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Moral Rights in Puerto Rico and the Puerto Rico V.3.0 Creative Commons License*

Contents

Introduction

This memorandum has been prepared by the 2006-2007 class of the University of Puerto Rico School of Law Cyberlaw Clinic.[1] It is designed to explain the Clinic's analysis while porting version 3.0 of the Creative Commons License to Puerto Rico. Because U.S. economic copyright protections are applicable to Puerto Rico, v.3.0 of the US CC license will be ported to our jurisdiction in the Spanish language. The only issue relates to moral rights: their possible waiver and scope. Therefore, this memorandum deals exclusively with the issue of potential waivability of moral rights in Puerto Rico and provides a background on the Island's legal relationship to United States copyright law. In all, it hopes to provide the community with tools for the subsequent public discussion in Puerto Rico.

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The document covers three general aspects. First, it discusses Puerto Rico's mixed cultural and legal tradition and explains the coexistence of U.S. economic copyright protection through federal law and the Spanish moral rights tradition. Second, it discusses the issue of moral rights waiver in a variety of jurisdictions and in Puerto Rico. The third part proposes specific language to address moral rights in the context of Puerto Rico's ambiguous treatment of such rights.

A. Applicable Law

In 1898 the United States acquired the Island of Puerto Rico from Spain as a result of the Hispanic-American War. At the time, applicable intellectual property law derived from the Spanish Civil Code, the Spanish Intellectual Property Act of 1879 and its Regulations and treaties in this matter. By virtue of US Congressional Acts of 1900 and 1917, providing for the constitutional organization of the Island, many of these Spanish intellectual property laws continued to be in force. That continued to be the case after the Federal Relations Act of 1950 and the Constitution of 1952.[2] The protection of copyright in Puerto Rico law has been, thus, limited to the protection of moral rights as in Spain, as opposed to the protection of economic rights which is provided by U.S. copyright law.[3]

U.S. federal law is applicable in Puerto Rico, even though the Island is not a state of the Union due to several historical and legal facts: First, Puerto Rico is not an independent country; instead it is a "non incorporated territory", subject to the Congress' plenary powers under the "territorial clause" of Article IV, sec. 3, of the U.S. Constitution's.[4] This is true today, even after the Federal Relations Act of 1950 and the

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[2] *See* Reynal v. Tribunal Superior, 102 DPR 260 (1974); 2 P.R. Off. Translation 326, 1974 WL 36873 (P.R.).

[3] *See* Ossorio Ruiz v. Secretario, 106 DPR 49 (1977), 6 PR Off. Translation 65, 1977 WL 50830 (P.R.).

[4] That is, "a territory appurtenant and belonging to the United States, but not a part of the United States within the revenue clauses of the Constitution." Downes v Bidwell 182 U.S. 244, 287 (1901).

Constitution of 1952 which gave Puerto Rico substantially more authority to regulate local affairs.[5] Second, by virtue of the Federal Relations Act of 1950 all federal laws that are "not locally inapplicable", are the law of the land in Puerto Rico.[6] Third, in the specific case of copyright law, federal law specifically preempts local law only as to those rights addressed by the Copyright Act.[7]

Because the U.S. Copyright Act only addresses economic interests, federal preemption of copyright law in Puerto Rico occurs with regards to economic rights and not moral rights which, as has been stated, have their origin in the previous Spanish colonial era.[8] Thus, as is characteristic of a mixed legal tradition, Puerto Rico has two copyright regimes: one covering economic rights through US law, in U.S. courts, and another covering moral rights, by way of Puerto Rico law which is informed by the Spanish civil law doctrine, enforceable in local courts.

In 1988 the Civil Code was amended by the Puerto Rico Intellectual Property Act,[9] which provides for specific protection of moral rights during the life of the author plus fifty years.[10]

Moral rights are defined in the law as the right of an author "to benefit from [a literary, scientific, artistic and/or musical work], and the exclusive prerogatives to

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[5] It is beyond question that, even when Puerto Rico is a territory of the United Status, it has a solidly defined distinct culture, language and sense of national identity. *See* NANCY MORRIS, PUERTO RICO: CULTURE, POLITICS AND IDENTITY (1995).

From Ricky Martin, Marc Anthony, and others who carry the good name of this small but proud nation within a nation, our presence has been felt all over the world. "The most consistently cited element of Puerto Ricanness [sic] was the Spanish language. [...] Another commonly cited element that respondents in certain focus groups felt defined Puerto Rico and set it apart was the island's history, particularly 400 years of Spanish colonialism, 100 years of U.S. sovereignty, and the blend of the cultures of the indigenous Taino Indians, Spanish colonizers, and African slaves." Morris, at 82-84. *See also* José Julián Álvarez González, *Law, Language, and Statehood: The Role of English in the Great State of Puerto Rico*, 17 LAW & INEQ. J. 359 (1999).

[6] 39 Stat. 954, 48 USCA 734: "The statutory laws of the United States not locally inapplicable, except as hereinbefore or hereinafter otherwise provided, shall have the same force and effect in Porto Rico as in the United Status…"

[7] *See* Pancorbo v. Wometco, 115 DPR 495, 15 P.R. Off. Translation 650, 1984 WL 270923 (P.R.).

[8] *Id.*

[9] Act of July 15, 1988, 31 LPRA ss. 1401-1401(h).

[10] 31 LPRA 1401(c).

attribute to him/herself or retract its authorship, dispose of his/her work, authorize its publication and protect its integrity, in accordance with the special laws in effect on the matter."[11] In order to avoid undue conflict with federal law, the Puerto Rico law specifies that the protection of moral rights is independent from the protection of economic rights under federal law in federal courts.[12] As can be seen from the general definition, moral rights in Puerto Rico include: (1) attribution, (2) the right to retract the work, (3) the right to dispose of the work, (4) to authorize its publication and (5) protect its integrity. Aside from generally defining these rights and providing remedies, the law is almost completely silent as to their specific contours. Clarification of these contours is of particular importance to the porting of CC licenses to Puerto Rico.

It is widely understood that the prospect of moral rights waiver (or the rigidity of such waiver in many jurisdictions) presents a challenge for Creative Commons licenses, especially in the case of its integrity component, since original author's moral rights may inhibit downstream user's creative expression by impeding the production of derivatives from the licensed work.[13] Thus, for our purposes it is crucial to understand (1) when a violation of the integrity right occurs and (2) under what circumstances, if any, it can be waived. The law, as has been said, is vague in this respect. The Puerto Rico Supreme Court caselaw dealing with this topic is, regrettably, not very enlightening.

B. Moral Rights in Puerto Rico

The main problem we encountered is that the contours of such rights are not clear, either in statute or case law. First, we do not know for certain whether they can be waived and if so, to what extent and under which circumstances. Second, the law

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[11] 31 LPRA 1401.
[12] 31 LPRA 1401(b).
[13] *See* http://www.lessig.org/blog/archives/002449.shtml; http://wiki.creativecommons.org/Version_3#International_Harmonization_.E2.80.93_Moral_Rights

and caselaw are also ambiguous as to the circumstances where an infringement of moral rights is deemed to occur. We are not certain if any adaptation, without qualification, would be deemed to be prejudicial to the author's honor and reputation and, thus, a violation of the moral right of integrity (as in the case of Japan). This ambiguity is caused by the fact that our local intellectual property statute is vague on many issues and that the PR Supreme Court caselaw on the issue is scarce.

The next three sections address these issues. First, in section **B(1)**, we engage in a comparative analysis to identify a baseline in which to place the Puerto Rican moral rights regime. We conclude that, as a general matter, in those jurisdictions where moral rights waiver is allowed, it is explicitly provided for in the national legislation. Second, section **B(2)**, although the law in Puerto Rico is silent as to the polar positions of the issue (inalienability and waivability of moral rights), the caselaw on point suggests that it is inalienable, although some remarks have been made suggesting a more pragmatic approach. The caselaw, therefore, casts doubt as to the rigidity of its inalienability and/or as to the required conditions for waiver. Finally, in section **B(3)**, with regard to the requisites for integrity rights infringement, the cases are simply confusing, leaving doubt as to whether any change to an original work constitutes a violation of the right of integrity.

In light of these considerations, and given our law's ambiguity, in part **C** we propose an approach for dealing with moral rights in the PR CC license.

B(1). Inalienability vs. Waivability: A comparative analysis

Most jurisdictions throughout the world grant moral rights to authors. While the scope of such rights may vary from one jurisdiction to another, members of the Berne Convention are required to provide legal protection for at least two specific

moral rights: attribution and integrity.[14] However, the Berne Convention does not address the issue of waiver of moral rights.[15] Rather, each individual country has to determine in their own legislation the extent to which, if any, an author is able to waive such rights.[16]

Traditionally, civil law jurisdictions have provided a stronger and broader protection of moral rights than common law jurisdictions.[17] France, considered to be the birthplace of the moral rights doctrine (*droit moral),* has recognized moral rights long before the Berne Convention. In addition to the minimum requirements established by said multilateral treaty –that is, the recognition of the right of attribution (*droit de paternité)* and integrity (*droit au respect à l'oeuvre*)[18]-- French copyright law also affords authors protection of rights such as the right to withdrawal (*droit de repentir* or *de retrait*)[19] and to control publication of his or her work (*droit de divulgation).*[20]

Current French copyright legislation provides explicitly that these rights are

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[14] "Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation". *Berne Convention for the Protection of Literary and Artistic Works,* September 9, 1886, art. 6bis, S. Treaty Doc. No. 27, 99th Cong., 2d Sess. 41 (1986). Available at: http://www.wipo.int/treaties/en/ip/berne/

[15] Waiver of Moral Rights in Visual Artworks, Executive Summary. Available at: http://www.copyright.gov/reports/exsum.html

[16] *Id*. It is important to note, however, that some commentators argue that allowing waiver of moral rights undermines the principle of such rights protected under Berne.

[17] Cyrill P. Rigamonti, *Deconstructing moral rights*, 47 HARV. INT'L L.J. 353 (Summer 2006).

[18] Article L.121.1 of the French Copyright Act states that "the author shall enjoy the right of respect for his name, his authorship, and his work," and that "this right shall be attached to his person." ("L'auteur jouit du droit au respect de son nom, de sa qualité et de son oeuvre. Ce droit est attaché à sa personne"). Code de la Proprieté intellectuelle [Intellectual Property Code; hereinafter "French Copyright Act"], Law No. 92-597 of July 1, 1992. Available at: http://www.celog.fr/cpi/. See Raphaël Van Butsele c/ Didier F. TGI Compiègne, ord., réf. , 25 Juill. 2001, (determining that the publication of photographs on the internet without mentioning the author's name constitutes infringement of the right of attribution). Available at: http://www.legalis.net/jurisprudence-decision.php3?id_article=68; see also Fersing v. Buffet, Cour d'Appel Paris, May 30, 1962, D. Jur. 1962, 570; Cass. chs. exprops., July 6, 1965, Gaz. Pal. 126 (1965). (determining that the dismantling of a work of art and selling the pieces as individual works of art constituted a violation of the artist's right to integrity).

[19] L.121.4, supra note 5.

[20] L.121-2, supra note 5.

"inalienable"[21] and although upon an author's death they may be transmitted to his or her heirs or legal successors (as they are "perpetual"), they may not be otherwise transferred or assigned.[22] Given that moral rights under French copyright legislation are conceived as an extension of the author's personality, which means that there is a "permanent and unbreakable" bond between the author and his work,[23] French courts have consequently determined that "(i) authors cannot legally relinquish or abandon the rights of attribution and integrity altogether, (ii) advance blanket waivers are unenforceable, and (iii) narrowly tailored waivers that involve reasonably foreseeable encroachments on the author's moral rights are generally valid".[24]

Most civil law jurisdictions follow the French tradition in their own regulation of moral rights. The current Copyright Act of Spain[25] also exceeds the minimum level of protection required by the Berne Convention, recognizing not only rights required by the treaty (attribution and integrity) but also other moral rights recognized by the French legislation, such as the right to withdrawal and the right to disclosure, as well as other peculiar moral rights rarely protected in other jurisdictions such as the right of the author to access the single or rare copy of the work, subject to certain limitations.[26] But more importantly, article 14 of the current Spanish legislation, specifically provides that these rights are inalienable and nonwaiveable ("*irrenunciables")*, thereby explicitly proscribing any contractual limitation of such rights between an author and the user of

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[21] Art. L. 121-1, supra note 5.

[22] *Id.*

[23] Mira Sundara, *Moral Rights in Information Technology: A new kind of "Personal Right"?* 12 INT'L J.L. & INFO. TECH 32 (Spring 2004).

[24] See Cyrill P. Rigamonti, supra note 17. *See also* Cour de cassation, Civ.1, 4 avril 1991, *Affaire Béart*, *Revue Internationale du Droit d'Auteur*, October 1991. As cited in: http://fr.creativecommons.org/FAQjuridiques.htm.

[25] Royal Legislative Decree 1/1996 of 12 April 1996 [Real Decreto Legislativo 1/1996, de 12 de abril, por el que se aprueba el Texto Refundido de la Ley de Propiedad Intelectual, regularizando, aclarando y armonizando las disposiciones legales vigentes sobre la materia]. Available at: http://www.mcu.es/propint/files/LeyProp_Intelectual_mod172_n.pdf

[26] *Id.* Art. 14 (7). This right is not unlimited as the author shall not requiere displacement of the work, and the exercise of this right shall not cause any unduly harm or burden to the possessor of the work.

his work.[27]

Mexico also follows the traditional civil law concept of moral rights. Chapter II, Title II of the Mexican Federal Legislation of Author's Rights[28] is dedicated to moral rights, recognizing the traditional moral rights afforded to authors in other civil law jurisdictions. The Mexican legislation has been very clear in stating its view concerning moral rights. It specifically states that moral rights are considered "attached" to the author and are inalienable, perpetual, imprescriptible, and incapable of renunciation.[29] The act explicitly provides that once the work of an author enters the public domain, it may be used freely; the only limit is to respect the author's moral rights.[30] Mexico is very defined in its position and follows the tradition of civil law countries by stating in its legislation literally that moral rights cannot be waived.

At the other end of the spectrum, common-law countries have traditionally favored protection of economic rights, although protection of moral rights have been directly or indirectly achieved by other means.[31] In the past couple of decades, however, countries such as the United Kingdom, the United States, and Australia, have developed moral right concepts into their national legislation.[32] Nevertheless, while these countries have incorporated substantive legal protection of moral rights through statutory provisions, simultaneously they have allowed waiver of such rights, leading some commentators to question their level of compliance to their international obligations[33].

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[27] *Id.*, supra Note 14.

[28] La Ley Federal del Derecho de Autor, Publicado en el Diario Oficial de la Federación el 24 de diciembre de 1996. (En vigor a partir del 24 de marzo de 1997). Available at: http://info4.juridicas.unam.mx/ijure/tcfed/134.htm?s=

[29] Art. 19

[30] Art. 152

[31] See Gerald Dworkin, *The Moral Right of the Author: Moral Rights and the Common Law Countries*, 19 COLUM.-VLA J.L. & ARTS 229 (1995)

[32] Rigamonti, *supra* note 17,

[33] Dworkin, *supra* note 31. According to some others, allowing waiver of moral rights undermines the principle of moral rights.

British law introduced moral rights by enactment of the *United Kingdom Copyright, Designs and Patents Act of 1988,*[34] the two most important rights being the rights of attribution ("the right to be identified as author or director")[35] and the right of integrity (defined as "the right to object to derogatory treatment of work"),[36] which are limited to the duration of copyrights[37], unlike in France where such rights are perpetual. It is important to note, however, that the rights of attribution and integrity are subject to certain requirements and exceptions, for instance, the requirement that the right of attribution must be asserted by the author.[38] British law also recognizes two other moral rights: the right against false attribution of work[39] and the right to privacy of certain photographs and films[40], although some commentators have held that such rights are not technically moral rights.[41]

Nevertheless, under British copyright legislation, although moral rights are not assignable,[42] waiver of such rights is allowed by a written instrument [43] in relation to specific works, works of a specified description or works generally concerning existing or future works[44], either conditionally or unconditionally, and subject to revocation[45]. Furthermore, in spite of the written requirement for a waiver, British law also provides for informal waivers under the general law of contracts or the doctrine of estoppel.[46] Finally, in relation to joint works, the law provides that a waiver by one joint author

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[34] United Kingdom Copyright, Designs and Patents Act of 1988. Available at: http://www.opsi.gov.uk/acts/acts1988/Ukpga_19880048_en_1.htm
[35] §§ 77-79.
[36] §§ 80-83.
[37] § 86 (1)
[38] §78
[39] § 84
[40] §85
[41] Rigamonti, *supra* note 17, at 400.
[42] § 94, supra Note 17.
[43] § 87 (2).
[44] § 87 (3)(a)
[45] § 87(3)(b).
[46] § 87 (3)(c)

does not bind the other joint author(s).[47]

Similarly, in the United States, its adherence to the Berne Convention in 1988 resulted in the enactment of the Visual Artists Rights Act of 1990 (VARA), which provides substantive protection of moral rights specifically to artists in the field of visual arts.[48] VARA limits protection to the rights of attribution and integrity. The right of attribution includes the right of the author to claim or disclaim authorship and to prevent the use of his or her name "in the event of a distortion, mutilation, or other modification of the work which would be prejudicial to his or her honor or reputation".[49] Under VARA, the right of integrity confers the author not only the right to prevent "any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation" but also a modality of such right that is not commonly afforded to authors in other jurisdictions: the right to prevent "any destruction of a work of recognized stature, and any intentional or grossly negligent destruction of that work"[50].

