

2007

## A Copyright Revolution: Protecting the Famous Photograph of the Che Guevara

Sarah Levy

Follow this and additional works at: <https://scholar.smu.edu/lbra>

---

### Recommended Citation

Sarah Levy, *A Copyright Revolution: Protecting the Famous Photograph of the Che Guevara*, 13 LAW & BUS. REV. AM. 687 (2007)  
<https://scholar.smu.edu/lbra/vol13/iss3/9>

This Comment and Case Note is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in Law and Business Review of the Americas by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

# A COPYRIGHT REVOLUTION: PROTECTING THE FAMOUS PHOTOGRAPH OF CHE GUEVARA

*Sarah Levy\**

**W**HEN Alberto Diaz Gutierrez, known professionally as Alberto Korda, snapped a photo of Ernesto “Che” Guevara at a memorial service for Cuban revolutionaries on March 5, 1960,<sup>1</sup> he unknowingly sparked a copyright controversy that continues to this day. Reproductions of the photographic image ran unchecked until September of 2000 when Korda won copyright protection in a British court against Smirnoff Vodka for its use of his Guevara image in advertising.<sup>2</sup> After Korda’s death in 2001, his daughter, Diana Diaz, continued to fight the uncontrolled use of Korda’s Guevara image with a successful lawsuit during 2003 against Reporters Without Borders (RSF), a Paris-based press rights group that had created a poster campaign using Korda’s Guevara image.<sup>3</sup> A daughter of Guevara by his second marriage,<sup>4</sup> Aleida Guevara, and Guevara’s widow, Aleida March, plan to pursue legal action against companies around the world that they claim are exploiting Guevara’s image.<sup>5</sup>

In light of the history of this famous image, several issues must be examined to determine the extent of the copyright protection available around the world. Photographs have not always enjoyed the same protection as other copyrightable works and the protection available still varies between jurisdictions. The circumstances surrounding the creation of a work have implications in establishing authorship and thereby ownership of the copyright. Furthermore, the question of ownership is a signifi-

---

\* Juris Doctor graduate, May 2007, Southern Methodist University of Law; B.S. Biology, 2002, Dallas Baptist University. For Elizabeth—my mother, first teacher, and continued inspiration.

1. Anita Snow, *Vodka Ad Featuring Famed Photo of ‘Che’ Guevara Sparks Furor*, ASSOCIATED PRESS, Aug. 9, 2000, available at <http://archives.cnn.com/2000/WORLD/americas/08/09/cuba.cheguevara.ap/>.

2. Laura King, *Photographer Wins Copyright on Famous Che Guevara Image*, ASSOCIATED PRESS, Sept. 16, 2000, available at <http://archives.cnn.com/2000/WORLD/europe/09/16/cheguevaraphoto.ap/>.

3. Damian Wroclavsky, *Che’s Family Plans to Fight Use of Famed Photo*, REUTERS, Aug. 29, 2005, available at <http://www.commondreams.org/cgi-bin/print.cgi?file=/headlines05/0829-01.htm>.

4. Che Guevara—Biography, [http://en.wikipedia.org/wiki/Che\\_Guevara](http://en.wikipedia.org/wiki/Che_Guevara) (last visited Apr. 4, 2007).

5. Wroclavsky, *supra* note 3.

cant factor in determining not only the transferability of the copyright protection but also the duration of that protection within different jurisdictions. A comparison of the relevant laws of Cuba, the United States, and treaties adhered to by the international community shows a variety of possible results when looking at the protection afforded to the Korda photograph.

## I. PHOTOGRAPHS AS COPYRIGHTABLE WORKS

A U.S. district court recently noted that “[t]here is no uniform test to determine the copyrightability of photographs.”<sup>6</sup> Copyright protection is reserved for those works that are both original and fixed in tangible form.<sup>7</sup> Because copyright is a function of statute, rather than an inherent right, protection available to an author depends on the applicable law at the time of the work’s creation.<sup>8</sup>

### A. CUBA

The first jurisdiction of relevance is Cuban law because Cuba is both the location where the photograph originated and the domicile of the photographer at issue in this article. The Cuban Copyright Statute provides in article 2: “Copyright regulated by this Law refers to scientific, artistic, literary and educational works of an original character, which have been or may be brought to public knowledge by any lawful means, whatever their form of expression, their contents, their value or purpose.”<sup>9</sup> The statute specifically includes photographic works in article 7(h) when listing the type of works referenced by article 2.<sup>10</sup> Furthermore, the relevant regulations describe protected works as “all works produced or capable of publication by means of . . . photography, or by any other means of printing or reproduction.”<sup>11</sup> Although photographs are within the subject matter of copyrightable works in Cuba, the extent of that protection will be discussed in the following sections.

