support the mechanisms of that empowered talent, whether it be state or federal patronage or the marketplace.

I am often told: "Well, the marketplace will take care of your artists." But, you know, not all of my artists. Believe me.

Where my passion lies is with this total disinvestment in American creativity that has been led by the conservatives in this country who have also turned the agency into a fundraising machine for their politics and their ideology. That is how it has been played out.

For the moment, this last election, things have shifted. We will see what goes on. But, as the director of my organization, I know that every spring when the NEA was up for debate in the House, I had to get my ducks in line because I knew my members were going to be paraded as being blasphemous. And inevitably, they were.

You know, last year, it was Representative Hoekstra who went after thirteen artists and twenty-six organizations. Fortunately, this is where I empathize with the NEA staff. They have to respond to the slash and burn attitude from this man who says, "see, give me these files, give me these files, give me these files."

HOPE O'KEEFFE:

We produced something over twenty thousand pages.

ROBERTO BEDOYA:

Basically, this is the politics of arts funding.

The lawsuit was my response to the politicization of the arts. The chilling effect of the NEA language is what we wanted to talk about. The lawyers argued it, and that is how it got played out. But the experience of living in this atmosphere is what we have got to work with. Artists will continue to do work. Artists will ask more from the NEA. Thank God that they will. But, as you know, artists will do what they do.

MOTION PICTURES, MORAL RIGHTS, AND THE INCENTIVE THEORY OF COPYRIGHT: THE INDEPENDENT FILM PRODUCER AS "AUTHOR"

I. INTRODUCTION

The Visual Artists Rights Act of 1990[1] ("VARA") marked a historic departure in U.S. copyright law. For the first time[2] at the federal level,[3] certain moral rights[4] were guaranteed to specified classes of artists. This was an apparent break with our intellectual property law tradition, under which rights resembling moral rights could only be secured through contract.[5] Striking as VARA is, however, it does not encompass all authors and works of art. It excludes, for example, all audiovisual works such as motion pictures.[6] A number of rationales for this exclusion can be gleaned from VARA's legislative history and from commentaries on VARA. The most formidable argument is that motion picture production is a collaborative art. According to this view, because of the sheer number of potential moral rights claimants, it would be inefficient and unwieldy to grant moral rights to the numerous creators of a motion picture.[7] However, not all films are produced in the same manner—some are independently made while others are studio-produced.[8] The argument in this Note is that, with respect to in-

[1] Pub. L. No. 101-650, 104 Stat. 5128 (1990) (codified at 17 U.S.C. §§ 101, 106A, 113(d), 301(f)).

[2] *See* MARSHALL LEAFFER, UNDERSTANDING COPYRIGHT LAW § 12.4[B][5] at 378 (2d ed. 1995) ("Finally, in 1990, with [VARA], the U.S. for the first time gave explicit, but hardly complete, recognition to a moral right.").

[3] Prior to VARA's enactment, a number of states enacted artists' rights statutes granting limited moral rights to authors of certain classes of art. *See, e.g.*, CAL. CIV. CODE § 987 (West 1997); N.Y. ARTS & CULT. AFF. LAW § 14.03 (McKinney 1996).

[4] The term "moral rights," from the French *droit moraux*, refers to the personal, noneconomic rights of the author of a copyrightable work. Depending on the jurisdiction, there are generally three or four moral rights, two of which, the right of attribution (granting an author the right to claim or disclaim authorship in a work) and the right of integrity (granting the author the right to sue for alterations to the work that cause dignitary or reputational harm to the author), are incorporated into VARA. For further discussion of moral rights, see *infra* Part II.A.

[5] *See* Gilliam v. American Broad. Cos., 538 F.2d 14, 24 (2d Cir. 1976) ("American copyright law, as presently written, does not recognize moral rights or provide a cause of action for their violation. . . . Thus courts have long granted relief for misrepresentation of an artist's work by relying on theories outside the statutory law of copyright, such as contract law . . . .") (citations omitted).

[6] VARA limits protection to "work[s] of visual art," the definition of which expressly excludes motion pictures. *See* 17 U.S.C. § 101 (1994) ("A work of visual art does not include . . . any . . . motion picture or other audiovisual work. . . .") (definition of "work of visual art").

[7] *See infra* Part II.B.4.

[8] *See infra* Part V.

dependent films, the producers rather than entire collaborative teams, directors, or screenwriters, should be deemed "authors," and that based upon the Constitution, the Copyright Act of 1976,[9] and some of the reasoning behind VARA, moral rights should be secured for these independent producers.

Federal codification of moral rights is striking because it seems so inconsistent with our copyright law tradition, based as it is in freedom of contract and free market enterprise.[10] However, also located in our tradition is a respect for individual identity, personality and privacy.[11] Both the state visual artists rights acts and VARA grew from this strand of our tradition.[12] In this sense then, the radical break from tradition referred to in the opening paragraph was radical only because it was the first explicit congressional recognition of moral rights.

After VARA's enactment, the interesting question is whether it should be extended, either horizontally (to include other works of art) or vertically (to include a greater degree of rights). The most substantial bar to extension would be our own tradition of placing the economic over the personal.[13] One of the underlying premises of this Note is that a basis for overcoming that tradition exists in our constitutional law, and that moral rights not only are no bar to economic growth, but rather can increase it.

A. *Hypothetical Framework*

An independent film producer envisions a film. Over the next five years she devotes her life to shepherding it to fruition. She secures rights to the underlying short story, hires one and then another screenwriter and manages to acquire production and completion funds. As the script drafts become more refined, she hires a director and commences pre-production.[14] She weathers the

9 17 U.S.C. §§ 101-1101 (1994).

10 *See, e.g.*, Data Gen. Corp. v. Grumman Sys. Support Corp., 36 F.3d 1147, 1187 (1st Cir. 1994) ("We must not lose sight of the need to preserve the economic incentives fueled by the Copyright Act, [which is] designed ultimately to improve the welfare of consumers in our free market system.").

11 *See* Edward J. Damich, *A Critique of the Visual Artists Rights Act of 1989*, 14 NOVA L. REV. 407 (1990). Damich locates the genesis of moral rights in U.S. law in the rights of personality and privacy, noting that moral rights essentially are concerned with protecting the artist's identity. *See id.* at 408-12 (citing Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 250 (1903) and Harper & Row Publishers, Inc. v. Nation Enters., Inc., 471 U.S. 539, 555 (1985)).

12 *See id.*

13 *See* CRAIG JOYCE ET AL., COPYRIGHT LAW § 7.07[A] at 610 (3d ed. 1994) (noting that generally the concept of moral rights is "in conflict with American copyright law as it has developed over almost two centuries.").

14 Most feature films go through four phases before completion: development (fund raising, script development and attachment of key personnel such as director); preproduction (logistical planning of the production period, hiring of additional key personnel like director of photography and production designer); production (shooting of the film); postproduction (editing and sound mixing). *See* Eric Schwartz, *The Financing of Motion Pictures, in* REPORT OF THE REGISTER OF COPYRIGHTS, TECHNOLOGICAL ALTERATIONS TO MOTION PICTURES AND OTHER AUDIOVISUAL WORKS: IMPLICATIONS FOR CREATORS, COPYRIGHT OWNERS, AND CONSUMERS Attachment III at 2-3 (1989) (adding a fifth stage, "marketing").

grueling production period and guides the project through postproduction to completion. She has accomplished one of the most daunting feats in art and entertainment: she has made a feature film. *Now* the problems begin, not only for the independent film producer, but for the general public, too.

In order for the film to reach the public, the intrepid producer must secure a distribution deal. The distributors will have requirements to which the producer, who has spent half a decade with her project, would likely object. However, since all distributors impose similar conditions, objecting is pointless. If she wants the film seen by the public and if, from a policy standpoint, we want the public to have that opportunity, she must comply with the distributors' demands.

The most onerous demands at first seem unexceptional in light of our free market and contracts-based traditions: First, for a negotiated sum, the producer must assign to the distributor all rights in the film either in perpetuity or for the length of any copyright term;[15] second, the film may be altered for exploitation purposes in any manner the distributor deems necessary, such as editing for television, color alteration, or panning-and-scanning for video release.[16]

15 In this scheme, the rights assigned from producer to distributor are copyrights that the producer owns *only* as a result of securing them through contract, or the work-for-hire provision of the Copyright Act of 1976, from all creative personnel involved in the film (e.g., director, writer, production designer).

There are, however, instances, particularly with smaller, or independent, distributors, where the deal is a license to distribute for a limited term in a particular format in a particular territory. *See infra* notes 153-55 and accompanying text. The major distributors combined with the mini distributors, who account for the vast majority of distributed films in North America, *see* Telephone Interview with Annie Gerson Swanson, former Director of West Coast Operations, Baseline, Inc. (Feb. 25, 1998) (on-file with Author) [hereinafter Gerson Swanson Interview], generally require blanket, total assignment, *see* RENEE HARMON, THE BEGINNING FILMMAKER'S BUSINESS GUIDE: FINANCIAL, LEGAL, MARKETING, AND DISTRIBUTION BASICS OF MAKING MOVIES 89 (1994) (noting that on a standard distribution deal the "[p]roducer grants the distribution company all rights to the picture, including the copyright.").

16 *See* Schwartz, *supra* note 14, at 1-2 ("[U]nder . . . traditional copyright principle[s], the right to exploit a work for other markets—markets created by the techniques of colorization, panning and scanning, or lexiconning—can be contracted for without regard to the integrity of the original work."). For an extensive catalogue and description of the potential post-completion changes to motion pictures, see REPORT OF THE REGISTER OF COPYRIGHTS, TECHNOLOGICAL ALTERATIONS TO MOTION PICTURES AND OTHER AUDIOVISUAL WORKS: IMPLICATIONS FOR CREATORS, COPYRIGHT OWNERS, AND CONSUMERS 39-63 (1989) [hereinafter COPYRIGHT OFFICE REPORT].

Of course, the producer can only assign rights in the work that she owns. This means

The result of this scheme is that independent producers, after bringing a work of art to existence, must relinquish all future interest in it almost *in toto* in order for the public to benefit from it. The relinquished rights include control over all future modifications, whether rising to the level of "mutilation" or mere alteration.[17] The effect of these modifications, which occur in most feature-length motion pictures,[18] may serve as a disincentive to independent producers, forcing them from the field. The modifications may cause harm to the honor or reputation[19] of the independent producer, the psychological effect of which may be debilitating and the economic effect profound.[20] From a policy, if

that if her agreement with the director, for example, limits post-completion alteration to panning-and-scanning, the producer cannot assign to the distributor a right to alter the film by colorization. *See* Directors Guild of America Basic Agreement of 1993 § 7-1501 ("The Employer [producer] shall not enter into an agreement with a third party, the terms of which require the Employer to breach any obligations under this Article 7 . . . .") [hereinafter DGA BA]. Because the distributor will make all such alterations a deal requirement, the producer, in order to guarantee the widest possible exploitation, will likely require the director (and other creative personnel) either to assign to her the maximum rights available or to sign a work-for-hire provision, *see* 17 U.S.C. § 201(b) (1994) ("In 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 . . . ."), or both. The limits on these assignments or work-for-hire agreements between director and producer are imposed not by the directors individually, but by the their guilds, which impose on producers, and thus on the distributors to whom the producers assign, limitations on alterations. *See infra* Part VI.

17 *See* 17 U.S.C. § 106A(a)(3)(A) (stating that authors of works of visual art "shall have the right to prevent any intentional distortion, mutilation or other modification of that work."). Note that these terms are open to interpretation, and due to the relatively few published opinions concerning VARA, they remain untested.

18 *See* COPYRIGHT OFFICE REPORT, *supra* note 16, at 45-60 (cataloguing the techniques of widespread post theatrical exhibition to motion pictures).

19 *See* 17 U.S.C. § 106A(a)(3)(A) (granting authors of visual art a right of integrity if "intentional distortion, mutilation, or other modification of th[e] work . . . would be prejudicial to his or her honor or reputation . . . .").

20 There is no empirical evidence on reputational harm to motion picture producers. However, there are some indicia that support the contention that such harm is real.

