FILM LABELLING AS A CURE FOR COLORIZATION [AND OTHER ALTERATIONS]: A BAND-AID FOR A HATCHET JOB

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I. INTRODUCTION

"I just can not watch anymore . . . please I can't watch anymore."[1] This simple statement, by noted film director John Huston, encompasses the anger, pain, and frustration at his inability to protect the integrity and essence of his films.

Under United States law, the copyright owner of a "work made for hire"[2] is considered to be the author of that work.[3] Unfortunately for film directors like John Huston, unless they contracted for the retention of certain rights, the studio that finances the film, or its successor in interest, will be able to alter the work virtually in any way.

Most western European countries recognize the doctrine of moral rights, which protects an artistic author's rights in his or her work from unauthorized alteration or modification.[4] Currently, however, the United States copyright law does not provide for moral rights protection.[5] Although the United States has adopted some of the standards utilized by European nations, the concept of

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[1] Telephone Interview with Keith LaQua, Executive Director of the Artists Rights Foundation (Apr. 8, 1993). Mr. LaQua relates film director John Huston's reaction after Huston viewed the first few minutes of the colorized version of his legendary classic, "The Asphalt Jungle."

[2] 17 U.S.C. § 101 (1988) specifically considers motion pictures to be "work[s] made for hire."

[3] *See infra* note 52 and accompanying text.

[4] The term "moral rights" comes from the French term "droit moral" which refers to an artist's personal, rather than economic, rights in their work. *See, e.g.*, Daniel McKendree Sessa, Note, *Moral Right Protections in the Colorization of Black and White Motion Pictures: A Black and White Issue*, 16 HOFSTRA L. REV. 503, 504 n. 24 (1988) (citing Roberta Rosenthal Kwall, *Copyright and the Moral Right: Is an American Marriage Possible?*, 38 VAND. L. REV. 1, 18 (1985); Martin A. Roeder, *The Doctrine of Moral Right: A Study in the Law of Artists, Authors, and Creators*, 53 HARV. L. REV. 554, 578 (1940); Roberta I. Shaffer, *The Artist's Case for Droit Moral and Droit De Suite Continues*, 15 INT'L J. LEGAL INFO. 1, 5 (1987)).

[5] Thomas J. Davis, Jr., *Fine Art and Moral Rights: The Immoral Triumph of Emotionalism*, 17 HOFSTRA L. REV. 317, 318 (1989). *See infra* notes 105-19 and accompanying text.

acknowledging an artist's moral rights has been conspicuously absent.

Contingent to the moral rights doctrine is the ability of an author to disclaim his or her work if that work has been materially altered by the copyright owner. Artistic authors are concerned that the public may be unaware of material alterations and of the author's objections to those changes. This issue of public disclosure is an important argument for those seeking to have films that have been altered or modified labelled as such. The film labelling movement has gathered steam in recent years and the film industry has engaged Congress in a struggle to inform the public as to what viewers are actually seeing when they watch a film on home video or television.

Part II of this article will review the various types of film alterations most commonly used, specifically focusing on deletion and editing of material and colorization. Part III will discuss the United States' Copyright Act of 1976 and the Berne Convention in relation to the moral rights doctrine.[6] Part IV will look at recent developments in United States legislation and establish where films have been given some protection and where protection is lacking. This article also will discuss the current Congressional controversy over potential legislation about film labelling. Finally, this article will address the disagreement within the film industry on the film authorship and moral rights debate.

II. FILM ALTERATIONS

A. *Types of Alterations*

There are various ways that films can be altered. Some of the more commonly used techniques include colorization, letterboxing, panning and scanning, lexiconning, deletion of material, and digital replacement of images.[7]

Colorization[8] is a process that matches colors with the greyscale[9] of the black-and-white original and then alters the film frame

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[6] The Berne Convention for the Protection of Literary and Artistic Works, *open for signature* July 24, 1971, S. TREATY DOC. 27, 99th Cong., 2d Sess. (1986) [hereinafter Berne Convention].

[7] Janine V. McNally, *Congressional Limits on Technological Alterations to Film: The Public Interest and the Artists' Moral Right*, 5 HIGH TECH. L.J. 129, 132 (1990).

[8] Colorization is a trademark of Colorization, Inc., which is a Canadian company associated with Hal Roach Studios (the creator of the "Little Rascals" series). Anna S. White, Comment, *The Colorization Dispute: Moral Rights Theory as a Means of Judicial and Legislative Reform*, 38 EMORY L.J., 237 n.1 (1989) (citing Copyright Registration for Colorized Versions of Black and White Motion Pictures, 52 Fed. Reg. 23,443, 23,444 (1987)).

[9] The colors in a black-and-white film are represented by blacks, whites, and greys. A computer scans a videotape of the black-and-white film and determines what true colors

by frame.[10] An art director chooses a "key" frame and selects the colors for each part of that frame. This key frame is used as a standard for all the other frames in a particular scene.[11] The film's "palette" is thus re-created and a computer electronically overlays the new color scheme onto a videotape copy of the film.[12]

Letterboxing is the process by which a film, retains its original aspect ratio when it is viewed on television.[13] A dark band appears along the top and bottom of the screen, but the full movie theater image can be seen on a home television without any appreciable cropping of the original picture.[14]

Panning and scanning is a technique where the central characters in a scene are followed by a scanner which assures that those characters will appear in the middle of the screen and will not be cropped when the film is shown on television.[15] This system is used as somewhat of a substitute for letterboxing.[16]

Lexiconning alters the speed of a film, which can affect the total running time as much as six to seven percent. These changes are not very noticeable to the naked eye. If not monitored properly, however, lexiconning may extend beyond the acceptable level and affect the overall aesthetic composition of the film.[17]

Deletion of material from a film occurs when portions are edited or removed to allow for certain censorship requirements or television commercials. For instance, a film that is two hours in length will not fit into a two hour television time slot and provide

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should be used to replace the grey-scale tones. Dan Renberg, *The Money of Color: Film Colorization and the 100th Congress*, 11 HASTINGS COMM. & ENT. L.J. 391, 394 (1989).

10 McNally, *supra* note 7, at 133; *see also* James Thomas Duggan and Neil V. Pennella, *The Case for Copyrights in Colorized Versions of Public Domain Feature Films*, 34 J. COPYRIGHT SOC'Y 333, 336 (1987).

11 McNally, *supra* note 7, at 133.

12 Anne Marie Cook, Note, *The Colorization of Black and White Films: An Example of the Lack of Substantive Protection for Art in the United States*, 63 NOTRE DAME L. REV. 309, 323 (1988).

13 The Academy of Motion Pictures Arts and Sciences has set a projection standard for feature films of 1.85:1 where the image is 1.85 times as wide as it is high. Certain films with a more "panoramic" look may utilize aspect ratios as high as 2.35:1. In contrast, the National Television System Committee standard is 1.33:1. McNally, *supra* note 7, at 133 n.30 (citation omitted).

14 McNally, *supra* note 7, at 133 (citation omitted).

15 *Id.* at 133-34.

16 *Id.* at 134.