### B. UNITED STATES

Photographs first received federal protection in the United States under the Copyright Act of 1865 (1865 Act).<sup>12</sup> But the extent of the pro-

---

6. *SHL Imaging, Inc. v. Artisan House, Inc.*, 117 F. Supp. 2d 301, 309 (S.D.N.Y. 2000).

7. Joshua W. Andrews, Comment, *The Fine Art of Copyright Protection: A Suggestion for Change in the Application of the Fair Use Doctrine*, 36 U.S.F. L. REV. 759, 766 (2002).

8. *Barris v. Hamilton*, No. 96 Civ. 9541 (DAB), 1999 U.S. Dist. LEXIS 7225, at \*10 (S.D.N.Y. May 14, 1999).

9. Copyright Law, *Gaceta Oficial de la República de Cuba*, No. 49, art. 2, 30 de diciembre de 1977 (Cuba), translated in 1 *COPYRIGHT LAWS & TREATIES OF THE WORLD* (U.N. Educ., Scientific & Cultural Org. et al. eds., 2000).

10. *Id.*

11. ARPAD BOGSCH, *THE LAW OF COPYRIGHT UNDER THE UNIVERSAL CONVENTION* 271 (1964).

12. *SHL Imaging, Inc.*, 117 F. Supp. 2d at 306.

tection was unclear, and there was much debate over the distinction between artistic and ordinary photographs.<sup>13</sup> One of the first cases to consider the protection available under the 1865 Act came out of the Supreme Court and established an originality requirement for protection of photographs.<sup>14</sup> The issue raised in *Burrow-Giles Lithographic Co. v. Sarony* was whether a photograph, which is a reproduction of the “exact features of some natural object or of some person,” falls within the definition of “works” whereby the producer is the author, and therefore the work is copyrightable.<sup>15</sup> The Court determined that “the Constitution is broad enough to cover an act authorizing copyright of photographs, so far as they are representatives of original intellectual conceptions of the author.”<sup>16</sup> Although copyright law has changed since the 1865 Act, the two principles which emerged from the Supreme Court’s decision in *Sarony* remain as workable criteria: (1) “an author is someone who creates the work himself” and (2) “an author must imbue the work with a visible form that results from creative choices.”<sup>17</sup>

The Copyright Act of 1909 (1909 Act) completely revised copyright law and increased the protection available to works outside those previously enumerated in the statute.<sup>18</sup> Although the law underwent another major revision in 1976, resulting in the current copyright law as codified in U.S. Code title 17, the 1909 Act still controls works created between 1909 and 1978.<sup>19</sup> The current copyright statute provides that “[c]opyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device” and includes pictorial works.<sup>20</sup>

More recently, a federal circuit court noted that “[a] photograph may be copyrighted, although it is the work of an instant and its significance may be accidental.”<sup>21</sup> The Supreme Court’s latest clarification of the originality and creativity requirements was in *Feist Publications, Inc. v. Rural Telephone Service Co.*, where the Court stated that the originality requirement is not difficult to satisfy and the author need only imbue the work with “some minimal degree of creativity.”<sup>22</sup> When considering the protection afforded to photographs under United States law, the Guevara image appears capable of copyright protection. The photograph taken by

---

13. *Id.* at 307-09.

14. *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884).

15. *Id.* at 56.

16. *Id.* at 58.

17. *SHL Imaging, Inc.*, 117 F. Supp. 2d at 308 (discussing the significance of the *Sarony* case when considering the protection available to photographs).

18. *Andrews*, *supra* note 7, at 763.

19. *Id.* at 763-64.

20. 17 U.S.C. § 102(a) (2000).

21. *Rockford Map Publishers, Inc. v. Directory Serv. Co.*, 768 F.2d 145, 148 (7th Cir. 1985) (citing *Sarony* when deciding that even aerial photographs for purposes of creating county plat maps are copyrightable).

22. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991).

