GATT and U.S. Moral Rights

by Jeffrey L Graubart

Spearheaded by Martin Scorsese and the Artists Rights Foundation, on March 15, 1995, landmark legislation was introduced in the U.S. Congress, entitled the Theatrical Motion Picture Act of 1995, which would provide U.S. moral rights to the creators of theatrical motion pictures. If enacted, U.S. directors, screenwriters and cinematographers would be deemed, for the first time, 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. The U.S. Congress has long resisted recognising the concept of authors' moral rights on several grounds. One, as discussed by Professor John Henry Merryman is "the comfortable, but incorrect, argument that our law already deals adequately with the problem." As observed by Professor Melville Nimmer, 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." 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 cheque, signs it, and uses it for payment. But what if someone else changes the amount over the signature? This would be both unlawful and morally wrong as the signature represents the individual's reputation and honour. It represents a promise to the payee that vouches for the legitimacy of the cheque. This is nothing more than the ancient 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 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 utilisation, and the right to withdraw it from circulation.

Berne Convention

U.S. law did not, until very recently, formally recognise any element of the internationally recognised concept 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.

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. Specifically, Article 6*bis* of the treaty addresses the value of signature and honour:

> 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 honour or reputation.

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 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 Theatre," 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. 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: "[The] 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".

Kastenmeier, however, personally rejected this course of action and 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 the recognition of moral rights which may be of great interest to authors and artists, if not to those who deal with their works."

On the other side of the Capitol, Senator Orrin Hatch agreed with the Subcommittee, saying "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."

Senator Hatch's statement captures perfectly why the issue of moral rights has proved to be 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 not only transfers the copyright to a work made for hire to the economic owner, *but also the status of author!* This contrasts to the system of continental Europe in which the rights of the author 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.

Sign a treaty and ignore the plain intent of one of its key components? Does our national signature mean nothing?

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. It gives the treaty its special character and its moral tone" *and that current U.S. law is insufficient to protect those rights.* They were supported by Representative Howard Berman, 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 we 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."

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 Organisation (WIPO).

"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 fulfil any obligation for the United States under Article 6*bis*."

But the comments of Paris-based intellectual property lawyer, Henri Choukroun should be noted: "Very few people would agree that the United States was in compliance with Article 6*bis*...It is most surprising that Dr.

Bogsch, the guardian of Berne, allowed this to happen." [Statement at Artists Rights Foundation's International Artists Rights Symposium, April 27, 1994.]

Ignoring such criticism, Congress readily reached the conclusion that "[b]ased on a comparison of its laws with those of Berne member countries, and 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 *6bis*," and thus passed the Berne Convention Implementation Act of 1988.

Post-Berne

Three years later, Congress softened its stance on the moral rights issue, if only slightly. In passing the Visual Artists Rights Act (VARA) in 1990, Congress recognised, 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 recognised by Congress, but not due to a lack of effort. The strongest proponents are motion picture directors and screenwriters, and they have garnered strong allies in the songwriting and recording artist community. The issue of colourising movies served to galvanise 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 colourising 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.

On March 15, 1995, these efforts were followed by the introduction of the Theatrical Motion Picture Authorship Act of 1995, at the behest of the Artists Rights Foundation and world renowned film director Martin Scorsese, which would modify the US. Copyright Act [17 U.S.C. Section 101, *et seq.*] by adding, *inter alia*, to Section 201(b) thereto:

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

The lack of recognition of moral rights in the U.S. 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," in that their films could be colourised, panned scanned, or time compressed by a subsequent copyright owner and then distributed in the U.S., 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.*

At the International Artists Rights Symposium held April 27, 1994, in Los Angeles, sponsored by the Artists Rights Foundation, Hon. Leon Schwartzenberg, member of and President of the Cinema intergroup of the European Parliament, provided the following cogent remarks:

> It is essential to recognise the physical people who create a film as its authors. By defending authors' rights we defend the consumers' rights. By recognising authors' rights, the production companies will lose nothing, but will gain the respect of artists. We must recognise *droit moral* as a human right. Authors are men of blood, not *societies anonyme* [limited liability companies].

