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Technological Alterations to Motion Pictures and Other Audiovisual Works: Implications for Creators, Copyright Owners, and Consumers—Report of the Register of Copyrights

REPORT

TECHNOLOGICAL ALTERATIONS TO MOTION PICTURES AND OTHER AUDIOVISUAL WORKS: IMPLICATIONS FOR CREATORS, COPYRIGHT OWNERS, AND CONSUMERS

Report Of The Register Of Copyrights
March 1989
United States Copyright Office
Washington, D.C.†

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EXECUTIVE SUMMARY

During the recent, successful effort to adhere to the Berne Convention for the Protection of Literary and Artistic Works, Congress extensively debated the issue of "moral rights" in general, and as applied to the motion picture industry. The term "moral rights" does not refer to a judgment about a work's morality (or lack thereof). Instead, it concerns the personal relationship of the author to his or her work apart from economic rights. In particular, it relates to the author's interest in having his or her authorship of the work acknowledged ("the right of attribution"), and to the author's interest in preventing unauthorized alterations in the work that are prejudicial to his or her reputation ("the right of integrity").[1]

In deciding on the form of implementing legislation for Berne adherence, Congress adopted the "minimalist approach;" i.e., to make only those changes absolutely required to join the Convention. After two years of hearings and consultations with foreign experts, Congress reached the conclusion that the totality of existing U.S. law — federal, state statutory, and common law — satisfied our obligations under the Convention to accord moral rights.

Accordingly, under the minimalist approach, Congress decided against amending the Copyright Act in the Berne implementing legislation to provide for a single, unified, federal system of moral rights.

This decision was not, however, based on hostility to moral rights in general, nor to such rights as applied specifically to the motion picture industry. In fact, both Senate and House subcommittees held hearings on colorization and other alterations to motion pictures during the second session of the 100th Congress. In addition, on February 25, 1988, Chairman Kastenmeier and Ranking Minority Member Carlos Moorhead of the House Subcommittee on Courts, Intellectual Property and the Administration of Justice[2] requested the Copyright Office to inquire into the present and future uses of technologies such as computer color encoding ("colorization"), panning/scanning, and time compression and expansion ("lexiconning"), and how these technologies affect "consumers, artists, producers, distributors and other affected individuals and industries." We were directed to consult with creators of motion pictures, broadcasters, consumers, and preservationists.

In order to fulfill this mandate, the Copyright Office staff visited two

1. *See* BERNE CONVENTION ARTICLE *6bis.*

2. The Subcommittee was formerly known as the Subcommittee on Courts, Civil Liberties and the Administration of Justice.

companies engaged in computer color encoding of motion pictures as well as a company that modifies theatrical motion pictures for viewing on television. The staff also interviewed representatives of motion picture companies, Turner Entertainment Company, the Directors' Guild of America, and the Screen Actors' Guild of America. In response to a Notice of Inquiry, we received twenty comments from all industry interests, as well as from educators, preservationists, and scholars. On September 8, 1988, we held a public hearing and received testimony from witnesses from all of the above groups.

This report represents the culmination of our interviews and of our review of the congressional hearings, the statements submitted in response to our Notice of Inquiry, and the testimony received at our September 8th hearing.

The report is comprised of seven chapters and two appendices. The first appendix reproduces the statements submitted in response to our Notice of Inquiry; the second reproduces the transcript of our September 8, 1988 hearing.

Chapter 1: Introduction

After noting the genesis of this report, the introduction provides an overview of previous Copyright Office actions in accepting claims to copyright in colorized versions of black and white motion pictures. It then briefly notes the issues to be examined, including how the use of technologies permitting the alteration of theatrical motion pictures has affected the interest of creators, distributor-copyright owners, and the public.

Chapter 2: Copyright in the Motion Picture and Television Industries

The second chapter of the report reviews copyright protection for motion pictures and television programs in the United States and under the Universal Copyright and Berne Convention.

The chapter also examines the various claims for authorship in motion pictures, beginning with a review of the U.S. case law, the treatment of authorship under the 1976 Copyright Act and the Berne Convention, as well as the national legislation of France, the Federal Republic of Germany, and the United Kingdom.

This review serves as background for a discussion of the position of U.S. motion picture directors that, for purposes of preventing material alterations to their works, the principal director and principal screen-

writer should be considered the "authors" of the motion picture. This position is based on a number of arguments; first, that the principal director is the single individual primarily responsible for the actual composition of the picture; second, that only the principal director and principal screenwriter represent the logical place to draw that line.

We then give the response of academics and motion picture industry representatives to the directors' arguments. Testimony by a law professor that motion picture scholarship has, in recent years, come to recognize the importance of the contributions of several groups of filmmaking professionals (e.g., cinematographers, art directors, and editors) is given. Testimony from motion picture industry representatives challenging the directors' position is recited. These representatives assert that for most of the motion pictures at issue, the old studio movie moguls are more properly regarded as the author of the work. Testimony on the current important role of certain producers is recounted.

The chapter concludes by noting the difficulties faced internationally in determining authorship in cinematographic works and notes that, due to the use of work made for hire arrangements in the United States, the issue generally has relevance only with respect to moral rights, a topic addressed in Chapter 5.

Chapter 3: Post Exhibition Alterations to Motion Pictures

This chapter is divided into two parts. The first part reviews the current and projected future technologies used to adapt theatrical motion pictures for viewing on television screens and notes the reason why these adaptations are believed necessary. The second part analyzes the effect of these adaptations on the aesthetics of motion pictures.

The chapter begins with an explanation of the predominance of post-theatrical markets (videocassettes, cable television and broadcast television) for motion pictures, and the reasons theatrical motion pictures are technologically adapted to be distributed to these markets. The principal technologies are:

Computer Color Encoding. This is a process by which black and white film prints are transferred to videotape and the videotape is electronically encoded with color.

Panning and Scanning. This is a process by which theatrical motion pictures, composed for viewing on large screens, are altered to fit on the narrower television screen.

Lexiconning. This technology involves the electronic time

compression or expansion of a motion picture in order to fit the picture into broadcast time slots.

Letterboxing. This technique permits the original composition of a theatrical motion picture to be retained on television by reducing the size of the image. This process leaves dark bands at the top and bottom of the screen.

We then analyze the aesthetic effects that each of these technologies have on motion pictures. We conclude that colorization has an adverse effect on the aesthetics of black and white motion pictures, that panning/scanning has had an adverse effect in the past, but that such effects have been somewhat ameliorated through the voluntary decision of directors and cinematographers to film theatrical motion pictures within the parameters of television. This decision has, however, also resulted in fewer motion pictures being shot in a widescreen format due to the predominance of the post-theatrical markets. We conclude that lexiconning can have an adverse aesthetic effect on motion pictures but that no information was presented indicating the extent to which it is employed or the effect to which it is employed in a manner resulting in an adverse aesthetic effect.

The chapter concludes with a review of future technologies such as High Definition Television and computer generation of characters.

Chapter 4: Impact of Collective and Individual Bargaining on the Development and Distribution of Motion Pictures

In this chapter, we discuss the nature of collective and individual bargaining. We note that the Directors' Guild of America's Basic Agreement contains a detailed set of minimum conditions for the preparation, production, post-production stages of motion pictures, and for post-theatrical release editing. Directors are given an absolute right to a "Director's Cut" — the penultimate form in which the motion picture is released. Directors do not have, and for purposes of legislative reform have disavowed, any desire to obtain the "Final Cut;" i.e., the right to determine the final form of the work as theatrically viewed.

Under the Basic Agreement, however, directors have obtained the right of consultation regarding post-theatrical alterations to motion pictures as viewed on videocassettes, and on cable and broadcast television. We recount the directors' unsuccessful efforts to transform, under the Basic Agreement, the provision that grants them right of consultation into an absolute right to permit or prohibit such alterations. We also discuss the position of producers that directors should not have such an

absolute right. We note that only a very few directors have obtained the desired rights in their individual contracts.

We then analyze the pros and cons of reliance upon collective and individual bargaining, and question whether the failure of the directors to obtain the rights they seek necessarily indicates a breakdown in labor relations, and one that requires federal legislation to repair it.

Chapter 5: Moral Rights

This lengthy chapter begins with a review of the nature of moral rights, with special emphasis on the Berne Convention and U.S. case law. We review recent state and federal legislative efforts to grant moral rights during hearings on U.S. adherence to the Berne Convention. We go into the testimony of directors, producers, and computer color encoding companies in detail, as well as the remarks of various Members of Congress.

We then set forth the directors' claims for moral rights legislation, the producers' response to those claims, and conclude with our analysis of the issue.

The directors' claim is based, essentially, on three premises: first, that no artist should have his or her work materially altered without his or her consent; second, that collective and individual bargaining is an inadequate means to obtain the right to prevent material alterations that are injurious to their reputation; and, third, that the public has an interest in viewing motion pictures in their original form.

The directors would limit these rights to the principal director and principal screenwriter. All of the other creative collaborators in the motion picture would have to rely on the principal director and principal screenwriters for vindication of their rights. Authors of preexisting works used in motion pictures, such as novelists and composers, are to rely on contractual provisions for prevention of unwanted material alterations to their works in the motion picture.

The producers' and "colorizers' " response to the directors' claim rests on the assertion that their activities are consistent with both the purposes of the Copyright Act and the rights they have fairly obtained through collective and individual bargaining. Additionally, they argue that imposition of restrictions on existing motion pictures would violate the "takings" clause of the Fifth Amendment to the U.S. Constitution. The producers and colorizers reject the directors' attempt to invoke the public interest, arguing that the directors actually seek a right permitting them to insist that the original version be the only version distributed to the public. They note the public's preference for color television viewing, and they point to their preservation efforts in restoring and making avail-

able black and white versions of motion pictures along with the colorized version. They stress the critical economic need and benefit of distributing motion pictures in nontheatrical markets. The producers and colorizers deny that directors should have the final say over the form in which their works are distributed in post-theatrical markets.

We then analyze these various arguments, concluding as follows.

Proponents of change in the existing law should bear the burden of showing that a "meritorious public purpose is served by the proposed congressional action." If this threshold is met, Congress is then faced with the "delicate job of bartering between what are often contrary interests."

In analyzing the directors' assertion that a meritorious public purpose is served by protecting the integrity of their works, we note that in adhering to the Berne Convention, the United States has declared that its law satisfies the obligations of that Convention, one part of which is Article 6*bis*, the moral rights provision. In adhering to the Convention, the United States specifically declared that the totality of existing U.S. law — federal, state statutory and common law — provides a level of moral rights protection that at least rises to the minimum level required by Article 6*bis*. The question of whether moral rights should be unified in a single federal system under the Copyright Act is the subject of dispute, but, after joining the Berne Union, it cannot be denied that the United States recognizes moral rights. Accordingly, the prevention of material alterations to motion pictures in a manner that injures the reputation of the creative collaborators of the film does represent a "meritorious public purpose," at least on its face.

Invocation of the public interest by some of the directors gives rise to a degree of ambiguity since they do not, strictly speaking, seek to preserve the original version of motion pictures, but instead seek to obtain rights for individual directors to decide whether the theatrical version should be materially altered.[3]

Additionally, we conclude that if Congress is persuaded that it should vest directors and screenwriters with increased moral rights, then Congress should also include the other creators in the list of beneficiaries. For example, the authors of the underlying works used in motion pictures get such benefit and should not be forced to rely on contractual protection, which the directors claim is inadequate for vindication of their rights.

3. The ambiguity of this invocation of public interest does not, of course, apply to directors' attempts to prevent material alterations to the works of other directors created during Hollywood's "Golden Era."

Finally, we discuss the likelihood that a violation of the takings clause of the Fifth Amendment would result from the grant of a new federal moral right as applied to existing motion pictures. Given this problem, the issue becomes whether legislation is required for future motion pictures since very few motion pictures are now shot in black and white, and many theatrical motion pictures are shot in a form that ameliorates the need for extensive panning/scanning for television viewing. We also discuss the important interest in ensuring that new motion pictures are created, and the interests of broadcasters, cable systems, and video retailers in delivering motion pictures to the public.

Chapter 6: Preservation

In this chapter we discuss issues of preservation: the availability of the original version of motion pictures, and the opportunity to view that version in theatrical exhibition, on videocassettes, and on cable and broadcast television. We review the steps taken by various private and public organizations to preserve motion pictures and the approaches that may be taken to better coordinate these various efforts.

Chapter 7: Conclusions

Chapter 7 contains our conclusions. Based on the testimony before the congressional committees and the Copyright Office, and the various written comments submitted to us in this inquiry, the Copyright Office reached the following conclusions.

(1) The Subcommittee should seriously consider a unified federal system of moral rights;

(2) If a unified federal system of moral rights is adopted, state moral rights protection should be partially preempted. Preemption should apply to rights equivalent to those granted in the amended federal statute but not to nonequivalent rights;

(3) If the Subcommittee prefers an industry-by-industry approach to moral rights, and chooses to zero in on the motion picture industry, the Subcommittee should carefully consider whether the existing web of collective and individual bargaining is adequate to protect directors' legitimate interests;

(4) If the Subcommittee chooses to grant a higher level of moral rights in the motion picture industry than now exists, the Copyright Office could support this effort in principle. This legislation would accord rights only to works created on or after the effective date of the legislation and would be granted to

authors of preexisting works used in motion pictures on or after the effective date, as well as to other creative participants in the motion picture (e.g., cinematographer, art directors, editors, and perhaps, actors and actresses).

CHAPTER 1: INTRODUCTION

The Copyright Office has prepared this report at the request of the chairman of the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the House Committee on the Judiciary, Robert W. Kastenmeier, and ranking minority member Carlos Moorhead.[4]

In their letter of request, sent in recognition of the extraordinary cultural and economic importance of motion pictures, Chairman Kastenmeier and Mr. Moorhead asked the Office to inquire broadly into the present and future use of technologies in the motion picture industry — technologies such as computer color encoding ("colorization"), panning and scanning, and time compression and expansion ("lexiconning") — and how they affect "consumers, artists, producers, distributors and other affected individuals and industries." They asked the Office to consult with the creators of motion pictures, the distributors of motion pictures, and the broadcast industry as well as "other commercial interests that exploit such works or own copyrights interests in them, and with consumers, archivists, academics and appropriate governmental agencies. . . ."

A. Scope of the Copyright Office Study

On May 25, 1988, the Office published in the Federal Register a Request for Information and a Notice of Hearing.[5] In addition to requesting information describing the aforementioned technologies, the Office solicited comments in four areas: (1) nature and impact of the technology; (2) contractual practices; (3) foreign practices; and, (4) possible future legislative action.[6]

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4. Letter of Feb. 25, 1988 to Ralph Oman, Register of Copyrights, United States Copyright Office reprinted in the Appendix. The subcommittee changed its name in the 101st Congress to the SUBCOMMITTEE ON COURTS, INTELLECTUAL PROPERTY AND THE ADMINISTRATION OF JUSTICE.

5. 53 Fed. Reg. 18937-18938 (May 25, 1988).

6. The areas of inquiry and specific questions examined are as follows:

(1) A description of the technologies of colorization, time compression and expansion and panning and scanning and how these technologies are utilized after the creation of a motion picture (so called post-production changes) and other audiovisual works and the reasons these techniques are used. Are these technologies used, for example, to enhance the commercial value of the film? Are there possible aesthetic considerations — both for the use and preven-

In response to the Request for Information, the Office received twenty written comments from the following groups and individuals: (1) Society for Cinema Studies; (2) Max Planck Institute for Foreign and International Patent, Copyright, and Competition Law (Munich, Federal Republic of Germany); (3) Color Systems Technology, Inc.; (4) Turner Broadcasting System, Inc.; (5) the Motion Picture Association of America, Inc.; (6) Quintex Entertainment, Inc. (Colorization, Inc.); (7) Professor Peter Jaszi; (8) the Directors Guild of America; (9) American Movie Classics; (10) Erol's Inc.; (11) Video Treasures, Inc. and Video Cassette Sales, Inc.; (12) Donald L. Pevsner, Esq.; (13) International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada (IATSE); (14) George Stevens, Jr.; (15) National Broadcasting Company, Inc.; (16) National Association of

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tion of the use of these technologies? What is the impact of the use of such techniques on both the economic rewards flowing to the creators of films and the producers of such films?

(2) What is the present extent of the use of the technologies and what is the present impact of the technologies on those involved in the distribution of the original and the altered versions of the work? What is the projected future use and impact of these technologies and any new technologies currently in the planning or development stages?

(3) How do existing contractual practices (both private contracts and collective bargaining agreements) between creators and producers govern the use of these techniques? What about contracts between producers and their assignees, such as broadcasters or intermediary-distributors? Are there differences in contract provisions negotiated by established creators and those negotiated by lesser-known artists?

(4) Is it possible to identify the creative interests affected by these techniques with any precision? What is the present status of such interests under copyright law in relation to the audiovisual works they create? Would new provisions in the Copyright Act, such as new moral rights provisions, be required to accord to such creators, a means to control or influence the use of these technologies in relation to their work? What public policy considerations are involved?

(5) Have foreign countries addressed any of the issues raised by these new technologies, and if so, how are these foreign practices relevant or applicable to practices in the United States?

(6) What, if any, is the impact of the use of such techniques on the public's access to audiovisual materials? Do these techniques essentially extend potential distribution of works by creating new commercial opportunities for public exploitation? Do these techniques have the effect of crowding out of the marketplace original versions of pre-existing works? Do these techniques affect the profitability of broadcasting or other distribution enterprises so as to permit them to acquire new works of other authors?

(7) Notwithstanding the answers to any of these questions, is there an overriding public policy problem posed by the unchecked use of these technologies? Are nationally and internationally recognized "classics" of American cinema being lost in their original form to future generations? What is, and what should be the government's role in the preservation of works? Should it be all works or is it in fact, possible to distinguish among audiovisual works so as to protect such classic works from any negative effects of these techniques and practices? Do the subsequent changes made to works misrepresent or unreasonably diminish the artistry involved in creating such classics?

(8) Finally, is a legislative solution to these issues appropriate, or would voluntary agreements (among the concerned parties or by industry agreement or code of conduct) suffice? If legislation is the best solution, what form should it take?

Broadcasters; (17) Morality in Media, Inc.; (18) American Film Technologies, Inc.; (19) Filmlife, Inc.; and (20) National Center for Film and Video Preservation of the American Film Institute.[7]

To better understand the technologies and current practices in the motion picture industry, the Copyright Office sent two staff members to Toronto, Canada, where they received a demonstration of the computer color encoding process used by Colorization, Inc. They also visited Los Angeles, California, and interviewed representatives of Color Systems Technology, Inc. (and received another in-depth demonstration of its computer color encoding process), as well as American Film Technology, Inc. (another computer color encoding process), Turner Entertainment Company, Walt Disney, Inc., the Alliance of Motion Picture and Television Producers, the Directors' Guild of America, the Screen Actors Guild of America, directors Elliot Silverstein and Sydney Pollack, and finally AME, Inc., a company which specializes in film to videotape transfers using panning and scanning techniques, where they witnessed a demonstration of that technology.

Pursuant to the May 25, 1988 Federal Register notice, the Copyright Office held a public hearing in the Library of Congress on September 8, 1988. Testimony was taken from fourteen public witnesses representing a broad spectrum of interests including all of the industries involved in the invention and use of the technologies, producers, distributors, artists, film preservationists and academicians.[8]

In order of appearance (and grouped by panel), the witnesses were: (1) "Colorization" Panel: Joseph Adelman (Color Systems Technology) with Jon Baumgarten, counsel, Bernard Weitzman (American Film Technology), and Rob Word (Quintex Corporation, Colorization, Inc.); (2) Roger Mayer (Turner Entertainment Company); (3) Arnold Lutzker, Esq. (Directors' Guild of America); (4) Joshua Sapan (American Movie Classics, cable television channel); (5) Preservation Panel: George Stevens, Jr. and John Belton (Society for Cinema Studies); (6) Video Retailers Panel: Vans Stevenson (Erol's, Inc.) and Burton Wides, Esq. (Video Software Dealers Association); (7) Academic Panel: Professor L. Jaszi (Washington College of Law, American University), and Dr. Thomas Dreier and Silke von Lewinski (Max Planck Institute for Foreign and International Patent, Copyright, and Unfair Competition Law, Munich, Federal Republic of Germany).

7. These statements are reprinted as Volume II of this report.

8. A transcript of the hearing is reproduced as Volume III of this report.

B. Previous Copyright Office Actions

The present study is, at least in part, the result of the Copyright Office's 1987 decision to accept, on a class basis, claims to copyright in computer color encoded versions of black and white motion pictures and television programs.[9] In light of this decision, it is appropriate to review briefly that history.

