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Private Control/Public Speech

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I. CONTROLLING THE FORM AND CONTENT OF ONE'S SPEECH

A. Introduction

WHEN DOES AN individual author have private control over her expression; and when must that control be limited? The subject of this chapter is authors' expressive autonomy and its limitations. We shall focus our discussion on the moral right of integrity as it operates in the UK.

The moral right of integrity allows authors to prevent certain modifications to their works. Section 80 of the UK Copyright, Designs and Patents Act 1988 ('the CDPA') upholds an author's integrity right, implementing into UK law Article 6*bis* of the Berne Convention for the Protection of Literary and Artistic Works. The UK Act provides that the author of a literary, dramatic, musical or artistic work, and the director of a film, 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'. The right is retained by the author even where ownership of the copyright in her work has passed out of her hands.

It is submitted that the integrity right is a human right, protecting authorial autonomy of expression. The right will be situated directly within the doctrine of freedom of expression. We will look at case law under the freedom of expression doctrine upholding the same principle as that of the integrity right: the protection against distortion of expression.

Freedom of expression often will arise on the opposing side of an integrity right claim, as well. The human rights of the modifier also may be engaged. The second part of the chapter will explore the circumstances under which a modification must be protected as within the modifier's autonomy of expression.

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B. The Right of Privacy Distinguished

Is the integrity right a right of privacy? The concept of 'privacy' has taken on divergent legal conceptions. It has been used widely in the UK, and in US state law, to mean keeping certain information private, that is, out of the public eye. The recent case of *Campbell v MGN Ltd*[2] is such a use. In that case the House of Lords upheld Naomi Campbell's right to the privacy of certain information about her narcotics addiction. The Younger Committee also understood privacy to mean in some sense 'seclusion' or 'intimacy'.[3]

Understanding the integrity right's protection of expression using this sense of privacy is inapposite. The term *ex*pression refers to an outward unfolding: the Oxford English Dictionary defines 'express' as to press out, emit, exude. The integrity right protects not the privacy of expression, but the nature of others' modification of the expression. So too the freedom of expression doctrine protects not private expression in isolation, but expression in communication.[4]

Yet privacy takes on another meaning as well: privacy can mean autonomy, in the sense of choice and control. The English Court of Appeal used privacy in this sense in *Douglas v Hello!*:[5] even in the absence of a right of publicity, the law of breach of confidence or privacy gives one the right to control over one's image in public.

In *Douglas v Hello!* Michael Douglas and Catherine Zeta-Jones sold exclusive photographic rights to *OK!* magazine to publish photos of their wedding. An intruder took unauthorised photos that were published in the rival magazine *Hello!*. The plaintiff celebrities felt the 'choice was ours as to what was and was not published about our wedding' (para 48), and sought 'control' (para 49). The Court wrote that 'control is not an improper objective of the law of confidence' (para 216). The Court upheld the celebrities' expressive autonomy.

The European Court of Human Rights (ECtHR) also has used privacy in the sense of autonomy. *Pretty v UK* can be seen as a claim for the privacy of decision-making, or for the protection of the freedom of the decision-making itself. The ECtHR found that underlying the Article 8 protection of respect for private life was the principle of autonomy, 'in the sense of the right to make choices about one's body'.[6]

[2] *Campbell v MGN Ltd* [2004] EMLR 15, [2004] 2 All ER 995. In this same case, at para 51, the position adopted by Sedley LJ in *Douglas v Hello! Ltd* (below n 5) is noted. That position regards the protection of autonomy as the basis of privacy law.

[3] Younger Committee, *Report of the Committee on Privacy* (Cm 5012, 1972) para 109.

[4] F Schauer, *Free Speech: A Philosophical Enquiry* (Cambridge, Cambridge University Press 1982) 98.

[5] *Douglas v Hello! Ltd* [2005] EWCA Civ 595.

[6] *Pretty v UK*, no 2346/02, 29 April 2002, (2002) ECHR 423, (2002) 35 EHRR 1, para 66 (justifying prohibitions on assisted suicide, however, as necessary in a democratic society).

These two senses of the term privacy are also found in US law. In US state law, privacy can mean keeping information private. In their seminal article in 1890 calling for a right to privacy, Warren and Brandeis' concern was for keeping information out of the journalistic public eye.[7] The US Restatement (Second) Torts, adopting Prosser and Keeton's four-part analysis, also places privacy in this light.[8] Yet Warren and Brandeis' use of Cooley's phrase 'the right to be let alone' has taken on the second meaning as well. In US constitutional law, the right to privacy has come to mean a right to private choice, namely autonomy. It is in this sense that privacy has been given protection in *Roe v Wade*,[9] the US constitutional protection of a woman's right to terminate a pregnancy. Also in *Griswold v CT*,[10] the US Supreme Court upheld privacy in the sense of autonomy, with the rejection of a state ban on the sale of contraceptives.

