

U.S.A. Moral Rights and Berne. The search for a basis for US adherence to the Berne Convention – Blog posted on 18 September 2014 by Jeffrey L. Graubart (Law Offices of Jeffrey L. Graubart, P.C.)

Moral rights – Berne Convention – moral rights in the U.S.A. – article 6bis Berne Convention – Lanham Act

The United States Response to Questionnaire Concerning Moral Rights in the 21st Century, prepared for the 2014 ALAI Brussels meeting ("U.S.A. National Report"), at p.2, states in pertinent part:

The legislative history to U.S. adherence to the Berne Convention asserts that the 1976 Copyright Act, coupled with state laws covering moral rights, put the United States largely in compliance with Berne, should the United States choose to join. This perspective was endorsed by the Director-General of the World Intellectual Property Organization.

It should be noted, however, that the endorsement by Director-General Arpad Bogsch referred to in the U.S.A. National Report was not without controversy. Although the Bogsch endorsement seems to have been one of the pivotal bases for the passage of Berne implementing legislation by the U.S. Congress in 1988¹, commentators have severely criticized the action by Dr. Bogsch and that of the U.S. Government, both at the time of U.S. adherence to Berne and since:

* "I am troubled...that we may not be intellectually honest when we conclude that we can join Berne by deeming U.S. laws to be in compliance, but assuming none of the responsibilities under the Convention to enhance the rights of authors."²

* "[I]t was crystal clear that U.S. law proved no such rights" and that "the Reagan Administration and Congress engaged in the charade of claiming that the United States already had adequate moral rights to permit adherence."³

* "Very few people would agree that the United States was in compliance with Article 6bis....It is most surprising that Dr. Bogsch, the guardian of Berne, allowed this to happen."⁴

Moreover, although other examples might have been selected by Dr. Bogsch in attempting to provide statutory support for U.S. compliance with Article 6bis of Berne, the body of Dr. Bogsch's endorsement specifically named only the Lanham Act: I believe that in the United States the common law and statutes (Section 43(a) of the Lanham Act) contain the necessary law to fulfil any obligation for the United States under Article 6bis.⁵

¹ Jeffrey L. Graubart, GATT and U.S. Moral Rights, COPYRIGHT WORLD, June/July, 1995, 21. A copy of the full text of this article is available at: <http://www.entertainmentlaw.la/pdfs/article1.pdf>.

² Congressman Howard Berman, H.R. REP. No. 100-609, 100 Cong. 2d Sess. (1988) n. 75-78.

³ William Patry, The United States and International Copyright Laws: From Berne to Eldred, 40 HOUS. L. REV. 749, 751 (2003)

⁴ Statement of Henri Choukroun at Artists Rights Foundation International Artists Rights Rights Symposium, April 27, 1994

⁵ H.R. REP. No. 100-609, at 37 (1988), reprinted in 9 NIMMER, COPYRIGHT, n. 33, at App. 32-37.

Yet, in 2003, the U.S. Supreme Court, in *Dastar Corp. v. 20th Century Fox Film Corp.*⁶, ruled that under the Lanham Act, authorship cannot be used as a circumvention of the underlying philosophy of a time limit on exclusive ownership of a copyright or patent. Allowing Lanham Act restrictions on a public domain work "would create a species of mutant copyright law that limits the public's 'federal right to 'copy and use'" expired copyrights,"⁷ and would effectively create "a species of perpetual patent and copyright, which Congress may not do."⁸ The U.S.A. Report, citing *Dastar*, correctly states, at p.4, that "the Lanham Act could not be used to prohibit a work from being copied without attribution." Also, at p. 6, the U.S. Report cites the U.S. Court of Appeals' decision in *Gilliam v. American Broadcasting Companies, Inc.* as an example of U.S. recognition of the moral rights to respect and integrity, yet *Gilliam* was based, at least in part, on the Lanham Act cause of action, now "discredited" by the majority opinion by the U.S. Supreme Court in *Dastar*⁹.

Thus, it is submitted that Dr. Bogsch's reliance on the Lanham Act as a basis for U.S. adherence to Berne no longer subsists, if it ever did.

⁶ 539 U.S. 23 (2003).

⁷ *Id.* at 34.

⁸ *Id.* at 37.

⁹ The Lanham Act, as one of the grounds for the majority's decision in *Gilliam*, was disputed by Judge Gurfein in his 1976 concurring opinion in *Gilliam*. "The Lanham Act is not a substitute for droit moral which authors in Europe enjoy" because the Lanham Act "does not deal with artistic integrity." 538 F. 2d at 27. Also see Justin Hughes, *American Moral Rights and Fixing the Dastar "Gap,"* 3 UTAH L. REV. 659, 691 (2007): "Perhaps the one person who gets the last laugh is Judge Murray Gurfein."