By Jeffrey L. Graubart

AGONY AND THE ECSTASY

IN THE MONTHS BEFORE THE DECEMBER 15, 1993 deadline for the General Agreement on Tariffs and Trade (GATT), European broadcasters and filmmakers launched an unparalleled lobbying effort to exempt cultural matters from the accord. Undoubtedly referring to the U.S. viewpoint, The European Union's foreign trade commissioner, Leon Brittan, told the European Parliament, "It is ignorance and shows a lack of civilization to pretend that cultural products are exactly the same as ordinary industrial products."[1]

European efforts were countered by a high-level meeting in October 1993 between President Clinton and 15 leading entertainment industry executives, including Paramount chairman Sumner Redstone; Universal's chairman, Lew Wasserman, and president, Sidney Sheinberg; and Disney's president, the late Frank Wells. At that meeting, President Clinton said, "Let me make it clear that fairness and justice must apply to audiovisual works as well as other elements in a final GATT deal." In the end, however, the pressure of the film industry's top executives made no difference as Hollywood's position on the GATT negotiations was ultimately abandoned by the White House. Instead, European resolve on the issue of cultural identity carried the day.[2]

The failure of the entertainment industry to condition U.S. approval of GATT on the inclusion of cinematographic and audiovisual materials illustrates the complex issues involved in international trade negotiations. More important, it provides a valuable lesson to U.S. creators and performers, on one side, and to U.S. entertainment industry executives, on the other, of their need to organize and unite as well as their European counterparts in order to compete in the global entertainment industry marketplace.

During the GATT negotiations, U.S. creators and entertainment business leaders were divided over a critical issue: recognition of artists' "moral rights," a concept recognized throughout Europe that provides the creators of artistic works with certain rights even when they no longer are the legal owners of a copyright. U.S. entertainment business leaders have long opposed adding these rights to U.S. law and the resulting friction with the creative community has put the entertainment industry at a disadvantage in international negotiations.

Whatever the merits of the arguments of the entertainment industry executives, it is critical that the industry put this divisive issue behind it and bring U.S. intellectual property law into the twenty-first century. Only then will the industry be able to present a united front in international negotiations concerning the enforcement of intellectual property rights—and that is the issue that is of undeniable interest to both creators and the business community.

Unfortunately, Congress has not begun to consider the pivotal issue of extending author status to U.S. composers, screenwriters, and directors for jointly created films and audiovisual works, as the Council of Europe has mandated for the domestic law of each member state of the European Union.[3] Each member nation has until July

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IT'S TIME FOR THE U.S. TO GIVE CREATORS THE SAME MORAL RIGHTS THEY ENJOY IN EUROPE

1, 1995, to implement the Directive on Copyright Duration, which extends the protection for audiovisual works from the present term of life-of-the-creator plus 50 years to life plus 70 years after the death of the last surviving author. This category includes the principal director, the author of the screenplay, the author of the dialogue, and the composer.[4]

The directive explicitly includes a category of rights that has a two-centuries-old history of acceptance outside the United States, but which the U.S. Congress has long resisted recognizing: the concept of an author's moral rights. Congress has resisted this action on several grounds. One is "the comfortable, but incorrect, argument that our law already deals adequately with the problem."[5] Another is the fear of "those user groups (notably the motion-picture and television industries)...[that] moral rights...represent a sinister threat to their ability to function profitably."[6] A closer examination of the concept of moral rights and the history of the moral rights debate in Congress and the courts will show, however, that the entertainment industry would be well served by recognition of these rights.

AN INDIVIDUAL WRITES A CHECK, SIGNS IT, AND USES IT for payment. But what if someone else changes the amount over the signature? That, of course, is not only unlawful but morally wrong because the signature represents the individual's reputation and honor. It represents a promise to the payee that vouches for the legitimacy of the check. This is nothing more than an ancient principle: the right to maintain the value of a signature and be protected by law if it is changed without permission. But U.S.-based film directors, screenwriters, authors, songwriters, and recording artists, enjoy no such protection.

