

**Turner Entertainment Co. v. Huston, CA Versailles, civ. ch., December 19, 1994, translated in Ent. L. Rep., Mar. 1995, at 3**

During the solemn hearing of 24 October 1994, the Court of Appeal consisting of Mr THAVAUD, President, Mrs PETIT, Councillor, Mr MARTIN, Councillor, Mrs CAMPION, Councillor, Mrs LOMBARD, Councillor, Assisted by Mrs LAMARQUE, Chief Registrar, heard the report of Mr THAVAUD, President, and the explanations of the parties' counsels, after which the case was reviewed in camera for a decision to be pronounced during the hearing of 19 December 1994, of which date the parties were notified.

After due deliberation by the same magistrates of the Court of Appeal, in accordance with the law, the following judgment was pronounced:

**I**

1. The cinematographic work entitled "ASPHALT JUNGLE" was produced in 1950 in the UNITED STATES by the METRO GOLDWYN MAYER (MGM) company, a division of LOEW'S Inc. The film was shot in black and white by the late John HUSTON, a movie director of American nationality, at the time bound by a contract of employment to LOEW'S Inc. and co-author of the screenplay with Ben MADDOW, bound to the same company by a contract as a salaried writer.

2. On 2nd May 1950, LOEW'S Inc. obtained from the U.S. COPYRIGHT OFFICE a certificate of registration of its rights to the film. This registration was duly renewed in 1977. On 26th September 1986 the benefit of this registration was transferred to the TURNER ENTERTAINMENT Co. by virtue of a merger with MGM, including transfer of the ownership of MGM's movie library and connected rights.

3. The TURNER company had the movie colorized, an operation which on 20th June 1988 resulted in registration of a copyright application, and it enabled the Fifth French Television Channel (LA CINQ) to announce that it would broadcast this colorized version at 8:30 p.m. on 26th June 1988.

4. The broadcast was objected to by John HUSTON's heirs, Angelica, Daniel and Walter HUSTON, who were subsequently joined by Mr Ben MADDOW, the Societe des Auteurs et Compositeurs Dramatiques (SACD), the Societe des Realisateurs de Films (SRF), the Syndicat Frangais des Artistes Interpretes (SFA), the Federation Europeenne des Relisateurs de l'Audiovisuel (FERA), the Syndicat Frangais des Realisateurs de Television CGT and the Syndicat National des Techniciens de la Production Cinematographique et de Television. They opposed the broadcast because they deemed it a violation of the author's moral right, aggravated in their opinion by the fact that John HUSTON had opposed colorization of his works during his life.

5. The dispute thus arising with LA CINQ and the TURNER ENTERTAINMENT Co. (TEC) resulted in FRANCE in the following decisions:

1) An order in summary proceedings on 24th June 1988, confirmed by a judgment of the Court of Appeal of PARIS on 25th June 1988, which suspended the broadcast of the colorized film as being likely to cause unacceptable and irreparable damage;

2) On 23rd November 1988 the Court of First Instance of PARIS judged as follows:

"Declares the action of Messrs and Mrs HUSTON and Mr Ben MADDOW and the voluntary intervention of TEC admissible insofar as they are limited to the television broadcasting of the colorized version of the film entitled "ASPHALT JUNGLE"; Declares the claims of the secondary voluntary intervenors admissible; Formally takes cognizance of the fact that Societe d'Exploitation de la Cinquieme Chaine has abandoned its plans for broadcasting the colorized version of the film entitled "ASPHALT JUNGLE"; As necessary forbids it from broadcasting this version on television; Dismisses all other claims; Dismisses the claim of the TEC company".

In admitting the claim, this judgment referred in substance to the Universal Copyright Convention signed in GENEVA on 6th September 1952, ratified by the UNITED STATES, to deduce that this convention provides citizens of member States in FRANCE with the benefit of the Law of 11th March 1957, notably Section 6, which provides that the moral right is attached to the person and is perpetual, inalienable and imprescriptible. Thus it distinguished between this moral right and the economic rights held by the TURNER company to the work, notably under contracts signed with John HUSTON and Ben MADDOW.

