

THE PROTECTION OF MORAL RIGHTS AND NEIGHBORING RIGHTS

Peter Jaszi, *Garland of Reflections on Three International Copyright Topics*, 8 CARDOZO ARTS & ENT. L.J. 47 (1989)

Prior to 1988, one significant failure of the Berne Convention was the Berne Union's inability to attract the United States as a member. In 1886, the United States was still in some ways an outlaw nation where world copyright was concerned, and a variety of practical and political difficulties effectively barred its adherence prior to 1988.

The earliest international copyright relations of the United States were based on notions of reciprocity. Later, the United States moved into a series of bilateral treaty relations with a variety of countries. In 1935, the Senate made an abortive attempt to ratify the Berne Convention. By the 1950's, the absence of the United States from the Berne Union posed a worsening dilemma. As the Berne minima became more exacting, i.e. as the level of protection required of signatory states by the successive acts of the Berne Convention became higher, it became increasingly difficult for the United States to join. As the prospect for United States adherence grew dimmer, the future of the Berne arrangements became less clear.

In the years from 1947 to 1952, a group of states convened by UNESCO, the newly-formed United Nations cultural agency, which included many Berne countries as well as the United States, designed a plan to attract nations that previously had avoided joining the Berne Union into a new multilateral copyright arrangement, the UCC. The UCC, to which the United States finally adhered in 1955, had been designed as a sort of junior Berne Convention, with the specific objective of bringing the United States and other recalcitrant nations into the fold. It was, in part, as a result of our experience with the UCC and our discovery that international copyright was not as threatening as it had been advertised to be, that the United States ultimately was able to muster the political will to join Berne.

The Berne Convention is only the most recent of a series of international copyright treaties to which the United States has become a signatory over the years. This explains one reason United States adherence to the Berne Convention may be less important with respect to the recognition of protection for American works abroad than has generally been supposed. In fact, rights in American works already have gained broad recognition under bilaterals and, in particular, under the UCC before United States adherence to the Berne Convention. At present, most countries are members of either the UCC, or of both Berne and the UCC. While the Berne Convention is a more powerful source of protection for works of foreign origin than the UCC, UCC protection had already yielded significant benefits for American authors abroad before March 1, 1989. Where a country had copyright relations with the United States under the UCC on that date, the additional benefits yielded by United States adherence to the Berne Convention may not, in the ordinary case, be great.

However, the UCC makes fewer requirements of signatory nations with respect to the term of copyright protection and protects fewer kinds of works. Where the nature of the rights protected is concerned, the UCC is relatively vague and indefinite in its language, while the Berne Convention is relatively specific and, as such, far more powerful. Thus, at the margin, there may be some advantages to Berne Convention adherence by United States copyright owners, in terms of the recognition of their rights abroad, even in countries which are contracting states of the UCC.

Moreover, the United States now has relations by way of the Berne Convention with some countries which are not members of the UCC, and with which the United States has no bilateral treaty relations. This group of countries represents a large part of the African continent, as well as four countries which have been identified as significant sites for piracy of United States works.

Thailand, one of these four, is an interesting case. Thailand has denied that it has effective copyright relations with the United States by way of bilateral agreements between the two states on the ground that those bilaterals were never properly ratified in Thailand. However, Thailand will find it

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harder to deny that it has relations with the United States by way of the Berne Convention because Thailand is a member of the Berne Union. Although Thailand is only a member at the 1908 Berlin level, some degree of relationship under Berne attaches despite the fact that the United States joined at the 1971 Paris level. The mere fact of United States Berne membership does not necessarily provide automatic protection for United States works in Thailand or in any other Berne Union country, but it provides a basis for litigation with respect to unauthorized uses of American works in those countries. Therefore, the United States decision to join Berne is not an insignificant development from the standpoint of American copyright owners with interests abroad.

Nonetheless, the importance of United States Berne adherence is easily overstated. As a practical matter, the United States had access to protection by way of the Berne Convention in the past without membership in the Berne Convention by means of the “back door to Berne.” The “back door to Berne” is a feature of the Berne Convention which results from the manner in which the Convention defines the term “country-of-origin.” The point is crucial because the Berne Convention requires a work which claims one Berne country as its country-of-origin to be protected on the basis of national treatment in all other countries of the Berne Union.

Country-of-origin is defined in terms of a variety of criteria, the most important of which is the place of the work’s publication. The Berne Convention identifies various factors to be consulted in determining the country-of-origin of a work. If the work is first published in a country of the Berne Union, that country is the country-of-origin. Moreover, if the work is published simultaneously in several countries of the Berne Union and the term of protection is longer in one country than another,³⁰ then the country that grants the shorter term of protection is the country-of-origin. Perhaps most significantly, if the work is published simultaneously in a Berne country and a country outside of the Berne Union, then the Berne country is the country-of-origin. Nowadays, if a work by an American author is published on the same day or within a few days in the United States and Canada, both would be the countries-of-origin, since the United States, like Canada, is a member of the Berne Union. But note that if one assumes the same circumstances of publication, the author could have claimed protection throughout the Berne Union even before March 1, 1989, on the grounds that Canada, a Berne country, was the country-of-origin of the work.

Many American works were protected under the Berne Convention before the United States adhered to Berne. However, such protection never approached comprehensiveness. The “back door to Berne” was not an effective technique by which to obtain Berne protection for works of art published in limited editions and other works addressed to a limited public. Therefore, American copyright owners of such works will benefit from United States adherence to Berne, at least in respect to Berne countries with which the United States has no other copyright relations.

Another way in which United States adherence to the Berne Convention may affect the rights of United States copyright owners abroad involves the retroactivity of Berne. Although in joining the Berne Union the United States failed to provide retroactive protection to works originating in other Berne countries and which were in the public domain in the United States as of March 1, 1989, retroactivity of protection is a feature of the 1971 Act of the Berne Convention.

Despite the rather stingy behavior of the United States with respect to extending retroactive protection to works originating in other Berne countries, one effect of United States Berne adherence may be to bring back into protection, in some Berne countries, United States works which as of March 1, 1989, were in the public domain there. This matter will be resolved under the domestic laws of the Berne countries in question.

As I have suggested, short-term benefits from United States Berne adherence, in the form of enhanced legal protection for United States works abroad, are real but limited. Interestingly, expanded legal protection for foreign works in the United States actually may be a more notable short term effect. As a practical matter, copyright owners in the Berne Union countries which had no copyright relations with the United States before March 1, 1989 had no good means equivalent to the “back door to Berne”

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available to American copyright proprietors through which to achieve indirect protection in the United States. Thus, although many United States works probably enjoyed protection in Egypt before March 1, 1989, few, if any, Egyptian works were protected here.

From the point of view of United States interests, the most important consequences of Berne adherence will be of a different kind. They will not be realized immediately, but will appear gradually over time.

First, United States adherence to the Berne Convention will serve the United States as an important talking point in its ongoing diplomatic efforts to promote greater recognition of the rights of American intellectual property owners abroad. Prior to 1989, American delegations representing the State Department, the Office of the United States Trade Representative, and private industry argued in favor of greater protection for American sound recordings, movies, and computer software. The governments of Pacific Rim countries responded by challenging the moral foundations of the American arguments. They pointed out repeatedly that the United States has never seen fit to join the Berne Union. This argument is no longer available.

Second, there is a close relationship between United States adherence to the Berne Convention and the potential for the development of an intellectual property code in the General Agreements for Tariff and Trade ("GATT").⁴ Because the copyright component of any set of intellectual property provisions in GATT will be based largely on Berne Convention principles, it would have been difficult or impossible for the United States to function effectively as an advocate for the inclusion of an intellectual property code in GATT without being a member of the Berne Convention.

There is another long term effect of the United States joining the Berne Convention which may or may not qualify as a benefit. Now that the United States has become a member of the Berne Union, it will be exposed over time to what I call the "culture" of the Union. Those influences will affect United States domestic law in a variety of ways. For example, the promotion of protection for authors' "moral rights" is, and has been since 1928, a basic feature of the Berne agreement. Despite Congress' decision to ratify the Berne Convention without making corresponding modifications in United States domestic law relating to moral rights, United States participation in Berne inevitably will tend to promote the cause of moral rights at home. That influence, in turn, will increase the likelihood of passage of moral rights legislation in the United States in the years to come. Thus, United States participation in the Berne Convention will change the future shape of domestic American law.

How much the United States will change the Berne Convention remains an open question. The United States brings to the Berne Union an orientation fundamentally different from that characteristic of most Berne Union countries. American participation may in time change the attitudes and the assumptions of the Berne Union, just as participation in the activities of the Berne Union are bound to change the United States.

Roberta Rosenthal Kwall, Copyright and the Moral Right: Is an American Marriage Possible?, 38 VAND. L. REV. 1 (1985)

The moral right doctrine generally is said to encompass three major components: the right of disclosure, the right of paternity, and the right of integrity. Some formulations of the moral right doctrine also include the right of withdrawal, the right to prevent excessive criticism, and the right to prevent assaults upon one's personality. For purposes of illustration, these components will be explored briefly in the context of the following hypothetical. A playwright, enthralled with the idea of writing a piece poking fun at the evangelical segment of society, suddenly envisions a story line through which she can communicate her ideas. In one day she outlines the plot and sketches some dialogue so that she will have a rough draft which she can develop further when inspiration strikes again. At this point, the playwright's interest in her work would be protected by an aspect of the moral right doctrine known as the right of

disclosure or divulgence. Underlying this component of the moral right is the idea that the creator, as the sole judge of when a work is ready for public dissemination, is the only one who can possess any rights in an uncompleted work. Prior to the time the playwright places her work into circulation, therefore, she retains the same right to determine both the form of her play before it is distributed and the timing of public circulation.

