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BY JEFFREY L. GRAUBART

U.S. Moral Rights And the GATT

This is the first part of a two-part article that will conclude next Friday.

SPEARHEADED by director Martin Scorsese and the Artists Rights Foundation, landmark legislation on March 15 was introduced in Congress by Rep. John Bryant, D-Texas, that would provide moral rights to the creators of theatrical motion pictures.[1] If enacted, U.S. directors, screenwriters and cinematographers would be deemed to be the co-authors of a motion picture for non-economic purposes, notwithstanding the legal title of the copyright being in the copyright proprietor.

Thus, this proposed legislation would dramatically alter present U.S. concepts dealing with the centuries-old concept of authors' moral rights, long championed by the nations of continental Europe, and the great majority of our nation's trading partners. Congress has long resisted recognizing the concept of authors' moral rights on several grounds. One is "the comfortable, but incorrect, argument that our law already deals adequately with the problem."[2] 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."[3] 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, at present, U.S. — based film

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Jeffrey L. Graubart *is a Los Angeles-based entertainment law and intellectual property practitioner and litigator. He is, among other things, chairman of the International Law Section of the Beverly Hills Bar Association and former chairman of the American Bar Association's Subcommittee on Moral Rights.*

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directors, screenwriters, authors, songwriters, and recording artists, enjoy no such protection.

Among the moral rights are the following:

- *Right of attribution*, defined as the right to be identified as the author of a work, or to disclaim authorship.
- *Right of integrity*, to prevent mutilation or modification of the work that would prejudice it or hurt the professional reputation of the author.
- *Other moral rights* include the right to prevent publication, the right to modify the work before (or after) its utilization, and the right to withdraw it from circulation.

Until recently, U.S. law did not formally recognize any element of the internationally recognized concept of the author's moral rights until 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 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 provision of the Berne Convention would become part of U.S. law.

The impetus for Congress accepting the Berne Convention was the constant drumbeat of complaints from the U.S. business community that national business interests were at a disadvantage in most of the world due mainly to rampant film piracy. Claiming to lose at least $1 billion 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, 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, Rep. Robert W. Kastenmeier expressed the views of the House Subcommittee on Courts, Civil Liberties, and the Administration of Justice, which he chaired, that it was the "best course to avoid statutory treatment of moral rights in the context of Berne."

Rep. Kastenmeier, however, personally 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:

> While statesmanship and the spirit of political compromise may, in the final reckoning, work a different solution to the moral rights question, I am reluctant to reject at the outset the necessity of recognition of moral rights which may be of great interest to authors and artists, if not to those who deal with their works. (134 CONG. REC. H1293-94 (daily ed. March 16, 1987).)

On the other side of the Capitol, Sen. Orrin Hatch agreed with Rep. 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.[3]

Senator Hatch's statement captures perfectly why the issue of moral rights has proved so divisive in the United States. The entertainment and other creative industries depend upon the work-made-for-hire concept, and under present 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 with the system of continental Europe in which the author's rights are retained by the creator even if the copyright is transferred under a work-for-hire provision. 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 representing 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 and that current U.S. law is insufficient to protect those rights."[5]

They were supported by Rep. Howard Berman, D-Calif., who pointed out the hypocrisy in Senator Hatch's position:

> I am troubled, however, that we may not be intellectually honest when we conclude that can join Berne by deeming U.S. laws to be in compliance, but assuming none of the responsibilities under the Convention 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 not seen a statutory approach that addressed my concerns. (134 CONG. REnC S14544 (daily ed. Oct. 5, 1988) (statement of Senator Hatch.)

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).[6]

> In my view, it is not necessary for the United States of America to enact statutory provision 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 U.S. under Article 6*bis*.[7]

So fortified, Congress reached the conclusion that "[b]ased on a comparison of its laws with those of Berne member countries, and 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*,"[8] and thus passed the Berne Convention Implementation Act of 1988.[9]

THREE YEARS later, Congress softened its stance on the moral rights issue, if only slightly. In passing the Visual Artists Rights Act (VARA)[10] 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,[11] but not due to a lack of effort. The strongest proponents are motion picture directors and screenwriters,[12] and they have garnered strong allies in the songwriting and recording artist community.[13] 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 labeled. Concerned that a more onerous labeling obligation would result, the Hollywood studios adopted a bland, less specific labeling procedure, sufficient, at least for the time being, to silence potential congressional critics.