Under VARA, visual artists may not transfer moral rights recognized by the statute but these rights may be waived provided the author enters a written agreement.[51] The waiver must identify the work and uses of that work to which the waiver applies[52], thereby proscribing the enforceability of blanket waivers, unlike the British copyright law that allows such waivers unconditionally.[53] Also, unlike in the United Kingdom, VARA allows a joint artist to waive the moral rights of the other artists in a joint work[54]. Finally, in the case of visual works of arts installed in buildings, the author may waive

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[47] § 88(3)
[48] 17 U.S.C.A. 106
[49] Id. 106 (a)(1)
[50] Id. 106 (a)(2)
[51] 17 U.S.C.A. 106 A (e)(1) (2000). See also *Waiver of Moral Rights in Visual Artworks*, Executive Summary, supra Note 2.
[52] Id.
[53] Rigamonti, *supra* note 17, at 406.
[54] 17 U.S.C.A. 106 A, supra.

his right to integrity through a written agreement with the owner of the building establishing that the work may be subject to destruction, distortion, mutilation, or other modification by reason of its removal.[55] However, the artist shall retain his moral rights if the owner of the building is able to remove the work without causing any harm, unless the owner made an unsuccessful good faith attempt to notify the author of his intentions to remove the work or, having been notified, the author fails to remove the work or to pay for its removal.[56]

The Australian Copyright Act of 1968[57] was amended to incorporate moral rights in the year 2000. Australia is one of the countries following the Anglo Saxon point of view permitting waiver of moral rights by the author of the work, even though such rights are "not transmissible by assignment, by will, or by devolution by operation of law".[58] Australian legislation attempts to create a balance between the creator's interest and the owner's free use or commercial exploitation of the author's works. According to Australian law, an author may give consent in relation to any acts or omissions occurring before or after the consent is given.[59] This legislation specifies that consent may be given in relation to (1) a specified work or specified works existing when the consent is given; or (2) a work or works of a particular description: (a) the making of which has not begun; or (b) that is or are in the course of being made.[60] The waiver provision for employees is, in contrast, much broader, as an employee may waive his rights in favor of his or her employer "in relation to *all works* made or to be made by [him or her] in the course of his or her employment".[61] Finally, in relation to

[55] Id. 113 (1)(d) (1) (a) –(b)
[56] Id. 113 (1)(d) (2)
[57] Copyright Act of 1968, Act No. 63 of 1968 as Amended Part IX. Available at: http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/framelodgmentattachments/62632B5B1514AEB0CA2570DC000DF45C
[58] § 195AN
[59] § 195AWA (2)
[60] § 195AWA (3)
[61] § 195 AWA (4)

joint works, the Australian moral rights act follows the U.K. provision in so far as waiver of moral rights of one joint author does not affect the moral rights of the other joint author.[62]

The dichotomy between common law and civil law jurisdictions in relation to moral rights, however, "is not entirely accurate [as] there are common law countries, such as Canada, which enacted moral rights legislation in the 1930s, and there are civil law countries, such as Switzerland, whose copyright statutes did not contain any specific moral rights provisions until the 1990s".[63] This dichotomy is further diluted by the fact that there are civil law jurisdictions, such as Holland, that allow authors to waive some of their moral rights.[64]

Under Canadian copyright law, which is heavily influenced by the civil law tradition of Quebec,[65] the author of a work has the right of attribution and integrity. Regarding the right of attribution, the law provides that such right entails "[the right] to be associated with the work as its author by the name or under a pseudonym and the right to remain anonymous"[66]. However, it is not an unrestricted right as the act provides that it is limited to "where reasonable in the circumstances"[67]. The right of integrity, on the other hand, concerns when an author's work has been "(*a*) distorted, mutilated or otherwise modified; or (*b*) used in association with a product, service, cause or institution" if it is prejudicial to his honor or reputation.[68] This right is also subject to limitations, as the act specifically provides that "(*a*) a change in the location

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[62] § 195 AZI (5)

[63] Rigamonti, *supra* note 17, at n. 6.

[64] Fernández-Molina, J. Carlos y Eduardo Peis**,** *Los derechos morales de autor en un entorno electrónico.* Available at: http://fesabid98.florida-uni.es/Comunicaciones/jc_fernandez.htm

[65] Dworkin, *supra* note 31.

[66] Art. 14.1 (1), Canadian Copyright Act. Available at http://www.cb-cda.gc.ca/info/act-e.html#rid-33225

[67] *Id.*

[68] Article 28.2 (1), supra note 25. Article 28.2 (2) provides that "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".

of a work, the physical means by which a work is exposed or the physical structure containing a work, or (*b*) steps taken in good faith to restore or preserve the work" [69] does not constitute infringement.

As in the U.S. and in the U.K., Canadian legislation prescribes that moral rights "may not be assigned but may be waived in whole or in part",[70] although the act of assigning a copyright "does not constitute by itself a waiver of any moral rights".[71] Therefore, "any act or omission that is contrary to any of the moral rights of the author of a work is, in the absence of consent by the author, an infringement of the moral rights".[72] Finally, contrary to France and Spain, where the duration of moral rights is perpetual, under Canadian copyright law, the duration of moral rights is the same as copyrights.[73]

In the Netherlands, under the current Dutch Copyright Act of 1912[74], an author has the same moral rights, distinct and separate from copyrights, recognized by the Berne Convention: the right of attribution and integrity. Under the Dutch Copyright Act, however, authors may waive certain moral rights, such as the right to attribution and to "oppose to any other alterations of [his] work, unless the nature of the alteration is such that opposition would be unreasonable".[75] However, the author may not waive his right to integrity ("any distortion, mutilation or other impairment of the work") in so far as "it could be prejudicial to the name or reputation of the author or to his dignity as such".[76]

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[69] Article 28.2 (3)

[70] Id. 14.1(2) See also: http://creativecommons.ca/index.php?p=moralrights, for more on waiver of moral rights in the context of Canadian Creative common licenses.

[71] *Id.* 14.1 (3)

[72] Art. 28.1

[73] *Id.* 14.2 (1).

[74] Dutch Copyright Act of 1912. Available at: http://www.ivir.nl/legislation/nl/copyrightact.html For more on moral rights in the context of Dutch Creative Common licenses see: http://fr.creativecommons.org/articles/netherlands.htm

[75] Article 25 (3), supra, note 28.

[76] Article 25 (1)(d), supra, note 28.

Brief Conclusion to this Comparative Survey

In all, at one end of the spectrum, there are jurisdictions, particularly civil law countries, that conceive moral rights as "inalienable", thereby proscribing any assignment or waiver of such rights. The concept of inalienability embraced by the civil law tradition is the most uncomfortable aspect of moral rights for common law jurisdictions since, according to some commentators, it may "interfere with the principle of freedom of contract between authors and users of copyrightable works"[77]. As a result, there are, at the other end of the spectrum, common law countries, that although they have recently incorporated a certain level of substantive protection of moral rights, in an attempt to fulfill their international treaty obligations, at the same time they have allowed waiver of such rights. Finally, between these two ends of the spectrum, there are civil law jurisdictions, such as Holland, that allow waiver of certain moral rights under certain circumstances. In any case, in light of this brief comparative analysis of waiver of moral rights in various jurisdictions, whether it is at one end of the spectrum or between both ends, the common thread seems to be that whenever countries allow for waiver of moral rights, it is explicitly provided for in their national legislation.

B(2). Can moral rights be waived under Puerto Rico law?

Supreme Court decisions dealing copyright law in Puerto Rico are scarce. The caselaw consist of only a handful of cases.[78] The lack of a sustained body of

[77] Rigamonti, supra, Note 4.

[78] *See* Reynal v. Tribunal Superior, 102 DPR 260 (1974); Osorio Ruiz v. Secretario de Vivienda, 106 DPR 49 (1977); Pancorbo v. Wometco of P.R., Inc., 115 D.P.R. 495 (1984); Cotto Morales v. Ríos, 140 D.P.R. 604 (1996); Harguindey Ferrer v. U.I., 148 D.P.R. 13 (1999), 1999 WL 203151 P.R.

authoritative judicial construction of moral rights, casts doubt as to the problem of waiver. Especially, since the Court's reading of the relevant doctrinal material can be ambivalent and offers little guidance as to the application of the Court's directives to the context of Creative Commons licenses.

The first time the Puerto Rico Supreme Court addressed the contours of moral rights in 1977, it did so with a pragmatic outlook that emphasized the need to balance such rights with other individual and community interests.

The Court's expressions in *Osorio Ruiz v. Secretario de Vivienda* would seem to open the door for a flexible moral rights doctrine in Puerto Rico that is able to take into account the need for free and open licenses in the context of distributed creative efforts brought by the current digital environment.[79]

> The moral right is born with the work itself and subsists, according to several commentators, even after its assignment… The applicability of the doctrine has prevailed even in the total absence of legislation… An attempt against the work impairs the personality and dignity of its creator. That is why some commentators have classified moral right as an "absolute, priceless, inalienable, intransferable, and imprescriptible" right…
>
> However, in order to establish the exact contours of the moral rights of authors and artists, this Court has to examine more carefully the nature of intellectual property. Sometimes its particular and complicated character has provoked extreme interpretations which we should avoid. Some commentators concentrate exclusively or mainly on the patrimonial aspect of intellectual property and strive to limit it to the typical property right, causing a serious harm to the moral right. Other commentators do the opposite, emphasizing the extrapatrimonial element in detriment of other individual and social interests. We favor a third approach, the eclectic, which recognizes the versatile nature of intellectual property and tries to harmonize interests in potential conflict.
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> **According to this approach, the moral right cannot be conceived as an absolute right. It should be reconciled with other individual and community interests.**[80]

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[79] Lawrence Lessig, Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity (2004); Yochai Benkler, The Wealth of Networks: How Social Production Transforms Markets and Freedom (2006).

[80] Ossorio Ruiz v. Secretario, 106 DPR 49, 6 PR Off. Translation 65; 1977 WL50830 (P.R.).

Unfortunately, later expressions eroded this pragmatic approach. For instance, in *Pancorbo v. Wometco* –heavily relying on the Spanish civil law tradition and treatise doctrine— the Court stated in unambiguous terms that "the author's moral rights are inalienable and imprescriptible".[81] And, more recently, in *Cotto Morales v. Calo Ríos*, the Court conceived moral rights in absolute—non pragmatic—terms when it concluded that "[a]bove all, it is understood that moral rights *are absolute rights*, that is, one of those rights that have a universal character and that require everyone to have a duty to the author. Therefore, every person has a general obligation to abstain from causing any perturbation of this right".[82]

A more recent case adds more confusion to the mix. In *Harguindey Ferrer v. U.I.,*[83] the Court recognized an editor's attribution rights claim. Interestingly, it described attribution rights in the following highly qualified manner: "[the right of attribution is], in general terms, the right of the author to have his authorship recognized, of course, *if that is what he desires*."[84] Is the Court implying by this last phrase that it is up to the author to decide whether his/her right of attribution (or moral rights in general) is to be respected? Is the Court implying that moral rights can be waived? The footnote following this statement is more ambiguous: "Our interpretation of the right of attribution does not restrict the boundaries of such important right. Simply put, we should not extend our holding beyond the controversy at hand".[85] There is really no way of deciphering these cryptic passages, only to note that there is no clear statement in the caselaw on the issue of waiver.

Given the above, it is difficult to ascertain to what extent moral rights can be

[81] Pancorbo v. Wometco, 115 DPR 495, 15 P.R. Off. Translation 650, 1984 WL 270923 (P.R.).
[82] Cotto Morales v. Calo Ríos, 140 DPR 604 (1996); 1996 WL 539079.
[83] 148 D.P.R. 13 (1999), 1999 WL 203151P.R.
[84] *Id.* at page 29 (emphasis added).
[85] *Id.* at page 29, n 44.

waived in Puerto Rico, regardless of form and context of waiver. The doctrinal and historical background of moral rights in Puerto Rico support inalienability, as the Spanish doctrine that serves as context to our civil law tradition gives preeminence to this notion and is heavily relied upon by the Supreme Court. But neither inalienability nor, on the other hand, waivability are provided for by the text of the Intellectual Property Act. On top of that, we have mixed and ambiguous signals as to whether moral rights are "absolute" or "pragmatic" and, thus, whether they can and should be counterweighted against other social values, such as free culture values and a richer and more diverse public domain.

B(3.) When does a violation of the integrity occur?

Assuming that moral rights cannot be waived, and even if they can be waived are retained in the PR Creative Commons license, another question remains: when and under what circumstances an end-user is deemed to have infringed such rights? This is particularly important in the case of the integrity component. A rigid notion would inhibit any downstream user from modifying the work in any way, or at least would subject the user to the author's objections and possibly to judicial actions, which include legal and equitable remedies.[86] On the other hand, if the right of integrity is only infringed when an alteration is found to be prejudicial the author's honor and reputation, then there may be more room for the downstream user to use the work flexibly.

As in the case of the right's inalienability, the statute is silent in this issue. It only states that the author of the work has the right to "protect its integrity".[87] Nothing more. The cases, although enlightening in some respects, have not directly addressed this important subtlety.

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[86] 31 LPRA sec. 1401(f).
[87] 31 LPRA sec. 1401.

The moral right of integrity has been vaguely described by the Court as "the right to defend the integrity of the work, which in its positive aspect authorizes the author to modify it, and in the negative aspect authorizes him to prevent its alteration or deformation by others".[88] The moral right of integrity has been qualified in later cases as "the right to prevent that the work be altered, distorted, truncated or shown in an objectionable context".[89] Although the cases recognize the commentator's and international instrument's emphasis on the notion that integrity rights are violated when alterations *are detrimental to the author's honor and reputation* (that is also the case of other US States with local moral rights such as New York and California),[90] it has not explained what does it mean to "alter, distort, truncate or show the work in an objectionable context" and, thus, it has not explained whether any alteration (or what kind of alteration) infringes the integrity right.

C. Suggested Approach

To the extent that things are unclear in this realm, and after careful consideration, we have concluded that the best policy seems to be to err in the side of caution leaving moral rights untouched in paragraph 4(g) in order to give stability to the license. Discussion has centered on the desirability of integrity rights waiver (as in the Canadian 2.5 License) and the prospect that such alternative might make PR licenses vulnerable to judicial invalidity. The policy question is, thus, which uncertainty is more tolerable: the one brought by the possibility of claims against downstream users for integrity rights violations when they use the licensed work flexibly or, on the other hand, the uncertainty brought by having the licenses *per se* vulnerable to attack for providing moral rights waiver. This, we expect, should be the focus of the debates when

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[88] Ossorio Ruiz v. Secretario, 106 DPR 49, 6 PR Off. Translation 65; 1977 WL50830 (P.R.).
[89] Pancorbo v. Wometco, 115 DPR 495, 15 P.R. Off. Translation 650, 1984 WL 270923 (P.R.). *See also,* Cotto Morales v. Calo Ríos, 140 DPR 604 at 623-24 (1996); 1996 WL 539079.
[90] *Id.*

the license is presented forpublic discussion.

As a result, we propose that the Puerto Rico license address the issue by, first, defining moral rights exactly as it is described in the Puerto Rico statute to avoid further confusion and, second, by retaining author's moral rights (whatever the extent of that protection may be today or defined in the future). This is consistent with iCommons' international harmonization efforts in the context of moral rights.[91] This should be the general approach in Puerto Rico, until the Intellectual Property Act is amended to allow waiver (at least integrity rights waivers in open licenses).

Because there are no clear signals as to what kind of alteration would violate the integrity right, the proposed language is silent on the issue; therefore, it does not specifically impede "derogatory action in relation to the Work which would be prejudicial to the Original Author's honor or reputation" as paragraph 4(f) of the unported version 3.0. Instead, it retains the right to protect the work's integrity, but allows the user to exercise the rights under the license to the fullest extent possible.

This shifts the unported license's emphasis from things the user *cannot* do (certain "derogatory actions") to, affirmatively, things the user *can* do (to exercise the rights under the license to the fullest extent possible). To the extent that it is unclear what it is exactly that the user can do (as the conditions for infringement are not defined), then the Puerto Rico license would have this vagueness built-in. Although this is somewhat risky, it is a slight risk that does not expose the license *per se* to challenge, but may expose certain *uses* of the licensed work.

With this approach, we are protecting the license from any challenge based on improper waiver (because there is no waiver) but, at the same time, if an individual challenge is presented for violation of integrity rights, then Puerto Rico courts would have the opportunity to define what are the requirements for infringement in the context

[91] http://wiki.creativecommons.org/Version_3#International_Harmonization_.E2.80.93_Moral_Rights

of open licenses. This approach, we believe, allows a healthy room for interpretation regarding the conditions for infringement.

The license, in short, is designed to accommodate legislative or judicial developments in this area. It also invites legislative reevaluation of moral rights in Puerto Rico and promotes for rethinking the rigidity of, at least, integrity rights in the context of free licenses.

In light of the above, we propose the following language:

Par. 1 (h) … Definitions

> **"Moral rights"** are those that permit the author or beneficiary of a literary, scientific, artistic and/or musical work to benefit from it, and to exercise the exclusive prerogatives to attribute to him/herself or retract its authorship, dispose of his/her work, authorize its publication and protect its integrity.

Par. 4(g) Restrictions.

> Licensor offers the Work under the terms of this License without prejudice to the Original Author's moral rights, but allowing You to exercise the rights under this License to the fullest extent permitted by the Puerto Rico Intellectual Property Act, as amended.

Aside from these considerations, the Puerto Rico license is a thoughtful translation of the United States v. 3.0 license due to the applicability of federal law. Thus, license porting in other areas has been straightforward and simple.

www.cyberclinic.pr / www.creativecommons.pr

Annexes to "Moral Rights in Puerto Rico and the Puerto Rico V.3.0 Creative Commons License"

LAWS OF PUERTO RICO ANNOTATED
TITLE THIRTY-ONE. Civil Code
Subtitle 2. Property Ownership and Its Modifications
PART IV-A. INTELLECTUAL PROPERTY
CHAPTER 163. Intellectual Property

§ 1401 Exclusive right: The author or beneficiary of a literary, scientific, artistic and/or musical work has the right to benefit from it, and the exclusive prerogatives to attribute to him/herself or retract its authorship, dispose of his/her work, authorize its publication and protect its integrity, in accordance with the special laws in effect on the matter.

§ 1401a Moral right: Moral law allows whoever creates a work, to enjoy the benefits of its authorship, as established in § 1401 of this title.
§ 1401b Moral right—Protection: The protection of the moral right of the creator of a work is independent from the protection of his/her proprietary right.

§ 1401c Moral right—Extension: The moral right of the proprietor extends up to fifty (50) years after the death of the author. In the case of the death or disability of the proprietor, the copyright protection will rest on his/her successors.

§ 1401d Moral right-- Creations by public employee: The Commonwealth of Puerto Rico shall be the proprietor of the rights related to the creations of government officials in the performance of their duties, and said rights shall be defended by the Governor of Puerto Rico.

§ 1401e Moral right—Exception: Except when otherwise agreed to, those works created for the purpose of advertising entities or promoting goods or services shall not enjoy protection by copyright. As long as the author's name is stated, neither will the fragmentation of a work for didactic or informative purposes enjoy this protection.

§ 1401f Moral right—Remedies: The violation of moral rights entitles one to request temporary or permanent injunction remedies that will include the restitution, seizure or destruction of works, as the case may be. Said violation also entitles one to claim damages. An adequate balance must be established between the property rights of the owner of a work and the moral rights of its author.

§ 1401g Moral right-- Statute of limitations: The actions provided in § 1401h of this title prescribe three (3) years after each violation became known.

§ 1401h Moral right—Actions: Any person who creates a work of art is entitled to receive five (5) percent of the increase in the value of said work at the moment it is resold. Said amount shall be deducted from the seller's earnings and his/her agent or proxy shall be jointly responsible for that amount. In those cases in which the whereabouts of the author are not known, the resulting amount shall be deposited in his/her name in a special account to be opened by Copyright Registrar.

Reynal v. Tribunal Superior, 102 DPR 260 (1974)

Vicente REYNAL et al., Petitioners,
v.
SUPERIOR COURT OF PUERTO RICO, San Juan Part, Charles Figueroa, Judge, Respondent.
No. O-73-26.

Supreme Court of Puerto Rico.
Decided May 15, 1974.

MR. CHIEF JUSTICE TRÍAS MONGE delivered the opinion of the Court.

The question which gave rise to this litigation is whether literary property in Puerto Rico is only protected by the legislation of the United States.

Mrs. Carmen Ramos Meléndez wrote and published in Puerto Rico in 1965 and 1970 a book entitled El Gobierno de Puerto Rico. In 1972, according to the allegations of the complaint which soon was going to be filed; Vicente Reynal and Roberto Lugo published another book under the title of Manual del Gobierno Civil de Puerto Rico which, in the opinion of Mrs. Ramos, uses her original ideas, the plan of presentation of material, the tables made by her, and her phrases and concepts, resulting in "a mere summary of the book El Gobierno de Puerto Rico." Consequently in the same year Mrs. Ramos and her husband filed a complaint for damages for invasion of literary property against Reynal and Lugo. In their answer, the defendants raised, among other defenses, that the jurisdiction over the matter involved corresponded exclusively to the United States District Court for the District of Puerto Rico. A hearing having been set for the discussion of this special defense, the court held that it had jurisdiction to entertain the case. Against this Order of the Superior Court the defendants filed before this court a petition for certiorari.

