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Article abstract

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These new "rights of personality" appear to apply equally to all artists. In practice, however, the Act's provision for waiving moral rights could lead to diminished protection for employee-creators. The author suggests that this is particularly true in the collaborative arts such as motion picture production where unequal bargaining conditions between creators and producers are likely to prevail.

MORAL RIGHTS AND CANADIAN COPYRIGHT REFORM: THE IMPACT ON MOTION PICTURE CREATORS*

par Jonathan HERMAN**

Les droits traditionnels qui accordent à l'artiste le monopole sur l'exploitation financière de son oeuvre, sont maintenant complétés par l'expansion des droits moraux qui ont été introduits au Canada par la réforme de la Loi sur les droits d'auteur de 1988. Le concept des droits moraux est inspiré de la doctrine européenne selon laquelle l'art est une extension de la personnalité de son auteur. Ce concept inclut donc le droit à la divulgation, le droit à la paternité et le droit à l'intégrité de l'oeuvre artistique.

Ces nouveaux «droits de la personnalité» semblent applicables également à tous les artistes. Cependant, en pratique la disposition de la Loi qui permet la renonciation des droits moraux pourrait conséquemment diminuer la protection des employés-créateurs. L'auteur soumet que cette crainte est particulièrement présente dans les milieux artistiques de collaboration tel que la production cinématographique et ceci en raison de l'inégalité du pouvoir de négociation entre créateurs et producteurs.

The traditional rights of an artist to preserve his monopoly on the financial exploitation of his work, now take their place alongside newly expanded moral rights introduced by the reform of Canada's Copyright Act in 1988. Moral rights are inspired by the European doctrine that art is the extension of the creator's personality and they include the rights to divulge, to claim authorship and to maintain the integrity of artistic work.

These new «rights of personality» appear to apply equally to all artists. In practice, however, the Act's provision for waiving moral rights could lead to diminished protection for employee-creators. The author suggests that this is particularly true in the collaborative arts such as motion picture production where unequal bargaining conditions between creators and producers are likely to prevail.

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*. Premier prix dans le cadre du Concours Chénier Picard 1989. Were it not for the generous advice and encouragement of Professor Marcel Dubé, this article would have met the same obscure fate of so many university term papers which have gone before it. It is to him that I express my sincerest gratitude.

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SOMMAIRE

INTRODUCTION

> There is more at stake in the expression of a work than economic reward. Creative works are very much the expression of the personality of their authors. There is an identification between authors and their works. The Sub-Committee agrees with the many witnesses who stated that creators cannot be fully protected unless their moral rights are recognized and enhanced.
>
> - A Charter of Rights for Creators[1]

For creators who believe that society's need to exploit artistic endeavour must be tempered with the recognition that art is an extension of the very personality of the artist, this affirmation in 1985 by the House of Commons Sub-Committee on the Revision of Copyright is a welcomed statement of principle. Statements of this kind are not new in Canada. In 1977, Keyes and Brunet made similar declarations in support of the codification of moral rights for creators[2], as did the government's White Paper in 1984[3]. Nor was statutory inclusion of moral rights completely foreign to Canadian law before 1985. The right of an author, independently of his copyright, to claim authorship of his work as well as to restrain its distortion has been part of the Copyright Act since 1931[4]. After more than thirty years of discussion of how to adapt antiquated copyright legislation to a rapidly changing society, the Charter of Rights for Creators is particularly significant in that it became the direct precursor to long-awaited legislative change. During the summer of 1988, Parliament finally adopted its Act to Amend the Copyright Act[5], and with it, a new set of moral rights for creators.

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1. CANADA, A Charter of Rights for Creators: Report of the Sub-Committee on the Revision of Copyright, Ottawa, Minister of Supply and Services, 1985, p. 6.
2. A.A. KEYES and C. BRUNET, Copyright in Canada - Proposals for Revision of the Law, Ottawa, Queen's Printer, 1977, pp. 55-59. In fact, it was this report whose thrust in favour of creators' moral rights marked a significant departure from previous studies which suggested that such rights should be based more on contractual rather than statutory considerations. p. 55.
3. CANADA, From Gutenberg to Telidon: A White Paper on Copyright, Ottawa, Minister of Supply and Services, 1984, pp. 1, 25-27.
4. Copyright Act, R.S.C. 1985, c. C-42, s. 14(4), formerly R.S.C. 1970, c. C-30, s. 12(7).
5. An Act to amend the Copyright Act and to amend other Acts in Consequence thereof, R.S.C. 1985, c. 10 (4th Supp.), formerly S.C. 1988, c. 15.

Although the reform deserves a warm round of applause, its proponents would do well to withhold any enthusiastic standing ovations for now, especially if they consider themselves to be moral rights «purists» or if they believe that all creators, particularly those employed in the motion picture industry, will benefit equally under the new law.

A general skepticism is warranted if one recognizes the apparent juxtaposition of this country's two legal traditions. Canada's copyright law is inspired, first and foremost, by the Anglo-American emphasis on the artist's economic right to profit from society's commercial exploitation of his creativity. The notion that the product of creative activity is a fundamental expression of one's personality and apart from whatever pecuniary benefits that may accrue to an artist, is absent from this legal tradition except to the extent that such rights of personality may find application in common law actions for injunction, defamation, negligence or breach of contract[6]. At the same time, the 1988 reform of the Copyright Act, in its repeal and replacement of s. 14(4), incorporates principles derived from the European tenets of the moral rights doctrine which explicitly codifies the concept of the extra-patrimonial nature of artistic expression. It is by examining the extent to which Canadian law embraces the European doctrine, that moral rights purists can assess the general impact of reform on creators' rights. This evaluation of the incorporation of moral rights doctrine in Canada will be the subject of the first part of my study in which I provide, in one section, an overview of the doctrine's basic concepts, drawing primarily on French law for illustration. In a later section, I assess the degree to which these concepts have been, and are now, part of Canadian copyright law.