Suppose that a few days after the playwright had finished her rough draft, she entered into an agreement with a publisher in which she promised to produce the final publication version of the play within six months. Subsequently, a personal crisis in the playwright's life triggers a deep sense of religious conviction and she no longer wishes to finish the play. In these circumstances her refusal to complete the play would be supported by her right to refuse to disclose, a corollary to the right of disclosure. Application of this right would preclude a judgment ordering the playwright to complete the play, although a court might award the publisher damages for breach of contract.

Some scholars believe that a second component of the moral right doctrine, known as the right of withdrawal, would allow the playwright in our hypothetical situation to recall all existing copies of her work if, following actual publication, she experienced a radical change of the convictions that originally provided the impetus for the play. Other commentators, however, have expressed doubts regarding the viability of the moral right of withdrawal because of the practical inconsistency in assuming that the public will forget works to which it has already been exposed.

To continue the illustration, now assume that the playwright completes her work and subsequently visits a publisher with her manuscript in hand and offers it to the publisher for \$ 1500. The publisher conditionally agrees to this arrangement, providing the playwright makes certain revisions. When the playwright tenders the revised manuscript to the publisher, the publisher refuses to publish it with the playwright's name, notwithstanding the appearance of the playwright's name on the original manuscript. In these circumstances the playwright would be protected by another component of the moral right, the right of paternity. As its name suggests, the right of paternity safeguards a creator's right to compel recognition for his work and prevents others from naming anyone else as the creator. Therefore, the playwright would be able to force publication of the work under her name. Additionally, the right of paternity protects a creator in the event that someone falsely attributes to him a work that is not his creation.

Two other aspects of the moral right doctrine are the creator's right to prevent excessive criticism and the creator's right to relief from other assaults on his personality. To appreciate fully the theoretical basis for these two rights, one must recall that the moral right doctrine safeguards rights of personality rather than pecuniary rights. The creator projects his personality into his work, and thus is entitled to be free from vexatious or malicious criticism and from unwanted assaults upon his honor and professional standing. By virtue of the prohibition against attacks on the creator's personality, the creator also is protected against misuse of his name and work. In the context of our hypothetical situation, such misuse would occur if an antireligious organization claimed that the playwright subscribed to antireligious views solely by virtue of her authorship of the play.

In the hypothetical situation, now suppose the playwright enters into an agreement with a movie producer authorizing the producer to write a screenplay based upon her play. The final version of the screenplay, however, distorts considerably the playwright's theme and mutilates her story line. The component of the moral right doctrine that would grant relief to the playwright in this situation is called the right of integrity. This right lies at the heart of the moral right doctrine. In our hypothetical case the adaptation process naturally would require certain modifications in the playwright's manuscript, but the right of integrity prevents those who make such alterations from destroying the spirit and character of the author's work. Although adaptations of a work from one medium to another present the most obvious potential for violations of a creator's right of integrity, in reality, any modification of a work can be problematic from an integrity standpoint. Any distortion that misrepresents an artist's expression constitutes a violation of the creator's right of integrity.

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There is, however, one rather incongruous aspect of the right of integrity. If the artist in our hypothetical situation was a painter rather than a playwright, the right of integrity probably would not allow her to prevent the destruction of one of her paintings by its owner. Perhaps the underlying rationale for this exception is that a work which has been destroyed completely cannot reflect adversely upon the creator's honor or reputation. Nevertheless, some commentators have criticized the destruction exception on the ground that it negates the creator's right of paternity and frustrates the public's interest in enjoying the artist's work.

To summarize, the moral right doctrine encompasses several discrete components. All nations that have adopted the moral right doctrine statutorily include at least some of the above protections, but the contours of the doctrine vary among the adhering countries. . . .

The 1971 revision of the Berne Convention for the Protection of Literary and Artistic Works contains a moral rights provision, Article 6bis, which recognizes the right of paternity and a limited right of integrity. The right of integrity is violated only by a distortion, alteration, or mutilation of the creator's work that is prejudicial to his honor or reputation. Both of these rights are independent of the creator's economic rights, and continue to exist following the creator's transfer of his economic rights. Despite the general recognition that Article 6bis affords the moral right doctrine, the treaty contemplates that the specific legislation of the respective Union members will govern substantive applications of the right. Some signatories to the Berne Convention are far more protective of a creator's moral rights than are others. France, for example, awards the greatest protection, while Germany and Italy follow closely behind. Several nations that are not members of the Berne Convention provide extensive protection for moral rights as part of their copyright laws. Ecuador, for example, protects an author's rights of paternity, disclosure, integrity, and withdrawal.

No discussion of the moral right doctrine would be complete without addressing how foreign jurisprudence treats three issues that arise in connection with the doctrine's application: alienability of the right, its duration, and its exercise after the creator's death. Although countries that have adopted the moral right do not endorse a uniform position with respect to these matters, neither inalienability nor perpetual duration are critical to the moral right's existence.

Some scholars have argued that moral rights should not be alienable because they protect personal attributes such as personality, honor, and reputation. France and numerous other countries expressly adhere to this position, and so, theoretically, in those countries a creator cannot waive or assign his moral rights. Nevertheless, in adjudicating the validity of waivers as a defense in actions for alleged right of integrity violations, the French judiciary tends to enforce contracts allowing reasonable alterations that do not distort the spirit of the creator's work, particularly with respect to adaptations and contributions to collective works. Indeed, this inclination on the part of French courts, which always have exhibited the utmost regard for the personal rights of creators, illustrates the inherent infeasibility of a truly inalienable moral right. The interests of creators in safeguarding their reputations and professional standing must be balanced against the interests of those who perform adaptations in maintaining creative liberty.

The United States balances these interests somewhat differently than those countries that recognize the moral right. Whereas countries that have adopted the moral right generally will not interpret contracts which do not address moral rights as implying a tacit waiver of the creator's rights, the opposite is true in the United States. Although courts in the United States rely on equitable principles to protect a creator against excessive mutilation of his work, in general the creator has the burden of extracting an agreement regarding modifications from the purchaser. Even when the creator has secured such an agreement, the danger exists that the contract will not bind subsequent purchasers. Waivers of the right of paternity are viewed favorably in this country, as evidenced by the traditional rule that a creator is not entitled to credit, absent a contractual provision to the contrary.

Article 6bis of the Berne Convention does not address the alienability issue, but it does address a second important issue concerning the moral right—duration. The 1971 Conference amended Article 6bis

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to include a provision calling for the recognition of a creator's moral rights following his death for a minimum period consisting of the duration of his copyright. Article 6bis(2) does afford each member some latitude in this respect, however, by providing that those countries whose laws do not protect all of the moral rights set forth in Article 6bis(1) on a posthumous basis may allow some of these rights to cease following the creator's death.

Countries that recognize the moral right can be divided into two groups with respect to the question of the right's duration. The first group, which includes West Germany and the Netherlands, follows the approach advocated by the Berne Convention and simultaneously terminates a creator's moral rights and copyright. The second group adheres to the French view that moral rights are perpetual. In France a creator's moral or personality rights always have been regarded as a separate body of protections, rather than as a component of the creator's pecuniary rights. Thus, in French theory no logical inconsistency results from protecting a creator's moral rights in perpetuity, despite the limited duration of his copyright.

Two justifications support the survival of moral rights subsequent to the creator's death. First, focusing solely on the interests of the creator, any mutilation or modification of his work that would be detrimental to his reputation during his lifetime is equally, if not more, injurious after his death, when he can no longer defend the integrity of his work. Second, focusing on society's interest in preserving its cultural heritage, when a creator's work is altered after his death, society is the ultimate victim for it can no longer benefit from the creator's original contribution. Adoption of these rationales helps to answer the related question concerning power of enforcement of a creator's moral rights following his death. In many countries moral rights are treated as any other form of property, and therefore, vest in the spouse and next of kin upon the creator's death. This approach, influenced by the first justification, recognizes a creator's family and descendants as the appropriate guardians of his reputation. Some countries, however, cognizant of society's interest in maintaining its cultural heritage, provide more extensive protection by entrusting a deceased creator's moral rights to an official body designated to protect the nation's creative works.

Despite the well-entrenched, if not perfectly uniform, position that the moral right enjoys in many European and Third World nations, creators in the United States are unable to benefit from express applications of the doctrine. Standing alone, this fact is neither a tribute to nor an indictment of our legal system. The critical inquiry is whether our failure to embrace the doctrine has resulted in inadequate protections for the important interests at stake. The overwhelming number of commentators who have studied this question have concluded that the scope of protection in America for the personal rights of creators is insufficient. The criticism is not surprising given that patchwork measures rarely approximate the degree of protection afforded by a cohesive legal theory whose exclusive objective is the specific protection of precise interests.

The principal doctrines that American courts have relied upon to protect a creator's moral rights include unfair competition, breach of contract, defamation, and invasion of privacy. The increasingly liberal applications of unfair competition law generally and section 43(a) of the Lanham Act in particular have popularized these doctrines as vehicles for redressing alleged violations of interests protected elsewhere by the right of integrity and paternity.

Courts rely upon express contractual provisions for granting relief to creators for violations of their integrity interests. In addition, many courts articulate a willingness to interpret ambiguous contracts to vindicate a creator's interests. In an extremely favorable decision for creators, *Gilliam v. American Broadcasting Companies, Inc.* [excerpted below], the Second Circuit held that extensive unauthorized editing of a work protected by common-law copyright constitutes copyright infringement at least in the absence of a governing contractual provision. In general, however, if the contract in question does not address modification rights, American courts will protect a creator only against excessive mutilation of his work. American creators thus fare less successfully in modification challenges than their counterparts in moral right countries. As discussed earlier, foreign courts that maintain an inalienable moral right will uphold contractual provisions allowing reasonable alterations of a creator's work in certain contexts, but

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they will refrain from holding that a creator tacitly has waived his right of integrity by signing an agreement silent on modification rights.