We believe that the federal legislation does not provide the only remedy to protect literary property in Puerto Rico and that its existence does not exclude in every situation the support that the Puerto Rican legislation can give to such a high purpose.

Before the Spanish-American War, the defense of copyright was derived from very diverse sources, among others, arts. 428 and 429 of the Spanish Civil Code; the Literary Property Act (Ley Sobre Propiedad Intelectual) of January 10, 1879 and its Regulations; the treatises on the matter; and from art. 16 of the Spanish Civil Code; which provided, in a similar manner to the provisions in art. 429, supra, that in the cases not provided for nor decided by special laws, the deficiency in such laws would be supplied by the provisions of the Civil Code. See, Puig Brutau, Jr.: III-II Fundamentos de Derecho Civil 201-202 (2d ed. 1973).

Upon the change of sovereignty, Art. XIII of the Treaty of Paris and the second of the Foraker Act, Act of April 12, 1,900, c. 191, sec. 2, 31 Stat. 77, attended, respectively, to the problem of the continued protection of the rights of property secured by copyrights and patents acquired by spaniards and the admission of their works, free of duty, for a number of years. In art. 8, more amply, it was provided by the Foraker Act that "the laws and ordinances of Puerto Rico now in force shall continue in full force and effect, except as altered, amended, or modified hereinafter, or as altered or modified by military orders and decrees in force when this Act shall take effect, and so far as the same are not inconsistent or in conflict with the statutory laws of the United States not locally inapplicable, or the provisions hereof, until alterd, amended, or repealed by the legislative authority hereinafter provided for Puerto Rico or by Act of Congress of the United States. . ." This article is now in force obviously by reason of the provisions of art. 58 of the Federal Relations Act. Act of July 3, 1950, c. 446, art. 4, 64 Stat. 319. On the history of this period, consult: Berbusse, E.J.: In the United States and Puerto Rico, 1898-1900, Chapel Hill, Univ. of North Carolina Press, 1966, p. 83 et seq.

The continued effectiveness of our former Civil Code and of other legislative pieces of Spanish origin were originally based on the aforecited art. 8. Olivieri v. Biaggi, 17 P.R.R. 108 (1911); Chevremont et al. v. People of Puerto Rico, 3 P.R.R. 108 (2d ed. 1903); Muñoz v. District Court, 42 P.R.R. 371 (1931); Ex parte Dones, 10 P.R.R. 170 (1906), affirmed, 202 U.S. 614. On the actual power of legislating in Puerto Rico over these matters, it is worth mentioning also, as an example, art. 37 of the Federal Relations Act.

Several of the provisions which, before the Spanish-American War, served as shield to the rights of intellectual property disappeared after 1898, among them, arts. 428 and 429 of the Spanish Civil Code, which were not incorporated to our Code. There survived, nevertheless, art. 16 of the Spanish Civil Code, now art. 12 of ours, 31 L.P.R.A. § 12; art. 1802 of our present Code. 31 L.P.R.A. § 5141; and, of course, everything provided in the Civil Code on property in general. 31 L.P.R.A. § § 1021-2841. It must be pointed out also that our Legislature has assumed expressly that it has power to legislate on the matter. Act No. 5 of December 8, 1955, 3 L.P.R.A. 1013(c); Rothenberg, S., Copyright Law 117, Clark Boardman Co., Ltd., N.Y. (1956) (1958 Supp.) In order to refer to only one of the causes of action which could, therefore, if justified by the facts, support the complaint in this case under the Puerto Rican legislation, it suffices to mention, in the light of the foregoing, that of unfair competition. Eneglotaria Medicine Co. v. Sosa, 38 P.R.R. 542 (1928); Cooperativa Cafeteros v. Colón Colón, 91 P.R.R. 361 (1964).

Can this Puerto Rican legislation coexist with that of the United States on this particular?

In Compco Corp. v. Day-Brite Lighting, Inc., 376 U.S. 234 (1964) and in Sears, Roebuck and Co. v. Stiffel Co., 376 U.S. 225 (1964), the Supreme Court of the United States inclined itself in favor of the theory of the exclusive power of Congress to legislate over this matter in the case of the states, the alleged need of uniformity in the field being derived from the provisions in the North-American Law on copyright, from the option to other remedies than those specified in the federal law in the case of unpublished works, Act of July 30, 1947, c. 392, sec. 1, 61 Stat. 652, 17 U.S.C.A. sec. 2; from the provision of jurisdiction of the federal district courts in cases under the North American law, 28 U.S.C.A. § 1338(a); from Art. I, sec. 8 of the Constitution of the United States, conferring power to Congress to legislate on these matters; and from the Supremacy Clause of said Constitution, Art. VI, cl. 2.

Aside from the fact that Compco and Sears have generated considerable controversy, A Symposium, "Product Simulation: A Right or a Wrong?", 64 Colum. L. Rev. 1178 (1964), both cases are distinguishable from the instant case. The state action in both litigations was directed fundamentally to obtain what was not obtainable under the federal legislation or to establish policies in conflict with the government of the federation. In the present case the contrary occurs: the local action tends to strengthen the same purpose of the United States legislation: the protection of copyright.

In a recent case, Goldstein v. California, 412 U.S. 546 (1973), a new light is shed on the problem. The Supreme Court of the United States states there:

> "The clause of the Constitution granting to Congress the power to issue copyrights does not provide that such power shall vest exclusively in the Federal Government. Nor does the Constitution expressly provide that such power shall not be exercised by the states." (P. 553.)

The guidelines set by Goldstein are reduced basically to distinguish between situation in which the exercise of concurrent powers by the Federal Government and by a State lead necessarily to a conflict and those where the conflict constitutes only a possibility.

[??] The federal copyright law applies clearly to Puerto Rico under the provisions of art. 9 of the Federal Relations Act. [FN1] The Puerto Ricans can make use of its benefits, if they so desire, or they may seek protection, according to the ruling of Goldstein, in the local legislation in those cases where both are not in conflict. In this last case, the right is more limited, since the protection which a state can grant is not extended beyond its boundaries. Goldstein, 558. The lesser scope of this last right does not erase, nevertheless, its existence.

Any invocation of the rule of uniformity, any claim of exclusive federal power to legislate over a matter raises problems which are extremely complex even in the case of the States which are members of the Union. Goldstein, 554. The question becomes, of course, more complicated in the case of Puerto Rico, in view of the singularity of our relations with the United States and of the differences of our economical-political problem. In the first place, in view of the decisions in the insular cases [FN2] and the provisions in art. 8 of the Foraker Act and arts. 9 and 37 of the Federal Relations Act, it is necessary to determine whether the constitutional or legal provision in question is applicable in Puerto Rico. In the second place, it is indispensable to decide whether the realities involved turn the federal legislation into a matter locally inapplicable. It is not necessary to go further into this matter, since, even considering Puerto Rico as a federated state for the purposes of this litigation, the coexistence of

powers is palpable to legislate, under norms which would not necessarily provoke conflicts with the United States legislation, in the field of literary property.

Many years ago, the Supreme Court of the United States pronounced itself, in the case of the legislation against monopolies, in favor of an ample policy of coexistence of powers. People of Puerto Rico v. Shell Co. (P.R.) Ltd., 302 U.S. 253 (1937). In the field of trade-marks, Puerto Rican legislation coexists with that of the United States. Eneglotaria and Cooperativa, supra. If the competition and the commercial production can be the object of double protection, we do not see any reason to treat in an inferior way literary and artistic production. For analogous cases, see Bordas & Co. v. Sec. of Agriculture, 87 P.R.R. 506 (1963), and García Mercado v. Superior Court, 99 P.R.R. 287 (1970).

For the reasons stated, the order of the trial court is affirmed and the case is remanded for further proceedings consistent with this opinion.

FN1. United States v. Ríos, 140 F. Supp. 376 (D. of P.R. 1956); Consentino v. I.L.A., 126 F. Supp. 420 (D. of P.R. 1954).

FN2. See: Downes v. Bidwell, 182 U.S. 244 (1901); Dooley v. United States, 182 U.S. 222 (1901); De Lima v. Bidwell, 182 U.S. 1 (1901), and the cases related with them.

Osorio Ruiz v. Secretario de Vivienda, 106 DPR 49 (1977)

Victor OSSORIO RUIZ, Plaintiff and Appellant,
v.
Jose H. Grau, SECRETARY OF HOUSING et al., Defendants and Appellees.
No. R-76-368.

Supreme Court of Puerto Rico.

Decided May 20, 1977.

MR. CHIEF JUSTICE TRIAS MONGE delivered the opinion of the Court.

The Urban Renewal and Housing Corporation hired appellant to paint some murals in several public houses buildings. Some time after he finished his work he understood that the Corporation was modifying it. The artist requested the issuance of an injunction to prohibit their alteration or destruction without his consent. The trial court refused to issue the writ.

The case raises vital questions on the protection of intellectual property in Puerto Rico.

In Reynal v. Superior Court, 102 P.R.R. ___ decided on May 15, 1974, this Court held that the North American legislation is not the only source of protection of intellectual property. This principle is even more evident here. North American legislation regarding "copyright" is intended to protect the economic exploitation of a work. The civil doctrine of moral right goes farther since it was drafted to protect artistic and literary works and their creators against non-economic damages. Roeder, M.A., The Doctrine of Moral Right: a Study in the Law of Artists, Authors and Creators, 53 Harv. L. Rev. 554, 557 (1940); Gilliam v. American Broadcasting Companies, Inc., 538 F.2d 14, 24 (2d Cir. 1976). The doctrine of moral right goes back to Roman times. Doc, Marie-Claude, Etude sur le Droit d'Auteur 34 et seq., Paris 1963. The federal legislation on copyright does not overcome the doctrine of moral right. They are different concepts, without conflict between them.

[1] Intellectual property has very particular characteristics which distinguish it from other type of property. It represents an expression of different rights, which can be grouped in two categories: the pecuniary or patrimonial rights concerning the alienation of the work, and the personal or extrapatrimonial rights which protect its integrity and the name and honor of its author, faculties which give rise to the said moral right doctrine. I-II Castán, Derecho Civil Español, Común y Foral 365-366, 11th ed. 1971; I Ladas, The International Protection of Literary and Artistic Property 575-578, N.Y. 1938; Kayser, Les Droits de la personnalité, 1971 Revue trimestrelle de droit civil 445, 473 (1971).

[2-4] The doctrine of the author's moral right was recognized in Spain a long time ago, notwithstanding that the text of the most recent law on intellectual property, approved on January 10, 1879, is not very explicit on the matter. VII Scaevola, Código Civil 569 et seq., 4th ed. 1943, Castán actually supports the fact that "the moral right of authors could find express consecration in a new law of Intellectual Property. . . ." Castán, op. cit. at 367. With regard to the legal source of this right in Puerto Rico, let it suffice to point out that art. 56 of said Spanish law of 1879 made it specifically applicable to Puerto Rico. [FN1] Giménez Bayo y Rodríguez-Arias Bustamante, La Propiedad Intelectual, 333, Madrid 1949 (the text of the law is included in that book). By virtue of art. 8 of the Foraker Act and of art. 58 of the Federal Relations Act, said legislation continued in effect in the country under the conditions specified therein. The former Spanish legislation and arts. 12 and 7 of our Civil Code constitute a broad basis for the acknowledgment in Puerto Rico of the moral right of authors, creators, and artists. II-I Castán, op. cit. at 416-418, 10th ed. 1971. Additional basis is found in the Universal Copyright Convention of September 6, 1952, signed by the United States. 6 U.S.T. 2731, T.I.A.S. 3324. According to the Spanish Act of 1879, intellectual property includes scientific, literary, and artistic works published by any means. Montero y Martinez, T., Propiedad Intelectual 13 et seq. and 66 et seq., La Habana 1951. See: Duchemin, J. L., Le Droit de Suite des Artistes, Paris, 1948, at 69.

[5] The Civil Law recognizes a particular preeminence to the moral right of an artist to have the product of his creative activity respected. II Espín, Derecho Civil Español 299 et seq., 4th ed. 1974; III-II Puig Brutau, Fundamentos de Derecho Civil 213, 2d ed. 1973; III Manresa, Código Civil Español 846 et seq., 7th ed. 1952; Giménez Bayo and Rodríguez-Arias Bustamante, La Propiedad Intelectual 16

et seq. Madrid 1949; III Planiol and Ripert, Derecho Civil Francés 499-500, Habana 1942; Monta, The Concept of Copyright versus the Droit d'Auteur, 32 So. Cal. L. Rev. 177, 179 (1959); Strauss, The Moral Right of the Author, 4 Am. J. Comp. L. 506, 507-514 (1955); Katz, The Doctrine of Moral Right and American Copyright Law - A Proposal, 24 So. Cal. L. Rev. 375 (1951); II-II Marty et Raynaud, Droit Civil 428, 2eme ed.; Sirey 1961.

[6] The moral right doctrine comprises in its ambit, among othe faculties, "the right to defend the integrity of the work, which in its positive aspect authorizes the author to modify it, and in the negative aspect authorizes him to prevent its alteration or deformation by others. Castán, op. cit. at 366. Desbois, H. Le Droit d'Auteur en France 483, 2eme ed., Dalloz 1966; Plaisant, R., Le Droit des Auteurs et des Artistes Exécutants 66, Paris 1970; Fabiani, M., Il Diritto d' Autore nella Giurisprudenza 57, 2d ed., Padova 1972.

[7] The moral right doctrine has been granted similar contents outside Spain. Article 6 bis (1) of the Bern International Convention of 1885, revised in Berlin in 1908, in Rome in 1928, and in Brussels in 1948, states as follows:

> (1) Independently of the patrimonial rights of the author, and even after the assignment of said rights, the author retains the right to claim the paternity of the work, as well as the right to object to every deformation, mutilation or other modification of the said work, which may be prejudicial to his honor or to his reputation."

See: Giménez Bayo and Rodríguez-Arias Bustamante, op cit. at 345; Encyclopédie Dalloz, Repertoire de Droit Civil, 2eme ed. 1967, Propriéte Litteraire et Artistique, par. 397 et seq.; Desbois, loc. cit.; Fabiani, loc, cit.; Moreira da Silva, M. Código do Direito de Autor 119, Coimbra 1966; Ionascu, Comsa and Muresan, Dreptul de Autor 25, Bucuresti 1969. The Universal Declaration of Human Rights also recognizes the moral right doctrine. Article 27(a). The right to prevent the deformation of a work has been recognized in Anglo-American case law and doctrine. Roeder, The Doctrine of Moral Right: a Study in the Law of Artists, Authors, and Creators, 53 Harv. L. Rev. 554, 565-572 (1940); Yankwich, Unfair Competition as an Aid to Equity in Patent, Copyright and Trade-Mark Cases, 32 Notre Dame Law. 438-464 (1957); Gilliam v. American Broadcasting Co., Inc., supra at 24; Prouty v. National Broadcasting Co., 26 F. Supp. 265 (D.C. Mass. 1939); Gordella v. Log Cabin Products, Inc., 89 F.2d 891 (2d Cir. 1937); Packard v. Fox Film Corp., 202 N.Y. Supp. 164 (1923); Curwood v. Affiliated Distributors, Inc., 283 F. 219 (S.D.N.Y. 1922); De Bekker v. Stokes, 153 N.Y. Supp. 1066 (1915); Royle v. Dillingham, 104 N.Y. Supp. 783 (1907); Drummond v. Altemus, 60 F. 338 (E.D. Pa. 1894).

[8-10] The moral right is born with the work itself and subsists, according to several commentators, even after its assignment. II-I, Puig Brutau, op. cit. at 423-425, 10th ed. 1971; Manresa, op. cit., 865-866; Espin, op. cit. at 311; Giménez Bayo and Rodriguez-Arias Bustamante, op. cit. at 255 et seq.; cf. Whicher, The Creative Arts and the Judicial Process 12, N.Y. 1965. The applicability of the doctrine has prevailed even in the total absence of legislation. Monta, op. cit. at 178. An artist's work is in fact an extension of his personality. Dalloz, op. cit., "Biens", par. 491 (1976). An attempt against the work impairs the personality and dignity of its creator. [FN2] That is why some commentators have classified moral right as an "absolute, priceless, inalienable, intransferrable, and imprescriptible" right. 1-2 Castán, Derecho Civil Español, Común y Foral 366, 11th ed. 1971; I Ladas, The Intenational Protection of Literary and Artistic Property 578-579 and 600-601 N.Y. 1938. It has been specifically sustained that the artis's condition as employee does not deprive him of his right to intellectual property. Desbois, op. cit. at 14, mise en jour, 1973.

[11] The moral right doctrine has been specifically applied to prevent the modification of murals. Roeder, op. cit. at 554, n. 2; Dalloz, op. cit., Propriéte Litteraire et Artistisque, par. 405 (1976).

However, in order to establish the exact contours of the moral right of authors and artists, this Court has to examine more carefully the nature of intellectual property. Sometimes its particular and complicated character has provoked extreme interpretations which we should avoid. Some commentators concentrate exclusively or mainly on the patrimonial aspect of intellectual property and strive to limit it to the typical property right, causing a serious harm to the moral right. Other commentators do the opposite, emphasizing the extrapatrimonial element in detriment of other individual and social interests. We favor a third approach, the eclectic, which recognizes the versatile nature of intellectual property and tries to harmonize interests in interests in potential conflict. I Espín, Derecho Civil Español 282, 4th ed. 1974.

[12] According to this approach, the moral right cannot be conceived as an absolute right. It should be reconciled with other individual and community interests. Each case should be examined in the light of its own facts. Ladas, op. cit. at 579; II Fisher, Studies on Copyright 123-125, Fred B. Rothman Co., N. J. 1963; Desbois, Le Droit d'Auteur en France 483, 2eme ed., Dalloz 1966. In any case, the artist cannot exercise his right abusively. The exercise of moral right is subject to the doctrine of abuse of the right. Plaisant, Le Droit des Auteurs et des Artistes Exécutants 60 et seq., Paris 1970; Desbois, op. cit. at 484-485; V Novissimo Digesto Italiano, Ed. Torinese, 1960, Diritti d'Autore, 695-696.

In certain circumstances the public interest may advise, for example, the destruction of a building. A mural on a building cannot prevent said action. [FN3] To hold that there is an unrestricted right to prevent said action is to fall into the extremes of the personal or extrapatrimonial theory.

On the other hand, to argue, as it has been argued here, that the acquisition of a work of art grants its owner the right to dispose of it as he wishes is tantamount to adopting the former patrimonial theory abolishing the right of every artist to have the product of his creativity respected.