17 *Id.* at 134 n. 41 (citing UNITED STATES COPYRIGHT OFFICE, TECHNOLOGICAL ALTERATIONS TO MOTION PICTURES AND OTHER AUDIOVISUAL WORKS: IMPLICATIONS FOR CREATORS, COPYRIGHT OWNERS AND CONSUMERS, 12; 53 (1989)). In fact, the video version of director Barry Levinson's *Avalon*, which was widely acclaimed for its "languid, evocative cinematography," was time-compressed to make room for advertisements for films such as *Hudson Hawk* and *Look Who's Talking Too*. M.G. Lord, *Honey They Shrunk The Film!*, NEWSDAY, Aug. 4, 1991, at 38.

time for commercials; thus, the film must be edited.[18]

Finally, computer generation of images involves the insertion of people or objects into existing videotapes or films. This technique has been used to add famous personalities to older films.[19] Of these types of alterations, deletion of material and colorization have engendered the most heated public controversy.

B. *Deletion of Material*

In *Preminger v. Columbia Pictures Corp.*,[20] a New York court held that when a filmmaker grants the television rights to his work to another party he implicitly grants the rights to cut and edit the film.[21] Director and producer Otto Preminger complained that his film, "Anatomy of a Murder," was to be shown on television with several portions of the film edited out. The studio that owned the copyright to the film sold the rights to Columbia, who had an agreement with its licensee television stations allowing the stations to cut portions of the film for commercials.[22] Preminger sought an injunction to prevent this editing but the court denied his request.[23] The court, however, held that should the level of cutting and editing become so great as to become "mutilation" of the film, then Preminger may have a proper cause of action.[24] Thus, a director, without express contract reservations, cannot prevent minor editing of a work when it is to be shown on television.

A more drastic example of deletion of material occurred in *Gilliam v. American Broadcasting Co.*[25] *Gilliam* involved the British comedy group, "Monty Python," and a U.S. broadcast of special presentations of Python's half-hour series "Monty Python's Flying

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18 Generally, for a film to run in a two hour time slot on television, it can be no longer than ninety minutes, thus requiring cutting of twenty-five percent of the original length. Interview with Tony Lord, Independent Producer (July 7, 1993).

19 McNally, *supra* note 7, at 134. Also, recall in recent years the television commercials for Diet Coke that used current celebrities such as Elton John, Christie Brinkley, and Paula Abdul and "imaged" them into classic films to pair them with Louis Armstrong, James Cagney, and Humphrey Bogart, among others. *See* Stuart Elliot, *New Spots are Set for Diet Coke, Pepsi*, N.Y. TIMES, July 24, 1992, at D4; Debra Stuart Seibel, *Film Technology's Ability to Mix and Match Past and Present Divides Entertainment Industry*, CHI. TRIB., Dec. 30, 1990, at C1.

20 267 N.Y.S.2d 594 (Sup. Ct. N.Y.), *aff'd* 269 N.Y.S.2d 913 (1st Dep't 1966).

21 *Id.* at 599.

22 *Id.* at 600.

23 The court held that "the right to interrupt the exhibition of a motion picture on television for commercial announcements and to make minor deletions to accommodate time segment requirements or to excise those portions which might be deemed, for various reasons, objectionable, has consistently been considered a normal and essential part of the exhibition of motion pictures on television." *Id.* at 599-600.

24 *Id.* at 603.

25 538 F.2d 14 (2d Cir. 1976).

Circus." The court found that the American Broadcasting Company (ABC), successor to the broadcast rights from the British Broadcasting Corporation (BBC), had grossly altered the program by deleting approximately 27% of the material.[26] The court further held that ABC had "impaired the integrity of appellants' work and represented to the public as the product of appellants what was actually a mere caricature of their talents."[27]

Monty Python based its cause of action on the moral rights doctrine; but the court, while finding in favor of Monty Python, did not adopt a moral rights approach. Rather, the court granted relief founded in the economic rights of the author.[28] The court premised this approach on section 43(a) of the Lanham Act.[29] The edited program represented something that was markedly different from the original, yet ABC continued to project the work as that of Monty Python.[30]

Some commentators assert that, based on *Gilliam*, colorization of a black-and-white film protected by copyright is an infringement of that copyright.[31] This argument, however, is misplaced. The *Gilliam* court found that since alterations to the program represented a different product than the original, potential Monty Python fans might be driven away.[32] This resulted in unfair competition and economic injury, thus allowing the application of the Lanham Act.[33] Colorized films, on the other hand, have done very well financially, so there is seldom any economic injury to the author.[34] While the *Gilliam* decision may protect an author where his film has been substantially edited, it most likely provides no

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[26] *Id.* at 19.

[27] *Id.* at 25.

[28] American copyright law, as presently written, does not recognize moral rights or provide a cause of action for their violation, since the law seeks to vindicate the economic, rather than the personal, rights of authors. . . . [C]ourts 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, or the tort of unfair competition.

Id. at 24 (citations omitted).

[29] 15 U.S.C. § 1125(a) (1988). The statute provides in part:

Any person who, on or in connection with any goods or services, . . . uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact . . . shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

15 U.S.C. § 1125(a) (1988).

[30] Gilliam v. American Broadcasting Co., 538 F.2d 14, 24 (2d Cir. 1976).

[31] Sessa, *supra* note 4, at 514.

[32] *Id.* at 515.

[33] *Id.* at 514; *Gilliam*, 538 F.2d at 24.

[34] Sessa, *supra* note 4, at 515.

protection from colorization.[35]

C. *Colorization*

The process of colorization has sparked numerous debates with those who maintain respect for the original film arguing one side, and the "Ted Turners"[36] arguing the other. Economically speaking, the Turner viewpoint has much support. The well-known film, *Miracle on 34th Street*, grossed approximately $30,000 a year in its original black-and-white form for the Metro-Goldwyn-Mayer (MGM) video library. Once Turner purchased the rights to the film and released it in a colorized form, the film grossed $350,000 in the following two years.[37] However, although television viewing of a colorized film may be higher than that for the black-and-white version, it is not necessarily a long-term prospect.[38]

Companies such as Turner Entertainment Co. (TEC) will claim that their profits are proof of the public's desire to have access to colorized films.[39] Nevertheless, opponents of colorization refuse to be swayed and vocalize their distaste:

> Anyone who has seen colorized films must be struck by the curious laws that govern their physical universe. All skies are the same color of blue, all grass is the same color of green. Lips are usually the same dried-blood color and everyone appears to wear the same shade of Max Factor pancake make-up, which often glows as if radioactive.[40]

Thus, personal tastes and differences will cover the spectrum, but the central question remains: when one purchases the copyright to a black-and-white film, does this give him free reign to alter that film in any way he chooses, including colorization?

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35 *Id.* at 515-16.

36 Ted Turner is the owner of Turner Broadcasting Co. and Turner Entertainment Co., one of the world's largest entertainment conglomerates that uses and heartily supports colorization. *See* Renberg, *supra* note 9, at 395. Turner's companies own the copyrights to much of the vast MGM library that includes such classic films as *It's a Wonderful Life, 42nd Street, Arsenic and Old Lace, Key Largo, The Maltese Falcon, The Philadelphia Story,* and *Yankee Doodle Dandy. Id.* at 395-96.

37 Renberg, *supra* note 9, at 396.

38 For example, with *Miracle on 34th Street,* the colorized version reached 13.4 million viewers when first shown in 1985, but dropped to 8.7 million when shown again in 1987; this second figure is quite close to the original 8 million viewers reached when the black-and-white version was shown in the early 1980's. Renberg, *supra* note 9, at 396 n.32 (citing Easton, *Colorization Issue May Be Decided By Committee Today,* L.A. TIMES, Aug. 4, 1988, at 1).