Between 1985 and 1986, several parties submitted claims to copyright in computer color encoded versions of black and white motion pictures and television programs. To assist it in developing practices regarding these claims, the Copyright Office published a Notice of Inquiry in the Federal Register on September 15, 1986, soliciting public comment and technical information on the computer color encoding process.[10]

The Notice stated the Office was "aware of sharply held differences of view on the aesthetic consequences of colorizing previously distributed black and white film." The Notice cautioned, however, that while the Copyright Office would follow that debate with interest, issues such as whether colorization "risks 'mutilating' the conscious artistry of black-and-white cinematographers . . . cannot and do not form any part of this present inquiry." [11]

The reason for this position is simply stated and firmly rooted in the case law: it is not the role of the courts or the Copyright Office to pass judgment on the aesthetic value of a work. As Justice Holmes stated in *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251-52 (1903):

> 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. At the one extreme some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke. It may be more than doubted, for instance, whether the etchings of Goya or the paintings of Manet would have been sure of protection when seen for the first time. At the other end, copyright would be denied to pictures which appealed to a public less educated than the judge. Yet, if they command the interest of any public, they have a commer-

9. 52 Fed. Reg. 23443-23446 (June 22, 1987).

10. 51 Fed. Reg. 32665-32667 (Sept. 15, 1986).

11. Despite this caveat, many of the forty-six written comments submitted focused on the aesthetic merits of computer color encoding.

> cial value — it would be bold to say that they have not an aesthetic and educational value — and the taste of any public is not to be treated with contempt. It is an ultimate fact for the moment, whatever may be our hopes for a change.

Original works of authorship, including computer color versions of black and white motion pictures that meet the legal and formal requirements of the Copyright Act, are entitled to registration, regardless of their aesthetic or artistic value. Congress, naturally, may amend the Copyright Act to prohibit copyright in "objectionable works," but for good reason it has never indicated a desire to do so. Such a radical reversal of current law should be undertaken, if at all, only after thorough review of the many adverse consequences that would inevitably result from such a step.

On June 22, 1987, the Copyright Office issued a Notice of Registration Decision.[12] The Notice informed the public that, after having reviewed the comments, the Office concluded some computer color encoded motion pictures and television programming may contain sufficient authorship to justify registration as derivative works. Of course, the copyright in such a derivative work has no effect whatsoever on the copyright status of the preexisting black and white work. 17 U.S.C. Sec. 103(b) (1978).

The Notice further announced that the Office would apply the same standard in determining whether the color added to a black and white motion picture or television program satisfies the requirements for registration as is currently applied to all other derivative works: that is, whether or not the modifications, taken as a whole, represent an original work of authorship.[13] This standard is taken directly from the statute, 17 U.S.C. Sec. 101 (1978) (definition of "derivative work") and from the Committee on the Judiciary's conclusion in 1976 that the statutory

12. 52 Fed. Reg. 23443-23466 (June 22, 1987).

13. The Notice enumerated five criteria the Office would apply in determining whether the coloring of a particular black and white film is a modification that satisfies this statutory standard of new authorship. The criteria to be used are:

(1) [n]umerous color selection 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;

(5) The existing regulatory prohibitions on copyright registration based on mere variations of color is confirmed.

phrase "original works of authorship" "is intended to incorporate without change the standard of originality established by the courts under the present [1909] copyright statute." H.R. Rep. No. 94-1476, 94th Cong., (1976).

Two days later, on June 24, 1987, the Copyright Office issued a proposed deposit regulation for claims to copyright in computer color encoded versions of black and white motion pictures and television programming.[14] Only six comments on the proposed regulation were received.

On August 9, 1988, the Office adopted a final deposit regulation.[15] The regulation adheres to the proposed requirement that a copy of the black and white version of the work be deposited when registration is sought for computer color encoding, and specifies that the black and white copy be an archival quality print where one is available.[16]

The Office based its authority to require deposit of a copy of the preexisting black and white work — in addition to a copy of the computer color encoded work when registration is sought for the latter — on both its general rulemaking authority and the authority given to the Register of Copyrights to specify by regulation the "nature of the copies or phonorecords to be deposited in the various classes. . . ." See 17 U.S.C. Secs. 408(c)(1), 702 (1978). The Office concluded that the deposit of a black and white print would facilitate the examination necessary to determine whether a computer color encoded version represents more than a trivial variation from the underlying black and white work, and would also "enrich the collections of the Library of Congress for the benefit of the public and posterity."

C. Issues Examined in this Report

The issues raised by computer color encoding of black and white films are but the latest manifestation of a centuries-old interplay between creativity, copyright, and technology: between the need to encourage authors to create works, the need to provide a framework within which lawful distributors of works can successfully market them to the public,

14. 52 Fed. Reg. 2369 (June 24, 1987).

15. 53 Fed. Reg. 29887-29890 (Aug. 9, 1988).

16. The order of preference is that followed in the "Best Edition Statement" of the Library of Congress, and will usually be a 35mm print. The Motion Picture Agreement, developed in 1941, by the Library of Congress and the motion picture copyright owners, is designed to encourage registration of motion pictures while allowing a registrant to keep copies of the print in circulation while the motion picture is being initially exhibited. The Motion Picture Agreement would not apply to the colorized versions because they are not being exhibited theatrically, and are on a videotape format.

and the desire of the public to have access to works of authorship in a convenient and affordable manner. The Supreme Court recently noted that "[f]rom its beginning, the law of copyright has developed in response to significant changes in technology." *Sony Corporation of America, Inc. v. Universal City Studios, Inc.*, 464 U.S. 417, 430 (1984).

By their very nature, the technologies involved in this report pose new problems, but the introduction of technologies that affect the rights of creators and the marketplace is not new. As in the past, in keeping with the constitutional goal of encouraging the promotion of the progress of science, any solution to the problems posed by such technologies must carefully balance the rights of all interests involved: creators, distributor-copyright owners, and the public.

The technologies at issue here are important to distributor copyright owners of theatrical motion pictures because they allow exploitation in other markets, e.g., broadcast television, cable television, videocassette markets, and airlines. The artistic creators of motion pictures argue that these technologies have materially altered the aesthetic value of their contributions. The public interest is in having access to works of authorship, including both the new altered versions and the original, unaltered version of the work.

In Chapter 3, we discuss these technologies in detail; however, by way of preface, we briefly summarize them here.

Computer color encoding ("colorization") is a process that uses computer technology and standard video signal processing to transform a black and white video signal into color. First, a new one-inch tape of the black and white film is made from a 35mm print. Next, each individual shot in the motion picture is identified and catalogued. The artistic director then adopts an overall look and color selection for the entire film. In order to accomplish this selection, a "storyboard" — a visual presentation of key shots — is created. Next, each individual shot is color encoded. The color is then balanced from one scene to the next, and ultimately within the entire work. Colorization is currently used only for videocassettes and television broadcasts. While there are no plans to use the process for theatrical exhibition, such an application may arise in the future with further improvements in technology and the existence of a viable marketplace.

Panning and scanning is a process by which motion pictures, created for the wide theatrical screen, are adapted for broadcast on narrower television screens. This process involves reconciling the larger theatrical "aspect ratio" (ratio of width to height) to the smaller space available on a television. In the case of theatrical motion pictures shot in 1.66, 1.75,

or 1.85:1 aspect ratios, little of the original image is lost in the transfer to the 1.33:1 aspect ratio of television; however, what was a close up in the theatre becomes a medium close up on TV; what was a medium shot in the theatre (waist up) becomes a three-quarter shot (knees up) on television.

In the case of larger theatrical aspect ratios, though, the image loss can be significant. To retain as much of the essential parts of the original theatrical image as possible under these circumstances, panning and scanning is used.[17] First, a film to tape transfer is made on a "telecine machine." A telecine operator then views the tape image on a video monitor and, in essence, electronically reframes the shot within the television parameters. Generally, the operators attempt to follow the central action, focusing on whoever is speaking, or, on the movements of the characters.

Time compression or expansion ("lexiconning") involves the actual speeding up or slowing down (without appreciably altering the voices) of films when screened on television, or, (much less often), when transferred to videotape. The film is viewed at a rate faster or slower than the standard theatrical rate of 24 frames per second. Lexiconning is used little, if at all, outside of commercial television which adheres to "on-the-hour" and "on-the-half-hour" time slots.

Later in this report, we shall examine other technologies, such as High-Definition Television and computer generation of images, as well as editing for airplanes. The critical point is not the mechanics of any particular technology, or necessarily whether the technology is new or old,[18] but rather whether or not the use of the technology affects a work's aesthetics and whether or not it impedes access to the original, unaltered version of the work.

CHAPTER 2: COPYRIGHT IN THE MOTION PICTURE AND TELEVISION INDUSTRIES

Due to the collaborative nature of filmmaking and its extensive use of preexisting works such as novels and musical compositions, the number of parties affected by copyright in the motion picture and televi-

17. An alternate approach to this problem known as "letterboxing," is discussed below in Chapter Three.

18. This point is demonstrated by directors' complaints about the routine deletion of substantial parts of their work for broadcast on television and exhibition on airlines, deletions that may have a deleterious effect on the aesthetics as the new technologies. *See generally,* Ginsburg, *The Right of Integrity in Audiovisual Works in the United States,* 135 R.I.D.A. 2 (1988); Kerever, *The Insertion of Advertising in Films Screened on Television,* 32 COPYRIGHT BULL. 10 (1988).

sion industries goes beyond the archetype of author, publisher, and public. In this chapter, we examine these complex relationships. We begin with a brief history of copyright protection for motion pictures and television programming.

A. Copyright Protection for Motion Pictures and Television Programs

Section 106 of the Copyright Act of 1976 grants certain exclusive rights in original works of authorship, including "motion pictures and other audiovisual works." 17 U.S.C. Sec. 102(a)(6) (1978).[19] The term of protection is the same as that granted to all other works of authorship. However, given the fact that motion pictures are generally created under work made for hire agreements, the usual term is that provided in Section 302(c): to wit, seventy-five years from the year of first publication or one hundred years from creation, whichever expires first.

The history of copyright for motion pictures may be traced to the late 1890's and early 1900's. See *Edison v. Lubin,* 122 F. 240 (3d Cir. 1903), *appeal dismissed,* 195 U.S. 625 (1904) (motion picture of launching of yacht held predictable under Act of 1870 as a single photograph; originality was found in its "artistic conception and expression. To obtain it requires a study of light, shadows, general surroundings, and a vantage point adapted to securing the entire effect."); *American Mutoscope & Biograph Co. v. Edison,* 137 F. 262 (C.C.D.N.J. 1905) (series of pictures telling a connected story similarly protected); *Harper Bros. v. Kalem Co.,* 169 F. 61 (2d Cir. 1909), *aff'd on other grounds,* 222 U.S. 55 (1911).

Protection for motion pictures as photographs continued under the 1909 Act, as originally codified. See 17 U.S.C. Sec. 5(j) (1909). Three years later, however, under the amendatory Act of August 24, 1912, 37 Stat. 488, motion pictures were expressly protected as either "motion-picture photoplays" or "motion-pictures other than photoplays." The first category, registered in class 1, was reserved for motion pictures that

19. Motion pictures are defined as "audiovisual works consisting of a series of related images which, when shown in succession, impart an impression of motion, together with accompanying sounds, if any." 17 U.S.C. § 101 (1986). Audiovisual works are defined as "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." *Id.* The 1909 Act had no definition of these terms. Compendium I of Copyright Office Practices contained the following definition: "A motion picture is a series of pictures presenting to the eye the illusion of motion, which pictures are projected on a screen or transmitted by means of television or otherwise, and have as their origin a series of connected pictures on film or other recording media." Chapter Two, Part 2.14.1.

were dramatic in character and told a connected story. The second category, registered in class m, was reserved for newsreels, travelogs and the like. Television programs were later accepted for registration in the appropriate motion picture category.

In expressly protecting motion pictures under the amendatory Act of 1912, the Congressional reports stated:

> The occasion for this proposed amendment is the fact that the production of motion-picture photoplays and motion-pictures other than photoplays has become a business of vast proportions. The money invested therein is so great and the property rights so valuable that the committee is of the opinion that the copyright law ought to be so amended as to give them distinct and definite recognition.
>
> H.R. Rep. No. 756, 62d Sess. 1 (1912); S. Rep. No. 906, 62d Cong., 2d Sess. 1 (1912).

There is evidence of another motive for the amendatory Act — that of limiting the liability of motion pictures for infringement of "undramatized" or "nondramatic works." See *Id.,* and *Townsend Copyright Amendment: Complete File of Arguments Before the Committee on Patents on H.R. 15263 and H.R. 20596,* 62d Cong., 2d Sess. (1912). Yet a third reason for the amendment — ease of classification by the Copyright Office — is suggested in Study No. 3, *The Meaning of "Writings" in the Copyright Clause of the Constitution,* 86th Cong., 1st Sess. 43, 76 (Comm. Print 1960).

B. International Conventions

1. Universal Copyright Convention

Article I of the Universal Copyright Convention provides that each contracting state "undertakes to provide for the adequate and effective protection of the rights of authors and other copyright proprietors in literary, scientific and artistic works, including writings, musical, dramatic and cinematographic works. . . ." There is no special provision governing the term of protection for cinematographic works, thus leaving national legislation to accord a term within the rules provided by Article IV(2). The general rule requires a term of life of the author plus 25 years; however, some countries measure the term of at least twenty-five years from first publication or from registration prior to publication.

2. The Berne Convention for the Protection of Literary and Artistic Works

Cinematographic works were first protected under Articles 14(2) and (3) of the 1908 Berlin Revision. Article 14(2) provided:

> Cinematographic productions shall be protected as literary or artistic works if, by the arrangement of the acting form or the combination of the incidents represented, the author has given the work a personal and original character.

This provision "regarded [cinematographic works] simply as another species of dramatic work, and little, if any, account was to be taken of the technical skills required to make them. . . ." Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works:* 1886-1986 at p.550 (1987).[20] Article 14(3) provided:

> Without prejudice to the rights of the author of the original work, the reproduction by cinematography of a literary, scientific or artistic work shall be protected as an original work.

Unlike Article 14(3), this provision protected cinematographic works in their own right. The 1971 Paris text of Berne, to which the United States adheres, combines the two Berlin revisions into a single provision, found in Article 14*bis*(1): "Without prejudice to the copyright in any work which may have been adapted or reproduced, a cinematographic work shall be protected as an original work. The owner of copyright in a cinematographic work shall enjoy the same rights as the author of an original work, including the rights in the preceding Article."[21]

Article 7(1) provides the basic term of protection of life of the author plus fifty years. Article 7(2), however, permits countries, in the case of cinematographic works, to provide that the term of protection shall expire "fifty years after the work has been made available to the public with the consent of the author, or, failing such an event within fifty years after the making." See W.I.P.O. Guide to the Berne Convention at 46-47 (1978); Ricketson, supra at 566-69.

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20. *See id.* at 551-62 for discussion of subsequent revisions and proposals.

21. *See also* Article 2(1) listing cinematographic works as encompassed by "literary and artistic works," and W.I.P.O. GLOSSARY OF TERMS OF THE LAW OF COPYRIGHT AND NEIGHBORING RIGHTS at 35 (1981) (defining "cinematographic work" as "Any sequence of images recorded successively on an appropriate sensitive material, mostly accompanied by sound, for the purpose of being shown as a moving picture").

C. *The Nature of Authorship in Motion Pictures*[22]

1. Case Law in the United States

There is little U.S. case law on the nature of authorship in motion pictures. In *Edison v. Lubin,* 122 F. 240, 242-43 (3d Cir. 1903), *appeal dismissed,* 195 U.S. 625 (1904), the court held that a motion picture of the launching of Kaiser Wilhelm's yacht "Meteor" embodied:

> artistic conception and expression. To obtain it requires a study of light, shadows, general surroundings, and a vantage point adapted to securing the entire effect. In *Bolles v. The Outing Co.,* 77 F. 966 (2d Cir. 1897), depicting a yacht under full sail was held to constitute an original work of art; and in view of the recent decision of the Supreme Court (*Bleistein v. Donaldson Lithographing Co.,* 188 U.S. 239 . . . (1903)) in reference to the character, in that regard, of a circus poster, we have no question that the present photograph sufficiently fulfills the character of a work of the fine arts.

Two years later, in *American Mutoscope & Biograph Co. v. Edison Mfg. Co.,* 137 F. 262, 266 (C.C.D.N.J. 1905), a motion picture of staged scenes occurring at and around Grant's Tomb was held copyrightable because the

> pictures express the author's ideas and conceptions embodied in the one story. In that story, it is true, there are different scenes. But no one has ever suggested that a story told in written words may not be copyrighted merely because, in unfolding its incidents, the reader is carried from one scene to another.

Cases under the 1909 Act do not appear to have delved into the nature of motion picture authorship. In *Epoch Producing Corp. v. Killiam Shows, Inc.,* 522 F.2d 737 (2d Cir. 1975), a case involving D. W. Griffith's film "Birth of a Nation," the parties extensively briefed the issue, but the court of appeals based its dismissal of Epoch's claim that Griffith was its work made for hire employee on factors other than the nature of Griffith's contributions.

2. Authorship in Motion Pictures Under the 1976 Copyright Act

During the revision process leading to passage of the 1976 Act, issues involving motion pictures and other audiovisual works centered on

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22. For simplicity's sake, we do not separately discuss the nature of authorship in television programming. It is generally recognized that unlike motion pictures, television programming is a "producer's medium." *See* testimony of Rob Word, *Quintex Corporation before the Copyright Office,* Sept. 8, 1988 hearing. Transcript at 38.

nonauthorship questions such as infringement by exhibition, the making of ephemeral copies, copyright in transmissions of live broadcasts that are simultaneously taped, termination of transfers, and work made for hire. This is also true of the legislative reports accompanying the Act. See H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. (1976); S. Rep. No. 94-473, 94th Cong., 1st Sess. (1975).

The Copyright Office's regulations under the 1976 Act[23] do not contain any discussion on point. Compendium II of Copyright Office Practices makes only one reference:

> A motion picture may embody the contributions of many persons whose efforts are brought together to make a cinematographic work of authorship. Some examples of copyrightable elements might be camera work, directing, editing, sound engineering, and other cinematographic contributions. By contrast, mere mechanical acts cannot serve as the basis for copyright registration; for example, a claim based on conversion from 35mm film to one-half-inch videocassette is not subject to registration.
>
> Chapter 4, Sec. 480.03.

See also Copyright Office Circular R45 at 6: "The production of a motion picture nearly always begins with some broad ideas and concepts which the various creators . . . then proceed to embody in a number of different concrete forms of creative expression: dialogue, dramatic action, camera work, visual effects, editing, music and so forth."

Likely reasons for the paucity of legal commentary on the nature of authorship in motion pictures in the United States are the work made for hire doctrine and the early dominance of the industry by the studios. These two reasons are, moreover, related. 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. See 17 U.S.C. Sec. 26 (1909 *repealed* 1978); *Picture Music, Inc. v. Bourne, Inc.*, 314 F. Supp. 640 (S.D.N.Y.), *aff'd*, 457 F.2d 1213 (2d Cir. 1970), *cert. denied*, 409 U.S. 997 (1972) (musical composition "Who's Afraid of the Big Bad Wolf" used in motion picture cartoon "Three Little Pigs" created by Walt Disney staff pianist).

Even outside of the studio system, directors and others were, of course, required to sign employment contracts for specific films. These contracts typically contained work made for hire clauses.

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23. 37 C.F.R. §§ 201-308.

While the studio system no longer prevails, work made for hire does.[24] Under this system, directors, screenplay writers, cinematographers, and others typically assign all rights to the producing or distributing company in exchange for compensation. During the omnibus revision of the 1909 Act, screenplay writers and composers attempted to alter the work made for hire doctrine by statutorily adopting something similar to the "shop right" doctrine of patent law. Under this approach, the employer acquires the right to use the work for purposes of his or her regular business, but the employee retains all other rights that do not compete with the employer. Congress, however, rejected the proposal:

> [W]hile this change might theoretically improve the bargaining position of screenwriters and others as a group, the practical benefits that individual authors would receive are highly conjectural. The presumption that initial ownership rights vest in the employer for hire is well established in American copyright law, and to exchange that for the uncertainties of the shop right doctrine would not only be of dubious value to employers and employees alike, but would also reopen a number of other issues.
>
> H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 121 (1976); S. Rep. No. 94-473, 1st Sess. 104-105 (1975).

Following rejection of this proposal, nothing further was mentioned about authorship or ownership in motion pictures. The Berne Convention and some foreign statutes contain provisions on ownership of cinematographic works, which may be profitably examined.[25]

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24. *See* second subdivision of the definition of "work made for hire" in § 101 of the 1976 Act, which includes contributions to motion pictures.

