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Authors and Exploitations in International Private Law: The French Supreme Court and the Huston Film Colorization Controversy

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by Jane C. Ginsburg* and Pierre Sirinelli**

INTRODUCTION

On May 28, 1991, France's Supreme Court, the Cour de cassation, rendered its long-awaited decision in *Huston v. la Cinq*,[1] a controversy that opposed the heirs of film director John Huston against the French television station Channel 5 and its licensor, Turner Entertainment. Defendants sought to broadcast a colorized version of Huston's black and white film classic, *The Asphalt Jungle*. Plaintiffs, John Huston's children and Ben Maddow, who collaborated with Huston on the film's screenplay, asserted that broadcast of a colorized version violated Huston's and Maddow's moral right of integrity in the motion picture. The central question before the Cour de cassation, however, concerned not the substance of the integrity claim, but plaintiffs' entitlement to invoke it.

Under French law, the moral right to preserve a work's artistic integrity is an incident of authorship. Upon creating the work, authors are invested with exclusive moral and economic rights.[2] While economic rights may be transferred, moral rights are both inalienable and perpetual.[3] Thus, a film director who has granted all economic interests in her work nonetheless retains the moral rights to oppose violations of the work's integrity and to receive authorship credit for her work. Under U.S. law, by contrast, film directors do not enjoy rights tantamount to, or even approaching, their French counter-

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1. Judgment of May 28, 1991, Cass. civ. 1re, 1991 La Semaine Juridique (Juris-Classeur Periodique) [J.C.P.] II 21731 note A. Françon; 149 REVUE INTERNATIONALE DU DROIT D'AUTEUR [R.I.D.A.] 197 (1991). An English translation of the decision appears at the Appendix.

2. France, Law of Mar. 11, 1957, art. 1.

3. *Id.*, art. 6.

parts. Most significantly, under U.S. copyright law's "works made for hire" doctrine, employees, or in most circumstances, commissioned creators who participate in the elaboration of a motion picture, are not considered "authors": the film's producer is deemed the "author."[4]

The problem in the *Huston* case therefore was: Who is the "author" of the film? If the French courts applied the U.S. law concept of authorship, then John Huston would not have been ruled the "author," and accordingly, he and his heirs would lack any moral rights. If, however, the French courts applied the French concept of authorship, then John Huston's status as an "author" would have been recognized; accordingly, he and his heirs would have been the beneficiary of the moral right of integrity. Thus, first and foremost the *Huston* affair presented an international conflicts of laws controversy.

Although the lower courts, issuing preliminary relief,[5] and the Paris first-level court[6] had held for plaintiffs on a variety of grounds, the Paris Court of Appeals, on July 6, 1989, found for defendants.[7] Declining to apply Article 14bis of the Berne Convention, which designates the competence of the law of the country where protection is sought to determine ownership rights in motion pictures,[8] the appellate court announced a choice of law rule designating the law of the country of the work's origin to determine copyright ownership and authorship status. The court believed that application of U.S. law, under which the creative contributors to the film enjoyed no authorship rights, did not violate strongly held French public policy.[9]

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4. *See* 17 U.S.C. §§ 101, 201 (1978).

5. Judgment of June 24, 1988, Trib. gr. inst., Paris (référé), Judgment of June 25, 1988, Cour d'appel, Paris (référé), 138 R.I.D.A. 309, 312 (1988) note Y. Gaubiac; 1988 JOURNAL DU DROIT INTERNATIONAL [CLUNET] 1010, 1016 note B. Edelman; 1988 REVUE TRIMESTRIEL DE DROIT COMMERCIAL [R.T.D. COM.] 42 obs. A. Françon; 1988 IMAGES JURIDIQUES, No. 1, at 3 obs. P. Sirinelli.

6. Judgment of Nov. 23, 1988, Trib. gr. inst., Paris, 139 R.I.D.A. 205 (1989); 1989 REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ [R.C.D.I.P.] 372, 378 note P.—Y. Gautier; 1989 CLUNET 67, 68 note B. Edelman; 1989 Dalloz-Sirey, *Jurisprudence* [D.S. Jur.] 342, 345 note B. Audit.

7. Judgment of July 6, 1989, Cour d'appel, Paris, 143 R.I.D.A. 329, 339 (1990) note A. Françon; 1990 J.C.P. II 21410 note A. Françon; 1990 D.S. Jur. 152, 155 note B. Audit; 1989 R.C.D.I.P 706, 716 note P.—Y. Gaütier; 1989 CLUNET 991, 992 note B. Edelman.

8. Berne Convention for the Protection of Literary and Artistic Works (1971) [hereinafter Berne Convention], art. 14bis(2). The Paris Court of Appeals acknowledged that the terms of this provision fit the case before it, but contended that application of this provision would undermine the general purpose of the treaty to promote international commerce in works of authorship.

9. On conflicts of laws and international copyright, *see generally* Paul Geller, *Harmonizing Copyright-Contract Conflicts Analysis*, 25 COPYRIGHT 49 (1989); Jane C. Ginsburg, *Colors in Con-*

The court found that the principles of moral rights lacked paramount importance even in internal French copyright law; therefore these principles could not command extraterritorial application.[10] Finally, the Paris court stated that even if Huston had standing, his moral rights were not violated, because colorization constitutes an adaptation, and, in the court's reasoning, if the work is a licensed and well-executed adaptation, it cannot violate the moral rights of the author of the underlying work.[11]

The Paris appellate decision provoked considerable discussion in French legal journals, almost all of it negative.[12] Commentators criticized both the court's conflicts analysis, as well as its treatment of moral rights and their role in French jurisprudence. The Cour de cassation has now reversed the Paris Court of Appeals on the standing question. The High Court[13] has held that French law directly governs all questions of authors' rights of integrity and attribution,[14] without inquiry into the legislative competence of foreign laws that had significant points of attachment to the litigation. The Court has thus stressed the international applicability of the French concepts of authorship and of these moral rights, whatever the country of the work's origin, the nationality or domicile of the work's creators, or the law governing the contract between creators and grantees. The case was then remanded to the Court of Appeals of Versailles for a decision on the merits of the moral rights claim.[15]

The Cour de cassation's decision appears to strike a blow for artistic integrity, for the decision places in the hands of creators from all countries the power to oppose derogatory alterations of their works

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flicts: Moral Rights and the Foreign Exploitation of Colorized U.S. Motion Pictures, 36 J. COPYRIGHT SOC'Y 81 (1988).

10. 143 R.I.D.A. 329, 333-37 (1990).

11. *See infra* text accompanying note 74.

12. *See supra* note 7. *See also* obs. F. Pollaud-Dulian, CAHIERS DU DROIT D'AUTEUR, Dec. 1989, at 1; obs. J. Ginsburg, CAHIERS DU DROIT D'AUTEUR, Dec. 1989, at 13.

13. The Cour de cassation is also referred to as the "haute juridiction."

14. Although the *Huston* case concerned the moral right of integrity, the statutory provisions on which the French supreme court relied give international application to both the right of integrity and the right of attribution. *See* discussion *infra* text at note 36.

15. Under French procedure, if the Cour de cassation reverses an appellate court's decision, the remand is almost always to an appellate court other than the one sustaining the reversal. *See generally* René David, *French Law* (1972), *excerpted in* COMPARATIVE LAW: WESTERN EUROPEAN AND LATIN AMERICAN LEGAL SYSTEMS 257, 271 (John Merryman & David Clark eds., 1978).