First, Article Seven of the Directors Guild of America Basic Agreement ("DGA BA") secures for directors an "absolute" right to a "Director's Cut," *see* DGA BA, *supra* note 16, § 7-508, while also agreeing that the employer, not the director, shall have final cut approval, *see id.* § 7-1501. It is difficult to see what purpose is served by granting the director an absolute right to create her own version of the film, given that there is no requirement on the part of the employer to use that version, other than to safeguard the director's honor as an artist—the right to create her own version, regardless of whether the employers use it. Second, the tension embodied in the DGA BA provision regarding pseudonymous crediting suggests the reputational value of the director's name. Section 8-211 allows the director to petition for pseudonymous credit, but the procedure requires the DGA to weigh the considerations of the employer's interest in having the director's name attached to the film. *See* DGA BA, *supra* note 16, § 8-211. That the director may want to remove her name from a film she has directed and that the employer may want the director's name attached nonetheless, suggests the reputational import of being publicly deemed a film's creator. *See also* Schwartz, *supra* note 14, at 10 ("[D]amage to [a director's] reputation can have severe economic consequences for the future of their directorial careers.").

If directors' reputations may be harmed, why not producers', especially independent producers who are not shielded by studio armor. *See infra* Part V (describing the differences between studio and independent producers). In addition, common sense and the Hollywood adage, "You're only as good as your last picture," suggest that reputation has great currency in the motion picture industry.

not a constitutional, standpoint, this is all wrong. The incentive theory of copyright envisions the Copyright Clause[21] as a means to empowering Congress to encourage creation of works of art, not serve as a disincentive.

B. *Outline*

Independent motion pictures are crucial to our cultural heritage and, consistent with the Copyright Clause, the progenitors of certain motion pictures should be protected with at least the minimal moral rights afforded the creators of the various fine arts protected under VARA. The core of the argument turns on a conception of the independent producer, rather than the conventional studio producer, the director, or the screenwriter, as the "author" of the film, as "author" is meant in relation to the Copyright Clause of the Constitution and the Copyright Act.

Part II discusses the doctrine of moral rights generally, and defines the contours of its embodiment in U.S. law, VARA. It lays out the arguments—political, theoretical, and practical—against extending moral rights to any motion pictures or audiovisual works, and challenges these arguments. It concludes that while these arguments may be supportable in some instances, they clearly are not in others.

Part III begins to rebut the most substantial argument against including under VARA works by independent film producers—that films are collaborative and that for moral rights purposes there is no feasible way to legislate who is the "author" of an independent film. This Part makes the case for producorial authorship in general, temporarily setting aside the specific case of independent producers.

Part IV argues that what is at stake in protecting certain motion picture creators is our past and our future cultural heritage. Part V distinguishes independent from studio producers, concluding that the former should be granted moral rights protection. It begins with a brief description of U.S. motion picture production and distribution practice, and then describes how, under that system, independent producers are more like painters in their studios than executives at the Studios.

Part VI considers joint authorship among independent producers and other key creative personnel as a solution to the moral

21 U.S. CONST., art. 1, § 8, cl. 8.

rights-collaborative art dilemma. It concludes that, given the fact that directors and writers have already achieved moral rights, and that, according to the incentive theory of copyright, our law is concerned with creation perhaps more than with creativity, it is crucial for independent producers to be the beneficiaries of moral rights legislation.

II. MORAL RIGHTS

A. *Moral Rights and U.S. Adherence to the Berne Convention*

The moral rights of authors, as generally conceived, are different from copyrights. Moral rights are viewed as personal rights of the author, hence moral rights are generally inalienable.[22] A moral rights conception views works of art as extensions of their creators[23] and is concerned primarily with safeguarding the honor and reputation[24] of the author rather than the author's right to control reproductions or derivations of the original work of art.[25] Copyrights are economic rights; moral rights are personal, non-economic rights.

The moral rights of artists are a staple of the laws of numerous countries, particularly those in Europe and most dramatically of France.[26] In fact, a grant of certain minimal moral rights for artists is required of member nations of the largest international copyright agreement, the Berne Convention for the Protection of Literary and Artistic Works ("Berne" or "Berne Convention").[27]

The minimal moral rights requirements of the Berne Conven-

22 *See* JOYCE ET AL., *supra* note 13, § 7.07[A] at 610 (reporting that a number of other countries recognize a "'moral right' that treats the author's work not as just an economic interest, but rather as an inalienable, natural right."). VARA does not make moral rights inalienable. *See* 17 U.S.C. § 106A(e)(1) (1994) (moral rights "may not be transferred, but those rights may be waived.").

23 *See* JOYCE ET AL., *supra* note 13, § 7.07[A] at 610 (noting that the moral rights doctrine views artist's work as "an extension of the artist's personality.").

24 The artist's "harm" and "reputation" are expressly what is protected under VARA. *See* 17 U.S.C. §§ 106A(a)(2), (3)(A).

25 Control over derivatives and reproductions are exclusive rights granted to copyright holders under the Copyright Act. *See* 17 U.S.C. §§ 106(1), (2).

Note that the reputation approach may ultimately be the same as the economic approach. The market value of the creator's other works will be less if the artist's reputation is hurt—hence a reputation basis of moral rights is equally economics-centric.

26 *See* Edward J. Damich, *The Visual Artists Rights Act of 1990: Toward a Federal System of Moral Rights Protection for the Visual Artist*, 39 CATH. U. L. REV. 945, 948 (1990) ("Because [an earlier, but substantially similar version of VARA] includes only visual art, it tacitly accepts an incremental medium-by-medium approach rather than bringing all kinds of works under the protection of a few general principles as does French law.").

27 *See* Berne Convention for the Protection of Literary and Artistic Works, opened for signature Sept. 9, 1886 (last revised July 24, 1971, Paris), *reprinted in* WORLD INTELLECTUAL PROPERTY ORGANIZATION, GUIDE TO THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS (Paris Act, 1971) (1978) [hereinafter Berne Convention].

tion are essentially the rights of integrity and attribution.[28] The right of attribution grants authors the right to claim or disclaim authorship of the work regardless of who owns the work or under what circumstances it is displayed.[29] The right of integrity, of which this Note is centrally concerned, protects the creator's work from being altered or mutilated.[30] In both the Berne Convention[31] and VARA,[32] such modification must result in prejudicial harm to the author's honor or reputation.[33]

After concluding that then-existing U.S. law sufficiently granted artists the minimal attribution and integrity rights required by Berne, the United States adhered to the Convention.[34] As a member, it would seem that the United States would have had to comply with the moral rights requirements of Berne.[35] Yet whether we have done so is of ongoing debate.[36] A year after United States adherence to Berne, Congress enacted the Visual Artists Rights Act.[37] This time frame suggests that Congress was not primarily spurred on to enact VARA in order to comply with Berne

28 *See id.* art. 6*bis*(1). Another generally referred to moral right is the right of disclosure. It is "the right to decide when and in what form the work will be presented to the public." JOYCE ET AL., *supra* note 13, §7.07[A] at 611.

29 *See* JOYCE ET AL., *supra* note 13, § 7.07[A] at 611.

30 *See id.*

31 *See* Berne Convention, *supra* note 27, art. 6*bis*(1).

32 *See* 17 U.S.C. § 106A(a)(3)(A).

33 Under VARA, there is also the explicit requirement that the defendant act intentionally in altering the work. *See id.* ("[T]he author of a work of visual art shall have the right to prevent *any intentional* distortion, mutilation, or other modification of that work . . . .") (emphasis added). There is no such explicit state of mind requirement in the Berne Convention. *See* Berne Convention, *supra* note 27, art. 6*bis*(1) ("[T]he author shall have the right to . . . object to *any* distortion, mutilation or other modification . . . .") (emphasis added). Despite these distinctions between Berne Conventon moral rights and VARA, at the time of VARA's enactment at least some members of the House of Representatives were under the impression that VARA's grant was "analagous" to that of the Berne Convention. *See* H.R. REP. No. 101-514, at 5 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6915, 6915 ("These rights are analgous to those protected by Article 6*bis* of the Berne Convention; which are commonly known as 'moral rights.'").

34 *See* Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, § 3, 102 Stat. 2853 § 3(b) (1988) ("The Provisions of the Berne Convention, the adherence of the United States thereto, and satisfaction of United States obligations thereunder, *do not expand or reduce* any right of an author or a work, whether claimed under Federal, State, or the common law . . . .") (emphasis added).

35 Congress reasoned that contract and unfair competition laws, among others, sufficiently amounted to the minimal moral rights requirements for Berne adherence. *See* H.R. REP. No. 101-514, at 7-8, *reprinted in* 1990 U.S.C.C.A.N. 6915, 6917-18 ("While some (chiefly motion picture directors and screenwriters) argued that adherence to Berne required the enactment of new laws, the vast majority of those using [sic] adherence contended that existing laws, both Federal and State, statutory and common, were sufficient to comply with the requirements of the Convention. The Congress agreed with the latter viewpoint . . . .") (citations omitted).

36 *See* Damich, *supra* note 26, at 945-46.

37 Pub. L. No. 101-650, 104 Stat. 5128 (1990) (codified at 17 U.S.C. §§ 101 , 106A, 113(d), 301(f)).

requirements. And since VARA is for the most part protective of artists rather than distributors and subsequent owners, it does not seem likely that the inspiration for VARA was intensive lobbying by non-artists groups. Rather, it appears that VARA was enacted, at least in part, because Congress was getting back into the business of granting limited monopolies to artists in order to promote the progress of the arts and to enhance the public welfare.[38] The relevance of VARA, despite numerous positive and negative critiques of it,[39] lay in the policy reasons for its enactment. It signals Congress' willingness to protect "authors" and their "writings" in order to continue to encourage the creation of works. That Congress could take that first step in the arena of moral rights suggests at a minimum the possibility of further steps, especially considering the seemingly purist motivation for VARA.[40]

One of the sources of VARA's substance was the spate of state visual artists rights statutes enacted prior to VARA. By the late 1980s, a number of states had artists rights laws that granted certain moral rights.[41] While they differ in degree of protection granted,[42] they all essentially limit protection to visual rather than audio, audiovisual, or literary works,[43] and grant forms of attribution and integrity.

[38] *See infra* Part III.B.

[39] *See, e.g.*, Damich, *supra* note 11; Damich, *supra* note 26; Colleen Creamer Fielkow, *Clashing Rights Under United States Copyright Law: Harmonizing an Employer's Economic Right with the Artist-Employee's Moral Rights in a Work Made for Hire*, 7 DEPAUL-LCA J. ART & ENT. L. 218 (1997); Robert A. Gorman, *Federal Moral Rights Legislation: The Need for Caution*, 14 NOVA L. REV. 421 (1990).

[40] *But see* JOYCE ET AL., *supra* note 13, § 7.07[D] at 632 (restating the position held by some that the motivation for Congress's enactment of VARA *was* to more fully comply with Berne, and that VARA's enactment was an implicit acknowledgment by the legislators that their pronouncement in 1989 was not entirely forthright).

As for the possibility of extending VARA to other areas, the official word from Congress at the time of VARA's enactment was that any extension would have to be considered separately. *See* H.R. REP. NO. 101-514, at 9, *reprinted in* 1990 U.S.C.C.A.N. 6915, 6919 ("[T]he bill's scope should be limited to certain carefully defined types of works and artists, and . . . if claims arising in other contexts are to be considered, they must be considered separately."). That Congress took a careful, limiting approach to drafting a bill that appeared to go against U.S. copyright law's strong economic influence lends support to the view that VARA *was* enacted to ensure Berne compliance.

[41] For an overview of most of these state statutes see COPYRIGHT OFFICE REPORT, *supra* note 16, at 96-103.

[42] California, for example, protects works from all mutilation, *see* CAL. CIV. CODE § 987 (West 1997), while New York protects works from being *displayed* in their mutilated form, *see* N.Y. ARTS & CULT. AFF. LAW § 14.03 (McKinney 1996).

[43] *But see* MASS. GEN. LAWS ANN. ch. 231, § 85S(b) (West 1997) (including within its purview any "photograph, audio or video tape, *film*.") (emphasis added). This appears to be the only artists rights law extending to film authors. As of this writing, there were no recorded cases involving this provision.

B. *Criticism of VARA's Scope of Protection*

There are a number of arguments in support of VARA's limited horizontal scope. Since works of visual art, as defined in the Copyright Act,[44] include personal works generally produced by the lone artists in her *atelier*, there is the barely feasible argument that works of a primarily commercial nature, unlike paintings, should be barred from protection.[45] Along similar lines is the suggestion that moral rights should not be extended because it would upset established business practices. For example, the billion dollar publishing and entertainment industries would be sent into a downward spiral.[46] More credible is the argument that authors of "visual art" are most deserving of moral rights protection because the resulting works tend to be the sole copy; that is, they are irreplaceable.[47] Finally, and perhaps most persuasively with respect to motion pictures and other audiovisual arts, is the argument that works of "visual art" are generally not produced in collaboration. Rather, they are the result of individual efforts. If protection extended to collaborative works, the argument runs, large-scale inefficiency would result because each collaborator would have a moral rights claim.[48] This Part discusses, in turn, each of these arguments against extending VARA to encompass motion pictures, concluding that none stands up to rigorous analysis.