25. The Universal Copyright Convention does not contain any special provisions on ownership of cinematographic works. Article I provides generally that protection must be granted to the rights of "authors and other copyright proprietors." In his treatise on the Convention, Arpad Bogsch, Director General of the World Intellectual Property Organization explains:

> [t]he fact that the Convention does not refer only to authors but also to "other copyright proprietors" seems to have at least two good reasons.
>
> The first reason is that "author" has a different meaning in the various copyright laws of the world. Some countries recognize as authors only physical persons, others recognize also legal entities. In the case of works made by an employee in the course of his employment, some countries recognize the employer, others the employee as author. The question of who is the author or are the authors of a photograph or a motion picture belongs among the most controversial problems of copyright law and the replies may considerably vary from one country to another. (second reason omitted).
>
> BOGSCH, THE LAW OF COPYRIGHT UNDER THE UNIVERSAL COPYRIGHT CONVENTION 7 (1968).

D. Berne Convention

Article 14*bis*(2)(a) of the Berne Convention provides: "Ownership of copyright in a cinematographic work shall be a matter for legislation in the country where protection is claimed." The W.I.P.O. Guide to the Berne Convention explains that such owners "may be the maker in his own right, as under the 'film copyright' system, or the maker by reason of a legal assignment, or it may be the various artistic contributors to the film. National legislation is free to adopt any of the systems." W.I.P.O. Guide at 85. The term "maker" is, absent proof to the contrary, considered to be "[t]he person or body corporate whose name appears on a cinematographic work in the usual manner." Article 15(2).

These provisions have an extensive and controversial history due to the widely differing approaches taken in national laws.[26] The "film copyright" system, found generally in common law countries (including the U.S.) vests all rights in one person or entity, typically the producing or distributing company. The "legal assignment" system vests ownership rights only in the natural persons who contribute to the film, but establish a statutory assignment of exploitation rights to the producer. A variant on this system establishes a presumption that such an assignment has taken place.

These different approaches to ownership of cinematographic works led to problems in exploiting them across national boundaries, a problem that was solved within Europe with respect to television programs by a 1958 agreement concluded under the auspices of the Council of Europe, which adopted the presumption of assignment system. This agreement led to initiatives to include similar provisions in the Berne Convention. After considerable debate and study,[27] the current provisions found in Article 14*bis* were agreed upon.

In addition to the provisions of Article 14*bis*(1) quoted above, Article 14*bis*(2) subsections (b)-(d) contain a special provision for authors of preexisting works used in cinematographic works created in countries that regard such authors as co-authors of the cinematographic work.[28] Under this provision — called a "presumption of legitimation" — authors of preexisting works may not, in the absence of an agreement to the contrary, object to enumerated forms of exploitation of the cinemato-

26. RICKETSON, THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS: 1886-1986 (1987) at 572-89 [hereinafter RICKETSON].

27. *See* RICKETSON, *supra* note 26, at 574-82.

28. The question of the moral rights of authors of such preexisting works is critical to this study, and is discussed in Chapter Five.

graphic work.[29] The purpose of the provision is to give film companies "complete freedom to do everything needed to ensure the international circulation of their films."[30]

Article 14*bis* (3) states that these provisions do not apply to "authors of scenarios, dialogues and musical works created for the making of the cinematographic work, or to the principal director thereof." If, however, national law does not make the presumption binding on the principal director, the country must notify the Director General of the World Intellectual Property Organization who will then notify the countries of the Union. The purpose of this provision is to "take[ ] into account those countries which treat the director as merely another employee of the film company" and to exclude from the presumption "authors whose works . . . can enjoy an existence other than in the film itself. . . ."[31] The Guide explains, however, that the presumption does apply to

> assistant producers and directors, those responsible for decor, costumers, cameramen and cutters, and also actors, to the extent that some countries treat them as co-authors of the film. It was agreed in Stockholm (1967) that no country in the Union which gives the copyright in films to the artistic contributors may adopt a law which does not allow for such a presumption of legitimation. In other words it is binding on all the countries concerned.
>
> National legislation does however remain free to provide that authors must share in the proceeds of the exhibition or other exploitation of the films to which they contributed.

In his thorough review of these provisions, Ricketson notes that they have been described as "devoid of practically any real substance," a description he agrees with, adding: "The purpose . . . was the production of a uniform international code to regulate exploitation of cinematographic works so as to promote the free circulation of films. This objective was hardly achieved, and the provisions adopted are the most obscure and least useful in the whole convention."[32]

The W.I.P.O. Guide Commentary on Article 14 understandably contains a more neutral discussion:

The rules [on ownership] were formulated at the Stockholm

29. These forms are: reproduction, distribution, public performance, communication to the public by wire, broadcasting or any other communication to the public, or to the subtitling or dubbing of texts, of the work.

30. W.I.P.O. GUIDE at 87.

31. W.I.P.O. GUIDE at 89.

32. RICKETSON, *supra* note 26, at 582. *See also id.* at 589.

Revision (1967); they gave rise, both in Stockholm and during the preparatory meetings, to much discussion and protracted negotiations. The result is Articles 14 and 14*bis*.

Their objective is to facilitate the international circulation of films and, to this end, to seek to bring closer together, if not unify, the legal theories on the subject in the various countries of the Union. Basically there are three different legal systems.

The "film copyright" system in which only the maker is the first owner of the copyright in the film (and not the producer, director, cameraman, etc.), but in which the rights in those works which go to make up the film and which enjoy an existence apart from the film (scenarios, script music, etc.) belong without restriction to their authors, from whom the film-maker must acquire them by contract, express or implied. In other words these authors enjoy copyright in their respective contributions and grant the maker of the film permission to use them. On the other hand, the latter owns all the copyright in the film itself and is therefore free, subject to any contractual stipulations to the contrary, to exploit it as he wishes.

A system in which the film is treated as a work of joint authorship of a number of artistic contributors (sometimes, but not always, listed in national law) from whom the maker must take assignments of their contributions in order to be able to exploit the film.

The system called "legal assignment" which also treats the cinematographic work as one of joint authorship but where the national law presumes a contract with the maker, assigning the right to exploit the film.

Since the Convention governs international situations, the problem was how to build a bridge between the systems without entirely ruling any of them out; this was done in Stockholm (1967) by adding a rule covering the interpretation of contracts known as "presumption of legitimation." This wedding of legal systems made a distinction between the author's pre-existing works (on which the film was based and from which it is adapted) and those of contributions which only come into existence during the making of the film. Article 14 governs the first and Article 14*bis* the second.

W.I.P.O Guide at 82-83.[33]

To see how national legislation has treated the ownership question, we shall examine the statutes of three countries: France, the Federal Republic of Germany, and the United Kingdom.[34]

E. France

The French Copyright Law of 1957, as amended in 1985, contains numerous provisions on cinematographic works.[35]

Article 14 of the Copyright Law provides:

> Authorship of an audiovisual work shall be deemed to belong to the physical person or persons who brought about the intellectual creation thereof.
>
> In the absence of proof to the contrary, the co-authors of an audiovisual work made in collaboration are presumed to be
>
> 1. The author of the script
> 2. The author of the adaptation
> 3. The author of the dialogue
> 4. The author of the musical composition, with or without words, especially composed for the work
> 5. The director (*realisateur*)
>
> When an audiovisual work is adapted from a pre-exisiting work or script which is still protected, the authors of the original work shall be assimilated to the authors of the new work.

Article 17 states that "[t]he producer of an audiovisual work shall be the natural or legal person who takes the initiative and responsibility for making the work." Article 63-1, which tracks Article 14*bis*(2) of the Berne Convention, declares:

> Contracts binding the producer and the authors of an audiovi-

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33. For similar reasons, the Berne Convention does not define the more general term "author." *See* W.I.P.O GUIDE at 11: "The Convention speaks of 'the rights of authors in their works' but it does not specifically define the word 'author' because on this point . . . national laws diverge widely, some recognizing only natural persons as authors, while others treat certain legal entities as copyright owners, some imposing conditions for the recognition of authorship which others do not accept."

34. For a good review of the laws of Latin American countries, *see* Emery, *Copyright in Cinematographic Works - A Study of Comparative Law in Latin America,* COPYRIGHT 291 (Sept. 1987).

35. *See, e.g.,* Articles 14-17, 63; as well as the 1985 Law on Author's Rights and the Rights of Performers, Producers of Phonograms and Videograms and Audiovisual Communication Enterprises, Title II, Articles 15-20, and Decree No. 56-158 (1956) *Registration of Contracts and Judgments Concerning Cinematographic Films.*

> sual work, other than the authors of a musical composition with or without words, imply, unless otherwise stipulated . . . assignment to the producer of the exclusive exploitation rights in the audiovisual work.

The advantages of this presumption are, however, severely restricted by Article 31 of Title II, which requires that "[t]he transfer of author's rights shall be subject to the condition that each of the rights transferred shall be specifically mentioned in the act of transfer." In reviewing these various provisions, one commentator concluded that "[w]e must . . . assume that this presumption of assignment is more philosophical (symbolizing the producer's privileged status) than truly legal." Kerever, *Audiovisual Works Under the French Law of July 3, 1985,* Copyright, July-August 1987 at p. 247.

F. Federal Republic of Germany

The German copyright law does not expressly state who is the author of a cinematographic work. Article 94(1) states, though, that:

> The producer of a cinematographic work shall have the exclusive right to reproduce the visual record or the visual or sound record on which the cinematographic work is fixed, and to distribute it, and to utilize it for public presentation, or for broadcast.

Article 94(3) provides for a 25 year term of protection for this right, while Article 94(2) permits for transfer of the right.

G. United Kingdom

Section 9(2)(a) of the 1988 U.K. Copyright, Designs and Patents Bill provides that in the case of a film the term "author" is to be regarded as "the person by whom the arrangements necessary for the making of the . . . film are undertaken."[36] In practice, therefore, in the United Kingdom, the producer or studio is the author of the work.

Based on the foregoing discussion, particularly the provisions of Article 14*bis* of the Berne Convention and the approach taken by the United Kingdom, it seems clear that U.S. law is consistent with international norms in its treatment of the producer as the work made for hire owner or author of a cinematographic work. The issue is principally significant in the United States only because of the directors' claims for a

36. *See also* Article 11 which states a general rule that works made by employees in the course of their employment are first owned by the employer, subject to any agreement to the contrary.

higher level of moral rights, an issue discussed in Chapter 8; however, since to some extent those claims are based upon a conception of authorship as encompassing only the principal director and screenplay writer, we briefly address them here.

H. The Directors' Position

The directors and writers concede that the producer or other commissioning party should, in the absence of an individual contract to the contrary, have final say over the content of the work as it is initially distributed.[37] They seek, however, to prohibit material alterations to the work after it has been so distributed, and seek to limit those who can object to such alterations to the principal director and screenplay writer.[38]

The basis for this approach appears to be two-fold. First, it is claimed that all of the other creative participants place their trust in the director.[39] Second, it is claimed, in any event, that aside from the principal screenplay writer, these other creative participants "do not compose the yarn" and are "professionally subject to the disciplines imposed by the script and the director."[40]

These contentions have been disputed by producers and academics. In a statement submitted in this inquiry, Professor Peter Jaszi noted that developments in film criticism "have called the continued usefulness of the traditional concept of 'authorship' into question, at least as a way of understanding how works of creativity (including motion pictures) function to create meaning."[41] Professor Jaszi added:

> One important accomplishment of motion picture scholarship in the past two decades has been to emphasize the importance of the contributions of many different sorts of participants in the process of filmmaking. Clearly, several groups of filmmak-

37. *See* DGA Basic Agreement at § 7-206 ("Individual with Final Cutting Authority"); § 7-505 (director's cut is presented to producer and other person designated as having final cutting authority). Statement of Directors Guild of America in *Berne Convention Implementation Act of 1987: Hearings on H.R. 1623 Before the Subcommittee on Courts, Civil Liberties and the Administration of Justice, House Judiciary Committee,* 100th Cong., 1st & 2d Sess. 421 (1987 & 1988); and *id.* at 427 (testimony of Frank Pierson on behalf of the Writers Guild of America); *Berne Convention: Hearings on S. 1301 and S. 1971 Before the Subcommittee on Patents, Copyrights and Trademarks, Senate Judiciary Committee,* 100th Cong., 2d Sess. 523 (1988)(*"1988 Senate Berne Hearings"*).

38. *See* H.R. 2400, 100th Cong., 1st Sess. (1988)(Gephardt, "Film Integrity Act of 1987").

39. *See* testimony of George Lucas in *1988 Senate Berne Hearings, supra* note 37, at 480.

40. Response of Steven Spielberg to Questions Posed by Sen. DeConcini, *1988 Senate Berne Hearings, supra* note 37, at 536.

41. Comment No. 7 at 4.

ing professionals, other than directors, have claims to be considered. Among others, the list would include art directors, cinematographers and film editors. *Id.* at 2.

Predictably, motion picture industry representatives have also disagreed with the directors' and screenwriters' claims. In a written statement submitted to the Subcommittee for its June 21, 1988 hearing on H.R. 2400, Roger Mayer of the Turner Entertainment Company wrote:

> [W]e need to explore a minor myth: the contention that the old movies were exclusively the director's vision, and thus the director has the right to control. There are a few exceptions but movie making — even today — is a hugely collaborative effort among many creators. Most of the black and white movies in question were made in the heyday of the studio system. Despite propaganda to the contrary, these old movies are not the immaculately conceived "children" of the directors. They are, for the most part, the "children" of the old movie moguls and their staff producers. Theirs was the "creative concept," and the financial responsibility. They chose the project, worked on the script with the writer, and then assigned all other jobs on the film, including the job of the director. As anyone familiar with the studio system knows, several writers or directors worked on many pictures, including such classics as "Gone With the Wind" and "The Wizard of Oz." The spiritual heirs of the moguls and producers, the *true* "parents" of these old films, are not the directors but the copyright holders — who want to show off their children proudly to as large an audience as possible. Nobody has more of a stake in preventing the destruction of these pictures than the copyright holders.
>
> Statement at p. 6. See also comments of Turner Broadcasting System, Inc. in this inquiry, Comment 4 at p. 21.

In his statement, David Brown, on behalf of the Motion Picture Association of America and his own production company, wrote:

> The American motion picture is a fusion of a variety of creative talents. It is a group collaboration. The worth and popularity of films depends on the skill of a legion of artists: the producers, directors, screenwriters, special effects artisans, actors, cinematographers, musicians, composers, lyricists, set designers, make-up artists, and others.
>
> Would *Chariots of Fire* have beguiled audiences if Vangelis had not created such a memorable score? Would *Jaws* have been so

> riveting and tension-packed without John Williams' thumping shark theme? Would the *Exorcist* have terrified and captivated audiences without the extraordinary make-up created for the young child? Would *Star Wars* have won such global applause without its astonishing special effects?
>
> The producer is no less a creative contributor than the director or screenwriter. Many of our most treasured motion pictures came to life because a producer had an idea and pursued it.[42]
>
> Statement at 4.

I. Conclusion

We noted above the considerable difficulties faced over a period of decades in attempts to revise the Berne Convention to come up with a satisfactory uniform treatment of authorship in cinematographic works, and how the ultimate result of those efforts has been described as being "devoid of practically any real substance."[43] In light of these difficulties and the history of the film industry in the United States, we predict that Congress would find problematic any effort to define the authors of a cinematographic film. In any event, since directors and writers did not seek to alter the rules for the exploitation of the first distributed product, the question is only faced in the context of moral rights, a question that adds even more complications, and which is discussed in detail in Chapter 5.

CHAPTER 3: POST EXHIBITION ALTERATIONS TO MOTION PICTURES

If motion pictures were only viewed in theatres, Chairman Kastenmeier and Mr. Moorhead would not have requested this report, since directors have, for purposes of legislative reform, disavowed any desire to alter the traditional work made for hire relationship, according to which the producer retains the power to determine the "final cut," — the power to determine the form in which the motion picture is first released for theatrical exhibition.[44] Instead, the directors' complaints concern only

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42. For references in the nonlegal literature discussing the nature of authorship of these other contributors, *see e.g.*, CARRINGER, THE MAKING OF CITIZEN KANE; MORDDEN, THE HOLLYWOOD STUDIOS: HOUSE STYLE IN THE GOLDEN AGE; LOURIE, MY WORK IN FILM (autobiography of art director); BALSHOFER & MILLER, ONE REEL A WEEK (cinematographers).

43. RICKETSON, *supra* note 26, at 582.

44. *See* DGA Basic Agreement §§ 505, 1502 and especially 1500, "[t]he Employer's decision in all business and creative matters shall be final;" and *House Berne Hearings* at 421, 427 and 521; *1988 Senate Hearings* 523 and Oral Statement of Sydney Pollack prepared for the

post exhibition changes, changes that occur almost exclusively[45] in adapting the theatrical film for the different technical requirements of the television screen.

The economic reason for adapting theatrical motion pictures for viewing on television screens — whether via free broadcast, cable, or videocassette — is obvious. The average cost of producing a feature film for a Motion Picture Association of America member is estimated to be over $20 million, up 113% from 1980. An additional $9 million is, on average, spent on advertising.[46] It has also been estimated that approximately two-thirds of MPAA member company films never recoup their costs.[47] Thus, "[o]nly through revenues from non-theatrical sources here and abroad, are MPAA members able to reduce their losses with respect to some films and recoup their costs as to others."[48]

While we cannot obtain exact figures, some estimates state that only 10 percent of a film's total audience views the work in the theatre: of the remaining 90 percent, 20 percent see it on videocassette or on cable television, while 70 percent view it on broadcast television, with the videocassette market growing in importance. In 1986, for the first time, video rentals and sales surpassed proceeds from the box office. In 1988, box office sales were $4,458,400,000. Videocassette rentals alone were $5,490,600,000, videocassette sales added another $1,394,900,000. For obvious reasons, directors are not, to our knowledge, seeking to prohibit any distribution of their works in these media.[49]

SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES AND THE ADMINISTRATION OF JUSTICE, Sept. 30, 1987, reprinted in Comment No. 3 of this inquiry (directors have "no intention of upsetting the economic rights. The marketing, licensing, buying, selling, and theatrical exhibition of motion pictures rest solely with the proprietor. Our concern is subsequent to the time at which the film has begun to live in some form of exhibition, when it has acquired an identity." *Id.* at 5.).

45. Recently, the Library of Congress was the scene of an embarrassing and regrettable example of theatrical alteration. On July 29, 1988, before an audience that included the Librarian of Congress, the Register of Copyrights, Members of Congress, and diplomats, Soviet director Alexandr Askoldov complained bitterly that his long suppressed film "Commissar" was altered by the removal of certain opening shots, and retitling. Additionally, publicity photographs were altered by removing Stars of David from the clothing of characters representing oppressed Jews.

As Mr. Askoldov informed the surprised and chagrined audience at the screening, these changes were made by the American distributor without his permission or knowledge. In commenting on these changes, Mr. Askoldov said: "I am absolutely appalled. What the Russian bureaucrats did not do to my film in the Soviet Union [the distributor] did in the United States." Washington Post, July 30, 1988 at C3.

46. Comment No. 5, Statement of Motion Picture Association of America at 5.

47. *Id.* at 6.

48. *Id.*

49. Distribution of motion pictures for free television broadcast may be declining. *See*

Instead, the directors complain about certain forms of alterations made to their works in the process of converting them for viewing on television sets. However, colorization aside, the alterations complained of have been in existence for quite some time (as long as 25 years in some cases), and with little public complaint by directors.[50] In responding to this point during hearings in the Senate on May 12, 1987, several directors testified they had unsuccessfully attempted, through collective bargaining, to prohibit such alterations.[51] The directors have, nevertheless, obtained certain contractual provisions concerning editing for television.[52] And, certain individual directors have obtained considerable control over both the original form of the film and post-theatrical release alterations.

The issue of whether collective and individual bargaining should be relied upon in lieu of legislation is complex and is addressed below in Chapter 4. However, in order to understand the nature and efficacy of such bargaining, we need a basic understanding of the technologies involved and how they affect the aesthetics of filmmaking and the habits and preferences of viewers.

A. Adoption of Broadcast Standards for Television

Just as theatrical screens and television monitors come in different sizes, methods for projecting the images displayed vary as well. The Academy of Motion Pictures projection standard is 1.85:1, meaning that the projected image is 1.85 times as wide as it is high. This relationship

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testimony of Sydney Pollack in *House Berne Hearings* at 531 ("Most movies don't sell to television anymore and the few that do are the best movies."); testimony of Steven Spielberg in *Senate 1988 Berne Hearings* at 533 ("You don't see a lot of films on television any more. They don't work as well. They show them on HBO. They show movies on cassettes because people would rather see them without them being all chopped up."). This may explain the apparent rise in the number of "made for television" movies. However, even these movies have been subsequently altered. *See* N.Y. Times, Jan. 22, 1989 at H27 (article by director Nicholas Meyer, complaining that his two hour and fifteen minute made for television movie *The Day After* was going to be broadcast the next night "with more than 23 minutes removed and 4 more minutes 'gained' through use of compression.").