In most nations of western Europe, directors or screenwriters are entitled to enjoin the exhibition of their motion pictures if, for example, they have been colorized without permission and if they believe the colorization distorts, "mutilates," or otherwise modifies the creators' reputation. Recent cases in France, Italy,[7] and Holland[8] have found for the creators, citing respect for the integrity of the original works.

Many other nations require that the names of all composers, lyrists, and performers be broadcast at the time a song is played on the air. The 1973 Brazilian Copyright Act, for example, requires such attribution.[9]

These examples illustrate several different approaches to artists' rights that have emerged in the past century throughout the world:
1. In the United States, protection of artists' *economic* rights has been enshrined, but the artists' moral rights have been ignored.
2. In many industrialized nations (including the original signatories to the Berne Convention for the Protection of Literary and Artistic Works), minimum standards of artists' moral rights are part of each nation's copyright law.
3. In France, considered to be the most protective of the nations recognizing artists' rights, an artist's moral right (*droit moral*) was first recognized at the time of the French Revolution and continues to be highly safeguarded.

Because a right is titled a moral right, it should not be assumed that it cannot be enforced legally, that it has no economic importance, or that it refers to a judgment about a work's morality—or lack thereof. The moral right of the artist is actually a composite right, including the following:

- The right of attribution. To identify the artist by name as the author of his or her work, or to disclaim authorship of that work.
- The right of integrity. To prevent mutilation or other modifications of the work, or to prejudice, in any way, the work or other professional honor or reputation of the author.
- Other moral rights. These include the right of divulgation (the right to withhold the work from the public until the artist determines when and whether it is complete and when and whether it should be made available), the right to modify the work before (or after) it's utilization, and the right to withdraw it from circulation.[10]

U.S. law did not, until very recently, formally recognize any element of the author's moral rights. But the issue came to a head—or seemed to—in 1988, when the United States finally adhered to the Berne Convention, the world's first and foremost copyright treaty. Originally signed by eight nations in Berne, Switzerland, on September 9, 1886, the treaty protects the rights of authors across national borders. For more than a century Congress refused to ratify the treaty, expressing concern that the moral rights provisions of the Berne Convention would become part of U.S. law. Specifically, Article 6*bis* of the treaty addresses the value of signature and honor:

> Independently of the author's economic rights, and even after the transfer of said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation, or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.[11]

The impetus for Congress accepting the Berne Convention was a constant drumbeat of complaints from the U.S. business community that, due mainly to rampant film piracy, national business interests were at a disadvantage in most of the world. Claiming to lose at least $1 billion dollars annually from film piracy, the Motion Picture Association of America was at the forefront of promoting U.S. inclusion in the Berne Convention. Yet this group, composed primarily of the large Hollywood studios, while decrying piracy and demanding entry to "the Berne Theater," refused to pay the price of the ticket—recognition of true moral rights.

When the treaty was debated, members of Congress amazingly argued that the United States could adopt the Berne Convention without accepting the moral rights provisions. For example, in the House debate, Representative Robert W. Kastenmeier expressed the views of the House Subcommittee on Courts, Civil Liberties, and the Administration of Justice, which he chaired:

> [T]he best course was to avoid statutory treatment of moral rights in the context of Berne. This conclusion rested in part on the political reality that legislation with a moral rights provision simply would not pass. Furthermore, amendments to the Copyright Act relating to moral rights are not required in order to secure U.S. adherence to Berne.[12]

Kastenmeier, himself, rejected this course of action and opposed any adoption of the Berne Convention that avoided consideration of the moral rights issue. He instead urged that a "spirit of political compromise...work a different solution" and expressed his "relutan[ce] to reject at the outset the necessity of the recognition of moral rights."[13]

On the other side of the Capitol, Senator Hatch agreed with Kastenmeier's subcommittee:

> The rights have their origin in French law. If enforced in the United States, these moral rights would drastically alter copyright relationships. The right of paternity could alter the work-for-hire doctrine whereby an author is paid to produce a work whose copyright is held by the author's employer, not the author. The right of integrity would make a...movie producer's efforts to edit a...film very difficult. At a minimum, moral rights would cause mountains of litigation if applied to the United States....[Therefore] U.S. implementing legislation

should be neutral on the issue of moral rights.[14]

Senator Hatch's statement captures perfectly why the issue of moral rights has proven so divisive in the United States. The entertainment and other creative industries depend upon work made for hire, and under U.S. copyright law, the creator transfers not only the copyright to a work made for hire to the economic owner, but also the status of author. This contrasts to the system in continental Europe in which the rights of the author are retained by the creator even if the copyright is transfered under work-for-hire provisions. The U.S. position represents a declaration by Congress of the superiority of property rights over individual rights, a clear philosophical distinction to continental Europe's position, which stresses natural rights of the author that cannot be alienated by agreement or law.