[13] In the case at bar the Urban Renewal and Housing Corporation apparently wishes to restore and retouch the murals painted by appellant. We consider that, if that is the situation, said corporation should be entitled to maintain its property in the appropriate conditions of freshness and cleanliness. What it is not entitled to do is to proceed to touch up or make the necessary changes under the aforementioned conditions, without the consent of the artist, who in turn is entitled to watch for the integrity of his artistic creature. The necessary harmony in this case may be achieved by giving the author the opportunity to carry out the work. If the economic or other conditions which he may wish to impose were unacceptable to the Corporation, the Court may establish the conditions it may deem reasonable in the light of the evidence presented, and also it may limit them to those offered by the Corporation in a bona fide contract to other competent persons. The moral right doctrine has been drafted to protect extrapatrimonial and not merely economic interests. The artist cannot make unreasonable demands.

The extrapatrimonial rights of the type discussed may be limited by legislation or treaty. See art. 6 of the Spanish act of 1879, Giménez Bayo and Rodríguez-Arias Bustamante, op. cit. at 287 et seq., and art. 4 of the Universal Copyright Convention. 6 U.S.T. 2731, 2736, and 2737. The problem of the duration of the moral right is not raised here, therefore we need not enter into a detailed discussion of the same.

For the foregoing reasons, the judgment appealed from is hereby reversed and the case is remanded to the trial court for further proceedings consistent with this opinion. Meanwhile, the temporary injunction issued by the Superior Court against the Urban Renewal and Housing Corporation on April 29, 1976 is hereby reinstated.

Mr. Justice Martín dissents in a separate opinion. Mr. Justice Negrón García issued an opinion concurring in part and dissenting in part.

FN1. The law became effective in the Island by virtue of the Royal Decree of January 10, 1879. Its effectiveness does not depend on the Civil Code which became effective ten years later by virtue of the Royal Decree of July 31, 1889.

FN2. Note the similarity with the provision of Art. II, Sec. 1 of the Constitution of Puerto Rico, which proclaims that the dignity of the human being is inviolable. The effectiveness of this declaration does not depend on the approval of any law. Alberio Quiñones v. Commonwealth, 90 P.R.R. 791, 794 (1964); González v. Ramírez Cuerda, 88 P.R.R. 121, 130 (1963).

FN3. If it could be removed, the artist may request that he be allowed to do it under the conditions deemed reasonable by the Court. Remember, also, the powers of the Institute of Puerto Rican Culture to preserve the cultural values of the people of Puerto Rico. Act No. 89 of June 21, 1955, 18 L.P.R.A. § 1195 et seq.

Judgment of the Superior Court, Mayaguez Part, Hon. Waldo Santiago, Judge.

MR. JUSTICE MARTIN, dissenting.

The artist's "moral right" is not protected in Puerto Rico by the Constitution or by any law. At the time of the change of sovereignty in Puerto Rico in 1898, the Spanish Law of Intellectual Property of January 10, 1879, governed here. It was incorporated through reference to the Spanish Civil Code, through arts. 428 and 429, [FN1] when it was enacted on July 24, 1889. [FN2] But the Code Commission which revised the Civil Code in Puerto Rico in 1902, eliminated arts. 428 and 429, which referred to the Spanish Intellectual Property Act of 1879, J. R. No. 5 of March 1, 1902, Revised Statutes and Codes of Puerto Rico; therefore, our jurisdiction remained under the protection of the federal legislation applicable to that matter. [FN3] Organic Act of 1900, Act of April 12, 1900, chap. 191, sec. 8, 31 Stat. 79.

In the United States, where the artist's right has not been recognized, it has been held that the artist has no right whatsoever regarding the protection of his artistic reputation when he has sold his work unconditionally. Crimi v. Rutgers Presbyterian Church, 194 Misc. 570, 89 N.Y.S.2d 813 (Sup. Ct. 1949); Vargas v. Esquire, Inc., 174 F.2d 522 (7th Cir. 1947), see Merryman, J. H., The Refrigerator of Bernard Buffet, 27 Hastings L. J. pp.1035-39. There is little an artist can do in the United States if a contractual obligation has not been imposed upon the acquirer of his work to assure that his authorship will be acknowledged and that his work will be respected. Treece: American Analogues of Author's "Moral Right," 16 Am. J. Comp. L. 487, 501 (1968).

Many countries in Europe, South and Central America, have legislation protecting intellectual property, Merryman, op. cit., supra at 1023, 1036-37 (1976). In France, however, the moral right of the artist had a judicial origin and developed gradually through court decisions since the middle of the past century. It was not until 1957 that the rules were codified into general rules. Sarraute, Current Theory on the Moral Right of Authors and Artists under French Law, 16 Am. J. Comp. L. 465-466; Merryman, op. cit., supra at 1026. Some countries which have adopted the moral right concept have signed international agreements binding each signing country with regard to the intellectual rights in force in those countries: the Bern Agreement of 1886, for example, modified in the Berlin conference in 1908 by 15 countries, subsequently in Rome in 1932 and later in Brussels in 1948; also, the Universal Convention of Geneva in 1952.

The requirements to enjoy the protection of the agreements depend on the internal laws of each State, which shall demand the formalities it may wish to the works published in its territory or to the works of its nationals, wherever they are published. See II Espín, Manual de Derecho Civil Español, 4th ed., 1974, at 304, 313. Naturally, the countries which do not offer protection to the intellectual rights of their artists do not participate in international treaties.

There are three different positions with regard to this matter. In the United States, the burden is placed on the artist who is to agree his rights with the purchaser, but this does not solve the problem that subsequent acquirers of the work will not be bound by the agreement. The intermediate position, represented by the Bern Convention and the law of Germany places on the purchaser the burden to acquire the artist's consent if he wishes to modify the work. The third position, in France [FN4] (and Italy, where there is a comparable situation) places onus on the purchaser and protects the artist against his own assent unless the modification of the work is a reasonable one to which the artist has assented. Merryman, op. cit., supra at 1045.

The case at bar raises that which has been called the right of "integrity" of the work, recognized in some jurisdiction as an inseparable part of the moral right of the artist. This right, as it has been said, is protected in France and other countries, but not in Puerto Rico, unless the artist has protected himself through a contract.

The works involved herein consist of some murals painted on several public housing buildings owned by the Urban Renewal and Housing Corporation (U.R.H.C.). The U.R.H.C. hired the petitioner artist as art professor and paid him a salary [FN5] to paint several murals on some buildings managed by said agency. According to the stipulation of the parties, petitioner used as assistants four youngsters whom he trained in his creations of drawings and paintings and who were paid by the U.R.H.C. That agency provided all the necessary materials, including the paint. Petitioner created and conceived the figures,

forms, and meanings of the works done.

Since the artist did not reserve the right to intervene in the restoration of the works acquired by the U.R.H.C. whenever the effects of time and weather required it, the State may carry out the restoration work using any artist it chooses.

The determination on what constitutes the artist's moral right and the protection of said right is a legislative function. The law should establish the criteria on what is a work of art, as well as on the qualifications an artist should have and which must be protected. The rules should be fixed and specified after consulting persons who know about this spiritual work and whom the Legislature may resort to for advice and counsel. Article 7 of our Civil Code (31 L.P.R.A. § 7), authorizing this Court to decide in accordance with equity when there is no statute applicable to the case, taking into consideration the natural justice embodied in the general principles of case law and in accepted and established usages and customs, does not give this Court basis to adopt the principles enforced through specific legislation in many countries.

If I were a lawmaker I would favor the implementation of legislation to protect that right. In my capacity as Justice I deem that it is not my function to legislate.

In this particular case there is no evidence that the works involved have an exceptional merit justifying the intervention of the courts to protect property belonging to the public patrimony, nor does it arise that there are accepted and established usages and customs with regard to the moral rights of the artist.

In view of the foregoing I would affirm the judgment rendered by the trial court dismissing petitioner's petition for injunction.

FN1. Article 428. "The author of any literary, scientific, or artistic work, is entitled to profit by it and dispose of it at will." Código Civil Español, Dionisio Doblado, 1889, 2d ed. Madrid.
Article 429. "The Law of Intellectual Property determines the persons to whom such right pertains, the manner of exercising it, and the period of its duration. In cases not provided for or determined by such special law, the general rules with respect to property established by this Code shall be observed." Ibid.*

FN2. The Law of Intellectual property of 1879 and the Spanish Civil Code became effective in Puerto Rico by virtue of the Royal Decree of July 31, 1889. See Rodríguez v. San Miguel et al., 4 P.R.R. 101, 110 (1903); Torres et al. v. Rubianes et al., 20 P.R.R. 316, 323 (1914).
*Translator note: Translation taken from The Civil Code of Spain, translated and edited in 1918 by F. C. Fisher.

FN3. See Arthur Fisher, Studies on Copyright (1963) on the history of the federal legislation in force as of March 1, 1902, regarding copyrights before the 1909 compilation, p. 72-73.

FN4. In France, the statutory provision establishes that the moral right is "perpetual, inalienable, and imprescriptible."

FN5. The Copyright Act of the United States establishes that the term "author" includes an employer in the case of works made for hire. That is, the person who participates in the creation is an employee of the one who hires his services, therefore breaking the relation between the artist and the created work. See 17 U.S.C.A. § 26; Monta, The Concept of 'Copyright' versus the 'Droit D'Auteur,' 32 So. Cal. L. Rev. 177, 178-179 (1959).

Review
Judgment of the Superior Court, Mayaguez Part, Waldo Santiago, Judge

MR. JUSTICE NEGRON GARCIA, concurring and dissenting.

In order to comply fully with the adjudicative function of this Court in the appellate stage, the following roots were taken into consideration, beginning with the Judiciary Act of the beginning of the century:
"[Said article forty-nine (49)] is based upon the principle that the original source of justice is the

written or statute law, which should in all cases be strictly complied with. Next to the law and accompanying it, facilitating its correct interpretation, comes the jurisprudence developed by the courts in the precedents of the higher courts, in which the results of judicial experience, of careful study and scientific labor are crystallized. In the constant change of legal relations many cases may occur which are not specifically provided for in the existing law or precedents. It becomes necessary, therefore, to give to the judges some standard or rule by which to decide such cases equitably and definitely.

"This rule is to be found in the principle of equity. In these cases the judge must apply the general principles of justice; that is to say, those rules which are not laid down in any law but which are nevertheless the foundations of all laws not only among certain nations but among all educated and civilized peoples.

"The decisions of the court of appeals must therefore be in accord with the law, with legal doctrine, or with equity, but in every case must meet the ends of justice." I U. S. Comission to Revise and Compile the Laws of Porto Rico 121-122 (1901). (Underscore supplied.)

Bearing in mind this perspective, first it is necessary to broaden and establish certain facts besides those stated in the opinion of the Court. From the thorough examination of the color photographies of the murals in controversy and the stipulations agreed by the parties in first instance, it is unquestionable that appellant Ossorio, as art teacher under contract, created with his talent the figures, forms, and meaning of the murals. Concurrently, he trained four youngsters who helped him in the performance of his artistic work on the exterior walls of several buildings property of U.R.H.C. We can also see that the murals were painted on some walls which are an essential part of the structure of the buildings; consequently, there can be no speculation on their possible removal. Even more important, since these murals on exterior walls are exposed to the rigors of the weather, they deteriorate rapidly and should be renewed periodically. In that sense the situation is similar to that of the painting and maintenance provided to any building, structure, or residence in Puerto Rico.

A critical analysis of the authorities and the case law mentioned by the Court shows that it is extremely weak to sustain that the Spanish law on intellectual property approved almost a century ago, on January 10, 1879, is applicable to Puerto Rico today, particularly in view of the express repeal of arts. 428 and 429 of the Spanish Civil Code when it was adopted by virtue of the review of our Code in 1902.

However, considering that there is no clear and categorical provision of law regulating the matter, it is proper in equity, pursuant to art. 7 of our Civil Code (31 L.P.R.A. § 7), that this Court acknowledge in principle and render as valid in our jurisdiction, with certain limitations, the right to intellectual property in artistic painting in its dimensions of author and integrity of work, as primary ideal factors over those merely pecuniary.

In short: what is in theory the moral right?

"[T]he moral, personal, or extrapatrimonial rights (which safeguard the paternity and integrity of the work). This last group of powers concentrates in the usually called--more or less properly--moral right of the author, which is, undoubtedly, a right of the personality, since it refers to an ideal property inseparable from the person. The author's moral right--says De Cupis-- constitutes a private right which has as object not the work of creativeness, which is a property of a patrimonial nature, but rather the personal property of intellectual paternity, the moral way of being of the author himself." I-2 Castán Tobeñas, Derecho Civil Español, Común y Foral 365-366 (1963).

And Puig Brutau states:

"Intellectual property means the set of rights acknowledged by law to the author on the works he has produced with his intelligence, particularly the right to have his paternity acknowledged and respected, as well as that he be allowed to propagate the work, authorizing or denying the reproduction, as the case may be.

"Actually, we can only speak about property in regard to literary, scientific or artistic works, in a very broad sense. It suffices to bear in mind that it does not refer to a corporal thing, does not confer a perpetual right, and cannot be used, enjoyed or vindicated as if it involved property of a material object. As we shall see when we deal with the object and content of this right, the interest protected is the work of the mind or of intellectual activity, regardless of the things used to manifest and give it material form. To own a copy of a book is not to own the work contained in the book. The printed work has been possible through the previous existence of the author's creation, and he has the exclusive right to allow its publication.

"It is an almost worldwide ackowledged right, although its regulation may vary within very broad limits. On the one hand the author's right, which is a more or less limited monopoly must be acknowledged; on the other hand, that limitation is intended to render the author's right compatible with the social interests involved in the publication of knowkedge. The right is thwarted, after all, by its temporary character." III-2 Fundamentos de Derecho Civil 201 (1973).

Now then, the exaltation of the beautiful and artistic cannot be achieved through ideals of absolute and abstract justice, sacrificing the formulation of specific law and the balance which should characterize every judicial decision based on "equity." Manresa advises us on this difficulty upon stating that "in the regulation of the exercise of the right to intellectual property, their is a fair principle involved, but that it can hardly be clearly expressed, in an essentially juridical manner, since it has to be expressed in circumstantial provisions of an empirical and conventional nature." 3 Código Civil Español 631 (1934).

As to the aspect regarding the integrity of the work under our consideration and in the particular circumstances of the case. I dissent from the final provision which actually confers appellant Ossorio, as painter, an almost eternal absolute right to intellectual property, incompatible with the exponents of the eclectic or intermediate theory adopted by the Court. His prerogative of seeing that his work be respected should be in harmony with the property right of appellee U.R.H.C. to keep, preserve, and restore its patrimony allowing it to hire other competent persons, excluding appellant if it thus deems pertinent, including appellant's former students who helped to carry it out.

To fulfill this task it is not necessary to ask the author's previous authorization, since due to the nature, characteristics and location of the work, there is an implied permission. It is even less proper to grant him a preferential right which would be tantamount to vinculating the appellee entity perpetually with the artist, in an onerous manner, with the consequent burden and economic loss arising therefrom. The French doctrine which gave birth to the concept of moral right acknowledges, under certain conditions, that it can be waived. Straus: The Moral Right of the Author, 4 Am. J. Comp. L. 515-516 (1955). "It appears that the power of alienation extends only to the question of modification and use, and does not include the right of paternity." Katz, The Doctrine of Moral Right and American Copyright Law--A proposal, 24 So. Cal. L. Rev. 406-409 (1950-51).

In view of the foregoing, the conclusion of the learned trial court was correct:

"The U.R.H.C is bound to maintain and preserve its buildings. The preservation includes the embellishment as it was done in the present case through the painting of murals on the walls of some buildings and the renewal and touch up of said murals. We think that the painter cannot invoke any right to oppose the preservation of the same by other persons or to demand that he be the only one entitled to restore and touch up the work, since nothing had been agreed to that effect in the service contract."

Appellant Ossorio's copyright is not a permanent exclusive right to restore his works, it is rather a right to defend their integrity, opposing any unjustified, unnecessary, and unreasonable mutilation, deformation or substantial modification of the murals, which could cause proven damage to his honor or reputation. We ask ourselves: If due to budgetary reasons the U.R.H.C. could not renew and maintain the murals, could appellant Ossorio resort to the courts to force it to do so? I respectfully deem that under the juridical theory sustained by the Court he can do so and that the U.R.H.C. could not even choose to have them eliminated in justified circumstances.

In view of the foregoing, and since no damages to the integrity of the works were proved in the trial court, I would affirm the judgment dismissing the complaint.

Pancorbo v. Wometco of P.R., Inc., 115 D.P.R. 495 (1984)

Julio E. PANCORBO et al., Plaintiffs and Appellants,
v.
WOMETCO DE PUERTO RICO, INC. et al., Defendants and Appellees.
No. R-84-21.

Supreme Court of Puerto Rico.

Decided June 4, 1984

MR. CHIEF JUSTICE TRIAS MONGE delivered the opinion of the Court.

In Reynal v. Tribunal Superior, 102 D.P.R. 260 (1974), we examined the issue of whether, in Puerto Rico, protection of intellectual property depended exclusively on the federal laws then in force. In Ossorio Ruiz v. Srio. de la Vivienda, 106 D.P.R. 49 (1977), we pronounced ourselves on the authors' moral right doctrine. Shortly after, on January 1, 1978, a new federal copyright law came into effect. 90 Stat. 2598, 17 U.S.C. § 101 et seq. (1976). The instant case raises the need to clarify the effect of said statute in Puerto Rico regarding some copyright aspects.

Late in 1980, Julio Enrique Pancorbo and Alfonso Gende Casanova, artists known as Henry Lafont and El Casanova, respectively, sued Wometco de Puerto Rico, Metro Goldwyn Mayer, United Artists, and others. Plaintiffs alleged that defendants were showing, without their authorization, a motion picture, Fame, where they appear on the screen for a good seventy seconds. They sought $500,000 for damages, plus 5% of the proceeds derived by the defendants from showing the film. Defendants moved for summary judgment contending that the new federal legislation has preempted the field. Plaintiffs objected.

The documents on the record show some additional facts. Let us see. In August 1978, after the federal statute became effective, El Casanova and Henry Lafont videotaped a TV program. The program had a 44-minute duration. The videotape was sold to a broadcasting station in the United States. By means not explained in the record, the producers of Fame gained access to the videotape and used, without plaintiffs' knowledge or consent, seventy seconds of the program. Plaintiffs' objection to the summary judgment was grounded on, among other arguments, the allegation that their moral right had been violated.

The Superior Court ruled that "[t]he field having been preempted and the local law displaced and abolished by special legislation whose application is within the exclusive province of the federal courts, we lack jurisdiction on the matter. . . ." Consequently, its judgment favored the defendants. We agreed to review.

[1] The new federal law, just as the prior legislation, expressly applies to Puerto Rico, 17 U.S.C. § 101 (1976). Said statute makes significant changes. on the scope of copyright protection. It considerably extends federal protection of the right, but in no way does it completely preempt the field or exclude all state action. See the legislative history of S. 22, H.R. Rep. No. 94-1476, 94th Cong., 2nd Sess. 301, reprinted in 1976 U.S. Code Cong. & Ad. News 5745-5749, 5819. Article 301 (17 U.S.C. § 301 (1976)), of the new statute describes the limits of federal exclusiveness. Items (a) and (b) of this article provide:

> (a) On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.
> (b) Nothing in this title annuls or limits any rights or remedies under the common law or statutes of any State with respect to--
> (1) subject matter that does not come within the subject matter of copyright as specified by sections 102 and 103, including works of authorship not fixed in any tangible medium of expression; or
> (2) any cause of action arising from undertakings commenced before January 1, 1978; or
> (3) activities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106.