These two views of privacy are also echoed in scholarly comment. Gavison understands privacy as secrecy, anonymity and solitude.[11] Feldman characterises privacy as freedom of choice.[12] Where privacy is understood as seclusion and autonomy is understood as freedom of choice, commentators show the non-equivalence of the two terms,[13] and counsel their disjunction.[14] Feinberg explores the overlap and confusion of concepts with regard to the privacy right as developed in US jurisprudence,

[7] SD Warren, LD Brandeis, 'The Right to Privacy' (1890) 4 *Harvard Law Review* 193 at 205, citing T Cooley, *A Treatise on the Law of Torts* (2nd edn) (Chicago, Callaghan & Co 1888) at 24, 29.

[8] Restatement (Second) Torts sec 652A, adopting WL Prosser, 'Privacy' (1960) 48 *California L Rev* 338 (seclusion, appropriation of name or likeness, publicity, and false light).

[9] 410 US 113 (1973). The other aspect of privacy is also present in abortion cases: Justice O'Connor in *Planned Parenthood of Southeastern Pennsylvania v Casey*, 112 S.Ct. 2791 (1992), calls the abortion decision among the 'most intimate and personal choices a person may make in a lifetime'. For a critical view of the legal use of the concept of privacy in *Roe v Wade*, see CA MacKinnon, *Feminism UnModified* (Cambridge, Mass, Harvard University Press 1987) 99-102 (women do not have privacy but are seen to constitute men's privacy).

[10] 381 US 479 (1965). Justice Goldberg's concurring opinion in *Griswold v CT* uses 'privacy' in the sense of solitude.

[11] R Gavison, 'Privacy and the Limits of the Law' (1980) 89 *Yale LJ* 421 at 428. Diane Zimmerman describes both the tort and the constitutional right as addressing 'expectations of seclusion': DL Zimmerman, 'Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort' (1983) 68 *Cornell Law Review* 291 at 296, 297.

[12] D Feldman, 'Secrecy, Dignity, or Autonomy? Views of Privacy as a Civil Liberty' (1994) *Current Legal Problems* 41. See also HH Cohn, 'On the Meaning of Human Dignity' (1983) 13 *Israel Yearbook on Human Rights* 226 at 247; JW Harris, *Property and Justice* (Oxford, Clarendon Press 1996) at 229 (privacy as a range of autonomous choice); J Michael, 'Privacy' in Christopher McCrudden and Gerald Chambers (eds), *Individual Rights and the Law in Britain* (Oxford, Clarendon Press 1994) 265 at 267-8 (privacy as choice and control over the circulation of information).

[13] G Dworkin, *Theory and Practice of Autonomy* (Cambridge, Cambridge University Press 1988) at 104; H Gross, 'Privacy and Autonomy' in JR Pennock and JW Chapman (eds), *Privacy: NOMOS XIII* (New York, Atherton Press 1971) 169-181 at 181; R Wacks, 'The Poverty of "Privacy"' (1980) 96 *Law Quarterly Review* 73, 79.

[14] E Beardsley, 'Privacy, Autonomy, and Selective Disclosure' in JR Pennock and JW Chapman (eds), *Privacy: NOMOS XIII* (New York, Atherton Press 1971).

and argues that had Justice Douglas in *Griswold v CT* used 'autonomy' in place of 'privacy', the confusion in the various meanings of privacy would have been avoided.[15]

It is in the latter sense that the integrity right can be called a right to privacy, as autonomy. The integrity right protects an author's choice and control over the form and content of her expression even in a public forum. This principle was upheld in *Joseph v National Magazine Co Ltd*,[16] considering a complaint against editorial modification to a literary work well before the enactment of section 80 of the CDPA. In that case the court wrote that the 'plaintiff was entitled to write his own article in his own style, expressing his own opinions'.

We will call the integrity right directly a right of autonomy, to avoid reference to the dual nature of the term 'privacy'. Our discussion also will avoid the frequent characterisations of the integrity right as a right of reputation or a personality right.[17] We characterise the integrity right as a right of expressive autonomy.