Artists representating film directors, screenwriters, and visual artists (including Sydney Pollack and Martin Scorsese) naturally urged that the United States adopt the European viewpoint. They argued at the congressional hearings that "artists' rights is at the heart of the treaty. It gives the treaty its special character and its moral tone." Furthermore, they contended, current U.S. law was insufficient to protect those rights.[15]

They were supported by Representative Howard Berman who pointed out the hypocracy in Senator Hatch's position:

> I am troubled, however, that we may not be intellectually honest when we conclude that we can join Berne by deeming U.S. laws to be in compliance, but assuming none of the responsibilities under the [c]onvention to enhance the rights of authors....We are not really solving any perceived problem if screenwriters and directors can effectively be coerced into waiving the rights afforded by statute. Those directors and screenwriters who are sufficiently prominent can achieve the rights in question by the vehicle of their contracts, and those who are not strong enough in their respective fields can easily be coerced into relinquishing those rights as a condition of being hired. I continue to have concerns on this point, and have not seen a statutory approach that addresses my concerns.[16]

Pushing aside these objections, Congress grounded the implementing legislation that ratified the Berne Convention on the language of a letter received from Arpad Bogsch, the director general of the World Intellectual Property Organization (WIPO)[17]:

> In my view, it is not necessary for the United States of America to enact statutory provisions on moral rights in order to comply with Article 6*bis* of the Berne Convention. The requirements under this Article can be fulfilled not only by statutory provisions in a copyright statute but also by common law and other statutes. I believe that in the United States the common law and such statutes (Section 43(a) of the Lanham Act) contain the necessary law to fulfill any obligation for the United States under Article 6*bis*.[18]

So fortified, Congress reached the conclusion that "[b]ased on a comparison of its laws with those of Berne member countries, and the current status of [f]ederal and [s]tate protections of the rights of paternity and integrity, [Congress] finds that current United States law meets the requirements of Article 6*bis*,"[19] and thus passed the Berne Convention Implementation Act of 1988.[20]

Two years later, Congress softened its stance on the moral rights issue, if only slightly. In passing the Visual Artists Rights Act (VARA)[21] in 1990, Congress recognized, for the first time, some of the moral rights of visual artists. This legislation, however, covers only artistic works by painters, sculptors and "photographic artists." Moreover, VARA provides those artists with the rights of attribution and integrity only. The moral rights of other creators have yet to be recognized by Congress,[22] but not due to a lack of effort. The strongest proponents are motion picture directors and screenwriters,[23] and they have garnered strong allies in the songwriting and recording artist community.[24] The issue of colorizing movies served to galvanize creative forces within the motion picture industry to begin their lobbying effort. In hearings before the House Committee on Intellectual Property and Judicial Administration and the Senate Judiciary Subcommittee on Patents, Copyrights and Trademarks during 1992 and 1993, they advocated legislation, which, if enacted, would have required that all films that have been materially altered by panning, scanning, lexiconning, time compression and/or expansion, and/or colorizing be so labelled. Concerned that a more onerous labelling obligation would result, the Hollywood studios adopted a bland, less specific labelling procedure, sufficient, at least for the time being, to silence potential congressional critics.

The lack of recognition of moral rights has also raised a valid concern by foreign directors, "whose guilds work tirelessly to protect the moral rights of American directors overseas, [but who] have no recourse should their work be altered in the United States,"[25] that their films could be colorized, panned and scanned, or time compressed by a subsequent copyright owner and then distributed in the United States, without regard to the moral right of integrity belonging to the directors and screenwriters. This is technically and legally possible because U.S. copyright law considers the copyright owner to be the author.