50. Individual directors have, of course, protested editing of their films for television. *See* Preminger v. Columbia Pictures Corp., 267 N.Y.S.2d 913 (App. Div.), *aff'd mem.*, 173 N.Y.S.2d 80 (N.Y. 1966); Stevens v. NBC, 148 U.S.P.Q. 572 (Cal. Sup. Ct. 1966); 76 Cal. Rptr. 106 (Ct. App. 1969).

51. *See Legal Issues that Arise When Color is Added to Films Originally Produced, Sold, and Distributed in Black and White, Hearing Before the Subcommittee on Technology & The Law, Senate Judiciary Committee,* 100th Cong., 1st Sess. 14 (1987) (testimony of Elliot Silverstein); 44 (testimony of Woody Allen).

52. *See id.* at 15 and DGA Basic Agreement Para. 7-509, as well as a right of consultation for "coloring, time compression and expansion, changes in the exhibition of the aspect ratio (*e.g.*, 'panning and scanning.').

between width and height is called the "aspect ratio." In an effort to create panoramic effects and lure audiences away from television, processes that permitted even wider screens were developed in the 1950s. Among the better known of these processes are CinemaScope and PanaVision, which have aspect ratios of 2.35:1.

The net aesthetic result of these higher " 'Scope" aspect ratios has been called into question by one prominent critic:

> The compression of the wide image onto the film and its subsequent expansion in the projector made the photography grainy, especially in black and white, which was henceforth virtually abandoned . . . . The new shape was impossible to compose for . . . . Editing was cut to a minimum because on an image so large each cut made the audience jump. Instead, and cheaper, the camera stayed still while the cast roved around the empty spaces in front of it, and there was an absurd number of shots in which the leading actors reclined so as to better fit the frame. Close-ups and subtle nuances were forgotten: no longer did the camera direct the drama, you had to look around and find it yourself . . . . In many cinemas CinemaScope was even a fraud, for it had to be on a screen smaller in area than the old image, which was now being referred to sneeringly as 'postage stamp.' This happened when the old screen had already occupied all the width allowed by the cinema's structure: to get the CinemaScope shape, if you could not go any wider, height had to be sacrificed, and audiences wondered why suddenly they were looking at a ribbon of picture across the middle of the space which the old screen had occupied.
>
> Halliwell, Halliwell's Film Guide 1002 (2d ed. 1979). See also Transcript of the Copyright Office September 8, 1988 hearing at 13.

Even Halliwell admits, though, that directors enjoyed composing for 'Scope.[53] It is, though, ironic that in the late 1950's and early 1960's, the motion picture companies began selling these films for viewing on televi-

53. A number of current directors would like to compose in 'Scope but are faced with a dilemma. If they do so, they must either forego the extremely important television market, or see their films significantly altered for adaptation for television. *See* Balton, *The Shape of Money,* 57 SIGHT & SOUND 45, 46 (Winter 1987), reprinted in Comment No. 1 (quoting director Martin Scorsese as wanting to shoot all his films in 'Scope, "but I realize that when it's shown on TV the power of the picture will be completely lost."). This reluctance to shoot in 'Scope has resulted in a tacit acceptance of the 1.85:1 aspect ratio.

sion in order to recoup the increased costs of production.[54]

This increased economic dependence on the television market led the motion picture companies to develop "pan and scan" systems that would avoid severe problems that inevitably result in unaltered transmission of 'Scope films on television. The source of the problem is found in the smaller aspect ratio used in television, a ratio that is the result of a decision made in the 1940's by the engineering community in setting the broadcast standards for television. The National Television System Committee standard agreed upon is an aspect ratio of 1.33:1.

Accordingly, if a theatrical motion picture shot in larger aspect ratio is to be viewed on a television screen,[55] the motion picture aspect ratio must be reconciled with the (smaller) aspect ratio of the television screen. There are two principal ways of doing this: "letterboxing" and "panning/scanning."

B. Letterboxing

Letterboxing is the technique favored by a number of directors, including Woody Allen, who used it in adapting his film "Manhattan" for nontheatrical distribution. In addition, letterboxed versions of "Hidden Fortress," "The Graduate," "Blade Runner,"[56] "New York, New York," and "Ferris Bueller's Day Off," among others are available on videocassette.

With letterboxing, the theatrical aspect ratio is retained, but the picture is shrunk, resulting in the image being "boxed in" by dark bands above and below. The aesthetic effect of letterboxing is subject to some dispute. For directors and cinematographers, letterboxing affords the opportunity of keeping the film's theatrical composition intact. However, the central image is smaller, a result that has adverse effects on small screen televisions leading some critics to contend that "you end up seeing less."[57] Of course, it is less of a problem on large screens. Broadcasters oppose it based on a belief that it is "unattractive to viewers."[58] For the same reason, many of the motion picture companies[59] and the

54. The trend toward vertical integration in the entertainment industry has created a situation where cable systems are assisting in the financing of theatrical motion pictures, which are then shot with the cable market in mind.

55. Since it is the projected aspect ratio of television that matters, the need for adaptation is the same for cable and videocassettes as for broadcast.

56. A demonstration of the letterboxing of this film was given at the Copyright Office's Sept. 8, 1988 hearing.

57. *See* Belton, *The Shape of Money, supra* note 53, at 46-47.

58. *See* Comment No. 15, statement of National Broadcasting Company at 2.

59. *See* Comment No. 5, statement of the Motion Picture Association of America, Tab C

video retailers[60] oppose it.

George Stevens, Jr. of the American Film Institute, however, submitted a statement in this inquiry in which he asserted "[a]udiences will, particularly as the resolution of television sets improve, quickly adjust to the dark spaces on the top and bottom of the screen and appreciate the preferred experience of seeing scenes as they were composed by the director and his cameraman."[61]

From demonstrations of letterboxing given at our September 8, 1988 hearing, certain aesthetic advantages are apparent. These advantages must be weighed against the tendency of some consumers to object to the presence of dark bands on the screen. The various benefits of letterboxing can, perhaps, best be understood by contrasting the technique with its alternative: panning and scanning.[62]

C. Panning and Scanning

"Panning and scanning" was introduced in approximately 1961 as a result of network television's refusal to show the equivalent of letterboxed films, based on a belief that viewers prefer a picture that fills the entire television screen. The goal of panning and scanning is "to try and preserve what the director did with the original film and try and make it look best."[63] At its simplest, panning and scanning involves a process "whereby the widescreen image is successively recomposed by a camera which scans the width of the image possessing full height but missing the sides (which have been chopped off)." Comment #1, statement of Society for Cinema Studies at 6. The "rule of thumb for panners and scanners is to follow the action, which simply translates into holding on whoever is speaking or following the movements of the central character." *Id.* at 20-21.

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at 2: "Panning and scanning is generally the option of choice. Consumers prefer an image that fills the entire screen over the 'wide and short' image, with broad black top and bottom borders, that appear on a 'letterboxed' image."

60. *See* testimony of Vans Stevenson of Erol's Inc. at Copyright Office Sept. 8, 1988 hearing, Transcript at 248-49 (although Erol's has not had negative reaction to the few films letterboxed, a belief was stated that letterboxing "would have a tremendously adverse impact on our business, because . . ., when people watch television, they are used to watching it full frame . . . .").

61. Comment No. 14 at 6.

62. The introduction of High-Definition Television (HDTV) may make letterboxing a more attractive alternative to panning and scanning. HDTV will bring vastly superior contrast and larger screens. Additionally, the expected use of a larger aspect ratio than the 1:33.1 currently used in television will result in less of the image being cropped.

63. Statement of Ralph Martin, supervisor of panning and scanning for Warner Bros., quoted in Belton, *Shape of Money, supra* note 53, at 45.

A technical and somewhat more optimistic description of panning and scanning is provided in the following comments of the Motion Picture Association of America:

> [First,] [f]ilm transfer is undertaken on a "telecine machine," manufactured by such companies as Rank Cintel, Bosch Fernseh and Marconi. A reel of film is threaded through an apparatus that looks like a film projector and onto a take-up reel. A cathode ray tube (CRT) is used as a light source, and projects through the passing film frames. The focal point of the light source which moves across the film frame is called the "raster." The "projected" image then passes through a series of mirrors which divide the pictures' red, green and blue components. These color components are picked up by photoelectric cells which transform the photographic image into electronic information, which is then manipulated through computer-controlled electronics.
>
> The "telecine operator" (also known in the trade as a "colorists") sits before a sophisticated bank of electronic equipment. The operator views the image fed from the telecine machine on a high-quality video monitor. In order to determine how the picture should be panned-and-scanned, the telecine operator moves the "raster" across the film image, deciding which portions of each frame should be transferred to video.
>
> In layman's terms, it is possible to think of the moving "raster" as a "camera" that is moved around the film image to capture and accentuate those parts of the image that will be most effective in the video version of the film. The increased sophistication of computer electronics now permits the telecine operator to make both linear and non-linear moves across the film image. Thus, the telecine operator can vary the speed with which the "camera" pans across the image in virtually any direction. Moreover, by using a device called an "x-y zoom," the telecine operator can zero in on and accentuate them in the video version. Comment # 5 at Tab C pp. 3-4.

D. Effects of Panning and Scanning on the Aesthetics of Theatrical Motion Pictures

Early panning and scanning sometimes involved single, fixed position scanning whereby the center portion of the original image was rephotographed, a "technique" that occasionally led to bizarre recom-

posed scenes. For example, in a commercial airliner cockpit scene in "The High and The Mighty," John Wayne and Robert Stack are having a conversation, but in the panned and scanned version one cannot see them, only a view of the instrument panel and the cockpit console between them.[64]

Improvements in panning and scanning were made later in the 1960s, with the introduction of telecine devices, which permitted up to twelve different positions of rephotographing the original image. One foe of panning and scanning concedes that "[t]oday, there are virtually an infinite number of possible positions as well as new technologies which make optically introduced panning movements virtually indistinguishable from actual camera pans."[65]

The aesthetic effort of panning and scanning will ultimately depend upon the degree to which the aspect ratios have to be reconciled and the original shots recomposed, the skill of the telecine operator, the care with which the panning and scanning is done, and the amount of time the operator is given to complete the job. Even the best telecine operator cannot compensate for the loss of visual image of a wide screen exhibition of motion pictures shot in 'Scope.

Some motion picture companies do panning and scanning in-house, while others contract it out. Under the Directors' Guild of America Basic Agreement, directors have a right to be consulted about and to be present during the panning and scanning process.[66]

The right of consultation is not, of course, the same as the right to prohibit panning and scanning, nor even to have the final say over how a film is panned and scanned. Perhaps in light of these limits (and in order to retain the financial benefit of exploitation on television), directors and cinematographers have attempted to minimize the negative effects of panning and scanning by shooting the original theatrical version of the film in an aspect ratio roughly equivalent to that of television. This process began in the early 1960s, when the American Society of Cinematographers issued a series of recommendations to its members

> advising them to compose their widescreen images for television's "safe action area." Camera manufacturers began to produce viewfinders which indicate this area with a dotted line, and cinematographers began to protect their composition for

64. *See generally,* Belton, *Pan and Scan Scandals,* 3 THE PERFECT VERSION 40 (1987), and testimony of Rob Word at Copyright Office Sept. 8, 1988 hearing, Transcript at 13-14. (Tieing problem, in part, to widescreen composition).

65. Belton, *The Shape of Money, supra* note 53, at 45.

66. *See* DGA Basic Agreement at § 7-513.

> television by keeping essential narrative and/or aesthetic elements within this frame-within-a-frame. By keeping all crucial story information within the safe action area, cameramen adapted their art to satisfy the demands of television screen and the needs of panning and scanning. The extreme widescreen compositions of the 1950s which exploited the full width of the frame and often placed figures at either edge of it gave way to conservative compositions characterized by "dead" space on either side of the central area of interest in the frame. . . . In effect, the threat of panning and scanning for television has taken its toll on widescreen aesthetics.[67]

Since many directors and cinematographers have, for over a quarter of a century, been shooting within the "safe area" in order to both preserve, as much as possible, the integrity of their composition and not foreclose the profitable television market, they have somewhat weakened their claim that legislation is required to permit them to prohibit panning and scanning.[68] Notwithstanding the sometimes regrettable effects of poor panning and scanning, adequate technical and marketplace solutions to the problem appear to exist.

E. Lexiconning

Cable services such as HBO and Showtime, as well as videocassettes and videodiscs are generally not subject to time limitations, and thus, "it is rarely necessary to modify [the] running time of a film for these media."[69] This is not the case for television broadcasts and airlines. "Airlines must show motion pictures that fit conveniently into the travel time not allocated for meal and beverage service and other amenities" while "[t]elevision broadcasters need motion pictures that will fit into designated time slots (usually measured in 30-minute increments) with time

67. Comment No. 1, Society for Cinema Studies at 9-10. Importantly, in 1960 the Directors Guild of America, Writers Guild of America, Screen Actors Guild, and the American Federation of Musicians signed collective bargaining agreements with the producers waiving the guilds' rights to revenues for free television broadcasts of theatrical motion pictures before 1960, in exchange for a cash settlement to be applied for pension plans to be established under the agreement. For theatrical motion pictures made since 1960 and broadcast on free television, the guild divided up a total of 12.5% of the gross revenues for those pictures in the following proportions: 1.2% each for the DGA and WGA, 3.6% for the SAG, 1% for the AFM, and 5.4% for the International Alliance of Theatrical and Stage Employees.

68. In addition, credible (but not necessarily dispositive) testimony was received suggesting that imposition of letterboxing would adversely affect the broadcast industry and meet with at least some consumer opposition.

69. Comment No. 5, statement of Motion Picture Association of America at 4.

allotted for the carriage of commercial announcements."[70]

A "lexicon" machine — which either compresses or expands the running time of a film — alters the motion picture in order to fit into a specific time slot. Technically, lexiconning may be described as follows:

> Compression or expansion is accomplished by changing the rate at which the film frame runs past the "raster." Today's telecine equipment permits speed changes that are measured in hundredths of a frame per second, permitting precise changes in timing of the motion picture. Compression and expansion are accomplished so that no change is discernible to the naked eye.
>
> By ascertaining the running time needed for the video version of a feature film and applying a mathematical formula, the telecine operator can determine whether an entire motion picture or selected portions should be expanded or compressed. Motion pictures can be compressed or expanded by up to 6 or 7 percent with no effect on the viewer perception of the work, although a 2 to 3 percent change in speed would be the average. Time-base correction devices are used to interpolate picture information, thereby avoiding "jerking" or other defects in the video image.
>
> A 1-to-2 percent change in the speed of the film has no noticeable effect in the pitch of the audio. If the speed change is greater, it becomes necessary to adjust the pitch of the sound to eliminate the "chipmunk effect" or "slo-mo effect." This is accomplished by running the sound levels through an audio pitch changer (manufactured by companies such as Lexicon and Evertime) which makes the necessary adjustments automatically when it is instructed what the original film rate is (in frames per second) and what the new film rate is.[71]

Lexiconning is generally performed by independent television stations, although some film packaging firms may supply already lexiconned films to these stations. Lexiconning has been the subject of collective bargaining, through which the directors have gained some measure of control over the practice.

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70. *Id.*

71. Comment No. 5, statement of Motion Pictures Association of America, Tab C at 5.

F. The Effects of Lexiconning on the Aesthetics of Theatrical Motion Pictures

The adverse effects of lexiconning are best appreciated when time is compressed. One particular example from "Casablanca" was shown at the Copyright Office's September 8th hearing. Based on this and other examples, we concluded lexiconning can adversely affect the director's, cinematographer's, editor's, and actors'/actresses' contributions. And, unlike panning/scanning, there is nothing these individuals can do during the shooting of the theatrical version of the film to protect it from such subsequent alteration. Section 7-513 of the DGA Basic Agreement gives directors the right to be consulted about lexiconning, however, given that lexiconning generally takes place at independent stations, it is hard to see how this consultation could effectively take place.

Little information was provided about the extent of lexiconning, and outside of a few egregious examples, not much is known about how often lexiconning results in noticeably adverse effects. For films that do not fit within the regular broadcast time slots, some adjustment must be made either in the work itself or in the matter in which motion pictures are scheduled for broadcast.

G. Computer Color Encoding

In our prior proceeding to determine whether to register claims to computer color encoded versions of black and white motion pictures, we received considerable technical commentary on the "colorization" process.[72] Additionally, Copyright Office staff spent a day each at Colorization, Inc. and Color Systems Technologies studying, in-depth, how their respective processes work. Because the encoding companies each use different processes, no single description of computer color encoding can be accurate.[73] Accordingly, the following description is, of necessity, general.

The process begins with a decision by a commissioning party[74] to

72. *See* comments submitted in connection with *Registration of Claims to Copyright Notice of Inquiry: Colorization of Motion Pictures,* Docket RM 86-1. We solicited and received additional descriptions in connection with this report. *See* Comment No. 3 (Color Systems Technology) and Comment No. 4 (Turner Broadcasting Systems).

73. A good discussion of the three principal processes is found in IEEE Spectrum, Aug. 1987, reproduced in Comment No. 18 (American Film Technologies). *See also* Comment No. 3 (Color Systems Technology), Exhibits E & F.

74. Most computer color encoding is done by an encoding company on behalf of a client, although this is not the case for Quintex, which has its encoding done by an affiliated company, Colorization, Inc. Color Systems Technology also owns rights to some films which it will color.

"colorize" a particular motion picture for which it either owns the copyright, or which is in the public domain, e.g., *It's a Wonderful Life.* The commissioning party of the encoding company obtains the best quality (black and white) print(s) of the work, which is then cleaned up by removing defacing marks and scratches and which is then copied intact onto a videotape.[75] Black and white video signal information on the videotape is digitized and entered into a computer. Software first divides the black and white video frame into a grid consisting of 1,024 horizontal and 512 vertical pixels and then establishes the luminance (brightness) and chrominance (color) values for each such pixel.[76]

Next, the black and white videotape is viewed in its entirety by an art director. The film is then categorized into individual scenes in which the basic visual elements are constant. The scenes are numbered chronologically and described in detail, including the type of movement and the presence of special effects. A reference file with specific information about and descriptions of each character is made, along with layouts of the sets.[77] For each scene, research is gathered such as historical information (uniforms, flags, etc.), and publicity photographs or other information about the original cinematography. Typically, this information fills in a very small proportion of the color selection process. The vast majority of color selection is based on the art director's (and client's) interpretation of the script, the personality of the characters, and the overall mood of the picture. Once these decisions are made, the scenes are broken down into a number of key frames. A key frame typically "include[s] the first frame of a scene, and usually several succeeding frames that require a change or introduction of color, because a change in lighting casts a different tone on all colors."[78] Each key frame is "handpainted;" i.e., the color is determined in its entirety by the art director. This color information is then stored in the computer, which proceeds to automatically encode the color from the key frame to subsequent frames until the next key frame occurs, whereupon the process is repeated until the film has been completely encoded.

After completion of the initial encoding, the art director reviews

75. Encoding companies have emphasized that the original print is left untouched by this process.

76. A television signal is comprised of four signals: (1) a chrominance signal, which generates red, green, and blue; (2) a luminance signal, which controls brightness and intensity; (3) vertical blanking interval signals; and (4) horizontal blanking signals.

77. Colorization, Inc. actually creates a "storyboard," a comprehensive series of three ring binders containing details of all the scenes in the film. One such storyboard, for a Laurel and Hardy short, and provided to us for this study, filled six three ring binders.

78. IEEE Spectrum, Aug. 1987 at 51.

each frame in the equivalent of a cutting room in order to make necessary adjustments in color and to hand paint objects which did not appear in the key frames. The frames are then organized in the proper sequence and transferred onto a master tape. The entire process takes approximately one month, with an average cost of $3,000 per minute, or $300,000 for a 100 minute motion picture.

The oldest of the encoding companies is Colorization, Inc., of Toronto, Canada, formed in 1981 and affiliated with Quintex Corporation, which owns a substantial portion of its stock. Colorization's first release — a color-encoded version of Laurel and Hardy's *The Music Box* — was broadcast in 1983. Its first full length colorized motion picture was *Topper,* released in 1985. It has recently decided to focus almost exclusively on encoding black and white television series.

Color Systems Technology of Marina Del Rey, California was founded in 1983 and has colored encoded a number of films for 20th Century Fox and Turner Entertainment (out of its MGM, Warner Bros., and RKO libraries). It recently signed a contract with French director Jean-Luc Goddard to color encode his film *Breathless.*

Tintoretto, Inc. of Toronto was formed in 1986 by former employees of Colorization, Inc. and uses a process similar to Colorization, Inc.

The most recent encoding company is American Film Technologies, of San Diego, California, formed in 1987. It has encoded a number of films for Turner Entertainment Company and others.

Less than one hundred black and white films have been color encoded to date.[79] Color encoding has also been used with television programs, newsreels, and cartoons. It is used almost exclusively for videocassettes, and for cable and television broadcasts. Technically, colorized video tapes may be transferred to a print format and exhibited in theatres. However, as one comment letter noted:

> This is more of a function of the commercial marketplace rather than one of technology. The relative growth of home video, television, and pay cable distribution, has led to this practice. Moreover, theatrical distribution, in most cases, is commercially viable only for entirely new mass appeal movies, and not for derivative works based on the classic motion pictures.
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> Comment of Hal Roach Studios, Inc., in Copyright Office Docket No. 86-1, at p. 17.