Korda was created independently—the work of an instant with significance that may have been unrealized at the time.<sup>23</sup> Moreover, Korda was not just a person with a camera, snapping photos without creative care. He was a professional photographer, having established his first commercial studio four years prior to taking the Guevara photo.<sup>24</sup> Under the relatively low requirements articulated by U.S. courts, Korda's Guevara image should obtain copyright protection.

### C. OTHER COUNTRIES

In countries other than Cuba and the United States, protection for photographs varies by jurisdiction, but several treaties shed light on the anticipated response from the international community. The Berne Convention, which 160 countries have signed,<sup>25</sup> states in article 7(4) that “[i]t shall be a matter for legislation in the countries of the Union to determine the term of protection of photographic works.”<sup>26</sup> The Universal Copyright Convention does not require protection for photographs<sup>27</sup> but also does not enjoin their sixty-four contracting states<sup>28</sup> from providing protection for photographic works.<sup>29</sup> In 1994, the World Trade Organization (WTO) implemented the Trade-Related Aspects of Intellectual Property Rights Agreement (TRIPS), which allows the 150 WTO member countries<sup>30</sup> to exclude photographs from the realm of protection provided for intellectual property.<sup>31</sup> But a change in attitude towards photography and copyright protection became evident in 1996 when the

- 
23. Korda was walking up and down the street, photographing the political leaders and persons of significance in attendance at the funeral, when he came upon an open space in the crowd and saw Guevara with an expression that impressed Korda. He captured a couple of shots, and less than a minute later Guevara had stepped out of view. When Korda later developed the photographs, he discarded one of the Guevara shots because a person in the crowd had stepped into the frame, and he kept the other Guevara photo because it had turned out good. Interview with Alberto Korda, [http://cheguevara.cubasi.cu/Initial.aspx?menu\\_activo=1](http://cheguevara.cubasi.cu/Initial.aspx?menu_activo=1) (follow “Noticias” hyperlink; then follow “El autor de la foto” hyperlink; then read “¿ Fue durante el día o la noche?” and “¿Usted recuerda si el rollo era Tri-X?”) (Last visited Oct. 31, 2005).
  24. Bill Lasarow, *Alberto Korda*, EXHIBITION PREVIEW NEWSL. (ArtScene, S. Cal.), Nov. 1998, <http://artscenecal.com/ArticlesFile/Archive/Articles1998/Articles1198/AKordaA.html>.
  25. World Intellectual Property Organization (WIPO), Members of WIPO Bodies: Assembly (Berne Union), [http://www.wipo.int/treaties/en/ShowResults.jsp?country\\_id=ALL&search\\_what=B&bo\\_id=7](http://www.wipo.int/treaties/en/ShowResults.jsp?country_id=ALL&search_what=B&bo_id=7) (last visited Apr. 4, 2007).
  26. Berne Convention for the Protection of Literary and Artistic Works art. 7(4), Sept. 28, 1979, S. Treaty Doc. No. 99-27, 1971 WL 123138, [http://www.wipo.int/treaties/en/ip/berne/trtdocs\\_wo001.html](http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html) [hereinafter Berne Convention].
  27. *SHL Imaging, Inc.*, 117 F. Supp. 2d at 307.
  28. United Nations Educational, Scientific and Cultural Organization (UNESCO), Universal Copyright Convention—Contracting States, <http://erc.unesco.org/cp/convention.asp?KO=15241&language=E> (last visited Apr. 4, 2007).
  29. Universal Copyright Convention art. IV(3), July 24, 1971, 25 U.S.T. 1341, 1974 WL 166720, [http://www.unesco.org/culture/laws/copyright/html\\_eng/page4.shtml](http://www.unesco.org/culture/laws/copyright/html_eng/page4.shtml) [hereinafter Universal Copyright Convention].
  30. World Trade Organization, Members and Observers, [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm) (last visited Apr. 4, 2007).
  31. *SHL Imaging, Inc.*, 117 F. Supp. 2d at 307.

World Intellectual Property Organization (WIPO) Copyright Treaty banned its sixty-three contracting states<sup>32</sup> from applying article 7(4) of the Berne Convention.<sup>33</sup> The WIPO Copyright Treaty effectively lifted the limitation on the term of protection available to photographs within those states that provided legislation to that end.<sup>34</sup>

## II. OWNERSHIP OF THE PHOTOGRAPH

Turning next to the Guevara photo itself, in order to establish authorship, we must consider the circumstances in which it was taken. Korda was a photojournalist for the newspaper *Revolución* when he captured the famous Guevara photo in 1960,<sup>35</sup> and he also served as Fidel Castro's personal photographer from 1959 to 1969.<sup>36</sup> Because it appears that Korda was an employee of not one but two employers when the Guevara image was created, the question of copyright ownership becomes more complex.

