Adherence to the Berne Copyright Convention: The Moral Rights Issue

by Ralph S. Brown

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102a. ADHERENCE TO THE BERNE COPYRIGHT CONVENTION: THE MORAL RIGHTS ISSUE

By RALPH S. BROWN*

The probability that the United States will at long last adhere to the Berne Convention is mounting.[1] It is indeed possible that, even before these remarks appear in print, both houses of Congress will have agreed on necessary changes to the Copyright Act, so that the Senate can exercise its prerogative to vote adherence.

When that occurs, we will be accepting the obligations that flow from the oldest and strongest of the collection of treaties that give authors rights outside their home countries. The Berne Convention achieved its centennial in 1986.[2] Several times revised and expanded,[3] it goes far beyond assuring authors that they will be given "national treatment"—that is whatever rights each country gives its own authors.

Berne has a formidable catalog of rights that must be recognized, covering most of the range of modern copyright law—and beyond.[4] One such

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*Simeon E. Baldwin Professor Emeritus, Yale Law School; Visiting Professor, New York Law School. This survey is adapted from remarks at a panel discussion on this subject at New York Law School March 3, 1988. I am indebted to the helpful contributions of my fellow-panelists: Harry Johnston, Esq., Vice-president, Law, Time, Inc.; Irwin Karp, Esq., Director, National Committee for the Berne Convention; John M. Kernochan, Nash Professor of Law, Columbia Law School. None of them is responsible for anything I state or misstate here. The session was sponsored by the N.Y. Law School Communications Media Center and the Columbia University Center for Telecommunications and Information Studies.

[1] "Today, the climatic variables are all favorable for U.S. adherence. There is a strong political consensus in favor of U.S. membership." Testimony of Cong. Robert W. Kastenmeier, Chairman, Subcommittee on Courts, Civil Liberties and the Administration of Justice, House Committee on the Judiciary before the Subcommittee on Patents, Trademarks and Copyrights, Senate Committee on the Judiciary, Feb. 18, 1988; "[A] consensus may be emerging among the affected interests in the United States and the Congress that the United States should now adhere to the Berne Convention." Statement of Ralph Oman, Register of Copyrights, ibid., p. 19.

[2] Consult *Papers Presented at a Conference to Celebrate the Centenary of the Berne Convention, 1886-1986*, 11 COLUM.-VLA J. OF LAW & THE ARTS 1 (1986).

[3] The successive versions of the Berne Convention for the Protection of Literary and Artistic Works are found in UNESCO and WIPO, 3 Copyright Laws and Treaties of the World (unpaged, 1984).

[4] For a concise and authoritative introduction to Berne, published by the World Intellectual Property Organization, consult C. Masouye, Guide to the Berne Convention (1978). A full treatment is S. Ricketson, The Berne Convention for the Protection of Literary and Artistic Works (1987).

fringe right protects folklore,[5] about which our law is assuredly silent. It got a toehold in the latest revision, that of Paris in 1971.

Moral rights, the topic of this paper, are assuredly not at the fringe. They have been part of Berne since the Rome revision of 1928.[6] Are they recognizably part of our law? Need we change our law to accommodate them? Is there something about moral rights that is alien to our system, so that we should stay clear of Berne rather than accept an obligation to respect them?

Before canvassing these questions, let us quickly tick off the reasons commonly advanced why we should be part of Berne, and also recall the price we have to pay in departures from our settled ways of conferring or denying copyright.

The official push for joining Berne, endorsed by President Reagan himself,[7] is fuelled by concern about our global trading position in intellectual properties. We are the great exporter. Somehow, it is suggested, membership in Berne would enable us to proceed more effectively against the massive piracy of American books and movies and television programs that has long been epidemic in certain parts of the world.[8]

It is not altogether clear why those rascals the pirates, who are not just denizens of parts of Asia and Africa, they are everywhere, will be any more respectful of us in Berne than they are of us not in Berne. For one thing, illicit flat-out copying of American works surely violates the Universal Copyright Convention of 1952, which we joined in 1955. The UCC, fostered by us, requires "adequate and effective protection of the rights of authors and other copyright proprietors."[9] Berne has a fuller set of teeth; but the 78 countries in the UCC (including the USSR, but not China) substantially overlap the 76 members of Berne (which do not include China, the USSR, or the United States).[10]

For another, American copyright owners, by simultaneous publication at home and in a Berne country, have been able to qualify for Berne protec-

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[5] In Article 15(4), but only as supported by legislation in the country of origin. See Masouye, note 4, supra, 95; Teran, *International Copyright Developments—A Third World Perspective*, 30 J. COPR. SOC'Y 129, 145 (1982).