79. *See* Comment No. 4, statement of Turner Broadcasting System, Exhibit A, for a partial list of these films.

The underlying rationale for computer color encoding black and white motion pictures is not complex: to broaden the number of people who view the pictures and to make a profit by doing so. Judged by these standards, colorization has been successful.[80] The effect of computer color encoding on the aesthetics of motion pictures, is of course, a separate issue, and one we will now address.

H. Effect of Colorization on the Aesthetics of Black and White Motion Pictures

Unquestionably, "colorizing" a black and white motion picture changes that film's aesthetics.[81]

Indeed, the basis for the Copyright Office's June 12, 1987 Notice of Registration Decision with respect to claims to copyright in color encoded motion pictures, was the Office's finding that the color selection represented new authorship apart from that found in the underlying black and white film. It is not, therefore, an adverse reflection on computer colorizing to describe the process as altering the aesthetics of the black and white film it is based upon. Nor, hyperbole aside, is the issue the quality[82] of the encoding. The issue is simply, given that colorization undeniably alters the aesthetics of the black and white work, should Con-

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80. *See* Comment No. 4, Turner Broadcasting System at 7-19; Comment No. 3, Color Systems Technology at 4-6, 12-13, 23-25.

81. *See* statement of N.Y. Times film critic Vincent Canby, submitted to the Subcommittee for its June 21, 1988 hearing on H.R. 2400, at 1-2:

> Black-and-white films are made according to their own aesthetics. Some things can be done in color photography that cannot be done in black-and-white. Black-and-white offers opportunities to the film maker not available in color. Because of this, we respond to black-and-white films in one way, and to color films in another. Black-and-white films are neither better nor worse than color. They are a different aspect of cinema art.

See also Senate Colorization Hearings at 11 (testimony of Elliot Silverstein: ("Black and white photography is not color photography with the color removed. It involves a completely different technique . . . ."); 18 (testimony of Sydney Pollack); 47 (taped testimony of John Huston); and 55 (testimony of Woody Allen).

On November 23, 1988, the First Chamber of the Grand Instance of Paris, France, upheld a moral rights claim asserted by director John Huston's heirs against the proposed broadcast of a colorized version of the director's film, *The Asphalt Jungle.*

In a statement submitted in connection with this report, scholars at the Max Planck Institute for Foreign and International Patent, Copyright and Competition Law, concluded that colorization would, absent consent, violate the moral rights of those who contributed to the creation of a black and white motion picture. Comment No. 2 at 11-12.

In 1964, an Italian appeals court is reported to have issued an injunction on moral rights grounds against the Italian publisher Loganesi restraining it from distributing copies of a book with drawings by artist Ben Shahn that had been created in black and white but colored without his approval.

82. *See Senate Colorization Hearings* at 17, testimony of director Sydney Pollack: "You have seen a demonstration of the new technology that is quite good and, like all technologies,

gress grant directors (and others) the right to prohibit it, notwithstanding the "universal acknowledg[ment] that [in the United States] owners or licensees of the copyright have the legal right to decide whether these old movies should be colored,"[83] a question properly reviewed in the context of moral rights, a topic we cover in Chapter 5, below.

I. Future Technologies

The Copyright Office has received information about two future technologies that may effect the aesthetics of motion pictures shown on television. The first of these is High-Definition Television (HDTV).[84] When finally introduced, HDTV will provide a television picture with sharply improved color and clarity. This sharper picture is the result of a more than doubling in the number of lines per frame currently used (525) and use of the latest digital processing techniques. The Federal Communications Commission has not yet adopted an aspect ratio for HDTV, although most proposals are for aspect ratios higher than the current 1:33.1 ratio used on standard television sets. Thus, HDTV could further reduce the need for panning and scanning. Moreover, since broadcasters and cable systems are expected to use film prints for HDTV transmissions instead of tapes, HDTV may affect the manner in which producers shoot motion pictures intended for television viewing.

Congress and the Copyright Office also received evidence on computer generation of life-like representations of people, through which "[w]e may be able to recreate stars of the past, Clark Gable and Rita Hayworth, cast them in new roles, bring them forward into time in new settings. . . ."[85] We have seen a demonstration of this technology, which appears to be in its infancy. We do not, therefore, see any urgent need to study issues raised by this technology in this report.

CHAPTER 4: THE IMPACT OF COLLECTIVE AND INDIVIDUAL BARGAINING ON THE DEVELOPMENT AND DISTRIBUTION OF MOTION PICTURES

We noted in the last chapter that only 10 percent or so of a theatrical motion picture's total audience comes from theatrical exhibition; the

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is going to get better. But the fundamental issue is not how good it is . . . . [It is] that it is not in any sense the same as black and white . . . ."

83. Statement of Roger Mayer, Turner Entertainment Company, submitted to the Subcommittee for its June 21, 1988 hearing on H.R. 2400, at 5.

84. *See generally,* statements and testimony submitted to the *House Subcommittee on Telecommunications and Finance in Connection with its March 8 and 9, 1989 hearings on HDTV.*

85. *Senate Colorization Hearings* at 46.

remaining 90 percent comes from videocassette and cable (20 percent) and free broadcast television (70 percent). We also noted that roughly two-thirds of all MPAA member company films do not recoup their costs. Given these statistics, it is hardly surprising that virtually all theatrical motion pictures are made with the understanding that they will subsequently be viewed on television screens. We further noted that the different technical requirements of television viewing will, at least under industry preferred approaches, lead to certain alterations in the motion picture for these post-exhibition markets.

In this chapter, we examine how collective and individual bargaining in the motion picture industry affects the development and distribution of motion pictures.

A. Copyright Ownership and Preparation of the Motion Pictures for Exhibition

Perhaps more than any other form of authorship, motion pictures are the result of collaborative effort and a great deal of money. Those who participate in the film's creation generally all share in the twin objectives of artistic and financial success. The manner and amount in which directors, screenplay writers, actors, and others are compensated varies considerably, and is outside the scope of this study.[86] Compensation aside, all of these creative participants will be typically employed under work made for hire or transfer of rights agreements, under which the employer — be that a producer, studio, or financing corporation[87] — is considered the author and copyright owner.

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86. The two principal methods of compensation are payment of a flat fee under a service contract and net profit participation. *See generally,* SQUIRE, THE MOVIE BUSINESS BOOK (1983); RUDELL, BEHIND THE SCENES: PRACTICAL ENTERTAINMENT LAW (1984); VOGEL, ENTERTAINMENT INDUSTRY ECONOMICS: A GUIDE FOR FINANCIAL ANALYSIS (1986).

87. For simplicity's sake, we will refer to this individual or corporation as the "producer" since most of the testimony in the recent congressional hearings have been couched in director versus producer terms. A "producer" will, we understand, most often be a company, perhaps established solely or principally for purposes of producing motion pictures and television programs.

Whether the producer, studio, or financial corporation backing the picture owns the copyright is generally dependent upon how large a role the producer plays in bringing the various elements together, and how much financial risk he or she takes. If, for example, the producer packages a deal and then signs a contract with a studio under which the studio bears the ultimate responsibility for completion of the picture, it is expected the studio will usually own the copyright. If, however, the producer obtains independent financing, hires the director, screenplay writer, actors, and clears rights, he or she may own the copyright. For purposes of this report, the significant point is that the copyright is typically owned under a work made for hire agreement by someone other than the director. *See 1988 Senate Berne Hearings* at 408, 438-40, 519. Of course, on occasion, directors have also assumed the role of producer, in which case they are also the copyright owner.

The extent to which the producer may exercise these rights is, however, circumscribed by a number of factors, the most important of which are: (1) the economics of the motion picture industry, which require post-theatrical exhibition marketing of films on cable, videocassettes, and free television; and, (2) the Guild[88] and individual creative artists' agreements.

B. The Directors Guild of America's Basic Agreement

Section 7 of the Directors Guild of America's (DGA) Basic Agreement[89] contains a detailed set of minimum conditions for the preparation, the production, and the post-production, and post-theatrical release editing of motion pictures. Under Section 7-101 of the Agreement, the director "participat[es] in all creative phases of the film-making process, including but not limited to all creative aspects of sound and picture;" "[t]he Director's function is to contribute to all of the creative elements of a film and to participate in molding and integrating them into one cohesive dramatic and aesthetic whole."

After the director completes shooting of the principal photography, he or she is responsible for the presentation to the producer (or representative thereof) of his or her cut of the film, known as the "Director's Cut." Sections 7-501, 505. This responsibility is described as an "absolute right," Section 7-508, and "[n]o one shall be allowed to interfere with the Director of the film during the period of the Director's Cut." Section 7-504.

Following presentation of the Director's Cut, the producer, in collaboration with the director,[90] prepares the "Final Cut." While the Final Cut may be identical to the director's version, it may not be: the decision is the producer's. One example of the give and take that occurs at this stage was given by director Sydney Pollack before the Subcommittee at its September 30, 1987 hearings on the Berne Convention:

[A] studio might say, we can only run a certain number of

88. The principal guilds and unions are the Directors Guild of America ("DGA"), Writers Guild of America ("WGA"), Screen Actors Guild ("SAG"), International Alliance of Theatrical and Stage Employees ("IATSE"), and the American Federation of Musicians ("AFM").

89. The Basic Agreement is negotiated with the Alliance of Motion Picture and Television Producers ("AMPTP"), which represents a variety of producers of motion pictures and television programs. *See* Comment No. 5, Statement of Motion Picture Association of America, Tab B at n.2. Many non-AMPTP members are also signatories to the Basic Agreement. It is estimated that upwards of 90% of the production companies in the United States are signatories to the Agreement. *Id.* at 2. Approximately 95% of the directors of motion pictures produced in the United States are represented by the DGA. *Id.*

90. DGA Basic Agreement, § 7-506.

showings per day. This is an economic decision. If the movie is under two hours, and we have 10 minutes to turn an audience around, we can get in an extra show.

If you make this movie 2 hours and 10 minutes, we can't get that extra show in. It is now my job [as director] to try as hard as I can to make it to their time limit.

Here is what does happen sometimes. Sometimes you go to them and you say, look, guys, it is now 2 hours and 10 minutes. You look at it. If you agree that I can get it down to no less than that, I will cut it.

The studio will look at it - forgive me for being personal - I signed a contract on "Out of Africa" that said I would deliver a 2 hour and 15 minute movie. That movie went out at 2 hours and 41 minutes so I violated that contract by half an hour.

When I got the movie to 2 hours and 41 minutes, I called the studio and said, I am going to show you the movie. I owe you a cut of 2 hours and 15 minutes.

Here is what I have so far; I am a little bit stuck here. They looked at the movie and said, do the best you can do. If you can't get it any shorter, you can't.

They would have been totally within their rights, to make me cut it, and I wouldn't have argued with them - it was their $30 million. I am not going to tell them what length they have to release the movie at.

House Berne Hearings at 528.[91]

Following agreement upon and release of the "Final Cut" version of the film for theatrical exhibition, the post exhibition release editing begins. Editing may be required for foreign exhibition (e.g., dubbing, compliance with censorship laws), and, of course, for domestic viewing on cable, videocassettes, and later, airlines, and television broadcast. Sections 7-509 through 7-513 of the DGA Basic Agreement have a number of provisions giving directors the right to be present while editing is accomplished. Of particular relevance is Section 7-513:

The Employer shall consult with the Director with respect to coloring, time compression and expansion, changes in the exhibition of the aspect ratio (e.g., "panning and scanning") and

91. In some instances, however, directors, in their individual contracts, have been able to obtain "final cut" authority, and to prohibit exhibition alteration to the work. *See 1988 Senate Berne Hearings* at 366, 529, 532; *Senate Colorization Hearings* at 44.

> changes to allow exhibition in three dimensions made to a theatrical motion picture after delivery of the answer print. The Director's services in connection with such consultation shall be provided at no cost to the network or Employer or distributor.

Section 7-509 recognizes the director's role in preserving the basic integrity of the motion picture as theatrically released by affording the director the first opportunity to edit the film in non-theatrical markets, including network television (Section 7-509(b)); syndication (Section 7-509(d));[92] and, domestic home video (Section 7-509(g)). Additionally, the director has the right to do the shooting if new footage is added to the theatrical version (Section 7-509(e)).

These provisions were the result of protracted negotiations. As director Elliot Silverstein testified in 1988 Senate hearings on U.S. adherence to the Berne Convention:

> [I]n the last negotiation the specific areas that we are discussing here were proposed at the bargaining table.
>
> What we did gain was the right to consult on all of these things, and we said to the CEOs of the companies who face us: "That is not good enough. The consultation doesn't mean anything because if we disagree, we lose." The answer came back, "That's right. If we disagree, you lose," so that this is a pro forma consideration. This is not a moral right. It is a right of consultation.[93]

This testimony was disputed by Roger Mayer of the Turner Entertainment Company at the Copyright Office's September 9, 1988 hearing: "When somebody says you can consult, that is not an idle thing. That involves time. It involves money. I think it is a concession, and I think it is something they earned."[94]

It is a fair question to ask why the directors' failure to obtain the desired rights through the collective bargaining process necessarily indicates a breakdown in that system, and one requiring federal legislation to

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92. *But cf. Senate Colorization Hearings* at 14-15 for testimony by the directors noting difficulties in enforcing certain of these provisions.

93. *1988 Senate Berne Hearings* at 533. *See also* draft proposals reproduced in Comment No. 3, statement of Color Systems Technology, Exhibit BB; *House Berne Hearings* at 519.

94. Transcript at 84. *See also* Comment No. 5, statement of Motion Picture Association of America, Tab C at 5-6, and *id.* at 6 (noting establishment of a "creative rights" standing committee, requested by the directors, composed of an equal number of directors and producers, to provide a forum for discussing creative rights issues).

repair.[95] In any labor setting, the parties arrange their priorities, including those they are willing to strike over[96] and those they are willing to trade off to obtain other benefits without having to strike.[97]

Certainly, the directors receive substantial compensation in exchange for granting their employers broad rights to exploit their films.[98] Moreover, labor relations in the motion picture industry have a long history and do not present a situation where the economic leverage of the employers dwarfs that of the employees.

C. The Adequacy of Reliance on Collective and Individual Bargaining for Creative Rights

Additionally, the DGA Basic Agreement represents only minimum rights; individual directors have frequently negotiated above these requirements,[99] although the number who are able to gain substantial control over the final product and its post exhibition form is estimated to be only 5 percent.[100] If one cannot bargain for the desired rights, the option still exists for the director to seek independent financing of his or her film, a task which may be difficult, but which is certainly not impossible. For European directors, that practice is standard.

One rebuttal to reliance on collective or individual bargaining was given by director Arthur Hiller before the Subcommittee at its June 21, 1988 hearings on H.R. 2400:

> What we are talking about is a social issue, and that is the preservation of an art form. And that talks about our society as it is today and the society of the future, and I think that is beyond collective bargaining.
>
> Unofficial transcript at 88.

Assuming such a public interest does exist "beyond collective bargaining," the question is raised whether the entire collective bargaining

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95. *See* questioning of director Sydney Pollack by Chairman Kastenmeier in *House Berne Hearings* at 519.

96. The directors have expressed doubts that the issues covered in this report are mandatory subjects of bargaining. The producers claim that they are.

97. *See* comments by Rep. Berman at the *Subcommittee's June 21, 1988 hearing on H.R. 2400,* unofficial transcript at 87-88.

98. *See* statement of Roger Mayer, Turner Entertainment Company, submitted to the Subcommittee for its June 21, 1988 hearing on H.R. 2400, at 6-7.

99. Of particular interest in this respect is the Turner Entertainment Company's February 14, 1989 announcement that it would not colorize *Citizen Kane* because of concern that the contract between RKO Pictures, Orson Welles, and Welles' production company arguably prohibited such alteration.

100. *See* testimony of Steven Spielberg, *1988 Senate Berne Hearings* at 529.

agreement should then be renegotiated. Congress might conclude it could be unfair to alter that agreement by legislatively granting directors rights they are not able to obtain through collective bargaining, while leaving the agreement intact for those provisions favorable to the directors.

A second reason given by directors for not relying on collective or individual bargaining is based on alleged restrictions in the labor laws regarding subjects of bargaining. This issue was raised by director Sydney Pollack during the Subcommittee's September 30, 1987 Berne hearings.

> We are prevented from negotiating to the point of that kind of control [i.e., on a moral rights clause] by our collective bargaining agreement. We are still working for hire, and we are still employees. We cannot negotiate for total control over the product legally.[101]

Elliot Silverstein, Chairman of the President's Committee of the DGA elaborated on this point:

> It is very clear that we are governed as a labor union by the labor law which gives the right to control to the employer, and we don't seek in any way to allow our position to come into collision with that requirement of labor law.
>
> If moral rights began at an earlier point than we suggest [post exhibition release], it would be a collision there, so that what we are looking for is that point after the employer, employee relationship has completed its defined role and something exists that can be protected. We, as a matter of fact, I can tell you in our recent negotiations completed this last summer, we were told specifically that the things we were asking for pushed right up against the so-called final cut, that is the final creative authority and we could not go any further.
>
> It was no longer a mandatory subject of bargaining and we were in danger of stepping out from under the protection of the anti-trust laws, and becoming independent contractors, if we didn't submit to the right to control definition. So we can only go so far in negotiations.
>
> *Id.* at 535.

In hearings before the Senate on March 3, 1988, the directors again

101. *House Berne Hearings* at 519.

raised this issue.[102] The producers contest this interpretation of the labor laws, and note that they have bargained with the DGA for almost a half century on a wide variety of issues.

In any event, since the DGA's concern about its status as a labor organization seems to apply only to efforts to control the *pre*-theatrical release form of the film, and the DGA seeks from Congress only rights to control the *post*-theatrical release form of the film, it appears there is no restriction in the labor laws, even under the DGA's interpretation of them, on the DGA's ability to collectively bargain for precisely the rights they have sought from Congress. The fact that they have not obtained these rights may, perhaps, be ascribed to nothing more than the ordinary give and take of labor negotiations. Nor is it out of the question that directors may obtain the desired rights in the future, as the following colloquy at the Copyright Office's September 8, 1988 hearing suggests:

> MR. PATRY [Copyright Office]: Would you agree that the most that directors are going to get from collective bargaining is the right of consultation, and not the right of final say over colorization and editing?
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> MR. MAYER [Turner Entertainment]: Not necessarily, although I would hope that that's the result. I do not think it's an idle possibility that they could get these rights; because I would say to you that many of the creative rights that they have obtained in the past, such as the right to a first cut, the right to preview, the right to edit for television. I've sat around many, many meetings where the producers said, "No way we will ever give anything like that. It will ruin business. There is just no way," and in some way they figured out a way.
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> . . .
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> . . . Is it possible in collective bargaining they could obtain the right to veto? Yes, it is possible. Is it likely? Probably not.
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> Transcript at 83-84.

The reasons producers give for not wanting to accord the directors the desired rights appear to be economic, not aesthetic.[103] The Motion

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102. *See* testimony of Steven Spielberg, *1988 Senate Berne Hearings* at 528 ("[b]ecause we work for hire and our union, our labor union, can't really negotiate into th[e] area [of pre-release alterations] without affecting our definition as a labor union."); *id.* at 584, (testimony of Elliot Silverstein).

103. One down-to-earth way of making this point was given by Bernard Weitzman of American Film Technologies at our Sept. 8, 1988 hearing:

> Now one of the things that we can't do with the director . . . is give the director absolute final control. Some directors will never let a picture go. They will work on

Picture Association of America has stated:

> In order to improve the odds of financial success, the copyright owners must have the freedom to adapt their productions to the differing needs of the various markets. If legislation were enacted that called into question the copyright owner's ability to do that, the widespread performance of their products so essential to recoupment of these huge investments would be seriously jeopardized.[104]

The National Association of Broadcasters stated:

> An inability by the broadcasters to insert commercials into the program or to compress the program to conform to the limits of television technology, absent some agreement with the artist, would make it commercially unprofitable to show such programs not supported by advertising. The effect would be the end of commercial television as we know it.[105]

These dire projections, however, assume that directors (and other creative participants) would on occasion exercise their rights irresponsibly. The directors credibly testified that they have sound economic reasons for exercising rights in a reasonable manner. See House Berne Hearings at 532; 1988 Senate Berne Hearings at 504 (testimony of Steven Spielberg: "If a director or a writer does not agree to an alteration of a finished film which is desired by the financier, it is highly likely he or she will not be employed by the financier. . . ."); testimony of Roger Mayer at Copyright Office September 8, 1988 hearing, Transcript at 84-86.