On March 15, these efforts were followed by Representative Bryant's sponsorship and introduction of the Theatrical Motion Picture Authorship Act of 1995, at the behest of the Artists Rights Foundation and Mr. Scorsese that would modify the U.S. Copyright Act [17 U.S.C. § 101, et seq.] by adding, inter alia, to Sec. 201(b) thereto:

> (2) In the case of theatrical motion pictures with respect to ownership of noneconomic interests in the work, the author shall be the principal director, principal screenwriter, and principal cinematographer.[14]

The lack of recognition of moral rights in the United States 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,[15] is that their films could be colorized, panned, 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 present 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 Corp., the present copyright owner of The Bridge over The River Kwai, be entitled to modify that film in any way it sees fit? Representative Bryant's new legislation seeks to prevent such a scenario and may also be buttressed by our country's recent reversal at the hands of the foreign GATT negotiators.

In the months before the Dec. 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.

European efforts were countered by a high-level meeting in October 1993 between President Clinton and 15 leading entertainment industry executives. 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.[16]

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 unit as well as their European counterparts in order to compete in the ever-expanding global entertainment industry market place.

Whatever the merits of the arguments of the U.S. entertainment industry executives, it is critical that the industry put this divisive issue behind it and bring U.S. intellectual property law into the 21st century. Only then will industry be able to present a united front in future international negotiations concerning the enforcement of intellectual property rights — and that is the issue which is of undeniable interest to both creators and to the business community.

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(1) H.R.———, 104 Cong., 1st Sess. (1995 ["Theatrical Motion Picture Authorship Act o 1995"].

(2) Merryman, The Refrigerator of Bernarc Buffet, 27 HASTINGS L.J. 1023, 1049 (1976).

(3) Nimmer, Implications of the Prospective Revisions of the Berne Convention and the Unit ed States Copyright Law, 19 Stan. L. Rev. 499, 54 (1967).

(4) 134 CONG. REC. S14544 (daily ed. October 5, 1988) (statement of Sen. Hatch).

(5) H.R. REP. No. 100-509, 100th Cong., 2d Sess. (1988) at n. 75-78.

(6) WIPO is an arm of the United Nations anc the permanent secretariat for the member state of the Berne Convention.

(7) H.R. REP. No. 100-352, 100 Cong., 2d Sess (1988) at 10. This same letter, dated June 12 1987, was also submitted to the House. See H.Rep. No. 100-609, 100th Cong., 2d Sess. (1988) n. 84. But cf. the comments of Paris-based intel lectual property lawyer, Henri Choukroun: "Ver few people would agree that the United State was in compliance with Article 6*bis* . . . It is mos surprising that Dr. Bogsch, the guardian o Berne, allowed this to happen." Statement at Art ists Rights Foundation's International Artists Rights Symposium, April 27, 1994.

(8) H.R. REP. No. 100-609 at 38.

(9) Berne Convention Implementation Act of 1988, Pub. L. No. 100-566, 102 Stat. 2859, 100th Cong., 2d Sess.

(10) Visual Artists Rights Act of 1990, Pub. L No. 101-650, 104 Stat. 5089 § 601.

(11) Under the French Copyrights Act, art. 14 and the Italian Copyright Law, art. 44 authors o pre-existing works are deemed to be co-authors of motion pictures for economic and moral rights purposes. Library of Congress, Copyright Office Technological Alterations to Motion Pictures and Other Audiovisual Works at n. 324, 325 (Mar 1989).

(12) These include directors Steven Spielberg and George Lucas, as well as actors Angelica Huston, Sally Field and Tom Cruise.

(13) E.g., Don Henley, Danny Elfman.

(14) Supra, note 1.

(15) Elrick, supra, note 9 at 10.

(16) Uruguay Round Agreements Act of 1994 Pub. L. No. 103-465, 108 Stat. 4809, 103d Cong. 2c Sess.