39 Renberg, *supra* note 9, at 395.

40 Renberg, *supra* note 9, at 395 n.26 (quoting *Film Integrity Act of 1987: Hearings on H.R. 2400 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Judiciary Comm.*, 100th Cong., 2d Sess. (1988) (statement of Vincent Canby, film critic, N.Y. Times)).

Director John Huston, who co-authored and directed the film, *The Asphalt Jungle*, relinquished all rights to the film to MGM in 1948.[41] TEC purchased the rights to the film to colorize and re-release it. While TEC acquired the copyrights to the film from MGM in 1986, it did not acquire the "moral rights"[42] to Huston's work, as such rights do not currently exist under U.S. copyright law.[43]

After TEC colorized the film, it attempted to broadcast the work on French television. At this point, Huston's heirs and the co-author of the script, Ben Maddow, brought an action in the French courts to prevent TEC from showing the colorized version.[44] After lengthy appeals, the highest civil court in France, the Cour de Cassation, barred the showing of the colorized film, holding that Huston's moral rights in the black-and-white original version were being infringed by the new colorized version.[45] The court further held that French copyright law does not allow infringement of an artist's moral rights in the integrity of a work, and these rights attach to the author's person as personal property rights that are enforceable by the author's heirs.[46] Some believe that this decision has opened a "Pandora's Box" because anyone claiming authorship in a work can object to its altered showing, at least in countries recognizing moral rights. Most film directors, however, see this as a decisive victory in the struggle for the recognition of American artists' moral rights.[47]

III. U.S. Copyright Law & the Berne Convention

A. *The U.S. Copyright Act of 1976*

The 1976 Copyright Act,[48] based on the copyright clause of the U.S. Constitution,[49] provides protection for an author's economic rights to his or her work.[50] With the majority of films, how-

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41 Susan Wagner, *High Court Bars Showing of Colorized "Asphalt Jungle,"* Int'l Bus. Daily (BNA) (July 10, 1991).

42 *See supra* note 4 for a definition of the term "moral rights."

43 Wagner, *supra* note 40.

44 Jeffrey L. Graubart, *U.S. Moral Rights: Fact or Fiction?*, N.Y.L.J., Aug. 7, 1992, at 7 (citing Judgment of May 28, 1991, (Ste. "La Cinq" c. Angelica Huston et autres), Cass. civ., le ch., Arret 861 P (Fr.)).

45 Wagner, *supra* note 40.

46 *Id.*

47 *Id.*

48 Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified at 17 U.S.C. §§ 101-914 (1982)).

49 "The Congress shall have Power . . . 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." U.S. Const. art. I, § 8, cl. 8.

50 Renberg, *supra* note 9, at 396 (citing *Mazer v. Stein*, 347 U.S. 201, 219 (1954)).

ever, the copyright protections may not exist for the true author. Existing copyright law defines a film as a "work made for hire."[51] A director is treated as a hired hand, rather than the creative and artistic force behind the film. Under copyright law, therefore, the author of a film is the person or entity for whom the work was prepared, in other words, the producer or studio, not the director.[52] For the most part, the director, screenwriter, and cinematographer have no right to object to any use of the completed work, unless they have contracted for such a right. This contractual protection, however, will not save older films that have fallen into the public domain or films where the director was not savvy enough to retain these rights in his contract.[53] The right to colorize comes within the bundle of rights an author possesses and may transfer to others.[54] Further, in 1987, the Copyright Office of the Library of Congress decided to allow registration of a colorized film as a derivative work.[55] The Copyright Office also devised a set of criteria to determine whether a colorized work is sufficiently original to allow its registration as a derivative work.[56] Most commercially colorized films can meet all of the required criteria and can be

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[51] A work made for hire is defined as "a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work . . . ." 17 U.S.C. § 101 (1988 & Supp. 1992). The United States Supreme Court had occasion to interpret this provision in *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989). In that case, a sculptor was hired by an organization to produce a statue for display in Washington, D.C. When the project was completed, both parties filed for copyright registration. The Court, in reviewing the Congressional reports at the time of enactment of 17 U.S.C. § 101, held that a sculptor's work was not a commissioned work under the works made for hire subsection. *Community for Creative Non-Violence*, 490 U.S. at 746. The court also noted that the statute specifically limits commissioned works to "contribution to a collective work, as a part of a motion picture, as a translation, or as supplementary work." *Id.* (citing 17 U.S.C. § 101).

[52] 17 U.S.C. § 201(b) (1988) provides: "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, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright." *Id.*

[53] Cook, *supra* note 12, at 324. Directors of films created before colorization was invented could hardly imagine that their works would be altered in such a manner. *Id.* at 325.

[54] Copyright Registration for Colorized Versions of Black and White Motion Pictures, 37 C.F.R. § 202.

[55] 37 C.F.R. § 202. "Derivative work" is defined as "a work based upon one or more preexisting works, such as a . . . motion picture version, . . . art reproduction, . . . or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a 'derivative work.'" 17 U.S.C. § 101.

[56] These criteria include: (1) Numerous color selections must be made by human beings from an extensive color inventory; (2) The range and extent of colors added to the black-and-white work must represent more than a trivial variation; (3) The overall appearance of the motion picture must be modified; registration will not be made for the coloring of a few frames or the enhancement of color in a previously colored film; (4) Removal of color from a motion picture or other work will not justify registration; and (5) The existing regulatory prohibition on copyright registration based on mere variations of color

registered.[57]

B. *The Berne Convention*

The opponents of colorization have sought to combat the copyright provisions primarily with the doctrine of moral rights.[58] Their major weapon was, initially, the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention).[59] The Berne Convention provides:

> Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.[60]

This provision protects authors, who are nationals of signatory countries, from intrusions into the essence of their artistic work, whether it is within the boundaries of their own nation or in a foreign market.[61] However, as this is not a self-executing treaty, Congress was required to enact legislation, in the form of an amendment to the Copyright Act, to ratify the treaty and bind the U.S. to its provisions.[62] Congress enacted the Berne Convention Implementation Act of 1988, which ratified most of the treaty, but did not include the moral rights provision.[63] Under the statute,

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is confirmed. Copyright Registration for Colorized Versions of Black and White Motion Pictures, 37 C.F.R. § 202 (1987).

57 Renberg, *supra* note 9, at 403-04.

58 Sessa, *supra* note 4, at 509.

59 Berne Convention, *supra* note 6. This is widely considered to be the most significant of any modern-day moral rights protections. Signatory countries include: France, United Kingdom, Germany, Italy, Spain, Mexico, Sweden, Denmark, Brazil, Israel, Netherlands, Switzerland, and, with regard to certain provisions, the United States. *See* 6 MELVIN NIMMER, NIMMER ON COPYRIGHT app. 22. Article 1 of the treaty sets forth the Convention's general intent: "The countries to which this Convention applies constitute a Union for the protection of the rights of authors in their literary and artistic works." Berne Convention, *supra* note 6, Art. 1.

60 *Id.* at Art. 6 *bis* (1).

61 *Id.* at Art. 5; see *infra* note 63.