[44] *See* 17 U.S.C. § 101 (1994) (listing paintings, drawings, prints, certain sculptures, and certain still photographs as protectable) (definition of "work of visual art").

[45] *See* H.R. REP No. 101-514, at 9, *reprinted in* U.S.C.C.A.N. 6915, 6919 (finding cause to deny motion pictures protection because the markets in which films are commercially exploited require modifications to the works, while the types of works protected generally do not require modification to retain their commercial value); LEAFFER, *supra* note 2, § 8.28[B] at 279 ("Works not covered [by VARA] include . . . works destined for commercial purposes . . . .").

[46] *See* H.R. REP NO. 101-514, at 9, *reprinted in* U.S.C.C.A.N. 6915, 6919 ("Granting these artists the rights of attribution and integrity might conflict with the distribution and marketing of these works."); COPYRIGHT OFFICE REPORT, *supra* note 16, at 155 ("Due to the fact that almost two thirds of the motion pictures made by Motion Picture Association members lose money, motion pictures must be 'adapted to meet the particular needs of each of these delivery systems.'") (citations omitted).

[47] *See* H.R. REP. NO. 101-514, at 9, *reprinted in* U.S.C.C.A.N. 6915, 6919 ("Motion pictures and other audiovisual works are generally produced and exploited in multiple copies. . . . In contrast, the works of visual art covered by [VARA] are limited to originals: works created in single copies or in limited editions. . . . Further, when an original of a work of visual art is modified or destroyed, it cannot be replaced. This is not the case when one copy of a work produced in potentially unlimited copies is altered.").

[48] *See id.* ("By contrast, those who participate in a collaborative effort, such as an audiovisual work, do not typically own the economic rights. Instead, audiovisual works are generally works-made-for-hire. Granting these artists the rights of attribution and integrity might conflict with the distribution and marketing of these works.") (citation omitted); LEAFFER, *supra* note 2, § 8.28[C] at 281 ("[A]n expansive moral rights concept, presenting a constant threat of legal challenge, brought by any one or more collaborators would tend to undermine . . . economic expectations . . . ."). *See generally* Gorman, *supra* note 39.

1. Commercial Nature of Motion Pictures

VARA tends to deny protection to works destined for commercial uses.[49] Motion pictures are considered destined for commercial consumption.[50] But this is a spurious categorization. What art is not commercial? Painters create works in preparation of gallery shows, the purpose of which is to sell the paintings. This is no different, no less commercial, than a film being created in order to be shown in movie theaters. The commercial nature of the work should not bear on authors securing federal moral rights. If the work's degree of commericial*ness* determines VARA's scope, then VARA contradicts itself; it also runs afoul of the Constitution.

It is contradictory for a law that grants personal, *noneconomic* moral rights, to withhold those rights on *economic* grounds. In addition, Congress' power to grant moral rights is controlled by the Copyright Clause of the Constitution and the Supreme Court's constitutional rulings in regard to it. As far back as *Bleistein v. Donaldson Lithographing Co.*,[51] our copyright law has not subjected commercial art work, including advertisement art, to a nonprotectability status, *just because it was commercial.*[52] In any event, it should be evident today, if it was not in 1903, that all works of art are advertisements in the sense that they contribute to the notoriety and worth of the author's entire *oeuvre.* In addition, deciding what is commercial would be just as demanding on the courts as determining whether a work, on the merits, promotes "the progress of Science and the useful Arts,"[53] a determination *Bleistein* prohibited the courts from making.[54]

2. Burden on Billion-dollar Industries

Another relatively weak argument in support of limiting the scope of protectable works under VARA is that expanding it to

49 *See supra* notes 44-45 and accompanying text. Note also that generally the works expressly not protected (e.g., applied arts, magazines, newspapers) may, simplistically, be deemed *more* commercial than works protected (e.g., paintings, drawings, sculptures). *See* 17 U.S.C. § 101 (1994) (definition of "work of visual art"). Perhaps the bar on "commercial" works is based upon a mere assumption that harm to such commercial work, such as advertising art, is less likely to be "prejudicial" to the creator's "honor or reputation." This does not, without more, justify an outright bar. It is over-inclusive.

50 *See* 17 U.S.C. § 101 ("A work of visual art does not include . . . any motion picture . . . .") (definition of "work of visual art").

51 188 U.S. 239 (1903).

52 As Justice Holmes wrote,"[a] picture is none the less a picture and none the less a subject of copyright that it is used for an advertisement." *Id.* at 251.

53 U.S. CONST. art. I, § 8, cl. 8.

54 *See Bleistein*, 188 U.S. at 251 ("It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits.").

copyrightable materials such as literary works and motion pictures would place too great a burden on those industries.[55] This is merely smoke and mirrors. Just because there *may* be a substantial effect on currently existing business practice is no reason to say that the change should not be adopted. Regardless, this hypothetical substantial effect, arguably, would be precisely the purpose of applying moral rights to these industries: to give the author greater protection, specifically with regard to her personal expression. If the artist is to be afforded greater rights, then it is likely, though not inevitable, that the interests of publishers and motion picture distributors will be lessened. The question is: is this a worthy outcome?

What the publishers and distributors will lose is precisely what the authors will retain: the right to control subsequent alterations of the unique personal expression of the author, regardless of who owns the work. Leaving publishers aside,[56] subsequent motion picture owners, that is, distributors, will have to alter their dealings with motion picture makers. For example, under VARA, moral rights are waivable.[57] Distributors would then have to pay that much more for valid waiver from the maker of the motion picture.[58] Whether moral rights are waivable or not, however, distributors would merely be forced to negotiate with the creator of the motion picture over the creation of altered versions for ancillary markets. For example, the distributor might have to agree that the motion picture author would be responsible for creating the television version or the airplane version of the film. In fact, this is presently not uncommon with motion picture directors,[59] as opposed

55 *See supra* note 46 and accompanying text.

56 This Note is concerned primarily with moral rights for authors of motion pictures, not moral rights for authors of literary works. Clearly, some of the arguments for the one may overlap, perhaps substantially, with arguments for the other.

57 *See* 17 U.S.C. § 106A(e)(1) (1994).

58 The issue of waiver of moral rights was of such concern to Congress that VARA included a provision directing the Register of Copyrights to conduct a study on the effects of waiver. *See* Visual Artists Rights Act of 1990, Pub. L. No. 101-650 § 608. The findings of the resulting Copyright Office Report were inconclusive due to the relative "infancy" of federal moral rights legislation in the United States. REPORT OF THE REGISTER OF COPYRIGHTS, WAIVER OF MORAL RIGHTS IN VISUAL ARTWORKS at Executive Summary ¶ 8 (1996). However, the results of a Copyright Office survey of some 1000 artists indicated that the waiver of moral rights provision in VARA amounted to an "'escape clause' for buyers." *Id.* ¶ 5. This Note does not take up the issue of the effects of the waiver provision.

In other Berne Convention countries moral rights are generally inalienable. *See supra* note 22 and accompanying text.

59 *See* DONALD E. BIEDERMAN ET AL., LAW AND BUSINESS OF THE ENTERTAINMENT INDUSTRIES 391-92 (3d ed. 1996) (recounting DGA arbitration involving director Warren Beatty, arising out of his agreement with a film studio concerning his right to edit the television version of *Reds* (Paramount Pictures 1981)).

Such deals are usually between the director and the producer. When the producer

to independent producers.

The business practice that would be turned topsy-turvy would be distributors having a free ride on the backs of creators—not an unenviable result. Distributors would be forced to pay for rights properly belonging to the creator. And it would not necessarily be so bad for the distributor since it is likely that its interests would be aligned with those of the creator.[60] That is, while the distributor may wish to exploit the work in television or on airplanes, so might the author. Since the distributor's interest in the work stems to some extent from its appreciation of the work, and therefore the creator's abilities, the distributor should be happy to have the creator's services for the creation of the television or airplane version. All they have to do is negotiate the terms of the deal.

One of the purposes of both the Copyright Act of 1976 and VARA was to advance the standing of creators,[61] no doubt in order to ensure that creators are adequately encouraged to create works in the first place, as the Constitution contemplates.[62] If moral rights are granted to authors of motion pictures, Congressional and Constitutional intent are satisfied, at least if the side effects are not too burdensome on our major arts industries. Forcing distributors to negotiate can hardly be too upsetting; and the advantages, the encouragement of the creation of more and varied works, are incalculable.

3. Irreplaceability

A more substantial argument against extending moral rights to motion picture authors involves the physical nature of the works. Singular works that are not readily copyable—without losing most of what makes them unique—such as paintings, are indeed irreplaceable. Everyone—owner, author, and the public—loses out should such a work be altered or mutilated. Motion pictures and

sells the film to the distributors, the producer's obligations to third parties run with the film. *See id.* ("'ABC [Television] could not acquire from Paramount any greater rights than Paramount had acquired from [the producer,] Beatty.'") (quoting Warren Beatty/JRS Prods., Inc. v. Paramount Pictures Corp. (DGA Case No. 1738, 1985) (Edward Mosk, Arb.)); *see also supra* note 16.

60 *See* COPYRIGHT OFFICE REPORT, *supra* note 16, at 74 (noting that creators have sound economic reasons for forging an alliance with distributors and would not be inclined to exercise their moral rights unreasonably).

61 *See generally* H.R. REP. No. 101-514, at 5 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6915, 6915 ("'The theory of moral rights is that they result in a climate of artistic worth and honor that encourages the author in the arduous act of creation.'") (quoting *The Visual Artists Rights Act of 1989; Hearings on H.R. 2690 Before the Subcomm. on Courts, Intellectual Property, and the Admin. of Justice of the House Comm. on the Judiciary*, 101st Cong. 3 (1989) (statement of the Hon. Ralph Oman, Register of Copyrights) [herinafter *VARA Hearings*]).

62 *See infra* Part III.B.

other works for which mechanical and chemical reproduction results in near perfect copies,[63] may be altered or even destroyed, but the copies retain the essence of the original.[64] Therefore, the argument concludes, there is no need to extend the right of integrity to these works.

This reasoning is suspect. It is premised on the belief that the original of the protected works embodies the spirit of the creator, that the original is what the creator worked upon most closely, and that any reproduction will not retain that spirit.[65] This makes sense with respect to works such as paintings, for which no means of reproduction can adequately retain the creative spark and spirit of the creator. Hence, harm to the original is a loss that is irreplaceable. With respect to motion pictures, because hundreds of prints are made of each film, loss to any one of them is no great loss, the argument runs, since the other prints—due to near flawless mechanical reproduction—remain extant. This reasoning, however, confuses the original with the copy,[66] with respect to motion pictures. Motion picture have an original that is also the singular embodiment of the work and is also irreplaceable—the negative. The hundreds of prints exhibited in movie houses are prints, or reproductions, of the negative. It is difficult to argue—and the House Report does not so try—that the process by which motion picture copies are made results in retention of the creator's spirit while the process by which copies of paintings are made does not. The House Report merely states this as a conclusion. In the end, loss of the original (motion picture negative or painting) is an irreplaceable loss. Copies, or prints, of paintings are as irrelevant to preservation of the work as are the copies of motion pictures.[67]

In addition, VARA extends protection not only to works such

63 Motion pictures are shot on negative film, like most still photographs. Final versions, the prints exhibited in movie theaters, are positive prints made from the edited original negative. *See* KRIS MALKIEWICZ, CINEMATOGRAPHY 164-66 (2d ed. 1989). The negative cut is like a sculptural cast from which multiple nearly identical copies may be made.

64 *See* H.R. REP. No. 101-514, at 12, *reprinted in* 1990 U.S.C.C.A.N. 6915, 6922 ("'Accordingly, the physical existence of the original itself possesses an importance independent from any communication of its contents by means of copies. . . . Were the original defaced or destroyed, we would still have the copies, we would all know what the work looked like, but, I believe, we would all agree that the original's loss deprives us of something uniquely valuable.'") (quoting *VARA Hearings*, *supra* note 61, at 3 (testimony of Professor Jane C. Ginsburg)) (omission in original).

65 *Id.* ("The original or few copies with which the artist was most in contact embody the artist's 'personality' far more closely than subsequent mass produced images.").