American readers may be surprised at the Cour de cassation's failure to discuss the merits, particularly in light of the Paris court's statement that even if Huston did have standing, the substance of his moral rights claim failed. However, at the conclusion of its decision, the High Court ruled that it was annulling the Paris court's decision "in all respects."

in France, even when these persons are not considered "authors" in their home countries or in the countries of the works' origin. As a matter of conflict of laws, however, the Court's analysis is problematic in its insistence upon a highly extrusive application of French law concepts of authorship. This article will first examine the Court's choice of law discussion. It will review traditional French conflicts analysis in order to demonstrate some peculiarities about the *Huston* decision. The significance of the decision may be gauged in part by the extent to which the High Court departed from conventional French conflicts analysis in favor of a direct application of French law. The article will next consider the scope of the decision, particularly from the point of view of *Huston*'s impact on U.S. creators and exploiters. Finally, the article will endeavor to evaluate in some detail the circumstances under which a U.S. contributor to a work made for hire may now claim authorship status and enforce her moral rights in France.

I. INTERNATIONAL CONFLICT OF LAWS REGARDING AUTHORSHIP STATUS

A. METHODOLOGY

In general, when a French court encounters a case presenting extraterritorial elements, the judges determine the law competent to govern the claim by applying the traditional conflicts method. This method entails determining which of the potentially pertinent laws (French or foreign) applies to the problem posed. The choice among the laws of countries presenting a point of attachment to the claim follows from objective reasoning. The court characterizes the claim as, for example, one in tort, or contract, or real property, and then applies the choice of law rule corresponding to the claim thus characterized. For example, the choice of law rule pertaining to a real property claim designates the application of the law of the situs of the property.[16] The choice of law rule is thus, in theory, abstract, neutral, bilateral and devoid of nationalism.[17] The issues-oriented ap-

16. *See generally* 1 HENRI BATIFFOL & PAUL LAGARDE, DROIT INTERNATIONAL PRIVÉ ¶ 280 (7th ed. 1981); DOMINIQUE HOLLEAUX ET AL., DROIT INTERNATIONAL PRIVÉ ¶ 336 (1987).

17. HOLLEAUX ET AL., *supra* note 16, ¶¶ 288-94; PIERRE MAYER, DROIT INTERNATIONAL PRIVÉ ¶ 115 (3d ed. 1987); Yvon Loussouarn, *La Regle de conflit est elle une regle neutre?*, 1980-81 TRAVAUX DU COMITÉ FRANÇAIS DE DROIT INTERNATIONAL PRIVÉ II 43. The conflicts approach here described resembles that set forth in the RESTATEMENT (FIRST) OF CONFLICT OF LAWS (1934).

proach that dominates much of the thinking (if not the actual judicial decisions) in the United States[18] has not made much headway in French choice of law reasoning.[19]

Because the initial designation of the applicable law is, at least in theory, made without regard to the forum's public policy, application of the chosen foreign law may lead to a result that the French forum finds wholly unpalatable. When the forum's "ordre public" is gravely affronted, the forum may refuse to apply the foreign law and will substitute its own substantive rule. This "eviction" of the normally competent foreign law is in principle exceptional, but it allows for preservation of strongly held local policy within a "neutral" choice of law system.[20] The "ordre public" or public policy escape device from the choice of law rule is not unique to French conflicts analysis; the traditional U.S. approach to conflicts also enabled courts to decline to apply a foreign law "injurious or of bad example or against public policy or against morality."[21]

Alternatively, a French court seeking to enforce a particularly strong local policy might simply forego any choice of law analysis and directly apply French law. Local laws that French courts apply in lieu of conflicts analysis are called "laws of immediate application" or "lois de police." To rise to the level of a "loi de police," and thus govern all transactions presenting a point of attachment with France, regardless of the nationality or domicile of the parties, the local law must be one "whose application is necessary for the nation's political, social, and economic organization . . . ."[22] The standard is vague, but greater precision may be impossible. As two of the leading French conflicts scholars have explained, a law of immediate application "concerns matters in which the social interests at issue seem *so* important that the forum's law must apply according to its own

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18. See articles contained in *Symposium: Conflicts of Law*, 34 MERCER L. REV. 501-808 (1983), especially Herma Hill Kay, *Theory into Practice: Choice of Law in the Courts*, 34 MERCER L. REV. 521 (1983).

19. *See, e.g.*, YVON LOUSSOUARN & PIERRE BOUREL, DROIT INTERNATIONAL PRIVÉ ¶ 147 (3d ed. 1989) (arguing that the conflicts method espoused by many in the United States — which the authors label "juridical impressionism" — is ill-adapted to civil law reasoning).

20. See generally MAYER, *supra* note 17, ¶¶ 205-20, especially ¶ 206 for an enumeration of the functions and goals of the "ordre public" exception, including the preservation of certain local legislative policies. *See also* HOLLEAUX ET AL., *supra* note 16, ¶¶ 585-95.

21. Joseph Henry Beale, *Summary of the Conflict of Laws in* PERSPECTIVES ON CONFLICT OF LAWS: CHOICE OF LAW 2, 6 § 49 (James A. Martin ed., 1980). *See generally* EUGENE SCOLES & PETER HAY, CONFLICT OF LAWS 72-75 (1982).

22. Phocion Francescakis, *Conflits de lois*, *in* 137 DALLOZ REPERTOIRE DROIT INTERNATIONAL (1968) (quoted in MAYER, *supra* note 17, ¶ 122).

terms; it is a question of degree."[23] The invocation of the "loi de police" is nonetheless exceptional; in most litigations presenting foreign points of attachment, the French judge will follow the traditional conflicts method.[24]

In conflicts of copyright law, international treaties often supply the applicable choice of law rule.[25] When the treaties furnish no rule, French copyright conflicts analysis resorts to the traditional conflicts method. While commentators have differed regarding what the content of the choice of law rules should be, general agreement exists that copyright claims presenting extraterritorial aspects call for choice of law analysis.[26] In *Huston*, however, the Cour de cassation seems to have disregarded choice of law as a touchstone for determining authorship status and entitlement to attendant rights. Rather than inquiring into the competence of foreign laws presenting points of attachment with the litigation, the High Court appears to have opted for the immediate application of French law.

The Court based its ruling on two French statutory provisions. The first, a disposition of the 1964 law on reciprocity in international copyright, denies copyright protection to works from countries that do not protect French copyrights, but nonetheless ensures protection of moral rights in works from these countries.[27] The Court interpreted this disposition to mean that "in France, no violation may be made of the integrity of a literary or artistic work, whatever the territory on which the work was first disclosed." The second provision, Article 6 of the 1957 copyright law, grants authors the moral rights of attribution and integrity.[28] According to the Court, "the person who is the author of the work from the sole fact of the work's creation is invested with moral rights which are established for his benefit." The Court held that the author-protective rules set forth in

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23. BATIFFOL & LAGARDE, *supra* note 16, ¶ 251, at 299. *See, e.g.*, HOLLEAUX ET AL., *supra* note 16, ¶ 653 (aid to endangered minors; certain spousal obligations; certain imperative protections of employees; labor bargaining representation; consumer protection measures); MAYER, *supra* note 17, ¶¶ 124-25 (adds rules of free and fair competition to the list of "lois de police").

24. For a fuller discussion, in English, of laws of immediate application, see Friedrich K. Juenger, *General Course on Private International Law in* 193 RECUEIL DES COURS 201-02 (1985-IV).

25. *See, e.g.*, Berne Convention, art. 5.2 ("[T]he extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed.").

26. *See generally* JACQUES RAYNARD, DROIT D'AUTEUR ET CONFLITS DE LOIS (1990).

27. France, Law of July 8, 1964, art. 1, cl. 2.

28. France, Law of Mar. 11, 1957, art. 6.

these texts are "laws of imperative application" in France, whatever the work's country of origin.

Thus, in France, the "author" of a foreign work is the person French law would deem the author, whatever her status at home. Indeed, if the French law definition of authorship is now a "loi de police,"[29] then a French court need not even inquire into the content of the authorship law in the country of origin. The Court's technique gives no recognition whatever to the international dimension of the litigation. This juridical imperialism is all the more debatable because the Court's abandonment of the traditional conflicts method was not necessary in order to obtain a moral rights-sensitive result. Recognition of Huston's standing to claim moral rights could have followed from application of a choice of law approach. Most significantly, the Court could have followed the choice of law rule set forth in the Berne Convention.[30] Alternatively, the Court could have acknowledged that the normally competent law was U.S. law, but could have declined to apply U.S. law in this instance because the result of depriving the director and screenwriter of their claim to protect the film's integrity would have violated strongly held French public policy. Indeed, the Court could have justified application of the public policy exception by relying on the same considerations it stressed in directly applying French law.