[2] As we can see, the federal statute governs only and exclusively all "legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106." Article 106 provides:

> Subject to sections 107 through 118, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:
> (1) to reproduce the copyrighted work in copies or phonorecords;
> (2) to prepare derivative works based upon the copyrighted work;
> (3) to distribute copies or phonorecords of the copyrighted works to the public by sale or other transfer of ownership, or by rental, lease, or lending;
> (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and
> (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.

[3-4] Nimmer points out that the state's cause of action is not excluded if the establishment thereof requires additional elements or elements different from those constituting the acts specified in art. 106. Some examples of state actions which are not affected by the new federal act are those grounded on breach of contract, or breach of trust, invasion of privacy, defamation, and deceptive trade practices. 1 Nimmer on Copyright 1-9 et seq. (1979). See: L. Jorgensen & M. McIntyre-Cecil, The Evolution of the Preemption Doctrine and its Effect on Common Law Remedies, 19 Idaho L. Rev. 85, 101 et seq. (1983); Comment, The Fine Art of Preemption: Section 301 and the Copyright Act of 1976, 60 Or. L. Rev. 287 (1981); G. Katz, Copyright Preemption Under the Copyright Act of 1976: The Case of "Droit de Suite", 47 Geo. Wash. L. Rev. 200, 211 et seq. (1978). In other words, if the interest whose local protection is sought is different from those protected by the federal statute, the state action is not preempted. Jorgensen & McIntyre-Cecil, op. cit., at 101-102. From a different point of view, if the state action is aimed at protecting rights that fall beyond the scope of the federal policy, and if such rights stem from deeply-rooted local interests, the local action subsists. Note, An Author's Artistic Reputation under the Copyright Act of 1976, 92 Harv. L. Rev. 1490, 1509 (1979).

[5-6] The case of the moral right is particularly clear with regard to the exposition of the general rule. The doctrine has a civil law background. For its long history, see: I S. Strömholm, Le Droit Moral de l'Auteur, Stockholm, Ed. P.A. Norstedt & Söners Förlag (1967). The concept of intellectual property comprises two categories of rights: those of a financial or property nature, and the extra-property rights linked to the personhood of the author. The moral rights doctrine has to do with the latter. I-2 J. Castán Tobeñas, Derecho civil español, común y foral 391-393, Madrid, Ed. Reus (1982).

[7-9] United States legislation has historically focused on protecting the financial aspect of intellectual property. The new federal statute does not, essentially, alter that viewpoint. Although, at times, it has been argued that, along the years, United States Law has recognized, through the use of different labels, conditions and purposes, isolated elements of the civil law doctrine of moral rights, it has not been adopted by the federal statute, nor is there any indication in the legislative history of an intent to bar acceptance of the same by the states, or permanence thereof wherever it exists. J. G. Petrovich, Artists' Statutory "Droit Moral" in California: A Critical Appraisal, 15 Loy. L.A.L. Rev. 29 (1981); Katz, op. cit., at 217-218; K. Gantz, Protecting Artists' Moral Rights: A Critique of the California Art Preservation Act as a Model for Statutory Reform, 49 Geo. Wash. L. Rev. 873, 879 (1981). ("Federal copyright law neither recognizes moral rights nor provides a basis for redress of their violation.") There is no legal basis to hold that the new federal copyright law has abolished the moral rights doctrine in Puerto Rico.

The foregoing interpretation explains why some states have enacted the civil law doctrine of moral rights, or vital traits of the same, after the federal statute was approved. The California Art Preservation Act, Cal. Civ. Code, sec. 987 (West 1982), in force since January 1, 1980; N.Y. Arts and Cultural Affairs Law Sec. 3B (McKinney 1984), in force since December 31, 1983.

[10-11] Let us apply the above principles to the case at bar. The fact that the plaintiffs sold the videotape has no bearing on their exercise of their moral rights. The author's moral rights are inalienable and imprescriptible. I-2 J. Castán Tobeñas, op. cit., at 392; II D. Espín, Manual de Derecho Civil Español 306, Madrid, Ed. Rev. Der. Privado (6th ed. 1981); C. Colombet, Propriété Littéraire et

Artistique 128-129, Paris, Ed. Dalloz (1976). The moral rights protect, among other interests, the paternity of the artwork and its integrity. The defense of said integrity includes the right to prevent that the work be altered, distorted, truncated or shown in an objectionable context. Castán Tobeñas, op. cit., at 391-393; An Author's Artistic Reputation, supra at 1490, 1493; Encyclopédie Dalloz, Propriété Littéraire et Artistique, VI Rép. Droit Civ., para. 628 (1974).

[12-13] Now then, moral rights do not provide sufficient legal basis for invoking financial rights as such. Plaintiffs have no ground whatsoever for claiming, in the Puerto Rican courts, royalties derived from the alleged unjust enrichment of the defendants, or other compensation grounded on the violation of a federally recognized property right. In regard to property rights equivalent to the rights protected by the federal act, the field is clearly preempted. [FN1]

[14] This does not mean that the violation of extra-property rights may never entail an award of pecuniary damages. Violation of these rights may generate, besides the obligation to do or not to do, the redress of moral damages. In such case, the measure of the damage is not the financial damage caused. The measure is the spiritual and social damage sustained, paying heed to the fact that the author's moral rights may vanish if the sanctions imposed are not sufficient. See: P. I. Medina Perez, El derecho de autor en la cinematografía, 191 Rev. Gen. Leg. Jur. 659, 680-682 (1952); J. Pérez Serrano, El derecho moral de los autores, 2 An. Der. Civ. 7, 23 (1949); J. Giménez Bayo and L. Rodríguez-Arias Bustamante, La Propiedad Intelectual 109-110, Madrid, Ed. Reus (1949); Supreme Court of Spain Judgment of April 4, 1936, No. 955 Aranzadi, V Repertorio de Jurisprudencia 486; II-1 S. Strömholm, op. cit., at 232-263 (1967); II-2 Strömholm, op. cit., 47, 91, 354, 396, 562 (1973); 5-3 R. Nicolo and M. Stella Richter, Rassegna di Giurisprudenza sul Codice Civile 407 et seq., Milano, Ed. Giuffrè (1969). Redress for damages is among the remedies afforded by the New York and California statutes cited above.

[15] The plaintiffs artists in this case have alleged, in opposition to the motion for summary judgment, that their right to the paternity and integrity of their work has been violated. They have established prima facie violations of their moral rights as authors, not preempted by the federal legislation. These allegations should be heard on the merits, together with the damages issue, and any other measures that could be in order.

The judgment below will be reversed, and the case remanded to the trial court for further proceedings consistent with this opinion.

Mr. Justice Negrón García disqualified himself. Mr. Justice Rebollo López concurs in the result without a written opinion.

> FN1. There could be a situation where the same act violates property and extra-property rights. This does not bar local vindication of the latter, or of those property rights not covered by the federal statute.

Cotto Morales v. Ríos, 140 D.P.R. 604 (1996)

SIXTO COTTO MORALES y OTROS, demandantes y recurridos,
v.
CALO RIOS y OTROS, demandados y recurrentes.
Número: RE-94-258

En El Tribunal Supremo De Puerto Rico.

Resuelto: 17 de abril de 1996
EL JUEZ ASOCIADO SENOR CORRADA DEL RIO emitió la opinión del Tribunal.

"La más sagrada, la más inatacable, la más personal de todas las propiedades es la obra fruto del pensamiento ...." [FN1] ***608**

FN1. D. Espín Cánovas, Derecho Civil Español, Madrid, Ed. Rev. Der. Privado, Vol. II, 1925, pág. 302.

El caso de autos nos brinda la oportunidad de expresarnos por primera vez acerca del alcance de la Ley de Propiedad Intelectual [FN2] y la concesión de daños al amparo de dicho estatuto.

FN2. Ley Núm. 96 de 15 de julio de 1988 (31 L.P.R.A. sec. 1401 et seq.).

Los hechos fundamentales que dan lugar al presente recurso de revisión se resumen a continuación.

I

Como parte de las actividades promocionales realizadas por los demandados recurrentes para anunciar los productos SONY en Puerto Rico, durante las Navidades de 1989 se preparó y publicó un catálogo en el que además de incluir los productos electrónicos de la demandada recurrente se incluyeron en el diseño gráfico de este catálogo las fotografías de unas diecinueve (19) obras artísticas de autores puertorriqueños.

Uno de estos autores fue el aquí demandante recurrido, Sr. Sixto Cotto, cuya obra serigráfica, "De Fiesta en la Calle", aparece en las páginas veinte (20) y veintiocho (28) del catálogo. [FN3]

FN3. Véase Alegato de los recurrentes, Apéndice, págs. 20 y 28.

El 21 de diciembre de 1990 se presentó una demanda sobre "violación al derecho moral del autor y daños'D'. En ésta, los aquí demandantes recurridos alegaron que los aquí demandados recurrentes, con el propósito de promocionar sus productos, habían publicado y mutilado sin su autorización una obra de su autoría. Reclamaron la suma de ciento cuarenta mil dólares ($140,000) en concepto de los daños alegadamente causados por las acciones de los demandados recurrentes. [FN4] ***609**

FN4. La parte demandada recurrente en este caso la componen el Sr. Calo Ríos, su esposa, María de Ríos, ambos por sí y en representación de la sociedad legal de gananciales constituida por ambos; Wonderman Worldwide, Inc. y Sony de Puerto Rico, Inc.

La demanda fue oportunamente contestada por los demandados recurrentes quienes negaron los hechos alegados en la demanda, pero admitieron que no se solicitó permiso del señor Cotto para la publicación, ya que la obra publicada era propiedad del codemandado Sr. Calo Ríos. [FN5] Además, negaron que hubiera ocurrido mutilación alguna a la obra. Como defensas afirmativas se planteó la falta de jurisdicción del tribunal de instancia para entender en campo ocupado, entre otras.

FN5. Según surge del informe pericial que obra en autos y que fuera preparado por el Sr. Jesús M. Díaz Caraballo, tasador de obras de arte, la serigrafía "De Fiesta en la Calle" tuvo una edición consistente en doscientos cincuenta (250) ejemplares seriados y quince (15) pruebas de artista.

El 23 de septiembre de 1992 los demandados recurrentes presentaron una Moción de Desestimación y/o Sentencia Sumaria. En ésta solicitaron del tribunal a quo la desestimación o sentencia sumaria tribunal de instancia para entender en los derechos patrimoniales reclamados por los demandantes recurridos, entre éstos la reclamación sobre propiedad, divulgación y reproducción de la obra, cuya jurisdicción es exclusiva del foro federal. Por otro lado, también plantearon en dicha moción que el tribunal carecía de jurisdicción sobre la reclamación de derechos morales de autor, toda vez que no se

había cumplido con el requisito de la Ley de Propiedad Intelectual sobre la inscripción de la obra. Los demandantes recurridos se opusieron a la Moción de sentencia sumaria mediante Moción de 23 de octubre de 1992. El tribunal de instancia acogió la solicitud de los demandados recurrentes y dictó sentencia parcial el 24 de febrero de 1993. En ésta desestimó la reclamación de daños patrimoniales de la parte demandante recurrida por carecer de jurisdicción para entender en ella.

En cuanto al requisito de inscripción de la obra, el tribunal de instancia entendió que no era necesaria su inscripción en el Registro de Propiedad Intelectual para tener ***610** derecho a la protección del derecho moral. Además, el tribunal de instancia expresó que lo que restaba por determinar en el caso era la violación de derecho moral de autor, si alguna, y el valor de dicha acción. La referida sentencia parcial advino final y firme al no recurrirse en alzada sobre sus disposiciones.

El 14 de marzo de 1994 los demandados recurrentes presentaron una nueva moción de sentencia sumaria basada en la ausencia de daños de la naturaleza de los que requiere un caso de violación de derechos morales. Alegaron que la ausencia de tales daños surgía con diáfana claridad de las propias deposiciones de los demandantes recurridos y del informe de su perito. También se trajo a la atención del tribunal a quo el hecho de que la alegada mutilación de la obra tampoco cumplía con los criterios de la doctrina del derecho moral, toda vez que lo que era objeto de la reclamación era una fotografía y no una obra como tal. Dicha moción fue declarada sin lugar el 23 de marzo de 1994; posteriormente no se recurrió en alzada de lo allí resuelto.

El 15 de abril de 1994, inmediatamente luego de concluir la presentación de la prueba, el tribunal de instancia dictó sentencia. En ella se determinó que la serigrafía titulada "De Fiesta en la Calle" había sido mutilada, que había sido publicada sin autorización [FN6] y que los codemandados habían sido temerarios. En consecuencia, el tribunal de instancia dictó sentencia a favor de los demandantes recurridos y les concedió la suma de dieciocho mil dólares ($18,000) como compensación global por los daños sufridos, así como las costas del pleito. Además, tras concluir que los demandados recurrentes habían actuado de manera temeraria, les impuso el pago de tres mil dólares ($3,000) en concepto de honorarios de abogado. ***611**

FN6. El tribunal de instancia en su Sentencia parcial de 24 de febrero de 1993 ya había adjudicado el reclamo sobre la publicación sin autorización determinando que éste implicaba reclamo de derechos patrimoniales sobre cuyo reclamo el tribunal no tenía jurisdicción.

Inconforme con la determinación del tribunal de instancia, la parte demandada recurrente presenta ante nos el presente recurso de revisión. En éste alegó la comisión de cuatro (4) errores por parte del tribunal a quo, a saber:

a. El tribunal de instancia carecía de jurisdicción para determinar sobre derechos patrimoniales de autor.

b. La serigrafía "De Fiesta en la Calle" no fue mutilada.

c. El tribunal de instancia abusó de su discreción al determinar que los codemandados recurrentes incurrieron en temeridad.

d. No procede la imposición de daños del tribunal de instancia.

Habiéndose presentado los alegatos de las partes, estamos en posición de resolver las controversias planteadas ante nos y procedemos a así hacerlo.

II

[1][2] Los derechos de autores, artistas, compositores, cineastas y demás integrantes de la comunidad intelectual de Puerto Rico están fundamentalmente protegidos por dos (2) piezas legislativas: la "Federal Copyright Act", 17 U.S.C. sec. 101 et seq., y la Ley de Propiedad Intelectual, supra. Además, y conforme resolviéramos en Reynal v. Tribunal Superior, 102 D.P.R. 260, 262-263 (1974), aplican de manera supletoria a cualquier controversia sobre propiedad intelectual las disposiciones del Código Civil de Puerto Rico que no sean incompatibles con la legislación federal sobre esta materia. [FN7]

FN7. Véase Exposición de Motivos de la Ley Núm. 96, supra, 1988 Leyes de Puerto Rico, pág. 428.

[3] La propiedad intelectual se define como "el conjunto de derechos que la ley reconoce al autor sobre las obras que ha producido con su inteligencia, en especial los de que su paternidad le sea reconocida y respetada, así como que se ***612** le permita difundir la obra, autorizando o negando, en su

caso, la reproducción'D'. [FN8]

FN8. J. Puig Brutau, Fundamentos de Derecho Civil, Barcelona, Ed. Bosch, T. III, 1973, págs. 200-201.

[4] En Puerto Rico la propiedad intelectual o los derechos de autor está formada por la imbricación de dos (2) derechos de naturaleza diferente: el derecho moral, que de manera primordial protege el vínculo personal entre el autor y su obra y el derecho patrimonial que consiste en el monopolio de la explotación de la obra.

En su primer señalamiento de error, la parte demandada recurrente aduce, en síntesis, que el tribunal de instancia carecía de jurisdicción para determinar sobre derechos patrimoniales de autor por competirle esta determinación al foro federal. Veamos.

[5][6] La doctrina de "campo ocupado" tiene su génesis en la cláusula de supremacía de la Constitución Federal, [FN9] en la que se dispone que la ley federal tendrá supremacía sobre las leyes estatales. Sin embargo, el Tribunal Supremo federal ha resuelto que la delegación de poderes bajo los cuales el Congreso aprobó la Federal Copyright Act no son exclusivos y, por ende, de darse las condiciones adecuadas, las leyes estatales pueden coexistir con las federales en el área de los derechos de autor. [FN10] Tal visión tiene su fundamento en que la apreciación de los logros intelectuales varían de estado a estado, dado el hecho de la gran diversidad de intereses que forman la Nación americana. [FN11] No obstante, se pueden suscitar situaciones en las que un estatuto federal no pueda coexistir con un estatuto estatal, en cuyo caso, la ley estatal puede invalidarse siguiendo varias alternativas. Primero, el Congreso puede declarar su intención específica de "ocupar el campo" ***613** en un área particular a reglamentarse. Segundo, de no haber una declaración expresa por parte del Congreso, se puede ocupar el campo si la reglamentación federal es tan abarcadora que no cabe duda que la intención federal era reglamentar la totalidad del área y no es posible ninguna otra reglamentación estatal. Finalmente, una ley estatal puede ser invalidada si conflige directamente con un estatuto federal. [FN12]

FN9. Art. VI, Cl. 2, Const. EE. UU., L.P.R.A., Tomo 1.

FN10. Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470, 478 (1974); Goldstein v. California, 412 U.S. 546 (1973).

FN11. Kewanee Oil Co. v. Bicron Corp., supra, pág. 479.

FN12. Véanse: Bordas & Co. v. Srio. de Agricultura, 87 D.P.R. 534 (1963); P.R. Consumer Affairs Dept. v. Isla Petroleum, 485 U.S. 495, 497- 498 (1988); Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

[7][8] Resolvimos en Bordas & Co. v. Srio. de Agricultura, 87 D.P.R. 534, 552-553 (1963), que "¿noo se presumirá que la reglamentación federal sustituye a la reglamentación estatal por el hecho de que el Congreso reglamente un área en forma limitada. Para que así sea es necesario que la ley del Congreso interpretada razonablemente esté en conflicto real con la ley del estado. En ausencia de una prohibición específica en la ley federal contra una ley local, la legislación insular que complementa la ley federal es válida siempre y cuando que la primera no esté sustancialmente en conflicto con la segunda". (Citas omitidas.)

[9] En Pancorbo v. Wometco de P.R., Inc., 115 D.P.R. 495 (1984), resolvimos específicamente el primer planteamiento de error al que hacen referencia los demandados recurrentes. Resolvimos en esa ocasión que en nuestra jurisdicción la Federal Copyright Act ocupa el campo en el aspecto de los derechos patrimoniales de autor. Sobre este particular sostuvimos lo siguiente:

... Los demandantes no tienen fundamento alguno para reclamar en los tribunales de Puerto Rico regalías derivables del alegado enriquecimiento injusto de los demandados u otra compensación fundada en la violación de un derecho patrimonial reconocido federalmente. En lo que respecta a los derechos patrimoniales equivalentes a los derechos protegidos por la Ley ***614** federal el campo está claramente ocupado. (Énfasis suplido y escolio omitido.) Pancorbo v. Wometco de P.R., Inc., supra, pág. 502.

Según lo antes expuesto, la sec. 301(a) de la Federal Copyright Act, 17 U.S.C., dispone que:

(a) On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by section 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State. (Énfasis suplido.)