The second part of my analysis will address the question of whether all creators will benefit equally under the moral rights provisions of the revised Copyright Act by focusing on creators in the motion picture industry. While the Act does not directly discriminate against any particular artists, the very nature of film production greatly

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6. Arthur L. STEVENSON Jr., «Moral Right and the Common Law: A Proposal», in American Society of Composers Authors and Publishers: Copyright Symposium, No. 6, New York, Columbia University Press, 1955, pp. 92-107. In the United States, for example, the moral right to claim authorship of a work has been indirectly sanctioned by citing a film distributor for breach of contract for not acknowledging the producer of the film on promotional posters (pp. 98-99). The author also gives the example of an action for damages in tort for the modification of sculptures without the artist's permission (pp. 104-105). Whether the possibility for such recourse exists in Canada is doubtful, considering the general limitation on copyright actions as provided by s. 63 of the Copyright Act.

complicates the applicability of the moral rights contained therein. In order to illustrate the problems in the Copyright Act which affect motion picture creators, I will discuss the two conditions necessary for the exercise of moral rights: 1) that there must be a copyrightable «work» and 2) that the creator must be an «author» of the work. The notion of collaborative works and the role of employment contracts in the film industry will be central to the discussion. In this part I will refer to both the English and the French copyright laws for their solutions to some of the problems engendered by the nature of motion picture production.

Part I The Framework for Moral Rights in Canada

To what extent does the 1988 revision of the Copyright Act embrace the European theoretical model of moral rights? The first section will provide an overview of the moral rights doctrine by examining both the nature and the different categories of these rights. The introduction of moral rights in Canadian law with s. 14(4) of the Copyright Act as well as the recent modifications, will be examined in the second section.

1. Overview of the Moral Rights Doctrine

The relationship between the artist and society may be characterized in straightforward economic terms: society places demands on its members to share with it the fruits of their intellectual labour. Artists supply those demands; however, if society recognizes an artist's right of ownership of his intellectual work, he may set conditions and exact a price for the society's consumption of it. Copyright confers in the creator a monopoly to exploit his work in public for his own economic self-interest. Moral rights doctrine, on the other hand, begins with the premise that intellectual creation is a reflection of the originality of the spirit and personality of the author. Quite apart from the economic right to exploit one's work, the person and his creation are disassociable.

In his study of the evolution of the doctrine, Stig Stromholm situates the origins of the modern juridical notion of moral rights in nineteenth century France and Germany with the philosophical development of rights attaching to the person and after «la création d'un minimum de protection pour les intérêts patrimoniaux des

auteurs»[7]. The development of the notion of moral rights, however, is not only the product of pure theory, but it is as well a reflection of sociological change, as Jeffrey Meade points out in his brief summary on the rise of moral rights in Europe:

> The recognition of an artist's moral rights may be seen then, as the product of the evolving relationship between the artist and his patron; that is from that of a craftsman who brought into being embodiments of the ideals and vision of his patron (more often than not the Church) to that of an individual who viewed his work as a form of self-expression. Concomitant to this was the changing relationship between the artist and his creation...[8]

It is the nature of this relationship to which I now turn.

1.1 Nature of Moral Rights

The fundamental characteristic of moral rights is that they are attached to the personality of the author. Stromholm underlines the central importance of this point:

> En effet, le droit moral moderne pourrait être décrit comme le résultat d'une opération intellectuelle qui consiste simplement en l'adoption, à un moment donné, de la catégorie juridique des droits de la personnalité pour désigner l'ensemble des règles censées protéger les intérêts non patrimoniaux des auteurs[9].

Kant believed that these extrapatrimonial «droits de la personnalité» would best be within the ambit of positive rather than natural law[10]. Of

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7. Stig STROMHOLM, Le droit moral de l'auteur en droit allemand, français et scandinave avec un aperçu de l'évolution internationale: étude de droit comparé, Stockholm, P.A. Norstedt & Soners Forlag, 1967, pp. 256-259.
8. Jeffrey MEADE, «Moral Rights in Intellectual Property and the "Film Colourization" Debate: An Applied Study», (1988) 4 I.P.J. 63 at p. 68.
9. STROMHOLM, op. cit, note 7 at p. 240.
10. Id., pp. 244-245.

course, the multiplicity of moral rights legislation in the world bears him out, but more importantly, even the very nature of these rights are found in today's positive law. The French Loi du 11 mars 1957 sur la propriété littéraire artistique offers a clear example:

> Art. 6. L'auteur jouit du droit au respect de son nom, de sa qualité et de son oeuvre. Ce droit est attaché à sa personne. Il est perpétuel, inaliénable et imprescriptible...[11]

The fact that moral rights are perpetual, inalienable and indefeasible follows logically from the concept that they are attached to the person. In the words of Claude Colombet, «le droit moral s'attache à l'auteur comme la lueur au phosphore»[12]. It is here that the nature of moral rights in the European tradition is distinguishable from economic rights. The latter are limited to a specific term, usually the life of the author plus fifty years from his death, whereas the former are unlimited in that they may be perpetually transmitted by succession. Moral rights are inalienable (and therefore unseizable) and cannot be waived[13]while economic rights can be assigned. Lastly, moral rights are indefeasible in that they may be exercized by an author even after assigning his pecuniary rights «aussi longtemps que l'oeuvre survit dans la mémoire des hommes et fait l'objet d'une exploitation»[14].