### A. CUBA

The Cuban Copyright Statute describes the author of a work as “the person who has created a work” and stipulates that “[i]n the absence of proof to the contrary, the person under whose name or pseudonym the work has been publicly made known shall be considered to be the author.”<sup>37</sup> Additionally, in the case of photographic works, copyright is “only recognized if every copy is duly identified in accordance with established regulations.”<sup>38</sup> While it is unclear from the statute what those regulations might be, Korda has been publicly acknowledged as the creator of the photograph both in Cuba and around the world.<sup>39</sup>

32. World Intellectual Property Organization, WIPO Copyright Treaty—Contracting Parties, [http://www.wipo.int/treaties/en/ShowResults.jsp?country\\_id=ALL&start\\_year=ANY&end\\_year=ANY&search\\_what=C&treaty\\_id=16](http://www.wipo.int/treaties/en/ShowResults.jsp?country_id=ALL&start_year=ANY&end_year=ANY&search_what=C&treaty_id=16) (last visited Apr. 4, 2007) [hereinafter WIPO Copyright Treaty Members].

33. *SHL Imaging, Inc.*, 117 F. Supp. 2d at 307. Although the court cites the date of the WIPO Copyright Treaty as 1998, the treaty was concluded in Geneva in 1996. The United States signed on April 12, 1997 and ratified the treaty on September 14, 1999. The treaty entered into force in the United States on March 6, 2002. See World Intellectual Property Organization, Treaties Database—Contracting Parties: United States, [http://www.wipo.int/treaties/en/Remarks.jsp?cnty\\_id=1085C](http://www.wipo.int/treaties/en/Remarks.jsp?cnty_id=1085C) (last visited Apr. 4, 2007).

34. *SHL Imaging, Inc.*, 117 F. Supp. 2d at 307.

35. Timothy Bancroft-Hinchey, *Alberto [sic] Korda – The Man Behind Che Guevara – Dies*, PRAVDA (Russia), May 29, 2001, available at <http://newsfromrussia.com/main/2001/05/29/6226.html>; see also Interview with Alberto Korda, *supra* note 23.

36. Alberto Korda—Biography, [http://en.wikipedia.org/wiki/Alberto\\_Korda](http://en.wikipedia.org/wiki/Alberto_Korda) (last visited Apr. 4, 2007). Korda served as Fidel Castro's personal photographer for ten years following the revolution that took place in 1959, before he turned his focus to underwater photography in 1968. Although the exact start date of Korda's employment with Castro is unknown, it can be inferred that Korda's employment term with Castro began in 1959 and ended in 1968. *Id.*

37. Law No. 49, art. 11, *supra* note 9.

38. *Id.* at art. 22.

39. Wroclavsky, *supra* note 3; see also Bancroft-Hinchey, *supra* note 35.

The author, however, is not always the owner of a copyright. The Cuban Copyright Statute has specific provisions regarding works created in the course of employment. Article 19 states that, while copyright is recognized in “works created in the course of employment by any State organisation, institution, entity or undertaking, or social or people’s organisation,”<sup>40</sup> authors must look to the regulations of the Council of Ministers for guidance in exercising their rights.<sup>41</sup> Furthermore, compensation for the copyright is considered to be “included within the salary which the author receives” if the work is created during the course of employment.<sup>42</sup> By Korda’s own admission, the newspaper he worked for in 1960 was a government-controlled paper,<sup>43</sup> and he received no compensation for the copyright from the Cuban government,<sup>44</sup> which is consistent with the provision in article 20 controlling works created in the course of employment. While Cuba may acknowledge Korda’s authorship in the photograph, any copyright protection is subject to the government’s discretion.<sup>45</sup>

#### B. UNITED STATES

The U.S. Code title 17 on copyrights states that “[i]n the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.”<sup>46</sup> A work made for hire can be either “a work prepared by an employee within the scope of his or her employment” or “a work specially ordered or commissioned for use . . . as a supplementary work.”<sup>47</sup> Notably, a supplementary work is defined within section 101 as “a work prepared for publication as a secondary adjunct to a work by another author for the purpose of . . . illustrating . . . or assisting in the use of the other work, such as . . . pictorial illustrations.”<sup>48</sup> If Korda was attending the funeral in 1960 as Castro’s personal photographer, then capturing the photo of Guevara was likely outside the scope of his employment. Unless Castro specially ordered or commissioned Korda to photograph political leaders at the funeral, Korda has ownership as the author of the image.