66 *See, e.g.*, 17. U.S.C. § 202 (1994) ("Ownership of a copyright . . . is *distinct from* ownership of any material object in which the work is embodied.") (emphasis added).

67 For example, where the original or negative is lost, the quality of subsequent copies would be diminished because those copies would have to be made from existing *copies*, rather than from the original.

as paintings, but also to limited edition print collections such as lithographs and photographs. Motion pictures are created in virtually the precise manner used to create still photographs: negative film is shot and from it prints, or copies, are made.[68] The rationale for protecting paintings is difficult to extend to photographs and the fact that still photograph protection extends only to series of 200 or less prints seems an unlikely ground for distinguishing photographs from motion pictures. The only concrete distinction is that from most motion picture negatives *more than* 200 prints are made.[69] That is, precisely setting the number at 200 removes the mainstream motion picture from VARA's scope. The arbitrariness of this number suggests that irreplaceability is not the strongest argument against excluding motion pictures from protection.

4. The Collaborative Art Conundrum

The primary argument against extending moral rights to authors of motion pictures is that they are generally collaborative works, with numerous contributors.[70] To grant a right of integrity, for example, to the artists contributing work to the creation of motion pictures would open the door to claims from virtually every creative member of a film crew. Would not the production designer, who is primarily responsible for the look of everything that goes before the camera, and the cinematographer, who marshals the lighting, frames the shots, and controls the movement of the camera, have viable claims against any party who edited the film for television or panned-and-scanned it for videocassette distribution?[71]

---

68 *See* MALKIEWICZ, *supra* note 63, at 50.

69 However, more than 200 prints are generally made for traditional, Hollywood exploitation. Independent and other motion pictures generally have far fewer than 200 prints made, at least for their initial releases. For a concise recap of all motion pictures, studio and independent, in release each week, including the number of prints in release, see any issue of *Weekly Variety* ("Domestic Box Office").

70 *See supra* note 48 and accompanying text.

If only two or three contributors are responsible for the work, joint authorship would be applicable. *See* 17 U.S.C. § 201(a) ("Copyright in a work protected under this title vests initially in the author *or authors* of the work.") (emphasis added). Joint authorship could apply to works with numerous collaborators, not just two or three, but all of the economic inefficiencies of communal ownership would arise. Joint authorship is analyzed in Part VI, *infra*.

71 Actually, they probably would not have meritorious claims because standard film production agreements between creative personnel and the production company or producer state explicitly that the relationship is deemed "work for hire." *See supra* note 16. If the work is for hire, then under the Copyright Act, the actual creator is not deemed the author. *See* 17 U.S.C. § 201(b). This precludes the actual creator from being eligible for all that the law confers on "authors," such as moral rights. *See* 17 U.S.C. § 106A(a) ("[T]he *author* of a work . . . .") (emphasis added).

Nevertheless, there may be situations where the work does not qualify as "for hire." In addition, moral rights generally are inalienable, *see supra* note 22, though not yet in VARA. In any event, this Note proposes that independent producers, not cinematographers or production designers, be deemed "authors" and be granted moral rights.

The argument is that the more moral rights claimants, the greater the likelihood that the public will be denied access to works. Assuming moral rights are waivable,[72] a distributor hoping to exploit a film in the videocassette market would need waiver from the *creators*, even though the distributor would be purchasing the rights from the copyright *owner*, because transfer to videocassette would require altering the image.[73] If the cinematographer feels his reputation would be harmed because his compositions would be garbled in the transfer to video, he has veto power over the deal. Granting any author such veto power may work to deny the public access to works.[74]

There are numerous responses to these claims. Perhaps the most straightforward is that the definition of audiovisual art is not limited to motion pictures.[75] If the big problem with granting moral rights to authors of audiovisual works is that audiovisual arts are generally collaborative arts, then what of the solo practitioner who creates her audiovisual works entirely on her own? If the work is a film, she writes, edits, directs, acts, photographs, etc.[76] What if the audiovisual work is not a film, which on the whole is expensive

---

72 *See supra* notes 57-58 and accompanying text.

73 This is panning-and-scanning. It is essentially re-photographing only the center portions of the wide screen movie image in order to fit it into the smaller television screen. *See* COPYRIGHT OFFICE REPORT, *supra* note 16, at 47-48. For a clear, concise description of panning-and-scanning and other common technological alterations to motion pictures, see *id.* at 39-61.

74 *See* LEAFFER, *supra* note 2, § 8.28[C] at 281 ("[A]n expansive moral rights concept, presenting a constant threat of legal challenge, brought by any one or more collaborators would tend to undermine . . . economic expectations."); *cf.* William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 327 (1989) ("The answer suggested by economic analysis is that, contrary to intuition, [moral rights] reduce the incentive to create *by preventing the author or artist from shifting risk to the publisher or dealer.*") (emphasis added).

75 It includes, for example

> works that consist of a series of related images which are intrinsically intended to be shown by the use of machines or devices such as projectors, viewers, or electronic equipment, together with accompanying sounds, if any, regardless of the nature of the material objects, such as films or tapes, in which the works are embodied.

17 U.S.C. § 101 (definition of "Audiovisual works"). This language obviously is not meant to be limited to motion pictures.

76 There are thousands of such works made each year, primarily by film students but also by professionals, especially in the documentary and experimental fields. These are generally films less than 30 minutes in length. *See* EDMOND LEVY, MAKING A WINNING SHORT 5-10 (1994). But there are also notable feature length films, both documentary and fictional, made by these solo practitioners. Jon Jost, who generally produces, directs, writes, photographs, and edits his feature length dramatic works, was the subject of a retrospective at New York's Museum of Modern Art, and is included in an encyclopedia of film. *See* JAMES MONACO ET AL., THE ENCYCLOPEDIA OF FILM 286 (1991).

for the solo practitioner, but rather a video, or slides synchronized to music, or an installation piece?[77] Surely these works are part of our cultural heritage and are clearly as personal as the works protected by VARA; they do not necessarily entail threats to big business operations; and generally they do not have hundreds of copies made of them. Yet they are denied protection. It is not the audiovisual component but the collaborative component that is the problem. Hence, an audiovisual work with a lone creator should be protected.

If VARA's bar to audiovisual works is logical at all, it is because feature-length, collaboratively-made dramatic motion pictures fall within the meaning of audiovisual art. They are the true target of the ban upon audiovisual works. These motion pictures are the most economically significant audiovisual art,[78] and distributors' exploitation of these works must be protected from a cinematographer's veto power.[79]

There are two responses to this. First, Congress could amend the language of VARA to include works of audiovisual art *other than* feature motion pictures. In one fell swoop the problem outlined above, of production designers and editors claiming integrity rights, disappears. Second, less onerous and more responsible, Congress could simply include all works of audiovisual art, including feature motion pictures, and let the problem turn on what the word "author" means. Congress could attempt to limn a special definition of "author of works of audiovisual art" by, for example, limiting the number of potential authors; or, Congress could leave it to the courts. As will be discussed more fully below, at least with respect to films created by independent producers, those producers alone should be deemed authors for moral rights purposes, thus eliminating the collaborative art conundrum that stands in the way of extension of moral rights protection to the authors of collaboratively made feature films.

Another response to the collaborative art conundrum is to look to other collaborative arts for guidance. Several commenta-

77 If the number of short films made by solo practitioners each year runs in the thousands, the number of such videos (whether home videos, fictional pieces, or documentaries) may be incalculable given the extent to which portable, consumer video cameras have entered U.S. cultural life.

78 These are motion pictures that play in movies houses across the country. They are produced in the standard mode with separate director, editor, producer, production designer, etc. While not as numerous as short films and videos made each year, these films are the most visible and wide-reaching.

79 *See* H.R. REP. NO. 101-514, at 9 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6915, 6919 ("Granting these artists the rights of attribution and integrity might conflict with the distribution and marketing of these works.").

tors have analyzed theater art in this respect.[80] Noting that in the theater the author of a work is always the playwright despite the sometimes substantial creative contributions of directors and actors not only to the production but to the script, John Kernochan has viewed theater as a useful model and starting point for solving the collaborative art conundrum with respect to feature films.[81] Essentially, the theater-as-institution places authorship in one party, the playwright, thus eliminating any potential problems arising from collaborators claiming authorship and thus moral rights. Theater, of course, is neither visual art,[82] thus coming within the bounds of VARA, nor audiovisual art.[83] Yet based on its model of a sole author, the collaborative art conundrum should not bar theatrical authors from securing federal moral rights protection.

The rationales for excluding motion pictures and their authors from moral rights protection is dubious. That motion pictures are commercial in nature is irrelevant, and the bar on this ground amounts to being just short of unconstitutional.[84] The fear that extending VARA would upset crucial industries and ultimately work as a disincentive to distributors to continue to engage in that worthy endeavor, is also unfounded,[85] if not irrelevant.[86] More substantial, but not wholly convincing, is the issue of ir-

80 *See, e.g.*, John Kernochan, *Moral Rights in Theatrical Productions: A Possible Paradigm*, 17 COLUM.-VLA J.L. & ARTS 385 (1993); Susan Etta Keller, *Collaboration In the Theater: Problems and Copyright Solutions*, 33 UCLA L. REV. 891 (1986).

81 *See* Kernochan, *supra* note 80.

82 In section 101 of the Copyright Act ("definitions"), a "'work of visual art'" is defined positively, *see* 17 U.S.C. § 101 ("A 'work of visual art' is . . . ."), and negatively, *see id* ("A work of visual art does not include . . . ."). Nothing approaching theater falls under either provision. "Motion picture[s]," however, are expressly listed as not being works of visual art. *See id.*

83 *See id.* ("Audiovisual works"); *supra* note 75 and accompanying text.

84 *See supra* Part II.B.1.

85 *See* Landes & Posner, *supra* note 74, at 327. That argument holds that distributors will no longer distribute due to the high costs exacted by moral rights, and that without distributors, creators will be dissuaded from producing, since there will be no one to distribute their works. This view has the horse before the cart. Granting creators more control over their works will result in the creation of more works. The problem is that distributors will find their business *less* remunerative—but not entirely eliminated—and will be forced either to leave the field or to bite their tongues and curse their bad luck. If they take the former route, other distributors will step in to fill the void. Though the business will be less profitable than for their predecessors, for the new distributors it will still be a viable business—provided authors continue to create works for distribution. If present distributors take the latter route, they will simply operate at a smaller profit. It seems unlikely that they will leave a profitable business on principle.

86 *See supra* Part II.B.2. The Constitution is concerned with promoting the creation of works. *See* U.S. CONST. art. 1, § 8, cl. 8; *infra* Part III.B. To the extent it is concerned with distributors, it is due to an interest in the works reaching the public. Implicitly, then, distributors will simply have to compete for the right to distribute the works. *But see* Harper & Row Publishers, Inc. v. Nation Enters., Inc., 471 U.S. 539, 558 ("By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create *and disseminate* ideas.") (emphasis added).

replaceability of works of visual art as opposed to perfectly, mechanically reproduced motion pictures.[87] But inclusion of photographs and other limited edition works casts doubt on this argument.[88] Finally, the collaborative art conundrum disappears if authorship of motion pictures can be granted to a single person or limited number of people. Producers are viable candidates for sole author status of motion pictures.

III. Producorial Authorship of Motion Pictures

Before attempting to define what independent producers are and to explain why they should be deemed authors of motions pictures for moral rights purposes, it is necessary to explore who properly may be deemed a motion picture author. The Constitution suggests that producers may not only be eligible for authorship status, but that they may be its most appropriate candidates.[89] Though this Part argues for producers generally, Part V cuts back slightly on the argument, concluding that only *independent* producers should be granted moral rights protection.

There are two places from which to begin the argument. The first is constitutional law. The second is a theoretical doctrine, the incentive theory of copyright, that attempts to explain the purpose of our copyright laws.

A. *Authorship and The Constitution*

Copyright law begins with the Constitution, which states that "Authors" may be granted limited monopolies, that is, copyrights, in their "Writings."[90] The Supreme Court has endeavored to define who an "author" is and what a "writing" is, and Congress, in promulgating copyright law, has chosen to defer to the Court rather than attempt its own definitions of these terms.[91] Relying on a form of literary parallelism, the Court has not defined what an "author" is so much as defined it in relation to what a "writing" is.[92] Hence, an "author" is someone who creates a "writing."

87 *See supra* Part II.B.3.

88 *See id.*

89 *See infra* Part III.B.