Having identified their principal characteristics according to the European model, it remains to examine the different categories of moral rights.

1.2 Categories of Moral Rights

There are essentially three broad classifications of moral rights which an author may exercize. First, he has the right to divulge his work. Second, he has the right to claim paternity of the work and third,

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11. Loi du 11 mars 1957 sur la propriété littéraire artistique, no. 57-298 as amended by no. 85-660.
12. Claude COLOMBET, Propriété littéraire et artistique, Paris, Dalloz, 2ième éd., 1980, p. 136.
13. Infra, pp. 13-14.
14. C. COLOMBET, op. cit., note 12 at p. 138.

the right to its respect and integrity[15]. I will deal with each of these in turn.

The right of an artist to divulge the product of his creativity is simply the ability to render his work available to the public or to keep it secret. Although this ability is consistent with the fundamental concept of rights attaching to the person, it is not difficult to confuse it with the basic economic right to publish. Given that the author has a monopoly of exploitation of his work which is the foundation of all copyright law, perhaps it can be said that the moral right to divulge exists even though the term «moral right» is nowhere to be found in the legislation. There is, however, an important distinction to be made in that the patrimonial right to publish cannot exist without the moral right of the author to render his work public. Colombet has this to say:

> Le droit de divulgation conditionne, dans son exercice, la naissance du droit patrimonial; car c'est seulement en prenant la décision de livrer l'oeuvre au public que son auteur l'investit de droits patrimoniaux; avant la divulgation, l'oeuvre fait partie intégrante de sa personnalité; avec la divulgation, elle devient un bien patrimonial: des droits pécuniaires naissent à partir de ce moment[16].

If an artist is invested with the moral right to make his work public, the corollary is that he also has the right to withdraw from the public a work already divulged. While an artist may have regrets about the publication of his work, the exercise of his right to withdraw it would not likely be absolute in that he would normally be required by law to indemnify the person into whose hands or under whose control the work has passed. Article 32 of France's Loi du 11 mars 1957 sur la propriété littéraire artistique is an example of this principle[17].

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15. The right to withdraw a work from the public is usually considered as a separate category; however, I have decided to group it with the right to divulge works, since the principles underlying these concepts are virtually identical.
16. C. COLOMBET, op. cit., note 12 at p. 140.
17. Loi du 11 mars 1957 sur la propriété littéraire artistique, no. 57-298 as amended by no. 85-660. Article 32 reads as follows: Nonobstant la cession de son droit d'exploitation, l'auteur, même postérieurement à la publication de son oeuvre, jouit d'un droit de repentir ou de retrait vis-à-vis du cessionnaire. Il ne peut toutefois exercer ce droit qu'à charge d'indemniser préalablement le cessionnaire du préjudice que ce repentir ou ce retrait peut lui causer. Lorsque,

The second category is the artist's right of paternity over the work, or his right to claim authorship of his creation. It also includes the right not to be associated with the work by using a pseudonym or by remaining anonymous if the work is made public. Noteworthy is the absence of moral rights protection in cases where a person uses an author's name for a work that the author did not create[18].

Finally, an artist has the moral right to protect the work from unauthorized distortion, mutilation or modification. Here again, the concept that an artist's creation is an expression of the uniqueness of his personality is inextricably linked to the principle that damage done to the work is actually an attack on the honour or reputation of the artist - damage to the person himself. Considering the upcoming analysis of the introduction of moral rights in Canadian law by virtue of the Rome Copyright Convention and s. 14(4) of the Copyright Act, for now, I will limit my comments on the right of integrity to these general parameters.

2. Moral Rights in Canadian Law

Until 1931, Canadian copyright law was solidly and exclusively anchored to the Anglo-American tradition of protecting the author's pecuniary interests. Moral rights doctrine, still based in Europe, had no place in Canadian legal thought although elements of it would be introduced when Canada sought to fulfill its international obligations under the 1928 Rome Copyright Convention. In this section, I will examine s. 14(4) of the Copyright Act and then evaluate the extent to which the European moral rights doctrine has been embraced by the reforms adopted in 1988.

2.1 Adherence to the Rome Copyright Convention 1928

Article 6 bis of the Rome Copyright Convention 1928 proved to be the legislative model for the introduction of the notion of moral rights in Canada. It reads as follows:

> (1) Independently of the author's copyright, and even after transfer of the said

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postérieurement à l'exercice du droit de repentir ou de retrait, l'auteur décide de faire publier son oeuvre, il est tenu d'offrir par priorité ses droits d'exploitation au cessionnaire qu'il avait originairement choisi et aux conditions originairement déterminées.

18. S. STROMHOLM, op. cit., note 7 at p. 140.

> copyright, the author shall have the right to claim authorship of the work, as well as the right to object to any distortion, mutilation or other modification of the said work which would be prejudicial to his honour or reputation.
>
> (2) The determination of the conditions under which these rights shall be exercised is reserved for the national legislation of the countries of the Union. The means of redress for safeguarding these rights shall be regulated by the legislation of the country where protection is claimed[19].

Only two of the three moral rights included in the European conception of rights of the personality are contained in this article -the right to the paternity and the integrity of the work. Moreover, there is no mention at all of their fundamental nature. Despite reference to these rights existing independently of the author's copyright we will see that the section falls short of protecting authors bound by employment contracts. Furthermore, it leaves the door open in paragraph 2[20], for each nation to determine its own rules for exercizing these rights, underscoring the obvious silence on the term during which the author may benefit, a noticeable departure from the perpetual character inherent in moral rights.