Despite the identical result, the difference in methodology is important. Had the Court applied the traditional conflicts method, it would have first had to enunciate a general choice of law rule for determining authorship status and rights ownership before holding that local contrary rules outweighed application of the designated foreign law. Clear statement of the normal choice of law rule would have afforded needed guidance, for lower French courts have elaborated different conflicts rules. While the prevailing trend recognizes the country of origin's rules on authorship status and copyright ownership,[31] a minority position designates the law of the forum.[32] Ad-

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29. Not all commentators believe that the *Huston* decision establishes that the French law definition of authorship is a "loi de police." *See* Paul Geller, *French High Court Remands* Huston *Colorization Case*, ENT. L. REP., Aug. 1991, at 3, 4. *But see* Françon, Note, *supra* note 1 (High Court has "categorized the cited texts as *lois de police*"; in so doing, the Court "probably believed that it would reinforce moral rights to assert, as a first principle, their primacy. Partisans of protection of creators will rejoice in such a firm attitude [of the Court].")

30. Berne Convention, art. 14 bis(2), *supra* text accompanying note 8.

31. *See, e.g.*, Judgment of Apr. 29, 1970, Cass. civ. 1re, 1971 R.C.D.I.P. 270, 271 note H. Batiffol; Judgment of Mar. 14, 1991, Cour d'appel, Paris, 1991 J.C.P. II ____ note J. Ginsburg (forthcoming); Judgment of Sept. 21, 1983, Trib. gr. inst., Paris, 120 R.I.D.A. 156 (1984); Judgment of Feb. 14, 1977, Trib. gr. inst., Paris, 97 R.I.D.A. 179 (1978).

mittedly, application of the Berne Convention conflicts rule would not have resolved the broader choice of law question, for the Berne rule concerns only cinematographic works.[33] Nonetheless, resort to the "loi de police" technique for application of French rules of authorship in *Huston* may promote further confusion, for the domain of the "imperative" application of the French definition of authorship remains uncertain.

B. SCOPE OF THE COURT'S CONFLICTS RULING

1. Works Affected

Although the *Huston* case concerned invocation of authorship status and moral rights in an audiovisual work, the High Court's designation of French law to govern authorship status applies to the full spectrum of works of authorship. The breadth of the decision becomes clear from the Court's treatment of the texts upon which it based its ruling. To demonstrate this point, it is necessary to explain some features of French decision-writing and decision-reading.

The style of a French High Court opinion is very different from its U.S. counterpart. The discussion that characterizes the opinions of the U.S. Supreme Court is almost entirely absent. Cour de cassation decisions, including the most important, rarely exceed one or two pages in length. A decision of reversal will cite the legal texts that the lower court will be held either to have misapplied or to have violated. Next, it will state the principle for which these texts stand or the rules that the texts enunciate. It will then — usually in a single paragraph — set forth the facts and the lower court's reasoning in a manner demonstrating the error of the decision below. The key to understanding the decision is generally the Court's statement of the meaning of the cited texts. The Court is not quoting the rule verbatim but is paraphrasing it, often in a way that tends to reshape it. Indeed, the Court may be offering a radically new interpretation of the rule, all under the guise of citation.[34] In *Huston*, the Court's selec-

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32. *See, e.g.*, Judgment of June 13, 1985, Cour d'appel, Paris, *summarized in* 2 REVUE DU DROIT DE LA PROPRIÉTÉ INDUSTRIELLE [R.D.P.I.] 116 (1986); RAYNARD, *supra* note 26, ¶¶ 528-39.

33. *See* Berne Convention, art. 14bis(2).

34. *See, e.g.*, Judgment of Mar. 29, 1991, Cass. ass. plén., 1991 J.C.P. II 21673, concl. D.H. Dontenwille, note J. Ghestin (describing Civil Code art. 1384, cl. 1 as setting forth a general principle of tort liability for the actions of persons for whom one is responsible; although this interpretation appears to be faithful to the text of art. 1384, it seems less so when art. 1384 is read in context with the two subsequent articles; moreover, the decision is di-

tion of the texts to cite was as telling as its description of their contents. On the one hand, the Court cited a French law that in fact did not apply to the *Huston* context. On the other hand, the Court did not cite an article of the Berne Convention that appears to have been entirely on point.

The referenced French law, the 1964 statute on reciprocity, concerns the extent of protection France will grant to works originating in countries that do not protect French works. The statute denies protection of economic rights when the country of origin is not a member of a copyright treaty to which France is also a signatory, and when that country fails to provide adequate and effective protection to French works. Nonetheless, this law preserves protection for rights of attribution and integrity in such works. Although this law makes moral rights claims in France available to foreign authors, one must recognize that the foreign authors at issue come from countries lacking copyright relations with France. That is not the case of the United States, which, together with France, participates in the Berne and Universal Copyright Conventions.[35] Thus, by its own terms, the 1964 law does not apply to U.S. works.

By contrast, the applicable text should have been Article 14bis(2) of the Berne Convention. This provision sets forth a conflicts rule for designating the ownership of author's rights in cinematographic works: the law of the country where protection is sought. Thus, in the *Huston* case, application of Article 14bis(2) would have led to the same choice of law (French law) as applied by the Cour de cassation through its method of immediate application of forum rules. Why then would the Court have failed to rely on the Berne Convention and instead have invoked a statute whose terms were inapposite?

The scope of the Berne Convention's choice of law rule may supply the answer. Article 14bis(2) applies only to cinematographic works. Moreover, the Convention does not set forth a choice of law rule for determining authorship in works generally. Thus, had the Court relied on the Berne Convention, its holding would have been limited to cinematographic works. By not citing the Berne Convention, the Court indicated its disposition to render a decision extending beyond the particular kind of work of authorship involved in the *Huston* controversy, to works of authorship of all kinds, at least as far as the moral rights of attribution and integrity are concerned. By the same token, the citation of the facially inapposite 1964 law can be under-

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rectly contrary to prior High Court interpretations of this text).

35. Universal Copyright Convention (Paris, July 10, 1974).

stood as interpreting the law beyond its context to derive a principle of general application. Implicit in the citation is a kind of a fortiori reasoning: if France protects moral rights in foreign works even when it denies protection to economic rights, surely it would also protect moral rights in foreign works when it grants protection to economic rights.

2. Rights Affected

The *Huston* case concerned standing to invoke the moral right of integrity, a question that turned on identification of the "author" of the work, for French law accords the right of integrity only to authors. The Court's ruling that French substantive law would define who is the "author" of a foreign work implicates another moral right as well, the right of attribution. This right is covered by the *Huston* decision because the statutes cited by the Court address integrity and attribution rights in tandem. Article 6 of the 1957 Copyright Act provides that the author enjoys the right to respect for "his name, his quality, and for his work," and declares these rights "inalienable;" the 1964 law on reciprocity guarantees attribution and integrity rights in France to all authors, regardless of their country of origin. The structure and logic of the High Court's decision therefore apply equally to the attribution right.[36]

The Court's application of the French definition of authorship may also affect entitlement to invoke economic as well as moral rights. This concern arises from the Court's apparent resort to a constant — French — concept of the identity of an "author," whatever the work's country of origin. Assessing the impact of the Court's decision requires inquiry into the content of that concept. It bears emphasis that the "author" *à la française* is the human being who created the work; it is neither a corporate entity, nor the person's employer, nor the commissioning party.[37] The physicality of the French concept of authorship prompts the suggestion that the *Huston* decision could call into question the recognition by French courts of claims to authorship status advanced by U.S. employers for hire. The validity of the

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36. The texts cited by the High Court in *Huston* addressed only the rights of attribution and integrity; there is no basis in that decision, then, for finding the right of "repentance or withdrawal" of "imperative application" to all those whom French law would consider "authors," whatever the work's country of origin. *See infra* note 63.