90 U.S. Const., art. I, § 8, cl. 8.

91 This is strongly implied given the fact that through numerous amendments to and revisions of our copyright laws, Congress has abstained from defining these crucial terms.

92 *See, e.g.*, Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53 (1884). There the Court, in deciding the issue whether photographs are capable of being "writings," stated: "We entertain no doubt 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*." *Id.* at 58 (emphasis added). A writing is that which an author creates.

For nearly a century, through case law decisions[93] and Congressional revision of the copyright law,[94] it has been well-settled that motion pictures are writings. Therefore, motion picture authors are people who create motion pictures. The problem to overcome in arguing that certain film producers should be deemed "authors" for moral rights purposes, is determining whether these producers *create* motion pictures. This is where the incentive theory of copyright is helpful.

B. *Authorship and The Incentive Theory of Copyright*

The incentive theory of copyright strongly supports viewing producers as authors for moral rights and copyright purposes because it interprets the Copyright Clause[95] as being ultimately concerned with encouraging the creation of works, rather than being ultimately concerned with quality, quantity, or degree of originality of works of art.

The Copyright Clause empowers Congress "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[96] The incentive theory of copyright interprets this language to mean that the ultimate purpose of copyright law is to benefit the public.[97] Copyright law, by granting authors limited property rights in their works, encourages authors to create where they otherwise might not for fear of not obtaining a worthwhile return on their emotional, psychic, and pecuniary investment.[98] With authors creating works, the public benefits[99] in two ways: immediately, because the works are in existence and readily available for consumption—though the public will pay a premium for access, namely what the author asks; and later, because the works, after the copyright term has expired, fall to the

93 *See, e.g.*, Edison v. Lubin, 122 F. 240 (3d Cir. 1903) (holding that a motion picture depicting the launching of Kaiser Wilhelm's yacht was copyrightable), *appeal dism'd*, 195 U.S. 625 (1904).

94 The most recent overhaul of U.S. copyright law was the Copyright Act of 1976, in which Congress made clear that motion pictures were copyrightable. *See* 17 U.S.C. § 102(a)(6) (1994) ("Works of authorship include . . . motion pictures . . . .").

95 U.S. Const., art. I, § 8, cl. 8.

96 *Id.*

97 *See* Joyce et al., *supra* note 13, § 1.05[A] at 15 (describing the incentive theory as "designed to produce an optimum *quantity* of works of authorship and thereby enhance the public welfare.") (emphasis added).

98 *See* Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) ("The immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor.").

99 *See id.* at 156 ("But the ultimate aim [of our copyright law] is, by this incentive, to stimulate artistic creativity for the general public good.").

public domain where the public may consume free of charge.[100] Hence, the purpose of copyright law is to make works available to the public. This is consistent with the Constitutional goal "To promote the Progress of Science and useful Arts."[101]

Under this view, copyright law is concerned primarily with the creation of works. And, given the ultimate purpose, that of allowing the public to build upon those works, it can be argued that quantity more than quality is the preeminent, though not sole, concern.[102] Hence, whether constitutional law or the incentive theory of copyright is the starting point, determining authorship of motion pictures turns on who creates them, or who is most pivotal in bringing about their creation. The party most responsible for the creation of works, that is, the author, is the party we want to encourage.

Arguments that directors and writers are most responsible for the creation of motion pictures are generally concerned with the aesthetic creation of the motion picture. But creative input is but one factor determining authorship for copyright purposes.[103] These arguments are premised on the assumption that the more creativity, the more the party is the author.[104] These arguments are concerned with aesthetic authorship not legal authorship. Legal

[100] Public consumption of works here means two things. First, it means that others are free to build upon works that have fallen to the public domain, and thereby make new works of art that contribute to the commonweal. However, in this situation, only that which is original expression of the author is copyrightable. *See* 17 U.S.C. § 102 (1994). This bars the subsequent author from co-opting the public domain material upon which her derivative work is based as her own copyrightable expression. *See* 17 U.S.C. § 103(b) ("The copyright in a . . . derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material."). This first meaning might be called derivative work public consumption. Second, public consumption of works here means consumerism. Once a work has entered the public domain, only distribution costs stand between copies of the work and the consuming public. Hence, if there is adequate demand for the work, the market will produce much lower costs due to competition among distributors. This may be called reproduction public consumption.

[101] U.S. CONST., art. I, § 8, cl. 8.; *see also* Mazer v. Stein, 347 U.S. 201, 219 (1954) ("The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance the public welfare through the talents of authors and inventors in Science and useful Arts.").

[102] The work still must be sufficiently "original" or it is not worthy of copyright protection. *See infra* Part III.C.

[103] *See* Feist Publications, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991) (listing independent creation and authorship as the other requirements.)

[104] For example, the director is considered the author of a film because she is the most creative. In the United States, this view is known as the "auteur theory." French in origin, *see, e.g.*, Francois Truffaut, *A Certain Tendency of the French Cinema*, CAHIERS DU CINÉMA IN ENGLISH, I (1966), at 30, *reprinted in* MOVIES AND METHODS 224 (Bill Nichols ed., 1976) (originally published in CAHIERS DU CINÉMA, no. 31 (Jan. 1954)), in the 1960s it was imported to the United States by New York critic Andrew Sarris, *see, e.g.*, Andrew Sarris, *Notes on the Auteur Theory in 1962*, FILM CULTURE (Winter 1962-63), *reprinted in* FILM THEORY AND CRITICISM 527 (Gerald Mast & Marshall Cohen eds., 3d ed. 1985), who championed such legends as Orson Welles and Jean-Luc Godard, *see id.* at 539-40.

authorship does not rely so heavily on quantity of creative input: Indeed, legal authorship requires only minimal creativity.[105]

C. *The Originality Requirement*

Originality is a constitutional requirement for any author seeking copyright protection.[106] In *Feist Publications, Inc. v. Rural Telephone Service Co.*, the Court clarified the law regarding the originality requirement. To be original, and thus be copyrightable, the work must be (1) independently created, (2) by an author, and (3) it must possess "at least some minimal degree of creativity."[107] Hence, *Feist* adds to the definition of "author" by, typically, clarifying the definition of "writing." Independent creation simply means not copied.[108] Since "author" is what needs defining, it is not helpful as a defining term. Therefore, producers are eligible for authorship status if they fulfill the creativity requirement.

Under the *Feist* formulation, *the work* must posses creativity.[109] It does not require the author to be the progenitor of that creativity. Therefore, an author may be someone who is responsible for the work possessing *de minimis* creativity.

This may seem odd, but it is in fact consistent with various provisions of our copyright law. First, our laws allow for transferability of rights.[110] Hence, a person contributing no creativity may own a copyrighted work due to a transfer of ownership.[111] Of course, transfer of ownership does not confer authorship status; it merely makes the transferee the owner of the copyright.[112] Sec-

[105] *See Feist*, 499 U.S. at 345 ("To be sure, the requisite level of creativity is extremely low; even a slight amount will suffice. The vast majority of works make the grade quite easily, as they possess some creative spark, 'no matter how crude, humble or obvious' it might be.") (quoting 1 M. NIMMER & D. NIMMER, COPYRIGHT § 1.08[C] [1] (1990)).

[106] *See Feist*, 499 U.S. at 345.

[107] *Id.*

[108] The independent creation requirement goes more to the issue of infringement, with which this Note is not concerned. Infringement turns on whether the copy is substantially similar to the original. If it is, and the alleged infringer can be shown not to have independently created her work, i.e., copied from the plaintiff's work, then there is infringement. *See generally* LEAFFER, *supra* note 2, §§ 9.2-9.5 at 285-95.

[109] "Original, as the term is used in copyright, means only that *the work* was independently created by the author (as opposed to copied from other works), and that *it* possesses at least some minimal degree of creativity." *Feist*, 499 U.S. at 345 (emphasis added).

[110] *See* 17 U.S.C. § 201(d)(1) (1994).

[111] *Id.* ("The ownership of 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.").

[112] The distinction between initial ownership of copyright, that is, authorship, and subsequent ownership of rights, is not insignificant. *See* Community for Creative Non-Violence v. Reid, 490 U.S. 730, 737 (1989) (stating that initial authorship status "determines not only the initial ownership of . . . copyright, but also the copyright's duration, § 302(c), and

ond, the work-for-hire doctrine allows for "author"-ship, not mere ownership, to vest in an employer who contributes zero creativity to a work.[113]

Therefore, determining who the author of a motion picture is need not turn on whether the person actually contributed creatively. In any event, some producers do contribute the requisite *de minimis* creativity. The threshold is not great.[114] A producer who makes script suggestions potentially satisfies the creativity requirement.[115] In addition, producers generally have final cut authority, which impliedly includes the right to re-edit, and thus reshape the director's version of the film.[116]

Hence, certain producers meet the copyright authorship requirements. However, not all producers are created equally. Some, namely studio producers, should not be deemed authors, while others, namely independent producers, should be so deemed. Before arguing the case for independent producers rather than studio producers, it is important to put into perspective the worth of motion pictures in general and independent films in particular. What is at issue in granting moral rights to certain

the owners' renewal rights, § 304(a), termination rights, § 203(a), and right to import certain goods bearing the copyright, § 601(b)(1).") (citing 1 M. NIMMER & D. NIMMER, NIMMER ON COPYRIGHT § 5.03[A], pp. 5-10 (1988)).

113 *See* 17 U.S.C. §§ 101 (definition of "work made for hire"), 201(b). This raises the question whether such work-for-hire authorship is itself constitutional on *de minimis* creativity grounds, an issue beyond the scope of this Note.

114 *See supra* note 105 and accompanying text.

115 In *Community for Creative Non-Violence v. Reid*, 846 F.2d 1485 (D.C. Cir.) (R. B. Ginsburg, J.), *aff'd on other grounds*, 490 U.S. 730 (1989), a sculptor agreed to create for a nonprofit organization a sculpture that would be appended to a base created by the organization. The court found that the sculpture was not made for hire, but strongly suggested that the organization's minimal creativity in making the base would be sufficient to confer joint authorship status. *See id.* at 1495 ("The facts thus far found by the district court, however, indicate that [the sculpture and stand combined work] may indeed qualify as a joint work.").

Most descriptions of a film producer's job note that producers generally shape scripts with writers with suggestions and even contribute directly to the finished scripts. *See, e.g.*, David Puttnam, *The Producer, in* THE MOVIE BUSINESS BOOK 34-43 (Jason E. Squire ed., 2d ed. 1992) [hereinafter MOVIE BUSINESS BOOK]. There's even an entire book aimed at explaining the "art" of producing. *See* BUCK HOUGHTON, WHAT A PRODUCER DOES: THE ART OF MOVIEMAKING (NOT THE BUSINESS) (1991).

116 *See* DGA BA, *supra* note 16, § 7-1501 (guaranteeing employer-producer final cut and creative authority over director). Only a handful of directors have the bargaining power to supersede general industry practice and obtain final cut over their films. *See* COPYRIGHT OFFICE REPORT, *supra* note 16, at 70 ("[T]he number [of directors] who are able to gain substantial control over the final product and its post theatrical exhibition form is estimated to be only 5 percent.") (citing *Berne Convention, Hearings on S. 1301 and S. 1971 Before the Subcomm. on Patents, Copyright and Trademarks, Senate Judiciary Comm.*, 100th Cong. 529 (1988) (testimony of Steven Spielberg)).

The DGA BA provides that producers generally must give interested directors a right of consultation on later editions of the film, for example, for airline and TV release. *See* DGA BA, *supra* note 16, § 7-513.

producers is not merely protecting our cultural history, but ensuring its growth.

IV. THE WORTH OF AMERICAN CINEMA

This Note is concerned primarily with the status under VARA of motion pictures, rather than all of the other arts, audiovisual or otherwise, that were excluded from moral rights protection.[117] According to the Constitution, the copyright laws should operate to benefit the public.[118] Indeed, the House Report accompanying the bill that would become VARA[119] indicates Congress' belief that VARA would help protect our cultural heritage and ensure its future growth.[120] Motion pictures, by far, are of the greatest social, cultural and economic significance to this country,[121] as they are to any political-cultural entity.[122] The following section further discusses the relevance of motion pictures in general and then distinguishes mainstream Hollywood cinema from independent cinema.

A. *American Cinema and the Independent Influence*

Certainly by the time of the emergence of the studio system in the 1910s and its solidification in the 1920s,[123] the movies were the preeminent signifier of U.S. culture, both to the U.S. and to the

117 For example, theater art was excluded. For a brief discussion of theater arts and moral rights, *see supra* notes 80-81 and accompanying text.

118 *See supra* Part III.B.