The law of defamation offers creators an avenue for relief if their works are disseminated to the public in such a manner as to injure their professional reputations. The injury might take the form of the publication of a mutilated version of the creator's work under the creator's name, or a false attribution of authorship with respect to a work of poor quality with which the creator was not associated. The key to any successful defamation action, however, is the creator's showing that the unauthorized acts exposed him to contempt or public ridicule, thus injuring his professional standing. Alternatively, a creator whose works have been published without his authorization or who is the victim of a false attribution may seek to redress his injuries by suing for invasion of privacy.

Although the substitute theories discussed in this section afford creators varying levels of protection for their moral rights, American creators typically are at a relative disadvantage compared to creators in moral right countries. The major difficulty facing American creators is the additional burden of molding moral rights claims into other recognized causes of action. Given that all of the substitute theories are supported by a theoretical basis different from that of the moral right doctrine, a successful claim may require elements of proof which are not applicable directly to a moral rights claim. The moral right doctrine is concerned with the creator's personality rights and society's interest in preserving the integrity of its culture. These interests are not the exclusive, or even the primary, focus of any of the substitute theories, all of which developed in response to completely different social concerns. Unfair competition law, as evidenced by its traditional elements of competition, passing off of one's goods or services as those of another, and likelihood of confusion, seeks to protect economic rights and, to a lesser extent, to prevent consumer deception. Similar societal concerns underlie section 43(a) of the Lanham Act, through which Congress intended to vindicate a producer's economic interests by proscribing false representations. Given the significantly different objectives behind the moral right doctrine, on the one hand, and unfair competition law and section 43(a) of the Lanham Act on the other, any protection that a creator may receive for his personality rights under either of these substitute theories merely is fortuitous.

Defamation and invasion of privacy doctrines are of limited utility in protecting a creator's moral rights. The personality rights safeguarded by the moral right doctrine encompass more than protection for a creator's professional reputation or relief for injured feelings. In addition, courts that invoke either defamation or privacy theories frequently adhere to technical rules and requirements that narrow the application of these doctrines in situations concerning moral rights.

Even contract law, which is the purported basis for decision in many cases concerning the integrity and paternity components of the moral right doctrine, cannot function as an adequate substitute. In addition to the limitations presented by the privity requirement and the judiciary's general reluctance to afford extensive protections for creators absent express contractual provisions, relatively unknown creators face a disparity of bargaining power that frequently results in a loss of valuable protections.

Shostakovich v. Twentieth Century-Fox Film Corp. Illustrates the unhappy plight of creators who cannot fit their moral rights cause of action into any of the alternate theories discussed above. In *Shostakovich* several prominent Russian composers sought injunctive relief against the defendant's use of their music in a film that, in the plaintiffs' view, had an anti-Soviet theme. In addition to the use of plaintiffs' music, which was in the public domain, the defendant used the plaintiffs' names on the credit lines. The *Shostakovich* plaintiffs based their right to relief on four grounds: (1) New York's statutory right of privacy; (2) defamation; (3) the deliberate infliction of an injury without just cause; and (4) violation of moral rights. With respect to the privacy claim, the court observed that "lack of copyright protection has long been held to permit others to use the names of authors in copying, publishing or compiling their works." As for the defamation claim, the court reasoned that the music's public domain status precluded any implication that the plaintiffs had approved of or endorsed the film, and thus the court refused to sustain plaintiffs' claim for libel. The court treated the plaintiffs' claim for the infliction of willful injury in conjunction with their moral rights claim. Although the court paid lip service to the moral right doctrine by noting that "conceivably under the doctrine of Moral Right the court could in a

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proper case, prevent the use of a composition or work, in the public domain, in such manner as would be violative of the author's rights," the court nevertheless declined the opportunity to vindicate the plaintiffs' interests. In refusing to grant plaintiffs their requested relief, the court emphasized that the plaintiffs made no allegations of distortion and no "clear showing of the infliction of a wilfull injury." Yet, an injury resulting from an inappropriate contextual use of a creator's work is actionable under the moral right doctrine, as evidenced by the French decision granting the plaintiffs in Shostakovich their requested relief. A reading of the American Shostakovich opinion suggests, however, that the court's discomfort with the moral right doctrine and the difficulty of its application provided the primary impetus for denying the plaintiffs' moral rights claims.

An even more fundamental drawback resulting from the judiciary's reliance on alternate theories rather than a cohesive framework to vindicate moral rights interests is the danger that the competing interests will not receive appropriate attention. Although the moral right doctrine seeks to protect the interests of creators and the public in general, entrepreneurs such as publishers, motion picture producers, broadcasters, and record manufacturers have valid interests that may be opposed diametrically to the right's existence and application. The appropriate balancing of competing interests in a given case depends not only upon the type of creation at issue but also upon its intended use. The adoption of a comprehensive moral right doctrine would provide the necessary framework within which these interests could be balanced effectively.

Although no comprehensive protection for a creator's moral rights currently exists in the United States, California and New York recently have enacted statutes affording visual artists protection for certain aspects of their moral rights. The California Art Preservation Act, which became effective on January 1, 1980, prohibits the intentional "physical defacement, mutilation, alteration or destruction of a work of fine art" by any person except the creating artist who owns and possesses the work. An artist may waive these protections, but only by "an instrument in writing expressly so providing which is signed by the artist." The Act contains a three year statute of limitations that runs from the occurrence of the act in question, and the artist's rights may be exercised by his heir, legatee, or personal representative for fifty years after his death. Remedies under the Act include injunctive relief, actual damages, punitive damages, reasonable attorneys' and expert witness fees, and any other relief that a court may deem appropriate. The statute's protection against destruction is particularly interesting given the reluctance of foreign jurisprudence to extend similarly the right of integrity. Nevertheless, the Act embodies a significant limitation with respect to protecting creators' integrity interests in that it is applicable only to works of "fine art" which have not been prepared under contract for commercial use by the purchaser. Moreover, the destructive act complained of must be intentional.

The New York statute, the Artists' Authorship Rights Act, is similar to the California Art Preservation Act. Under the New York law, effective January 1, 1984, no person other than the artist or someone acting under his authority can display publicly or publish a work of fine art or a reproduction thereof "in an altered, defaced, mutilated or modified form if the work is displayed, published or reproduced as being the work of the artist . . . and damage to the artist's reputation is reasonably likely to result therefrom." The New York statute guarantees the artist the right to compel recognition for his work of fine art as well as the right to disclaim authorship, and provides that a "[j]ust and valid reason for disclaiming authorship shall include that the work of fine art has been altered, defaced, mutilated or modified other than by the artist, without the artist's consent, and damage to the artist's reputation is reasonably likely to result or has resulted therefrom." Any artist who is aggrieved under the statute has a cause of action for legal and injunctive relief. Certain limitations are contained in the statute, however, including a qualified exemption for works prepared for advertising or trade use and the statute's narrowed applicability "only to works of fine art knowingly displayed in a place accessible to the public, published or reproduced" in New York state.

Although both the California and New York statutes represent a positive step for the protection of some moral rights for some creators, much more extensive legislation is needed in the United States so

that creators of all categories can obtain a broader range of protections. The following part examines the extent to which such protections are compatible with our present copyright statute.

Turner Entertainment Co. v. Huston, CA Versailles, Dec. 19, 1994 (civ. ch.), translated in ENT. L. REP., Mar. 1995, at 3

During the solemn hearing of 24 October 1994, the Court of Appeal consisting of Mr THAVAUD, President, Mrs PETIT, Councillor, Mr MARTIN, Councillor, Mrs CAMPION, Councillor, Mrs LOMBARD, Councillor, Assisted by Mrs LAMARQUE, Chief Registrar, heard the report of Mr THAVAUD, President, and the explanations of the parties' counsels, after which the case was reviewed in camera for a decision to be pronounced during the hearing of 19 December 1994, of which date the parties were notified.

After due deliberation by the same magistrates of the Court of Appeal, in accordance with the law, the following judgment was pronounced:

I

1. The cinematographic work entitled "ASPHALT JUNGLE" was produced in 1950 in the UNITED STATES by the METRO GOLDWYN MAYER (MGM) company, a division of LOEW'S Inc. The film was shot in black and white by the late John HUSTON, a movie director of American nationality, at the time bound by a contract of employment to LOEW'S Inc. and co-author of the screenplay with Ben MADDOW, bound to the same company by a contract as a salaried writer.

2. On 2nd May 1950, LOEW'S Inc. obtained from the U.S. COPYRIGHT OFFICE a certificate of registration of its rights to the film. This registration was duly renewed in 1977. On 26th September 1986 the benefit of this registration was transferred to the TURNER ENTERTAINMENT Co. by virtue of a merger with MGM, including transfer of the ownership of MGM's movie library and connected rights.

3. The TURNER company had the movie colorized, an operation which on 20th June 1988 resulted in registration of a copyright application, and it enabled the Fifth French Television Channel (LA CINQ) to announce that it would broadcast this colorized version at 8:30 p.m. on 26th June 1988.

4. The broadcast was objected to by John HUSTON's heirs, Angelica, Daniel and Walter HUSTON, who were subsequently joined by Mr Ben MADDOW, the Societe des Auteurs et Compositeurs Dramatiques (SACD), the Societe des Realisateurs de Films (SRF), the Syndicat Frangais des Artistes Interpretes (SFA), the Federation Europeenne des Relisateurs de l'Audiovisuel (FERA), the Syndicat Frangais des Realisateurs de Television CGT and the Syndicat National des Techniciens de la Production Cinematographique et de Television. They opposed the broadcast because they deemed it a violation of the author's moral right, aggravated in their opinion by the fact that John HUSTON had opposed colorization of his works during his life.