37. *See* Judgment of July 3, 1990, Cass. civ. 1re, 1991 R.T.D. COM. 44, 48 obs. A. Françon (French law restricts authorship status to physical persons). *See also* Jane C. Ginsburg, *French Copyright Law: A Comparative Overview*, 36 J. COPYRIGHT SOC'Y 269, 271 (1989) and sources cited therein.

suggestion, however, turns on further analysis: What rights of authorship accrue to the physical person French law contemplates?

Under French law, the "author" unites two sets of rights. Article 1 of the French copyright law provides that the "author" enjoys "an incorporeal property right" that "includes attributes of an intellectual and moral order, as well as attributes of an economic order."[38] Does this text permit the dismemberment of the concept of "author" and of "author's rights" so as to designate only the text's moral rights components as "laws of imperative application" to foreign claimants? Arguably, the text accords authors moral and economic rights as an ensemble, for these rights flow together from "the sole fact of the work's creation."[39] Indeed, the High Court quoted this exact phrase in order to emphasize the identity between the "author" and the work's creator (as opposed to the creator's employer). On the other hand, one could contend that the French legislature has already bifurcated authors' rights, by separating integrity and attribution rights from economic rights — and according universal application only to the former — in the 1964 law, also relied upon by the Cour de cassation. The interpretation of the concept of authorship underlying the Court's decision will determine the decision's scope, for if one insists on the union of moral and economic rights within the "author's" person, then the *Huston* decision could disable a foreigner from claiming economic rights ownership arising out of his status in the country of origin as the "author" and initial titleholder of the copyright.[40]

The practical impact, however, of even a broadly defined French concept of authorship to U.S. employers' for hire claims of economic rights ownership need not be devastating. For even if a French court henceforth declines to recognize employers' for hire *initial* copyright ownership arising out of authorship status, the court will almost certainly recognize economic rights ownership flowing from contract.[41]

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38. France, Law of Mar. 11, 1957, art. 1.

39. *Id.*

40. Clearly with respect to moral rights, and possibly with respect to economic rights, the *Huston* decision belies the expectations of U.S. motion picture producers, expressed during the revision process leading to the 1976 Copyright Act, that merely making the U.S. employer for hire the initial owner rather than the "author" could give rise to foreign exploitation problems, but that these could be resolved by labelling the employer the "author" in the U.S. statute. *See* SUPPLEMENTARY REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW: 1965 REVISION BILL *reprinted in Copyright Law Revision: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Judiciary Comm.*, 89th Cong., 1st Sess. 66 (Comm. Print 1965).

41. *See* Judgment of Feb. 1, 1989, Cour d'appel, Paris, 142 R.I.D.A. 301, 307 (1989) note

Accordingly, in the wake of *Huston*, U.S. employers for hire might obtain general assignments of their employees' or commissioned parties' copyright interests.[42] Such assignments might seem an absurdity, if viewed only from a U.S. perspective: why obtain a transfer of rights from employees who have nothing to transfer? Seen from a French perspective, however, employees are the principal beneficiaries of copyright, and a writing is necessary to transfer exploitation rights.[43] If French courts are now to treat the actual creators of foreign works as their "authors," then the court might well deem a U.S. employer for hire who lacks a contract of transfer a stranger to the work, and decline to recognize the U.S. employer's or its French licensee's standing to sue for infringement.[44]

II. AUTHORS AND EXPLOITATIONS UNDER MORAL RIGHTS CONTROL

The most significant questions *Huston* raises for U.S. creators and exploiters concern the realm of moral rights. A general contract of

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P. Sirinelli; Judgment of Apr. 29, 1970, Cass. civ. 1re, 1970 CLUNET 936, 937 note A. Françon.

42. A French court might construe certain employment contracts as a presumptive transfer of economic rights in works created pursuant to employment. *See* France, Law of Mar. 11, 1957, *as amended by* Law of July 3, 1985, art. 63-1 (employment contract for creation of audiovisual work is presumed to effect a transfer of copyright for audiovisual exploitation of creators' contributions); France, Law of July 3, 1985, art. 14 (presumption of transfer of rights in work commissioned for advertising), art. 45 (rights in employee-created software devolve upon employer); *cf.* European Communities Council Directive of May 14, 1991 on the Legal Protection of Computer Programs, 250/91/EEC, art. 2.3 *reprinted in* 1991 O.J. (L 122) 42 ("Where a computer program is created by an employee in the execution of his duties or following the instructions given by his employer, the employer exclusively shall be entitled to exercise all economic rights in the program so created . . . .").

43. *See* France, Law of Mar. 11, 1957, art. 1, cl. 3 (existence of an employment contract does not derogate from moral and economic rights which an author enjoys from the sole fact of creating the work), art. 31 (contracts of exploitation must be in writing).

44. A panel of the Paris Court of Appeals had announced this result even before the decision in *Huston*; *see* Judgment of June 13, 1985, *summarized in* 2 R.D.P.I. at 116 (1986). That decision may have seemed aberrational at the time; it appears less so now.

One might inquire whether, to the extent foreign creators would be considered "authors" for purposes of economic as well as moral rights, they also would enjoy French law's economic protections of authors. For example, Article 35 of the French copyright statute announces a general principle of proportional, rather than lump sum, remuneration for exploitation of the author's work. However, Article 36 exempts transfers of rights "to or by a person or an enterprise established abroad." French commentators have inferred from this exemption that French copyright law's economic rights protections do not express a public policy overriding the contrary obligations undertaken by an author pursuant to a contract legitimately governed by foreign law. *See, e.g.*, Judgment of Feb. 1, 1989, Cour d'appel, Paris, 142 R.I.D.A. 301, 307 (1989) note P. Sirinelli; Judgment of Apr. 29, 1970, Cass. civ. 1re, 1970 CLUNET 936, 937 note A. Françon.

transfer will not resolve these questions because the French law explicitly provides for the inalienability of moral rights.[45] In the second part of this article we will therefore explore more closely who is entitled to claim authorship status in France, and how U.S. creators' moral rights may affect the exploitation of their works in France.

A. WHO IS AN "AUTHOR" UNDER FRENCH LAW?

As discussed above, *Huston* reiterates that the "author," at least for purposes of standing to claim certain moral rights, means the actual physical person who created the work, and excludes not only corporate entities, but any surrogate whose economic investment in the work's creation might entitle him to authorship status in another copyright system, notably those of Anglo-American orientation.[46] However, despite the Court's emphasis on the equivalence between the "author" of the work and its "creator," the French copyright statute defines neither of these terms.

Several elements of the statute nonetheless reinforce *Huston*'s conclusion that the "author" must be a physical being. Article 14, concerning authorship of audiovisual works, states that "the quality of being an author of an audiovisual work belongs to the physical person or persons who realize the intellectual creation of the work." Article 13, governing ownership of collective works and setting forth an exception to the principle of employee ownership of works, states that this kind of work is the "property of the physical or juridical person under whose name the work is made public." Thus, although a juridical person is entitled to initial rights ownership, the statute does not label it an "author"; it provides only that the work is the juridical person's "property." Article 45 of the 1985 amendments to

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45. France, Law of Mar. 11, 1957, art. 6. Concern that a U.S. employee for hire or other author who executes a waiver of moral rights in a contract governed by U.S. law will subsequently invoke her unwaivable moral rights in France might prompt a U.S. employer for hire or grantee to seek to circumvent foreign moral rights guarantees by providing in the contract for a damage action in a U.S. court (or for liquidated damages) in the event of the author's breach of the waiver. The willingness of a U.S. court to enforce such a clause may depend on either of two factors: 1) its approach to international comity; or 2) its reading of the waiver clause. With regard to the first, we expect the U.S. court would defer to the judgment of a foreign court having jurisdiction over the parties and ruling on the local application of domestic law. With regard to the second, a U.S. court might imply into the waiver clause the condition that the waiver be effective under the law of the jurisdictions in which the work is exploited. As a result, the clause would be inapplicable to French exploitation.