119 H.R. REP. NO. 101-514 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6915.

120 *Id.* at 6, 6916 ("'Artists in this country play a very important role in capturing the essence of culture and recording it for future generations. It is often through art that we are able to see truths, both beautiful and ugly. Therefore, I believe it is paramount to the integrity of our culture that we preserve the integrity of our artworks as expressions of the creativity of the artist.'") (quoting 135 CONG. REC. 2199 (daily ed. June 20, 1989) (statement of Rep. Markey)).

121 Numerous pages have been written on the social import of motion pictures in the United States. *See, e.g.*, ROBERT SKLAR, MOVIE-MADE AMERICA: A CULTURAL HISTORY OF THE MOVIES (1975); MICHAEL RYAN & DOUGLAS KELLNER, CAMERA POLITCA: THE POLITICS AND IDEOLOGY OF CONTEMPORARY HOLLYWOOD FILM (1988).

122 In addition to SKLAR and RYAN & KELLNER, *both supra* note 121, numerous other books have discussed the socio-cultural-political relevance of films. *See, e.g.*, BILL NICHOLS, IDEOLOGY AND THE IMAGE (1981); NARRATIVE, APPARATUS, IDEOLOGY (Philip Rosen ed., 1986); HOME IS WHERE THE HEART IS: STUDIES IN MELODRAMA AND THE WOMAN'S FILM (Christine Gledhill ed., 1987); ROBERT LAPSLEY & MICHAEL WESTLAKE, FILM THEORY: AN INTRODUCTION (1988); ROBERT STAM, SUBVERSIVE PLEASURES: BAKHTIN, CULTURAL CRITICISM, AND FILM (1989); ANTONIA LANT, REINVENTING WOMEN FOR WARTIME BRITISH CINEMA (1991). Perhaps the most influential work on the cultural significance of narrative feature film in general and Hollywood movies in particular is Editors of Cahiers du cinéma, *John Ford's* Young Mr. Lincoln, *in* NARRATIVE, APPARATUS, IDEOLOGY, *supra*, at 444 (originally published as Young Mr. Lincoln, *texte collectif*, CAHIERS DU CINÉMA, no. 223 (Aug. 1970); first English-language version published in SCREEN (U.K.) (Autumn 1972), at 5).

123 *See* DAVID COOK, A HISTORY OF NARRATIVE FILM 195-98 (1981); DAVID BORDWELL ET AL., THE CLASSICAL HOLLYWOOD CINEMA: FILM STYLE & MODE OF PRODUCTION TO 1960 87-153 (1985).

rest of the world.[124] Even today, years after the rise of television, the movies are our primary audio-visual cultural heritage. Congress recognized as much when it enacted the National Film Preservation Act of 1988.[125] The rest of the world envisions the U.S. as much by the movies we export as the politics we wage. From a political standpoint, our future is our past and the movies are both. They are our most essential art.

Generally speaking, U.S. cinema can be divided into two groups: mainstream, Hollywood studio films and independent cinema.[126] The distinction is crucial. The latter, though less widely seen, has a great influence on the former and significantly shapes and defines its contours. Thus, the independent cinema indirectly defines our cultural heritage.

There is debate as to what exactly is "independent cinema,"[127] but it is fair to say that independent cinema is produced without Hollywood studio money or aesthetic influence. Independent cinema also strongly influences Hollywood. There are numerous examples of talented directors, producers, and actors being plucked from the independent cinema and placed within the Hollywood paradigm.[128] This may be called direct influence. There are equally numerous examples of modes of cinematic discourse and subject matter plucked from the independent cinema and employed by the mainstream cinema, though usually in a less radical manner.[129] This is indirect influence.[130] Whether direct or indirect

124 *See* Editors of Cahiers du cinéma, *supra* note 122 (arguing that classical Hollywood cinema is the sine qua non of cinematic cultural imperialism).

125 Pub. L. No. 100-446, 100 Stat. 1782 (codified as amended at 2 U.S.C. §§ 178-178L (1988)).

126 This distinction is valid if limited to consideration of feature-length dramatic works, which are most prevalent. On the fringes of that behemoth are documentary films, both feature length and short, as well as experimental cinema, consisting mostly of short films. For an overview of American avant-garde cinema, see P. ADAMS SITNEY, VISIONARY FILM: THE AMERICAN AVANT-GARDE 1943-1978 (1979). For an overview of American documentary cinema, see RICHARD MERAN BARSAM, NONFICTION FILM: A CRITICAL HISTORY (1973).

127 *See, e.g.*, MARK LITWAK, DEALMAKING IN THE FILM AND TELEVISION INDUSTRY 154 (1994) (noting that allegedly "independent" productions are nothing less than studio fare and expressing amazement at the plethora of types of producers found in most movie credits today).

128 *See* Gerson Swanson Interview, *supra* note 15 (stating that there are "loads of examples," such as actor Richard Edson, who went from the independent films of Jim Jarmusch to *Good Morning, Vietnam* (Silver Screen Partners III/Touchstone Pictures 1987)).

129 A large body of literature has developed around the Hollywood aesthetic system, or language, of filmmaking, and its alternatives. *See, e.g.*, BORDWELL ET AL., *supra* note 123.

130 An example of aesthetic influence is the "jump cut." It was first popularized by radical usage in *Breathless* (Georges de Beauregard/Société Nouvelle de Cinéma 1960), but has became relatively standard in Hollywood filmmaking. An example of subject matter influence is the spate of Hollywood dramas and comedies produced for the black audience, that might not have occurred if *She's Gotta Have It* (40 Acres & a Mule Filmworks 1986) had not been made and been a success.

the influence is strong and meaningful. Much of the cultural, ideological, and political significance that is the system known as the mainstream Hollywood cinema draws on the independent cinema. Put differently, much of the content of Hollywood as cultural heritage and ideological signifier derives from independent cinema. The U.S. cinema, primarily through mainstream Hollywood production, is of crucial economic and cultural importance and the independent arm of U.S. cinema is the preeminent creative source of subject matter and stylistic development for the mainstream cinema.

The progenitors of the independent cinema are a diverse group, a fact that contributes to its significance and influence. Some independent films are created primarily at the urging and drive of the director, or writer-director.[131] Others are created by producers.[132] The one group that by definition cannot create independent cinema are the Hollywood studios. The group most responsible for creating independent cinema are independent producers. Distinguishing them from their Hollywood counterparts is the focus of Part V.

V. INDEPENDENT VERSUS STUDIO PRODUCERS

It will be helpful to discuss the motion picture production and distribution industries and how the prevailing modes create different categories of works and producers. From that discussion, a framework will emerge for arguing that the independent producer and her film is distinct from the studio producer and her movie and why the one, but not the other, should be considered an "author."

A. *Production and Distribution Standards*

1. History and Practice

Most U.S.-produced feature films are made under the aegis, both financial and aesthetic, of a major Hollywood studio. Until the 1950s, studios were clearly defined. They produced, distributed, and exhibited motion pictures.[133] After *United States v. Para-*

131 For a humorous and informative account of one producer's dealings with a who's who of the most prominent writer-director's of the independent cinema, see JOHN PIERSON, SPIKE, MIKE, SLACKERS AND DYKES: A GUIDED TOUR ACROSS A DECADE OF AMERICAN INDEPENDENT CINEMA (1995).

132 *See* Puttnam, *supra* note 115, at 35 ("With few exceptions I generally either conceive of my stories or find them in newspapers. *Chariots of Fire, Local Hero* and *The Killing Fields* all had their origins in newspaper[s] . . . .").

133 *See supra* note 123 and accompanying text. This era, roughly from the late 1910s to the early 1950s, is popularly known as the Golden Age of American cinema, and academi-

mount,[134] the definition began to shift, primarily because that case, an antitrust action, forced the studios to divest themselves from their exhibition interests.[135] For several decades after *Paramount* the studios concentrated on distribution, leaving production and exhibition to other entities.[136] But the break from production and exhibition was not total. With respect to exhibition, the studios have increasingly returned to that field, especially since the 1980s.[137] With respect to production, the studios remained thoroughly involved but more as financiers than actual assembly line production houses,[138] as they had operated from the 1910s to the early 1950s.[139]

Since the 1950s and especially since the 1970s, the studios have maintained their prominence in the public eye as distributors.[140] Their production role, however, has shifted. The head of production has become a "green lighter," responsible primarily for agreeing to furnish production funds. Unlike under the studio system, the films often originate with producers outside the studio

cally referred to as the Classical Hollywood Cinema. *See* BORDWELL ET AL., *supra* note 123. The studio system was very much the creation of film pioneers like Thomas Ince and Adolph Zukor, who popularized such traits of the classical system as assembly line production methods, contract actors, directors and producers, and vertical integration (whereby one company produced, distributed, and exhibited films). *See* COOK, *supra* note 123, at 196-98; SKLAR, *supra* note 121, at 141-57.

134 334 U.S. 131 (1948).

135 *See id; see also* SKLAR, *supra* note 121, at 274 ("By 1954 the five major [studios] had divested themselves of ownership or control of all their theaters.").

136 *See* COOK, *supra* note 123, at 399; SKLAR, *supra* note 121, at 287.

137 The combination of *United States v. Loewe's, Inc.*, Equity No. 87-273, 1980 WL 1963 (S.D.N.Y. February 27, 1980), which modified the *Paramount* decision by allowing a distribution company to produce films, and the Reagan Administration's inattentiveness to the matter, *see* BIEDERMAN ET AL., *supra* note 59, at 610, ushered in the current era of renewed vertical integration in the film industry.

138 *See generally* Schwartz, *supra* note 14; Norman H. Garey, *Elements of Feature Financing, in* MOVIE BUSINESS BOOK, *supra* note 115, at 139.

139 For much of the classical Hollywood period, production at the studios was organized in roughly the following manner. The studio chief, e.g., Louis B. Mayer at MGM, had on salary a head of production who supervised various salaried producer-unit heads who, in turn, supervised the actual production of the films. *See* BORDWELL ET AL., *supra* note 123, at 320. Ideas for movies would begin with any of these parties, and the studio chiefs were as likely to come up with the idea as the head of production or a unit producer. *See id.* ("With a project in mind, [head of production Irving] Thalberg and the selected associate [producer] would assign a writer, a director, and the leads. The associate then took over following the rewrites until a script was ready for Thalberg's revisions."). All were part of the studio and in no way independent of it. The studios also had on the payroll salaried directors, writers, and actors any of whom might initiate the story idea but all of whom would, in doing so, be acting within the scope of their employment. Virtually all major directors, actors, and screenwriters were contractual employees of the studios. All of their creative work was work for hire. *See* COPYRIGHT OFFICE REPORT, *supra* note 16, at 22-23 ("Under the studio system, large numbers of script writers, directors, actors, and other creative contributors were retained on a salaried basis, and the studio accordingly would have been regarded as the employer for hire.").

140 At the cinema, the very first image of most U.S. films is the familiar studio trademark, such as that of Columbia Pictures, Universal Pictures, Warner Bros.

proper.[141] Many of these producers have development deals[142] and first-look option agreements[143] with the studios regarding project funding.[144] These producers obtain their studio deals primarily because of their track records, which consist of studio financed or aesthetically influenced pictures. Since Hollywood studios are primarily concerned with mass entertainments that appeal to the broadest public sector, and since these producers are concerned with maintaining their often plush relations with the studios,[145] both parties have an interest in projects that are neither independent in aesthetics nor in subject matter. They are, rather, interested primarily in the familiar.[146] Therefore, these producers, today's "Hollywood producers," are independent only in the sense that they are no longer salaried employees as in the classical era.[147] Their lack of independence is underscored by the fact that their studio development deals often include ample studio funding for offices, project development, various perks and large advances,[148] which results in something akin to high salaried employment.[149]

Independent producers are different from studio producers in ways that support the argument that independent producers should be deemed "authors" for moral rights purposes. For example, the financing and distribution schemes are strikingly different for studio versus independent films. In addition, the creative input

141 *See* David V. Picker, *The Film Company as Financier-Distributor, in* MOVIE BUSINESS BOOK, *supra* note 115, at 187.

142 *See* LITWAK, *supra* note 127, at 15 (describing the various types of development deals, the common denominator of which is that studios pay producers money in exchange for projects that the studio may produce).

143 *See id.* (describing first look deal as studio getting "first crack[ ] at the producer's projects.").

144 *See* Gerson Swanson Interview, *supra* note 15.

145 *See* LITWAK, *supra* note 127, at 15 (noting the benefits that befall a producer with an "exclusive" development deal, such as office space, secretaries, development assistants, and a hefty advance).