The directors do not, however, seek changes in the labor laws to help them achieve their goals. Instead they seek amendment of the Copyright Act to provide for a high level of moral rights, a topic to which we now turn.

CHAPTER 5: MORAL RIGHTS

Before addressing the details and merits of the directors' demands

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> it interminably, because they feel it could always be improved, and if anybody else touches it, it's bad. Well, we can't run a business if somebody says we are going to do it as long as we want to do it. We can never meet air dates. We can never meet budgets. We can never meet cost control. We can't do anything if the director has the absolute right to decide what's good or bad.

Transcript at 53.

104. Comment No. 5 at 6. In cases where the director has net profit participation in the film, he or she has an obvious stake in the financial success of the work as well. Additionally, financial failure can harm a director's future ability to obtain employment.

105. Comment No. 16 at 15.

for new moral rights legislation, it will be helpful to review the nature and history of those rights.

A. The Nature of Moral Rights

The term "moral rights" conjures up a variety of associations, some of which concern themselves with copyright law.[106] Professor Ricketson writes:

> Authors' rights have long been recognized as having a non-economic dimension [which] . . . can be seen as an emanation or manifestation of [the author's] personality. . . . Any author, whether he writes, paints or composes, embodies some part of himself - his thoughts, ideas, sentiments and feelings - in his work, and this gives rise to an interest as deserving of protection as any of the other personal interests protected in the institutions of positive law, such as reputation, bodily integrity and confidences. The interest in question relates to the way in which the author presents his work to the world, and the way in which his identification with the work is maintained. . . .
>
> In European legal doctrine, the interest protected has usually been called the author's "moral interest" and the rights which protect this interest are referred to as the author's "moral rights." The adjective "moral" has no precise English equivalent, although "spiritual," "non-economic" and "personal" convey something of the intended meaning.[107]

The Ad Hoc Working Group on U.S. Adherence to the Berne Convention identified four general categories of moral rights: (1) right of publication; (2) rights of recall; (3) right to claim authorship; and, (4) right to protect the integrity of the work.[108]

B. Moral Rights Under the Berne Convention

The Paris text of the Berne Convention, to which the United States adhered on March 1, 1988, refers in Article 6*bis* to only two of several

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106. *Cf.* Comment No. 17, Sept. 28, 1988 letter from Morality in Media, Inc., for a somewhat different interpretaion of the term.

107. RICKETSON, *supra* note 26, at 456.

108. *Final Report of the Ad Hoc Working Group on U.S. Adherence to the Berne Convention* (*"Ad Hoc Working Group Report"*), reproduced in *U.S. Adherence to the Berne Convention, Hearings Before the Subcomm. on Patents, Copyrights and Trademarks of the Senate Judiciary Comm.*, 99th Cong., 1st & 2d Sess. 460 (1986) (*"1986 Senate Hearings"*). For a comprehensive listing of rights under copyright which are denominated "moral rights" under the laws of one or more Berne Union member states, *see* WIPO GLOSSARY OF TERMS OF THE LAW OF COPYRIGHT & NEIGHBORING RIGHTS 158 (1980).

rights that might be regarded as "moral rights": the right to claim authorship, and the right to protect the integrity of the work.[109]

Regarding the first of these, the W.I.P.O. Guide to the Berne Convention summarizes:

> This right . . . may be exercised by the author as he wishes; it can even be used in a negative way i.e., by publishing his work under a pseudonym or by keeping it anonymous, and he can, at any time, change his mind and reject his pseudonym or abandon his anonymity. Under it, an author may refuse to have his name applied to a work that is not his; nor can anyone filch the name of another by adding it to a work the latter never created. The right . . . is exercisable even against those permitted by the Convention to reproduce the work or to take extracts from it;

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109. Article 6*bis*(1) reads: "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 or her honor or reputation." *See also id.*, par. 2 and commentary thereon in W.I.P.O. GUIDE at 44 for discussion on the required term of moral rights.

The Ad Hoc Working Group Report concluded that Article 6*bis* does not "explicitly grant a right of recall, and the absence of the provision from the laws of several members indicates that 'recall' cannot be considered a right granted by Article 6*bis*." Final Report, reproduced in *1986 Senate Hearings* at 461.

United States law provides the exclusive right to first publication in 17 U.S.C. § 106(1) (1978). *See generally* discussion of this right in *Harper & Row, Pub., Inc. v. Nation Enter.*, 471 U.S. 539 (1985). *But cf.* comments of Professor John M. Kernochan, 1986 *Senate Hearings* at 170. For an interesting conflict between an exclusive licensee's right of publication and the author's moral right not to have an unfinished manuscript published, *see Society of the Survivors of the Riga Ghetto, Inc.*, 188 Misc. Lexis (N.Y. Sup. Ct.) (No. 29972186, as amended Dec. 1988).

The issue of whether moral rights are waivable was the subject of some controversy during the hearings on the Berne Implementation Act legislation. *See e.g., 1986 Senate Hearings* at 94; The Berne Implementation Act of 1987: *Hearings of N.R. 1623 before the Subcomm. on Courts, Civil Liberties and The Administration of Justice of the House Judiciary Comm.*, 100th Cong., 1st & 2d Sess. 40, 367-69, 1168 (1987 & 1988) (*"House Berne Hearings"*); *The Berne Convention: Hearings on S. 1301 and S. 1971 before the Subcomm. on Patents, Copyrights and Trademarks of the Senate Judiciary Comm.*, 100th Cong., 2d Sess. 289-300 (1988) (*"1988 Senate Hearings"*). *Cf.* Comment No. 2 submitted to the Copyright Office in this inquiry, Statement of the Max-Planck-Institute for Foreign and International Patent, Copyright, and Competition at 6-7:

> [t]he courts in most European countries do accept that the author may either transfer or waive the power to exercise his moral rights. However, each moral right has what is called a "positive nucleus," which is regarded as being so vital to the expression of the respective personality that any waiver in this respect would be null and void.

See also id. at 12 ("any 'gross distortion' [sic] or other 'gross injuries,' . . . certainly form part of this 'positive nucleus.' ").

the author's name must be mentioned.[110]

The so-called "right of integrity" concerns the ability of the author to defend against or seek redress for unauthorized changes to or uses of his or her work which are mutilating, distorting, or otherwise prejudicial to the artist's honor or reputation.

C. *Moral Rights Under the Copyright Act*

While the Copyright Act contains provisions respecting pseudonymous and anonymous works,[111] it does not provide a cause of action for violations of the author's wish to use a pseudonym or to remain anonymous. Such protection may be available, however, under various state law theories.[112]

The Copyright Act similarly does not provide for the right to protect the integrity of the work. Although the right to prepare derivative works granted in Section 106(2) is frequently cited as a component of the right of integrity, Article 6*bis* refers to moral rights as being *independent* of economic rights, and thus it is hard to see how Section 106(2) would permit an author to protect the integrity of his or her work if he or she had previously transferred all Section 106(2) rights.[113]

D. *Moral Rights in the Case Law*

U.S. case law on moral rights claims has been extensively discussed in law review articles.[114] We will therefore, only summarize those deci-

110. W.I.P.O. GUIDE TO THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS 41 (1978).

The Universal Copyright Convention, to which the United States also adheres, does not require moral rights. In the Report of the Rapporteur-General on the Universal Copyright Convention it is stated that the text of the Preamble to the Convention reflected the desire of some delegations to "avoid reference to *'droit moral,'" Records of the Intergovernmental Copyright Conference* 73 UNESCO (1952) and that a proposal by Greece to include a reference in Article I of the Convention to the "droit moral" of the author was defeated. *Id.* at 74. *See also* Minutes of the Conference, *id.* at paras. 1, 58, 100, 107, 112, 116, 118, 126, 141, 148, 378, 380, 391, 393, 403-05, 408-10, 417, 535, 873-76, 879, 880, 882, 883, 904, 932, 1453, 2002-03, 2006, 2008, 2010, 2013, 2014, 2019, 2024-26, 2032, 2035, 2042, 2067, 2087, 2590-94, 2598, and working Documents DA/1, 2, 5, 6, 69, 77, 101, 107, 122, 123, 143, 162, 173, 182, 206. *But, cf.* BOGSCH, THE LAW OF COPYRIGHT UNDER THE UNIVERSAL COPYRIGHT CONVENTION 65-66 (3d ed. 1968); Dietz, *Elements of Moral Right Protection in the Universal Copyright Convention,* 21 UNESCO 17 (1987).

111. *See* 17 U.S.C. § 101 (1986) (definitions of the terms); § 302(c) (term of protection for such works).

112. *See* Clemens v. Press Publishing Co., 122 N.Y. Supp. 206 (1910); Ellis v. Hurst, 121 N.Y. Supp. 438 (1910).

113. *See generally,* Kerever, *The Insertion of Advertising in Films Screened on Television,* 32 COPYRIGHT 10 (1988).

114. *See, e.g.,* Roeder, *The Doctrine of Moral Rights: A Study in the Law of Artists and*

sions as they relate to the two rights specified in Article 6*bis* of the Berne Convention and, where possible, as they relate to motion pictures.

1. Right to Claim Authorship

There are two aspects to the right to claim authorship: (1) the right to insist upon or disclaim authorship; and, (2) the right to prevent misattribution of authorship.

Creators, 53 HARV. L. REV. 554 (1940); Katz, *The Doctrine of Moral Right and American Copyright Law - A Proposal,* 24 SO. CAL. L. REV. 375 (1951); Stevenson, *Moral Right and the Common Law: A Proposal,* 6 COPYRIGHT L. SYMP. (ASCAP) 89 (1955); Strauss, *The Moral Right of the Author,* COPYRIGHT OFFICE STUDY NO. 4, 86th Cong., 1st Sess. 109 (1959) (Comm. Print); Treece, *American Law Analogues of the Author's "Moral Right,"* 16 AM. J. COMP. LAW 487 (1968); Grant, *The Doctrine of Droit Moral: Its Place in American Copyright Law,* 16 HOW. L.J. 53 (1971); Comment, *Toward Artistic Integrity: Implementing Moral Right Through Extension of Existing American Legal Doctrine,* 60 GEO. L. J. 1539 (1972); Valentine, *Copyright: Moral Right - A Proposal,* 43 FORDHAM L. REV. 793 (1975); Comment, *Protection of Artistic Integrity: Gilliam v. ABC,* 90 HARV. L. REV. 473 (1976); Goldberg, *"Moral Right": in American Law,* 43 BROOKLYN L. REV. 1043 (1977); Comment, *The Monty Python Litigation - Of Moral Right and the Lanham Act,* 125 U. PA. L. REV. 611 (1977); Diamond, *Legal Protection for the "Moral Rights": of Authors and Other Creators,* 68 TRADEMARK REP. 224 (1978); Comment, *An Author's Artistic Recognition Under the Copyright Act of 1976,* 92 HARV. L. REV. 1490 (1979); Maslow, *Droit Moral and Sections 43(a) and 44(i) of the Lanham Act. A Judicial Shell Game?,* 48 GEO. WASH. L. REV. 377 (1980); De Silva, *Droit Moral and the Amoral Copyright: A Comparison of Artists' Rights in France and the United States,* 28 BULL. COPR. SOC'Y 1 (1981); Rosen, *Artists' Moral Rights: A European Evolution: An American Revolution,* 2 CARDOZO ARTS & ENT. L.J. 155 (1981); Amarnich, *Recognition of the Moral Right: Issues and Options,* 29 COPYRIGHT L. SYMP. (ASCAP) 31 (1983); Hathaway, *American Law Analogues to the Paternity Element of the Doctrine of Moral Rights: Is the Creative Artist in America Really Protected?,* 30 COPYRIGHT L. SYMP. (ASCAP) 121 (1983); Note, *Moral Rights and the Realistic Limits of Artistic Control,* 14 GOLDEN GATE U.L. REV. 447 (1984); Davis, *State Moral Rights and the Federal Copyright System,* 4 CARDOZO ARTS & ENT. L.J. 233 (1985); Kwakk, *Copyright and the Moral Right: Is an American Marriage Possible?,* 35 VAND. L. REV. 1 (1985); Ginsberg, *The Right of Integrity in Audiovisual Works in the United States,* 135 R.I.D.A. 2 (1988). For a sampling of articles on moral rights in foreign countries, *see* RICKETSON, *supra,* note 26, at 456 n.435.

For articles on colorization, *see, e.g.,* Bader, *A Film of a Different Color: Copyright and the Colorization of Black and White Films,* 5 CARDOZO ARTS & ENT. L.J. 497 (1986); Koha, *Paint Your Wagon Please! Colorization, Copyright and the Search for Moral Rights,* 40 FED. COMM. L.J. 1 (1987); Note, *Black and White and Brilliant: Protecting Black and White Films from Color Recoding,* 9 HASTINGS COMM/ENT. L.J. 522 (1987); Gilbaldi, *Artists' Moral Rights and Film Colorization: Federal Legislative Efforts to Provide Visual Artists with Moral Rights and Resale Royalties,* 38 SYRACUSE L. REV. 965, 968-69 (1987); Note, *Artists' Rights in the United States: Toward Federal Legislation,* 25 HARV. J. ON LEGIS. 153 (1988); 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 LAW. 309 (1988); Note, *Moral Rights Protections in the United States in the Colorization of Black & White Motion Pictures: A Black & White Issue,* 26 HOFSTRA L. REV. 503 (1988); Beyer, *Internationalisms, Art, and the Suppression of Innocation: Film Colorization and the Philosophy of Moral Rights,* 82 NW. U.L. REV. 1011 (1988); Ginsburg, *Colors in Conflict: Moral Rights and the Foreign Exploitation of Colorized U.S. Motion Pictures,* 36 J. COPYRIGHT SOC'Y 81 (1988).

In general, the mere failure to credit an author has not constituted copyright infringement.[115] It may, however, constitute "reverse palming off" under Section 43(a) of the Lanham Act.[116]

As discussed further below, certain states provide a right of attribution or disclaimer for specific classes of works, such as works of the fine arts. For example, California has made it a violation of its law to fail to give proper credit, including screen credit to actors.[117]

The importance of the right to receive credit in the motion picture industry has long been noted: "It can be fairly said that in the entertainment industry the credit clauses of an agreement are often considered of greater importance than the provisions for monetary compensation."[118] Crediting (attribution) is, in a real sense, one's resume. The failure to achieve proper attribution could have an adverse impact on one's ability to earn a livelihood, or to market freely one's creative labor. For this reason, the guilds, including the Directors Guild of America and the Screen Actors Guild, have long engaged in collective bargaining on the issue.[119]

Guild agreements represent minimum standards. Individual director's and actor's contracts may, and almost always do, contain further requirements.[120] Disputes have arisen both over the meaning of such contractual provisions, and in circumstances where the artist's individual contract is silent on the nature of the proper attribution. And, although cases such as *Harris v. Twentieth Century-Fox Film Corp.*, 43 F. Supp.

115. Locke v. Times Mirror Magazine, Inc., Copyright L. Rep. (CCH) Para. 25,750 (S.D.N.Y. 1985); Wolfe v. United Artists Corp., 742 F.2d 1439 (2d Cir. 1983) (*Wolfe I*); Wolfe v. United Artists Corp., 583 F. Supp. 53 (E.D. Pa. 1984) (*Wolfe II*); Suid v. Newsweek, Inc., 503 F. Supp. 146 (D.D.C. 1980). *Cf.* Peckarsky v. ABC, 603 F. Supp. 688, 697-98 (D.D.C. 1984) (decision unclear).

116. Lamothe v. Atlantic Recording Co., 847 F.2d 1403 (9th Cir. 1988); Smith v. Montoro, 648 F.2d 602 (9th Cir. 1981) (one actor's name substituted for another's).

117. *See* CAL. BUS. & PROF. CODE §§ 17200, 17203; Meta-Films Assoc. v. MCA, Inc., 568 F. Supp. 1346, 1364 (C.D. Cal. 1984) and, *generally,* Note, *Giving the Devil Its Due: Actors' and Performers' Right to Receive Attribution for Cinematic Roles,* 4 CARDOZO ARTS & ENT. L.J. 299 (1985) ("1985 CARDOZO NOTE"); Berman & Rosenthal, *Screen Credit and the Law,* 9 UCLA L. REV. 156 (1962) ("Berman & Rosenthal").

118. Berman & Rosenthal, *supra* note 117, at 156. *See also* SELZ & SIMENSKY, ENTERTAINMENT LAW (1983), Chs. 8-16, for an exhaustive treatment of the subject.

119. *See* DGA Basic Agreement § 8-102 (form of credit); § 201 (screen credit); § 202 (visibility of director's name); § 203 (credits on paid advertising, including "size and location of credit, title of motion picture, 'one sheets,' outdoor-type advertising, trade paper advertising, advertising in newspapers, magazines and their periodicals"); § 203 (phonorecords, books and tapes); § 207 (theatrical and souvenir programs); § 208 (videodisc/videocassette containers); and, *generally,* § 300 (credit for directors of television films).

120. *See* DGA Basic Agreement § 8-104 ("any Director shall have the right to negotiate for any credit in excess of minimum").

119 (S.D.N.Y. 1942) and *Vargas v. Esquire, Inc.*, 164 F.2d 522 (7th Cir. 1947) have been cited for the proposition that an author cannot require his or her name to be applied to a work unless the contract expressly requires it, these cases have involved express transfers of "all rights." By contrast, another case, in dictum, stated: "Courts will protect against . . . the omission of the author's name unless, by contract, the right is given to the publisher to do so . . . ."[121]

The differences in the approaches taken by courts reflect different approaches to construction of contracts. One court may find that an author who enters into a contract has thereby transferred away all rights not specifically reserved, while another may find that the author retains everything not specifically granted.[122]

The rule where there is no written contract is uncertain. One commentator has concluded there is no clear U.S. authority for a right to claim authorship.[123] But, in a recent case, *Edison v. Viva Int'l, Ltd.*, 209 U.S.P.Q. 345, 347 (N.Y. App. Div. 1979) it was broadly held "[w]here . . . the parties have entered into a contract of publication, plaintiff's so-called 'moral right' is controlled by the law of contract . . . ." Where the contract is silent on particular issues, the court indicated custom and usage are to be examined.[124]

2. Misattribution of Authorship

Most cases involving failure to credit, however, arise under facts where there is also misattribution of authorship. It is quite rare that a work is published without any statement of authorship at all.[125] It ap-

121. Harms, Inc. v. Tops Music Enter., 160 F. Supp. 77 (S.D. Cal. 1958). *See also* Clemens v. Press Pub. Co., 122 N.Y.S. 206 (1910) ("The purchaser [of a literary work] cannot garble it, or put it out under another name than the author's; nor can he omit altogether the name of the author, unless his contract with the latter permits him so to do.").

122. *See* review of the cases in 1985 CARDOZO NOTE, *supra* note 117, at 312-15. *But cf.* Gilliam v. ABC, 538 F.2d 14, 22 (2d Cir. 1976) ("omission of any terms [in contract] concerning alterations in the program after recording must be read as reserving . . . exclusive authority for such revisions"); Warner Bros. Pictures, Inc. v. CBS, 216 F.2d 945 (9th Cir. 1954) (character rights in novel reserved unless specifically granted.).

123. *See* statement of Professor Edward J. Damich before the House of Representatives, in *House Berne Hearings* at 545.

124. The decision in *Edison* was based on similar language in Seroff v. Simon & Schuster, Inc., 162 N.Y.S.2d 770 (N.Y. Sup. Ct. 1957), which in turn was based on a law review article, Chafee, *Reflections on the Law of Copyright*, 45 COLUM. L. REV. 719, 729 (1945).

125. *But cf.* FEL Publications v. Catholic Bishop of Chicago, 214 U.S.P.Q. 409 (7th Cir. 1982), *cert. denied*, 459 U.S. 131 (1982) (omission of compiler's name from collection of hymnals may state cause of action under Section 43(a) of the Lanham Act); Community for Creative Non-Violence v. Reid, 846 F.2d 1485, 1498-99 (D.C. Cir. 1988), *cert. granted on other grounds*, — U.S. — (Nov. 8, 1988; to be argued March 29, 1989) ("Independent of Reid's

pears well established that a misattribution of the actual authorship of a work constitutes a violation of Section 43(a) of the Lanham Act.[126]

However, this sort of a misattribution of an author's contribution to the creation of a work differs from situations where a work is subsequently altered in a manner which a *credited* author believes to be so changed as to no longer represent his or her vision. Since the reproduction of substantial portions of a copyrighted work, in either its original form or in a distorted form, will constitute copyright infringement absent a contractual right to reproduce the work, most disputes have involved interpretations of the scope of a transfer or assignment of reproduction of performance rights in the work, with the licensee claiming it has the right to make the disputed alterations.