5. The dispute thus arising with LA CINQ and the TURNER ENTERTAINMENT Co. (TEC) resulted in FRANCE in the following decisions:

1) An order in summary proceedings on 24th June 1988, confirmed by a judgment of the Court of Appeal of PARIS on 25th June 1988, which suspended the broadcast of the colorized film as being likely to cause unacceptable and irreparable damage;

2) On 23rd November 1988 the Court of First Instance of PARIS judged as follows:

"Declares the action of Messrs and Mrs HUSTON and Mr Ben MADDOW and the voluntary intervention of TEC admissible insofar as they are limited to the television broadcasting of the colorized version of the film entitled "ASPHALT JUNGLE"; Declares the claims of the secondary voluntary intervenors admissible; Formally takes cognizance of the fact that Societe d'Exploitation de la Cinquieme Chaine has abandoned its plans for broadcasting the colorized version of the film entitled "ASPHALT

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JUNGLE”; As necessary forbids it from broadcasting this version on television; Dismisses all other claims; Dismisses the claim of the TEC company”.

In admitting the claim, this judgment referred in substance to the Universal Copyright Convention signed in GENEVA on 6th September 1952, ratified by the UNITED STATES, to deduce that this convention provides citizens of member States in FRANCE with the benefit of the Law of 11th March 1957, notably Section 6, which provides that the moral right is attached to the person and is perpetual, inalienable and imprescriptible. Thus it distinguished between this moral right and the economic rights held by the TURNER company to the work, notably under contracts signed with John HUSTON and Ben MADDOW.

Finally, it held that John HUSTON and Ben MADDOW, by their art, had imbued their work with an original and personal character and that, because HUSTON’s renown is based on the interplay of black and white, creating an atmosphere, the said atmosphere would be jeopardized by colorization.

3) The Court of Appeal of PARIS, appealed to by the TURNER company, judged as follows on 6th July 1989:

“States that the author of the film entitled ‘ASPHALT JUNGLE’ is the TURNER company and that the heirs of John HUSTON as well as Ben MADDOW have no moral right to this work shot in black and white; Notes that the colorized version of the said film is an adaptation, under U.S. law, for which the TURNER company obtained a registration certificate on 20th June 1988; States that the principle of colorization could not be criticized by the heirs of John HUSTON and by Ben MADDOW, even if they could claim a moral right to the black and white film; Accordingly, reversing the judgment, Dismisses the claims of the heirs of John HUSTON and Ben MADDOW and judges admissible but unfounded the interventions of the six legal entities supporting their claims; Authorizes the Fifth Channel to broadcast the colorized version of the film entitled ‘ASPHALT JUNGLE’, formally recognizing the cognizance petitioned for.”

The judgment further provided for various warning notices intended for television viewers, with respect to the possibility of using the color control device and respect for the memory of John HUSTON.

In reversing the judgment against which the appeal was brought, the Court of Appeal of PARIS settled the conflict of laws in favor of U.S. law, the law of the first publication of the work having, according to said court, granted the status of author solely to LOEW’s, which cannot be defeated by the BERNE Convention, effective from 1st March 1989, which is an instrument to harmonize relations between the member countries and is not competent to affect acquired rights or the effect of contracts between producer and director. Moreover, it dismissed the exception according to which the French conception of international law was violated and held that the copyright granted to the “derivative work” transferred in 1988 to the TURNER company made it impossible for Messrs and Mrs HUSTON and Mr MADDOW to raise it if they had a moral right to claim.

6. Messrs and Mrs HUSTON and Mr MADDOW and the intervenors appealed against this judgment of the Court of Appeal of PARIS to the Cour de Cassation.

In a ruling dated 28th May 1991, the Supreme Court reversed and cancelled every provision of the judgment of the Court of Appeal for violation of Section 1.2 of Law 64-689 of 8th July 1964 and Section 6 of the Law of 11th March 1957, stating: “According to the first of these texts, the integrity of a literary or art work cannot be affected in FRANCE, regardless of the State in whose territory the said work was made public for the first time. The person who is its author, by its creation alone, enjoys the moral right stipulated in his favor by the second of the aforesaid texts; these are laws of mandatory application.”

II

1. The TURNER ENTERTAINMENT Co. duly referred the case to the Court of Appeal of VERSAILLES, appointed as Court of Remand, and petitioned it to reverse the judgment of the Court of First Instance of PARIS, to judge that the claims of Messrs and Mrs HUSTON are inadmissible or that

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they have in any case no grounds to claim the moral right to which they refer and therefore to dismiss their case and all other intervenors. It also claims as follows:

- In support of its argument of inadmissibility, that Messrs and Mrs HUSTON cannot claim the status of foreign author, which is reserved for the TURNER company under the laws applicable at the place of creation and the agreements governed by them; that they are therefore not entitled to claim French law, under the GENEVA Convention, in order to protect themselves and exercise rights which they have not acquired;

- That it is in any event the recognized holder of the patrimonial rights of the authors and that it was therefore entitled to introduce the colorized version by applying a technique which does not alter the essence of the work.

2. Messrs and Mrs HUSTON and Mr MADDOW petitioned the Court of Remand to confirm the judgment of the Court of First Instance of PARIS, further petitioning the court to add that the broadcasting of the colorized version of the film entitled "ASPHALT JUNGLE" has violated their moral right and thus to order the TURNER company to pay them FRF 1,000,000 by way of damages and costs and a further FRF 100,000 under Section 700 of the New Code of Civil Procedure; thus:

- They oppose that French law alone is competent to determine the status of author, as pointed out by the Cour de Cassation in a decision which stresses the importance of moral right and results in dismissal of the law applicable to the agreement between director and producer; and that their claim is therefore admissible;

- That black and white is the form of expression in which the authors and especially John HUSTON have delivered their esthetic conception to the public; that colorization therefore alters the very essence of the work, of which it is no "adaptation" at all but a "transformation" or "modification"; that, moreover, John HUSTON was formally opposed to this during his life.

3. Societe des Auteurs et Compositeurs Dramatiques (SACD) intervened voluntarily and joined itself to the submissions of Messrs and Mrs HUSTON, whose claims it supports in application of Section 3.1 of its bylaws and Section 65, paragraph 2 of the Law of 11th March 1957 and Section 38 of the Law of 3rd July 1985.

4. Societe des Realisateurs de Films (SRF), Syndicat Francais des Artistes Interpretes (SFA), Federation Europeenne des Realisateurs de l'Audiovisuel (FERA), Syndicat Francais des Realisateurs de Television CGT and Syndicat National des Techniciens de la Production Cinematographique et de Television pleaded the same and claimed FRF 10,000 from the TURNER company by virtue of Section 700 of the New Code of Civil Procedure.

5. Maitre Hubert LAFONT, ex-officio as court administrator in the compulsory reorganization of LA CINQ submitted that there is no case against him in view of the conversion into compulsory liquidation and Me PIERREL's court-ordered appointment as liquidator; he furthermore claimed from the TURNER company FRF 5,000 by virtue of Section 700 of the New Code of Civil Procedure.

6. Maitre PIERREL ex-officio petitioned the court to declare his appeal admissible and well-founded, to take formal cognizance of the fact that LA CINQ, in accordance with the judgment of the Court of Appeal of PARIS on 6th July 1989, broadcast the film accompanied by the ordered notices, to reverse the referred judgment of the Court of First Instance of PARIS and, judging again, to judge that Messrs and Mrs HUSTON and Mr MADDOW do not have status as the film's authors and that they cannot claim in FRANCE the benefit of the moral right, to judge secondarily that colorization is in principle a legal adaptation and does not violate any moral right, to dismiss the claims of the opponents and to order Messrs and Mrs HUSTON and Mr MADDOW to pay them FRF 30,000 by virtue of Section 700 of the New Code of Civil Procedure. He thus reiterated the arguments already produced by the TURNER company, stressing that John HUSTON could not be unaware of the fact that he did not have the status of an author by virtue of the law governing the contracts signed with the producer.

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7. The TURNER ENTERTAINMENT Co. maintained its initial claims, notably on the inadmissibility of the opponents' claims in submissions in answer to which it maintains:

- That it is the constant rule in private international law that the situation is governed by the law of the place where it occurs; that, therefore, the status of author of an art work is the status recognized in the country where the work has been created, i.e. in this case the UNITED STATES OF AMERICA; that this means LOEW'S Inc., to which the rights have been transferred;

- That the Court of Remand is not bound by the judgment of the Cour de Cassation, criticized by an authorized doctrine;

- That, in fact, the Law of 8th July 1964, incorporated as Section L 111-4 in the Code of Intellectual Property, does not apply in that it assumes that the foreign State does not provide French works with adequate and effective protection, which is not the case in the UNITED STATES; that the second paragraph of Section 1 of this law, which alone is referred to in the judgment of the Cour de Cassation, is not severable;

- That, lastly, the GENEVA Convention does not govern the formation of rights and the pre-existing status of author, for which it only organizes protection;

- That, secondarily, the Cour de Cassation has not pronounced itself on the violation of the moral right alleged to result from the colorization and that this violation has not been shown.

8. SACD opposed in replication the submissions produced ex-officio by Me PIERREL and maintained its claims as an intervenor.

9. In their turn, Messrs and Mrs HUSTON and Mr MADDOW replicated as follows:

- That the Cour de Cassation found for a solution which alone enables the authors to exercise their moral right in FRANCE; that this position complies with Section 14*bis*(2) of the BERNE Convention, which provides for application of the law of the country of protection in designating the holder of the rights to a cinematographic work;

- That U.S. law only protects economic rights, wherefore the Law of 8th July 1964 remains applicable for lack of reciprocal agreements on moral right;

- That, contrary to the submissions of the TURNER company, colorization violates the moral right retained.