146 As evidence of this studio trend to focus on the familiar in order to guarantee audiences, thus reducing the number of engaging new works, notice the sharp increase over the past 15 years in the production of sequels, prequels, and television show adaptations.

147 *See* LITWAK, *supra* note 127, at 154 ("Producers are often referred to as 'independent producers.' While they may not be tied exclusively to one studio, most are hardly independent. They may rely heavily upon studios for financing and distribution of their pictures.").

148 *See supra* note 145 and accompanying text.

149 According to the agency factors used for determining whether there is an employee/employer relationship, *see* Community for Creative Non-Violence v. Reid, 490 U.S. 730, 751-52 (1989) (listing relevant agency factors), thus resulting in a work for hire arrangement under the Copyright Act of 1976, *see* 17 U.S.C. § 101 (definition of "work made for hire") (1994), producers with development deals would be hard pressed to claim independent contractor status. Of course, given the fact that the Copyright Act expressly makes certain work relations, like those involved in the creation of motion pictures, work for hire relationships, these producers would have a doubly difficult time arguing that they are independent. *See id.*

and day-to-day supervision of the creation of the work point up relevant distinctions. Overall, independent producers exercise a degree of control over and direct relation to the resulting film that far exceeds the mostly financial relation most studio producers have with the resulting films. All of these differences underscore the fact that not all producers should have "authorship" claims for moral rights purposes. Producers with a greater degree of independence are more likely to require moral rights in order to find it psychically, let alone financially, worthwhile to continue making movies. In addition, producers with a closer, more personal relationship with the films are more likely to have their honor or reputation harmed by subsequent modifications to their works.

2. Difference Between Independent and Studio Production

The most fundamental differences between independent and studio production involve financing and distribution schema. The studio film is financed by studio money. The producer raises funds for the film essentially via her preexisting development deal with the studio. In this sense, the financing for production is already in place when the producer enters the development deal. Even if the studio declines to exercise its option, the producer often turns to another studio for financing. Under this scheme, the resulting film is always already a studio, rather than producer, property.

Independent film financing, on the other hand, may arise in any number of ways, none of which is by a deal with a studio. In fact, arguably, the film industry itself distinguishes independent from studio films on funding grounds, such that should the film be produced with studio money, it is generally not considered independent.[150] Independent films are financed by the producers themselves. Sometimes it is from their own pockets,[151] other times it is from friends and business associates willing to risk venture capital.[152] Still other times, it is from fringe motion picture investors who are not distributors or aligned with a studio. Perhaps the most common source of funding for independently produced films is presales, whereby some entity, usually a distributor of limited

150 *See* Gerson Swanson Interview, *supra* note 15 ("Basically, if the studio finances your film, it's not an independent film.").

151 One of the most relayed stories involved actor-director-producer Robert Townsend and the making of *Hollywood Shuffle* (Conquering Unicorn Productions 1987). Townsend ran out of money during production of this low-budget, independent film. In order to continue, he financed production on his various credit cards. *See* MONACO ET AL., *supra* note 76, at 539.

152 *See* Henry Jaglom, *The Independent Filmmaker*, *in* MOVIE BUSINESS BOOK, *supra* note 115, at 75, 76 (recounting how he raised $1 million "through dentists and doctors investing $25,000 to $50,000 apiece.").

scope[153] or a film sales company,[154] finances a portion of the film's budget in exchange for various rights.[155]

There are several distinctions between pre-sales and straight studio financing under development deals and first-look agreements. First, the rights granted to sales companies and limited scope distributors are not as extensive as under the studio approach, by which the studio owns all distribution rights in the resulting film.[156] Second, under the presales approach, because the independent producer can pick and choose from numerous potential presales entities, the independent producer is in a better position regarding control of the finished work as compared to the position she would be in if one entity financed the entire project. For example, because the independent producer under the presales approach obtains only limited financing from several companies, no one company can own all rights in the film and each company is in a weaker position, because of its relatively small financial investment, to demand the right to alter the film after its completion.[157]

Distribution may be the most crucial distinction between independent films and their studio produced counterparts. As already noted, the studio-distributor always already owns distribution rights to the resulting work. Indeed, integral to the development deal is the studio-distributor's ownership of distribution rights. Because the very basis of the studio producer and studio-distributor relationship is the understanding that the distributor will own distribution rights,[158] no haggling over distribution terms occurs between the producer and the distributor. They are, in reality, the same entity with respect to distribution. In other words, the quintessence of a studio film is that the studio is the distributor from the moment it greenlights, or agrees to finance, production.

153 A coined phrase, essentially it means a distributor who obtains limited distribution rights rather than all distribution rights.

154 Sales companies sell or license distribution rights to local distributors. They are like middlemen between the owners of the films and the various distributors.

155 *See* LITWAK, *supra* note 127, at 220 ("These independently produced projects are often dependent on investors or pre-sale distribution deals (selling off various foreign-distribution rights) to finance production.").

156 *See* HARMON, *supra* note 15, at 89 (noting that on a standard distribution deal "[p]roducer grants the distribution company all rights to the picture, including the copyright.").

157 Because the studio and minor distributors have a stranglehold on U.S. distribution, *see supra* note 15, the presales companies are generally not U.S. distributors. Rather, they are foreign entities obtaining foreign rights. Hence, to obtain U.S. distribution, which is how the work will most immediately benefit the public welfare, the producer must still do battle with the U.S. studios.

158 *See* LITWAK, *supra* note 127, at 15 ("When a producer enters an EXCLUSIVE development deal, he agrees to distribute all his projects through one studio.").

By contrast, independent films are generally produced without firm U.S. distribution deals in place prior to completion of production.[159] As a result, when the independent producer, after completing the film, seeks distribution, she must negotiate with distributors. The distributor may be a minor or major, studio distributor. In either case, the distributor purchases, or licenses most rights in the film, including distribution rights.[160] All distributors demand the same terms: assignment to them of all rights and interest in the film in perpetuity.[161] The independent producer, then, will exchange all control and interest in the project for a negotiated sum. The only question is which distributor will offer the most money in return for the blanket assignment.[162]

In addition, the fact that production of independent films goes forward without pre-determined distribution, underscores the independent producer's more personal relationship with the project. While financial gain is certainly a relevant factor in spurring an independent producer to proceed with a project, it cannot be the sole determinant. If it were, these producers would not devote the time, energy, and money to creating films without first being assured that the works will find distribution.[163] Rather, these producers create films for something more than financial return. Indeed, given the dire chances of achieving any meaningful distribution and return on investment (of time, energy, and money), it is striking how many independently produced films are made each year. The motivations for such producers must extend beyond financial return to something akin or equal to the motivations of the very visual artists to whom VARA does grant moral rights.

Another significant difference between independent producers and studio producers involves their degree of creative contribution to, if not control of, their films. No doubt, during the classical period, the studio, through its production hierarchy, exercised tremendous creative control and made significant creative

159 *See id.* at 220 ("These independently produced projects *are often dependent on investors or pre-sale[s] . . . to finance production.* The producer then enters an acquisition agreement with a distributor for release of the picture.") (emphasis added).

160 *See supra* note 15.

161 *See id.*

162 At film festivals, where most independent films that ever find meaningful distribution find it, bidding wars may arise over the amount to be paid for the blanket assignment of rights from producer to distributor. *See* LITWAK, *supra* note 127, at 223. Bidding wars do not include *what rights* will be transferred, only *the amount to be paid* for the blanket transfer.

163 *See* Gerson Swanson Interview, *supra* note 15 ("I must have tracked thousands of films through development and production only to never hear from them again. If they were distributed, it was in Hungary, on video.").

contributions. In fact, it has been argued that the aesthetic authors of films made under the studio system were not writers, directors, or producers, but rather the juridical entities themselves, which, through the production system they had devised, imprinted their films with a kind of aesthetic insignia.[164] Hence, a Warner Bros. film, with it's tough guy characters and contemporary edge, were discernible from a Paramount picture, with its elegance and sophistication.

However, with the demise of the studio system after *Paramount*, came a new production structure,[165] which resulted in varied productions at each studio. The producers of studio films since the 1950s and especially since the 1960s: (1) develop projects with studio funding, and (2) do so with the aim, under their development deals, of obtaining studio financing.[166] Hence, the projects are devised and developed with the ultimate goal of meeting with studio approval and obtaining financing. Under this system, though producers may concoct the ideas or even the plots of projects, the usual way they arrive at viable projects worthy of development is through already fleshed out scenarios submitted by screenwriter agents or by story and idea pitches directly from writers. That is, the norm is for producers to select an already fleshed out project from a host of submissions. The progenitors of these films are the writers, idea pitchers, and directors. Once a project is on the development track, again with the ultimate goal of pleasing the studio greenlighter, the producer shapes the project by paying—with studio funding—for various script drafts from any number of writers, and by attempting to put together an attractive "package" including director and actors.[167] To whatever extent these contributions may be deemed creative, and to some extent surely they are, they are generally subject to the studio-distributor's final say. As a precondition to greenlighting, studios will ultimately decide which director, what actors, and which script elements remain.[168] Under this system then, the studio-distributor, rather than the studio pro-

164 *See generally* THOMAS SCHATZ, THE GENIUS OF THE SYSTEM: HOLLYWOOD FILMMAKING IN THE STUDIO ERA (1996).

165 *See* Picker, *supra* note 141, at 187 ("Since 1950 the major studios established in earlier years have had to seek new roles and functions for themselves within a changing industry.").

166 *See supra* notes 141-48 and accompanying text.

167 *See* Schwartz, *supra note* 14, at 6 (describing the studio producer as a "package producer" as compared to the independent, or "pure producer.").

168 *See* LOUISE LEVISON, FILMMAKERS AND FINANCING: BUSINESS PLANS FOR INDEPENDENTS 67 (1998) ("[T]he studio has total control over the filmmaking process. Should studio executives choose to exercise this option, they can fire anyone and hire anyone they wish.").

ducer, is the final arbiter of the key creative elements of a film. Independent producers, on the other hand, play a far more integrated role in the creative shaping of their films.[169]

Another significant difference is that independent producers, because they are less financially dependent on one studio greenlighter for production financing than are their studio counterparts, have more creative decision making power than studio producers, who may ultimately be vetoed by the studio-distributor. But creative control is often less an issue in the independent cinema because producers tend to be creatively aligned with the other creative personnel, primarily the writer and director. This is because the independent producer has more or less free rein in hiring these parties, and hence tends to choose people with whom she is likely to be aesthetically aligned.[170] The studio producer, on the other hand, must be content with the director, writer, or actor placed on the project by talent agencies or the studio itself.[171] Secondly, independent producers are generally project-oriented more than profit-oriented. Their primary concern is with making the best movie not necessarily the most profitable one.[172] Hence, the usual conflict between producers on the one hand and directors and writers on the other, tends to melt away with independent productions.[173]

Finally, studio producers, once their projects are greenlit, are more hands off during the production and post production phases of the project. There are two reasons for this. First, studio producers often do not possess the necessary skills to line produce films. Line producing is the actual management of every aspect of production, from securing locations and renting equipment to overseeing agreements and bookkeeping.[174] Rather, the studio producer, or studio, hires a line producer to perform that function.[175] The producer's role during production and post production is to oversee the line producer and make sure, essentially, that the film *the studio* wants made gets made. The independent producer, on the other hand, even if she hires a line producer, is on-hand to make sure that the film *she* wants made gets made. Second, especially if the producer has low stature from the studio's point of view, the studio producer's job, from the studio's point of view, is complete. The producer has brought the studio a project which effectively is now in the studio's hands and the producer's services are no longer required.[176] The studio hires line producers or other producing parties to "produce" the film. In contrast, there is no studio-distributor to play this role in relation to the independent producer. Overall, the independent producer is more closely a part of the creation of her film than is the studio producer to the creation of a studio film. This element of closeness between the creator and the work was one of Congress' rationales for protecting personal works.[177]

These differences between studio and independent producers point to a view of the studio producer as an employee who works for hire. Authorship in work-made-for-hire situations rests with the hiring party, here the distributor,[178] not the producer. Since the studio is the real force behind the creation of studio films, the studio producer is dispensable. What would be the adverse effects of not allowing *studio* producers to obtain moral rights? At worst, the studio producer would no longer produce and the studio would find others to fill their positions, resulting in slight inefficiency while the replacements are trained. Even if that did happen, since the studio is often more the creator than the studio producer,[179] denying moral rights to these producers would have at most negligible adverse effects. Studio producers should not be considered "authors."