C. Freedom of Expression Doctrine

Recognition of the integrity right reflects the rise in individual rights of expression. It also reflects aesthetic-philosophical currents supporting the notion of creative, expressive individualism. The focus of this discussion will be situating the integrity right within the freedom of expression doctrine.

The integrity right principle can be found in cases concerning the freedom of expression. Courts already have held that a speaker must be protected against the distortion of his or her speech for his or her speech to be free. It is the autonomy rationale that is used by the courts in these cases, supporting the speaker's choice and control over expression.[18]

In addition to UK case law, we will look to precedents of the ECtHR. US cases are also relevant to the 'Anglo-American tradition' of freedom of expression: in *Derbyshire County Council v Times Newspapers Ltd*,[19] the UK court wrote that arguments of American constitutional cases are already a recognised part of English law, in its free expression principle.

[15] J Feinberg, *The Moral Limits of the Criminal Law: Harm to Self* (vol 3, New York and, Oxford, Oxford University Press 1986) 84-91. The various uses of 'autonomy' might then have become problematic for defining the contours of the legal right. It would have been necessary to make explicit that autonomy was used in the sense of discretionary control.

[16] *Joseph v National Magazine Co Ltd* [1959] Ch 14, 20.

[17] See LK Treiger-Bar-Am, 'The Moral Right of Integrity: A Freedom of Expression', in F Macmillan (ed), *New Directions in Copyright* (vol 2 Cheltenham, Edward Elgar 2006).

[18] *Board of Education, Island Trees Union Free School Dist No 26 v Pico,* 457 US 853, 866 (1982) (fostering self-expression). See also CE Baker, *Human Liberty and Freedom of Speech* (New York and Oxford, Oxford University Press 1989) 49-59; R Dworkin, *Taking Rights Seriously* (London, Duckworth 1978) 198; Schauer (n 4) 67-72.

[19] *Derbyshire County Council v Times Newspapers Ltd* [1993] 1 All ER 1011.

With respect to the freedom of expression (as with the meaning of autonomy and privacy, as seen above), UK courts can look to both sides of the Atlantic.

i Choice over Expression

The English 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.[20]

In *Ashdown* the Court also cited *Jersild v Denmark*, where the ECtHR wrote that Article 10 of the European Convention on Human Rights (ECHR) protects 'not only the substance of the ideas and information expressed, but also the form in which they are conveyed'.[21] The integrity right embodies the same principle.

The First Amendment of the US Constitution protects a speaker's choice and control over expression. In *West Virginia State Board of Education v Barnette*,[22] the US Supreme Court found unconstitutional a state regulation requiring children in public schools to salute the American flag. The individuals' right to autonomy was safeguarded against the state's compulsion to declare a belief, or to utter what is not in one's mind. In *Miami Herald v Tornillo*,[23] the US Supreme Court held that a newspaper could not be compelled by state law to print a political figure's reply to a press critique.

ii Distortion of Speech

Similarly, a speaker's choice is not free if it is distorted by the speech of another. School cases have 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'.[24]

A series of cases concerning shopping centres also upholds this principle. In these cases shopping centre owners disallowed the collection of signatures or the distribution of leaflets on their property. The courts have been careful not to burden the owners' expression rights. The owners' speech

[20] *Ashdown v Telegraph Group Ltd* [2002] Ch.149, para 31. The Court considered the claimants' copyright claim as pitting property rights against expression rights, see para 39. The analysis herein looks to situations where rights of expression are in conflict.

[21] *Jersild v Denmark*, Series A No 298 (1994), (1995) 19 EHRR 1, para 31.

[22] *West Virginia State Board of Education v Barnette*, 319 US 624, 631 (1943)('self-determination').

[23] *Miami Herald v Tornillo*, 418 US 241 (1974).

[24] *Rosenberger v Rector and Visitors of University of Virginia,* 515 US 819, 833 (1995) (citation omitted); see also *Hazelwood School District v Kuhlmeier,* 484 US 260 (1988), and *Downs v Los Angeles Unified School District*, 228 F.3d 1003 (2000).

cannot be compelled by requiring them to allow leafletting. In *PruneYard Shopping Center v Robins*,[25] where the US Supreme Court sustained a California law requiring the proprietors of shopping malls to allow visitors to solicit signatures on political petitions, the owners' rights of expression were found not to be burdened.