46. For example, U.S. copyright law provides that the employer, or under certain enumerated circumstances, the commissioning party, is deemed the "author" of works created pursuant to the employment or commissioned work contract. *See* 17 U.S.C. §§ 101, 201(b) (1978).

the 1957 Copyright Act provides that "all the rights recognized to authors" "devolve upon" the employer when software is created pursuant to employment; the statute does not denominate the programmer's employer as the "author."

We next examine the second prong of the Cour de cassation's equation, that the author is the physical person who "created" the work. What does it mean to "create" a work in French copyright law? Article 7 of the 1957 law declares that "the work is deemed created, independently of any public disclosure of the work, from the sole fact of the realization, even incomplete, of the author's conception." This text indicates two components to creation: conception and concretization. Several decisions hold that the simple realization of another's conception does not constitute authorship; the person putting the author's ideas into concrete form will not be an author unless the realization requires the exercise of artistic judgment in the execution.[47]

By the same token, simply furnishing an "idea," without conferring a concrete form upon it, does not make one the creator of a work of authorship. Thus, French courts have held, for example, that Christo's wrapping of the Pont Neuf constituted a protectible work because he did not merely set forth the idea of wrapping the Pont Neuf but carried out the idea in a particular manner.[48] By contrast, the unrealized project of wrapping the trees on the Champs Elysées did not amount to a work of authorship because, absent the concretization of the concept, the project was merely an "idea."[49] On the other hand, in French copyright law, as in U.S. copyright law, the contribution of elaborated ideas may make one a co-author of a collaborative work.[50] Of course, as in U.S. copyright law, the distinction

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47. *See, e.g.*, Judgment of May 31, 1976, Cour d'appel, Limoges, 90 R.I.D.A. 173 (1976) (rejecting claim to co-authorship status of weaver of tapestry executed from artist's cartoons); Judgment of July 6, 1976, Trib. gr. inst., Paris, 90 R.I.D.A. 190 (1976) (author of a photograph held to be the person who prepares the composition of the shot, not the person who simply depresses the camera's shutter). *See also* Judgment of Mar. 29, 1989, Cass. civ. 1re, 141 R.I.D.A. 262 (1989) (affirming decision of appellate court that the director of television program was not a co-author of the work because his contribution was purely technical).

48. Judgment of Mar. 13, 1986, Cour d'appel, Paris, 1987 DALLOZ SOMMAIRES COMMENTÉS [D. SOMM. COMM.] 150 obs. C. Colombet.

49. Judgment of May 26, 1987, Trib. gr. inst., Paris, 1988 D. SOMM. COMM. 201 obs. C. Colombet. *Cf.* Judgment of Nov. 13, 1973, Cass. civ. 1re, 1974 D.S. Jur. 533, 534 note C. Colombet; 1975 J.C.P. II 18029 note M.C. Manigne (upholding co-authorship status of artist who created sculptures from Renoir's drawings under Renoir's supervision. Renoir's own status as an author of the sculptures was not challenged, although it appears that Renoir contributed no physical effort to their creation).

50. *Compare* Judgment of Dec. 18, 1978, Cass. civ. 1re, 1980 D.S. Jur. 49 note C.

in French law between providing unprotected "ideas" and supplying a protectable collection of ideas amounting to authorship can be elusive.[51]

The French law approach to authorship includes some special rules pertinent to two categories of works that are the subject matter of many U.S. works for hire: audiovisual works on the one hand, and "collective works" on the other. Whereas in the United States, employee-for-hire contributors to these works are not considered authors, in France they retain authorship status. *Huston* therefore raises the possibility that U.S. contributors to these kinds of works may enjoy standing in France as authors.

For audiovisual works, the statute lists certain contributors who are presumptively entitled to co-authorship status. These are the authors of the audiovisual work's scenario, adaptation, dialogue, musical soundtrack (when the music is created for the film) and the director.[52] This presumption does not preclude other contributors, for example, cinematographers or set designers, from proving their entitlement to co-authorship status. The work itself may supply the requisite indicia of authorship; for example, if a film's credits and advertising list a contributor as an author, a court may accept that characterization, even if the contributor is not the principal screenwriter.[53] Absent such convenient proof, however, a claimant to au-

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Colombet (set designer deemed a co-author when he not only supplied ideas, but sketches elaborating his ideas as well) *with* Fisher v. Klein, 16 U.S.P.Q.2d 1795 (S.D.N.Y. 1990) (Leval, J.) ("significant participation" in work's creation through suggestions and discussions, combined with parties' intent to collaborate on work, gives rise to co-authorship, even though one "author" did not physically realize the work). *See generally* CLAUDE COLOMBET, PROPRIÉTÉ LITTÉRAIRE ET ARTISTIQUE 27 & n.5 (5th ed. 1990).

51. On the difficulty of distinguishing unprotectable "ideas" from protected "form," see generally IVAN CHERPILLOD,, L'OBJET DU DROIT D'AUTEUR (1985) (comparative law: French, German, Swiss, U.S.); ANDRÉ LUCAS, LA PROTECTION DES CRÉATIONS INDUSTRIELLES ABSTRAITES 93-117, 163-72 (1975).

52. France, Law of Mar. 11, 1957, *as amended by* Law of July 3, 1985, art. 14.2. This presumption has applied to all audiovisual works since 1986. The prior version of the presumption, contained in the 1957 law, addressed only "cinematographic works." In French law, a "cinematographic work" is generally considered to mean an audiovisual work created for exhibition in cinemas; it does not include audiovisual works created for television. *See* Judgment of May 31, 1988, Cour d'appel, Paris, 139 R.I.D.A. 183 (1989); 1990 D.S. Jur. 235 note B. Edelman. *See also* Charles Debbasch, *A propos de la distinction entre les films et les oeuvres audiovisuelles*, 1991 Dalloz-Sirey, *Chronique* [D. Chr.] 179. As a result, the contributors to a pre-1986 made-for-TV work, as well as the contributors to all pre-March 1957 audiovisual works, must prove their authorship status. *See, e.g.*, Judgment of Mar. 29, 1989, Cass. civ. 1re, 141 R.I.D.A. 262 (1989).

53. *See, e.g.*, Judgment of May 24, 1989, Trib. gr. inst., Paris, 143 R.I.D.A. 353 (1990) (associate scriptwriter did not benefit from statutory presumption of authorship status, but film's credits entitled him to be considered a co-author of the film).

thorship status needs to show that her work manifested her personal intellectual creation, rather than purely technical contributions made under the director's orders.[54]

The statute also declares that "when the audiovisual work is based on a preexisting work or script that is still protected [by copyright], the authors of the original [underlying] work are assimilated to the authors of the new work."[55] This provision is distinct from the other attributions of authorship, for it creates a legal fiction of authorship on behalf of the author of the underlying work. This person need not have in fact participated in the elaboration of the audiovisual work in order to be denominated a co-author. Nonetheless, the author of the underlying work enjoys the economic and moral rights benefits of a co-author of the film. One might therefore inquire whether this fictional assimilation of authorship applies to authors of works from which foreign audiovisual works are derived. An affirmative answer could mean, for example, that not only John Huston's heirs, but also Dashiell Hammett's heirs would have standing to object to the French broadcast of a colorized version of *The Maltese Falcon*.