---

40. Law No. 49, art. 19, *supra* note 9.

41. The Council of Ministers is the source of administrative law in Cuba. DEBRA EVENSON, *REVOLUTION IN THE BALANCE: LAW AND SOCIETY IN CONTEMPORARY CUBA* 22 (Westview Press 1994).

42. Law No. 49, art. 20, *supra* note 9.

43. Interview with Alberto Korda, *supra* note 23.

44. Bancroft-Hinchey, *supra* note 35.

45. Article 3 of the Cuban Copyright Statute states that “[t]he protection of copyright established by this Law is subordinated to the superior interest imposed by the social necessity for the most ample diffusion of science, technology, education and culture in general. The exercise of the rights recognized by this Law must not affect these social and cultural interests.” Law No. 49, art. 3, *supra* note 9.

46. 17 U.S.C. § 201(b) (2000).

47. 17 U.S.C. § 101 (2000).

48. *Id.*

The implications change when considering Korda as a photojournalist for *Revolución*. If Korda took the Guevara photo within the scope of his employment, the authorship rights would rest with the newspaper as Korda's employer. The U.S. Supreme Court created a test in *Community for Creative Non-Violence v. Reid* in 1989 to evaluate work made for hire claims, identifying thirteen factors to consider when deciding if a party is an employer.<sup>49</sup> A circuit court, in applying the *Reid* test, found that a photographer is not a work-for-hire employee where the employer "controlled only the subject matter and composition of the images" but not "most aspects of the work."<sup>50</sup> In the case of Korda's Guevara image, it appears that the newspaper controlled few, if any, aspects of Korda's work. Although Korda acknowledged in an interview that he attended the funeral while working for the newspaper, his practice was to develop his photos and then present them to the newspaper, at which point the director of the newspaper would select the photos he wanted to publish.<sup>51</sup> The newspaper likely did not request that Korda photograph Guevara specifically, as evidenced by the fact that the newspaper did not even use the photo in its article about the funeral the following day.<sup>52</sup> Korda recalled that the newspaper did keep the photo on file, however, and used it in a subsequent publication alongside an announcement that Guevara would be speaking at a public event.<sup>53</sup> But other sources claim the photo remained unpublished in Korda's studio for the next seven years, leaving Korda's possession for the first time in 1967 when an Italian publisher named Giangiacomo Feltrinelli requested a copy of the image.<sup>54</sup> Feltrinelli wanted to use the photo as the cover image for the soon-to-be-published *Bolivian Diary* of Che Guevara, and Korda gave him two copies free of charge.<sup>55</sup> In light of this history, it is likely that a U.S. court would consider Korda an independent artist when he captured the picture of Guevara. Although he offered the photo to his current employer at the time, he maintained ownership rights in the Guevara image.

The latter alternative is consistent with the British court ruling assigning copyright ownership to Korda in 2000.<sup>56</sup> The suit was filed on behalf of Korda (under his real name, Alberto Diaz Gutierrez) by the Cuba Solidarity Campaign against the companies that used the image in Smirnoff advertising.<sup>57</sup> The London High Court affirmed Korda's copyright interest in the Guevara image<sup>58</sup> and awarded Korda a \$70,000 settlement, which he donated to children's health care in Cuba.<sup>59</sup> Since

---

49. *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 750-51 (1989).

50. *Marco v. Accent Publ'g Co.*, 969 F.2d 1547, 1551-52 (3d Cir. 1992).

51. Interview with Alberto Korda, *supra* note 23.

52. Wroclavsky, *supra* note 3.

53. Interview with Alberto Korda, *supra* note 23.

54. Wroclavsky, *supra* note 3.

55. *Id.*

56. King, *supra* note 2.

57. *Id.*

58. *Id.*

59. Wroclavsky, *supra* note 3.

Korda's death in 2001, his heirs have been involved in a dispute among themselves over the copyright ownership of the famous Guevara photo.<sup>60</sup>

### III. Transferability of Copyright

Unlike other areas of copyright law previously discussed, the realm of copyright inheritance does not contain exceptions for photographic works. As such, the general provisions regulating the transfer of copyright protection apply to photographs as well.