[6] As Article 6 *bis*. Masouye, supra, note 4, 41.

[7] Reagan, *Message to the Senate Transmitting the Berne Convention*, 22 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 826 (June 18, 1986).

[8] Statements of this sort are the grist of almost every Congressional hearing. For the most recent examples, see 35 BNA, PATENT, TRADEMARK & COPYRIGHT J. 373 (1988) (March 3, 1988 Senate hearing).

[9] Universal Copyright Convention, Art. I.

[10] Lists of members as of Jan. 1, 1985, are in 4 M. & D. NIMMER, NIMMER ON COPYRIGHT, App. 21 and 22 (1987). The tally is from Sandison, *The Berne Convention and the Universal Copyright Convention: The American Experience*, 11 COLUM.-VLA J. LAW & THE ARTS 89, 100 (1986).

tion in all Berne countries. This is the famous—or notorious—"backdoor to Berne."[11] True, any Berne county can close the backdoor. So far it has remained open.

Better enforcement of rights is, I submit, not the strongest reason for joining Berne. More compelling is the feeling, or impulse, or sentiment, that we simply ought to be part of the club, since it's the best club in town. The World Intellectual Property Organization, an arm of the United Nations that administers Berne (from Geneva), is where the action is. Within the next decade there will probably be another review of Berne. We ought to have a real voice, both in the strengthening of author's rights that has been the historic mission of Berne, and, from the other direction, in fending off developing countries that want easier access to works of authorship.[12] As Barbara Ringer put it in a pungent passage that describes our progress from "outlaw" to "outsider," to "stranger at the feast," "as the world's largest exporter of literary properties," she writes, "we can no longer afford to stand apart and content ourselves with sidelong glances."[13]

Let us accept that membership in Berne, even if it entailed burdens, would be beneficial. But most benefits have their costs. The costs for us lie in the pangs that accompany changes in our law, especially when the changes uproot established ways.

For the first 90 years of Berne, we were out of play with respect to duration of copyright. Berne requires copyright, in most cases, to endure for the life of the author plus fifty years.[14] We had our increasingly eccentric system of a term of years renewable for a second term,[15] borrowed from the mother country, but abandoned by her back in 1814.[16] The Universal Copyright

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[11] Id. at 103; 3 NIMMER, supra, note 10, § 17.04[D][2].

[12] This cluster of reasons is also repeatedly recited in hearings and other forums. See, e.g., statement by Barbara Ringer, former Register of Copyrights, before the House Subcommittee on Courts, Civil Liberties, and the Administration of Justice, Feb. 9, 1988.

[13] Ringer, *The Role of the United States in International Copyright—Past, Present, and Future*, 56 GEO. L.J. 1050, 1078 (1968).

[14] Life plus 50 came into Berne in the Berlin Revision of 1908. The duration provisions of Berne are in its Article 7.

[15] See Guinan, *Duration of Copyright*, 1 STUDIES ON COPYRIGHT 58 (Arthur Fisher Mem. Ed. 1963) for the elongation of the two terms, reaching 28 years renewable for another 28 in the 1909 Act. Works in their first term on Jan. 1, 1978, still have a renewal term, now of 47 years, for a total of 75 years, to match the extended term given works already in their second term on Dec. 31, 1977. 17 U.S.C. §§ 304(a) and (b). On the unceasing vagaries of rights in the renewal term, compare Kupferman, *Renewal of Copyright*, 44 COLUM. L. REV. 712 (1944), with Nevins, *The Magic Kingdom of Will Bumping: Where Estates Law and Copyright Law Collide*, 35 J. COPR. SOC. 77 (1988).

[16] See Guinan, note 14, supra, at 57. Great Britain adopted life plus 50 in 1911. Ibid.

Convention was tailored to accommodate our scheme. But then we changed our law in the 1976 General Revision and went to life-plus-fifty,[17] so that is no longer an issue.

The second major dissonance with Berne, which is still with us, lies with Berne's ban on any formalities for obtaining or retaining a copyright.[18] We, of course, still require a copyright notice on published works, and, before you can sue, registration.[19] Registration later than three months after publication also cuts out some remedies.[20] The defenders of the obligatory notice appear to be in full retreat. The Copyright Office would like to preserve registration pretty much as it is, and argues that the present law satisfies Berne (other Berne countries have similar laws). It wants to keep some stimulus for voluntary registration, because of the great utility of an official register of the more than half a million registrations annually, (though very few are directly linked to the initiation of litigation). Registration is also valuable because it augments the deposit of copies in the Library of Congress.[21]

However, the obligation to deposit copies of a published work in the Library of Congress already has a separate statutory base, enforced by money penalties[22] and is divorced from the preservation of copyright.