62 Renberg, *supra* note 9, at 399.

63 In fact, the legislation specifically preserved the existing status of rights " 'whether claimed under Federal, State, or the common law — (1) to claim authorship of the work; or (2) to object to any distortion, mutilation, or other modification of, or other derogatory action in relation to, the work, that would prejudice the author's honor or reputation.' " *Id.* at 407 n.96 (quoting Berne Convention Implementation Act of October 31, 1988, Pub. L. No. 100-568, 1988 U.S.C.C.A.N. (102 Stat.) 2853, 2854). This is in some ways consistent with the provisions of Berne, but only because Congress left out the moral rights article. Article 5 of the Berne Convention states:

> (1) Authors shall enjoy, in respect of works for which they are protected under this Convention, in countries of the Union other than the country of origin, the rights which their respective laws do now or may hereafter grant to their

the author's rights remained unchanged in that the owner of the copyright could do with the work as he pleases.[64]

Interestingly, the moral rights doctrine does not contest a copyright owner's ability to sell, display, or in any way capitalize upon the commercial nature of the work. This conforms with the copyright holder's economic property rights in the work. The moral rights doctrine, however, pertains to an author's personal, rather than property, rights and allows the author to object to changes and material alterations in the work, not its marketing.[65]

Practically, there may be some difficulty in applying the Berne Convention's moral rights provision. The scope of the Convention's definition of "author" is not entirely clear.[66] American copy-

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> nationals, as well as the rights specially granted by this Convention. (2) The enjoyment and the exercise of these rights shall not be subject to any formality; such enjoyment and such exercise shall be independent of the existence of protection in the country of origin of the work. Consequently, apart from the provisions of this Convention, the extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed. (3) Protection in the country of origin is governed by domestic law. However, when the author is not a national of the country of origin of the work for which he is protected under this Convention, he shall enjoy in that country the same rights as national authors.

Berne Convention, *supra* note 6, at art. 5.

Thus, the laws of the United States will apply to causes of action brought under Berne within United States jurisdiction. Since the United States failed to adopt the moral rights article of the treaty, however, foreign nationals, as well as Americans, will have no recourse under that particular provision. However, as in the case of "The Asphalt Jungle," recourse may be sought in France, for example, a nation that adheres to the moral rights doctrine.

64 Some of those involved with the Congressional hearings on the Berne implementation measures have put forth a variety of views as to why Congress did not implement the moral rights provision of the Berne Convention. Representative Robert Kastenmeier (D-Wis.) stated that the cause was 'the political reality that legislation with a moral rights provision simply, would not pass' and that artists are protected by current laws in the United States, "including the Lanham Act and laws relating to defamation [and] privacy." Renberg, *supra* note 9, at 407 (quoting 134 CONG. REC. H3083 (daily ed. May 10, 1988) (statement of Rep. Kastenmeier)).

Another Congressional representative stated, "I believe Congress should reexamine the protections afforded American artists by current law to prevent improper alterations of their works. Some argued that we should use [the Berne Implementation Act] as a vehicle for that initiative . . . [but] no change in our law on artist's rights is needed to meet Berne's standards." Michael Sissine Wantuck, Note, *Artistic Integrity, Public Policy and Copyright: Colorization Reduced to Black and White*, 50 OHIO ST. L.J. 1013, 1029 n.157 (1989) (citing *United States Adheres to the Berne Convention*, 36 J. COPYRIGHT SOC'Y 1, 17 (1988) and quoting 134 CONG. REC. S14,552 (daily ed. Oct. 5, 1988) (Statement of Sen. Leahy))). "I am glad that my colleagues in the Senate and the House agreed that the only way the United States could join Berne . . . was to leave the moral rights debate for another day." *Id.* at 1030 n.158 (citing *United States Adheres to the Berne Convention*, 36 J. COPYRIGHT SOC'Y 1, 17 (1988) (quoting 134 CONG. REC. S14, 552 (daily ed. Oct. 5, 1988) (statement of Sen. Leahy))).

65 Cook, *supra* note 12, at 317.

66 Article 15(2) of the Berne Convention provides: "The person or body corporate whose name appears on a cinematographic work in the usual manner shall, in the absence of proof to the contrary, be presumed to be the maker of said work." Berne Convention, *supra* note 6, art. 15(2).

right law focuses on establishing who constitutes the rightful author of a particular work, thereby allowing relatively clear application of the copyright protections. Integration of these laws with the Berne Convention muddies the copyright waters and may provide greater uncertainty in determining the author of a work. Even with this ambiguity, opponents of colorization consider Congress' failure to enact the moral rights protections under Berne a travesty.[67]

Though the Copyright Act and the Berne Convention have failed to give the security that colorization and alteration opponents desire, a series of legislative efforts have effected some measure of change in the protection of an artist's work.

IV. RECENT U.S. LEGISLATION

A. *The Film Integrity Act of 1987*

The Film Integrity Act of 1987 (FIA 1987)[68] was a well-intentioned, if not well drafted, piece of proposed legislation that suffered a fairly rapid demise. The Act was introduced around the time the debates took place over the Berne Convention. The hearings held on the bill proposed to amend the 1976 Copyright Act[69] to allow the principal director and the principal screenwriter of a film the right of approval for any material alteration of the work.[70]

The Directors Guild of America (DGA)[71] supported the bill, and asserted that the economic interests of the industry, as a whole, would benefit in the long-term since the country would have a higher regard for motion pictures as an artistic medium.[72]

The Motion Picture Association of America (MPAA),[73] as well

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67 Lee May, *Reagan Authorizes Copyright Expansion*, L.A. TIMES, Nov. 1, 1988, at 2.

68 The bill (H.R. 2400) was introduced by Richard Gephardt in May 1987. 134 CONG. REC. H3555 (daily ed. May 13, 1987).

69 The hearings were conducted by the Congressional Subcommittee on Courts, Intellectual Property, and the Administration of Justice in June 1988. Eric J. Schwartz, *The National Film Preservation Act of 1988: A Copyright Case Study in the Legislative Process*, 36 J. COPYRIGHT SOC'Y 138 (1989).

70 Renberg, *supra* note 9, at 408.

71 The DGA is the union that represents virtually every film director in Hollywood. Major studios are signatories of the DGA and are required to use DGA approved directors in their productions. Interviews with Tony Lord, Independent Producer (July 7, 1993).

72 *Film Integrity Act of 1987: Hearings on H.R. 2400 Before the Subcomm. on Courts, Intellectual Property, and the Administration of Justice of the House Comm. on the Judiciary*, 100th Cong., 2d Sess. 2, 4 (1988) [hereinafter *House Hearing*] (statement of Arthur Hiller, DGA director).

73 The MPAA, led by its president Jack Valenti, is a powerful lobbying organization in Washington, D.C., representing the interests of most of the major Hollywood film studios. Dennis Wharton, *Katzenberg in D.C. for Label Lobby*, DAILY VARIETY, Feb. 3, 1993, at 1; David J. Fox, *Power Play for Artists' Rights; Movies: Spielberg, Lucas and Ovitz Are Among the Creative Community Heavyweights to Launch a Foundation to Protect Fimmakers' Work*, L.A. TIMES, Dec. 6, 1991, at 7. The MPAA is also responsible for giving theatrical film releases their "rating"

as the Register of Copyrights, shared the opposite view. The MPAA believed that a film represents a collaborative effort. To give all the power to only two people, where in reality a much greater number of artists participate in creating a film,[74] would be improper.[75] The MPAA wanted to see the marketplace dictate alteration decisions and let the creative entities settle these differences in their individual and union agreements.[76] Further, Ralph Oman, the Register of Copyrights, feared that the Act would create problems with marketing and distribution of television and videocassette versions of a film and may interfere with non-film derivative works.[77] Oman also pointed out that no provision existed for the situation where the director wanted to colorize the film but the screenwriter did not.[78] As such, the bill contained flaws that turned out to be problematic in garnering enough support for its passage. Consequently, interest in the bill waned;[79] and after these hearings, the Subcommittee took no further action on the Film Integrity Act.[80]

B. *The National Film Preservation Act of 1988*

The National Film Preservation Act of 1988 (NFPA 1988)[81] had better success than the Film Integrity Act of 1987 (FIA 1987).[82] The NFPA 1988, introduced in May 1988 by U.S. Representative Bob Mrazek (D-N.Y.) established the National Film Preservation Board[83] and the National Film Registry.[84] This legislation took a

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(*i.e.*, G, PG, PG-13, R, NC-17, X). Steve Persall, *Ratings Continue to Serve*, ST. PETERSBURG TIMES, Dec. 7, 1993.

