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ENTERTAINMENT UPDATE

LAW AND ENTERTAINMENT

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U.S. Moral Rights: Fact or Fiction?

U.S. LAW HAS never before formally recognized the otherwise internationally recognized concept of the author's "moral rights."

Indeed, in finally agreeing to adhere, after more than a century's delay, to the world's first and foremost copyright treaty, Congress expressed its concern over the "moral rights" provisions of Berne becoming part of U.S. law:

> 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 magazine's or a movie producer's efforts to edit a written article or 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.[1]

But, in passing the legislation known as the Visual Artists Rights Act (VARA), Congress, for the first time, has recognized "moral rights" of visual artists. This legislation, which went into effect in June 1991, deals only with works by painters, sculptors and "photographic artists," but the entertainment industry should take note. Should a director or screenwriter be entitled to enjoin the exhibition of his or her motion picture that has been colorized without their authority if they believe the colorization distorts, "mutilates," or otherwise modifies the creators' reputation? Recent cases in Holland, Italy and France have favored the creators, citing respect for the integrity of the original works.

Should the creators be entitled to demand that the names of all composers, lyricists, and performers are broadcast at the time the song is played on the air? The 1973 Brazilian Copyright Act requires such attribution.[2]

THREE DIFFERENT approaches to artist's rights have emerged in the past century throughout the world:

1. In the United States, protection of artists' *economic* rights have been exalted, but the artists' moral rights have been ignored.

2. In many industrialized nations, as original signatories to the international treaty known as the Berne Convention on Copyright (1866), minimum standards of artists' moral rights are part of each nation's copyright law.

3. In France, thought to be the most protective of the nations recognizing artists' rights, the 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 (i) it cannot be enforced legally, that (ii) it has no economic importance, or (iii) the term "moral right" refers to a judgment about a work's morality (or lack thereof). Instead, as a creation of the mind of the author, it reflects the author's personality outside the work itself and independent of an economic interest or lack thereof.

The artist's moral right is actually a composite right. What are the components of the artists' moral right and how are they applied?

Right of "attribution": To have the artist's name identify him as the author of his work (or disclaim authorship of that work);

Right of "integrity": To prevent mutilation or other modifications to the work, or, in any way, prejudice the work or other professional honor or reputation of the author;

Other "moral" rights include (i) the right of divulgation, i.e., the right to withhold the work to a time the artist determines when and whether it is complete and when and whether it should be made available to the public, (ii) the right to modify the work before (or after) its utilization, and (iii) the right to withdraw it from circulation.

Congress, in enacting the VARA, however, limited artist protection to the rights of attribution and integrity.

OTHER THAN Congress' recent enactment of the VARA, and various state laws in favor of graphic artists, however, U.S. law has been almost non-existent, and the majority of American courts have not otherwise recognized the doctrine of moral rights. Compare, for example, the case of the internationally famous Soviet composers Dmitri Shostakovich, Aram Khachaturian, and Sergei Prokofiev, asking for an injunction in a New York court to prevent the use of their public domain music in a motion picture with an anti-Soviet theme, with *the same case* brought by the same composers simultaneously in a French court. The New York court, in *Shostakovich v. Twentieth Century Fox Film Corp.*,[3] denied the composers any remedy, questioning on what standard (good taste, artistic worth, political beliefs, or moral concepts) this right should be tested, while the French court, in *Le Chant du Mond v. Soc. Fox Europe*,[4] halted the exhibition of the motion picture on the grounds that the moral rights of the composers had been violated. Even 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 (e.g., the violation of the authors' right of respect).

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LIKEWISE, the heirs of John Huston, director of "The Asphalt Jungle," and its screenwriter, Ben Maddow, recently brought an action in the courts of France, citing the inalienable moral right of the creators that override contracts waiving such rights. After being initially rebuffed by the lower French courts 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," the Court of Cassation, the highest French court of appeal in private cases, reversed such rejection of moral rights and ordered the case to be retried in its entirety, to determine whether Messrs. Huston and Maddow may be considered "authors" for purposes of exercising moral rights in France.[5]

Examples of the discussion of moral rights by U.S. courts has been almost non-existent, although, in 1976, giving some relief to the creators of "Monty Python's Flying Circus," in a case involving the unauthorized editing of their programs, the U.S. Second Circuit Court of Appeals appropriately 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" but 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."

CONGRESS, in enacting the VARA, has taken the Second Circuit's lead but has limited the recognition of U.S. moral rights to artists of the works of graphic arts, i.e., paintings, drawings, sculpture and photographic works existing in a single copy, and then only after much lobbying by the National Artists Equity.

Creative forces within the motion picture industry commenced their own lobbying effort, galvanized by the "colorization" issue, culminated in the enactment by Congress in 1988 of the National Film Preservation Act, which expired last September. This was replaced by legislation passed by Congress in November, titled the National Film Preservation Act of 1991, which deleted from its 1988 predecessor, however, the "materially altered" labeling mandated in the 1988 Act to be affixed to the films chosen for the National Registry by that legislation. Accordingly, American film directors and screenwriters are currently engaged in attempting to influence Congress, in hearings before the House Committee on Intellectual Property and Judicial Administration, to enact the Film Disclosure Act of 1992. If enacted, it would require that all films that have been materially altered by panning, scanning, lexiconning, time compression and/or expansion, and/or colorizing be so label led.

ON THE INTERNATIONAL front, one valid concern being raised by British, French and Spanish directors is 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.

Indeed, after their own foot-dragging on moral rights for more than a century, creative forces in the United Kingdom were recently successful in having enacted "watered-down" moral rights legislation, but it was made ineffective by the insistence by the major U.K. record companies and music publishers that the new law allow for blanket waivers of the new moral rights at the time of the author's employment.

The intuitively appealing arguments to be made by U.S. creators may be properly and appropriately countered in some instances by U.S. motion picture and TV interests (and applauded in other instances, e.g., music publisher support for attribution crediting on records and for airplay), but in any event the time is now for U.S. creators to have their voice be heard — at least as loudly as their counterparts in Europe, Japan and Latin America — for legislation ensuring that their artistic personalities are protected as well as those belonging to their counterparts in the rest of the international community.

(1) CONG. REC. S 14544 (daily ed. October 5, 1988) (statement of Sen. Hatch).
(2) NICER & GELLER, INTERNATIONAL COPYRIGHT LAW AND PRACTICE [Brazil] 77-78.
(3) 80 N.Y.S. 2d 575, 77 USPQ 647 (1948).
(4) Judgment of Jan. 13, 1984, 1 Gaz. Pal. 191 (1954), P.A. 16, 80 (Cour d'Appel Paris).
(5) Ste. "La Cinq" c. Angelica Huston et autres, Arret 861 P, Cass. civ., le ch., hearing May 28, 1991.
(6) Gilliam v. American Broadcasting Co., 538 F. 2d 14, 24 (Id Cir. 1976).

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