Subject to some resolution of the registration requirement, it appears that we may be ready to take the costs, such as they are, of abandoning formalities.

Third, Berne protects certain works, notably of architecture, in ways that we do not.[23] Of some consequence, with us copyright does not subsist in the appearance of a building, only in the graphic plans. But a case can be made that our law would recognize rights in the purely artistic elements of a structure;[24] and, it is arguably only a short step from that to whatever Berne requires. While it would gladden the hearts of architects to have more extensive protection, it is unlikely that they will get it. A plausible fudging of rights in architecture will permit inaction on this score.[25]

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[17] 17 U.S.C. § 302(a).

[18] Art. 5(2).

[19] 17 U.S.C. §§ 401, 408, 411. The manufacturing clause of § 601 was a long-standing irritant, unacceptable under Berne as a formality, but it expired in 1986.

[20] 17 U.S.C. § 412.

[21] See Statement of Register Ralph Oman, note 1, supra, p. 15. Cf. Statement of Irwin Karp, p. 15 Ibid.

[22] 17 U.S.C. § 407.

[23] Art. 2(1). See *Final Report of the Ad Hoc Working Group on U.S. Adherence to the Berne Convention*, 33 J. COPR. SOC'Y 184 (1986).

[24] See Shipley, *Copyright Protection for Architectural Works*, 37 SO. CARO. L. REV. 393 (1986) (arguing for stronger protection).

[25] See Testimony of Cong. Robert Kastenmeier, note 1, supra, pp. 6-7: ("Whether we should extend substantial protection to architecture. . .can be considered after adherence to Berne").

The fourth long-standing barrier to Berne adherence has been Berne's requirement of recognition to moral rights. This brings us to the topic of this survey.

Here is the essential ascription of moral rights in Berne:

> Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor our reputation.[26]

This clause first embraces the paternity right, "the right to claim authorship." In some contexts we would more readily call this the right to credit. It also imbeds the integrity right, in embarrassingly high-flown language. Prejudice to "honor or reputation" sounds more like a remedy against defamation, rather than against unwanted editing.

Berne's rhetoric reflects French law. The French, who take moral rights very seriously, have at least two other moral rights, but they need not concern us. One is the right of first publication, which we essentially recognize too. The other is the right of withdrawal. You can make a contract to publish and then change your mind, provided you indemnify the assignee.[27] This right is ill-developed even in French law, deservedly so I would say.

From the recent debate about the moral rights situation and adherence to Berne, three positions have emerged. The first favors adherence, and argues that our law, as it stands, protects the paternity right and the integrity right sufficiently for us to be able to adhere in good faith. The second also favors adherence, but calls for explicit legislative recognition of moral rights; what we have is not good enough. The third opposes adherence, basically on the ground that the Berne treaty language would become part of the law of the land. It is further argued that even if Berne is not self-executing, adherence would influence the direction of adjudication and legislation toward creating rights in authors that would intolerably hamper the production of all the major media: print, broadcasting, film, and perhaps music.

Is the first position, sometimes dubbed "minimalist," a reasonable one? The paternity right, to claim authorship, to receive credit, has considerable support in our law and custom. By "custom" I refer especially to the highly-developed conventions and contracts for recognition that screen and stage figures have evolved, backed up by collective bargaining agreements. These

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[26] Art. 6*bis* (1).

[27] See Reeves, Bauer, & Lieser, *Retained Rights of Authors, Artists, and Composers under French Law on Literary and Artistic Property*, 14 J. OF ARTS MANAGEMENT & LAW, No. 4, pp. 10-14 (1985).

contracts get right down to the size of type in advertisements.[28] The law in the last decade has come to the rescue also of those unprotected by contract. It permits an actor or author who has been denied credit to invoke flashy Section 43(a) of the federal Lanham Act.[29] This protean passage makes actionable any false designation of origin.[30] It has been especially useful to authors who want to *deny* paternity, when their name has been put on something they didn't write.[31]

Of special interest is an Ohio case where a researcher protested that his boss had wrongly claimed paternity of the researcher's discovery. The court, applying state law, said it didn't make any difference whether the claim was labelled "plagiarism, invasion of privacy, or prima facie tort;" the plaintiff could have relief.[32]

That there is a paternity right does not mean that it can be exercised under all circumstances. Consider the case of a willing ghost-writer, who has initially contracted for anonymity, or for an "as told to" role, then changes her mind, and demands more credit than the contract called for. Put in more formal terms, can one effectively disclaim or waive the paternity right? To be sure, French law grandiloquently declare that moral rights are "perpetual, inalienable, and imprescriptable."[33] But it is not proposed that we adhere to French law, only to Berne. The Convention says nothing about inalienability.[34] We will return to the alienability question in connection with the integ-

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[28] See generally, 1 T. Seiz and M. Simensky, ENTERTAINMENT LAW (1983), chs. 8-15.