Finally, it held that John HUSTON and Ben MADDOW, by their art, had imbued their work with an original and personal character and that, because HUSTON's renown is based on the interplay of black and white, creating an atmosphere, the said atmosphere would be jeopardized by colorization.

3) The Court of Appeal of PARIS, appealed to by the TURNER company, judged as follows on 6th July 1989:

“States that the author of the film entitled ‘ASPHALT JUNGLE’ is the TURNER company and that the heirs of John HUSTON as well as Ben MADDOW have no moral right to this work shot in black and white; Notes that the colorized version of the said film is an adaptation, under U.S. law, for which the TURNER company obtained a registration certificate on 20th June 1988; States that the principle of colorization could not be criticized by the heirs of John HUSTON and by Ben MADDOW, even if they could claim a moral right to the black and white film; Accordingly, reversing the judgment, Dismisses the claims of the heirs of John HUSTON and Ben MADDOW and judges admissible but unfounded the interventions of the six legal entities supporting their claims; Authorizes the Fifth Channel to broadcast the colorized version of the film entitled ‘ASPHALT JUNGLE’, formally recognizing the cognizance petitioned for.”

The judgment further provided for various warning notices intended for television viewers, with respect to the possibility of using the color control device and respect for the memory of John HUSTON.

In reversing the judgment against which the appeal was brought, the Court of Appeal of PARIS settled the conflict of laws in favor of U.S. law, the law of the first publication of the work having, according to said court, granted the status of author solely to LOEW's, which cannot be defeated by the BERNE Convention, effective from 1st March 1989, which is an instrument to harmonize relations between the member countries and is not competent to affect acquired rights or the effect of contracts between producer and director. Moreover, it dismissed the exception according to which the French conception of international law was violated and held that the copyright granted to the “derivative work” transferred in 1988 to the TURNER company made it impossible for Messrs and Mrs HUSTON and Mr MADDOW to raise it if they had a moral right to claim.

6. Messrs and Mrs HUSTON and Mr MADDOW and the intervenors appealed against this judgment of the Court of Appeal of PARIS to the Cour de Cassation.

In a ruling dated 28th May 1991, the Supreme Court reversed and cancelled every provision of the judgment of the Court of Appeal for violation of Section 1.2 of Law 64-689 of 8th July 1964 and Section 6 of the Law of 11th March 1957, stating: “According to the first of these texts, the integrity of a literary or art work cannot be affected in FRANCE, regardless of the State in whose territory the said work was made public for the first time. The person who is its author, by its creation alone, enjoys the moral right stipulated in his favor by the second of the aforesaid texts; these are laws of mandatory application.”

## II

1. The TURNER ENTERTAINMENT Co. duly referred the case to the Court of Appeal of VERSAILLES, appointed as Court of Remand, and petitioned it to reverse the judgment of the Court of First Instance of PARIS, to judge that the claims of Messrs and Mrs HUSTON are inadmissible or that

they have in any case no grounds to claim the moral right to which they refer and therefore to dismiss their case and all other intervenors. It also claims as follows:

- In support of its argument of inadmissibility, that Messrs and Mrs HUSTON cannot claim the status of foreign author, which is reserved for the TURNER company under the laws applicable at the place of creation and the agreements governed by them; that they are therefore not entitled to claim French law, under the GENEVA Convention, in order to protect themselves and exercise rights which they have not acquired;

- That it is in any event the recognized holder of the patrimonial rights of the authors and that it was therefore entitled to introduce the colorized version by applying a technique which does not alter the essence of the work.