They furthermore petitioned the court to take cognizance of the violation of the authors' moral right by LA CINQ's broadcasting of the "colorized" film and to order Me PIERREL ex-officio to pay them one million francs in damages and costs on this ground.

10. In its rejoinder, the TURNER ENTERTAINMENT Co. petitioned the court again to judge that Messrs and Mrs HUSTON and Mr MADDOW cannot claim the benefit of the BERNE Convention and Law of 8th July 1985, which have no retroactive application, to dismiss application of the Law of 8th July 1964 because of the protection afforded by U.S. law for every attribute of copyright; to judge

- That colorization is by its nature an adaptation in the meaning of the law and to grant it the benefit of its earlier submissions;

- That ratification by the UNITED STATES of the BERNE Convention postdates the disputed situation by a considerable time;

- That, contrary to the ground produced by Messrs and Mrs HUSTON and Mr MADDOW, U.S. caselaw sanctions violation of the integrity or authorship of a work, which excludes application of the Law of 8th July 1964;

- That the Law of 3rd July 1985 cannot be claimed whereas it is not disputed that the TURNER company is the holder of the patrimonial rights, including the right to adapt the work and therefore to introduce a colorized version.

11. The closing order was pronounced on 17th February 1994.

III

1. It is first necessary to state that there is no case against Me Hubert LAFONT, ex-officio as court administrator in the compulsory reorganization of LA CINQ, as he has shown that his task ended on 3rd April 1992 when the procedure was converted into a compulsory liquidation procedure and Me PIERREL was court-appointed as liquidator.

2. Moreover, the interventions before the Court of Remand, in accordance with their bylaws, of Societe des Realisateurs de Films (SRF), Syndicat Francais des Artistes Interpretes (SFA), Federation Europdenne des Realisateurs de l'Audiovisuel (FERA), Syndicat Francis des Realisateurs de Television CGT, Syndicat National des Techniciens de la Production Cinematographique et de Television and Societe des Auteurs et Compositeurs Dramatiques (SACD) have not been debated in regard to their interest in acting thus; they must accordingly be declared admissible.

3. The TURNER company first opposes to Messrs and Mrs HUSTON and Mr MADDOW and the intervenors that U.S. law should be applied to determine who has the status of the film's author; it designates the producer, i.e. LOEW's Inc., which obtained the copyright on 2nd May 1950 and whose rights, renewed on 2nd May 1977, were transferred to the TURNER company; the action of Messrs and Mrs HUSTON and Mr MADDOW to protect rights which they have not acquired is therefore not admissible.

4. But the judges in first instance correctly stressed the "very different conceptions" of U.S. and French laws, the first focusing exclusively on the protection of economic rights without referring to the creative act underlying the inalienable moral right recognized by French law, viz. Section 6 of the Law of 11th March 1957, at the time applicable, which provides that "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".

John HUSTON and Ben MADDOW, of whom it is not disputed that the first is the co-author of the screenplay and the director of the film entitled "ASPHALT JUNGLE" and the second the co-author of the same film, as already referred to under (I-1), are in fact its authors, having created it, and whereas they are therefore, in the meaning of the aforesaid law, vested with the corresponding moral right, which is part of public law and therefore mandatorily protected.

5. Section 1 of Law No 64-689 of 8th July 1964 on the application of the principle of reciprocity with respect to copyright provides as follows:

"Subject to the provisions of the international conventions to which FRANCE is a party, in the event that it is noted, after consultation of the Minister of Foreign Affairs, that a State does not provide adequate and effective protection for works disclosed for the first time in FRANCE, irrespective of the form thereof, works disclosed for the first time in the territory of the said State shall not benefit from the copyright protection recognized by French law. However, the integrity or authorship of such works may not be violated. In the case provided for in paragraph 1 heretofore, royalties shall be paid to organizations of general interest designated by decree."

The defect in protection thus likely to affect the foreign work on the conditions governing reciprocity, as laid out in paragraph 1, can only concern its economic aspects, i.e. the patrimonial rights attached thereto, in that it is limited by the general mandatory rule providing for respect of an author's moral right as proclaimed without reservation in paragraph 2.

6. It follows that the moral rights attached to the person of the creators of the work entitled "ASPHALT JUNGLE" could not be transferred and, therefore, the judges in first instance correctly ruled that Messrs and Mrs HUSTON and Ben MADDOW were entitled to claim recognition and protection thereof in FRANCE.

7. However, the TURNER company, which it is not disputed is the holder of the author's economic rights, maintains that these rights include the right to adapt the work and therefore to colorize the film entitled "ASPHALT JUNGLE", arguing that it cannot be maintained that this denatures the work;

Me PIERREL, ex-officio, follows the same argument, submitting that the colorized version of the film is merely an adaptation of the original black-and-white version which is left intact and is therefore not affected.

8. However, “colorization” is a technique based on the use of computer and laser and it makes it possible, after transferring the original black-and-white tape onto a videographic media, to give color to a film which did not originally have color; the application of this process is in no event to be considered an adaptation, defined as “an original work both in its expression and in its composition”, even if it borrows formal elements from the pre-existing work; colorization, far from meeting these criteria, in fact merely consists in modifying the work by adding an element thus far not part of the creator’s aesthetic conception.

9. The judges in first instance in the present case have precisely pointed out that the aesthetic conception which earned John HUSTON his great fame is based on the interplay of black and white, which enabled him to create an atmosphere according to which he directed the actor and selected the backdrops; moreover, he expressed himself clearly about his film entitled “The Maltese Falcon” when stating, “I wanted to shoot it in black and white like a sculptor chooses to work in clay, to pour his work in bronze, to sculpt in marble”.

In 1950, while color film technique was already widespread and another option was available, the film entitled “ASPHALT JUNGLE” was shot in black and white, following a deliberate aesthetic choice, according to a process which its authors considered best suited to the character of the work.

10. Therefore, the film’s colorization without authorization and control by the authors or their heirs amounted to violation of the creative activity of its makers, even if it should satisfy the expectations of a certain public for commercially obvious reasons; the use of this process without the agreement of Messrs and Mrs HUSTON and Ben MADDOW infringed the moral right of the authors as mandatorily protected under French law; Messrs and Mrs HUSTON and Ben MADDOW have therefore good grounds to petition the court for reparation of their prejudice at the hands of the TURNER company, and they will therefore be allotted FRF 400,000 by way of damages and costs for the damage done; moreover, the judges in first instance correctly recognized their right to demand that LA CINQ SA be forbidden to broadcast the modified version of the film entitled “ASPHALT JUNGLE”.

11. It is constant that, contrary to the act required by the Court of First Instance, LA CINQ SA broadcast the colorized version of the film entitled “ASPHALT JUNGLE” further to a judgment by the Court of Appeal of PARIS, quashed by the Cour de Cassation on the conditions reiterated under (I-5); this broadcasting is also a direct and definite violation of the moral right whose protection was demanded by Messrs and Mrs HUSTON and Ben MADDOW, who are also wellfounded to demand reparation on this head; the Court has the elements needed to allot them the sum of FRF 200,000 by reversing the referred judgment on the pronounced cognizance.

12. Me PIERREL, ex-officio as court-appointed liquidator of LA CINQ SA, loses his case and will bear the costs; therefore, his claim under Section 700 of the New Code of Civil Procedure is inadmissible.

Equity does not justify the claim lodged ex-officio by Me LAFONT under this Section.

On the other hand, the same consideration of equity prompts the allotment, in application of the said Section 700 of the New Code of Civil Procedure, of FRF 60,000 to Messrs and Mrs HUSTON and Ben MADDOW and FRF 2,000 each to SRF, SFA, FERA, Syndicat Francais des Realisateurs de Television CGT and Syndicat National des Techniciens de la Production Cinematographique et de Television.

ON THESE GROUNDS

The Court, judging publicly, after hearing all parties and in last instance as Court of Remand; Pursuant to the closing order pronounced on 17th February 1994;

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1. DECLARES that the TURNER ENTERTAINMENT Co. was entitled to petition the Court of Referral;

2. DECLARES admissible the interventions, before the same court, of Societe des Auteurs et Compositeurs Dramatiques (SACD), Societe des Realisateurs de Films (SRF), Syndicat Francais des Artistes Interpretes (SFA), Federation Europeenne des Realisateurs de l'Audiovisuel (FERA), Syndicat Francais des Realisateurs de Television CGT and Syndicat National des Techniciens de la Production Cinematographique et de Television;

3. DECLARES THAT THERE IS NO CASE against Maitre Hubert LAFONT, ex-officio;

4. CONFIRMS the judgment pronounced on 23rd November 1988 by the Court of First Instance of PARIS, subject to the cognizance and the provisions dismissing application of Section 700 of the New Code of Civil Procedure in favor of Messrs and Mrs HUSTON and Ben MADDOW and the secondary intervenors;

Judging again and adding:

5. STATES that the colorization of the film entitled "ASPHALT JUNGLE" by the TURNER ENTERTAINMENT Co. and its broadcasting by LA CINQ SA in this version, contrary to the will of the authors or their heirs, has violated their moral right;

6. ORDERS the TURNER ENTERTAINMENT Co. to pay Messrs and Mrs HUSTON and Ben MADDOW FOUR HUNDRED THOUSAND FRENCH FRANCS (FRF 400,000) by way of damages and costs;

7. ORDERS Maitre PIERREL, ex-officio as court-appointed liquidator of Societe d'Exploitation de la Cinquieme Chaîne (LA CINQ SA) to pay them TWO HUNDRED THOUSAND FRENCH FRANCS (FRF 200,000) in damages and costs;

8. DECLARES its claim on the basis of Section 700 of the New Code of Civil Procedure inadmissible and dismisses the same claim by Maitre Hubert LAFONT, ex-officio;

9. ORDERS it jointly and severally with the TURNER ENTERTAINMENT Co. to pay Messrs and Mrs HUSTON and Ben MADDOW SIXTY THOUSAND FRENCH FRANCS (FRF 60,000) under the same Section 700 of the New Code of Civil Procedure and to pay TWO THOUSAND (FRF 2,000) to each of the intervenors referred to under (2), except SACD, which has lodged no claim in this respect;

10. ORDERS it further, jointly and severally with the TURNER ENTERTAINMENT Co., to bear the full cost of the appeal and authorizes SCP JULLIEN-LECHARNY-ROL and SCP LISSARRAGUE & DUPUIS, avoués, to collect the said costs directly under Section 699 of the New Code of Civil Procedure.