[29] At least where the credit is misattributed to another. Smith v. Montoro, 648 F.2d 602 (9th Cir. 1981). Section 43(a) is 15 U.S.C. Sec. 1125(a).

[30] For contrasting views of the proper scope of § 43(a), compare Germain, *Unfair Trade Practices Under Sec. 43(a) of the Lanham Act; You've Come a Long Way, Baby—Too Far, Maybe?*, 49 IND. L. REV. 84 (1973) with Bauer, *A Federal Law of Unfair Competition: What Should Be the Reach of Section 43(a) of the Lanham Act?* 31 UCLA L. REV. 671 (1984).

[31] Follett v. Arbor House Pub. Co., 497 F. Supp. 304 (S.D.N.Y. 1980). Cf. Shaw v. Time-Life Records, 38 N.Y.2d 201, 341 N.E.2d 817 (1975) (orchestra leader could have relief from misattribution on common-law passing-off ground); Zim v. Western Pub. Co., 573 F.2d 1318 (5th Cir. 1978) (privacy ground).

[32] Bajpayee v. Rothermich, 53 Ohio App. 117, 123, 372 N.E.2d 817, 821 (1977).

[33] Law of March 11, 1957, art. 6. See Françon and Ginsburg, *Authors' Rights in France: The Moral Right of the Creator of a Commissioned Work to Compel the Commissioning Party to Complete the Work*, 9 COLUM.-VLA J. LAW & THE ARTS 381, 382 (1985).

[34] Plaisant, *Droit de Suite and Droit Moral Under the Berne Convention*, 11 COLUM.-VLA J. LAW & THE ARTS 157, 161 (1986). Professor Plaisant observes that "it is in fact a personal right and so more or less inalienable." Ibid. I suppose there would be general agreement that moral rights are not assignable. Cf. Berne Convention Art. 6*bis* (2), which makes the enforcement of moral rights after the death of the author "at least until the expiry of the economic rights" (not perpetually, as the French law declares) "exercisable by the persons or

rity right, and the concerns of magazine publishers that drive them to oppose adherence.

The integrity right is much more complicated. The vivid example that comes to mind, when we envision the "distortion or mutilation" forbidden by Berne, is the destruction of a work of visual art. The classic American case is that of Alfred Crimi. His large fresco in a Presbyterian church in New York City lasted only eight years before the congregation, supposedly offended by Crimi's barechested Christ, let it be destroyed. Crimi had no remedy.[35] A current case, which trembles in the balance, is the fate of Richard Serra's "Tilted Arc," a rusty slab 12 feet high and 122 feet long that slants across the plaza of the Javits Office Building in downtown New York. The General Services Administration proposes to move it, where to it hasn't said. Serra lost a lawsuit seeking to prevent this,[36] but an advisory panel of art experts is on his side. At this writing, the bureaucratic outcome is not yet known.[37]

As is well-known, California and Massachusetts have modern statutes protecting artworks from alteration or destruction, and also establishing a paternity right for works "of recognized quality" (a bramble-bush still to be entered). New York (and three other states) have statutes too, which while emphasizing the paternity right, also protect the artist from public display, in an altered form, of a work attributed to him.[38] The New York statute was invoked to permit Robert Newman to complete a mural he had done by sandblasting on the outer brick wall of a theater in New York City.[39]

All these state statutes raise prickly questions of preemption under federal copyright law.[40] But, for the time being, there they are; and they are

institutions authorized by the legislature." The practical question is not in alienability, whatever that means, but whether an author or his representatives can effectively waive or disclaim the exercise of a moral right. Plaisant further asserts that: "French law is almost alone in declaring inalienability, although in practice it is applied with caution." Ibid. at 162.

35 Crimi v. Rutgers Presbyterian Church, 194 Misc. 570, 89 N.Y.S. 2d 813 (Sup. Ct. 1949).

36 Serra v. General Services Administration, 667 F. Supp. 1042 (S.D.N.Y. 1987), appeal pending ("moral rights" as such not raised; First Amendment claim rejected because decision to move the work was "content-neutral," namely desire to open up the Plaza).