In 1931, Parliament incorporated the language of article 6 bis virtually word for word as part of its willingness to conform to its international obligations as a signatory of the Convention. With the adoption of the language came its limited scope as well:

> 14(4) Independently of the author's copyright, and even after the assignment, either wholly or partially, of the said copyright, the author has the right to claim authorship of the work, as well as the right to restrain any distortion, mutilation or other modification of the work that would be

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19. The Rome Copyright Convention 1928, art. 6 bis, Schedule III, R.S.C. 1985, c. C-42.
20. Ibid.

> prejudicial to his honour or reputation[21].

Notwithstanding the section's apparent shortcomings, it has proven that although it «may well be a toothless tiger, its tail can still deliver a powerful whack»[22] at least insofar as it applies the right to the integrity of the author's work, and this despite the fact that Canadian courts have had few opportunities to test its scope.

In one of the only reported cases in this matter, Snow v. The Eaton Centre, the artist was able to demonstrate, at least for the purposes of injunctive relief, that the defendant's decoration of his sculpture was a prima facie distortion which prejudiced his honour or reputation[23]. The judgment implicitly recognizes the fundamental notion of the work as an extension of the artist's personality.

The essential test in order to grant relief under s. 14(4) is that the author must have suffered prejudice to his honour or reputation, and of course this is a subjective assessment the judge must make in appreciation of the facts and circumstances of the case. The court's subjectivity was equally apparent in Patsalas v. The National Ballet of Canada where a choreographer sought to restrain the direction by another choreographer, of one of the works he had created[24]. He was unsuccessful in convincing the judge of the prejudice which would be caused to him should the ballet proceed[25]. A similar question was raised in the case of a screenwriter in Pollock v. CFCN Productions although the court concluded that an injunction to restrain the showing of a film was justified on the grounds that a «serious question of law», namely the interpretation of s. 14(4) should be considered at trial[26].

While none of the cases shed light on the specific elements necessary to show prejudice to honour or reputation of the author, they are equally silent on the meaning of «distortion, mutilation or other modification» which is the other prong for moral rights remedy under s. 14(4). Although the terms suggest a catch-all for every type of change to the work, E. Colas argues that the moral right to integrity

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21. Copyright Act, R.S.C. 1985, c. C-42, s. 14(4).
22. David VAVER, «Snow v. The Eaton Centre: Wreaths on Sculpture Prove Accolade for Artists' Moral Rights», (1983-84) 8 C.B.L.J., p. 91.
23. Snow v. The Eaton Centre, (1982) 70 C.P.R. (2d) 105 (Ont. H.C.).
24. Patsalas v. The National Ballet of Canada, (1986) 13 C.P.R. (3d) 522 (Ont. H.C.).
25. Id., p. 528.
26. Pollock v. CFCN Productions Ltd., (1983) 73 C.P.R. (2d) 204 at p. 206 (Alta. Q.B.).

should include recourse for the destruction of the work, even in the case where the artist cedes his property rights to another by way of contract, and this despite the fact that the word «destruction» is not expressly part of s. 14(4)[27].

A final observation should be made about the person s. 14(4) seeks to protect. One of the deficiencies of this provision is that it seems to exclude authors who create works under employment contracts. The beneficiary of 14(4) is the author «independently of [his] copyright...». Thus, it follows that only those creators who are capable of owning copyright are deemed to be authors for the purposes of moral rights protection. Given that s. 13(3)[28] vests first ownership of a copyrighted work in the employer where the author was employed to create the work, it is inconceivable that the employee can claim a right to the integrity of the work any more than he can claim a right of paternity. Boncompain argues along the same lines:

> Il ne semble pas que l'on puisse parler ici de cession. L'auteur naturel de l'oeuvre est, juridiquement, censé n'avoir jamais été titulaire du droit d'auteur. Il ne pourrait donc pas prétendre au bénéfice au paragraphe 7 de l'article 12[29].

This clear derogation from the moral rights doctrine appears to have been remedied with the 1988 reform of the Copyright Act, as we shall see in the next section.

2.2 Reform of the Copyright Act

The adoption of An Act to Amend the Copyright Act[30] is notable for, among other things, its recognition of the need to clarify and extend the narrow and somewhat weak attempt by s. 14(4) to

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27. E. COLAS, «Le droit moral de l'artiste sur son oeuvre», (1981) 59 Can. Bar Rev. 521 at p. 532.
28. Copyright Act. R.S.C. 1985, c. C-42, s. 13(3) reads as follows: «Where the author was in the employment of some other person under a contract of service or apprenticeship and the work was made in the course of his employment by that person, the person by whom the author was employed shall, in the absence of any agreement to the contrary, be the first owner of the copyright»...
29. Jacques BONCOMPAIN, Le droit d'auteur au Canada: Etude critique, Ottawa, Le Cercle du Livre de France Ltée, 1971, p. 277.
30. An Act to amend the Copyright Act and to amend other Acts in Consequence thereof, R.S.C. 1985, c. 10 (4th Supp.).

embrace the moral rights doctrine in Canada. Far from a perfect reflection of the European model, the Act does go a long way to confer wider rights for creators. The new s. 14.1 replaces 14(4)[31] and reaffirms the author's right of paternity and of the integrity of the work, the latter subject to the general rules of infringement enumerated in ss. 28.1 and 28.2(1)(a) and (b), restrictions in ss. 28.2(3) and 64.1 as well as presumptions attaching to specific works in 28.2(2)[32]. The principle of the inalienability of moral rights is contained in ss. 14.1(2), (3) and (4)[33]although tempered by the right to waive moral rights as stipulated in the same sections. Despite the fact that s. 14.2 fills the gap caused by s. 14(4)'s silence on the term of moral rights, the new provision clearly derogates from the perpetual nature of the rights by limiting them to the same term as economic rights[34]. Lastly, s. 34 now contains subs. (1.1) which lists recourses available for authors whose moral rights have been infringed[35].