The shopping centre cases also present a precedent for the integrity right insofar as they acknowledge that the freedom of expression may require regulation of property rights.[26]

A further precedent is to be found where courts uphold the principle that a speaker cannot be forced to subsidise activities that would compel his or her expression. In *Pacific Gas & Electric Co*, the US Supreme Court struck down a state law requiring a private utility to place a newsletter in its billing envelopes, because the utility 'may be forced either to appear to agree with [the intruding leaflet] or to respond'.[27] These cases are considered more fully below.

A case we would like to look at more closely is *Hurley and S Boston Allied War Veterans Council v Irish American Gay, Lesbian and Bisexual Group of Boston*.[28] In *Hurley*, the Supreme Court ruled that the 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 bisexuals 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.

A unanimous Supreme Court reversed. The Court's ruling upheld the principle of autonomy, supporting the Veterans Council's speech: 'under the First Amendment … a speaker has the autonomy to choose the content of his own message'.[29] One who chooses to speak may also decide what not to say.

The Court upheld the same principle that the integrity right supports: the speaker – or the speaker's work – cannot be forced by another's speech to say something against the will of the author. The Court rejected the forced alteration of one's message.[30] 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'.[31]

[25] *PruneYard Shopping Center v Robins*, 447 US 74 (1980).
[26] *Appleby v UK*, no 44306/98, ECHR 2003-VI, (2003) 37 EHRR 38.
[27] *Pacific Gas & Electric Company v Public Utilities Commission of California* 475 US 1, 15 (1986) (plurality opinion; citation omitted).
[28] *Hurley and S Boston Allied War Veterans Council v Irish American Gay, Lesbian and Bisexual Group of Boston*, 515 US 557 (1995).
[29] Above (n 28) 573.
[30] Above (n 28) 577, 581.
[31] Above (n 28) 578.

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. Had a First Amendment claim been raised by GLIB, the case would have presented autonomy of expression arguments on both sides. It is to situations of conflicting claims of freedom of expression that the discussion will now turn.

II. LIMITATIONS ON THE RIGHT TO CONTROL THE CONTENT OF SPEECH

The first part of this chapter has addressed reasons grounded in expressive autonomy for allowing restrictions on the use of another's speech: specifically the restrictions entailed in moral rights law. A similar analysis could be made of copyright and even trade mark law.[32] We are not, of course, claiming that this is the only way of approaching the justification of those regimes. However, it is an approach to these rights that has a certain explanatory power, the implications of which we want to explore.

In this second part of the chapter we will address the question of the limits to control over a work inherent in the expressive autonomy justification. In particular, we will focus on limits set by the expressive autonomy of those who would adopt an existing work for use as part of their own speech. When, on the basis of the expressive autonomy justification for moral rights, ought speech over which there has been private control become available to public use? When ought it to be available to other speakers as a vehicle for the development of their own autonomy, a vehicle for expressing views perhaps quite at odds with those of the original speaker?

Within the confines of this paper we shall have to gloss over a number of difficulties. For example, an important analogy will be drawn from the law of trade mark. In doing so, it will be assumed that the expressive autonomy justification for control over a copyright work and a trade mark are of similar strength. Many commentators, however, would want to be more generous to those who would adopt trade marks for use in their own speech than to those who would adopt copyright works. This may be because of the traditional reluctance to protect commercial speech. It may also be because trade marks are characteristically owned by corporations and the autonomy claim seems less apposite when it is made by groups rather than individuals. But there is a minefield of difficulty in those questions around which this chapter will have to skirt.

[32] See M Spence, 'The Mark as Expression/The Mark as Property' (2005) 58 *Current Legal Problems* 491.

Two approaches seem possible to the question of when a concern for expressive autonomy entails a limitation to the control that it gives a speaker over the use of her work or mark.

The first approach is advocated by Bezanson.[33] He claims that whenever the use of someone else's expression is transformative, then the original speaker no longer has a claim based in expressive autonomy to control his or her speech. Transformative use he categorises as either substantive transformation (where the original speech is incorporated into new speech and transformed in the process: as it is sometimes put 're-coded') or transformation by avowal (where the original speech is simply adopted and affirmed by the second speaker). The idea here is that the work, once transformed, becomes the speech of the person responsible for its re-coding or avowal and not the speech of the original speaker. To take an example from the facts of a well-known US copyright case, once a drawing of Mickey Mouse finds its way into an obscene comic book,[34] it is no longer the speech of Walt Disney or the Disney Corporation over which they might be given some control, it is transformed and becomes the speech of the comic book artist.