74 The MPAA suggests other participating artisans, such as producers, special effects personnel, actors, cinematographers, musicians, composers, lyricists, set designers, makeup artists, etc. House Hearing, *supra* note 72, at 4 (statement of David Brown, MPAA representative).

75 *House Hearing*, *supra* note 71, at 4 (statement of David Brown, MPAA representative).

76 *Id.* at 6 (statement of Roger Mayer of Turner Broadcasting).

77 *Id.* at 25 (statement of Ralph Oman).

78 *Id.* at 28.

79 This is not surprising, given the stature of the opponents to the legislation. The Motion Picture Association of America has a powerful voice in Congress and it appears that Mr. Oman's views also weigh heavily on these copyright issues. Renberg, *supra* note 9, at 410.

80 *Id.*

81 2 U.S.C. §§ 178-178l (1988) (repealed 1992).

82 *See supra* notes 68-80 and accompanying text.

83 As in the original 1988 enactment of the NFPA, the 1992 re-enactment of the NFPA provides that the Librarian of Congress shall select the members of the Board, choosing from various organizations, including: The Academy of Motion Pictures Arts and Sciences, The Directors Guild of America, The Writers Guild of America, The National Society of Film Critics, The Society for Cinema Studies, The American Film Institute, The Motion Picture Association of America, The Screen Actors Guild of America, The American Society of Cinematographers, The Departments of Theatre, Film and Television at UCLA and New York University, and several other groups. 2 U.S.C. § 179b(a)(1) (1992).

84 Renberg, *supra* note 9, at 410.

different approach than the FIA 1987. It did not seek to amend the Copyright Act,[85] rather, it established the Film Preservation Board and Registry under the auspices of the Librarian of Congress.[86]

The law protected films that were deemed "culturally, historically, or aesthetically significant."[87] However, no film could be registered until 10 years after its theatrical release.[88] In addition, only a limited number of films were allowed to be registered under the Act.[89]

The legislation also provided for a seal that indicated that the film was registered with the commission and was selected as "an enduring part of our nation's historical and cultural heritage."[90] The seal was allowed to be shown only if the film had not been materially altered,[91] thus giving some incentive for showing films in their original state.[92] Any materially altered registered film had to include a disclaimer that alerted the viewer that the film had been changed.[93] The Attorney General enforced the law, and civil fines of up to $10,000 could be imposed.[94]

Although the NFPA 1988 provided for labelling of certain altered films, its primary emphasis was not the moral rights of the original author. Rather, it focused upon the public's interest in the preservation of certain works.[95] The law was enforced by the public, through the Attorney General, rather than by any particu-

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85 See *supra* notes 48-57 and accompanying text.

86 Schwartz, *supra* note 69, at 158-59.

87 *Id.* at 158. This determination was to be made in conjunction with the Proposed Guidelines, 54 Fed. Reg. 49,310 (1989) (proposed Nov. 30, 1989).

88 National Film Preservation Act of 1988, Pub. L. No. 100-446, 1988 U.S.C.C.A.N. (102 Stat.) 1782-83 (repealed 1992).

89 The law provided for 25 films per year to be registered with the commission to be selected by the Librarian of Congress. *Id.* Some of the films selected in the first year include *Citizen Kane, Gone With the Wind, The Grapes of Wrath, The Maltese Falcon, Mr. Smith Goes to Washington, On the Waterfront, Singin' in the Rain, Snow White* and the *Seven Dwarfs, Star Wars, Sunset Boulevard, Vertigo,* and *The Wizard of Oz.* McNally, *supra* note 7, at 129.

90 *Id.* at 140.

91 These alterations included time compression, panning and scanning (if noticeable), some types of editing, and colorization. Proposed Guidelines, *supra* note 85, §§ 1(c), 2(b). *See also supra* notes 7-19 and accompanying text.

92 McNally, *supra* note 7, at 140.

93 A disclaimer for a colorized film reads: "This is a materially altered version of the film originally marketed and distributed to the public [in black and white]. It has been altered without the participation of the principal director, screenwriter, and other creators of the original film." 2 U.S.C. § 178c(d)(1)(A) (1988).

94 2 U.S.C. §§ 178e(b)(2) (1988).

95 McNally, *supra* note 7, at 139-42. 2 U.S.C. § 178(a) provided that "The Librarian of Congress . . . shall establish a National Film Registry . . . for the purpose of . . . [maintaining and preserving] films that are culturally, historically, or aesthetically significant." 2 U.S.C. § 178(a). Thus, the intention of the law clearly was not to protect an individual's moral rights in her work.

lar individual.[96] The Act also differed from moral rights protection in that the Act did not determine who the author of the work was; it merely selected the film based on its presumed value to the history and heritage of the nation and avoided the personal artistic issues that might otherwise arise.[97]

As in the case of the Film Integrity Act of 1987,[98] even though a film was registered under the NFPA 1988, this did not prevent a copyright holder from colorizing or altering the film in any way. The copyright holder simply had to attach a disclaimer as to any alterations. Finally, the NFPA 1988 only provided for three years of funding for the commission, which allowed the selection of a total of seventy-five films.[99]

Although falling short of total expectations, the NFPA 1988 provided some solace to opponents of film alterations. Under the NFPA 1988, an altered film had to be labelled as such, if it was fortunate enough to be selected by the commission. However, when the Act expired, a whole new battle ensued.

C. *The National Film Preservation Act of 1992*

The National Film Preservation Act of 1992 (NFPA 1992)[100] possesses many of the same provisions found in the 1988 version.[101] However, the new law does not provide for mandatory labelling of materially altered films.[102] The reauthorization requires the Librarian of Congress to conduct a study of the current status of film preservation techniques and to develop a national film preservation plan.[103] The newest set of selections under the revised act includes several controversial pieces, and the first animated short ever registered.[104] Because the NFPA 1992 abolished the film la-

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96 *Id.*

97 The labelling provision states that the director, screenwriter, and other creators of the original film have not participated in the alteration process. This, however, does not take into account the situation where one of these people, perhaps the cinematographer, agreed to certain alterations that the others did not. *Id.*

98 *See supra* notes 68-80 and accompanying text.

99 2 U.S.C. § 178i(b) (1988) (repealed 1992).

100 2 U.S.C. § 179a-179k (1992). The 1992 version of the NFPA repealed the 1988 version, yet retained the majority of the 1988 provisions.

101 The 1992 version also provides for the selection of 25 films per year by the Librarian of Congress and allows an annual budget of $250,000. This version of the Act has a term of four years as opposed to the 1988 version which lasted only three years. 2 U.S.C. §§ 179c(b), 179j, 179k (1992).

102 This deletion has stirred new debates over the labelling/alteration issue and film directors and screenwriters are looking to Congress to give them a helping hand. Jeffrey L. Graubart, *U.S. Moral Rights: Fact or Fiction?*, N.Y.L.J., Aug. 7, 1992, at 5; *see also infra* notes 120-53 and accompanying text.