Como puede verse, la Federal Copyright Act gobierna exclusivamente tan sólo los derechos legales o en equidad equivalentes a cualquiera de los derechos exclusivos, dentro del ámbito general del derecho de autor, especificados en la sec. 106 de la referida ley, 17 U.S.C., que en lo pertinente dispone:

Subject to sections 107 through 118, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

(1) to reproduce the copyrighted work in copies or phonorecords;

(2) to prepare derivative works based upon the copyrighted work;

(3) to distribute copies or phonorecords of the copyrighted works to the public by sale or other transfer of ownership, or by rental, lease, or lending;

(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and

(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.

[10] Claramente puede concluirse que el alcance de la ***615** legislación federal es estrictamente patrimonial. La doctrina establecida en Pancorbo v. Wometco de P.R., Inc., supra, continúa en vigencia. Resolvimos allí que la "ley federal gobierna exclusivamente tan sólo 'los derechos legales o en equidad equivalentes a cualquiera de los derechos exclusivos, dentro del ámbito general del derecho de autor ...' ". [FN13] Concluimos, pues, que "si la acción estatal intenta proteger derechos que radican fuera del ámbito de la política federal y si tales derechos tienen por fuente intereses locales de honda raíz'D', [FN14] tal acción no está desplazada por la legislación federal. Más aun, aporta a nuestra conclusión el hecho de que precisamente en otras jurisdicciones estatales se ha comenzado a proteger los derechos morales de autor, siguiendo así la tradición civilista de proteger ambas facetas de la propiedad intelectual. [FN15]

FN13. Pancorbo v. Wometco de P.R., Inc., 115 D.P.R. 495, 499 (1984).

FN14. Pancorbo v. Wometco de P.R., Inc., supra, pág. 500.

FN15. Véase, por ejemplo, Cal. Civ. Code sec. 987 (West Supp. 1995); Conn. Gen. Stat. Ann. sec. 42-116t (West 1995); La. Rev. Stat. Ann. sec. 51:2153-55 (West 1995); Me. Rev. Stat. Ann. tit. 27, sec. 303 (West 1995); Mass. Gen. Laws Ann. ch. 231, sec. 85S (West Supp. 1995); N.J. Stat. Ann. sec. 2A:24A-4 (West 1995); N.M. Stat. Ann. sec. 13-4B-3(A) (Michie 1995); 73 Pa. Cons. Stat. Ann. sec. 2104 (Supp. 1995); R.I. Gen. Laws sec. 5-62- 3 (1995).

La Legislatura del estado de California aprobó en 1979 la primera de estas legislaciones protectoras de los derechos morales en la que determinó que:

... the physical alteration or destruction of fine art, which is an expression of the artist's personality, is detrimental to the artist's reputation, and artists therefore have an interest in protecting their works of fine art against such alteration or destruction; and that there is also a public interest in preserving the integrity of cultural and artistic creations. [FN16]

FN16. Cal. Civ. Code sec. 987(a) (West Supp. 1995).

De igual forma, en el estado de Nueva York se creó en 1984 la Arts and Cultural Affairs Law [FN17] en cuya Sec. 14.03 se dispone que ninguna persona que no sea el artista ***616** o su designado puede exhibir en un lugar público o publicar una reproducción de manera:

FN17. New York Arts and Cultural Affairs Law Sec. 14.03 (CLS, 1995).

¿...o altered, defaced, mutilated or ¿ino modified form if the work is displayed, published or reproduced as being the work of the artist, or under circumstances under which it would reasonably be regarded as being the work of the artist, and damage to the artist's reputation is reasonably likely to result there from ¿...o [FN18] (Énfasis suplido.) N.Y. Arts & Cult. Aff. sec. 14.03 (McKinney 1984).

FN18. Íd.

Sobre este particular, se resolvió en esa jurisdicción que:
Reproduction of minor, unrepresentative segments of works of multi-media artist in brochure violated CLS Arts & Cult. Affrs. Law sec. 14.03(1), where artist sought to enjoin publication of brochure by nonprofit group protesting tax-based funding of artist's work, which brochure contained photographic reproductions of portions of artist's work, because extracting fragmented images from complex, multi-imaged collages clearly alters and modifies such work. [FN19]

FN19. Wojnarowicz v. American Family Ass'n., 745 F.Supp. 130, 135-139 (S.N. N.Y. 1990).

También se determinó en el antes citado caso, que las reclamaciones sobre derechos morales realizadas al amparo de la legislación estatal no estaban en contravención con la legislación federal de copyright. [FN20]

FN20. Wojnarowicz v. American Family Ass'n., supra, págs. 135-136.

Con posterioridad a nuestras expresiones en Pancorbo v. Wometco de P.R., Inc., supra, el Congreso aprobó una legislación federal que al presente protege los derechos morales de autor. Luego de que Estados Unidos se acogiera al Tratado de Berna, [FN21] el Congreso aprobó la Visual Artists Rights Act [FN22] el 1ro de diciembre de 1990. En dicho estatuto se acoge el principio básico civilista de que se debe ***617** proteger el derecho moral del autor y se dispone, en lo pertinente, que el artista tendrá derecho a:

FN21. Véase Berne Convention Implementation Act of 1988, L. Núm. 100- 568, Sec. 2, 102 Stat. 2853 (1988), donde se acoge el Tratado de Berna sobre derechos de autor.

FN22. 17 U.S.C. secs. 101, 106A, 107, 113, 301, 411, 412, 501, 506 (en adelante Ley VARA).

...prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation, and any intentional distortion, mutilation, or modification of that work is a violation of that right .... [FN23]

FN23. 17 U.S.C. secs. 106A(a) (3)(A).

[11] En el caso de autos, dicho estatuto en nada afecta la determinación que hiciera el foro de instancia. La legislación federal que protege el derecho moral del autor fue aprobada con posterioridad a los hechos del caso de autos. Además, dicha legislación federal es de aplicación a obras de doscientos (200) ejemplares o menos. [FN24] En el caso ante nos, la obra mutilada tuvo una edición de doscientos cincuenta (250) ejemplares. Por último, la nueva legislación federal no ocupa el campo permitiendo que los estados, o como en este caso Puerto Rico, puedan legislar a favor de los derechos morales de sus autores cuando la legislación federal no protege estos derechos.

FN24. 17 U.S.C. sec. 101(1).

En Pancorbo v. Wometco de P.R., Inc., supra, resolvimos que la Federal Copyright Act no ocupaba el campo en cuanto a los derechos morales de los autores en Puerto Rico. Bajo las enmiendas que añadió el nuevo estatuto federal, tales determinaciones continúan sustancialmente en vigor.

Al respecto, Visual Artists Rights Act of 1990 (17 U.S.C. sec. 301(f)) dispone que:
(f)(1) On or after the effective date set forth in section 610(a) of the Visual Artists Rights Act of 1990, all legal or equitable rights that are equivalent to any of the rights conferred by section 106A with respect to works of visual art to which the rights conferred by section 106A apply are governed exclusively by section 106A and section 113(d) and the provisions of this title relating to such sections. Thereafter, no person is entitled ***618** to any such right or equivalent right in any work of visual art

under the common law or statutes of any State.
(2) Nothing in paragraph (1) annuls or limits any rights or remedies under the common law or statutes of any State with respecto to--
(A) any cause of action from undertakings commenced before the effective date set forth in section 610(a) of the Visual Artists Rights Act of 1990;
(B) activities violating legal or equitable rights that are not equivalent to any of the rights conferred by section 106A with respect to works of visual art; or
(C) activities violating legal or equitable rights which extend beyond the life of the author. (Énfasis suplido.)

Claramente nos encontramos ante un caso en el que el Congreso expresamente declaró su intención reguladora en cuanto a un área específica. Técnicamente la situación del caso de autos no cae bajo el alcance del estatuto federal ya que, como mencionamos anteriormente, su edición sobrepasa los doscientos (200) ejemplares seriados y el estatuto federal tiene efecto prospectivo luego de su aprobación en 1990.

En Puerto Rico, la Asamblea Legislativa, con la reafirmación de que no existe base en derecho para sostener que la Federal Copyright Act aboliera la doctrina del derecho moral en nuestra jurisdicción, aprobó en 1988 la Ley de Propiedad Intelectual con el fin de "promover el que la comunidad intelectual del país goce de la mayor protección de sus derechos". [FN25]

FN25. Exposición de Motivos de la Ley Núm. 96, supra, 1988 Leyes de Puerto Rico, pág. 429.

En la propia exposición de motivos del citado estatuto, se puede apreciar que la Asamblea Legislativa utilizó como norte los criterios que esbozamos en Pancorbo v. Wometco de P.R., Inc., supra, a los efectos de que a pesar de la aplicación en nuestra jurisdicción de la Federal Copyright Act, ésta no "ocupaba el campo" en torno a la protección de los derechos morales de autor ya que "si el interés que se desea proteger localmente es distinto a aquellos que el estatuto ***619** federal protege, la acción estatal no queda desplazada". [FN26] Con posterioridad, el Congreso aprobó la citada Ley VARA, sin embargo, el alcance limitado de esta legislación federal no tiene aplicación al caso de autos y solamente afectaría de forma limitada los alcances de la ley local. [FN27]

FN26. Pancorbo v. Wometco de P.R., Inc., supra, pág. 500.

FN27. Primeramente, VARA, a diferencia de la Ley Federal de Copyright, que solamente protege los derechos patrimoniales y no los derechos morales de autor, regula un área limitada de los derechos morales, ya que solamente aplica a trabajos de artes visuales. Al respecto, el propio estatuto define los trabajos de artes visuales.

"A 'work of visual art' is--
"(1) a painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author, or, in the case of a sculpture, in multiple cast, carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author; or
"(2) a still photographic image produced for exhibition purposes only, existing in a single copy that is signed by the author, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author."
Resultaría incongruente pretender que una ley que tiene un alcance limitado a una minúscula fracción de la producción artística de la que son capaces los seres humanos, ocupe el campo de forma tal que impida que los estados, o Puerto Rico, legislen para favorecer los derechos morales de sus autores de una forma más abarcadora y completa. Al respecto, el propio estatuto, en la sección 301(f)(2), supra, dispone que las leyes estatales que no estén en conflicto con el estatuto federal continuarán en vigor.

El propósito fundamental de la Ley de Propiedad Intelectual es promover la protección de los derechos de nuestra comunidad intelectual, fortaleciendo la legislación local con la actualización de las disposiciones contenidas en la Ley sobre Propiedad Intelectual española de 10 de enero de 1879. [FN28]

FN28. Véase Op. Sec. Just. Núm. 1988-28.

[12] La propia Ley de Propiedad Intelectual, supra, dispone en su Art. 1 que "¿eol derecho moral es aquél que permite, a quien crea una obra, gozar de la protección del derecho de propiedad intelectual". [FN29]

FN29. 31 L.P.R.A. sec. 1401a.

[13] Podemos concluir, pues, que la legislación federal no ocupa el campo ni impide que la Ley de Propiedad Intelectual proteja los derechos morales de los autores en ***620** Puerto Rico, con excepción de los que quedan directamente excluidos por el estatuto federal.

Un análisis de la sentencia recurrida nos obliga a concluir que no le asiste la razón a la parte demandada recurrente en cuanto a su primer planteamiento de derecho ya que el tribunal de instancia no concedió compensación alguna por concepto de daños patrimoniales.

El tribunal a quo concedió compensación a los demandantes recurridos en concepto de "la publicación no autorizada y mutilación ...". [FN30] Ello no significa que la compensación concedida se deba reducir bajo la premisa de que el tribunal de instancia carecía de jurisdicción para conceder daños patrimoniales. Las expresiones del tribunal sobre la publicación no autorizada de la obra son meramente una referencia lógica de la prueba desfilada, y no el fundamento para la concesión del remedio. Éste está amparado en los daños morales causados por la mutilación.

FN30. Solicitud de revisión, Apéndice, pág 19.

III

En su segundo señalamiento, los demandados recurrentes aducen, en síntesis, que la serigrafía "De Fiesta en la Calle" no fue mutilada.

Al respecto el tribunal de instancia determinó que:

...la obra de Don Sixto Cotto ha sido mutilada dentr¿oo del concepto de lo que "MUTILACIÓN'D' SIGNIFICA CUANDO SE TRATA DEL DERECHO DE PROPIEDAD INTELECTUAL DENTRO DEL CONCEPTO DE DERECHO MORAL DEL AUTOR. [FN31]

FN31. Solicitud de revisión, pág. 4.

Sobre este particular el perito del demandante recurrido, Jesús M. Díaz Caraballo, quien se especializa en la evaluación y tasación de obras de arte, expresó que en efecto la obra aquí en controversia había sido publicada en ***621** forma mutilada. Al respecto el tribunal a quo en sus determinaciones de hechos expresó que "¿noo se trata de cambios o modificaciones en la obra que sean intranscendentes o accesorias, sino que se trata de asuntos importantes a la obra misma y al buen nombre y prestigio de su autor". [FN32]

FN32. Solicitud de revisión, pág. 4.

[14] El derecho moral de autor constituye un derecho privado que tiene por objeto no la obra del ingenio, que es un bien de naturaleza patrimonial, sino el bien personal de la paternidad intelectual, modo de ser moral de la personalidad del propio autor. En el derecho civil se ha clasificado el derecho moral de autor como un derecho personalísimo, junto a otros derechos tales como el derecho a la vida, a la libertad e integridad física, derecho al honor, derecho a la imagen y otros. [FN33]

FN33. Véase, en términos generales, M.E. Martínez Rivera, El Derecho de Autor en Puerto Rico ... ¿legislación judicial? 21 Rev. Jur. U.I.A. 421, 424- 425 (1987).

Nos dice Castán, [FN34] que los derechos de la personalidad son los que se "ejercitan sobre la propia persona ... o más propiamente ... sobre determinadas cualidades o atributos, físicos o morales, de la persona humana". Fue en la Conferencia Internacional de Roma en 1928 donde quedó consagrado en forma legislativa y con ámbito internacional el derecho moral de autor. Allí se dispuso que:

FN34. J. Castán Tobeñas, Los Derechos del Hombre, Madrid, Ed. Reus, 1969, pág. 26.

Independientemente de los derechos patrimoniales del autor, y lo mismo después de la cesión de dichos derechos, el autor conserva el derecho de reivindicar la paternidad de la obra, así como el derecho de oponerse a toda deformación, mutilación u otra modificación de dicha obra que fuere perjudicial a su honor o a su reputación. [FN35]

FN35. N. Pérez Serrano, El Derecho moral de los autores, 2 An. Der. Civ. 13 (1949).

Según Castán, [FN36] integran el contenido del derecho moral ***622** de autor, como facultades o prerrogativas más sobresalientes las siguientes:

FN36. J. Castán Tobeñas, Derecho Civil español, común y foral, Madrid, Ed. Reus, 1984, T. I, Vol. 2, pág. 402.

(1) El derecho de publicación.
(2) El derecho de paternidad intelectual.
(3) El derecho de defensa de la integridad de la obra, que en su aspecto positivo le autoriza para modificarla, y en el negativo para impedir que sea alterada o deformada por los demás.
(4) El derecho de arrepentimiento.

[15] En nuestra jurisdicción, el derecho moral de autor está consagrado en la Ley de Propiedad Intelectual. Ésta dispone en su Art. 1 que "¿loa protección del derecho moral del creador de una obra es independiente de la protección de sus derechos patrimoniales". [FN37]

FN37. 31 L.P.R.A. sec. 1401b.

El referido artículo también provee el mecanismo legal necesario para que se pueda reclamar una compensación si se probasen daños al derecho moral protegido. A tales efectos dispone que:
La violación del derecho moral da derecho a solicitar remedios interdictales temporeros o permanentes, que incluyan la restitución, confiscación o destrucción de obras, según sea el caso. Dicha violación también da derecho a reclamar daños. Deberá establecerse un adecuado balance entre el derecho de propiedad del titular de una obra y el derecho moral de su autor. (Énfasis suplido. [FN38]

FN38. 31 L.P.R.A. sec. 1401f.

[16] Este artículo deja establecido que en efecto dentro del ordenamiento jurídico de nuestra jurisdicción en lo relativo a derechos morales de autor, la concesión de una compensación económica por daños y perjuicios es permisible y no contraviene la legislación federal.

[17] El derecho moral del autor es usualmente clasificado en la doctrina civilista como un derecho de la personalidad, distinguiéndolo particularmente de los derechos patrimoniales. Dentro de los derechos de la personalidad ***623** se incluyen: el derecho a la propia identidad, al nombre, a la reputación personal, a la ocupación, a la integridad de la propia persona y a la intimidad. Alguno de estos derechos, como el derecho a la integridad personal y el derecho a la intimidad, ya están protegidos en Puerto Rico por nuestra Constitución.

[18] Ante todo, se estima que el derecho moral es un derecho absoluto, es decir, uno de esos derechos que revisten carácter universal y que implican, por lo tanto, un deber de todos los demás sujetos jurídicos con respecto a su titular. De ahí la obligación general que a todos incumbe de abstenerse y evitar cualquier trastorno o perturbación a ese derecho. [FN39]

FN39. Véase Pérez Serrano, supra, págs. 22-23.

Podemos concluir, pues, que en el caso de autos nos enfrentamos a una controversia exclusivamente de quebrantamiento del derecho moral de un autor, irrespectivamente de que pudieran existir otros daños o derechos patrimoniales recobrables bajo la Federal Copyright Act.

[19] Como expresáramos anteriormente, uno de los aspectos más importantes del derecho moral de autor es el derecho del artista a mantener la integridad de su obra. Este derecho encuentra su fundamento en que la obra es una creación del espíritu y, por consiguiente, es una expresión de la propia personalidad e identidad del autor. Por ello, la distorsión, mutilación o falsa representación,

maltrata una expresión de esa personalidad y el honor de su creador. La tendencia manifiesta de este Tribunal nos conduce a delinear los componentes del derecho moral de autor de la doctrina civilista en nuestra jurisdicción. En Pancorbo v. Wometco de P.R., Inc., supra, págs. 501-502, expresamos que:

Entre otros intereses, el derecho moral salvaguarda la paternidad de la obra y su integridad, la defensa de esa integridad ***624** incluye el derecho a impedir que la obra sea alterada, deformada, truncada o expuesta en un contexto objetable.

En cuanto al aspecto de la mutilación de la obra al que se refieren los demandados recurrentes concluimos que tratándose el caso de autos de la apreciación de prueba documental que obra en autos, estamos en igual posición que el foro de instancia de evaluarla. [FN40] Al igual que el foro recurrido, concluimos que la obra fue mutilada.

FN40. Bco. Central Corp. v. Yauco Homes, Inc., 135 D.P.R. 858 (1994).

Los únicos que presentaron prueba pericial ante el tribunal a quo fueron los demandantes recurridos, mediante el testimonio de su perito, Jesús M. Díaz Caraballo, quien declaró a preguntas tanto de los demandantes recurridos como de los demandados recurrentes que la obra había sido mutilada al reproducirse en la página veintiocho (28) del catálogo en el cual aparece cortada en su margen izquierdo, eliminándose una franja vertical de aproximadamente tres octavos de pulgada (3/8") de área impresa. Al eliminarse esta franja se le cortó a la paloma de la rúbrica la mitad del cuerpo dejando solamente la cola y una pequeña parte del tronco y de un ala. Determinó el foro a quo que el señor Cotto utiliza frecuentemente una diminuta paloma como rúbrica en sus obras. Este elemento iconográfico es distintivo del trabajo del artista y se utiliza al igual que la firma. En el caso de autos la mutilación de la obra no solamente afecta la rúbrica del autor al quedar irreconocible, sino que también se afecta su composición general, al perderse un elemento que le impartía movimiento y continuidad a la escena incorporando el margen del papel a la totalidad de la composición artística.