This concept of transformative use, though not in as broad a form as we find it in Bezanson, has been powerful in the law of many jurisdictions relating to the parodic re-coding of works and marks. Thus the UK law of copyright used to adopt the position, though no longer does, that a parody was not a reproduction of a work if the parody itself constituted a work attracting protection.[35] A commitment to permitting transformative uses might also be found in the UK provision of a notice explaining that a work has been modified as a potential remedy for its derogatory treatment.[36] The effect of such a notice is to declare that the relevant speech is no longer that of the original creator, but of the modifier. In the *Alcolix* decision, the German Federal Court of Justice (*Bundesgerichtshof*) claimed that a parody would constitute a *freie Benutzung* ('free use') of a copyright work as long as there was sufficient *innerer Abstand* ('inherent distance') between it and the original.[37] In Italian copyright law, a parody will not

[33] RP Bezanson, 'Speaking Through Others' Voices: Authorship, Originality and Free Speech' (2003) 38 *Wake Forest Law Review* 983.

[34] *Walt Disney Productions v Air Pirates* 581 F.2d 751 (9th Cir 1978).

[35] For the older position see: *Hanfstaengl v Empire Palace* [1894] 3 Ch 109 at p 128 per Lindley LJ; *Glyn v Weston Feature Film Company* [1916] 1 Ch 261 at p 268 per Younger J; *Joy Music Limited v Sunday Pictorial Newspapers (1920) Limited* [1960] 2 QB 60 at 70 per McNair J. For the current position see: *Schweppes Ltd v Wellingtons Ltd* [1984] FSR 210 at 212 per Falconer J; *Williamson Music Ltd v The Pearson Partnership Ltd* [1987] FSR 97 at 106 per Judge Paul Baker QC. Some commentators argue that the concept of transformative use nevertheless has a role to play in parody cases as a guide to whether the part taken is substantial, see WR Cornish, *Intellectual Property* (5th edn) (London, Sweet and Maxwell 2003) 11-10; H Laddie, P Prescott and M Vitoria, *The Modern Law of Copyright and Designs* (3rd edn) (London, Butterworths 2000) at 4.54-5, 3.139; *ibid* at 3.142.

[36] Section 103(2) CDPA.

[37] BGH; (1994) *Gewerblicher Rechtsschutz und Urheberrecht (GRUR)* 206 (*Alcolix*).

constitute an infringement of the work upon which it is built if the parody is an '*opera dell'ingegno di carattere creativo*', which will itself depend upon whether it has an *autonoma identità*.[38] The concept of the transformative use is as attractive to courts as to commentators.

Bezanson's claim seems to us, however, to go too far. It is certainly the case that if a work or mark is so transformed that it is no longer recognisable as part of a new text, then any speech claim that there might be over the work or mark in its original form must be extinguished. But this is not the only situation that Bezanson has in mind, as is made clear by his concept of transformation by avowal. He seems to mean that *any* expressive adoption of the work or mark by a subsequent speaker breaks the connection between the work or mark and the original speaker. He seems to mean that *any* expressive adoption of the work means that the only possible speech claim is that of the party undertaking the recoding or avowal. No jurisdiction has used the concept of transformative use in quite this way, and they have been right not to do so.

It is at least arguable that using a work or mark in contexts in which the work or mark is identifiable still constitutes a kind of compelled speech. An analogy might be found in the US cases providing that forced financial contributions to the expressive activity of others can constitute compelled speech. Wasserman argues that the heart of the difficulty with forced financial contributions is not that some hearer will mistakenly identify a particular contributor with a particular view, but that it threatens the expressive autonomy of the speaker simply by forcing him or her to participate in expressive acts with which he or she might disagree.[39] Madison puts the same point, less helpfully, as forcing the speaker to 'subsidise' the speech of the second user.[40] Talk of 'subsidy' seems unfortunate because, of course, it assumes the right to control, but his point is essentially the same as that of Wasserman. In this way, permitting the transformation of a work is different from permitting the criticism of it in the way that any regime of free speech must do. This is because criticism does not involve the participation of the original speaker. If that is right, then it cannot be that *no* transformative use threatens the expressive autonomy of the creator of a work or mark, but only transformative use in which the work or mark is no longer identifiable.

A second approach to the limitation of the expressive autonomy claim of the creator of a work starts with the assumption that the use of the work may affect the expressive autonomy of its creator wherever that work is identifiable, but then asks whether there are situations in which respect for

[38] Tribunale di Milano (1996) *Foro Italiano* 1426 (*Va dove ti porta il cuore*).

[39] HM Wasserman, 'Compelled Expression and the Public Forum Doctrine' (2002-2003) 77 *Tulane Law Review* 163 at 191-193.