#### A. CUBA

The Constitution of Cuba recognizes a right to inherit personal property, but that right is forfeited to the State if the heir establishes residence or citizenship outside Cuba.<sup>61</sup> Under Cuban law, copyrights may be transferred by inheritance, with the rights of "recognition of the authorship of a work and the right to defend its integrity" belonging equally to the heirs.<sup>62</sup> Yet these rights may not be fully exercisable if Korda's heirs live outside Cuba, for the law also provides that "[t]he works of deceased Cuban authors whose rights of copyright are exercised by natural persons or legal entities permanently located abroad may be declared to be within the patrimony of the State and at the disposal of the Council of Ministers."<sup>63</sup> For the heirs of Korda who reside and have citizenship in Cuba, a right may exist equally among them to defend the integrity of their father's work.

#### B. UNITED STATES

The U.S. Code title 17 on copyrights states that "[t]he ownership of a copyright may be transferred in whole or in part by any means of conveyance or by operation of law, and may be bequeathed by will or pass as personal property by the applicable laws of intestate succession."<sup>64</sup> Although the 1909 Act did not expressly provide for transfer of copyright by intestate succession, it was understood to be included in the act's provision of transfer by will.<sup>65</sup> Under both the 1909 Act and the current act, in the absence of a will, courts determine the proper disposition of a copyright interest in accordance with the intestate succession law of the decedent's domicile.<sup>66</sup> This holds true even if the decedent's domicile is in a foreign country.<sup>67</sup> Korda was domiciled in Havana,<sup>68</sup> though he was visit-

60. *Id.*

61. EVENSON, *supra* note 41, at 187.

62. Law No. 49, art. 44, *supra* note 9.

63. *Id.* at art. 41.

64. 17 U.S.C. § 201(d)(1) (2000).

65. 3 MELVILLE B. NIMMER (1963-1985) & DAVID NIMMER (1985-present), NIMMER ON COPYRIGHT §10.06 (2005).

66. *Id.*

67. *Id.*

68. King, *supra* note 2.

ing Paris when he died.<sup>69</sup> As such, the Cuban law on inheritability, as discussed above, applies in U.S. courts as well.

#### IV. DURATION OF PROTECTION

Even after copyright protection has been established, there is still the question of how long it will last. The duration of protection for photographic works has changed over the years, along with the general attitude towards photographs, as discussed previously, which has frequently led to inconsistent outcomes. Much like the other aspects of copyright protection, duration will depend upon the applicable jurisdiction.

##### A. CUBA

General copyright protection under Cuban law lasts for the life of the author plus twenty-five years, with the twenty-five year period beginning on January 1 of the year following the author's death.<sup>70</sup> But for photographs, there is yet another exception. Instead of the general protection provided above, photographs retain copyright protection for only ten years from the date the work is first used.<sup>71</sup> After the copyright expires, the Council of Ministers can declare the work as property of the State.<sup>72</sup> It is not clear whether the Korda photograph was first used in publication sometime during 1960<sup>73</sup> or in the publication of Che's *Bolivian Diary* in 1967.<sup>74</sup> Regardless of the specific date, it seems that in Cuba the copyright protection in Korda's Guevara photograph would have already expired, and despite the claims of ownership from Korda's heirs, the State would now hold any rights associated with the photograph.

##### B. UNITED STATES

Unlike Cuba, the United States has kept in step with international movements towards greater copyright protection. Senator Orrin Hatch, in an essay on copyright legislation, recalled the testimony of the Register of Copyrights, Marybeth Peters, before the Judiciary Committee in 1995:<sup>75</sup>

The Copyright Office believes harmonization of the world's copyright laws is imperative if there is to be an orderly exploitation of copyrighted works. In the past, copyright owners refrained from entering certain markets where their works were not protected. In the age of the information society, markets are global and harmonization of national copyright laws is, therefore, crucial.

---

69. Bancroft-Hinchey, *supra* note 35.

70. Law No. 49, art. 43, *supra* note 9.

71. *Id.* at art. 47.

72. *Id.* at art. 48.