La pérdida que sufre la obra como un todo se agrava al quedar incompleto el juego tridimensional que sirve de soporte y confirmación visual de lo que ocurre en el resto del diseño. La dualidad entre protuberancia y profundidad en el elemento geométrico rojo-verde del margen inferior, y el ***625** borde de luz vertical en el extremo izquierdo del plano oscuro que aparenta ser el apoyo horizontal del cuatro "gigante", se han eliminado, dejando a la obra impedida en su función de jugar con el espectador y hacerle saber que el tratamiento es intencional.

[20] Inciden los demandados recurrentes al argumentar que por tratarse de una reproducción del original no se ha mutilado la obra objeto del presente pleito. Como hemos expuesto anteriormente, el derecho moral del autor emana de un respeto a su integridad personal e intelectual. La integridad personal no se desvanece por el mero hecho de que la obra se reproduzca, si al reproducirse se mutila según hemos descrito. Máxime cuando, como en el caso de autos, tal reproducción se hace sin el consentimiento del autor, aunque éste no pueda recobrar en la jurisdicción local la porción por dicho quebrantamiento.

[21] La mutilación de la obra reproducida cuando ésta es publicada sin la autorización del autor involucra su derecho moral de forma parecida a la mutilación de la obra propiamente. Resolver lo contrario significaría abrir las puertas al abuso indiscriminado por parte de terceros aprovechados del caudal artístico que producen nuestros artistas.

En cuanto a la imposición de daños por parte del tribunal de instancia, dicho foro dispuso en su sentencia que los aquí demandados recurrentes estaban obligados solidariamente ante los demandantes recurridos a pagar por los "daños que se le han ocasionado como consecuencia de la publicación no autorizada, y mutilación de la obra del autor Don Sixto Cotto y los daños accidentales sufridos por su esposa como consecuencia de las actuaciones culposas y negligentes de la parte demandada ...". [FN41] (Énfasis suplido.) Al así resolver, el tribunal a quo concedió la suma global de dieciocho mil dólares ($18,000) a los demandantes ***626** recurridos que se distribuyen en doce mil ($12,000) al Sr. Sixto Cotto y seis mil ($6,000) a su esposa. Al respecto, el autor Nicolás Pérez Serrano expresa en su obra que el derecho moral de autor es un derecho no evaluable en dinero ya que no se trata de un derecho patrimonial. Sin embargo, el mismo autor reconoce que esto "no quiere decir que en caso de lesión o agravio no tenga el titular la facultad de reclamar indemnización'D'. [FN42]

FN41. Solicitud de revisión, págs. 19-20.

FN42. Pérez Serrano, supra, pág. 23.

[22] La gestión judicial de estimación y valorización de los daños es difícil y angustiosa. En esta gestión los tribunales de primera instancia están en mejor posición que el tribunal apelativo, por razón de su contacto directo con la prueba. De ahí que el tribunal apelativo sólo alterará las sumas concedidas por daños cuando sean ridículamente bajas o exageradamente altas. [FN43] Determinamos que las cuantías concedidas están justificadas como compensación por el daño moral sufrido por los demandantes recurridos, daño que la Ley de Propiedad Intelectual, en su Art. 1401f, supra, les permite recobrar.

FN43. Vélez Rodríguez v. Amaro Cora, 138 D.P.R. 182 (1995).

[23] En cuanto a la determinación de temeridad por parte del tribunal de instancia, expresamos en Miranda v. E.L.A., 137 D.P.R. 700, 719 (1994), que " '[l]a determinación sobre si una parte ha procedido con temeridad o no descansa en la sana discreción del tribunal' ". La partida de honorarios de abogado concedida no variará en apelación, a menos que la misma sea excesiva, exigua o constituya un abuso de discreción. [FN44]

FN44. Véase Ramírez v. Club Cala de Palmas, 123 D.P.R. 339, 350 (1989).

Sin existir en el caso de autos elementos de abuso de discreción que nos muevan a variar la determinación del tribunal de instancia sobre esta partida, ésta permanecerá inalterada. ***627**

En conclusión, en el caso de autos la parte demandada recurrente quebrantó con sus actuaciones negligentes y culposas el derecho moral del autor de la obra "De Fiesta en la Calle", por lo cual procede que confirmemos la sentencia recurrida.

El Juez Asociado Señor Fuster Berlingeri concurrió sin opinión escrita.

Abril 17, 1996

Harguindey Ferrer v. U.I., 148 D.P.R. 13 (1999)

JUAN HARGUINDEY FERRER, demandante y peticionario,

v.

UNIVERSIDAD INTERAMERICANA DE PUERTO RICO y FREDDIE MEDINA, demandados y recurridos.

Número: CC-96-49

En El Tribunal Supremo De Puerto Rico.

Resuelto: 7 de abril de 1999

EL JUEZ ASOCIADO SENOR REBOLLO LOPEZ emitió la opinión del Tribunal.

¿Tiene el editor [FN1] de la traducción de una obra literaria, que ya está protegida por la Ley de Propiedad Intelectual federal [FN2] derecho a reclamar bajo nuestra Ley de Propiedad ***18** Intelectual [FN3] por el alegado da ño moral que ha sufrido al no reconocerse su trabajo como editor y no compensarse dichos servicios? Esta es la interrogante a la que nos enfrentamos hoy.

I

Robert F. Hehman (en adelante Hehman) es el **autor** de la obra General Biology Laboratory Activities [FN4] y es quien posee los derechos de **autor** de la misma. En el año 1988, Hehman acordó con la Universidad Interamericana de Puerto Rico (en adelante Universidad), la Sra. Blanca Riesco y Burgess International Group (en adelante Publicadora), que su obra sería traducida y publicada en el idioma español. [FN5] La versi ón en español sería titulada Manual de Laboratorio Biología Moderna y Actividades de Laboratorio Zoología.

El Dr. Juan Harguindey (en adelante Harguindey), demandante-peticionario, era empleado de la Universidad durante el año académico 19881989. Éste se desempeñaba como instructor en el Departamento de Biología. Durante dicho periodo, Harguindey "participó en el proyecto de editar material provisto de antemano consistente en las traducciones" [FN6] de la obra en cuestión. La participación de Harguindey fue a solicitud del Dr. Freddy Medina (en adelante Medina) quien también laboraba para la Universidad. [FN7] Es aqu í donde comienza la discrepancia entre las partes.

Alega la Universidad que Medina solicitó la colaboracion ***19** de Harguindey para "editar las traducciones que se estaban haciendo para preparar el Manual, dentro de su horario de trabajo y utilizando los recursos de la Universidad". [FN8] Asimismo, Medina sostiene que, al solicitarle la edición a Harguindey, no concertó acuerdo o contrato alguno adicional al sueldo que recibía éste como empleado de la Universidad.

Por su parte, indica Harguindey que, a solicitud de Medina, confeccionó la edición del Manual de Zoología (en adelante Manual), y que se le prometió una retribución económica por el trabajo realizado. Dicha compensación, según Harguindey, sería adicional a su ingreso como profesor en la Universidad por ser éste un trabajo adicional fuera de sus funciones contratadas. "Específicamente se le señaló al demandante que se le pagaría lo que correspondiese del producto final de la obra ...". [FN9]

Sostiene, además, Harguindey que el crédito por su trabajo fue adjudicado a Medina. A su vez, Medina alega que a Harguindey se le reconoció su labor como editor en la página de "Reconocimientos" del Manual. Además, manifiesta que Medina nunca reclamó derechos de autoría sobre el Manual. [FN10]

Así las cosas, el 3 de noviembre de 1993, Harguindey presentó demanda ante el antiguo Tribunal Superior de Puerto Rico, Sala de San Juan, contra la Universidad y Medina. Además de los señalamientos expuestos previamente, esbozó los siguientes hechos: que se le requirió "editar y reorganizar lingüísticamente material de literatura ... y hacer el mismo un trabajo publicable" (Solicitud de certiorari, Anejo I, pág. 1); que la Universidad, por medio de Medina, acordó otorgar a Harguindey "la parte que correspondiere del producto final de publicación como retribucion ***20** económica así como el debido reconocimiento de su propiedad intelectual allí expuesta". [FN11] Íd.

Trabada la controversia, la Universidad solicitó que se desestimara el pleito por alegada falta de jurisdicción. Adujo que lo reclamado por Harguindey constituían daños patrimoniales, los cuales tenían que dilucidarse exclusivamente en el foro federal. El tribunal de primera instancia accedió a lo solicitado, desestimando la demanda por falta de jurisdicción.

Oportunamente, Harguindey acudió en apelación al Tribunal de Circuito de Apelaciones, cuestionando la determinación del tribunal de instancia. El referido foro apelativo confirmó la sentencia. El sustrato de su decisión fue que, a su juicio, al ser la reclamación una "puramente económica y por tal razón en lo que respecta a los derechos patrimoniales de propiedad intelectual, equivalentes a los derechos protegidos por la ley federal, el campo está ocupado por lo cual no hay jurisdicción para considerar la misma". [FN12] Solicitud de certiorari, Anejo XIII, pág. 69.

Inconforme, Harguindey acudió en certiorari ante este Tribunal. El peticionario le imputa al Tribunal de Circuito de Apelaciones haber errado al entender que no había jurisdicción en una controversia "claramente contractual y a una acción en reclamo patente de los derechos extrapatrimoniales del demandante". [FN13]

Le concedimos término a la parte demandada-recurrida para que mostrase causa por la cual no debíamos expedir el auto solicitado y dictar sentencia revocatoria de la emitida por el Tribunal de Circuito de Apelaciones, Circuito Regional de San Juan.

Dentro del plazo concedido, en cumplimiento de dicha orden, ha comparecido la Universidad junto a Medina. En su comparecencia, desmenuzan las alegaciones de Harguindey ***21** con el objetivo de demostrar que el reclamo sólo le atañe al foro federal. Añaden que los argumentos sobre la labor realizada, y no pagada, no surgen de la demanda y que es en la oposición a la moción de desestimación donde, por primera vez, se levanta dicho punto.

II

[1] El primer paso en todo análisis de propiedad intelectual es uno bastante sencillo: ¿posee el demandante "propiedad intelectual" sobre el bien en cuestión? Sólo luego de contestar dicha interrogante es que procede, en buena metodología adjudicativa, ponderar si el reclamo versa sobre derechos patrimoniales o extrapatrimoniales, y, por ende, cuál foro, el federal o el estatal, posee jurisdicción para atender la disputa. Autoría es una condición sine qua non para cualquier reclamo de derechos de **autor.** [FN14] En el caso ante nos, tanto las partes como los dos foros judiciales antes mencionados omitieron el primer paso.

[2][3] El derecho del **autor** sobre las creaciones de su inteligencia, para su publicación y explotación económica o para mantenerlas inéditas, constituye "propiedad intelectual". [FN15] En Cotto Morales v. Ríos, 140 D.P.R. 604, 611612 (1996), este Tribunal, citando a Puig Brutau, definió la propiedad intelectual como " 'el conjunto de derechos que la ley reconoce al **autor** sobre las obras que ha producido con su inteligencia, en especial los de que su paternidad le sea reconocida y respetada, así como que se ***22** le permita difundir la obra, autorizando o negando, en su caso, la reproducción' ". (Énfasis suplido.) Como norma general, el **autor** es quien, como cuestión de hecho, crea la obra; esto es, la persona que transforma una idea a una expresión tangible, merecedora de protección por la ley de propiedad intelectual. Community for Creative NonViolence v. Reid, 490 U.S. 730, 737 (1989). ¿Excluye esto la posibilidad de que el editor [FN16] de la obra posea propiedad intelectual? Esto es, ¿es el editor un **"autor"** para propósitos de propiedad intelectual? [FN17]

[4] De un examen de nuestra Ley de Propiedad Intelectual [FN18] se desprende que la propiedad intelectual de una obra corresponde al **autor** por el solo hecho de su creación. En esa misma corriente, el Copyright Act otorga al **autor** de una obra el derecho "exclusivo" [FN19] de adaptar la misma, esto es, el derecho a crear obras derivadas (derivative work) de la obra original. La ley federal de derechos de **autor** describe el derivative work como:

"... a work based upon one or more preexisting works, such as a translation ... fictionalization, motion picture version, sound recording, art reproduction, abridgement, condensation, or any other form in which a work may be recast, transformed or adapted." [FN20] 17 U.S.C. sec. 101. Además, véase 1 Nimmer on Copyright Sec. 3.01 y ss.

La obra derivada incluye "editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship ...". [FN21] ***23**

[5] Ahora bien, el hecho de que el **"autor"** de una obra retenga sus derechos con respecto a "obras derivadas", [FN22] ¿excluye la posibilidad de que el editor de la obra, entiéndase otra persona que no es el **autor,** posea propiedad intelectual?

A esos fines, el tratadista Lasso de la Vega nos ilustra a los efectos de que:

"[l]os derechos y obligaciones del editor, su mayor o menor complejidad, obran en función de la doctrina jurídica que admitamos respecto del concepto de propiedad intelectual en general.... [S]i ... la producción intelectual se considera propiedad individual, será indispensable observar una serie de reglas encaminadas a proteger al **autor** y al editor en sus derechos respectivos." J. Lasso de la Vega, El contrato de edición, Madrid, Estades, Artes Gráficas, Cap. IX, 1949, pág. 91.

[6][7] Fernández Mourillo, abundando un poco más, nos ofrece la siguiente tesis: "la propiedad intelectual ... se atribuye y tiene como sujeto, no sólo a la persona que produce rigurosamente la obra, sino también a otras que, con la base de esa producción y con intervención espiritual simultánea o posterior, o bien con intervención puramente material o de empresa, contribuyen a su publicación y difusión." [FN23] M. Fernández Mourillo, Legislación y Propiedad ***24** Intelectual, 1ra ed., Madrid, Ed. Reus, 1930, Cap. XVII, pág. 86. Al atender la edición, el comentarista expresa que "[e]n otro orden de fundamentos, pero también con reconocimiento del derecho de propiedad [intelectual] ... están los que, sin haber concebido la obra ... [se les] denomina como editores, respecto de los cuales, también la ley reconoce derecho de propiedad intelectual ...". (Énfasis suprimido.) [FN24]

[8] Al momento de decidir si la "obra" de una persona debe recibir protección, las leyes sobre propiedad intelectual nos remiten a un concepto básico: la protección de una "expresión". [FN25] "La obra debe ser original del **autor,** en el sentido de que no sea copia de la obra de otra persona." [FN26] Para ilustrar el criterio de originalidad, Puig Brutau nos brinda el ejemplo del traductor. Al respecto, nos dice que "no hay duda de que en la medida en que ha de expresar ideas en un idioma distinto de aquel en que han sido originalmente expresadas, ha creado en cierto modo una obra original". [FN27]

Un criterio análogo rige en la jurisdicción federal. La ley federal alude al original work of authorship. Al así hacerlo, lo que la ley federal requiere es una creación independiente, no una novedosa. Así, no se le denegará protección bajo la ley federal de propiedad intelectual a una obra simplemente porque es sustancialmente similar a una obra que fue producida previamente por otro **autor** y que, por ***25** ello, no es novel. [FN28] Originalidad, para fines del Copyright Act, sólo significa que la obra debe su nacimiento al **autor,** esto es, que fue una creación independiente y no una copia de otras obras. [FN29] Además de ser una creación independiente, hace falta un grado "mínimo" de creatividad. Feist Publications, Inc. v. Rural Tel. Service Co., 499 U.S. 340, 345 (1991).

En el caso de autos, ¿qué expresión original expuso Harguindey en el manual publicado que merezca protección? Alegadamente, la edición de la traducción de la obra original. El trabajo de edición tiene diversas manifestaciones. A manera ilustrativa, el Occupational Outlook Handbook, al tratar el aspecto de la edición, nos dice:

Editors select and prepare material for publication or broadcasting and supervise writers.

Editors frequently write and almost always review, rewrite, and edit the work of writers. However, their primary duties are to plan the contents of books, magazines, or newspapers and to supervise their preparation. They decide what will appeal to readers, assign topics to reporters and writers and oversee the production of the publications. [FN30] (Énfasis suplido.)

[9] El trabajo de edición cumple con el estándar de "expresión". De hecho, el propio Reglamento para la presentación, depósito e inscripción de obras en el Registro de la Propiedad Intelectual [FN31] reconoce la autoría de la edición. En específico, el Art. 359(n)23 del Reglamento del Registro de la Propiedad, Reglamento Núm. 4750 de 10 de agosto de 1992, R.P.R. sec. 601 et seq., reza: ***26**

Los autores de obras derivadas, incluyendo antologías, ediciones, traducciones o compendios obtendrán la autorización escrita del **autor** o autores de la obra original pre-existente o de los derechohabientes acreditados cuyos derechos no hayan prescrito.

[10][11][12] El hecho de que la edición es la criatura intelectual del editor es una perogrullada. Debe señalarse que la edición no usurpa la protección intelectual que el derecho le da al **autor** del texto; por el contrario, se trata de una autoría independiente. La "obra" del editor es, precisamente, la edición que fue producto de su inteligencia. [FN32] Puede que --en apariencia-- no ostente la tangencia propia del libro; no obstante, la labor intelectual editorial, en este caso aparenta ser la "depuración neta" [FN33] del libro mismo. Por ende, esta creación amerita igual protección. "El **autor** al transmitir su derecho para la edición no ha renunciado a la paternidad del libro. En consecuencia, el derecho --que es obligación para el editor en este aspecto-- a estampar su nombre como **autor** del libro le corresponde, en principio, a él." [FN34] Concluimos, pues, de esa misma forma, que el editor también tiene derecho

a ***27** que la autoría de su trabajo --edición-- sea reconocida como tal. La edición constituye una "obra" adicional e independiente del Manual per se; por eso, constituye propiedad intelectual de su forjador. Como señala Desantes:

La relación social autoreditor, que surge con motivo de la publicación de un libro, es también una relación jurídica a la que se accede por el contrato de edición.... En tal relación jurídica los sujetos son -- normalmente-- los mismos del contrato, el contenido es el complejo de situaciones en que los sujetos se encuentran dentro de un entramado de derechos y obligaciones y el objeto es la edición misma como continente de una creación intelectual. (Énfasis suplido.) [FN35]

III

Habiendo resuelto que el editor posee propiedad intelectual sobre su labor editorial, [FN36] corresponde dilucidar si dicho derecho es vindicable ante el foro federal o el estatal.

[13] Según expresáramos en Cotto Morales v. Ríos, ante, los derechos de la comunidad intelectual de Puerto Rico están protegidos por dos (2) estatutos: la Federal Copyright Act [FN37] y la Ley de Propiedad Intelectual de Puerto Rico. [FN38] Adem ás, de manera supletoria, aplican las disposiciones de nuestro Código Civil siempre que no sean incompatibles con la legislación federal. ¿Estamos ante un derecho patrimonial o uno extrapatrimonial?