103 2 U.S.C. §§ 179a(a)(1), 179a(b)(1)(A) (1992).

104 Although it praises the highly controversial Ku Klux Klan, "The Birth of a Nation"

belling requirement, proponents of film labelling must turn elsewhere for guidance and support for their cause.

D. *Visual Artists Rights Act of 1990*

Wedged in time between the 1988 and the 1992 enactments of the NFPA, is the Visual Artists Rights Act of 1990 (VARA).[105] It provides moral rights protection for artists and protects the personal interests in their work, even after the copyright is transferred to a third-party purchaser.[106] This Act was the result of efforts of moral rights advocates to overcome Congress' failure to adopt the moral rights provision of the Berne Convention.[107] The legislation protects works of visual art[108] and gives the artist two kinds of moral rights — the right of attribution and the right of integrity.[109]

The right of attribution allows the artist to claim authorship of a work and prevent the use of her name as the author of any work which she did not create.[110] It also allows the artist the right to prevent the use of her name in connection with a mutilated, distorted or otherwise modified work, if that alteration would be "prejudicial to . . . her honor or reputation."[111]

The right of integrity gives an artist the right to prevent intentional mutilations, distortions and other modifications of a work, which would be prejudicial to her honor or reputation.[112] All of the rights granted under the Act may not be transferred but may be waived by the artist.[113]

The passing of the VARA was a big step towards recognizing

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was included in the registry. Librarian of Congress James Billington concedes that even though this type of film is reprehensible, it is an example of the early film masterpieces. Also included was the Warner Bros.' Bugs Bunny short, *What's Opera, Doc?* Eric Brace, *More Films for the Time Capsule*, WASH. POST, Dec. 7, 1992, at B7.

105 17 U.S.C. §§ 101, 106A, 113, 301, 501(a) (1990).

106 The moral rights provided in the VARA are independent of the usual copyright and are retained by the artist, even if the economic copyrights are sold or assigned. William A. Tanenbaum and Jeffrey M. Butler, *The Impact of the Visual Artists Rights Act*, N.Y. L.J., Apr. 9, 1993, at 1.

107 Since Congress felt that U.S. law already provided such protection in the form of unfair competition, privacy, defamation and misrepresentation causes of action and in certain provisions of the Copyright Act, it chose not to include the moral rights section of Berne in the ratification legislation. *Id.* at 11.

108 "A work of visual art is - (1) a painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer . . . (2) a still photographic image produced for exhibition purposes only . . . ." 17 U.S.C. § 101 (Supp I. 1993).

109 "[T]he right of attribution . . . [is] known as the right of paternity in European practice." Tanenbaum and Butler, *supra* note 104, at 11, col. 1; *see also* 17 U.S.C. § 106A(a) (Supp I. 1988).

110 17 U.S.C. § 106A(a)(1).

111 17 U.S.C. § 106A(a)(2).

112 17 U.S.C. § 106A(a)(3).

113 17 U.S.C. § 106A(e)(1).

moral rights in the United States. Opponents of film colorization and unauthorized alterations, however, found no help under the VARA.[114] The enacted version of the Act does not protect motion pictures, even though the original version of the VARA provided protection for such films.[115] Without the protection that the VARA provides other artists, film directors can have grossly altered works attributed to them. One difference, however, between those works protected by the VARA and motion pictures is that when films are colorized or otherwise altered, the original generally still exists.[116] When a painting or sculpture is altered, the original work is changed forever.[117]

As far as allowing colorization to go unchecked, some argue that the public's desire should be taken into account and the economic success of the altered version should be the determinative factor.[118] On the other hand, director Steven Spielberg contends that "the creation of art is not a democratic process. The public has no right to vote on the artistic choices that go into filmmaking. The public has the right to accept or reject the result, but not to participate in the action."[119]

Since the VARA expressly omits motion pictures from its list of protected works, opponents of colorization are still without recourse. The one small protection they did have, under the NFPA 1988, was taken away in the re-enactment under the NFPA 1992.

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114 The VARA provides protection for "works of visual art." It also states that a work of visual art does not include "any poster, map, globe, chart, technical drawing, diagram, model, applied art, motion picture or other audiovisual work, book, magazine, newspaper, periodical, . . . [or] any portion or part of any item [previously] described. . . ." 17 U.S.C. § 101.

115 Timothy M. Casey, *The Visual Rights Act*, 14 HASTINGS COMM. & ENT. L.J. 85, n.116 (1991) (citing 133 CONG. REC. 11,502, S.1619, 100th Cong. 1st Sess. (1982)).

116 17 U.S.C. § 101 fully defines "work of visual art" as

> (1) a painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author, or, in the case of a sculpture, in multiple cast, carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author; or (2) a still photographic image produced for exhibition purposes only, existing in a single copy that is signed by the author, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author.

17 U.S.C. § 101.

Here, Congress clearly sought to protect those works of art that are not mass produced. Thus, the destruction of a work of visual art that is not mass produced would have a greater impact on the public's access to the work than the colorization of one copy of a film.

117 Casey, *supra* note 15, at 99.

118 *Id.* at n.112 (citing Michael Kernan, *The Great Debate Over Artists' Rights; Facing the Tough Question of Who Really Controls a Work of Art*, WASH. POST, May 22, 1988, at F1).

119 *Id.*

Fortunately, there is some new support in Congress and in the film industry.

E. *The Film Disclosure Act of 1992*

Congress is presently considering the Film Disclosure Act of 1992 (FDA).[120] The Senate version of the bill was introduced on February 25, 1992 by United States Senators Alan Simpson (R-Wyo) and Howard Metzenbaum (D-Ohio).[121] It seeks to amend section 43 of the Lanham Act to inform the public of any material alterations and allow the artistic authors the right to disclaim those alterations.[122] The bill requires labelling of films for such alterations as colorization, panning and scanning, lexiconning, time compression or expansion, and editing.[123] The bill seeks to ensure that artistic authors of films[124] have the ability to inform the public that significant changes have been made to the author's work, and to require that any materially altered film bears such a label.[125] Senator Simpson describes the bill as basically a "truth in packag-

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120 H.R. 5868, 102d Cong., 2d Sess. (1992); S. 2256, 102d Cong., 2d Sess. (1992). This bill was originally introduced to Congress as H.R. 3051, 102d Cong., 1st Sess. (1991), by Rep. Robert Mrazek (D-NY) in 1991. It was designed to add a new section 43(c) to the Lanham Act (15 U.S.C. § 1125) and provided for labelling of materially altered films. The original bill also required any public exhibition and all advertising materials to include a label disclosing the nature of the alteration and any objections posed by the artistic authors. *See Intellectual Property, Senate Bill Would Amend Lanham Act to Protect Moral Rights of Film Artists*, Daily Report for Executives (BNA), Feb. 27, 1992, at A13.

121 *See* S.2256, 102d Cong., 2d Sess. (1992).

122 *Intellectual Property, supra* note 120 at A13.

123 Although this Senate version is very similar to the original House bill, it differs in several important aspects, because:

> "First, it exempts film advertising from the labeling requirement; Second, it changes the wording of the labels to ensure that the labels are factual, and not derogatory in any manner; Third, it derives the remedies for a violation from the Lanham Trademark Act, not the Copyright Act; Fourth, it establishes clear time limitations in the process of determining whether the artistic author objects to the alterations, to ensure that timely release of films into the secondary markets is not impeded; Fifth, it prevents a film author from receiving more than $1 as consideration for waiving his or her right to object to a material alteration, to ensure that directors, screenwriters and cinematographers do not use this new right simply as leverage in contract negotiations with studios; and Sixth, it clarifies that once a distributor of a materially altered film has contacted the authors of a film to determine whether there is an objection to the alteration, no subsequent commercial users of the film need to contact the film's authors—unless that user makes additional alterations."