It is not my intention here to undertake an exhaustive analysis of each of these provisions; however, a number of observations are in order. The first deals with the beneficiaries of moral rights under the new law, a subject I will return to when I examine the moral rights of motion picture creators[36]. Section 14.1(1) is the foundation for the rights covered by the revision and it reads as follows:

> 14.1(1) The author of a work has, subject to section 28.2 the right to the integrity of the work and, in connection with an act mentioned in subsection 3, the right, where reasonable in the circumstances, to be associated with the work as its author by name or under a pseudonym and the right to remain anonymous[37].

The words «independently of the author's copyright» which we saw in the now repealed s. 14(4), are conspicuously absent, this despite the recommendation in From Gutenberg to Telidon to retain the wording[38]. In my view, this amendment effectively removes the barrier previously

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31. Id., ss. 3, 4.
32. Id., ss. 6, 11.
33. Id., s. 4.
34. Ibid.
35. Id., s. 8.
36. Infra, p. 15.
37. R.S.C. 1985, c. 10 (4th Supp.), s. 4.
38. From Gutenberg to Telidon, op. cit., note 3 at p. 26.

faced by employees who could not benefit from moral rights since they could not have been endowed, as legal authors, with the right of ownership of copyright in a work. All that is now necessary is for a person to create a copyrightable work in order for him to be an author envisioned by s. 14.1(1). This reasoning takes on its full importance, when read with 14.1(2), the allowance for waivers, with respect to creators in the motion picture industry, for example, as well as in those sectors where creation under employment contracts is integral to the business.

Where the reform innovates is in s. 28.2 which provides the conditions upon which an author may institute proceedings for the infringement of his moral right of integrity:

> 28.2(1) The author's right to the integrity of a work is infringed only if the work is, to the prejudice of the honour or reputation of the author,
> (a) distorted, mutilated or otherwise modified: or (b) used in association with a product, service, cause or institution.
> (2) In the case of a painting, sculpture or engraving, the prejudice referred to in subsection (1) shall be deemed to have occurred as a result of any distortion, mutilation or other modification of the work[39].

Although it is evident that Parliament did not take into account Colas' call for the explicit inclusion of the right of recourse against the destruction of a work[40], it did adopt the 1985 Sub-Committee recommendation that authors be protected from unauthorized use of their work in advertising given «the realities of our consumer society»[41]. The presumption of infringement of the right of integrity in the case of unique works should also be a welcomed addition to the rights of artists.

To conclude this part of my study, I would suggest that the 1988 revision of the Copyright Act is a marked improvement over the half-hearted introduction of moral rights in s. 14(4) although it remains

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39. R.S.C. 1985, c. 10 (4th Supp.), s. 6.
40. E. COLAS, loc. cit., note 27.
41. A Charter of Rights for Creators, op. cit, note 1 at p. 7.

a considerable distance in some respects from the purists' conception of moral rights theory. Notable gaps include the waiveability of the rights and the term linked to that of economic rights. As for the absence of the explicit moral right in Canada to render a work public, I see no practical difference between that and the economic right to publish. Perhaps it is at the level of principle versus practicality that the European and Anglo-American traditions differ so markedly. Certainly, the juxtaposition of the two approaches in one law will pose the most interesting challenges of interpretation for intellectual property jurists.

I turn now to the narrower question of the applicability of the reform to creators in the motion picture industry.

Part II Application of Reform on Motion Picture Creators

The 1985 Sub-Committee's A Charter of Rights for Creators[42] makes no declaration that all creators are created equal. The rights contained in the Copyright Act are destined, it is true, to provide for the general well-being of those among us whose talent is expressed in books, paintings, photographs, and so on. But the law which confers upon these people the economic and newly expanded moral rights protection to encourage them to exploit their activity, does not apply to everybody who puts pen to paper or light to celluloid. Our copyright legislation only protects creators who express themselves in a work specifically recognized by Parliament, and such creators must be «authors» of the work according to law. Thus, in order to answer the question «are creators better off after the expansion of moral rights in Canada?», we must first determine if they have created a copyrightable «work», and if they are «authors».

Situating the motion picture industry in the larger evaluation of moral rights reform is particularly interesting, not only because of the distinct treatment it receives in the law as a result of its special technological nature and connection with diverse types of expression, but also because of the interplay, generally speaking, between two of its central features: each production is the result of a multiplicity of creative input and the industry is big, capital-intensive business. The extent to which moral rights provisions will benefit creators in this business depends on 1) whether there can be a multiplicity of authors and 2) the strength of their bargaining power if they are employees in the business.

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42. Ibid.

In the analysis which follows, I will first explore the nature of film productions as copyrightable «works». A second section will deal with the identification of «authors» as well as the consequences of employment relationships on moral rights protection.

1. Condition: Motion Picture Work Must be Copyrightable

We have already seen that in order for a creator to benefit from moral rights protection as defined in s. 14.1(1) of the Copyright Act[43], he must be an author of a work[44]. In this part I discuss the general qualifications necessary for motion pictures or their constituent elements to be copyrightable works and I provide an overview of the idea that films are «collaborative works».

1.1 Notion of Motion Picture «Works»

Section 5(1) of the Copyright Act states that «... copyright shall subsist in Canada... in every literary, dramatic, musical and artistic work...»[45]. Films that we see in movie theatres are likely to involve a number of these distinct works. The novel upon which a film is based, for example, would be copyrighted as a literary work; the musical score would be protected as a musical work and the choreography of a dance number would be protected as a dramatic work[46]. But a film is more than disparate creative elements, rather, they also exist as whole entities, independent subjects capable of being protected by copyright law.