[14] Aun cuando ha sido atacada por varios sectores,***28** [FN39] "[e]n Puerto Rico la propiedad intelectual o los derechos de **autor** está formada por la imbricación de dos derechos de naturaleza diferente: el derecho moral, que de manera primordial protege el vínculo personal entre el **autor** y su obra y el derecho patrimonial que consiste en el monopolio de la explotación de la obra". Cotto Morales v. Ríos, ante, pág. 612. [FN40]

[15] De entrada, resulta meritorio señalar el hecho de que la protección del derecho moral del creador es independiente de la protección de sus derechos patrimoniales. Ley Núm. 96, supra, 31 L.P.R.A. sec. 1401b.

[16] Al atender los **derechos morales,** el Reglamento para la Presentación, Inscripción y Depósito de Obras en el Registro de la Propiedad Intelectual [FN41] los define como:

... aquellas prerrogativas exclusivas del **autor** que lo facultan a defender la integridad de su obra, a determinar bajo qu[é] condiciones y circunstancias ésta ha de divulgarse o publicarse, a atribuirse su autoría o a retractarla cuando la obra ya no coincida con sus convicciones intelectuales, artísticas o éticas .... (Énfasis suplido.)

[17] Recientemente, el Prof. Pedro G. Salazar ha analizado, de forma abarcadora, el derecho moral de **autor** en Puerto Rico. Al respecto nos indica que:

"El llamado 'derecho moral' del **autor** es la contrapartida del derecho 'patrimonial' o de explotación que le permite a un **autor** beneficiarse económicamente de su creación. En conjunto, ambos ***29** constituyen el derecho autoral en toda su plenitud aunque, jurídicamente, son, cada cual, de naturaleza muy distinta." [FN42]

[18][19] Asimismo, al atender el derecho moral del **autor,** Puig Brutau, citando a Kayser, reseña "[c]omo aspectos especialmente protegidos por el derecho moral de **autor** ... los siguientes: el derecho a que sea reconocida la paternidad de su **autor**, el derecho a que no sea deformada o alterada sin su consentimiento y el derecho de arrepentirse y a retirarla". (Énfasis suplido.) [FN43] Puig Brutau, op. cit., p ág. 213. Se ha dicho que el derecho moral de **autor** cobija cuatro (4) grandes áreas; una de ellas es el derecho de atribución. A esto nos referimos cuando, al definir propiedad intelectual, expresamos en Cotto Morales v. Ríos, ante, pág. 611, que es " 'el conjunto de derechos que la ley reconoce al **autor** sobre las obras que ha producido con su inteligencia, en especial los de que su paternidad le sea reconocida y respetada ...' ". (Énfasis suplido.) Éste es el derecho de atribución.

De lo anterior resulta forzoso concluir que el reclamo de Harguindey, de que otra persona se atribuyó la autoría de su obra --la labor editorial--, es una alegada violación al derecho moral de **autor** vindicable ante el foro estatal. Este reclamo, como expresamos antes, está cimentado en uno de los cuatro (4) pilares básicos del derecho moral de **autor**: el derecho de atribución. Esto, en términos generales, no es otra cosa que el derecho del **autor** a que se le adjudique la autoría de la obra, claro está, si es que éste así lo desea. [FN44] As í pues, si Harguindey logra demostrar que fue él, y no Medina, quien editó el Manual, el tribunal vendrá obligado ***30** a atribuirle la edición de la obra a

quien determine que fue su verdadero **autor.** [FN45]

[20] En fin, en cuanto al reclamo de autoría de la edición, erró tanto el tribunal de instancia como el foro apelativo intermedio al declararse sin jurisdicción. Resolvemos así, teniendo como norte el estándar de revisión aplicable a casos que se dilucidan a través de una solicitud de desestimación. Sabido es que, al entender en una moción de desestimación debemos dar por ciertas y buenas todas las alegaciones hechas en la demanda. Ramos v. Marrero, 116 D.P.R. 357, 369 (1985); First Fed. Savs. v. Asoc. de Condómines, 114 D.P.R. 426 (1983). Además, hay que interpretarlas de la manera más favorable para el demandante. Unisys v. Ramallo Brothers, 128 D.P.R. 842 (1991); Romero Arroyo v. E.L.A., 127 D.P.R. 724 (1991). Así, en casos como el de autos, donde se plantea la desestimación por falta de jurisdicción en la materia, es necesario determinar si, tomando como cierto lo alegado por el demandante, el foro tiene jurisdicción para atender el reclamo. Examinadas las alegaciones, concluimos que el tribunal tiene jursidicción sobre la materia pues se trata, en primera instancia, de uno de los pilares del derecho moral de **autor**: el derecho de atribución.

[21][22] Ahora bien, para gozar de los beneficios de nuestra Ley de Propiedad Intelectual "es necesario haber inscrito el derecho y las obras que lo sustentan en el Registro de la Propiedad Intelectual ...". [FN46] Sin embargo, en situaciones tan peculiares como la de autos, cuando, precisamente, la alegación es que otra persona se atribuyó la autoría de la obra (edición), resolvemos que no será necesario ***31** que la obra esté inscrita. Como bien comenta el Prof. Pedro G. Salazar, "[d]ado el carácter personalísimo del derecho moral no parecería necesario condicionar su 'reserva' a la inscripción de la obra que lo sustenta en un Registro de Propiedad Intelectual. Ello se justifica plenamente en el caso de los derechos económicos, alienables y transferibles, para fines del establecimiento de una clara cadena de titularidad o 'tracto sucesivo' y para facilitar la dilucidación judicial de controversias mediante presunciones rebatibles de título. ... Exigir una inscripción registral para poder ejercer el derecho moral, como lo hace la Ley puertorriqueña, parecería contrario a la naturaleza misma de ese derecho". (Énfasis suplido y en el original.) [FN47]

[23] Por otro lado, no debe albergarse duda sobre el hecho de que no tenemos jurisdicción sobre el derecho a explotar económicamente la obra; éstos son reclamos patrimoniales. Es decir, si la reclamación de Harguindey versa sobre reproducción; regalías; distribución; etc., el foro federal será el que ostente la jurisdicción sobre la materia. [FN48] Los aspectos relacionados a la compensación de Harguindey sólo pueden dilucidarse en el foro estatal si no comprenden los mismos. Desde ***32**Pancorbo v. Wometco de P.R., Inc., 115 D.P.R. 495, 500 (1984), reconocimos varias acciones estatales que no estaban afectadas por el Copyright Act; entre éstas, están las fundadas en la violación de un contrato o de una relación fiduciaria, la difamación, y las violaciones al derecho moral de **autor**, entre otras. Así, pues, dado que el reclamo de Harguindey aparenta ser de índole contractual, el tribunal tiene jurisdicción para entender en él. Claro, si se aparta de esos linderos y recae en las regalías, reproducción, etc., debe desestimarse esa reclamación.

En esa misma línea --remuneración económica-- como expresamos antes, la Universidad alega que este asunto no fue planteado ni "mínimamente" en la demanda. De hecho, del expediente surge que uno de los fundamentos para oponerse a este asunto es que la Universidad entiende que esto es una reclamación de salarios no devengados que está prescrita.

Debido a que aún no se ha presentado prueba al respecto, no podemos pasar juicio sobre tal alegación. De un examen de las alegaciones del demandante, no puede concluirse si cuando Harguindey "acordó ... [una] retribución económica" [FN49] lo hizo desde una relación obrero-patronal --y, por ende, es una reclamación de salarios-- o si, por ejemplo, se trata de un contrato de servicios profesionales. Así pues, aunque las alegaciones expuestas por el demandante no son el mejor ejemplo a seguir, toda vez que las alegaciones pretenden esbozar a grandes rasgos la reclamación, [FN50] debe determinar el foro de instancia de qué tipo de reclamación se trata; si la misma está prescrita o si, a solicitud de parte, puede enmendarse la demanda conforme ***33** a la Regla 13.1 de Procedimiento Civil, 32 L.P.R.A. Ap. III.

IV

A tenor con todo lo antes expuesto, procede decretar la revocación de la sentencia emitida por el Tribunal de Circuito de Apelaciones, devolviéndose el caso al foro de instancia para la continuación de procedimientos ulteriores consistentes con lo aquí resuelto.

El Juez Asociado Señor Negrón García se inhibió.

FN1. Está en controversia si, en efecto, el demandante fue el editor. Este asunto no será objeto de determinación en esta etapa, pues el caso llega ante nos vía desestimación.

FN2. 17 U.S.C. sec. 101 et seq.

FN3. Ley Núm. 96 de 15 de julio de 1988, según enmendada, 31 L.P.R.A. sec. 1401 et seq.

FN4. Vols. I, II, III.

FN5. Apéndice I de los recurridos.

FN6. Alegato de la demandada-recurrida, págs. 23.

FN7. Durante el año académico anterior, Medina fue el supervisor de Harguindey. Sin embargo, según la Universidad, cuando Medina solicitó la ayuda de Harguindey, ya no fungía como su supervisor.

FN8. Alegato de la demandada-recurrida, pág. 3.

FN9. Solicitud de certiorari, pág. 2.

FN10. Alegan los demandados-recurridos que, tanto el **autor** Hehman como Burgess, suscribieron contratos para la traducción de la obra, por lo cual pagaron las regalías correspondientes a la Dra. Anna Lavernia y Blanca Riesco.

FN11. Párrafos 2 y 3 de la demanda.

FN12. Sentencia del Tribunal de Circuito de Apelaciones, pág. 6 (KLAN9500716).

FN13. Solicitud de certiorari, pág. 3.

FN14. 1 Nimmer on Copyright Sec. 5.01[A], pág. 53.

FN15. M.A. Del Arco Torres y M. Pons González, Diccionario de Derecho Civil, Pamplona, Ed. Aranzadi, 1984, pág. 445, citando al tratadista Diego Espín Cánovas.

Por otro lado, el Black's Law Dictionary define el derecho de **autor** (Copyright) como "[a]n intangible, incorporeal right granted by statute to the author or originator of certain literary or artistic productions, whereby he is invested, for a limited period, with the sole and exclusive privilege of multiplying copies of the same and publishing and selling them". (Énfasis suplido.) Black's Law Dictionary, Minnesota, Ed. West Publishing, Co., 1979, pág. 304.

FN16. Volvemos a enfatizar que no estamos adjudicando, en esta etapa, quién fue el editor de la obra; sólo nos ceñimos a las alegaciones de la demanda.

FN17. Véase R. Versteeg, Defining "Author" for the Purposes of Copyright, 45 Am. U. L. Rev. 1323 (1996).

FN18. Ley Núm. 96 de 15 de julio de 1988 (31 L.P.R.A. sec. 1401 et seq.).

FN19. Value Group, Inc. v. Mendham Lake Estates, L.P., 800 F. Supp. 1228 (D. N.J. 1992).

FN20. 17 U.S.C. sec. 101.

FN21. 17 U.S.C. sec. 101.

FN22. Esto no significa que otra persona, que no es el **autor,** pueda crear una obra derivada al alterar la obra original. En ese caso, el derecho de **autor** en obras derivadas se extiende sólo a aportaciones de ese otro **autor.** Moore Pub., Inc. v. Big Sky Marketing, Inc., 756 F. Supp. 1371, 1374 (D. Idaho 1991); Apple Computer, Inc. v. Microsoft Corp., 821 F. Supp. 616, 628 y ss., (N.D. Cal. 1993); 17 U.S.C. sec.

103. "A derivative work is copyrightable if it is sufficiently original. The law requires more than a modicum of originality." (Cita y escolio omitidos.) Waldman Pub. Corp. v. Landoll, Inc., 43 F.3d 775, 782 (2do Cir. 1994). En el caso ante nos, según se desprende del expediente, el **autor** (Hehman) autorizó el trabajo en cuestión. La naturaleza de esa autorización -- contractual--; si fue a Medina y si éste, a su vez, podía autorizar o ceder el derecho a otro (Harguindey) corresponde, en primer plano, al tribunal de instancia.

FN23. M. Fernández Mourillo, Legislación y Propiedad Intelectual, 1ra ed., Madrid, Ed. Reus, Cap. XVII, pág. 86. Reseña el comentarista las distintas gradaciones en el área de propiedad intelectual. Por ejemplo, "[p]uede suceder que, existiendo publicada y atribu[i]da a un **autor** determinada obra, haya quien se dedique a operar en ella alteraciones o cambios que, purgándola de defectos, o ampliando y adaptando su contenido a nuevas necesidades y circunstancias, vengan en realidad a darl[e] una nueva vida, naciendo con ello otra categoría de productores literarios, a la que se da el nombre genérico de transformadores de obras ...". (Énfasis suprimido.) Íd., pág. 87. No estamos en posición de evaluar la labor que alega haber realizado Harguindey, sin embargo reconocemos que hay una gran gama de autorías sobre las que la ley concede propiedad intelectual en virtud del derecho de atribución.

Éste es uno de los pilares del derecho moral de **autor,** el cual será discutido más adelante.

FN24. Íd., pág. 88.

FN25. Para un análisis del alcance de la protección, véase el artículo de I.G. Mahony, Copyright Infringement; Comparative Law Yearbook of International Business, Londres, Ed. Kluwer Law International, 1997, pág. 391 y ss.

FN26. J. Puig Brutau, Fundamentos de Derecho Civil, 2da ed., Barcelona, Ed. Bosch, T. III, Vol. II, pág. 206.

FN27. Íd., pág. 207, citando a Marvin.

FN28. Nimmer on Copyright, supra, Sec. 2.01[A], pág. 2-7.

FN29. Nimmer on Copyright, supra, Sec. 2.01, pág. 2-9.

FN30. Occupational Outlook Handbook, Washington, D.C., U.S. Department of Labor, Bureau of Labor Statistic, ed.19961997, págs. 4 y 5. Sobre las distintas acepciones de la "edición" véase The Encyclopedia of Careers and Vocational Guidance, 8va ed., 1990, Chicago, J.G. Servicing Publishing.

FN31. Reglamento del Registro de la Propiedad, Reglamento Núm. 4750, Departamento de Estado, 11 de agosto de 1992, efectivo desde el 10 de septiembre de 1992.

FN32. Precisamente ese es el reclamo de "autoría" que hizo Harguindey en la demanda. Véase la deposición que se le tomara a éste, Anejo X, pág. 42. El planteamiento del demandante es que Freddie Medina --no la publicadora-- se atribuyó la autoría de la edición cuando en realidad la misma fue efectuada por Harguindey. Íd., pág. 43.

FN33. Aunque el caso de marras se encuentra en ciernes, nos parece que la labor "editorial" que alega haber realizado Harguindey no es la que, en términos generales, aluden los tratadistas al considerar "el editor". Tampoco parece ser la "edición" a que se refiere el Registro de la Propiedad Intelectual que dice: "[e]ditor incluye a todo el que publique libros con o sin discursos preliminares, notas apéndices, vocabularios, glosarios o ilustraciones." Artículo 359(n)2 inciso (p). En lugar de ser un tipo de casa editora, que produce, publica y difunde el libro, intimamos que la labor en controversia es la depuración del libro. En la deposición que le fuera tomada a Harguindey, éste señaló que al requerirle su labor se le dijo: " '[m]ira, te vamos a encargar que hagas la edición, que traspases, que traslades a un castellano legible, correcto e incluso elegante, si se puede decir, un libro de una norteamericana que está traduciendo sus capítulos la Doctora Margot Lavernia, ya se te pagará lo que corresponda' ". (Pág. 14 de la deposición, Anejo X.) Alegato de la parte demandada recurrida, Anejo X, pág. 14. Sin embargo, dado que la alegación de Harguindey es que fue el editor, en función de ello circunscribimos nuestro análisis.

FN34. J.M. Desantes, La relación contractual entre **autor** y editor, España, Eds. Universidad de Navarra, Cap. IV, págs. 143144.

FN35. Desantes, op. cit., Cap. I, pág. 29.

FN36. No nos compete aquí resolver si la labor en disputa constituye una de coautoría. Sobre el particular véase Childress v. Taylor, 945 F.2d 500 (2do Cir. 1991); P. Goldstein, Copyright: Principles, Law, and Practices, Sec. 4.21.2, 1989, pág. 379; en contraste, véase la posición de Nimmer al respecto, Nimmer on Copyright, supra, Sec. 6.07, pág. 623. En específico, véase el análisis sobre co-autoría de **derechos morales** hecho por P.H. Karlen, Joint Ownership of Moral Rights, 38 J. Copyright Soc'y 242 (1991).

FN37. 17 U.S.C. sec. 101 et seq.

FN38. Ley Núm. 96 de 15 de julio de 1988 (31 L.P.R.A. sec. 1401 et seq.).

FN39. Cf. D.A. Ramos, "Oh, Pretty Woman", Luke Took Your Beauty Away, May NAFTA Come to Your Rescue? Campbell v. AcuffRose, Can There Ever Be "Moral Rights" in the United States or Puerto Rico?, 29 (Núm.1) Rev. Jur. U.I.A. 173, 188195 (1994).

FN40. Aun cuando la legislación federal ha comenzado a expandir su alcance para abarcar los **derechos morales** --Visual Artists Rights Act of 1990-- los libros no están incluidos. 17 U.S.C. sec. 101(A)(i).

FN41. Art. 359(n)2(E), 1 R.P.R. sec. 602(E).

FN42. P.G. Salazar, El derecho moral del **autor** en las legislaciones puertorriqueña, norteamericana y española, 31 (Núm. 3) Rev. Jur. U.I.A. 407 (1997).

FN43. Puig Brutau, op. cit., pág. 213.

FN44. Nuestra interpretación del derecho de atribución no restringe los linderos de tan importante derecho. Simplemente, no debemos extender nuestros pronunciamientos más allá de la controversia que nos compete.

FN45. Claro, como expresáramos en Cotto Morales v. Ríos, 140 D.P.R. 604 (1996), aunque el derecho moral del **autor,** por no ser patrimonial, no es cuantificable en dinero, puede reclamarse una indemnización monetaria cuando el mismo sea lesionado.

FN46. Ley de Propiedad Intelectual, supra, según enmendada, 31 L.P.R.A. sec. 1402(d).

FN47. Salazar, supra, pág. 419.

FN48. En Cotto Morales v. Ríos, ante, pág. 614, expresamos que "[l]a Federal Copyright Act gobierna exclusivamente tan sólo los derechos legales o en equidad equivalentes a cualquiera de los derechos exclusivos, dentro del ámbito general del derecho de **autor,** especificados en la sec. 106 de la referida ley, 17 U.S.C., que en lo pertinente dispone:

" 'Subject to sections 107 through 118, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:
" '(1) to reproduce the copyrighted work in copies or phonorecords;
" '(2) to prepare derivative works based upon the copyrighted work;
" '(3) to distribute copies or phonorecords of the copyrighted works to the public by sale or other transfer of ownership, or by rental, lease, or lending;
" '(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and
" '(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.' "

FN49. La alegación número tres (3) de la demanda dice: "[q]ue la parte allí requirente acordó, por medio del Sr. Freddie Medina, otorgar al Sr. Harguindey la parte que correspondiere del producto final de publicación como retribución económica así como el reconocimiento de su propiedad intelectual allí expuesta". Solicitud de certiorari, Anejo I, pág. 1.

FN50. Dorante v. Wrangler of P.R., 145 D.P.R. 408 (1998).

P.R., 1999