2. Messrs and Mrs HUSTON and Mr MADDOW petitioned the Court of Remand to confirm the judgment of the Court of First Instance of PARIS, further petitioning the court to add that the broadcasting of the colorized version of the film entitled "ASPHALT JUNGLE" has violated their moral right and thus to order the TURNER company to pay them FRF 1,000,000 by way of damages and costs and a further FRF 100,000 under Section 700 of the New Code of Civil Procedure; thus:

- They oppose that French law alone is competent to determine the status of author, as pointed out by the Cour de Cassation in a decision which stresses the importance of moral right and results in dismissal of the law applicable to the agreement between director and producer; and that their claim is therefore admissible;

- That black and white is the form of expression in which the authors and especially John HUSTON have delivered their esthetic conception to the public; that colorization therefore alters the very essence of the work, of which it is no "adaptation" at all but a "transformation" or "modification"; that, moreover, John HUSTON was formally opposed to this during his life.

3. Societe des Auteurs et Compositeurs Dramatiques (SACD) intervened voluntarily and joined itself to the submissions of Messrs and Mrs HUSTON, whose claims it supports in application of Section 3.1 of its bylaws and Section 65, paragraph 2 of the Law of 11th March 1957 and Section 38 of the Law of 3rd July 1985.

4. Societe des Realisateurs de Films (SRF), Syndicat Francais des Artistes Interpretes (SFA), Federation Europeenne des Realisateurs de l'Audiovisuel (FERA), Syndicat Francais des Realisateurs de Television CGT and Syndicat National des Techniciens de la Production Cinematographique et de Television pleaded the same and claimed FRF 10,000 from the TURNER company by virtue of Section 700 of the New Code of Civil Procedure.

5. Maitre Hubert LAFONT, ex-officio as court administrator in the compulsory reorganization of LA CINQ submitted that there is no case against him in view of the conversion into compulsory liquidation and Me PIERREL's court-ordered appointment as liquidator; he furthermore claimed from the TURNER company FRF 5,000 by virtue of Section 700 of the New Code of Civil Procedure.

6. Maitre PIERREL ex-officio petitioned the court to declare his appeal admissible and well-founded, to take formal cognizance of the fact that LA CINQ, in accordance with the judgment of the Court of Appeal of PARIS on 6th July 1989, broadcast the film accompanied by the ordered notices, to reverse the referred judgment of the Court of First Instance of PARIS and, judging again, to judge that Messrs and Mrs HUSTON and Mr MADDOW do not have status as the film's authors and that they cannot claim in FRANCE the benefit of the moral right, to judge secondarily that colorization is in principle a legal adaptation and does not violate any moral right, to dismiss the claims of the opponents and to order Messrs and Mrs HUSTON and Mr MADDOW to pay them FRF 30,000 by virtue of Section 700 of the New Code of Civil Procedure. He thus reiterated the arguments already produced by the TURNER company, stressing that John HUSTON could not be unaware of the fact that he did not have the status of an author by virtue of the law governing the contracts signed with the producer.

7. The TURNER ENTERTAINMENT Co. maintained its initial claims, notably on the inadmissibility of the opponents' claims in submissions in answer to which it maintains:

- That it is the constant rule in private international law that the situation is governed by the law of the place where it occurs; that, therefore, the status of author of an art work is the status recognized in the country where the work has been created, i.e. in this case the UNITED STATES OF AMERICA; that this means LOEW'S Inc., to which the rights have been transferred;

- That the Court of Remand is not bound by the judgment of the Cour de Cassation, criticized by an authorized doctrine;

- That, in fact, the Law of 8th July 1964, incorporated as Section L 111-4 in the Code of Intellectual Property, does not apply in that it assumes that the foreign State does not provide French works with adequate and effective protection, which is not the case in the UNITED STATES; that the second paragraph of Section 1 of this law, which alone is referred to in the judgment of the Cour de Cassation, is not severable;

- That, lastly, the GENEVA Convention does not govern the formation of rights and the pre-existing status of author, for which it only organizes protection;

- That, secondarily, the Cour de Cassation has not pronounced itself on the violation of the moral right alleged to result from the colorization and that this violation has not been shown.