A motion picture may be protected as a dramatic or artistic work. The definition of «dramatic work» in s. 2 «includes... any cinematograph production where the arrangement or acting form or the combination of incidents represented give the work an original character»[47]. If the film does not contain incidents that give the work an original character, «the cinematograph production shall be protected as a photograph»[48], and therefore, as an artistic work whose definition

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43. R.S.C. 1985, c. 10 (4th Supp.).
44. Supra, p. 12.
45. R.S.C. 1985, c. C-42.
46. R.S.C. 1985, c. C-42, s. 2 as amended by R.S.C. 1985, c. 10 (4th Supp.), s. 1(3). Note that a choreographic work now no longer needs to have a story line to be protected.
47. R.S.C. 1985, c. C-42, s. 2.
48. R.S.C. 1985, c. C-42, s. 3(1)(e).

includes photographs[49]. Canadian Admiral Corporation v. Rediffusion Inc. is the main authority on the evaluation of what gives a film an original character and thus, the distinction between films as dramatic or artistic works[50].

The categorization of films as one or another subject of copyright determines the type of economic rights the copyright owner may exercize according to s. 3 of the Act; however, there is another qualification which can be made for the purpose of ascribing authorship in copyrightable works in situations where contributions to the creation of a work have been made by more than one person. Given that motion picture productions usually involve the creative input of many people, it is revelant, for the determination of who may benefit from moral rights protection, to know if Canadian copyright law regards films as «collaborative works».

1.2 Motion Pictures as «Collaborative Works»

Jacques Boncompain points to two completely different meanings for collaborative works:

> La collaboration peut être entendue de deux manières. Dans la première, plusieurs personnes contribuent à la réalisation d'une même oeuvre, chacune d'entre elles agissant dans le domaine qui relève de sa compétence. Ainsi, dans une oeuvre mélodramatique, l'une composera la musique, l'autre le livret. Dans la seconde, il n'y aura collaboration que si l'ensemble des personnes qui ont pris part à sa réalisation, ont agi de concert dans la composition de chacun de ses éléments[51].

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49. R.S.C. 1985, c. C-42, s. 2.
50. Canadian Admiral Corporation v. Rediffusion Inc. [1954] Ex. C. Can. 382. The court came to the conclusion that the passive filming of a spectator sport such as football, which requires no creative intervention, does not give the film an original character to place it outside the domain of photographs/artistic works and into the domain of dramatic works. It also concluded that broadcasting the game «live» was not a «process analogous to cinematography» and was therefore ineligible to be protected as a cinematographic production.
51. J. BONCOMPAIN, op. cit., note 29 at p. 154.

The contrast between the two concepts is striking and the application of one or the other has far-reaching ramifications. Those ramifications for motion picture creators will be the subject of an upcoming section; for now it is useful to look at which interpretation has been favoured in comparative law. I begin with France.

In order for a work to be classified as collaborative in France, only one condition is necessary as Henri Desbois points out:

> ... il suffit que des efforts distincts aient été appliqués à un but commun et que chacune des contributions ait été réalisée en contemplation des autres. C'est donc à la communauté d'inspiration et au mutuel contrôle qu'est attaché le critère de la coopération[52].

In other words, collaboration is not restricted by a narrow requirement for absolute indivisibility of the artists' contribution to the point where one cannot distinguish one's efforts from another. The French copyright law is squarely in line with the tendency which allows for the divisibility of contributions but indivisibility of authorship:

> Art. 9. Est dite oeuvre de collaboration, l'oeuvre à la création de laquelle ont concouru plusieurs personnes physiques.
>
> Art. 10. L'oeuvre de collaboration est la propriété commune des coauteurs[53].

The law goes as far as to recognize cinematographic works (now included in the broader category of audio-visual works)[54] as collaborative efforts:

> Art. 14. Ont la qualité d'auteur d'oeuvre audiovisuelle la ou les personnes

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52. Henri DESBOIS, Le droit d'auteur en France, Paris, Dalloz, 3ième éd., 1978, p. 165.
53. Loi du 11 mars 1957 sur la propriété littéraire artistique, no. 57-298 as amended by no. 85-660.
54. Loi relative aux droits d'auteur et aux droits des artistes-interprètes, des producteurs de phonogrammes et de vidéogrammes et des entreprises de communication audio-visuelle[illegible]

> physiques qui réalisent la création intellectuelle de cette oeuvre.
>
> Sont présumés, sauf preuve contraire, coauteurs d'une oeuvre audiovisuelle réalisée en collaboration;
> 1° L'auteur du scénario;
> 2° L'auteur de l'adaptation;
> 3° L'auteur du texte parlé;
> 4° L'auteur des compositions musicales avec ou sans paroles spécialement réalisées pour l'oeuvre;
> 5° Le réalisateur[55].

As we can see, the classification of motion pictures as collaborative works, has an enormous impact on the ownership of moral rights in France. Any creator on a production, therefore, can benefit from the protection conferred by the copyright law, even those who are not specifically presumed to be creators by virtue of art. 14.