[40] MJ Madison, 'Complexity and Copyright in Contradiction' (2000) 18 *Cardozo Arts & Entertainment Law Journal* 125 at 166.

the expressive autonomy of the person who would transform a work requires that they be entitled to do so. Two situations have emerged in which this seems to be the case.

The first is the situation in which it is necessary to adopt and transform the work adequately to comment upon the work or its creator. This is arguably reflected in the copyright defences relating to criticism or review.[41] It seems reasonable to allow transformation of a work for this purpose because there may be no other effective way in which to comment upon a speaker or their words than to use, and sometimes to recast, them. Moreover, using a work for this purpose does not undermine, but recognises the nexus between a work and its creator that it is the overall purpose of moral rights law to protect. If I am to engage in dialogue in the market of ideas, then I must expect that others will take my words and scrutinise, analyse, quote and mis-quote them. As the French legislators said in enacting their parody provision, that is '*la gloire et la servitude de l'artiste*'.[42] Criticism by transformation of a work, while it is different to mere criticism in that to some extent it forces the original speaker to participate in speech with which he or she would not agree, at least involves the type of serious engagement with speech that might be expected as a part of public discourse. A speaker cannot object to being compelled to participate in an argument about the meaning and value of his or her own work.

The second situation is more problematic. This is the situation in which a work has become a cipher for a range of meanings different from those that the creator of the work would ascribe to them. An example upon which there has been frequent comment is drawn from trade mark law. The trade mark 'Barbie', at least in English, is used generically to mean something such as a woman who is regarded as, in the words of one commentator, 'a beautiful but empty headed accessory'.[43] A whole world of Barbie Art – a world that has recently seen US litigation vindicating the rights of the Barbie artists[44] – has been built upon this range of meanings. If there genuinely exists no alternative vehicle for expressing a particular range of meanings – as there may not be in the Barbie case – then the mark may have become itself a kind of public forum. It may have become a space for debate rather than a contribution to debate. This type of thinking seems to underpin the trade mark law of genericide,[45] although that law is

[41] Section 30 CDPA.

[42] 'Il va de soi que l'auteur se doit de consentir, à partir de la divulgation de l'ouvrage, à ce que l'ouvrage, lui échappe en partie. Les analyses de l'oeuvre, les citations, les revues de presse, les pastiches, les caricatures, la diffusion partielle par les mille moyens de la publicité moderne, constituent la gloire et la servitude de l'artiste.' *Journal Officiel de la République Française Vol XXIV* (Paris, Imprimerie des journaux officiels 1955).

[43] RC Dreyfuss, 'Expressive Genericity: Trademarks as Language in the Pepsi Generation' (1990) *65 Notre Dame Law Review* 397 at 400.

[44] *Mattel Inc v Walking Mountain Productions*, 353 F.3d 792 (9th Cir 2003).

[45] Section 46(1)(c) Trade Marks Act 1994.

arguably inadequate to protect the relevant free speech interest. In particular, genericide happens when, in the terminology of Peirce's semiotics, a trade mark shifts from being a symbol with one particular referential function (that of identifying the supplier of goods or services) to being a symbol with a different referential function (that of signifying a whole type of goods or services).[46] The situation with which we are concerned is the much more semiotically significant situation of a symbol coming to operate as an index (that is, as a sign used to point to something else because of a conventional association). There is arguably no good reason why this second situation ought not to be regarded as worthy of an exception to infringement and also why copyright works ought not to be regarded as just as capable of becoming generic in this way as trade marks are.

Of course, prioritising the interests of the second speaker in this context is a much stronger thing to do than prioritising the interests of the second speaker in the first range of contexts. But, in the case of a limited range of works which have become important cultural symbols, such a response seems justified as a way of upholding expressive autonomy. This is largely because the link between that work and its original creator will have inevitably weakened as the work acquired its new range of meanings.

If the argument of this chapter can be accepted then there are good expressive autonomy justifications both for granting, and for limiting, a creator's control over his or her work. Of course, other social policies also do, and should, shape the intellectual property regimes, but the notion that works are speech, the protection of which is required by a commitment to respecting expressive autonomy, is one that deserves greater investigation than it has often had in the common law jurisdictions.

[46] See CS Peirce, 'The Icon, Index and Symbol' in C Hartshorne and P Wiess (eds), *Collected Papers of Charles Sanders Peirce: Elements of Logic* (Vol 2, Cambridge, Mass, Harvard University Press 1960) 156-173.