Accordingly, potentially insensitive corporate copyright holders (which could include multinational corporations controlling major U.S.-based entertainment entities from abroad), as the technical authors and often propelled solely by the profit motive, could change the history depicted in the original version of "American" motion pictures without the true authors having any ability to raise a meaningful legal protest or the right to enjoin defacement. For example, would the Sony Corporation, the present copyright owner of *The Bridge over the River Kwai*, be entitled to modify that film in any way it sees fit?

WITH LEGISLATIVE ACTION TO protect artists' rights limited to VARA and a few other state laws, creators have looked to the American courts to recognize the doctrine of moral rights. Historically, however, they have found little more satisfaction in the courts than in Congress.

Consider, for example, the case of the internationally famous Soviet composers Dmitry Shostakovich, Aram Khachaturian, and Sergei Prokofieff. The three sought an injunction in a New York court to prevent music they had composed, but which was in the public domain, from being used in a motion picture with an anti-Soviet theme. Simultaneously, the composers brought the same case in a French court. The New York court, in *Shostakovich* v. *Twentieth Century Fox Film Corp.*,[26] denied the composers any remedy. The court questioned what standard—good taste, artistic worth, political beliefs, or moral concepts—could serve as a basis for testing the artists' moral rights. In contrast, the French court, in *Le Chant du Mond* v. *Soc. Fox Europe*,[27] halted the exhibition of the motion picture on the grounds that the moral rights of the composers had been violated. Despite the fact that the music was in the public domain and therefore no economic harm could be shown, the court recognized that the composers had sustained moral damage—a violation of their right of respect.

Author Stephen King, on the other hand, found some satisfaction in U.S. courts, but without any explicit recognition of his moral rights. An appeals court in *King* v. *Allied Vision Ltd.*[28] enjoined film distributors from using King's name in advertising and marketing the film *The Lawnmower Man*, in which the defendants used a two-minute scene from one of the author's short stories. Without denominating the plaintiff's moral rights, the court stated:

> Even absent any presumption arising from plaintiff's Lanham Act [citation omitted] claim, plaintiff has nevertheless demonstrated irreparable harm. Where, as here, a creative work is misattributed to a prominent author or artist, reputational harm is inevitable and largely immeasurable. [Citing cases]...Moreover, even if plaintiff sustains no measurable loss in profits, plaintiff's name and reputation are inevitably diluted by the misattribution to him of works which

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> he did not create....The law does not permit such calculated and deceptive practices.[29]

This was a judicial recognition of the creator's (moral) right of integrity in the guise of a common law right.

As *King* exemplifies, legal discussions of moral rights by U.S. courts before 1994 were notable for their absence. An exception occured in 1976 in *Gilliam* v. *American Broadcasting Co.* when the creators of Monty Python's Flying Circus earned some relief in a case involving the unauthorized editing of their programs. The U.S. Second Circuit Court of Appeals observed:

> American copyright law, as presently written, does not recognize moral rights or provide a cause of action for their violation, since the law seeks to vindicate the economic, rather than the personal, rights of authors. Nevertheless, the economic incentive for artistic and intellectual creation that serves as the foundation for American copyright law...cannot be reconciled with the ability of artists to obtain relief for mutilation or misrepresentation of their work to the public on which the artists are financially dependent. [Citing cases.] Although such decisions are clothed in terms of proprietary right in one's creation, they also properly vindicate the author's personal right to prevent the presentation of his work to the public in a distorted form.[30]

The most important recent decision on moral rights of American directors and screenwriters came in late 1994, not from U.S. courts, but from France. In 1988, the heirs of John Huston, director of *The Asphalt Jungle*, and the movie's screenwriter, the late Ben Maddow, brought an action in the courts of France. There a court enjoined Turner Entertainment Co. from televising a colorized version of *The Asphalt Jungle*, even though Huston had granted "all rights" to Turner's predessor-in-interest, MGM. The plaintiffs cited the inalienable moral right of the creators, which override contracts waiving such rights. The plaintiffs were initially rebuffed by the court of appeal on the basis that French law "prohibits barring the application of American law and setting aside the contracts and, consequently, compels denying the parties Huston and Maddow any possibility of asserting their moral rights." That decision was based on the following factors:

1. International law and orderly commercial relations required the upholding of the 1986 contract between Turner and MGM.
2. The public interest would be served by giving the French audience access to new technological developments like colorization.
3. Huston's moral rights, if any, were not clear.[31]

But France's highest court of appeal in private cases, the Court of Cassation, rejected this analysis of moral rights and ordered the case to be retried in its entirety, to determine whether Huston and Maddow may be considered authors for purposes of exercising moral rights in France.[32] The French high court noted that when Turner acquired the copyright in *The Asphalt Jungle*, moral rights were not included in Huston's grant to MGM because they do not exist in U.S. copyright law. Accordingly, the Court of Cassation instructed the court of appeals to consider the matter under French domestic law rather than under the court of appeal's earlier basis for decision.

Notwithstanding the fact that the Court of Cassation's decision was strongly criticized by legal scholars at the time it was rendered in 1991,[33] the court of appeal, on remand in December, 1994, found Huston and Maddow to be co-authors and ordered defendant Turner Entertainment to pay 400,000 francs ($74,000) for its broadcast of *The Asphalt Jungle* in 1988, and French Channel 5 (*La Cinq*), to pay 200,000 francs ($37,000).[34] The decision was based on Article 6 of the French copyright statute, which provides:

> [The] author enjoys the right to respect for his name, his status, his work. This right is attached to his person, it is perpetual, inalienable and imprescribable. It is transmitted after death to the author's heirs.[35]

Ironically, but for the success of France and other European nations in exempting audiovisual works from the GATT Agreement, this decision might well have become the vehicle by which the United States was required, by international tribunal, to recognize moral rights. Representatives of Turner would undoubtedly have appealed the decision to the new World Trade Organization, the body created by the GATT Agreement to decide such international trade disputes.[36] It is not impossible to imagine that the WTO, relying on the GATT-related Agreement on Trade-Related Aspects of Intellectual Property (TRIPS),[37] would have demanded U.S. adherence to the moral rights provisions contained in the Berne Convention. But because the European broadcasters and filmmakers succeeded in excluding audiovisual works from the scope of GATT,[38] Turner is precluded from challenging the result in *Huston* before the WTO.

The passage of VARA finally forced the courts in the United States to consider the moral rights issue head-on. In 1994, in *Carter* v. *Hemsley-Spear, Inc.*,[39] moral rights, *qua* moral rights, were, for the first time, acknowledged to be part of U.S. law by a federal district court. Congress, in enacting VARA, had taken the Second Circuit's lead in *Gilliam*, but limited the recognition of U.S. moral rights to artists who create paintings, drawings, sculpture, and photographic works existing in a single copy, and then only after

much lobbying by the National Artists Equity. Although VARA specifically recognizes the visual artist's right of attribution and right of integrity (as enumerated in Article 6*bis* of the Berne Convention and the domestic law of numerous European nations) surprisingly, and contrary to its continental precursors, VARA did not extend these rights to the creator of a "work made for hire."[40]

In *Carter*, the plaintiffs were sculptors engaged by the defendants to "design, create, and install sculpture and other permanent installations" in the lobby of a building controlled by the defendants. The agreement provided that the plaintiffs were entitled to "receive design credit" and to own the copyright to the work created. After the work created by the plaintiffs was substantially completed, the defendants sought to remove the work from the building.[41] Basing its decision on VARA,[42] the court held that the plaintiffs were entitled to an injunction prohibiting the defendant-owners of the building from 1) "taking any action to alter, deface, modify, or mutilate plaintiff's sculptures" and 2) "denying plaintiffs access to [the building]"[43] in order to assure to the plaintiffs the right to "protect, or prevent the exploitation or infringement of, their copyright in the [w]ork."[44]

Building on VARA, Berne, the GATT Agreement, and decisions such as *King* and *Carter*, U.S. courts may in the future more easily recognize the existence of moral rights. Of course, appropriate congressional legislation would ensure this result. The arguments made by U.S. creators for full recognition of moral rights may be properly and appropriately countered in some instances by U.S. motion picture and television interests. In any event the time is now for U.S. creators to have their voices heard—as loudly as their counterparts in Europe, Japan, and Latin America—for legislation that would insure that their artistic personalities are protected as well as those of their counterparts thoughout the world.