***Gilliam v. American Broad. Cos., Inc.*, 538 F.2d 14 (2d Cir. 1976)**

LUMBARD, Circuit Judge:

Plaintiffs, a group of British writers and performers known as "Monty Python," appeal from a denial by Judge Lasker in the Southern District of a preliminary injunction to restrain the American Broadcasting Company (ABC) from broadcasting edited versions of three separate programs originally written and performed by Monty Python for broadcast by the British Broadcasting Corporation (BBC). We agree with Judge Lasker that the appellants have demonstrated that the excising done for ABC impairs the integrity of the original work. . . .

Since its formation in 1969, the Monty Python group has gained popularity primarily through its thirty-minute television programs created for BBC as part of a comedy series entitled "Monty Python's Flying Circus." In accordance with an agreement between Monty Python and BBC, the group writes and delivers to BBC scripts for use in the television series. This scriptwriters' agreement recites in great detail

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the procedure to be followed when any alterations are to be made in the script prior to recording of the program. The essence of this section of the agreement is that, while BBC retains final authority to make changes, appellants or their representatives exercise optimum control over the scripts consistent with BBC's authority and only minor changes may be made without prior consultation with the writers. Nothing in the scriptwriters' agreement entitles BBC to alter a program once it has been recorded. The agreement further provides that, subject to the terms therein, the group retains all rights in the script.

Under the agreement, BBC may license the transmission of recordings of the television programs in any overseas territory. The series has been broadcast in this country primarily on non-commercial public broadcasting television stations, although several of the programs have been broadcast on commercial stations in Texas and Nevada. In each instance, the thirty-minute programs have been broadcast as originally recorded and broadcast in England in their entirety and without commercial interruption.

In October 1973, Time-Life Films acquired the right to distribute in the United States certain BBC television programs, including the Monty Python series. Time-Life was permitted to edit the programs only "for insertion of commercials, applicable censorship or governmental . . . rules and regulations, and National Association of Broadcasters and time segment requirements." No similar clause was included in the scriptwriters' agreement between appellants and BBC. Prior to this time, ABC had sought to acquire the right to broadcast excerpts from various Monty Python programs in the spring of 1975, but the group rejected the proposal for such a disjointed format. Thereafter, in July 1975, ABC agreed with Time-Life to broadcast two ninety-minute specials each comprising three thirty-minute Monty Python programs that had not previously been shown in this country.

Correspondence between representatives of BBC and Monty Python reveals that these parties assumed that ABC would broadcast each of the Monty Python programs "in its entirety." On September 5, 1975, however, the group's British representative inquired of BBC how ABC planned to show the programs in their entirety if approximately 24 minutes of each 90 minute program were to be devoted to commercials. BBC replied on September 12, "we can only reassure you that ABC have decided to run the programmes 'back to back,' and that there is a firm undertaking not to segment them."

ABC broadcast the first of the specials on October 3, 1975. Appellants did not see a tape of the program until late November and were allegedly "appalled" at the discontinuity and "mutilation" that had resulted from the editing done by Time-Life for ABC. Twenty-four minutes of the original 90 minutes of recording had been omitted. Some of the editing had been done in order to make time for commercials; other material had been edited, according to ABC, because the original programs contained offensive or obscene matter.

In early December, Monty Python learned that ABC planned to broadcast the second special on December 26, 1975. The parties began negotiations concerning editing of that program and a delay of the broadcast until Monty Python could view it. These negotiations were futile, however, and on December 15 the group filed this action to enjoin the broadcast and for damages. Following an evidentiary hearing, Judge Lasker found that "the plaintiffs have established an impairment of the integrity of their work" which "caused the film or program . . . to lose its iconoclastic verve." According to Judge Lasker, "the damage that has been caused to the plaintiffs is irreparable by its nature." Nevertheless, the judge denied the motion for the preliminary injunction on the grounds that it was unclear who owned the copyright in the programs produced by BBC from the scripts written by Monty Python; that there was a question of whether Time-Life and BBC were indispensable parties to the litigation; that ABC would suffer significant financial loss if it were enjoined a week before the scheduled broadcast; and that Monty Python had displayed a "somewhat disturbing casualness" in their pursuance of the matter.

Judge Lasker granted Monty Python's request for more limited relief by requiring ABC to broadcast a disclaimer during the December 26 special to the effect that the group dissociated itself from the program because of the editing. A panel of this court, however, granted a stay of that order until this appeal could be heard and permitted ABC to broadcast, at the beginning of the special, only the legend

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that the program had been edited by ABC. We heard argument on April 13 and, at that time, enjoined ABC from any further broadcast of edited Monty Python programs pending the decision of the court.

I

In determining the availability of injunctive relief at this early stage of the proceedings, Judge Lasker properly considered the harm that would inure to the plaintiffs if the injunction were denied, the harm that defendant would suffer if the injunction were granted, and the likelihood that plaintiffs would ultimately succeed on the merits. . . .

We then reach the question whether there is a likelihood that appellants will succeed on the merits. In concluding that there is a likelihood of infringement here, we rely especially on the fact that the editing was substantial, i.e., approximately 27 per cent of the original program was omitted, and the editing contravened contractual provisions that limited the right to edit Monty Python material. It should be emphasized that our discussion of these matters refers only to such facts as have been developed upon the hearing for a preliminary injunction. Modified or contrary findings may become appropriate after a plenary trial.

Judge Lasker denied the preliminary injunction in part because he was unsure of the ownership of the copyright in the recorded program. Appellants first contend that the question of ownership is irrelevant because the recorded program was merely a derivative work taken from the script in which they hold the uncontested copyright. Thus, even if BBC owned the copyright in the recorded program, its use of that work would be limited by the license granted to BBC by Monty Python for use of the underlying script. We agree.

Section 7 of the Copyright Law provides in part that “adaptations, arrangements, dramatizations . . . or other versions of . . . copyrighted works when produced with the consent of the proprietor of the copyright in such works . . . shall be regarded as new works subject to copyright . . .” Manifestly, the recorded program falls into this category as a dramatization of the script, and thus the program was itself entitled to copyright protection. However, *section 7* limits the copyright protection of the derivative work, as works adapted from previously existing scripts have become known, to the novel additions made to the underlying work, and the derivative work does not affect the “force or validity” of the copyright in the matter from which it is derived. Thus, any ownership by BBC of the copyright in the recorded program would not affect the scope or ownership of the copyright in the underlying script.

Since the copyright in the underlying script survives intact despite the incorporation of that work into a derivative work, one who uses the script, even with the permission of the proprietor of the derivative work, may infringe the underlying copyright.

If the proprietor of the derivative work is licensed by the proprietor of the copyright in the underlying work to vend or distribute the derivative work to third parties, those parties will, of course, suffer no liability for their use of the underlying work consistent with the license to the proprietor of the derivative work. Obviously, it was just this type of arrangement that was contemplated in this instance. The scriptwriters’ agreement between Monty Python and BBC specifically permitted the latter to license the transmission of the recordings made by BBC to distributors such as Time-Life for broadcast in overseas territories.

One who obtains permission to use a copyrighted script in the production of a derivative work, however, may not exceed the specific purpose for which permission was granted. Most of the decisions that have reached this conclusion have dealt with the improper extension of the underlying work into media or time, i.e., duration of the license, not covered by the grant of permission to the derivative work proprietor. Appellants herein do not claim that the broadcast by ABC violated media or time restrictions contained in the license of the script to BBC. Rather, they claim that revisions in the script, and ultimately in the program, could be made only after consultation with Monty Python, and that ABC’s broadcast of a program edited after recording and without consultation with Monty Python exceeded the scope of any license that BBC was entitled to grant.

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The rationale for finding infringement when a licensee exceeds time or media restrictions on his license—the need to allow the proprietor of the underlying copyright to control the method in which his work is presented to the public—applies equally to the situation in which a licensee makes an unauthorized use of the underlying work by publishing it in a truncated version. Whether intended to allow greater economic exploitation of the work, as in the media and time cases, or to ensure that the copyright proprietor retains a veto power over revisions desired for the derivative work, the ability of the copyright holder to control his work remains paramount in our copyright law. We find, therefore, that unauthorized editing of the underlying work, if proven, would constitute an infringement of the copyright in that work similar to any other use of a work that exceeded the license granted by the proprietor of the copyright.

If the broadcast of an edited version of the Monty Python program infringed the group's copyright in the script, ABC may obtain no solace from the fact that editing was permitted in the agreements between BBC and Time-Life or Time-Life and ABC. BBC was not entitled to make unilateral changes in the script and was not specifically empowered to alter the recordings once made; Monty Python, moreover, had reserved to itself any rights not granted to BBC. Since a grantor may not convey greater rights than it owns, BBC's permission to allow Time-Life, and hence ABC, to edit appears to have been a nullity. . . .

ABC contends that appellants must have expected that deletions would be made in the recordings to conform them for use on commercial television in the United States. ABC argues that licensing in the United States implicitly grants a license to insert commercials in a program and to remove offensive or obscene material prior to broadcast. According to the network, appellants should have anticipated that most of the excised material contained scatological references inappropriate for American television and that these scenes would be replaced with commercials, which presumably are more palatable to the American public.

