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U.S. Moral Rights And the GATT

This is the second part of a two-part article that began last Friday.

WITH LEGISLATIVE action to protect artists' rights heretofore limited to VARA and a lew 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 Soviet composers Dmitri Shostakovich, Aram Khachaturian and Sergei Prokofiev. 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, they brought the same case in a French court. The New York court, in *Shostakovich v. Twentieth Century Fox Film Corp.*,[16] 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*,[17] halted the exhibition of the motion picture on the grounds that the composers' moral rights 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. The court in *King v. Allied Vision Ltd.*[18] enjoined film distributors from using Mr. 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 demonstrat-

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ed irreparable harm. Where, as here, a creative work or artist, reputational harm is inevitable and largely immeasurable loss in profits, plaintiff's name and reputation are inevitably diluted by the missattribution to him of works which he did not create. . . . The law does not permit such calculated and deceptive practices."[19]

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 occurred 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. Court of Appeals for the Second Circuit 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."[20]

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 French courts. There a court enjoined Turner Entertainment Co. from televising a colorized version of *The Asphalt Jungle*, even though Mr. Huston had granted "all rights" to Turner's predecessor-in-interest, MGM. The plaintiffs cited the inalienable moral right of 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. Mr. Huston's moral rights, if any were not clear.[21]

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 tried in its entirety, to determine whether Huston and Maddow may be considered authors for purposes of exercising moral rights in France.[22] The French high court noted that when Turner acquired the copyright in *The Asphalt Jungle*, moral rights were not included in Mr. Huston's grant to MGM, Turner's predecessor-in-interest, because they do not exist in U.S. copyright law. Accordingly, the Court of Cassation instructed the Court of Appeal 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 when it was rendered in 1991,[23] the Court of Appeal, on remand in December 1994, found Mr. Huston and Mr. Maddow to be co-authors and ordered 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).[24] 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."[25]

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.[26] It is not impossible to imagine that the WTO, relying on the GATT-related Agreement on Trade-Related Aspects of Intellectual Property (TRIPS),[27] would have demanded U.S. adherence to the moral rights provisions contained in Article 6*bis* of the Berne Convention. But because the European broadcasters and filmmakers succeeded in excluding audiovisual works from the scope of GATT,[28] Turner was precluded from challenging the result in Huston before the WTO.

THE PASSAGE of VARA finally did force the courts in the United States to consider the moral rights issue head-on. In 1994, in *Carter v. Helmsley-Spear Inc.*,[29] 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.

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."[30]

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.[31]

Basing its decision on VARA,[32] the court held that the plaintiffs were entitled to an injunction prohibiting the defendant-owners of the building from "taking any action to alter, deface, modify or mutilate plaintiff's sculptures" and "denying plaintiffs access to [the building]"[33] in order to assure to the plaintiffs the right to "protect, or prevent the exploitation or infringement of, their copyright in the [w]ork."[34]

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, such as the Bryant bill, 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 TV interests. In any event, however, 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 ensure that their artistic personalities are protected as well as those of their counterparts throughout the world.

There seems to be evidence of a 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 such 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.[35]

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 United States. The GATT debate may only be a harbinger of things to come in international copyright relations. That experience, however, makes manifest the fact that in order to secure important national goals, now compromises with the international copyright community will be required.

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AS EVIDENCED by such examples as Tom Hanks "shaking hands" with John Kennedy in *Forrest Gump* and Coca-Cola's use of Humphrey Bogart in its clever TV 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 heighten 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.

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(16) Shostakovich v. Twentieth Century Fox Film Corp., 80 N.Y.S.2d 575, 77 U.S.P.Q. 647 (1948).

(17) Le Chant du Mond v. Soc. Fox Europe, I Gax Pal. 191 (1954), D.A. 16, 80 (Cour d'Appel Paris).

(18) King v. Allied Vision Ltd., 807 F. Supp. 300 (2d Cir. 1992), aff'd in part [on "possessory" credit], and rev'd in part [on "based on" credit], 976 F.2d 824 (2d Cir. 1992).

(19) King, 807 F. Supp. at 304.

(20) Gilliam v. American Broadcasting Co., 538 F. 2d 14, 24 (2d Cir. 1976).

(21) Wagner, France: High Court Bars Showing of Colorized Asphalt Jungle, 5 WORLD INTELLECTUAL PROPERTY REPORT 171 (1991).

(22) Ste. "La Cinq" c. Angelica Huston et autres, Arret 861 P. Cass. civ., le ch., hearing May 28, 1991.

(23) "The Cour de Cassation has thus opened a Pandora's box susceptible of generating thousands of causes, an unrestrained blackmail between American producers and persons considered co-authors in films in French law. The Court de Cassation now considers [that] French law is superior to foreign laws and that it can thus expropriate from foreigners in France rights acquired abroad." [Wagner, supra n. 18 at 172].

(24) Turner Entertainment Co. c. Angelica Huston et autres, Court of Appeal of Versailles, Decision No. 68, Roll No. 61S/92, Dec 19, 1994.

(25) Loi du 11 mars 1957, No. 296, Sur La Propriete Litteraire Artistique [France 1957].

(26) See H.R. REP. 5110, 103d Cong., 2d Sess. (1994) ("Uruguay Round Agreements Act"). At the announcement of the 1991 decision of the Court of Cassation (and prior to the GATT Agreement establishing the World Trade Organization mechanism), French copyright lawyer Andre Betrand inquired, "Must the Ted Turner Company now go before the International Court of Justice at the Hague, or the European Court of Human Rights at Strasbourg, to obtain justice in its cause?" quoted in Wagner, supra n. 18 at 172.

(27) Referred to in Sec. 101(d)(15) of the Uruguay Round Agreements Act. See supra n. 2 (in April 14 issue).

(28) See supra n. 1 (in April 14 issue).

(29) Carter v. Helmsley-Spear Inc., 852 F. Supp. 228, 861 F. Supp. 303 (S.D.N.Y., 1994).

(30) A "work of visual art" is defined to include paintings, drawings, prints, and sculptures, existing in a single copy or in limited edition, 17 U.S.C. 101. Works made for hire, works of applied art and works not otherwise subject to copyright protection such as totally utilitarian objects, are excluded from this definition. Carter, 961 F. Supp. at 313. This is presumably because "[M]oral rights afford protection for the author's personal, noneconomic interests . . ." 861 F. Supp. at 313, citing Jane C. Ginsberg, Copyright in the 101st Congress: Commentary on the Visual Artists Rights Act and the Architectural Works Copyright Protection Act of 1990, 14 COLUM.-VLA J.L. & ARTS 477, 478, and corporations, as nonactual persona, although capable under U.S. copyright law of being able to own economic rights, cannot, by definition, hold these moral rights.

(31) Carter, 861. F. Supp. at 312.

(32) 17 U.S.C. 106A(a)(3) provides that the author of a work of visual art shall have the right (A) to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation, and any intentional distortion, mutilation, or modification of that work is a violation of that right, and (B) to prevent any destruction of a work of recognized nature, and any intentional or grossly negligent destruction of that work is a violation of that right.

(33) Carter, 852 F. Supp. at 230.

(34) Id. at 232.

(35) Robert Hadl, statement at Artists Rights Foundation's International Artists Rights Symposium, Apr. 27, 1994. In addition to European collections from tape and hardware levies, other separate and very significant collections have their genesis in cable retransmission levels and rental rights.