The English Copyright Act 1956, on the other hand, endorses the narrower approach and unlike the French law, makes no special accomodation for motion pictures within the ambit of collaborative works. Section 11(3) defines a work of joint authorship as «a work produced by the collaboration of two or more authors in which the contribution of each author is not separate from the contribution of the other author or authors»[56]. Canada's Copyright Act uses wording which is virtually identical[57]. Although Harold Fox's reliance on Levy v. Rutley would seem to leave open to interpretation the question of whether films could be works of joint authorship («the contribution need not be equal and different portions may be the sole productions of either one»)[58], I cannot see how the wording in the English and Canadian copyright laws can be taken in any way other than in the restrictive sense. I agree with Boncompain on this point:

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55. Loi du 11 mars 1957 sur la propriété littéraire artistique, no. 57-298 as amended by no. 85-660.
56. Copyright Act 1956, 4&5 Eliz. 2, c. 74, s. 11(3).
57. R.S.C. 1985, c. C-42. S. 2(u) reads as follows: «"works of joint authorship" means a work produced by the collaboration of two or more authors in which the contribution of one author is not distinct from the contribution of the other author or authors».
58. Harold G. FOX, The Canadian Law of Copyright and Industrial Design, Toronto, The Carswell Company Ltd., 2nd ed., 1967, p. 244.

> ... semblerait devoir décider que l'oeuvre cinématographique n'est pas une oeuvre de collaboration. Même si le producteur intervient dans le choix des créateurs et la composition du scénario, il est généralement possible de distinguer la part qui revient à chaque auteur[59].

The qualification of cinematographic productions cannot, however, be dismissed as works of joint authorship at this point since the matter is not yet settled in law. As the next section will demonstrate, the choice of solution to this problem could have an important impact on the prospects of creators in the motion picture industry who hope to benefit from the new moral rights provisions.

2. Condition: Motion Picture Creator must be an «Author»

Unless the creator is an author within the meaning of the Copyright Act, he cannot hope to take advantage of the moral rights contained therein. This section will take a closer look at the consequences of whether or not we can apply the notion of collaborative works to film production, and in a second part, will examine the impact of contractual relationships between creators and producers on claims of authorship.

2.1 Consequences of Qualification of «Collaborative Works» in Canada

We have already seen that French law singles out film productions and other audio-visual works as being appropriately classified as works of joint authorship in the wide sense of the term. One way to highlight what would be the consequences for the non-recognition of films in Canada as works of the same kind, is to look at how comparable systems actually work in practice.

In England, the consequences are relatively straightforward. Under the Copyright Act 1956, copyright in a film vests in only one person: the «maker» of the film who is defined as «the person by whom the arrangements necessary for the making of the film are undertaken»[60]. The deliberate denial of the notion of collaborative

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59. J. BONCOMPAIN, op. cit., note 29, p. 158.
60. 4 & 5 Eliz. 2, c. 74, s. 13.

works for film production combined with the conferral of copyright ownership in the producer, is in marked contrast with the solution in France whose application underscores the fundamental competition between public policy objectives.

The Loi du 11 mars 1957 contains a comprehensive set of rules for film production which, when viewed as a whole, points to a dilemma involving the balance between the personal moral rights of an author as an individual creator according to the entrenched European moral rights doctrine, and the collective rights of coauthors to see the fruits of their common creative goals become reality. In other words, the particularity of collaborative works demands that the rights of the personality of each individual contributor be mitigated in favour of the group effort to see its work through to completion without the overhanging threat of disruption for the sake of individual rights. This limitation of moral rights is precisely the purpose of arts. 15 and 16 of the law which prevents one of the authors enumerated in art. 14. (or art. 17, if the producer has creative input) from obstructing the completion of a film to its «standard copy», by reason of his desire to exercize a moral right contained in art. 6[61]. Even once a film is completed, a coauthor intent on exercizing his recourse must be sure to have just cause, since his obstruction could lead to an action in damages against him[62].

Just before the adoption of the new law, French courts ruled that while two artists working on an animated cartoon were indeed coauthors of a collaborative work, they could not abuse their moral rights without good and sufficient reason in order to halt production on the film. The Cour d'Appel de Paris said the following in 1953:

> Considérant [qu'à] la différence du peintre, du sculpteur, de l'écrivain, les auteurs d'un film de dessins animés rencontrent devant eux des droits de collaborateurs sans doute plus

61. Loi du 11 mars 1957 sur la propriété littéraire artistique, no 57-298 as amended by no. 85-660.
62. Loi du 11 mars 1957 sur la propriété littéraire artistique, no. 57-298 as amended by no. 85-660, art. 16.

> modestes qu'on ne saurait cependant méconnaître.
>
> Considérant que le droit moral des auteurs d'un film, incontestable, indéniable et auquel un grand respect est dû, trouve cependant sa limitation dans le droit de ceux qui ont formé équipe avec eux et sans lesquels leur oeuvre serait vaine[63].

Thus, French legislators in 1957 recognized that it was possible to reconcile the fact that film creators, although entitled to rights of coauthorship in collaborative works, could not abuse the moral rights with which they are also endowed. Danièle Huet-Weiller pinpoints the reasons why film producers are wary, not so much of moral rights in and of themselves, but rather of seeing them combined with the notion of collaborative works in the industry:

> The risk of abuse increases with the number of participants and it would seem even more serious since a work for the cinema ... is at the same time a commercial and industrial enterprise with considerable sums at stake. This explains why distrust of the moral right is manifest above all in cinematographic circles[64].

She outlines the alternatives proposed by the producers in the industry:

> The cinematographic work should be considered as a commissioned or collective work and authorship attributed to the person physically or morally responsible for taking the initiative. Such arguments have won

63. Société Les Gémeaux v. Prévert et Grimault, (1954) 2 R.I.D.A. 102 at p. 103 (Cour d'appel de Paris). See also Grimault et Prévert v. Société Les Gémeaux, (1956) 13 R.I.D.A. 161 at p. 166 (Cour d'appel de Paris).

