5), 80(7), 81(6)(c), 82(2)(b), 103(2).
[159] 447 U.S. at 98 (Powell, J., concurring)(citation omitted).
[160] *Ibid* at 100.

The school cases follow the same pattern. As in *Hurley* and the *PruneYard* majority, the attribution or identification of one speaker with the message of another speaker was held to be significant in finding distortion of expression. In *Hazelwood School District v Kuhlmeier,* 484 US 260, 270-73 (1988), the Supreme Court found that a school has authority over expressive activities that might reasonably be perceived to bear the school's imprimatur. Similarly in *Downs v Los Angeles Unified School District*, 228 F.3d 1003, 1009 (2000), the Circuit Court upheld the school's removal of antagonistic material from a school bulletin board which implicated the school as speaker.

Yet at the same time, in *Downs* the Court distinguished *Hazelwood*, and wrote that even without attribution and with opportunity for disavowal, the distortion of a speaker's expression may be unconstitutional:

> Rather than focusing on what members of the public might perceive Down's speech to be, in this case we find it more helpful to focus on who actually was responsible for the speech.[161]

Likewise with s80, the opportunity for the primary author to disavow the modification ought not be considered sufficient remedy. Compelling the author to disavow, or to request a disavowal from the modifier, compels the author's speech. This is the case whether or not others would associate the author with the modified work. Laddie has taken this view of s80 as well.[162]

(d) Horizontal application

Many of the cases discussed above extend freedom of expression principles to the private sphere. In some of the cases discussed above, public actors were parties to the disputes, with government either compelling expression or having its expression compelled: *Barnette* struck down the government's compelling of expression, and in the school cases the courts held that government and schools may not be compelled to convey a message with which they disagree. Yet in *Miami Herald v Tornillo*, the Court struck down a state law requiring that a private actor – a newspaper – be compelled to carry the expression of another.[163] In *Hurley*, the Court ruled that a private body could not be forced to accept the distortion of its expression by the expression of another private body, by virtue of a public law.[164] In the shopping centre cases the courts have recognised that the state cannot compel private actors to carry another private actor's message. Those cases point

[161] 228 F.3d 1003, 1011 (2000).
[162] Laddie supra n.4 at 13.19 (derogatory treatment infringes even where it is clear that the author has not consented to and is not responsible for the modification).
[163] 418 U.S. 241. Arguably both the party whose expression was compelled, namely the newspaper, and the political candidates whose replies were to be printed, were public actors.
[164] While *Hurley* is an example of the horizontal application of freedom of expression principles, this may have been an incorrect application: the parade arguably should have been considered a public forum, as discussed infra.

to two precedents in different factual situations: the owner cannot compel the leafleters no to speak, and the leafleter cannot compel the owner to speak, by virtue of public law. In *PruneYard*, the Supreme Court found that the California law could compel the owner to allow the leafleter's speech, but only where the owner's speech was not burdened.

The horizontal effect of the freedom of expression in the Human Rights Act ('HRA') is oft-debated.[165] The ECHR has recognised that for rights to be effective, it is not always enough for the state to refrain from interfering with them; sometimes the state must take positive action in the sphere of relations between private individuals to protect people's rights and their ability to enjoy them.[166] *Ashdown* applies freedom of expression principles horizontally. Fleming writes that 'constitutional guarantees are being increasingly applied to relations between individuals.'[167] Feldman writes that rights under the Convention may affect substantive private law rules as rights gradually lead to an adjustment of legal values affecting the whole of English law.[168]

Section 80 is analogous to these horizontal private applications of the freedom of expression principle. S80 provides that the state cannot condone the distortion of one (private or public) body's expression by the expression of another (private or public) body. Furthermore, application of freedom of expression principles to private actors' expression may be considered a regulation of public discourse with s80, where the artistic expression has become a cultural text, as discussed below in the public forum analysis.

3 Limitations on the Right: Defences

We have seen that the integrity right supports a principle already recognised in the freedom of expression doctrine. Restrictions on the freedom of expression doctrine must be applied to the integrity right as well. Modifications could be defended against s80 claims on the basis of freedom of expression from a number of aspects.

As discussed above,[169] s80 cannot be interpreted as an action to prevent excessive criticism. Where an allegedly infringing modification is criticism, even excessive criticism of the primary work, no action ought lie. Nor does derogatory treatment include insulting treatment. An action to prevent insults would fall short of the guarantees of freedom of expression for the modifier. Moreover, a modification could be defended as a

[165] D. Feldman, *Public Law* (Oxford: Oxford University Press, 2004), 19.61 (citation omitted).
[166] *Appleby* (Article 10); *Plattform 'Atrzte für des Leben' v Austria* Series A No 139 (1988) 13 E.H.R.R. 204, para 38 (Article 11(1)). See also Feldman (2004) supra n.165 at 7.152, 7.154, 9.02.
[167] J. Fleming, "Libel and Constitutional Free Speech", in P. Cane and J. Stapleton, eds., *Essays for Patrick Atiyah* (Oxford: Clarendon Press, 1991), 333, 334.
[168] Feldman (2004) supra n.165 at 19.66.
[169] Text at nn10-14.

transformative use of the primary work, with the modification constituting an 'original' work of its own.[170]

Another limitation on the right is that modifications should be permitted where the primary work has become a public forum.[171] Restrictions on expression are suspect in a public forum. Under the HRA, public authority landowners cannot exclude or impose conditions on the use of land in a manner incompatible with Article 10 of the Convention.[172] Even before the HRA, private expression in public fora could not be excluded without a reason withstanding administrative law scrutiny.[173] In US doctrine, the constitutional scrutiny of restrictions on expression in public fora is strict.[174]