Independent producers, on the other hand, are subject to no oversight. They are substantially their own masters and bear all of

169 *See generally* PIERSON, *supra* note 131; Puttnam, *supra* note 115.

170 This view is based upon my personal experience from working at Good Machine, Inc., an independent film production company.

171 *See* LEVISON, *supra* note 168.

172 *See supra* text accompanying note 163.

173 The producer's alignment with the key creative elements, namely director and writer, has practical basis as well. Often potential independent film investors will be concerned with a director's control over the resulting work (e.g., that the director will care only about art while the investor will be concerned primarily with profit). To ease that concern, an independent producer will stand as a negotiator of sorts by agreeing that the director will not have final cut and that most key creative decisions will require the producer's co-approval. The investor is contented because he is sure the director will not have the lone say and the director is happy because he cannot be trumped by an art-insensitive investor, only by the producer, with whom he is more creatively aligned. This appeared to be the approach taken by Good Machine, Inc., acting in its producorial capacity.

174 *See* LITWAK, *supra* note 127, at 155 ("The line producer is the person in charge of logistics for the shoot.").

175 *See id.* ("[The producer] will often hire a 'Line Producer' to work for him.").

176 *See* LEVISON, *supra* note 168, at 82 ("No matter who you are . . . , once the film gets to the studio, you can be negotiated to a lower position or off the project altogether. The studio is the investor, and it calls the shots. If you are a new producer, the probability is high that studio executives will want their own producer on the project.").

177 *See* H.R. REP. No. 101-514, at 12 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6915, 6922 ("[VARA is concerned with those works] 'with which the artist was most in contact . . . .'") (quoting *VARA Hearing*, *supra* note 61, at 4 (testimony of Professor Jane C. Ginsburg)).

178 *See* 17 U.S.C. § 201(b) (1994) ("In 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 . . . .").

179 *See supra* note 168 and accompanying text.

the risks.[180] They are indispensable. They meet the constitutional and statutory requirements of authorship, and are not barred from authorship claims on grounds of being employees. In addition, denying a grant of moral rights to certain independent producers could have more concrete adverse effects. As the hypothetical at the beginning of this Note describes, these producers often put themselves into the films,[181] often investing energy, time, and their own money in order to bring the projects to the public. If they lose the right of integrity, they may lose interest in creating these vital works. And there is no party to replace them, as is the case with studio producers. Independent producers should be considered authors for moral rights purposes.

But should independent producers be considered the sole authors of the motion pictures they produce? And if they should share it with others, as joint authors, "who [should] be included in the charmed circle?"[182]

VI. Producers, Directors, and Other Authorship Claimants

This Part is premised on the view that independent producers who are not employees, which many studio producers amount to, and who meet the other constitutional and statutory requirements of authorship, are authors of the motion pictures they create. From that premise, it is argued that, based on the incentive theory of copyright law, which sees copyright law as a means to enhance the public welfare by encouraging the *creation* of works of art,[183] these independent producers take precedence over the authorial claims of other parties and should be deemed the sole authors of their motion pictures. By locating authorship of these films in one person, the collaborative art conundrum disappears and the party most responsible for creating these films will, by obtaining moral rights in the resulting work, not be discouraged from creating films.

A. *Joint Authorship: Directors, Writers, and Producers*

Creation, not creativity is the key.[184] If nothing distinguishes a

180 In comparison, the studio producer bares little risk. *See* Litwak, supra note 127, at 15 ("Essentially, the overall development deal takes the financial risk of producing off a producer's shoulders and places it with the studio."). Litwak notes also that development deals tend to create *disincentives* to producers because the hefty advances are generally guaranteed whether or not the producer gets a film off the ground. *See id.* at 16.

181 This too was a rationale relied upon by Congress in extending moral rights to certain creators. *See supra* Part II.B.3.

182 Joyce et al., *supra* note 13, § 3.02[D] at 179.

183 *See supra* Part III.B.

184 *See supra* notes 109-15 and accompanying text.

director's claim for authorship from a producer's claim, they may be deemed joint authors.[185] But recognizing joint authorship begins the slippery slope towards having to recognize the collaborative art conundrum: the unwieldiness of allowing every creative contributor to a motion picture to claim moral rights in the work.[186] Since the amount of creative contribution is irrelevant to a claim of joint authorship,[187] if no other distinction can be drawn between directors and other creative contributors to a motion picture, then all creative contributors must be deemed authors and hence moral rights claimants. This, however, runs into the Congress' collaborative art bar. Locating authorship in a single person is the best chance for these culturally precious independent films to obtain moral rights.

One way to distinguish the director is to rely partially on the rationale supporting the argument for producorial claims of authorship, namely the party's galvanizing force. Like the producer who is the primary motivating and galvanizing force behind getting a film off the ground and getting it made, the director is *the* galvanizing force regarding all creative matters prior to final cut.[188] As with the producorial claim, if we want to reward those most responsible for creating works, directors are by far the most relevant claimant of all creative contributors.

However, equally important to the producorial claim for authorship is the producer's indispensability: without her, the film would not be made. Under this view, the director's claim is not well supported since the director is, ultimately, replaceable where the independent producer is not.

In one sense, the screenwriter is in a worse position than the director to a claim of joint authorship with the producer. The writer is not a galvanizing force in any way and the writer's position in relation to other creative crew members does not approach that of the director. In another sense, the writer may be on firmer ground than the director. How indispensable is a writer to a motion picture? To some, the writer is the most indispensable party because everything flows from the screenplay.[189] This argument

185 *See* 17 U.S.C. § 201(a) ("Copyright in a work protected under this title vests initially in the author *or authors* of the work.") (emphasis added).

186 *See supra* Part II.B.4.

187 *See supra* notes 109-15 and accompanying text.

188 From the directors' viewpoint, "all of the other creative participants place their trust in the director."). *See* Copyright Office Report, *supra* note 16, at 33 (citing *Berne Convention, Hearings on S. 1301 and S. 1971 Before the Subcomm. on Patents, Copyright and Trademarks, Senate Judiciary Comm.*, 100th Cong., 2d Sess. 480 (1988) (testimony of George Lucas)).

189 *See generally* Richard Corliss, Talking Pictures: Screenwriters in the American Cinema 1927-1973 (1974).

has much more force in a setting, admittedly not uncommon in Hollywood or the independent sector, where the script exists and the producer merely selects it to produce.

Here, it is necessary to distinguish between moral rights and copyrights. Thus far, no such distinction has been drawn because under the Copyright Act of 1976, to obtain either, one must be an "author."[190] However, the distinction ultimately turns on the difference between the actual author, or creator, and the legal "author." Moral rights, ostensibly, should fall only to the former since moral rights are essentially personal rights akin to the right of privacy.[191] A premise of the moral rights doctrine is that art is an extension of the artist into the world.[192] Under that view, since an "author"-in-law (through the works made for hire doctrine) does not actually create the work, this "author" should not be eligible for moral rights.[193] Hence, thus far there has been little need to draw out this distinction.

However, because directors and screenwriters, unlike producers, are not employers and thus not already "authors"-in-law, it is necessary to mark this distinction. As creators, directors and writers are proper candidates for moral rights, but the Copyright Act creates an untenable catch-22 even for the visual artists VARA seeks to protect. Moral rights, a personal right of the creator, extends only to "authors;" yet section 201(b) of the Copyright Act of 1976 allows employers, who create nothing, to be deemed "authors," excluding the creator from the personal right VARA is supposed to secure her.[194] Directors and writers, even in the view of their own guilds, create works for hire as employees of the producer.[195]

Hence, under the current law, even if directors and writers were to be included in the moral rights legislation, they would be in a bind since essentially they work for hire. As this catch-22 is under attack,[196] assume that the law is amended and moral rights extend *only* to the creator and not to the employer, even in a work for hire context. Under this hypothetical, directors, then, would

190 *See, e.g.*, 17 U.S.C. §§ 106A(a) ("[T]he author of a work of visual art shall have the right . . . .") (moral rights), 201(a) ("Copyright in a work protected under this title vest initially in the author . . . .") (copyrights), 201(b) ("In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author . . . .") (copyrights).

191 *See supra* Part II.A.

192 *See id.*

193 *See* Fielkow, *supra* note 39.

194 *Id.*

195 *See* DGA BA, *supra* note 16; Writers Guild of America Basic Agreement [hereinafter WGA BA].

196 *See generally* Fielkow, *supra* note 39.

turn to Congress for moral rights legislation on their behalf. Congress' response might be harsh but realistic: motion picture and television directors and writers already have moral rights. The Writers Guild of America Basic Agreement and the Directors Guild of America Basic Agreement, which are negotiated with and bind motion picture and television producers, each guarantee certain strong attribution rights and limited integrity rights.[197]

What most substantially differentiates producers from directors and writers is bargaining power. At first this may seem an absurd articulation considering that generally the latter two are viewed as the creative artists locked in battle with the money hungry producer. In fact, the field is a little more level than that, if not lopsided in favor of directors and writers. These groups have powerful guilds behind them which negotiate collective bargaining agreements on behalf of their members. The result of that strength has been certain guaranteed moral rights.[198] In addition, these Basic Agreements contain only the minimal requirements; the parties are free to negotiate beyond the agreements.[199]

Hence, while writers and directors negotiate with producers, even independent producers, they are guaranteed certain moral rights. The producer on the other hand, and especially the independent producer, has no such guild or collective bargaining strength.[200] In fact, when battling distributors, the scenario is quite grim for independent producers.[201] Those producers who resist the distributors usually revert to self-distribution.[202] These films are seen by the smallest fraction of people who would see them if they were distributed by even a minor distribution company, let alone a major one.[203]

197 *See* WGA BA, *supra* note 195, art. 8; DGA BA, *supra* note 16, arts. 7, 8.

198 *See id.*

199 *See supra* note 116 and accompanying text.

200 *See* LITWAK, *supra* note 127, at 154 ("The Producer's Guild is not recognized as a union or a guild by the studios. They consider producers part of management and have refused to enter into a collective-bargaining agreement . . . .").

201 Remember, studio producers do not have this problem because they produce directly under the aegis of the distributor-studio. In that context, the distributor-studio always already wins the battle because there is no battle to win. *See supra* notes 141-50 and accompanying text.

202 This is commonly referred to as four-walling. *See* HARMON, *supra* note 15, at 73. Whether because the independent producer is resisting distributors in order to retain the precious copyrights, or because the producer could not even obtain an offer from a distributor and is simply trying to get the film to the public, the situation is grim. *See id.* at 105-06 (stating the harsh reality many independent distributors face when they are unsuccessful in striking a deal with either a theatrical or video distributor).

203 *See id.* at 105 ("To produce a salable [low-budget] film . . . , be fully aware of the following: Your film won't be accepted by an independent distributor. Your film won't find an extensive domestic distribution.").

Finally, directors and writers who are unhappy with changes to their work made by producers, independent or studio, or distributors, can become producers, even if in name only. By doing so, these directors and writers are technically the employer, oddly, of themselves, and hence can circumvent the work-for-hire catch-22. They are now "authors." This is a route some directors and writers have taken.

This is not to argue that authorship should fall to anyone who is most responsible for getting a work made, irrespective of anything else. That party must still satisfy the originality requirement, which only some producers do. The purpose of limiting authorship status to one party rather than to all parties who contribute originality to a motion picture is to secure copyright, and hence, moral rights, for the person most responsible for creating works. This person will then feel amply protected and, hopefully, inspired to continue to create motion pictures, thus fulfilling the Constitutional goal of generating works for the public.

VII. Conclusion

Creation is not more important than creativity. They are on the same plane, at least with respect to motion pictures. Denial of moral rights to the independent producer is a denial of rights to a party likely to thrive with moral rights. The same reasons that propelled Congress to enact VARA in order to protect visual artists should persuade the government to extend moral rights to independent producers. No justifiable ground, short of the inefficiencies of collaborative art, bar extension to motion pictures. With authorship located in a single person, the most indispensable person with respect to the culturally significant independent cinema, the collaborative art problem subsides, and creativity *and* creation are rewarded.

*Stuart K. Kauffman**

* This Note is dedicated to my wife, Lisa Albin Kauffman, for two reasons: I would not have gone to law school without her urging and support; and the film contracts that she and other artists sign first alerted me to issues involving moral rights and motion pictures. I also would like to thank Professor William Patry, for his comments on an earlier draft of this Note, and for, well, teaching me copyright law. Finally, notwithstanding this Note, I am an auteurist at heart.