In *Gilliam v. ABC,* 538 F.2d 14, 27 (2d Cir. 1976), a leading case on the issue, Judge Gurfein, in a concurring opinion, wrote:

> If the licensee may, by contract, distort the recorded work, the Lanham Act does not come into play. If the licensee has no such right by contract, there will be a violation in breach of contract. The Lanham Act can hardly apply literally when the credit line correctly states the work to be that of the plaintiffs which, indeed it is, as far as it goes. The vice complained of is that the truncated version is not what the plaintiffs wrote. But the Lanham Act does not deal with artistic integrity. It only goes to misdescription of origin and the like.

Significantly, this view does not appear to have been shared by the majority, which indicated that such actions could violate the Lanham Act. *Id.* 24-25.

Similar revisions on contract rights was placed by the court in *Granz v. Harris,* 198 F.2d 585 (2d Cir. 1952), in which it was held: "[a]n obligation to mention the name of the author carries the implied duty, however, as a matter of contract, not to make such changes in the work as

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ownership of the copyright, CCNV might be obliged to credit Reid as an author of the sculpture").

126. *See* Lamothe v. Atlantic Record Co., 847 F.2d 1403 (9th Cir. 1988); Smith v. Montoro, 648 F.2d 602 (9th Cir. 1981) (removal of actor's name from film credits and substitution of another's name); Dodd v. Fort Smith Special School Dist. No. 100, 666 F. Supp. 1278 (W.D. Ark. 1987) (substitution of teachers' and students' names); Marling v. Ellison, 218 U.S.P.Q. 702 (S.D. Fla. 1982) (infringing work); Wildlife Int., Inc. v. Clements, 591 F. Supp. 1542 (S.D. Ohio 1984) (advertising brochures falsely stated they represented "the artistic standards now associated with [the artist] and that [the artist] approves the quality"); Follett v. Arbor House, 497 F. Supp. 394 (S.D.N.Y. 1968) (misstatement of author's contribution); Geisel v. Poynter Products, 295 F. Supp. 331 (S.D.N.Y. 1968) (false representation of sponsorship). Relief has also been provided under a theory of libel. *See* Ben-Oliel v. Press Pub. Co., 251 N.Y. 250, 256 (1929).

would render the credit line a false attribution of authorship." A more expansive view of the situation was offered by Judge Frank in his concurring opinion in *Granz:*

> An artist sells one of his works to the defendant who substantially changes it and represents the altered matter to the public as that artist's product. Whether the work is copyrighted or not, the established rule is that, even if the contract with the artist expressly authorizes reasonable modifications (e.g., where a novel or stage play is sold for adaptation as a movie), it is an actionable wrong to hold out the artist as author of a version which substantially departs from the original.[127]

The right to claim or disclaim authorship may have application to alterations of motion pictures in a number of circumstances. For example, a film, originally shot in black and white, is, without the consent of the director (but pursuant to a transfer of "all rights") color encoded and marketed as, "Jane Smith's Godzilla 1950: The Colorized Version." It may be argued that, under these circumstances, a false impression of association with the color encoded work is created. Of course, the inclusion of statements or labelling disclosing the director's non-association with the color encoded version, considerably, if not completely diminished the cause of action.[128]

A more difficult case arises with panning/scanning and lexiconning, done without the director or other creative participants' authorization but pursuant to a transfer of "all rights." A claim that such actions constitute a false attribution of authorship demonstrates interaction between

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127. *But cf.* Jaeger v. American Int'l Pictures, Inc., 330 F. Supp. 274 (S.D.N.Y. 1971) (stating that *Granz* "differ[s] substantially from . . . a large-scale collaborative work like a movie.").

Older state cases provided relief under various state theories. *See e.g.,* Chesler v. Avon Book Div., 352 N.Y.S.2d 552 (N.Y. Sup. Ct. 1973) ("Although the authorities are sparse, it is clear that even after a transfer or assignment of an author's work, the author has a property right that it shall not be used for a purpose not intended or in a manner which does not fairly represent the creation of the author."). *But cf.* Edison v. Viva Int'l, 421 N.Y.S.2d 203 (N.Y. Sup. Ct. 1979) ("To publish in the name of a well-known author any literary work, the authorship of which would tend to injure an author holding his position in the world of letters, has been held to be libel . . . . In the third cause of action, the plaintiff avers that the defendant published an article *different* in form and content from his original work. To state that the published work was different from the original is not to state that the plaintiff was libeled.").

128. *Cf.* Gilliam v. ABC, 538 F.2d 14, 25 n.13 (majority); *id.* at 27 n.1 (concurring opinion). *See also* Consumers Union v. General Signal Corp., 724 F.2d 1044, 1053 (2d Cir. 1983) ("disclaimers are a favored way of alleviating consumer confusion . . . ."); National Film Preservation Act of 1988, contained in Interior Appropriations Act for fiscal 1989, P.L. 100-466 (establishing National Film Preservation Board and labelling requirements for certain materially altered films).

the right of attribution and the right of integrity. We assume most cases would arise under circumstances where changes to a work for which an author is credited would involve distortions or mutilations of the work. These cases are, thus, derivative of the right of integrity.

3. The Right of Integrity

Article 6*bis* of the Berne Convention does not bar any modification to a work; it only prohibits those that are "prejudicial to the [author's] honor or reputation." [129] The W.I.P.O. Guide to the Convention contains this discussion on the right:

> The formula is very elastic and leaves a good deal of latitude to the courts. Generally speaking, a person permitted to make use of a work . . . may not change it either by deletion or by making additions. A producer may not, on his own authority, delete several scenes from a play nor a publisher strike out chapters from a narrative. The problem becomes more delicate when it is a case of adaptation; for example when writing a play or making a film from a novel, one cannot insist that the adaptor sticks [sic] strictly to the text. Means of expression differ and the change to stage or screen calls for modifications. But the adaptor's freedom is not absolute; this "right of respect" allows the author to demand, for example, the preservation of his plot and the main features of his characters from changes which will alter the nature of the work or the author's basic message. The Convention speaks of prejudice to honor or reputation. The formula is very general. The author must decide whether the fact that the text was, during its adaptation to the theatre or screen, given a slightly pornographic twist to meet the taste of some of the audience, ruined his reputation as a serious author or, on the contrary, gave his work a flavour more suitable to a later age.
>
> W.I.P.O. Guide at 42.

Among the examples of distortions, mutilations, or other modifica-

129. *But cf.* contrary views of certain Belgian and French commentators, discussed in Ricketson, *supra* note 107, at 472-73. *See also* Kerever, *The Insertion of Advertising in Films Screened on Television,* 32 COPYRIGHT 10, 12 (1988), in which the wording of Article 6*bis* is interpreted as "reflect[ing] a choice between two conceptions of the application of moral rights: a subjective conception, whereby the author has the discretionary power to consider that the modification harms his reputation, and an objective conception requiring that the reality of the prejudice to his reputation be established by society, and hence by the judge in the event of litigation. Article 6*bis* adopted this latter approach."

tions offered by Ricketson are "imperfections in reproduction techniques (including poor or wrong colours in the case of artistic works)" and alterations of "location, period or 'atmosphere' of a [dramatic] piece" by a cinematographic director. Ricketson at 468-69. These changes would, however, still have to be prejudicial to the author's honor or reputation in order to constitute a violation of the right of integrity.

There have been only a very few U.S. cases providing relief (or have indicated relief would be available) under the Copyright Act for acts encompassed by the right of integrity.[130] In *Community for Creative Non-Violence v. Reid,* 846 F.2d 1485, 1498-99 (D.C. Cir. 1988), *cert. granted on other grounds,* — U.S. — (Nov. 8, 1988; to be argued March 29, 1989), the District of Columbia Court of Appeals indicated that an author has a right against the copyright owner if the owner "should publish an excessively mutilated or altered version" of the work, citing among other authorities, the Ad Hoc Working Group report's conclusions that existing common law doctrines and statutes are sufficient to meet the requirements of Article 6*bis* of the Berne Convention.

The more typical comment, however, is that found in *Gilliam v. ABC,* 538 F.2d 14, 24 (2d Cir. 1976): "American copyright law . . . does not recognize moral rights or provide a cause of action for their violation, since the law does seek to vindicate economic, rather than personal, rights of authors." *Gilliam,* like almost all of the integrity claims, also involved issues of contract interpretation.[131] Where a contract gives a

130. *See* National Bank of Commerce v. Shakles Corp., 503 F. Supp. 533 (W.D. Tex. 1980) (unauthorized addition of advertising materials in book held infringement); WGN Continental Broadcasting Co. v. United Video, Inc., 693 F.2d 622, 626 (7th Cir. 1982) ("if the publisher of a book leaves the inside covers blank, the book seller [cannot] inscribe the Lord's Prayer on them in order to broaden the book's appeal"); Gee v. CBS, 471 F. Supp. 14, 24 (E.D. Pa. 1979) (indicating that infringement would lie where alterations were done to "intentionally ridicule or humiliate" the author).

131. *But see* Preminger v. Columbia Pictures Corp., 267 N.Y.S.2d 594 (Sup. Ct. 1966), *aff'd,* 269 N.Y.S.2d 913 (N.Y. App. Div. 1966), *aff'd mem.,* 273 N.Y.S.2d 80 (N.Y. 1966) ("the law is not so rigid, even in the absence of a contract, as to leave a party without protection against publication of a garbled version of his work.").

A related question is whether the terms of the contract conveying rights include particular technologies, especially those not in existence at the time of the contract. *See generally,* Cohen v. Paramount Pictures Corp., 845 F.2d 851, 854 (1988) (composer who had licensed right to record work "on television" had not conveyed right to record work on videocassettes primarily because VCR's "were not invented or known in 1969, when the license was executed"); Goodis v. United Artists Television, 425 F.2d 397 (2d Cir. 1970); Bartsch v. MGM, Inc., 391 F.2d 150 (2d Cir. 1968), *cert. denied,* 393 U.S. 826 (1968); Autry v. Republic Productions, Inc., 213 F.2d 667 (9th Cir. 1954), *cert. denied,* 348 U.S. 858 (1954); Cinema Corp. of America v. De Mille, 267 N.Y.S. 327 (Sup. Ct. 1933), *aff'd,* 267 N.Y.S. 959 (1933); Ettore v. Philco Television Broadcasting Corp., 229 F.2d 481 (3d Cir. 1956), *cert. denied,* 351 U.S. 926 (1956).

Recently, an issue of contractual interpretation perhaps somewhat along the lines sug-

licensee certain rights, the licensee is bound by the terms of the contract. In *Gilliam,* the court found that ABC's substantial editing went beyond the rights it had contractually been granted. The court also found, however, that plaintiffs were likely to prevail on a claim ABC had violated Section 43(a) of the Lanham Act[132] by "broadcasting a program properly designated as having been written and performed by [plaintiffs], but which has been edited, without their consent, into a form that departs substantially from the original work." 538 F.2d at 24. This action "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," *Id.* at 25; "in such a case, it is the writer or performer, rather than the network, who suffers the consequences of the mutilation, for the public will have only the final product by which to evaluate the work." *Id.* at 24.[133]

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gested here received attention by some of the parties involved in this inquiry. On February 14, 1989, the Turner Entertainment Company announced that it had discontinued preparation for the colorization of *Citizen Kane,* based upon a review of the contract between RKO Pictures, Inc., Orson Welles, and his production company Mercury Productions. It was the Turner Company's conclusion that "[w]hile a court test might uphold our legal right to colorize the film, provisions of the contract could be read to prohibit colorization without permission of the Welles' Estate." It is unknown how many other directors have similar contractual provisions.

The laws of certain foreign countries make the distinction along the lines discussed above, but with an emphasis on whether the new technology represents a new economic market. As one witness commented, the test in West Germany is whether there is "a new and technically as well as economically distinct and separable way of exploitation." Statement of the Max-Planck-Institute for Foreign and International Patent, Copyright, and Competition Law, Comment No. 2, at 9. *See* West German statute at §§ 31(4) and 89(1). The purpose of this distinction is to let authors "participate in any further exploitation, the economic impact of which [they] couldn't have judged and foreseen at the time when bargaining for renumeration." *Id.*

132. This provision, as amended by Pub. Law 100-67, 100th Cong., 2d Sess.; 102 Stat. 3935 (1988), reads:

> (a) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any work, 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, which -
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> (1) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or
>
> (2) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities,
>
> shall be liable in a civil action by any person who believes that he or she is likely to be damaged by such act. 15 U.S.C. § 1125(a) (1988).

133. *See also* Autry v. Republic Productions, Inc., 213 F.2d 667, 670 (9th Cir. 1954), *cert. denied,* 348 U.S. 858 (1954) (although court found that defendant had the contractual right to show edited versions of film on television with commercials, it disapproved of the lower court's finding that the defendant possessed the right to "so alter or emasculate the motion pictures as

The *Gilliam* court, however, rejected plaintiff's claim that, absent a contractual right to edit a work, no changes could be made, holding "[c]ourts have recognized that licensees are entitled to some small degree of latitude in arranging the licensed work for presentation to the public in a manner consistent with the licensee's style or standards." 538 F.2d at 23.

Of particular interest is the exclusion from the labelling requirements contained in the National Film Preservation Act of 1988, of changes made as part of "customary practices and standards and reasonable requirements of preparing a work for distribution or broadcast." In a colloquy on this provision, Representative Mzarek stated that it was the House-Senate conferee's belief that this provision excludes editing for television, time compression, and colorization, but *not* panning and scanning.[134]

One effect of these exclusions might be unintended: if a label is not affixed stating the film has been "materially altered," arguably, a Section 43(a) violation might lie. If such a label is affixed, one would probably not.[135]

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to render them substantially different from the product which the artist created"); Preminger v. Columbia Pictures Corp., 267 N.Y.S.2d 594 (N.Y. Sup. Ct. 1966), *aff'd,* 269 N.Y.S.2d 913 (1st App. Div. 1966), *aff'd mem.,* 273 N.Y.S.2d 80 (N.Y. 1966) (while minor editing for television permitted in the absence of a contractual provision to the contrary and where director knew of industry practice, the editing of 53 minutes from a 161 minute film would constitute an actionable mutilation); Stevens v. NBC, 148 U.S.P.Q. 572 (Cal. Sup. Ct. 1966) (contempt proceeding) (court has the right to protect the artistic integrity of a product; while contract read to give network right to insert commercials into broadcast of motion picture "the commercials must not be inserted so as to alter or adversely affect or emascualte the artistic or pictorial quality of the film, or destroy or distort materially or substantially the mood, the effect or the continuity of the film"); 76 Cal. Rptr. 106 (1969).

Authors have fared less well in suits against motion pictures or television broadcasts that have allegedly violated their moral rights in the adaptation to the screen. *See* Prouty v. NBC, 26 F. Supp. 265 (D. Mass. 1939); Shostokovich v. Twentieth Century-Fox Film Corp., 80 N.Y.S.2d 575 (N.Y. Sup. Ct. 1948), *aff'd,* 87 N.Y.S.2d 430 (1949) (*but cf.* Societe Le Chant du Monde v. Societe Fox Europe et Societe Fox Americaine Twentieth Century, [1954], D. Jur. 16, 80 (Cour Appel, Paris) (injunction granted against inclusion of composer's works in film granted)); Dreiser v. Paramount Publix Corp., 22 COPYRIGHT OFF. BULL. 106 (N.Y. Sup. Ct. 1938).

134. 134 CONG. REC. H7246 (Sept. 8, 1988). Rep. Fazio disagreed. *Id.* at 7246-47. Sen. DeConcini, with Sen. Johnston's concurrence, stated that panning and scanning was included.

135. *See* comments of the Directors Guild of America before the Patent and Trademark Office, Docket No. 80743-8143 at 3-4, and *Id.* at 5-6 (proposed legislative changes); *House Berne Hearings* at 1260-62; *1988 Senate Hearings* at 507-08.

E. State Law

Nine states have passed legislation granting limited moral rights to limited classes of works, principally works of the fine arts.

1. California

California was the first state to enact specific moral rights legislation, doing so in 1979. This Act, the California Art Preservation Act, codified in Cal. Civ. Code § 987, is limited to works of "fine art," defined as "an original painting, sculpture, or drawing, or an original work of art in glass, of recognized quality, but . . . not [a] work prepared under contract for commercial use by its purchaser." Architectural works are not within this protected class.[136]

Two principal acts are covered: (1) attribution (or disclaiming authorship for a just and valid reason); and, (2) mutilation, destruction, or alteration of a work, and grossly negligent framing, conservation, or restoration of a work. An exclusion is provided for fine art created under a work made for hire arrangement for use in "advertising, magazines, or other print and electronic media." There is, though, no provision on waiver, because it was thought that waiver would undercut the rights granted artists under the statute.

In 1982, the Act was amended to include a provision on removal of works of fine art from buildings.[137]

2. Connecticut

Passed in 1988, the Connecticut law extends protection to an incredibly detailed class of "works of fine arts." Public Act No. 88-284. Significantly, the definition does not include (or exclude) motion pictures:

> any drawing, painting, sculpture, mosaic, photograph, work of calligraphy, work of graphic art including any etching, lithograph, offset print, silkscreen or other work of graphic art; craft-work in clay, textile, fiber, metal, plastic or other material; art work in mixed media, including any collage, assemblage or

136. Robert H. Jacobs, Inc. v. Westoaks Realtors, Inc., 205 Cal. Rptr. 620 (Div. 1984).

137. *See generally,* Gantz, *Protecting Artists' Moral Rights: A Critique of the California Art Preservation Act as a Model for Statutory Reform,* 49 GEO. L.J. 873 (1981); Karlen, *Moral Rights in California,* 19 S.D.L. REV. 675 (1982); Petrovich, *Artists' Statutory Droit Moral in California: A Critical Appraisal,* 15 LOY. L. REV. 29 (1984); Note, *California Art Preservation Act: A Safe Hamlet for "Moral Rights" in the U.S.,* 14 U.C. DAVIS L. REV. 975 (1981); Francione, *California Art Preservation and Federal Preemption by the 1976 Copyright Act - Equivalence and Actual Conflict,* 18 CAL. W.L. REV. 189 (1982); Note, *The Americanization of Droit Moral in the California Art Preservation Act,* 15 N.Y.U. J. INT'L L. & POL., 244 (1983).

> other work combining any of said media with other media; or a master from which copies of an artistic work can be made, such as a mold or photographic negative, with a market value of at least two thousand five hundred dollars; provided work of fine art shall not include (A) commissioned work prepared under contract for trade or advertising usage, provided the artist, prior to creating the work, has signed an agreement stating that said work shall be a commissioned work which may be altered without consent; (B) work prepared by an employee within the scope of his employment duties.

The artist is granted the right to claim authorship and, by negative implication, to prevent the intentional physical defacement or alteration of a work of fine art. These rights may not be waived "except by an instrument in writing expressly so providing which is signed by the artist." The term exists "until the fiftieth anniversary of the death of [the] artist."

3. Louisiana

In 1986, the Louisiana legislature enacted moral rights for works of "fine art," defined as "any original work of visual or graphic art of recognized quality in any medium which includes, but is not limited to, the following: painting, drawing, print, photographic print, or sculpture of a limited edition of no more than three hundred copies; however, 'work of fine art' shall not include sequential imagery such as motion pictures." La. Rev. Stat. 51:2152(7).

The specific rights granted are the right to claim or disclaim authorship and of the right of integrity (with respect to the public display and reproduction of works of fine art that have been "altered, defaced, mutilated, or modified."). *Id.* at § 2153.

Exceptions are made for alterations that are the result of the passage of time, the inherent nature of the materials, or conservation that is not negligent, and "work prepared under contract for advertising or trade use unless the contract so provides. *Id.* at § 2155. The author may expressly agree to having his or her name omitted, *Id.* at § 2154, and appears to be able to "consent to" a public display of a defaced, mutilated or modified version of the work. *Id.* at § 2153 (Preamble).

4. Maine

The Maine legislature granted limited moral rights of attribution (and disclaimer) and integrity in 1985, extending them to "any original work of visual or graphic medium which includes, but is not limited to,

painting, drawing, print, photographic print or sculpture of a limited edition of no more than 300 copies. 'Work of fine art' does not include sequential imagery, such as that in motion pictures." Title 27, Libraries, History, and Culture, ch. 303.1.D.

Covered works are protected against public display, publication, and reproduction in an altered, defaced, mutilated or modified form when this "would reasonably be regarded as being the work of the artists, and damage to the artists' reputation is reasonably likely to result . . . ." An exclusion is made for conservation that is not the result of gross negligence, and for works, "prepared under contract for advertising use, unless the contract so provides."

5. Massachusetts

The Massachusetts legislature was also active in 1985, providing protection to "any original work of visual or graphic art of any media which shall include, but not be limited to, any painting, print, drawing, sculpture, craft object, photograph, audio or video tape, film, hologram, or any combination thereof, of recognized quality." Mass. Gen. Laws. ch. 110, § 231-85S(b).

Some commentators contend that the Act encompasses motion pictures.[138] Massachusetts has a broad exclusion, though, for works "created by an employee within the scope of his employment," *Id.* at § 85S(b), a category that would seemingly eliminate most of the creative participants in motion pictures.