We conclude, however, that the High Court's decision in *Huston* does not support assimilating authors of underlying works to the status of co-authors of the resulting non-French audiovisual work. The Cour de cassation in *Huston* stressed the entitlement to moral rights flowing to all authors, French or foreign, "from the sole fact of the work's creation." A corollary to this principle may be that moral rights flow *solely* from the fact of the work's creation.[56] Because the author of the underlying work did not participate in the creation of the audiovisual work, we would argue that the statutory assimilation of underlying authors to the status of co-authors of audiovisual works is not of "imperative application" to foreign audiovisual works. As a result, this particular French law characterization of authorship should not apply.[57]

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54. *See generally* COLOMBET, *supra* note 50, at 124-25, and decisions cited at nn.1-2.

55. France, Law of Mar. 11, 1957, art. 14.3.

56. Article 1 of the 1957 law bases the author's rights "du seul fait de la création"; we imply "et seulement du fait de la création."

57. By contrast, if a French film were based on a U.S. novel (*e.g.*, Truffaut's *The Bride Wore Black* was based on a short story by William Irish (a.k.a. Cornell Woolrick who also authored the story upon which the film *Rear Window* was based). *See* Abend v. Stewart, 110 S.Ct. 1750 (1990)). French law should apply to assimilate the U.S. novelist to a co-author of the film. This is not an extraterritorial assertion of French law, since in this instance the audiovisual work is itself French. Moreover, nothing in Article 14 governing French audiovisual works limits the assimilation of co-authorship to French nationals. As a result, the U.S.

Collective works form a second category of U.S. works for hire whose individual creators may now enjoy authorship status in France. As in U.S. law, collective works include newspapers, periodicals and encyclopedias.[58] The French statute makes the physicial or juridical person who coordinates the creation and assemblage of the work the "owner" and "invests" him with the copyright in the work in its entirety.[59] However, each physical person who contributed to the work preserves her authorship status with respect to her individual contributions. As a result, she may claim attribution of authorship if her contributions can be individually identified.[60] Moreover, the High Court has ruled that she may invoke her right of integrity against the coordinator's modifications of her contributions,[61] although that court has also held that some alterations will be tolerated in the interest of harmonizing the work as an ensemble.[62]

B. EXPLOITATIONS SUBJECT TO THE MORAL RIGHT OF INTEGRITY

With respect to employee-created works generally, under *Huston* any contributor to a work exploited in France who is considered an

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author of the underlying work should share in the profits of the exploitation of the audiovisual work (as well as receiving compensation for granting the derivative work's right in the novel to create the audiovisual work).

58. *Compare* 17 U.S.C. § 101 (1978) (defining "collective work" and "work made for hire") *with* France, Law of Mar. 11, 1957, art. 9.3 (defining "oeuvre collective"). For a discussion of examples of works deemed "collective" in French law, see COLOMBET, *supra* note 50, at 119.

59. France, Law of Mar. 11, 1957, art. 13.

60. *See* Judgment of May 20, 1988, Cour d'appel, Versailles, 1989 D. SOMM. COMM. 44 obs. C. Colombet (photographer has the right to credit for his photographs in catalogue).

61. Judgment of Oct. 9, 1980, Cass. civ. 1re, 108 R.I.D.A. 156 (1981) (reversing appellate court for failure to determine if alterations made to contributions to encyclopedia of business law were necessary to collective enterprise of editing encyclopedia); Judgment of May 17, 1984, Trib. gr. inst., Paris, 122 R.I.D.A. 214 (1984) (cuts and rewrites of contributions to musical encyclopedia held to violate contributor's right of integrity).

62. Judgment of Dec. 16, 1986, Cass. civ. 1re, 133 R.I.D.A. 183 (1987) (editor of legal encyclopedia's effort to "fuse the various contributions into an ensemble" held not to violate contributors' moral rights).

Authors of contributions to newspapers and magazines also retain economic rights in their individual contributions. They may exploit these contributions separately, so long as they do not compete with exploitation of the collective work. France, Law of Mar. 11, 1957, art. 36.3.

Art. 36.4 further provides that "only the author has the right to gather his articles and speeches in a collection and to publish them or to authorize their publication in this form." Arguably this provision could apply to the French publication of articles and speeches by foreign employees for hire; however, Article 36 as a whole concerns economic rights. Although the right at issue here evokes the moral right of "divulgation," its placement in the statute makes it more likely to be considered more economic than moral in nature, and, under our analysis, might not apply "imperatively" to foreign creators.

"author" under French law is entitled to recognition of her authorship status (moral right of attribution) and to ensure the integrity of her work.[63] We will now address certain kinds of exploitations of U.S. works in France that may implicate the creator's moral right of integrity. Our examination will focus especially on the French exploitation of audiovisual works.

In French law, the moral right of integrity varies in intensity according to the nature of the exploitation of the work. An exploitation of the work itself, as opposed to its adaptation, requires absolute fidelity.[64] Unauthorized modifications of the work convey a false impression of the work and thus misrepresent the authorial personality within the work.[65] By contrast, when the creator has authorized an adaptation, she can no longer contend that any departure from the underlying work denatures her creation.[66] There are, however, at least two classes of adaptations that will be held to violate the author's underlying right of integrity. First, incompetent adaptations: an inept adaptation will be held to violate the underlying author's moral rights.[67] Second, unanticipated adaptations: even with a broad and general right to create derivative works, certain kinds of derivative exploitations, particularly those unknown at the time of contracting, may not only have been uncontemplated by the author, but, if contemplated, would have been excluded because they would have violated the work's integrity.[68]

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63. The special copyright regime for software set forth at Article 45 to the 1985 amendments of the French copyright act transfers to the employers of programmers "all rights recognized to authors." However, the programmer is still considered the "author" of the software, for Article 46 sets forth the moral rights that the "author" may not claim. These are the rights of integrity and of "repentance or withdrawal," that is, the right of the author to withdraw from circulation a work she considers unworthy. *See* France, Law of Mar. 11, 1957, art. 32. Article 46 thus preserves to programmers the moral right of attribution of their authorship status. Moreover, the right of integrity is disqualified only with respect to authorized adaptations.

64. *See* France, Law of Mar. 11, 1957, art. 6 (general principle of right of integrity), art 16.3 (no addition, deletion or change may be made in the final version of an audiovisual work without the agreement of the co-authors), art 47 (the person undertaking the public performance of a work must assure that the conditions under which the work is performed will respect the work's integrity).

65. *See* COLOMBET, *supra* note 50.

66. *See generally* Pierre Sirinelli, Le droit moral de l'auteur et le droit commun des contrats 278-89 (1985) (thesis, University of Paris).

67. *See, e.g.*, Judgment of Apr. 18, 1979, Trib. gr. inst., Paris, 102 R.I.D.A. 175 (1979).

68. *Cf.* Sirinelli, *supra* note 66, at 280 & n.3 (duty of respect is open-ended to allow for accommodation of unanticipated kinds of exploitations).

1. Exploitations of the Work Itself: Audiovisual Works

French texts and case law furnish several pertinent examples of the exploiter's obligations of fidelity in the domain of audiovisual works. One instance of current concern is commercial interruptions of televised programs. Until 1986, commercials appeared only before and after programs, not during them. Since 1986, a telecommunications statute has allowed the commercial interruption of broadcast audiovisual works, but only on privately-owned television stations; it permits only one interruption per work, subject to the author's agreement.[69] A French court has held that insertion of commercials without the director's agreement violated his right of integrity.[70] Under *Huston*, it appears that a French licensee of a U.S. film would be obliged to secure the agreement of the film's director and screenwriter (and other creators that French law designates as "authors" of an audiovisual work[71]) before the film may be broadcast with an interruption for advertisements. French courts have also held that the superimposition of the television station's logo on a broadcast film violated the work's integrity,[72] as did the insertion into a broadcast documentary's credits of a notice warning viewers that they might find the documentary's point of view dated.[73]

2. Adaptations and Moral Rights

When the author has granted rights to adapt her work to another medium, the adaptor's duty of fidelity is necessarily attenuated. The adaptor must enjoy sufficient leeway to create her own original work of authorship in the new medium; nonetheless, French courts have held that she must respect the substance, character and spirit of the underlying work.[74] Determining whether the latter has occurred nec-

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69. France, Law of Sept. 30, 1986, art. 73, *as modified by* Law of Jan. 17, 1989. *See* 1989 R.T.D. COM. 236 obs. A. Françon.