The proof adduced up to this point, however, provides no basis for finding any implied consent to edit. Prior to the ABC broadcasts, Monty Python programs had been broadcast on a regular basis by both commercial and public television stations in this country without interruption or deletion. Indeed, there is no evidence of any prior broadcast of edited Monty Python material in the United States. These facts, combined with the persistent requests for assurances by the group and its representatives that the programs would be shown intact belie the argument that the group knew or should have known that deletions and commercial interruptions were inevitable.

Several of the deletions made for ABC, such as elimination of the words "hell" and "damn," seem inexplicable given today's standard television fare.⁸ If, however, ABC honestly determined that the programs were obscene in substantial part, it could have decided not to broadcast the specials at all, or it could have attempted to reconcile its differences with appellants. The network could not, however, free from a claim of infringement, broadcast in a substantially altered form a program incorporating the script over which the group had retained control.

Our resolution of these technical arguments serves to reinforce our initial inclination that the copyright law should be used to recognize the important role of the artist in our society and the need to encourage production and dissemination of artistic works by providing adequate legal protection for one who submits his work to the public. We therefore conclude that there is a substantial likelihood that, after a full trial, appellants will succeed in proving infringement of their copyright by ABC's broadcast of edited versions of Monty Python programs. In reaching this conclusion, however, we need not accept appellants' assertion that any editing whatsoever would constitute infringement. Courts have recognized that licensees are entitled to some small degree of latitude in arranging the licensed work for presentation to the public in a manner consistent with the licensee's style or standards. That privilege, however, does not extend to the degree of editing that occurred here especially in light of contractual provisions that limited the right to edit Monty Python material.

⁸ We also note that broadcast of the Monty Python specials was scheduled by ABC for an 11:30 p.m. to 1:00 a.m. time slot.

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II

It also seems likely that appellants will succeed on the theory that, regardless of the right ABC had to broadcast an edited program, the cuts made constituted an actionable mutilation of Monty Python's work. This cause of action, which seeks redress for deformation of an artist's work, finds its roots in the continental concept of *droit moral*, or moral right, which may generally be summarized as including the right of the artist to have his work attributed to him in the form in which he created it.

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 inability of artists to obtain relief for mutilation or misrepresentation of their work to the public on which the artists are financially dependent. Thus courts have long granted relief for misrepresentation of an artist's work by relying on theories outside the statutory law of copyright, such as contract law or the tort of unfair competition. 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.

Here, the appellants claim that the editing done for ABC mutilated the original work and that consequently the broadcast of those programs as the creation of Monty Python violated the Lanham Act § 43(a). This statute, the federal counterpart to state unfair competition laws, has been invoked to prevent misrepresentations that may injure plaintiff's business or personal reputation, even where no registered trademark is concerned. It is sufficient to violate the Act that a representation of a product, although technically true, creates a false impression of the product's origin.

These cases cannot be distinguished from the situation in which a television network broadcasts a program properly designated as having been written and performed by a group, but which has been edited, without the writer's consent, into a form that departs substantially from the original work. "To deform his work is to present him to the public as the creator of a work not his own, and thus makes him subject to criticism for work he has not done." In such a case, it is the writer or performer, rather than the network, who suffers the consequences of the mutilation, for the public will have only the final product by which to evaluate the work. Thus, an allegation that a defendant has presented to the public a "garbled," distorted version of plaintiff's work seeks to redress the very rights sought to be protected by the Lanham Act and should be recognized as stating a cause of action under that statute.

During the hearing on the preliminary injunction, Judge Lasker viewed the edited version of the Monty Python program broadcast on December 26 and the original, unedited version. After hearing argument of this appeal, this panel also viewed and compared the two versions. We find that the truncated version at times omitted the climax of the skits to which appellants' rare brand of humor was leading and at other times deleted essential elements in the schematic development of a story line. We therefore agree with Judge Lasker's conclusion that the edited version broadcast by ABC impaired the integrity of appellants' work and represented to the public as the product of appellants what was actually a mere caricature of their talents. We believe that a valid cause of action for such distortion exists and that therefore a preliminary injunction may issue to prevent repetition of the broadcast prior to final determination of the issues. . . .

For these reasons we direct that the district court issue the preliminary injunction sought by the appellants.

GURFEIN, Circuit Judge, concurring:

I concur in my brother Lumbard's scholarly opinion, but I wish to comment on the application of Section 43(a) of the Lanham Act, *15 U.S.C. § 1125(a)*.

INTERNATIONAL INTELLECTUAL PROPERTY LAW

I believe that this is the first case in which a federal appellate court has held that there may be a violation of Section 43(a) of the Lanham Act with respect to a common-law copyright. The Lanham Act is a trademark statute, not a copyright statute. Nevertheless, we must recognize that the language of Section 43(a) is broad. It speaks of the affixation or use of false designations of origin or false descriptions or representations, but proscribes such use “in connection with any goods or services.” It is easy enough to incorporate trade names as well as trademarks into Section 43(a) and the statute specifically applies to common law trademarks, as well as registered trademarks.

In the present case, we are holding that the deletion of portions of the recorded tape constitutes a breach of contract, as well as an infringement of a common-law copyright of the original work. There is literally no need to discuss whether plaintiffs also have a claim for relief under the Lanham Act or for unfair competition under New York law. I agree with Judge Lumbard, however, that it may be an exercise of judicial economy to express our view on the Lanham Act claim, and I do not dissent therefrom. I simply wish to leave it open for the District Court to fashion the remedy.

The Copyright Act provides no recognition of the so-called *droit moral*, or moral rights of authors. Nor are such rights recognized in the field of copyright law in the United States. If a distortion or truncation in connection with a use constitutes an infringement of copyright, there is no need for an additional cause of action beyond copyright infringement. An obligation to mention the name of the author carries the implied duty, however, as a matter of contract, not to make such changes in the work as would render the credit line a false attribution of authorship.

So far as the Lanham Act is concerned, it is not a substitute for *droit moral* which authors in Europe enjoy. If the licensee may, by contract, distort the recorded work, the Lanham Act does not come into play. If the licensee has no such right by contract, there will be a violation in breach of contract. The Lanham Act can hardly apply literally when the credit line correctly states the work to be that of the plaintiffs which, indeed it is, so far as it goes. The vice complained of is that the truncated version is not what the plaintiffs wrote. But the Lanham Act does not deal with artistic integrity. It only goes to misdescription of origin and the like.

The misdescription of origin can be dealt with, as Judge Lasker did below, by devising an appropriate legend to indicate that the plaintiffs had not approved the editing of the ABC version. With such a legend, there is no conceivable violation of the Lanham Act. If plaintiffs complain that their artistic integrity is still compromised by the distorted version, their claim does not lie under the Lanham Act, which does not protect the copyrighted work itself but protects only against the misdescription or mislabelling.

So long as it is made clear that the ABC version is not approved by the Monty Python group, there is no misdescription of origin. So far as the content of the broadcast itself is concerned, that is not within the proscription of the Lanham Act when there is no misdescription of the authorship.

I add this brief explanation because I do not believe that the Lanham Act claim necessarily requires the drastic remedy of permanent injunction. That form of ultimate relief must be found in some other fountainhead of equity jurisprudence.

Herman Cohen Jehoram, *The Nature of Neighboring Rights of Performing Artists, Phonogram Producers and Broadcasting Organizations*, 15 COLUM.-VLA J.L. & ARTS 75 (1990)

The term “neighboring rights” is an abbreviation of “rights neighboring to copyright.” It was first used in 1948 at the Brussels Diplomatic Conference for the Revision of the Berne Convention. The expression appeared in a resolution with regard to a new subject, not to be dealt with in the old copyright convention itself: the protection of performing artists. The Brussels conference adopted two other resolutions, with regard to the protection of producers of recordings and the protection of broadcasts, respectively, without, however, using the term “neighboring right.” The resolutions expressed the wish

that the governments of the Berne Union countries consider the best means of assuring the protection of these three different interests, without prejudice to the rights of authors. This finally led to the International Convention for the Protection of Performers, Producers Phonograms and Broadcasting Organizations, the Rome Convention of 1961. Here the three interests are bundled together, and although the Convention itself does not use the term “neighboring rights,” it has been widely used since then in national legislation and in literature to designate the three rights conferred by the Rome Convention.

This should not obscure the fact, though, that several national copyright statutes also cover other “neighboring” or “related” rights. In Germany, for instance, we encounter rights not only of the three Rome beneficiaries but also of organizers of performances, a neighboring right of film producers, a right of photographers (where the photography is not a work), a right in editions of works or texts which are no longer protected, and a right concerning the publication of posthumous works. The United Kingdom also confers a so-called “copyright” on cinematograph films, cable-transmissions and the typographical format of published editions. Sweden has the so-called “catalogue rule,” protecting a large number of informational items in “catalogues, tables, and similar compilations.” In the Netherlands there has long been protection for “non-personal writings” like telephone directories or broadcast listings, which are protected by what could be called a neighboring right, or pseudo-copyright.

Rights neighboring to copyright, are, by definition, rights which are not genuine copyrights. They provide a strengthened protection against certain acts of unfair competition which can very loosely be associated with copyright infringements. Therefore they are situated “in the vicinity” of copyright. Only performers’ rights constitute a special case. . . .

Performers’ Rights: A Special Case

As defined in Article 3 of the Rome Convention, performers are actors, singers, musicians, dancers and other persons who act, sing, deliver, declaim, play in or otherwise perform literary or artistic works.