There seems to be evidence of an historical "conspiracy" of silence in the United States in the unwillingness of Congress and the entertainment industry to face the issue of artists' moral rights. As recent events have illustrated, the Europeans have again shown that unity and determination is a prescription for victory. Meanwhile, this nation's entertainment industries have failed to come close to uniting U.S. artists and U.S. business interests. In enlightened self-interest, however, some form of solidarity may soon occur in coming battles with international competitors over suchs issues as the distribution to U.S. creators and producers of the more than $7 million being collected by seven European countries from videotape and hardware manufacturers for off-air taping. The majority of this money is being generated by U.S. audiovisual product, but not any of it is being paid to U.S. performers, and only small sums are being realized by U.S. producers, directors, and writers.[45]

The day may soon come when Europeans insist in the negotiations over that issue—or in other future battles where they feel they maintain sufficient clout—that the price of a greater share of these revenues to U.S. producers must be U.S. recognition of moral rights for creators. U.S. GATT negotiators learned a similar lesson in 1993.

The insular, pre-Berne era is clearly in the past for the U.S. The GATT debate may only be the harbinger of things to come in international copyright relations. That experience, however, makes manifest the fact that in order to secure important national goals, new compromises with the international copyright community will be required.

As evidenced by such examples as Tom Hanks "shaking hands" with John Kennedy in *Forest Gump* and Coca-Cola's use of Humphrey Bogart in its clever television commercials, digital technology permits the creation, manipulation, reuse, and delivery of programming content that, at present, is virtually unlimited. The expanded use of this technology is likely to highten the demand for moral rights legislation. In addition, international delivery systems such as the Internet, offer prime examples of why the U.S. copyright industries will be forced to join forces with U.S. creators to modernize the already inadequate U.S. Copyright Act and to reach strategic compromises with the international copyright community. ◆

[1] *EC Asks U.S. to Focus on GATT*, THE HOLLYWOOD REPORTER, Oct. 13, 1993, at 1.

[2] Uruguay Round Agreements Act of 1994, Pub. L. No. 103-465, 108 Stat. 4809, 103d Cong. 2d Sess.

[3] Treaty Establishing the European Economic Community [EEC Treaty], art. 100A and art. 189B. Art. 100A states:

> The Council shall, acting on a proposal from the Commission, issue Directives for the approximation of such provisions laid down by law, regulation or administrative action in Member States as directly affect the establishment of the Common Market.

[4] "Whether or not these persons are designated as coauthor." Council Directive 93/98, art 2(2) of Oct. 29, 1993 ("Directive Harmonising the Term of Protection of Copyright and Neighbouring Rights in the European Union").

[5] Merryman, *The Refrigerator of Bernard Buffet*, 27 HASTINGS L.J. 1023, 1049 (1976).

[6] Nimmer, *Implications of the Prospective Revisions of the Berne Convention and the United States Copyright Law*, 19 STAN. L. REV. 499, 549 (1967).

[7] Ted Elrick, *Whereforth Moral Rights*, DGA NEWS, Sept.-Oct. 1991, at 8, 9.

[8] *Id.* Pres. Dist. Ct. Amsterdam, Dec. 21, 1978, Auteursrecht 1979/2.34.

[9] NIMMER AND GELLER, INTERNATIONAL COPYRIGHT LAW AND PRACTICE 77-78 [Brazil].

[10] *Cf.* Autry v. Republic Productions, Inc., 213 F. 2d 667 (9th Cir. 1954), *cert. denied*, 348 U.S. 858 (1954). Prominent cowboy-actor and entrepreneur, Gene Autry, sought, without success, to withdraw his films from the marketplace.

[11] Berne Convention for the Protection of Literary and Artistic Works (Paris Act of 1971), art. 6*bis*.

[12] 134 CONG. REC. H3083.

[13] 134 CONG. REC. H1293-94.

[14] 134 CONG. REC. S14544 (statement of Sen. Hatch).

[15] H.R. REP. No. 100-609, 100th Cong., 2d Sess. (1988) at n.75-78.

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