73. Interview with Alberto Korda, *supra* note 23.

74. Wroclavsky, *supra* note 3; see also Bancroft-Hinchey, *supra* note 35.

75. Orrin G. Hatch, *Toward a Principled Approach to Copyright Legislation at the Turn of the Millennium*, 59 U. PITT. L. REV. 719, 730 (1998).

There has been a distinctive trend towards harmonization over the last two decades; however, the development of the global information infrastructure makes it possible to transmit copyrighted works directly to individuals throughout the world and has increased pressure for more rapid harmonization. . . .

. . . .

It does appear that at some point in the future the standard will be life plus 70. The question is at what point does the United States move to this term?<sup>76</sup>

In seeming answer to that question, the Copyright Term Extension Act of 1997 extended the protection of the Copyright Act by twenty years.<sup>77</sup> Thus, the term of protection in the United States is now for the life of the author plus seventy years, similar to the trend abroad.

This extended protection has implications for the heirs of a copyrighted work as well. Senator Hatch states that, “[a]mong the primary justifications asserted for the adoption of the life-plus-70 term under the EU Directive was the conclusion that the life-plus-50 term is no longer sufficient to protect two generations of an author’s heirs.”<sup>78</sup> Under the prior fixed-term protection, many authors survived the end of their work’s copyright protection, leaving no interest available to their heirs.<sup>79</sup> There is significance in an inheritable copyright interest because “the opportunity to leave a legacy to one’s children and grandchildren operates as an important incentive to create.”<sup>80</sup>

### C. OTHER COUNTRIES

The international trend with which the United States aligned has been highlighted by several treaties. The Berne Convention provides that those countries with legislation protecting photographic works should have a duration of protection that lasts “at least until the end of a period of twenty-five years from the making of such a work.”<sup>81</sup> The term of protection may vary depending upon where future litigation is filed. But the minimum term of protection under the Berne Convention ended in 1985.<sup>82</sup> The Universal Copyright Convention states that in member countries choosing to protect photographic works, the minimum term of protection is ten years.<sup>83</sup> In 1993, after reevaluating the Berne Convention minimum requirements, a directive was issued by the Council of the European Communities requiring its member countries to extend the copy-

76. *Id.*

77. 17 U.S.C. § 302 (2000).

78. Hatch, *supra* note 75, at 732.

79. *Id.*

80. *Id.* at 733.

81. Berne Convention, *supra* note 26, at art. 7(4).

82. *Id.* Because the Berne Convention provides twenty-five years of protection from the date of a work’s creation, and the photograph in question was taken on March 5, 1960, the protection available to the Korda image under the Berne Convention expired on March 5, 1985.

83. Universal Copyright Convention, *supra* note 29, at art. IV(3).

right protection term to the life of the author plus seventy years.<sup>84</sup> The WIPO Copyright Treaty banned contracting states from applying article 7(4) of the Berne Convention,<sup>85</sup> lifting the limitation on the term of photographic protection. Rather than the minimum twenty-five years, photographs now enjoy the same protection as other works of authorship, the life of the author plus fifty years.<sup>86</sup> Korda passed away on May 25, 2001,<sup>87</sup> thus extending the protection of his famed Guevara photo until May 25, 2051 within the 182 WIPO contracting countries<sup>88</sup> and until May 25, 2071 within European Union member countries.

## V. CONCLUSION

The heirs of Korda may not find the copyright protection they desire in Cuba, but other countries, including the United States, hold promising atmospheres for future litigation brought by Korda's heirs. While two favorable decisions in European countries have already been awarded, it remains to be seen what the result would be in the United States. There seems to be little doubt that a photograph is capable of copyright protection, and ownership can be ascertained without too much trouble. The outcome of future litigation hinges upon the duration of protection available within a jurisdiction, and in the meantime, photographs are steadily gaining protection in the world of copyrights.

---

84. Council Directive 93/98, art. 1, 1993 O.J. (L 290) (EC).

85. *SHL Imaging, Inc.*, 117 F. Supp. 2d at 307; *see also* WIPO Copyright Treaty art. 9, Dec. 20, 1996, S. Treaty Doc. No. 105-17, 1997 WL 447232, [http://www.wipo.int/treaties/en/ip/wct/trtdocs\\_wo033.html](http://www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html).

86. *SHL Imaging, Inc.*, 117 F. Supp. 2d at 307.

87. Alberto Korda, *supra* note 36.

88. WIPO Copyright Treaty Members, *supra* note 32.