37 "Trying to Move a Wall of Art," N.Y. TIMES, March 13, 1988, p. —.

38 California Art and Public Building Statute, CAL. CODE § 15813.5 (West 1980); California Art Preservation Act, CAL. CODE § 987 (West 1983 Supp.); New York Artists' Authorship Right Act, N.Y. ARTS AND CULTURAL AFFAIRS LAW §§ 14.51-14.59 (McKinney 1984); Massachusetts Artists' Rights Statute, MASS. GEN. LAWS, ANN. ch. 488, §§ 1-2(c) (West 1984); Maine Act of June 20, 1985, ME. REV. STAT. ANN. tit. 27, § 303 (1985); New Jersey Artists' Rights Act, LAWS 1986, c. 97; Rhode Island P.L. 1987, ch. 566.

39 Newman v. Delmar Realty Co., Inc., 91 N.Y.L.J., June 11, 1984, p. 12 (Sup. Ct. 1984).

40 Francione, *The California Art Preservation Act and Federal Preemption by the*

proudly hailed as the dawn of moral right in this country for the visual artist.

These new statutes pulsate with questions both as to interpretation and validity. Without tackling any of these questions, let us accept that in California and New York, the two states that are the principal centers of the art market in this country, adequate recognition exists for the integrity rights of visual artists. At the federal level, Senator Edward Kennedy is promoting a Visual Artists Rights Act that would confer an integrity right.[41] The changes of its passage, it seems to me, are heavily compromised by its other half: it attempts to create a resale royalty right for visual artists. This controversial *droit de suite*, as it is called in francophone discourse, now exists by statute in California,[42] and in some European countries. Vigorously opposed by art dealers and collectors, the resale royalty cause is not likely to help the integrity cause.

In existing copyright law, *if* a visual artist who sells an artwork retains the copyright, she may be able to prevent mutilation or distortion of the work by reliance on her Section 106(2) exclusive right "to prepare derivative works based on the copyrighted work." The argument would run that the altered work would be comprehended in the capacious statutory embrace that makes a derivative work of "any. . .form in which a work may be recast, transformed, or adopted."[43] Would this avenue of protection extend to prevent the destruction of a work? We do not know, nor is there any authority that enfolds the integrity right in the derivative right.[44] Nor can we say at this time whether Lanham Act Section 43(a) could be invoked by the aggrieved visual artist.

The recognition in our law of any integrity right for wordsmiths, as distinct from visual artists, is exceedingly porous. The general view has been that the creator of a literary (or other) work who parts with the copyright has nothing to say about what is then done to the work unless control is reserved by contract.[45] Those who write as employees never have the copyright. If their work is "made for hire," the statute in a perverse way declares that the employer is the author, as well as the owner of the copyrights[46] (a matter to

1976 Copyright Act: Equivalence and Actual Conflict, 18 CAL-WEST. L. REV., 189 (1982).

41 The bill is Sen. 619. A summary of hearings on Dec. 3, 1987, is in CCH Copr. Law Rep. ¶ 20,465 (1988).

42 CAL. CIVIL CODE § 986 (1976).

43 17 U.S.C. § 101.

44 See Damich, *Moral Rights in the United States and Article 6*bis *of the Berne Convention: A Comment on the Preliminary Report of the Ad Hoc Working Group on U.S. Adherence to the Berne Convention*, 10 COLUM.-VLA J. LAW & THE ARTS 655, 659 (1986).

45 See 2 M. & D. Nimmer, NIMMER ON COPYRIGHT § 8:21[B]; Landon v. Twentieth Century-Fox Film Corp., 384 F. Supp. 450 (S.D.N.Y. 1974).

46 17 U.S.C. § 201(b).

which we shall presently return).

A lot has been made of *Gilliam v. ABC*,[47] the *Monty Python* case, where the Second Circuit held that a broadcaster's hamfisted bowdlerizing of the comic group's mild bawdry exceeded the broadcaster's contractual license to edit, and accordingly constituted copyright infringement. Further, the court said, the distortion was so marked that it was actionable as a false representation under Section 43(a) of the Lanham Act, which we have already seen to be a powerful prop for paternity claims. Judge Gurfein, who concurred in the result, was unwilling to follow the 43(a) path. He reminded us that the plaintiff's rights were still rooted in the contract, which might have granted ABC the privilege to edit to the point of distortion.[48] But even the majority stated: "American copyright law, as presently written, does not recognize moral rights, since the law seeks to vindicate the economic, rather than the personal rights of authors."[49]

That is a quite orthodox statement of a limit to the reach of our copyright law. Copyright needs support from other sources to make much headway in encompassing the claims of authors that are lumped together in the notion of moral rights. Section 43(a) of the Lanham Act has had some limited influence beyond the Monty Python case itself,[50] but it is a long way from providing a solid buttress for integrity rights of writers.