70. Judgment of May 24, 1989, Trib. gr. inst., Paris, 143 R.I.D.A. 353 (1990).

71. *See* France, Law of Mar. 11, 1957, art. 14.2; *supra* part II.A.

72. Judgment of Oct. 25, 1989, Cour d'appel, Paris, 1990 D. SOMM. COMM. 54 obs. C. Colombet.

73. Judgment of Apr. 4, 1991, Cass. civ. 1re, 1991 IMAGES JURIDIQUES, No. 85. For a fuller discussion of recent French court decisions addressing the right of integrity in audiovisual works, see Frédéric Pollaud-Dulian, *Moral Rights in France Through Recent Case Law*, 145 R.I.D.A. 126, 192-200 (1990).

74. *See, e.g.*, Judgment of Nov. 22, 1966, Cass. civ. 1re, 1967 D.S. Jur. 485 note H. Desbois at 488 (adaptation of literary work to film requires "recognizing a certain liberty to the cinematographic adaptor, whose role consists of finding, without denaturing the character of the work, a new expression of the substance of the underlying work" (quoting Judgment of May 13, 1964, Cass. civ. 1re)). *See generally* HENRI DESBOIS, LE DROIT D'AUTEUR EN

essarily demands case-by-case evaluation. It will often require courts to make artistic judgments to some extent because the author of the underlying work is in essence charging that the derivative work was ineptly produced.

A different kind of problem, one of particular pertinence to U.S. creators, is posed when the first author alleges that the very nature of the adaptation violates the character and substance of the underlying work. This, in essence, is the moral rights claim pressed by the *Huston* plaintiffs: John Huston chose to film his works in black and white, and he designed their "look" for the black and white medium. Accordingly, colorization deprives them of an essential quality and fundamentally alters their character. In this instance, it does not matter whether the adaptation was competently or poorly accomplished. The point is that, even if the adaptor was granted derivative work rights, and even if his work is well made, he could not make *this kind* of derivative work without violating the underlying work's right of integrity.

Analysis of how French courts would rule on this kind of integrity rights claim requires discussion of the extent to which, despite the ostensible "inalienability" of moral rights, French courts will in fact tolerate express or implicit waivers of such claims. In theory, the statutorily-declared "inalienable" character of these rights is understood to bar any transactions in moral rights.[75] Nonetheless, in practice, a court's response might differ if, on the one hand, the underlying work's author explicitly granted the right to make the kind of adaptation at issue, or, on the other hand, she granted a general right of adaptation but did not expressly envision the complained-of adaptation. In the first case, a court might determine that the author's grant of the specific adaptation right constituted the author's recognition that that kind of adaptation would not per se violate the underlying work's integrity. At that point, the issue might well reduce to whether the licensed adaptation was competently made.

In the latter case, a claim of per se violation of the right of integrity would likely fare better, particularly if the kind of adaptation at issue not only received no mention in the contract, but was unknown

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FRANCE ¶¶ 638-39 (3d ed. 1978).

75. *See, e.g.*, DESBOIS, *supra* note 74, ¶ 382 (author's renunciation of right to defend his "personality" as manifested in his works would amount to "moral suicide"); André Françon, *La liberté contractuelle dans le domaine du droit d'auteur en France*, 1976 D. Chr. 55. *But see* Bernard Parisot, *L'inaliénabilité du droit moral*, 1972 D. Chr. 71, 75. *Cf.* M.J. Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987) (considering rights that, in U.S. law, are, or should be, out of commerce).

or unforeseen at the time of contracting.[76] In the domain of economic rights, the French copyright statute mandates a restrictive interpretation of grants of future rights.[77] Presumably, a French court would also interpret restrictively broad grants of future exploitation rights that, if read expansively, would impinge on moral rights. If the court held, as a matter of economic rights, that the adaptation right at issue had not been transferred, the court would not be required to rule on the existence or enforceability of a moral rights waiver. If the court found a broad grant of economic rights, the court could still determine that the parties anticipated the author's continuing moral rights prerogotives.[78] Again, the question of waiver could be avoided.[79]

Suppose, however, the derivative works contract not only expressly covered new and unknown modes of adaptation but expressly waived any moral rights claims to which these potential adaptations could give rise. The underlying work's author could no longer allege lack of intent to authorize the adaptation at issue, and the waiver issue would be precisely posed. Despite the principle of inalienability of moral rights, it is unclear how a French court would rule in this situation, for the case law is neither abundant nor consistent.[80] Some first-level courts have declared that any explicit waiver is a nullity.[81] On the other hand, the Paris Court of Appeals has sustained a contract in which a novelist granted total freedom to the producer of a film adaptation.[82] The court held that the clause of the contract authoriz-

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76. *Cf.* France, Law of Mar. 11, 1957, art. 30.4 ("[W]hen a contract includes a total grant of one of the two rights set out in the present article [right of reproduction and right of public performance], the scope of the grant is limited to modes of exploitation set forth in the contract.").

77. For example, Article 38 provides: "The clause of a grant which tends to confer the right to exploit a work under a form not foreseeable or not foreseen at the date of the contract must be express and must stipulate a correlative participation in the profits of the exploitation."

78. *See, e.g.*, Judgment of Dec. 1, 1983, Trib. gr. inst., Paris, 120 R.I.D.A. 162, 165 (1984) (implying moral rights reservation in contract between authors of comic strip and publisher, and stating that had the contract purported to waive moral rights, the waiver would have been void).

79. On French courts' sometimes strained interpretations of contracts to avoid finding waivers of moral rights, *see, e.g.*, André Françon & Jane C. 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 ART & L. 381, 393-94 (1985).

80. For a fuller discussion of French courts' treatment of clauses renouncing moral rights objections to adaptations, see Sirinelli, *supra* note 66, at 296-307. *See also* works cited *infra* note 83.

81. *See, e.g.*, Judgment of Dec. 1, 1983, Trib. gr. inst., Paris, 120 R.I.D.A. 162 (1984); Judgment of May 27, 1959, Trib. gr. inst., Seine, 24 R.I.D.A. 145 (1959).

82. Judgment of Nov. 23, 1970, Cour d'appel, Paris, 69 R.I.D.A. 74 (1971).

ing the writer to insert in the film credits a notice of his disapproval of the film adaptation adequately secured his interest in preserving the integrity of the underlying work.[83]

Grantees of derivative works rights, however, should not rely heavily on this decision to bolster their claims to enforce a waiver of moral rights regarding new or unforseen modes of adaptation, even were the waiver clause accompanied by a clause permitting the author to warn the public of her displeasure with the adaptation. The Paris Court of Appeals decision did not concern novel or unanticipated forms of exploitation. Rather, it was a conventional book-to-film moral rights controversy, in which the novelist deplored the quality of the adaptation, for he asserted that the film lent an inappropriately comic aspect to the principal character of his novels. Moreover, the Paris Court of Appeals decision indicates that the true purpose of the novelist's suit was not to protect the integrity of his protagonist but to negotiate a better percentage of the film's profits.[84] In other words, the author appears to have been pressing a pecuniary rights claim in a moral rights guise. French courts have been

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83. A curious decision of the Cour de cassation, first civil chamber, Apr. 7, 1987, 134 R.I.D.A. 197 (1987), holds that, prior to creating a work, the author of a commissioned work may agree to "limit his liberty of creation," and thus be constrained to submit his work for the commissioning party's approval. Although the result may be justified by the facts of the case, the Court's reasoning has provoked uniform criticism, for the Court stated that moral rights in a work do not exist prior to the work's creation, and that an author's agreement, prior to creation, to "obey the imperatives of a commission" therefore does not constitute a forbidden waiver of moral rights. Commentators have stressed that moral rights are personal to the author; they precede creation of the work. Pre-creation agreements to accept the commissioning party's modifications thus do constitute waivers. *See, e.g.*, 1988 R.T.D. COM. 224 obs. A. Françon; Emmanuel Derieux, *Commissioned Work, Creative Freedom and the Author's Moral Right*, 141 R.I.D.A. 198 (1989); André Françon, *La jurisprudence française récente et le droit moral*, *in* MÉLANGES Offerts À Joseph Voyame 109, 110-12 (1989); Pollaud-Dulian, *supra* note 73, at 132-40.