8. SACD opposed in replication the submissions produced ex-officio by Me PIERREL and maintained its claims as an intervenor.

9. In their turn, Messrs and Mrs HUSTON and Mr MADDOW replicated as follows:

- That the Cour de Cassation found for a solution which alone enables the authors to exercise their moral right in FRANCE; that this position complies with Section 14*bis*(2) of the BERNE Convention, which provides for application of the law of the country of protection in designating the holder of the rights to a cinematographic work;

- That U.S. law only protects economic rights, wherefore the Law of 8th July 1964 remains applicable for lack of reciprocal agreements on moral right;

- That, contrary to the submissions of the TURNER company, colorization violates the moral right retained.

They furthermore petitioned the court to take cognizance of the violation of the authors' moral right by LA CINQ's broadcasting of the "colorized" film and to order Me PIERREL ex-officio to pay them one million francs in damages and costs on this ground.

10. In its rejoinder, the TURNER ENTERTAINMENT Co. petitioned the court again to judge that Messrs and Mrs HUSTON and Mr MADDOW cannot claim the benefit of the BERNE Convention and Law of 8th July 1985, which have no retroactive application, to dismiss application of the Law of 8th July 1964 because of the protection afforded by U.S. law for every attribute of copyright; to judge

- That colorization is by its nature an adaptation in the meaning of the law and to grant it the benefit of its earlier submissions;

- That ratification by the UNITED STATES of the BERNE Convention postdates the disputed situation by a considerable time;

- That, contrary to the ground produced by Messrs and Mrs HUSTON and Mr MADDOW, U.S. caselaw sanctions violation of the integrity or authorship of a work, which excludes application of the Law of 8th July 1964;

- That the Law of 3rd July 1985 cannot be claimed whereas it is not disputed that the TURNER company is the holder of the patrimonial rights, including the right to adapt the work and therefore to introduce a colorized version.

11. The closing order was pronounced on 17th February 1994.

### III

1. It is first necessary to state that there is no case against Me Hubert LAFONT, ex-officio as court administrator in the compulsory reorganization of LA CINQ, as he has shown that his task ended on 3rd April 1992 when the procedure was converted into a compulsory liquidation procedure and Me PIERREL was court-appointed as liquidator.

2. Moreover, the interventions before the Court of Remand, in accordance with their bylaws, of Societe des Realisateurs de Films (SRF), Syndicat Francais des Artistes Interpretes (SFA), Federation Europdenne des Realisateurs de l'Audiovisuel (FERA), Syndicat Francis des Realisateurs de Television CGT, Syndicat National des Techniciens de la Production Cinematographique et de Television and Societe des Auteurs et Compositeurs Dramatiques (SACD) have not been debated in regard to their interest in acting thus; they must accordingly be declared admissible.

3. The TURNER company first opposes to Messrs and Mrs HUSTON and Mr MADDOW and the intervenors that U.S. law should be applied to determine who has the status of the film's author; it designates the producer, i.e. LOEW's Inc., which obtained the copyright on 2nd May 1950 and whose rights, renewed on 2nd May 1977, were transferred to the TURNER company; the action of Messrs and Mrs HUSTON and Mr MADDOW to protect rights which they have not acquired is therefore not admissible.

4. But the judges in first instance correctly stressed the "very different conceptions" of U.S. and French laws, the first focusing exclusively on the protection of economic rights without referring to the creative act underlying the inalienable moral right recognized by French law, viz. Section 6 of the Law of 11th March 1957, at the time applicable, which provides that "the author enjoys the right to respect for his name, his status, his work—this right is attached to his person—it is perpetual, inalienable and imprescribable - it is transmitted after death to the author's heirs".