Nevertheless, for the sake of legitimizing a hoped-for adherence to Berne, one school of thought holds that by stitching together the paternity cases, the visual art statutes, *Monty Python*, and other scraps and fragments, we can fashion a loincloth, or at least a G-string, that will cover our moral rights nakedness.[51]

This point of view is reflected in most of the bills that have been introduced in Congress looking toward Berne adherence. They contain no provisions creating moral rights; and the statements that accompany them sometimes declare that none are necessary. Indeed, the current administration bill, S. 1971, declares that Title 17, the Copyright Act, does not "pro-

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47 Gilliam v. American Broadcasting Companies, Inc., 538 F.2d 14 (2d Cir. 1976).

48 Id. at 26.

49 Id. at 24.

50 See Jaeger v. American International Pictures, Inc., 330 F. Supp. 274 (S.D.N.Y. 1971); Benson v. Paul Winley Record Sales Corp., 452 F. Supp. 516 (S.D.N.Y. 1978). The main ground of the Monty Python case, that a licensee's distortion of a work may breach the license and become copyright infringement, is followed in National Bank of Commerce v. Shaklee Corp., 503 F. Supp. 533 (W.D. Tex. 1980); WGN Continental Broadcasting v. United Video, Inc., 693 F.2d 622 (7th Cir. 1982).

51 *Final Report of the Ad Hoc Working Group on U.S. Adherence to the Berne Convention*, 33 J. COPR. SOC'Y 184 (1986). See Kwall, *Copyright and the Moral Right: Is an American Marriage Possible?*, 38 VAND. L. REV. 1 (1985) (cites earlier articles).

vide" either paternity or integrity rights.[52]

An oblique justification for the currently dominant view that our skimpy moral rights garment will not embarrass us in Berne comes from the observation that other Berne countries, notably Great Britain and Australia, offer even less.[53] A more wordly rationale observes that because WIPO is every bit as eager to have us part of the club as we are to join it, it does not balk at our minimalist condition.[54]

The second of the three attitudes earlier described—that we should adhere to Berne, but that we need to have a stronger panoply of moral rights, is one that I lean toward, as do some commentators.[55] Representative Kastenmeier, the acknowledged Congressional dean of copyright (especially so since Senator Mathias's retirement), had a fleeting attachment to this position, and gave it a statutory debut in his H.R. 1623 of 1987. That bill contains a moral right clause to be added to Section 106 of the Copyright Act. It paraphrases the language of Berne, but it excludes works made for hire. Furthermore, a new Section 119 would make the moral right freely transferable and waivable. There is more in Section 119: unless the author withholds consent, necessary, customary and reasonable "editing, arrangement, or adaptation" in preparation for dissemination of a work "will not infringe the moral right."

Congressman Kastenmeier, after a round of hearings on his bill, made a pilgrimage to WIPO headquarters in Geneva. On his return, he testified before the Senate Subcommittee on Patents, Copyrights, and Trademarks that he no longer considers moral rights legislation necessary, and that its pursuit could delay passage of those changes necessary to secure adherence.[56]

There remains for consideration the third attitude listed earlier, that of opposition to adherence on the ground that any moral rights, from whatever

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[52] Such a declaration probably dispels any preemption of state law under 17 U.S.C. § 301. If federal rights were created, as was proposed in H.R. 1623, infra, preemption would occur on a large scale—too large to consider here.

[53] Final Report, note 51 supra. On the British position (which does protect against false attributions of paternity), see W. Cornish, INTELLECTUAL PROPERTY 392-6 (1981); J. Sterling and M. Carpenter, COPYRIGHT LAW IN THE UNITED KINGDOM 347-50 (1986).

[54] Letter from Dr. Arpad Bogsch, Director General of WIPO to Irwin Karp, Esq., June 16, 1987 (introduced by Mr. Karp at Senate hearings, March 18, 1988): "In my view, it is not necessary for the United States of America to enact statutory provisions on moral rights in order to comply with Article 6*bis* of the Berne Convention."

[55] Damich, note 44 supra; Geller, *Comments on Possible U.S. Compliance*, id. at 153; Kernochan, *Comments*, id. at 174; but cf. further Kernochan *Comments*, id. at 188 ("Squeaking by" is good enough). Cf. Paul Goldstein testimony, House Hearings Feb. 10, 1988 (legislation creating moral rights should operate prospectively only).