"The discovery that the intellectual contents of a work should be separated from the physical properties - is one of the significant acts of enlightenment experienced in modern Europe." (Indeed, this concept "obviously contrasts with the spirit of the Berne Convention, because it implicitly allows both that the creator may be a body corporate, and that the author as a person need not appear, in some way bought off by the salary that his employer pays him.") [FEDERATION OF EUROPEAN FILM DIRECTORS, LA CREAZIONE CINEMATOGRAFICA E L' AUTORE 263 (1993).]

Accordingly, potentially insensitive corporate copyright holders (which could include multinational corporations controlling major U.S.-based entertainment entities from abroad), being 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? The new proposed legislation seeks to prevent such a scenario and may be also be buttressed by our country's recent reversal at the hands of the foreign GATT negotiators.

Enter GATT

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 civilisation to pretend that cultural products are exactly the same as ordinary industrial products."

European efforts were countered by a high-level meeting in October 1993 between President Clinton and 15 leading entertainment industry executives, including the Chairmen and President of Paramount Universal and Disney respectively. 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 on a final GATT deal." In the end, however, the pressure of the film industry was to no avail, as European resolve on the issue of cultural identity carried the day.

During the GATT negotiations, U.S. creators and entertainment business leaders were divided over the recognition of artists' moral rights. 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 U.S. entertainment industry at a disadvantage in international negotiations.

Its failure 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 performer, on one side, and to U.S. entertainment industry executives on the other, of their need to organise and unit as well as their European counterparts in order to compete in the ever-expanding global entertainment industry market place.

It is now critical that the entertainment industry put this divisive issue behind it and bring U.S. intellectual property law into the twenty-first 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.

Judicial Developments

With U.S. legislative action to protect artists' rights heretofore limited to VARA and a few state laws, creators have looked to the American courts to recognise 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 Prokofleff. The three sought an injunction in a New York court to prevent music they had composed, but which was in public domain, from being used in a motion picture with an anti-Soviet theme.

Simultaneously, the same composers brought the same case in a French court. The New York court, in *Shostakovich v. Twentieth Century Fox Film Corp.* (1948), 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* (1954), 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 recognised 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.* (1992), 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 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.

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 unauthorised editing of their programs. The U.S. Second District Court of Appeals observed:

> American copyright law, as presently written, does not recognise 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.

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 colourised version of 'The Asphalt Jungle', even though 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 colourisation.
3. Huston's moral rights, if any were not clear.

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. 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, 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 criticised by legal scholars at the time it was rendered in 1991 [As French barrister, Andre Bertrand has stated [in 5 World Intellectual Property Report 171 (1991)]: "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 Cour 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."] the Court of Appeal, on remand in December, 1994, found Huston and Maddow to be 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). 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.

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 US was required, by international tribunal, to recognise moral rights. Representatives of Turner would undoubtedly have appealed the decision to the new World Trade Organisation and it is not impossible to imagine that the WTO, relying on the GATT-related Agreement on Trade-Related Aspects of Intellectual Property (TRIPS), would have demanded United States 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, Turner was precluded from chal-

lenging the result in Huston before the WTO.

The passage of VARA finally did force the US courts to consider the moral rights issue head-on. In 1994, in *Carter v. Hemsley-Spear. Inc.*, 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. Although VARA specifically recognises the visual artist's right of attribution and right of integrity (as enumerated in Article *6bis* 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."

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. Basing its decision on VARA, 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]" in order to assure to the plaintiffs the right to "protect, or prevent the exploitation or infringement of, their copyright in the [w]ork."

The Future

Building on VARA, Berne, the GATT Agreem \ent, and decisions such as *King* and *Carter*, U.S. courts may in the future more easily recognise the existence of moral rights. Of course, appropriate congressional legislation, such as the proposed legislation, would ensure this result. The arguments for full recognition of moral rights may be properly and appropriately countered in some instances. In any event, however, the time is now for U.S. creators to have their voices heard for legislation that would insure that their artistic personalities are protected as well as those of their counterparts throughout 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 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 none of it is being paid to U.S. performers, and only small sums are being realised by U.S. producers, directors, and writers.

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 a harbinger of things to come in international copyright relations. It is clear that in order to secure important national goals, compromises with the international copyright community will now 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 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 modernise the already inadequate U.S. Copyright Act and to reach strategic compromises with the international copyright community. Where is Lafayette?

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