Restrictions on expression are also subjected to heightened scrutiny in apparently *private* fora that have become *public*. The shopping centre cases bring to light this issue. In *PruneYard*, shopping centre owners were found to have opened their centres to the public at large, effectively replacing the state with respect to traditional First Amendment fora such as streets, sidewalks, and parks.[175] The owners were then obligated to allow the solicitations. In other areas as well, the public forum issue can be determinative of when expression must be allowed, even where that expression is arguably distortive of other expression. In school cases, for example in *Downs*, the forum is not considered public.[176]

In *Hurley*, the trial court's review of the city's involvement in the parade led it to believe that the Council's conduct was private, and did not have the character of state action.[177] Had the courts found state action in a public forum, the scrutiny would have been strict. Perhaps GLIB's right to expression would have been upheld. Relatedly, GLIB might have received protection had the Court found that GLIB had no meaningful alternative means of expression.[178]

---

[170] Text at nn87, 136. Discussion of the methodological analysis whereby a transformative use is found is beyond the scope of this paper.

[171] This application to the integrity right of the public forum principle from the freedom of expression doctrine is analogous to the application to copyright of the public domain principle from property doctrine, see eg Litman supra n.85.

[172] D. Feldman, *Civil Liberties and Human Rights in England and Wales* (2d edn, Oxford: Oxford University Press, 2002), 1015.

[173] *Ibid* at 1014, citing *R v Landes Borough of Barnet, ex parte Johnson* (1990) 89 L.G.R. 581, CA, affirming (1989) 88 L.G.R. 73, DC (council could not deny access for political organisation to attend festival). For a different view on this point, see Eric Barendt, Freedom of Speech (Oxford: Clarendon Press, 2001), 321.

[174] *Cornelius v NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788, 800 (1985).

[175] 447 U.S. 74, 90 (1980) (Marshall, J., concurring).

[176] 228 F.3d at 1012.

[177] 515 U.S. at 566.

[178] *Ibid* at 577-78. See also *Pruneyard* (examining whether leafleters had alternative locations).

The public forum argument could be raised by modifiers of speech in another sense as well. The *Hurley* decision has been critiqued for allowing the Council to control speech that was arguably not its own, but a 'cultural text.'[179] The Council's speech, ie the parade, may have been a public forum. Also the Boston St Patrick's Day Parade may have had an effective monopoly on expressing Irishness. Similarly for example the use of the term 'Olympics' in *San Francisco Arts & Athletics, Inc v. United States Olympic Committee*, 483 US 522 (1987) could have been supported upon a finding that the language itself was a public forum. The same could be said of Barbie and Mickey Mouse – or of Da Vinci's Mona Lisa. In such cases the users and modifiers may not have meaningful alternative means of communication.

With s80, a primary author's work may become an integral cultural icon such that the work itself can be called a public forum. In that case its modification should be protected, to allow the freedom of expression of members of the public as modifiers.[180] As seen above, meanings can be collective, and where an expression has entered the social fabric and cultural language, its modification may be defensible as expression in a public forum.

We have seen that with copyright doctrine there is debate as to whether the fair dealing/fair use doctrines and other limitations *within* copyright are sufficient or if the law should recognise defences from *outside* of the copyright doctrine, namely from the freedom of expression. Yet with the integrity right understood as a freedom of expression, this debate need not be entered. Defences to s80 claims are not fair dealing/fair use from within, as in copyright doctrine; s80 does not even allow a fair dealing defence. Nor are freedom of expression defences to s80 from outside of the integrity right doctrine. Rather, where s80 is understood as a freedom of expression, then principles from that doctrine are necessarily applied in support and also in defence of s80 claims.

E CONCLUSION

Intellectual property law has shifted from its pre-modern conception as the protection of action to the modern notion of the protection of a thing.[181] To the degree this characterisation could apply to the integrity right, it is the argument of this paper that s80

[179] M. Sunder, "Authorship and Autonomy as Rites of Exclusion: The Intellectual Propertization of Free Speech in *Hurley v Irish-American Gay, Lesbian and Bisexual Group of Boston*", 49 *Stanford Law Review* 143 (1996) at 157. I agree with Sunder's critique of allowing control over the use of cultural symbols and discursive spaces. Yet I disagree with Sunder's view that the *Hurley* principle necessarily allows for the creation of a monopoly on meaning. Rather, the decision allows control over the *presentation* of authorial expression.

[180] See Coombe, supra n.93, at n84 (the shopping centre cases are used as an analogy in the trademark area).

[181] Text at n49.

marks a return to a focus on the Author's conduct in expression, rather than (solely) the Text and the Reader. Yet the integrity right may be seen to protect authorial expression not as an intellectual property doctrine, but from within the freedom of expression doctrine. S80 is an author's right not based on the Romantic conception of protecting a creative genius, but a human right based on a conception of universal individual expression.

What are the ramifications of this interpretation of s80? Where S80 is understood as a right of expression, it can be understood not to require further proof of injury for a finding of infringement. Where an author states a claim pursuant to S80, she ought not be required to produce evidence of injury, whether to the author's personality, reputation, privacy or feelings. Rather, prejudice may be presumed from a distortion of the author's expression.

Further, a freedom of expression argument often may be made on both sides of a s80 claim. The freedom of expression analysis of s80 illuminates a defence to s80 claims. A freedom of expression defence raised by a modifier must be considered not as from outside of the s80 doctrine, as often is thought with copyright, but as arising from within s80 doctrine, as a freedom of expression doctrine. While understanding s80 as a freedom of expression would entail a liberal reading of claims, it would entail a liberal reading of defences as well.

Leslie Kim Treiger-Bar-Am