[56] Senate Hearings Feb. 18, 1988, note 1 supra.

source derived, are an unendurable clog on publishing and broadcasting. These interests, represented by former Register of Copyrights David Ladd,[57] view writers as sharing the litigious propensities of our society. Once given the levers of Berne to pull, they would rush into court (or into legislatures) to claim rights. One thing would lead to another and we might wind up with the remarkable array of moral rights that French authors enjoy.[58]

French law is indeed highly protective. Here in summary is an extraordinary recent case. Two writers contracted for a 13-week television series on modern painting. After four weeks, the broadcaster attempted to cancel. Although the remaining installments had not been completed or delivered, a court ordered specific performance of the contract, despite the presence of a liquidated damages clause.

Another case, brought by the artist Jean Dubuffet against the automaker Renault, similarly resulted in a direction for Renault to carry to completion a monumental sculptured entrance to its headquarters, despite an explicit liquidated damages provision in the contract under which Dubuffet undertook to design the work (and Renault to erect it).[59]

These two episodes suggest that the French moral right to control first publication includes an affirmative right to compel publication or realisation of a work, that failure to complete violates the integrity right, and that no waiver can be extracted from liquidated damages alternatives. Indeed, a stimulus of nightmares for those who commission great works! But the cases are at the borderline even of French law; Professors Françon and Ginsburg, in a helpful critique, tactfully conclude that they "represent a fragile jurisprudence."[60]

In any event, Berne does not incorporate French law. It is very doubtful that Berne stands in the way of waiver or disclaimer, of the two rights that it protects—paternity and integrity.[61] It does not appear that other leading

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[57] See his Statement before the House Subcommittee, Sept. 6, 1987, on behalf of "The Coalition to Preserve the American Copyright Tradition," composed of publishers, (predominantly of magazines) and Turner Broadcasting System. Movie producers favor Berne accession because of their preoccupation with piracy; but they want moral rights kept at a sub-minimal level. Statement of Motion Picture Association of America before House Subcommittee, Sept. 16, 1987.

[58] And beyond. One possibility that alarmed Ladd was a WIPO staff proposal that failure of a radio station to identify the composers and lyricists of popular music recordings would infringe their moral rights. Ladd Statement at 13, citing COPYRIGHT: MONTHLY REVIEW OF WIPO, 185, 207, July, 1987.

[59] On these two cases and other aspects of French moral right, see Françon & Ginsburg, note 33 supra, passim.

[60] Note 33 supra, at 406.

[61] This is clearly demonstrated by Nimmer, *Implications of the Prospective Revisions of the Berne Convention and the United States Copyright Law*, 19 STAN. L. REV. 499, 523 (1967).

Berne countries have such severe restrictions.[62] And the fear of extreme outcomes like those of the two recent French cases should be dispelled by the last subsection of Berne's Article 6*bis*: "Means of redress for safeguarding the rights granted by this article shall be governed by the legislation of the country where protection is claimed." We *are* masters of our fate.

Indeed, Congressman Kastenmeier's 1987 proposal, which by recognizing moral rights inflamed opponents of adherence, arguably should have had a calming effect. The moral rights provisions of H.R. 1623 were an almost toothless tiger when you consider that they excluded works made for hire, allowed full waiver and transferability, and contained an overriding editing privilege.

In my view, the Kastenmeier proposal concedes too much when it omits work "made for hire" altogether from its moral rights clause. Consider the status of people who create the products of the major media—broadcasting, film, the press. They are predominantly employees, so that their work is done for hire. Our copyright law, in a strong-arm way, makes authors out of employers and also confers ownership of all rights on the employer.[63] Whatever rights employees retain come from contract—collective bargaining contracts in some fields, individual contracts of employment in others. All these contracts typically leave to the employer the power to edit, alter, cut, or bury their employees' productions. If the relation is not one of employment, the work may still be considered for hire if it is supervised or controlled by the entity that proposes to buy it.[64] Even if the work cannot initially be considered for hire, if it is one of nine categories of commissioned works listed in the

[62] See Note 34 supra. "Inalienability" is much too capacious a concept to capture the practical concerns that attend dealings between authors and publishers (in whatever medium). See Rose-Ackerman, *Inalienability and the Theory of Property Rights*, 85 COLUM. L. REV. 931 (1985); Epstein, *Why Restrain Alienation?*, id. at 970. In our copyright law, transferability is the norm, 17 U.S.C. § 201(d); the only significant exception seems to be the puzzling restriction on the early exercise of the termination-of-grants right of § 203 in § 203c(a)(5), as to which see Curtis *Caveat Emptor in Copyright: A Practical Guide to the Termination-of-Transfers Provisions of the New Copyright Code*, 25 BULL. COPR. SOC'Y 19, 67 (1977).