Their relation to authors and copyright protection has a truly curious history. Of course, before and during most of the nineteenth century, performers did not feel any need for protection along the lines of copyright; their performances could not be fixed on any recording or be reproduced, nor could they be broadcast or otherwise electronically transmitted to a wider public. Performances had a completely fleeting character and fame, as Schiller described them in his poem “Wallenstein.” Josef Kohler, the patriarch of the modern law of intellectual property, spoke of the “art of the moment” (Kunst des Augenblicks).

Performances were only live and could not be exploited outside the hall in which they were given. Adam Smith, in his work *The Wealth of Nations*, gave as classical examples of unproductive labor: “players, buffoons, musicians, opera-singers, opera-dancers.” His reasoning was: “The work of all of them perishes in the instant of its production.” Therefore, performers did not need any protection vis-à-vis third parties. Their whole legal position was laid down in their contracts with the organizers of the performances. In the elaboration of copyright doctrine in the nineteenth century, performers could therefore be overlooked. They were “vagrants” anyway.

The picture changed radically with the inventions of professional sound recording, films, radio, television, cable-retransmission and all sorts of equipment for private recording. This technological revolution made performers as vulnerable as traditional authors to unauthorized exploitation by third parties. Performers had to compete with records and films, and much live music in public places, for instance, was replaced by the increased use of records. The result was an unemployment problem for the whole musical profession. The individual performers needed protection against the unauthorized recording and reproduction of their performances and against unauthorized broadcasting or other communication to the public. This was already recognized by the International Literary and Artistic Association (ALAI) at its Congress in Weimar in 1903. In 1909 the already quoted Josef Kohler retracted his former opinion that performances were no subject of copyright. Since it had become possible to give

the performance permanence, it had to be recognized as the work of an author, he now conceded. And indeed, I would think if personal expressions are protected by copyright, as is universally accepted, then it is difficult to see why a performance—which is always a personal expression—should be excluded. The mere fact that a performance presupposes a pre-existing musical or other work of a traditional author cannot be an obstacle. Marcel Proust recognized this in his elaborate descriptions, in *Remembrance of Things Past*, of the performance of Racine's *Phdre* by the actress "la Berma."

From the beginning, translations and other adaptations of pre-existing works have been protected by copyright. The German legislature followed Kohler immediately. In 1910 a new paragraph 2 of section 2 of the 'Literary and Musical Copyright Act equated performances with adaptation of a work. In 1960 the Bundesgerichtshof also drew the conclusion from this article that performers had a right to authorize, i.e., prohibit, the public communication of their records. This was a decisive step beyond what the new German Copyright Act of 1965 would do a few years later. This Act retreated to a mere "neighboring right" for performers, which did not include a right to authorize, but only a right to remuneration, as foreseen in Article 12 of the Rome Convention. The Czechoslovakian Copyright Act of 1926 also contained provisions conferring on performing artists the status of adapters of the interpreted works and granted protection to their performances.

American court decisions have reached exactly the same results. For instance, Judge Learned Hand wrote:

[I]n the vast number of renditions, the performer has a wide choice, depending upon his gifts, and this makes his rendition pro tanto quite as original a 'composition' as an 'arrangement' or 'adaptation' of the score itself, which Section 1(b) makes copyrightable. Now that it has become possible to capture these contributions of the individual performer upon a physical object that can be made to reproduce them, there should be no doubt that this is within the Copyright Clause of the Constitution.

Barbara Ringer wrote: "It now appears settled beyond dispute under American law that the contribution of performing artists to a sound recording constitutes an original intellectual creation capable of protection as the 'writing of an author.'" Nimmer said on the subject: "It would seem that any instrumental performance, and any vocal rendition, be it musical or spoken, contains what Mr. Justice Holmes referred to as 'something irreducible, which is one man's alone' and which may be the subject of copyright." Also, in Europe, a number of scholars were and are of the opinion that performers should really enjoy full copyright protection and not just a nebulous and weaker "neighboring right."

Rights of Performers in the Rome Convention

Nevertheless, the copyright protection of performers has not carried through on the international level of the Rome Convention. It has even been abolished in national jurisdictions where it had existed before, as in Germany.

The Rome Conference of 1928 for the revision of the Berne Convention was approached but it contented itself with a resolution that requested Berne Union countries to consider what measures they could take to protect the interests of performers. The next Revision Conference of Brussels in 1948 went a step further. As we have already seen above, three resolutions were taken. Unlike the other two resolutions on producers of phonograms and on broadcasters, the one on performers based itself on the artistic quality of the performances and used the expression "rights neighboring on copyright." On the one hand, the claims of performers were elevated above those of producers and broadcasters, on the other hand, they were chased out of the realm of copyright proper. The subsequent turbulent history of the Rome Convention has only confirmed this tendency.

The Rome Convention was finally prepared by three international organizations: the Berne Secretariat, UNESCO and the International Labour Organization. As far as performers' rights were concerned, the ILO had ideas that differed considerably from those of the other two organizations, which were used to thinking in terms of individual copyright. The ILO was only interested in alleviating the

unemployment problems of the performers' profession. Quite characteristically the separate ILO draft of 1956 for a convention prescribed that the performers' remuneration for secondary uses of their phonograms should be paid, not to the individual right owners, but to the national collectivity of artists.

The ILO was looking for a pragmatic solution to economic and social problems of performers without any wish to bother itself about the nature of the rights to be created. They even explicitly wanted a clear and unambiguous separation between those rights and copyright as was explained by Straschnov, the powerful lawyer of the European Broadcasting Union, who was very much involved in the preparation of the Rome Convention. Although the collectivistic approach of the ILO draft was not followed in the text of the final convention, the antinomy between individual intellectual property rights and collective labor conventions has remained alive.

This can be illustrated by reference to the international contractual so-called type B-agreements between royalty collecting societies. According to these international agreements, remuneration collected for foreign performers remains in the country where it has been collected, to the benefit of the performing arts professions in that country. The result is a clear transfer of the earnings of successful performers, those who perform, get recordings and have their recordings broadcast, to the professional funds for unsuccessful performers. This type of agreement is recommended mainly by the International Federation of Musicians (FIM), which elaborated those principles in 1969 in cooperation with the International Federation of Actors (FIA) and the International Federation of the Phonographic Industry (IFPI), other co-founders of the Rome Convention. In a recent article, Jelinek, Director of the Czech Association for the Protection of Performers, of course writes enthusiastically about the type B-agreement, but he also adds one cautious sentence: "It may be that type B, which does not provide for payments from one country to the performers of another country, is not so close to the fundamental ideas of the Rome Convention."

This short history of the elaboration of performers' rights in the Rome Convention may help to explain why the idea of a full copyright for performers found no support, perhaps least of all among the representatives of the performers' associations.

The final result was that the rights conferred on performers in the Rome Convention were the weakest of all. They were not even defined as rights to authorize or prohibit, in sharp contrast to the rights of producers and broadcasters. The performers only obtained the "possibility of preventing" certain acts, a possibility that could be restricted to actions based on unfair competition or criminal law, i.e., without the granting of any exclusive right at all. In addition, the list of acts which could be prevented was minimal. The main points were the unauthorized fixations or broadcasts or other communications to the public. Control over general reproductions of fixations (record-piracy) and the broadcasting or other communication to the public of records were not among the rights granted to performers. For the last activity only an optional right to remuneration was included in the convention. Moral rights were not considered at all.

Rights of Producers of Phonograms and Broadcasters

As we have seen, the need for protection of performers had been the first one to be recognized by the Rome Conference for the revision of the Berne Convention in 1928 and by the Brussels Conference of 1948. A difference was that in 1948, two resolutions were added on the protection of record producers and broadcasters respectively. The rights of performers were already called "rights neighboring to copyright"; the other rights were not given any name as yet.

The elaboration of a convention text to protect performers was entrusted to the ILO as of 1926. Later on, the interests of phonogram producers and broadcasters were added. Where the status of performers had been pushed down to that of beneficiaries of a "right neighboring to copyright," the protection of the organizational and technical achievements and financial investments of producers and broadcasters was now elevated to that same intermediate level of "rights neighboring to copyright." They both received full exclusive rights. The producers received the right to authorize or prohibit the

reproduction of their phonograms and an optional right to remuneration in the case of broadcasting a record. The broadcasting organizations obtained rights with respect to rebroadcasting, fixation of broadcasts and certain reproductions.

In the literature there was and has been much opposition to this combination of totally different interests, but pragmatism and contentment combined with a certain degree of agreement between the three interdependent interest groups prevailed. Succinct criticism, however, pervades even the official WIPO Guide to the Rome Convention and to the Phonograms' Convention, where it is said:

True, the purist may complain that, notwithstanding the skill and talent of a recording engineer or a broadcast producer, the making of a record or of a broadcast is, after all, an essentially industrial act, whereas the performances of artistes are of their nature acts of spiritual creation; and to mix them up together in one convention creates a hotch-potch. Nevertheless, the Rome Convention has done so, always with the guideline of stopping the unfair appropriation of the labor of others.

In many national statutes, however, the differences between the unfair competition protection of producers and broadcasters, on the one hand, and the protection of the artistic achievement of the performer, on the other hand, are generally recognized. One of the first symptoms is that moral rights are conferred on performers and not on the other two neighboring right owners. Also, the explanatory memorandum to, for instance, the German Copyright Act of 1965 stresses explicitly the difference between the respective artistic and technical-financial achievements involved. In a very recent Report on Copyright, the German government proposed to extend the uniform 25 year-term of protection of neighboring rights to 50 years only for performers, stressing anew the basic difference from the other beneficiaries of neighboring rights. With an amending act of 1990 this has now indeed been realized. Perhaps this consequence goes a little far, but the message is clear. In England, Cornish speaks of "entrepreneurial copyright" in sound recordings and broadcasts. Also in other international literature the fundamental differences are time and again stressed.