138 CONG. REC. S2215, 2216 (daily ed. Feb. 25, 1992) (statement of Sen. Simpson).

In August 1992, Rep. Mrazek introduced a new version of his original bill, now known as H.R. 5868, that is identical to the Senate version. *Intellectual Property, supra* note 120, at A113.

124 Senator Simpson's statement includes principal directors, screenwriters, and cinematographers as artists and authors of films. 138 CONG. REC. S2215, S2216 (daily ed. Feb. 25, 1992) (statement of Sen. Simpson).

125 The label contains two proposed parts: (1) the nature of the alterations, and (2) any objections of the principal artistic authors. *Id.*

ing" proposal.[126]

This legislation specifically seeks to inform the public of the artistic author's disagreement with the alterations. It does not circumvent the primary issue, as did both versions of the NFPA, merely by claiming protection of the public's interest in history or culture.[127] Every copy of a film sold or leased, including the packaging, and every public exhibition of a work, must include a clear and conspicuous label if that film has been materially altered.[128] Anyone, particularly film distributors and television networks, that wants to use a materially altered film must make a good faith effort to contact, in writing,[129] the artistic authors.[130]

The FDA also provides protection for any artistic author, regardless of nationality or domicile.[131] It preempts any disclosure requirements imposed under common law or any state statutes regarding material alterations of films.[132] The material alterations definition is fairly broad,[133] however there are some very important exceptions. Labelling is not required for

> insertions for commercial breaks or public service announcements, editing to comply with the requirements of the Federal

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126 *Id.*

127 The bill cites several reasons that are important to its enactment: (1) motion pictures are an American art form that uniquely captures and preserves our national and cultural heritage; (2) the integrity of a motion picture is compromised and diminished when the motion picture is sold, leased, or exhibited in a materially altered form; (3) the public is misled when motion pictures are sold, leased, or exhibited in a materially altered form; (4) the public has a right to know whether a motion picture which is being sold, leased, or exhibited has been materially altered; (5) the reputation of the artistic author of a motion picture may be harmed when the original work is sold, leased, or exhibited in a materially altered form; (6) the artistic authors of a motion picture must have the right to indicate their objections to any material alterations made to their work because otherwise the motion picture misrepresents their work; (7) the practice of materially altering motion pictures can result in the discouragement of artistic creation in the motion picture field; and (8) the Government has an interest in the encouragement of artistic creation through protection of an artistic author's reputation. *Id.* at 2216 (citing congressional findings in the Film Disclosure Act of 1992).

128 *Id.* § 3.

129 *Id.*

130 The bill specifically defines "artistic author" as "the principal director, principal screenwriter, and, to the extent a theatrical motion picture is colorized or its photographic images materially altered, the principal cinematographer of the film; or . . . the heir or heirs of that individual." *Id.*

131 "Any artistic author of a motion picture publicly exhibited or offered to the public through sale or lease within the United States who believes he is or is likely to be damaged by a violation of this subsection may obtain appropriate relief with respect to any violation of this paragraph without regard to the nationality or domicile of the artistic author." *Id.* § 3(G)(2)(A).

132 "Any disclosure requirements imposed under the common law or statutes of any State respecting the material alteration of theatrical motion pictures are preempted." *Id.* § 3(4)(C)(3).

133 "The term 'material alteration' means any change . . . made to a motion picture after its publication." *Id.* § 3(5)(H).

> Communications Commission . . . , transfer of film to videotape or any other secondary media now in existence or developed hereafter, preparation of a [theatrical] motion picture for foreign distribution . . . or legitimate film preservation activities. . . .[134]

Finally, the bill defines "motion picture" as any film equal to or longer than sixty minutes intended for exhibition, public performance, public sale or lease.[135]

Since the FDA's introduction, members of the film industry have chosen sides and the controversy has escalated. Initially, the largest organization representing supporters of the legislation was the Directors Guild of America (DGA). The most outspoken of the opponents of the FDA is the Motion Picture Association of America (MPAA). One of the major differences between the two groups' viewpoints is whether this issue should be resolved within the industry itself or by Congress. The DGA supports resolution of the controversy by Congress.[136] The MPAA, on the other hand, is pushing for Congress to dismiss the legislation and allow the industry to negotiate an agreement.[137] The rift between the MPAA and the DGA on film labelling focuses primarily on the wording of the label. The DGA supports a much stricter version than does the MPAA.[138] The MPAA expresses fears that tougher language on the

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134 *Id.*

135 *Id.* § 3(5)(A). A typical theatrical motion picture has a length of anywhere between eighty-eight minutes and one hundred twenty minutes. Some, like Francis Ford Coppola's *The Godfather*, may run up to one hundred eighty minutes or more. Interview with Tony Cord, Independent Producer (July 7, 1993).

136 The President of the DGA, Arthur Hiller, has stated that Congress is the correct venue for addressing film labelling and not collective bargaining with the studios. He claims that because a significant number of films are released by non-DGA members, that there must be an all-encompassing law so those films will have labelling protection. Further, the DGA contracts only run for a certain number of years and any protection found within them would expire at the termination of the contracts. Dennis Wharton, *Katzenberg in D.C. for Label Lobby*, DAILY VARIETY, Feb. 3, 1993, at 1. Also, the union is not allowed to strike over an issue such as this, so without Congressional action their leverage is greatly reduced. Dennis Wharton, *DGA Cool to Valenti Labeling Plan*, DAILY VARIETY, Feb. 2, 1993, at 1.

137 President of the MPAA, Jack Valenti, has stated that they are ready to voluntarily label films that are colorized or otherwise altered for home video use. *Majors Ready to Start Labeling Altered Pix*, DAILY VARIETY, Jan. 27, 1993, at 44. But DGA president Hiller retorted to this announcement that "[b]y now volunteering to label films, Mr. Valenti at least acknowledges that in the past consumers have been deceived by misrepresentation." Dennis Wharton, *DGA Cool to Valenti Labeling Plan*, DAILY VARIETY, Feb. 2, 1993, at 1.

138 For example, under the MPAA's suggestions, a film that has been panned and scanned would have a label reading: "This [film] has been formatted for home viewing so that it may be viewed on a TV screen." Wharton, *DGA Cool to Valenti Labeling Plan*, Daily Variety, Feb. 2, 1993, at 1. The FDA version, endorsed by the DGA, would read: "This film is not the version originally released. It has been panned and scanned. The director and the cinematographer object because this alteration removes visual information and changes the composition of the images." *Id.* Similarly, a colorized film would add: "It has

labels will disparage a film and hurt industry sales.[139]

The lines have been drawn in this fight, mostly with the studios and producers supporting the MPAA position and directors, writers, and Hollywood's "creative" forces supporting the DGA side. The reasons for opposing the legislation given by the MPAA supporters are quite varied and are expressed by groups including the Alliance of Motion Picture and Television Producers (AMPTP),[140] the United States Department of Commerce,[141] members of the House Copyright Subcommittee,[142] and the American Civil Liberties Union (ACLU).[143]

The Film Disclosure Act is not without its supporters, however. Aside from the DGA, the Writers Guild of America (WGA)[144] is behind the new legislation.[145] One significant supporter of this legislation is the recently formed Artists Rights Foundation.[146] The

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(also) been colorized. Colors have been added by computer to the original black and white images. The director and cinematographer object to this alteration because it eliminates the black and white photography and changes the photographic images of the actors." 138 CONG. REC. S2218 (1992) (statement of Senator Simpson).