[63] 17 U.S.C. § 201(b).

[64] Aldon Accessories, Ltd. v. Spiegel, Inc., 738 F.2d 548 (2d Cir. 1984). For a persuasive argument that Congress intended, when the work for hire provisions in the 1976 statute were drafted in 1965, to cut out this category, so that only work in the scope of employment (§ 101, definition of "work made for hire," subsec. (1)), or the commissioned works in subsec. (2) would be so labelled, see Litman, *Copyright, Compromise, and Legislative History*, 72 CORN. L. REV. 857, 889 (1987) and Hardy, *Copyright Law's Concept of Employment* 35 J. COPR. SOC'Y No. 3 (April 1988) (this issue). But the courts have stayed with the line of cases that continued after 1965 to emphasize supervision as an index of work for hire, unheeding of the statutory language, until a recent refreshing decision that parts company with *Aldon Accessories* and restores the 1965 in-

statute the parties can still agree that it shall be considered for hire.[65] These commissioned works include contributions to collective works (thus taking care of in magazines and newspapers), and parts of movies and other audiovisual works.

There is a groundswell of opinion among commentators that the reach of work made for hire is over-inclusive; a variety of proposals are riding on that wave with a view to leaving more copyrights to creators.[66]

All these relationships are malleable by contract and the same should be true of paternity and integrity rights. If that is so, does it make any difference whether a creator starts out with neither copyright nor moral right, if she is an employee, and has to make a contract to reclaim any part of the bundle of rights? Is something to be said for lodging the bundle initially with the creative person, and leaving their transfer to the initiative of the buyer?

I think something is to be said for tipping the balance initially toward the creator. Except for the highly sought-after few at the top who can largely make their own terms, most writers and artists have to come to terms with the hard realities of the market. The users of works of authorship tend to be large entities; the producers atomistic.

Returning from the perplexities of work for hire to the realities of the market-place, it stretches credulity to think that Time, Inc., for example, will under any imaginable legal regime lose its authority substantially to control the creative impulses of its many minions, highly paid though they may be.

Even in France, life goes on. Dr. Arpad Bogsch, the Director General of WIPO, made a pointed observation to Alan Hartnick, who reports it in his useful account of a recent WIPO/UNESCO Conference. Referring to American reaction to moral rights, Bogsch said to Hartnick: "Many magazines are published in Europe, notwithstanding moral rights, so why the concern?"[67]

Bogsch suggests a brute fact in all this. The behavior of writers for the media in the end (and in the beginning too) is going to be dominated by economic concerns. Never mind that moral rights are proclaimed as "personal" and contrasted to "economic" rights. Authors who flaunt their moral rights are not likely to find steady employment. The far-out French cases

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tention. Easter Seal Society v. Playboy Enterprises, 815 F.2d 323 (5th Cir. 1987), *cert. denied*, 56 U.S.L.W. 3661 (U.S. March 28, 1988) (No. 87-482).

65 17 U.S.C. § 101.

66 See Dreyfuss, *The Creative Employee and the Copyright Act of 1976*, 54 U. CHI. L. REV. 590 (1987); Fitzgibbons & Kendall, *The Unicorn in the Courtroom*, 15 J. ARTS MANAGEMENT & LAW 23 (Fall 1985); Karp, *Reflections on the Copyright Revision Act*, 34 J. COPR. SOC'Y 53, 67 (1986); Litman, note 65, supra; Ossola, *Works for Hire: A Judicial Quagmire and a Legislative Solution*, 17 J. ARTS MANAGEMENT & LAW 23 (No. 3, 1987); Note, 14 PEPP. L. REV. 381 (1987); 125 U. PA. L. REV. 1281 (1987); 20 U.S.F. L. REV. 649 (1986).

67 See Hartnick, *What Happened at the WIPO/UNESCO Geneva Conference on the Printed Word*, N.Y.L.J. Feb. 5, 1988, p. 5, 19 n.2.

arise from relationships that have been broken off, as in the two that I mentioned.

The alarms that cause large users of creative talent to fear and oppose Berne adherence because of what they perceive as threats from moral rights in the end seem false. If the choice then is whether to go in with ragged moral rights vestments, or to cut a better figure by legislation something like the discarded Kastenmeier proposals, I as legislator would prefer the second approach as more seemly for a proud nation. But perhaps the historic moment for accession has arrived. If it has, moral rights once again will have to wait.