As one commentator has pointed out, however, *see* Pollaud-Dulian, *supra* note 73, one should distinguish an agreement to "limit freedom of creation" from an agreement to tolerate violations of a work's integrity. Moral rights principles are not compromised if a commissioned author agrees, for example, to adhere to a budget, even if cost constraints may well restrict her artistic freedom. The Cour de cassation may simply have employed an overbroad formula to state an uncontroversial proposition. In any event, the Court's reasoning would not seem to extend to validating a pre-creation agreement to accept subsequent adaptations of the work. This agreement would constitute a waiver even under the Court's reasoning, because it would apply not to the commissioned work itself, but to works thereafter derived from it.

84. *See* Judgment of July 23, 1970, Cour d'appel, Paris, 69 R.I.D.A. at 75 (1971) (plaintiff initially brought breach of contract claim; first-level court raised moral rights issue *sua sponte*). *See generally* Sirinelli, *supra* note 66, at 305-07.

vigilant to prevent the misuse of moral rights to promote economic goals.[85]

A recent decision of the Cour de cassation reiterates the special, non-pecuniary character of moral rights claims.[86] The High Court affirmed the lower court's dismissal of an author's claim under the moral right of withdrawal.[87] The author had sought to exercise this right because he deemed the royalty paid by the publisher inadequate. The Court held that the moral right of withdrawal could not serve as a means to an economic end.

In this case, plaintiff (perhaps badly counseled) acknowledged the motivation for his claim; the courts thus had little difficulty declaring its impropriety. As a general matter, an author need not justify her motivation for invoking moral rights.[88] Nonetheless, the exploiter may raise, and bears the burden of proving, improper motivation as a defense. One may anticipate that French courts will henceforth hear and carefully scrutinize this defense.[89]

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85. *See, e.g.*, Judgment of Feb. 6, 1986, Cour d'appel, Paris, 1988 CLUNET 1021 note B. Edelman (discussed in Ginsburg, *supra* note 9, at 96-98 (invocation of right of attribution as means to pressure co-contractant into renegotiating compensation for merchandizing properties)).

This kind of misuse of moral rights, which the French would refer to as a "détournement de la finalité du droit," should be distinguished from "abuse of right" ("abus de droit"). The latter may be held to exist when the rights-claimant invokes the right in order to harm the other party. The Cour de cassation and some commentators have stated that moral rights are not subject to the defense of "abuse of right." *See* Judgment of June 5, 1984, Cass. civ. 1re, 124 R.I.D.A. 150 (1985); DESBOIS, *supra* note 74, ¶ 396; Pollaud-Dulian, *supra* note 73, at 146-48. *But see* COLOMBET, *supra* note 50, ¶ 133.

86. Judgment of May 14, 1991, *Chiavarino v. SPE*, Cass. civ. 1re, forthcoming 150 R.I.D.A. ___ (1991).

87. *See supra* note 63.

88. *Cf.* Judgment of Feb. 28, 1989, Cass. civ. 1re, 141 R.I.D.A. 257, 259 (1989) note A. Françon (reversing lower court's finding of widow's "notorious abuse" of exploitation rights of works of late artist Fujita; Mme. Fujita refused to license plaintiffs to reproduce Fujita's works in their biography; while the lower courts indicated suspicion of Mme. Fujita's motives for refusing, the High Court accepted Mme. Fujita's assertions at face value; Prof. Françon's note accompanying the decision suggests the High Court gave Mme. Fujita more credit than she deserved).

89. One may also anticipate that French courts will sense considerable pressure to scrutinize carefully foreign contributors' moral rights claims, lest they become, as one French commentator has predicted, "blackmail against American [film] producers." *See* André Bertrand, *Affaire "John Huston": la Cour de cassation opte pour "la loi de la jungle"*, 38 CAHIERS DU DROIT D'AUTEUR 1, 9 (1991). Bertrand also suggests that the U.S. producers might have recourse to the International Court of Justice in the Hague, or to the European Court of Human Rights in Strasbourg, "in order to obtain a very severe condemnation of France for violation of the producer's property right." *Id.*

CONCLUSION

The French Supreme Court's decision in *Huston* will significantly affect many foreign creators and exploiters of works of authorship. Under *Huston*, any contributor to a work exploited in France who is considered an "author" under French law is entitled to be recognized as the work's author and to ensure the integrity of the work. The breadth of the *Huston* decision raises the question whether French law also determines initial ownership of economic rights. Although at least one reading of the decision and the cited statutory texts supports an expansive view of the decision's scope, the more likely construction of the decision would limit its mandatory application of French law concepts of authorship to the moral rights of attribution and integrity.

An "author's" ability to invoke moral rights under *Huston* applies to the full range of works of authorship, not merely audiovisual works. With respect to audiovisual works, however, *Huston* has special implications. Most foreign contributors who, under French law, would enjoy the statutory presumption of authorship of audiovisual works,[90] as well as those contributors who prove their authorship, are entitled to protect their work against unauthorized modifications, including alterations, deletions, interruptions and insertion of commercials.

Finally *Huston* might well be read together with the High Court's contemporaneous decision regarding the moral right of withdrawal. The latter's emphasis on the peculiar importance of the "moral" character of moral rights may limit *Huston*'s potential impact. As a pair, the decisions indicate that French courts will entertain integrity and attribution rights claims from any person French law would deem the "author," no matter what that person's status in the work's country of origin; however, the courts will also examine closely the moral rights claim to ensure that the creator is in fact seeking to secure authorship attribution and/or to preserve the integrity of her work, rather than to renegotiate improved compensation.

90. Albeit not authors of underlying literary works.

Appendix

Decision of the Cour de cassation, first civil chamber, May 28, 1991: *Mme. Huston and others v. Société d'exploitation de la cinquième chaine and others*

* * *

Citing clause 2 of article 1 of law No. 64-689 of July 8, 1964 [the law concerning international reciprocity in copyright protection], together with article 6 of the law of March 11, 1957 [the copyright law];

Whereas, according to the first of these texts, in France, no violation may be made of the integrity of a literary or artistic work, whatever the territory on which the work was first disclosed; whereas the person who is the author of the work from the sole fact of the work's creation is invested with moral rights which are established for his benefit by the second of the texts cited above; whereas these rules are laws of imperative application;

Whereas the Huston plaintiffs are the heirs of John Huston, the co-director of the film "Asphalt Jungle," created in black and white, but of which the Turner Company, grantee of the producer, established a colored version; whereas, invoking their right to compel the respect of the integrity of John Huston's work, the Huston plaintiffs, joined by various entities [authors' rights societies], have requested the judges below to prohibit the television station "La Cinq" from broadcasting this new version; whereas the Court of Appeals dismissed their claim on the ground that the elements of fact and law found by the appellate court "prohibited the eviction of the American [copyright] law and the setting aside of the contracts" that had been concluded between the producer and the directors, contracts that denied the latter persons the status of authors of the film "Asphalt Jungle";

Whereas in so holding, the Court of Appeals has violated the above-cited texts by refusal to apply them;

For these reasons, and without need to hold on the other objections raised in the petition for this Court's review:

Reverse and annul, in all respects, the decision rendered by the Court of Appeals of Paris, July 6, 1989, reinstate therefore the case and the parties in the state in which they were before said decision and, for resolution of the case, send the parties before the Court of Appeals of Versailles.

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