64. Danièle HUET-WEILLER, «Abuse of Copyright as Regards Cinematographic Works», (1966) 48 R.I.D.A. 123 at p. 128.

> over the legislators in certain countries
> (In Great Britain in particular...)[65].

From this perspective, then, we can begin to see the consequences of the inapplicability of the notion of collaborative work for film productions. If the Canadian inspiration for copyright law is anchored in principles based first and foremost on the economic exploitation of artistic endeavour, such principles originating primarily in England, the motion picture creator who seeks the title of «author» must either be an independent producer or he must rely on his bargaining power in the job market for any hope of exercising moral rights.

On the other hand, in the event that films may be classified as collaborative works as they are in France, then the prospects of a creator benefitting from moral rights in the Copyright Act are much improved. Subject only to contracts of employment, which will be the subject of the next and final part of my study, these creators need only establish that they participated in the creative process even if their contribution is distinct from that of the other artists involved in the production. Such creators would then be considered «authors» within the meaning of the Act.

2.2 Role of Employment Contracts

We have seen that in England, at least, the ownership of copyright in a film is vested in the producer alone. The Canadian Copyright Act is silent on the matter; however, Fox asserts that the same is true for films in Canada: films protected as photographs or as dramatic works have copyright vested in the producer[66]. In the normal course of affairs, the production company is the employer of creators in the film industry such as writers, directors and so on; thus, it is upon the employer-employee relationship that moral rights protection will largely depend, regardless of the solution to the problem of qualification of films as collaborative works.

It is here that the juxtaposition of the European moral rights doctrine with the Anglo-American tradition finds its full significance. In an earlier discussion I referred to what I believe is one of the most positive of the revisions to the Copyright Act - the removal of the qualification that authors have moral rights «independently of [their]

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65. Id., p. 130.
66. H. FOX, op. cit., note 58 at pp. 175-176.

copyright»[67]. In light of this change I reasoned that creators who produced works while employed could now retain the moral rights which, under s. 14(4), had not been available to them as long as the employer was deemed to be the first owner of copyright[68]. If I am correct, then employees for whom creative activity is part of the job do not now have to clamour about the distinction between contracts of service and contracts for services insofar as their moral rights may be threatened[69].

If authorship for the purpose of moral rights protection can still be retained despite employment contracts, then motion picture creators actually have nothing to fear. Or do they? After all, there seems to be no need to have film productions classified as works of joint authorship. Yet it is for the same reason that Canada's Copyright Act, if it indeed follows the example of the English legislation, seems not to recognize films as works of joint authorship, that the moral rights doctrine will likely not have the same import as it does in Europe. This quotation from A Charter of Rights for Creators is revealing:

> Freedom is vital to the creative environment. Concerns expressed that hard-pressed and non-established creators may be tempted to give away too much control over their works are well meant, but lead to undesirable constraints[70].

The Sub-Committee does not specify what these «undesirable constraints» are; however, this sentiment is the backbone of the justification that moral rights enumerated in the reformed Act can be waived. The marked difference between Canadian and European brands of moral rights is typified by a 1970 French case, Luntz v.

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67. Infra, pp. 12-14.
68. On this point I respectfully differ with Lesley Harris who believes that moral rights, being unassignable, were still retained by the employee under s. 12(7) (now 14(4)). cf Lesley E. HARRIS, «Ownership of Employment Creations», (1985) 23:2 Osgoode Hall L.J. 275.
69. The distinction is still relevant, however, if economic rights are at stake. See University of London Press Limited v. University Tutorial Press Limited, [1916] 2 Ch. 601, Stevenson Jordan and Harrison Ltd. v. Macdonald and Evans, [1952] 1 T.L.R. 101 (C.A.), and Beloff v. Pressdam Ltd., [1973] 1 All E.R. 241 (Ch.).
70. A Charter of Rights for Creators, op. cit., note 1 at p. 7.

Productions Fox Europa where the court ruled that a film director's waiver of his moral rights in an employment contract was illegal and against public order[71]. Had the Canadian case of Fuller v. SC Entertainment been heard in France, a similar clause would likely have been struck down by the reasoning[72]. It is evident that in Canada, at least, the fundamental rights of the person as defined by European moral rights doctrine, will be a matter of negotiation between buyers and sellers of creative work. The pressure on creators to bargain away rights in the collaborative arts, such as the motion picture industry, will be that much greater.

CONCLUSION

The practical effects of the 1988 reform of Canada's Copyright Act may not be felt for some time; however, the clarification and extension of the existing moral rights contained in s. 14(4) should be welcomed by most members of the nation's creative industries. True, Canada is far off from embracing the European moral rights doctrine in its integrity and by saying as much I do not suggest that that is necessarily the desirable route to take. Ultimately, the direction is a matter of public policy choices, and after more than thirty years, our legislators have finally made theirs. With the few recent exceptions, much of our Copyright Act is still a verbatim reproduction of that which exists in England and it would not be surprising if the thrust of that law continues to be influential in Canada.

Although most proponents of moral rights in Canada can conclude that creators are better off under the new law, considering the broader range of recourses and cause for recourse now available to them, quite apart from the usual economic sanctions, employee-creators may not be so fortunate in practice. For these individuals, particularly the ones who work in the motion picture industry, the Charter of Rights for Creators held a lot of promise but may have fallen short on delivering the equal treatment for which most Charters of Rights are revered.

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71. Luntz v. Productions Fox Europa, (1970) 64 R.I.D.A. 180 (Trib. de Grande Instance de Paris).
72. Fuller v. SC Entertainment Corp et al., (1987) 18 C.P.R. (3d) 555 (F.C.T.D.).