John HUSTON and Ben MADDOW, of whom it is not disputed that the first is the co-author of the screenplay and the director of the film entitled "ASPHALT JUNGLE" and the second the co-author of the same film, as already referred to under (I-1), are in fact its authors, having created it, and whereas they are therefore, in the meaning of the aforesaid law, vested with the corresponding moral right, which is part of public law and therefore mandatorily protected.

5. Section 1 of Law No 64-689 of 8th July 1964 on the application of the principle of reciprocity with respect to copyright provides as follows:

"Subject to the provisions of the international conventions to which FRANCE is a party, in the event that it is noted, after consultation of the Minister of Foreign Affairs, that a State does not provide adequate and effective protection for works disclosed for the first time in FRANCE, irrespective of the form thereof, works disclosed for the first time in the territory of the said State shall not benefit from the copyright protection recognized by French law. However, the integrity or authorship of such works may not be violated. In the case provided for in paragraph 1 heretofore, royalties shall be paid to organizations of general interest designated by decree."

The defect in protection thus likely to affect the foreign work on the conditions governing reciprocity, as laid out in paragraph 1, can only concern its economic aspects, i.e. the patrimonial rights attached thereto, in that it is limited by the general mandatory rule providing for respect of an author's moral right as proclaimed without reservation in paragraph 2.

6. It follows that the moral rights attached to the person of the creators of the work entitled "ASPHALT JUNGLE" could not be transferred and, therefore, the judges in first instance correctly ruled that Messrs and Mrs HUSTON and Ben MADDOW were entitled to claim recognition and protection thereof in FRANCE.

7. However, the TURNER company, which it is not disputed is the holder of the author's economic rights, maintains that these rights include the right to adapt the work and therefore to colorize the film entitled "ASPHALT JUNGLE", arguing that it cannot be maintained that this denatures the work;

Me PIERREL, ex-officio, follows the same argument, submitting that the colorized version of the film is merely an adaptation of the original black-and-white version which is left intact and is therefore not affected.

8. However, “colorization” is a technique based on the use of computer and laser and it makes it possible, after transferring the original black-and-white tape onto a videographic media, to give color to a film which did not originally have color; the application of this process is in no event to be considered an adaptation, defined as “an original work both in its expression and in its composition”, even if it borrows formal elements from the pre-existing work; colorization, far from meeting these criteria, in fact merely consists in modifying the work by adding an element thus far not part of the creator’s aesthetic conception.

9. The judges in first instance in the present case have precisely pointed out that the aesthetic conception which earned John HUSTON his great fame is based on the interplay of black and white, which enabled him to create an atmosphere according to which he directed the actor and selected the backdrops; moreover, he expressed himself clearly about his film entitled “The Maltese Falcon” when stating, “I wanted to shoot it in black and white like a sculptor chooses to work in clay, to pour his work in bronze, to sculpt in marble”.

In 1950, while color film technique was already widespread and another option was available, the film entitled “ASPHALT JUNGLE” was shot in black and white, following a deliberate aesthetic choice, according to a process which its authors considered best suited to the character of the work.

10. Therefore, the film’s colorization without authorization and control by the authors or their heirs amounted to violation of the creative activity of its makers, even if it should satisfy the expectations of a certain public for commercially obvious reasons; the use of this process without the agreement of Messrs and Mrs HUSTON and Ben MADDOW infringed the moral right of the authors as mandatorily protected under French law; Messrs and Mrs HUSTON and Ben MADDOW have therefore good grounds to petition the court for reparation of their prejudice at the hands of the TURNER company, and they will therefore be allotted FRF 400,000 by way of damages and costs for the damage done; moreover, the judges in first instance correctly recognized their right to demand that LA CINQ SA be forbidden to broadcast the modified version of the film entitled “ASPHALT JUNGLE”.