139 Wharton, *supra* note 137.

140 AMPTP stresses that consumers know that certain adjustments are necessary when a film is transferred to its television format and the labels required under the FDA will mislead the consumer and tell them that the altered version is "bad." *Intellectual Property, supra* note 120, at A13.

141 Commerce Dept. Gen. Counsel Wendell Wilkie, on behalf of the Bush Administration, submitted a letter to the House Copyright Subcommittee Chairman attacking the bill stating that it was inconsistent with the government's deregulatory efforts and potentially harmful to U.S. trade. *VSDA and MPAA Attack Film Labeling Bills*, VIDEO WEEK, Mar. 9, 1992, at 4 [hereinafter *VSDA and MPAA Attack*]. The letter further stated that "[t]he bill would enlarge the 'moral rights' of 'artistic authors' of films beyond what is granted currently under U.S. law. . . ." Matthew Marshall, *Filmmakers Testify for Movie Labeling*, L.A. TIMES, Mar. 6, 1992, at 6.

142 Subcommittee members, particularly Reps. Glickman (D-Kan.), and Synar (D-Okla.) have questioned tying up Congress with private contractual matters where no evidence of direct economic or other types of harm has been presented. *VSDA and MPAA Attack, supra* note 141.

143 Robert Peck, representative of the ACLU, said that "[n]o compelling governmental interest exists sufficient to overcome the very substantial burdens this legislation places on free speech." Marshall, *supra* note 139. Peck also argues that because films are art, and not property, they require no special protection. Non-commercial artistic speech should not receive consumer protection warnings as this will tell consumers that the work is good or bad, or true or untrue and that this type of interference gives film artists an interest afforded to no other artists. *Intellectual Property, Film Labelling Legislation is Debated Before Senate Subcommittee*, DAILY REPORT FOR EXECUTIVES, Sept. 23, 1992, at D37. Professor Vincent Blasi, Columbia University School of Law, counters Peck's views by explaining that the bill simply allows artists to disavow any alterations to their work and that no one is telling the consumer what to think. *Id.*

144 The Writers Guild is the union that represents most film and television writers. Interview with Tonly Lord, Independent Producer (July 7, 1993).

145 Screenwriter Roger L. Simon, a member of the WGA, testified in front of the Senate Judiciary Subcommittee that the government has a duty to protect the integrity of American cinema. He also stated that "colorization is like red dye number three, an additive . . . [consumers] don't want. And just as with cholesterol, . . . the public has a right to know." *Intellectual Property, supra* note 143.

146 This is a charitable and educational non-profit organization established by the lead-

Artists Rights Foundation seeks to illuminate the issues surrounding the debate over film alterations.[147] Counted among its members are noted film directors, actors, actresses, writers, and cinematographers.[148]

The Artists Rights Foundation has several concerns with the present copyright laws. Under current United States law, the owner of the copyright is considered, legally, the author of the work and can alter the work in virtually any way he chooses.[149] The copyright owner also has other options. He can put the film on the shelf and prevent anyone from having access to it or he could alter the work in smaller, subtler ways that may eventually change the intent and meaning of the film.[150]

For example, a filmmaker makes a documentary about the rainforests, stating that sixty percent of the oxygen from the planet comes from the rainforests and showing swathes of trees being cut down by loggers. The film has dark, somber music and is decidedly against the systematic destruction of the rainforests. Another entity purchases the rights to the film and eventually sells it to a lumber company through a European subsidiary. They change the music to lighter, happier music. They take out the statements against rainforest destruction and otherwise edit out the actual dialogue from the work so it becomes a pro-logging film. The intent of the film has been completely altered, the artist's original work has been destroyed, and his reputation and integrity have been harmed.[151]

The Artists Rights Foundation stresses the fact that film artists have their particular tools and their particular ways of presenting their vision at the time they create the work.[152] This vision should

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ers of the DGA in 1989. Its mission is to "educate the public concerning the importance of the protection and preservation of film art, to defend an artist's work which is threatened with modification, distortion or mutilation, and to promote public debate to help safeguard our intellectual and cultural heritage." ARTISTS RIGHTS FOUNDATION, STATEMENT OF PRINCIPLE (1990). The initial supporter of the Artists Rights Foundation was J. Paul Getty, Jr., who donated $100,000 to begin the organization. Getty's family had a long history of involvement in the preservation and protection of art. The foundation is currently supervised by executive director Keith LaQua from offices at the Directors Guild. Ted Elrick, *Whereforth Moral Rights*, DGA NEWS, Sept.-Oct. 1991, at 8.

147 Telephone Interview with Keith LaQua, Executive Director of the Artists Rights Foundation (Aug. 25, 1993).

148 Some of the more prominent members include Steven Spielberg, George Lucas, Michael Ovitz, Stanley Kramer, Carl Reiner, Anjelica Huston, Sally Field, Bill Murray, Kevin Costner, Tom Cruise, Harrison Ford and Lawrence Kasdan. *Id.*

149 David J. Fox, *Power Play for Artists' Rights*, L.A. TIMES, Dec. 6, 1991, at 1.

150 Telephone Interview with Keith LaQua, Executive Director of the Artists Rights Foundation (Apr. 8, 1993) [hereinafter Telephone Interview].

151 *Id.* For a discussion of film editing not authorized by the artistic author, *see supra* notes 20-35 and accompanying text.

152 The foundation also feels that if an author wants to colorize his work, then it is

not be indiscriminately altered.[153]

V. CONCLUSION

When John Huston's heirs were able to block the showing of the colorized *Asphalt Jungle* they struck a chord in filmmakers' hearts. It is the responsibility of a film director/artist to convey to the audience his sense of style, tone and imagery. When a studio, or anyone for that matter, alters a film without the permission of the artistic author, they have defaced and damaged an original work of art. Further, when the altered work is exhibited to the public and attributed to the artistic author, that author's reputation may be damaged.

Currently in the United States, the owner of the copyright to a film may do with that film, for the most part, what he chooses. The failure of the United States to implement the moral rights provision of the Berne Convention is an insightful reflection of the current attitude of the United States towards its artists.

Fortunately, for the proponents of film labelling, legislation in recent years has attempted to acknowledge film authors' rights. Certainly, the strongest piece of legislation to have come in front of Congress recently is the Film Disclosure Act of 1992. This bill has come the closest to becoming a law that will inform the public of a film artist's disclaimers as to material alterations. If passed, it will act as a "truth in advertising" measure that will help to protect a film artist's integrity and reputation.

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permissible provided it is the original author's decision. Telephone Interview, *supra* note 150

153 Elliot Silverstein, President of the Artists Rights Foundation, expounding upon this point, states:

> "The defacement of art is the altering of history and is inherently dangerous to society. At issue is the preservation of historical truth, cultural honesty and the freedom of individual artistic expression and the maintenance of its integrity. In trying to profit from the present, we must not break continuity with the future by cannibalizing our past.
>
> The choice of appearance of any work of art is the moral right of the artist. We seek to ensure that the original image is transferred from one generation to another, through time, as it was originally intended."

ARTISTS RIGHTS FOUNDATION, *supra* note 146.