11. It is constant that, contrary to the act required by the Court of First Instance, LA CINQ SA broadcast the colorized version of the film entitled “ASPHALT JUNGLE” further to a judgment by the Court of Appeal of PARIS, quashed by the Cour de Cassation on the conditions reiterated under (I-5); this broadcasting is also a direct and definite violation of the moral right whose protection was demanded by Messrs and Mrs HUSTON and Ben MADDOW, who are also wellfounded to demand reparation on this head; the Court has the elements needed to allot them the sum of FRF 200,000 by reversing the referred judgment on the pronounced cognizance.

12. Me PIERREL, ex-officio as court-appointed liquidator of LA CINQ SA, loses his case and will bear the costs; therefore, his claim under Section 700 of the New Code of Civil Procedure is inadmissible.

Equity does not justify the claim lodged ex-officio by Me LAFONT under this Section.

On the other hand, the same consideration of equity prompts the allotment, in application of the said Section 700 of the New Code of Civil Procedure, of FRF 60,000 to Messrs and Mrs HUSTON and Ben MADDOW and FRF 2,000 each to SRF, SFA, FERA, Syndicat Francais des Realisateurs de Television CGT and Syndicat National des Techniciens de la Production Cinematographique et de Television.

#### ON THESE GROUNDS

The Court, judging publicly, after hearing all parties and in last instance as Court of Remand; Pursuant to the closing order pronounced on 17th February 1994;

1. DECLARES that the TURNER ENTERTAINMENT Co. was entitled to petition the Court of Referral;

2. DECLARES admissible the interventions, before the same court, of Societe des Auteurs et Compositeurs Dramatiques (SACD), Societe des Realisateurs de Films (SRF), Syndicat Francais des Artistes Interpretes (SFA), Federation Europeenne des Realisateurs de l'Audiovisuel (FERA), Syndicat Francais des Realisateurs de Television CGT and Syndicat National des Techniciens de la Production Cinematographique et de Television;

3. DECLARES THAT THERE IS NO CASE against Maitre Hubert LAFONT, ex-officio;

4. CONFIRMS the judgment pronounced on 23rd November 1988 by the Court of First Instance of PARIS, subject to the cognizance and the provisions dismissing application of Section 700 of the New Code of Civil Procedure in favor of Messrs and Mrs HUSTON and Ben MADDOW and the secondary intervenors;

Judging again and adding:

5. STATES that the colorization of the film entitled "ASPHALT JUNGLE" by the TURNER ENTERTAINMENT Co. and its broadcasting by LA CINQ SA in this version, contrary to the will of the authors or their heirs, has violated their moral right;

6. ORDERS the TURNER ENTERTAINMENT Co. to pay Messrs and Mrs HUSTON and Ben MADDOW FOUR HUNDRED THOUSAND FRENCH FRANCS (FRF 400,000) by way of damages and costs;

7. ORDERS Maitre PIERREL, ex-officio as court-appointed liquidator of Societe d'Exploitation de la Cinquieme Chaîne (LA CINQ SA) to pay them TWO HUNDRED THOUSAND FRENCH FRANCS (FRF 200,000) in damages and costs;

8. DECLARES its claim on the basis of Section 700 of the New Code of Civil Procedure inadmissible and dismisses the same claim by Maitre Hubert LAFONT, ex-officio;

9. ORDERS it jointly and severally with the TURNER ENTERTAINMENT Co. to pay Messrs and Mrs HUSTON and Ben MADDOW SIXTY THOUSAND FRENCH FRANCS (FRF 60,000) under the same Section 700 of the New Code of Civil Procedure and to pay TWO THOUSAND (FRF 2,000) to each of the intervenors referred to under (2), except SACD, which has lodged no claim in this respect;

10. ORDERS it further, jointly and severally with the TURNER ENTERTAINMENT Co., to bear the full cost of the appeal and authorizes SCP JULLIEN-LECHARNY-ROL and SCP LISSARRAGUE & DUPUIS, avoués, to collect the said costs directly under Section 699 of the New Code of Civil Procedure.