6. New Jersey

New Jersey enacted protection in 1986. Title 2A, Administration of Civil and Criminal Justice, ch. 42A, Artists' rights. The definition of "work of fine art" is copied verbatim from that of the Maine statute, *supra*, and thus excludes motion pictures.

7. New York

In 1983, New York passed the Artists' Authorship Rights Act, now codified in N.Y. Arts & Cult. Aff. §§ 14.01-14.03. The definition is the same as that adopted two years later by Maine, *supra*, and therefore excludes motion pictures.

At least one decision has been adjudicated under the Act, *Newman*

138. *See* Koven, *Observations on the Massachusetts Art Preservation Act,* 71 MASS. L. REV. 101, 106 (1986) ("By including film in the definition of fine art, the Massachusetts legislature may have bitten off more than the legal system can chew.").

v. Delmar Realty, New York Law Journal, June 11, 1984, in which an artist successfully prevented destruction of his mural.[139] Two claims under the New York statute, arising out of unauthorized reproductions of works of fine art have, however, been held preempted by the Copyright Act.[140]

8. Pennsylvania

In 1986, Pennsylvania passed a rather broadly phrased moral rights provision protecting "[a]n original work of visual or graphic art of recognized qualities created using any medium. The term shall include, but not to be limited to, a painting, drawing, or sculpture." Pa. Stat. Ann. tit. 73, §§ 2101-2110. It is unclear whether this extends to motion pictures.[141]

9. Rhode Island

Also in 1987, Rhode Island passed moral rights legislation, defining the term "work of fine art" identically to that in the Maine, New Jersey, and New York statutes, i.e., excluding motion pictures. R.I. Bus. & Prof. ch. 62 §§ 5-62-2 through 5-62-6.

F. Federal Legislative Efforts

1. Early Efforts to Adhere to the Berne Convention

Discussion of moral rights in the United States has been inextricably intertwined with the question of adherence to the Berne Convention, which was ratified in 1886, in Berne, Switzerland. The United States attended the final pre-ratification conference in that year as an observer.

When the Convention was opened for revision in Paris in 1896, the

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139. For a discussion of this case, *see* MERRYMAN & ELSEN, LAW, ETHICS AND THE VISUAL ARTS 169 (1987) ("MERRYMAN & ELSEN").

140. Tracy v. Skate Key, Inc., 9 U.S.P.Q.2d 155 (S.D.N.Y. 1988); Ronald Litoff, Ltd. v. American Express Co., 621 F. Supp. 981 (S.D.N.Y. 1985). A pendent claim for violation of the statute was presented in Serra v. United States Gen. Services Admin., 667 F. Supp. 1042, 1052 (S.D.N.Y. 1987), *aff'd,* F.2d (2d Cir. 1988), but was not heard when the court dismissed the federal claims. *See also* Update Art, Inc. v. Charnin, 110 F.R.D. 26 (S.D.N.Y. 1986) (claim presented). For a decision under prior New York Law, *see* Crimi v. Rutgers Presbyterian Church, 89 N.Y.S.2d 813 (N.Y. Sup. Ct. 1949) (destruction of mural allowed). For discussions of the New York statute, *see* Damich, *The New York Artists' Authorship Rights Act: A Comparative Critique,* 84 COLUM. L. REV. 1733 (1984); Scott & Cohen, *An Introduction to the New York Artists' Authorship Rights Act,* 8 COLUM. J.L. & ARTS 369 (1984); Note, *The New York Artists' Authorship Rights Acts: Increased Protection and Enhanced Status for Visual Artists,* 70 CORNELL L. REV. 158 (1984).

141. *Cf.* Meliodon v. Philadelphia School Dist., 328 Pa. 457, 195 A. 905 (1938) (alteration of sculpture permitted).

U.S. again attended as an observer and again did not adhere. This same pattern repeated itself in the 1908 Berlin revision. The 1909 general revision of the United States copyright law did little to move the U.S. toward compatibility with the Berne standards, even though those standards did not, at that time, include moral rights.

Moral rights were included as minimum rights under the Berne Convention at the Rome revision of 1928. The 1908 Berlin text of Berne remained open, however, for adherence until August 31, 1931, and, on January 13, 1931, H.R. 12549, legislation to permit Berne adherence passed the House of Representatives. Eight days later, on January 13, 1931, President Hoover transmitted the Berne treaty to the Senate for ratification, but Congress adjourned before the Senate acted on either the treaty or H.R. 12549.

On February 14, 1934, President Roosevelt sent the Rome text of the Convention to the Senate, which at that time was considering S. 1928, implementing legislation introduced by Senator Cutter. During hearings in 1934 on possible U.S. adherence to the Berne Convention, representatives of the motion picture companies raised objections to adherence, based in part on the Convention's moral rights provisions.[142] On Friday, April 19, 1935, the Senate, by a unanimous vote, ratified the Berne Convention. The following Monday, the Senate unanimously moved to reconsider the vote and returned the treaty to the Executive Calendar to await action on implementing legislation, action which did not occur until 1988.

In 1940, Senator Albert introduced a bill to revise the Copyright Act, Section 5 of which provided:

> (1) Nothing in this Act, nor any election to have copyright under this Act, shall be deemed to alter or in any manner impair any legal or equitable right or remedy of an author under common law or statutory law other than this Act, to claim the paternity of his work as well as the right to object to every deformation, mutilation, or other modification of the said work which may be prejudicial to his honor or reputation.
>
> (2) Nothing in this Act shall be deemed to limit or otherwise affect any present or future valid contract or waiver in respect to the subject matter of subdivision (1) of this section.

142. *See* statement of Edwin P. Kilroe in *International Copyright Union: Hearings on S. 1298 before the Senate Foreign Relations Comm.*, 72d Cong., 1st Sess. 69-70 (1934) ("A limitation on the right to change the plot, scenes, sequence, and descriptions of the characters in literary works would bring havoc to the film industry.").

The bill was not favorably acted upon.

Moral rights were touched upon briefly during the Senate's consideration of the Universal Copyright Convention. See *Universal Copyright Convention: Report of the Senate Committee on Foreign Relations,* S. Exec. Rep. No. 5, 83d Cong., 2d Sess. 3 (1954) (describing Berne's moral rights provisions as at variance with U.S. law).

2. The General Revision of the 1909 Copyright Act

In preparation for a complete revision of the outdated 1909 Copyright Act, the Copyright Office commissioned a number of studies on issues that might have to be addressed in such a revision. Study No. 4, by William Strauss, completed in 1959,[143] reviewed moral rights. Unlike most of the other revision studies, the Strauss moral rights study did not list possible future legislative proposals. The Register of Copyrights' 1961 report on the general revision very briefly reviewed the concept of moral rights, concluding:

> In the United States the moral rights of authors have never been treated as aspects of copyright. But authors have been given much the same protection of personal rights under general principles of common law such as those relating to implied contracts, unfair competition, misrepresentation, and defamation.

1961 Report at 4.

No recommendation on inclusion of moral rights in the revision legislation was made, and the subject does not appear to have been discussed much, if at all, thereafter.

3. Post 1976 Copyright Act W.I.P.O. Consultations

In 1978, the general effective date for the 1976 Revision Act, the World Intellectual Property Organization (W.I.P.O.) convened a Group of Consultants to review recent copyright legislation in, among other countries, the U.S., with a view to analyzing compatibility with the Berne Convention.

In the Group of Consultants meeting, the topic of moral rights was discussed. Representatives of the Copyright Office explained that while the United States did not have moral rights as part of its statutory copyright law, moral rights type protection was available under Section 43(a) of the Lanham Act and various state causes of action. The Group of

143. STRAUSS, THE MORAL RIGHT OF THE AUTHOR, COPYRIGHT OFFICE STUDY NO. 4, 86th Cong., 1st Sess. 109 (1959) (Comm. Print).

Consultants' position was that if the Copyright Office was comfortable in stating that this common law as it was developing was sufficient to permit the U.S. to join Berne, they would not second-guess that judgment.[144]

4. Visual Artist Bills

Following passage of the 1976 Copyright Act, bills were introduced to extend to authors and artists, under the Copyright Act, rights of paternity and integrity. The first of these bills, H.R. 288, 96th Cong., 2d Sess., was introduced by Representative Drinan on January 15, 1979. This bill, the "Visual Artists Moral Rights Amendment of 1979," would have amended Section 113 of the Act to include for pictorial, graphic and sculptural works, the rights to "claim authorship of such work[s] and to object to any distortion, mutilation or other alteration thereof, and to enforce any other limitation recorded in the Copyright Office that would prevent prejudice to the author's honor and reputation."[145] No action was taken on H.R. 2908.

In the first session of the 97th Congress, Representative Frank introduced H.R. 2908, identical to Representative Drinan's bill H.R. 288.[146]

In the first session of the 99th Congress, Representative Markey took over from Representative Frank as the House advocate of moral rights for visual artists, introducing H.R. 5772, a bill identical to that introduced by Senator Kennedy, S. 2796.[147] These bills were broader in scope than the previous Frank and Drinan efforts, although somewhat narrower in subject matter, since they borrowed from certain of the state statutes by limiting protection to pictorial, graphic, and sculptural works of "recognized stature." Sec. 2(3). The bills covered both the right to claim authorship and the right of integrity, as well as introducing a provision for a *droit de suite* allowing artists to share in the increasing value of their works in subsequent sales. A "field hearing" on S. 2796 was held in New York City on November 18, 1986.[148]

In 1987, during the 100th Congress, the Kennedy and Markey bills were reintroduced as S. 1619 and H.R. 3221. Hearings on S. 1619 were

144. Report of June 7, 1978 Group of Consultants' Meeting, Transcript of talk to Copyright Office Staff given by General Counsel Jon Baumgarten, at 10-11.

145. *See also* Congressman Dornan's introductory floor statement. 125 CONG. REC. 164 (1979).

146. *See* 127 CONG. REC. H217 (daily ed. March 30, 1981).

147. *See* 132 CONG. REC. S12, 185 (Sept. 9, 1986).

148. *See Visual Artists Rights Amendment of 1986, Hearing on S. 2796 Before the Subcomm. on Patents, Copyrights and Trademarks of the Senate Judiciary Comm.*, 99th Cong., 2d Sess. (1986).

held on December 3, 1987.[149] At the conclusion of the 100th Congress, these bills came close to being passed. S. 1619 was favorably reported out by the Senate Judiciary Committee, but failed to make it to the floor. H.R. 3221 was reported out by the Subcommittee, but was not reported out by the full Judiciary Committee.

5. The Berne Implementing Legislation

In 1983, efforts to obtain adequate and effective protection for U.S. works overseas were aided, for the first time, by tying preferential treatment for imports into the United States to the foreign country's protection of U.S. intellectual property.[150]

Delegations of the U.S. government officials visited countries affected by this legislation and were, on a number of occasions, met with remarks to the effect that before the United States could insist on other countries reforming their laws, the United States should join the Berne Convention. This argument had particular force in countries that were members of Berne and with which the United States had no multi- or bilateral relations.[151] As a result of these discussions with representatives of foreign countries, initiatives were begun to study ways to amend our copyright law to permit Berne adherence.

One important initiative was taken by a group of private sector attorneys formed at the request of the State Department and under the chairmanship of Irwin Karp, counsel for the Authors League of America. This group, called the Ad Hoc Working Group on U.S. Adherence to the Berne Convention, provided preliminary and final reports on issues raised by possible U.S. adherence to Berne. Chapter VI of the final report concerned moral rights and stated a conclusion that:

> Given the substantial protection now available for the real equivalent of moral rights under statutory and common law in the U.S., the lack of uniformity in protection of other Berne nations, the absence of moral rights provisions in some of their copyright laws, and the reservation of control over remedies to each Berne country, the protection of moral rights in the

149. *See Visual Artists Rights Act of 1987, Hearings on S. 1619 before the Subcomm. on Patents, Copyrights and Trademarks of the Senate Judiciary Comm.*, 100th Cong., 1st Sess. (1987), and on H.R. 3221 on June 9, 1988.

150. *See* Caribbean Basin Economic Recovery Act, Act of Aug. 5, 1983, Pub. L. No. 98-67, 97 Stat. 384. In 1984, similar provisions were inserted into the International Trade and Investment Act of 1984. Act of Oct. 30, 1984, Pub. L. No. 98-573, 98 Stat. 3018.

151. *See 1986 Senate Hearings* at 10 (Arpad Bogsch, Director of the World Intellectual Property Organization); *1988 Senate Hearings* at 95 (United States Trade Representative Clayton Yeutter).

United States is compatible with the Berne Convention.[152]

The Ad Hoc report acknowledged that there are no explicit moral rights provisions in U.S. copyright law, but pointed to Sections 106(a)(2) and 115(a)(2) of the Copyright Act, Section 43(a) of the Lanham Act, state statutes, and state and federal decisions "protecting various rights equivalent to those granted in Article 6*bis* under state common law principles," including contract, unfair competition, tort, libel, and right of privacy/publicity.[153] The Ad Hoc Committee's conclusions were criticized by some commentators,[154] and, perhaps surprisingly, by both those seeking to preclude federal moral rights protection,[155] and, by those seeking greater moral rights protection.[156]

a. Hearings on Berne Implementing Legislation in the Senate

On May 16, 1985, under the chairmanship of Senator Charles Mathias, Jr. of Maryland, the Subcommittee on Patents, Copyrights and Trademarks began hearings on possible Berne adherence by receiving testimony principally from government witnesses, but without introduction of a bill to implement legislation necessary to change U.S. law in ways to make it compatible with the Berne Convention standards.

The purpose of the hearings was to discover which provisions of U.S. law would need to be revised if adherence was felt desirable. The question of moral rights was only briefly raised.[157]

In preparation for a second day of hearings scheduled for April 15, 1986, the Copyright Office and the Senate subcommittee staff prepared a draft discussion bill and commentary.[158] Regarding moral rights, the draft proposed two alternatives:

Alternative A:

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152. *1986 Senate Berne Hearings* at 458.

153. *1986 Senate Berne Hearings* at 459, 462-66.

154. *See* Damich, *Moral Rights in the United States and Article 6bis of the Berne Convention: A Comment on the Preliminary Report of the Ad Hoc Working Group on U.S. Adherence to the Berne Convention,* COLUM. J.L. & ARTS 655 (1986).

155. *See* statement of CPACT, *1988 Senate Berne Hearings* at 401-02.

156. *See* statement of Directors Guild of America, *1988 Senate Hearings* at 518-21.

157. *See* testimony of former Register of Copyrights Barbara Ringer, *1986 Senate Hearings* at 44 ("We do [not] need a moral rights statute in order to adhere . . . .); statement of Copyright Office, *id.* at 70-71 (noting Article 6*bis*, 92-95) (describing moral rights and concluding issue deserved further study).

158. The *1986 Senate Hearings* reproduce an earlier version of this discussion bill and commentary at pages 657-72. A longer version, not reproduced, was the version sent out to the interested parties. This version contains two alternatives on moral rights, as compared to the single proposal found on page 667 of the Senate Hearings. Because the witnesses were responding to this more complete version, we have referred to it, rather than to the earlier one.

> This title does not afford to the owner of copyright in a work greater or lesser moral rights than those afforded to works under the law, whether Title 17 or the common law or statutes of a state, in effect [insert date], as held applicable and construed by a court in an action brought under this title.
>
> Alternative B:
> The author of a copyrighted work, even after the transfer of one or all of the exclusive rights, shall have the right to claim authorship of his or her work during the work's term of copyright.

The commentary on these proposals stated:

> We have proposed only a freezing of the law under T[itle] 17, intending to leave the further development, if any, of moral rights to state jurisprudence and to future legislation. Combined with the declaration concerning the non-self execution of the Convention, this provision would preclude the injection of Convention rules into federal copyright law, without Congressional enactment.
>
> Alternative A attempts to establish a rule that moral rights are unavailable under U.S. copyright law, beyond what the copyright law itself specifically provides. Alternative B (which is, strictly speaking, a complement to Alternative A) is intended to deal with the possibility that, in light of acknowledgment that the right of paternity is not recognized at common law if the parties to a contract so provide, Congress might choose to enact the most direct element of moral rights: the right of paternity.
>
> We note, too, recent Congressional proposals for introduction of moral rights into Title 17. Our recommendations in this exercise should not be taken as hostility toward moral rights in general. To the extent that implementing legislation for Berne adherence and consideration of moral rights legislation are roughly parallel tracks, further options may reveal themselves.

The Subcommittee hearing on April 16, 1986 received testimony from representatives of the private sector, some of whom criticized the draft moral rights proposal as confusing and needlessly foreclosing judicial developments that might have occurred without reference to Berne adherence.[159]

159. *See 1986 Senate Hearings* at 155-57, 163 (Irwin Karp); 168-71, 180-81 (Professor John

After the hearings, on June 18, 1986, President Reagan transmitted the Berne treaty to the Senate for its advice and consent.[160] On October 1, 1986, Senator Mathias introduced the first Berne implementation bill, S. 2904.[161] In his floor statement introducing the bill, Senator Mathias tied together self-execution of the Convention and moral rights, an association that became significant as the Berne implementing legislation worked its way through the 99th and 100th Congresses. See 123 Cong. Rec. at S2909. In reviewing moral rights, Senator Mathias stated: "The record of our hearings and the views of most specialists in copyright is that moral rights are substantially available under U.S. law, although not integrated in the Copyright Act." *Id.* The bill's provision on non self-execution of the treaty (Sec.2(a)(2)) was intended to "preclude resort to article 6*bis* as a basis for asserting entitlement to moral rights in any litigation, based upon any statute or rule of common law, to the extent that it is claimed that Berne Convention confers greater rights than the statute or rule of law involved." *Id.* While not containing a freeze on moral rights (or indeed any reference to the subject at all), Senator Mathias urged the Congress to reexamine the issue once the U.S. had joined the Berne Convention. *Id.*

The next hearings in the Senate raising moral rights issues concerned not Berne, but complaints by directors and others over the computer encoding ("colorization") of black and white motion pictures. On May 12, 1987, the Subcommittee on Technology and the Law of the Senate Judiciary Committee, chaired by Senator J. Leahy of Vermont, examined these complaints.[162]

Part of the background to the hearings involved the Copyright Office's August 20, 1986 Notice of Inquiry regarding claims to copyright in computer color encoded motion pictures and other audiovisual works. 51 Fed. Reg. 32665. The decision to accept, on a class basis, such claims, was not, however, issued until June 22, 1987, some six weeks after the Senate hearing. 52 Fed. Reg. 23443.

The witnesses at the May 12th Senate hearing consisted of two op-

M. Kernochan); 222-23, 351 (Association of American Publishers). *Cf. id.* at 230 (Motion Picture Association of America, indicating either alternative would be acceptable); 324-25 (United States Council for International Business, supporting adoption of a provision similar to Alternative B); 374-75, 400 (National Cable Television Association, objecting to any moral rights); 400-01 (CBS, expressing preference that existing law be unchanged); 418, 422-25 (Graphic Artists Guild of America, American Society of Magazine Photographers, supporting adherence based on existing law); 715 (Professor Paul Goldstein (same)).

160. S. TREATY DOC. NO. 99-27, 99th Cong., 2d Sess. (June 20, 1986).

161. 99th Cong., 2d Sess. (1986); 132 CONG. REC. S14508 (daily ed. Oct. 1, 1986).

162. *Legal Issues that Arise when Color is Added to Films Originally Produced, Sold, and Distributed in Black and White,* 100th Cong., 1st Sess. (1987).

posing panels on color encoding, as well as Professor Paul Goldstein of Stanford University. The first panel included four directors: Elliot Silverstein, Sydney Pollack, Woody Allen, and Milos Forman, and one actress, Ginger Rogers. The second panel included representatives of companies involved in the actual color encoding: Roger L. Mayer (President, Turner Entertainment Co.), Rob Word (Senior Vice President for Creative Affairs, Hal Roach Studios), and Buddy Young (President, Color Systems Technology, Inc.). A film tape of director John Huston advocating opposition to color encoding was played. Correspondence in opposition to color encoding was received from the National Society of Film Critics, American Federation of Television and Radio Artists, International Photographers Guild, Make-Up Artists and Hair Stylists Local 706, Screen Actors Guild, French movie authors and directors, the Costume Designers Guild, and a professor of law.

While the witnesses were passionate in their opposition to or support of colorization, the specific question of moral rights and their relationship to Berne adherence was *not* raised, nor did the directors propose a particular legislative solution to prevent colorization. Instead, the directors made a general request for Congressional "guidelines" to prohibit colorization and other alterations to motion pictures, arguing that copyright owners of motion pictures have a "custodial responsibility to pass on the works they hold for the next generation, unchanged and undistorted."[163]

The next day, Representative Gephardt introduced the "Film Integrity Act of 1987," H.R. 2400, 100th Cong., 1st Sess. In his floor statement introducing the bill, Mr. Gephardt explained that the intent of the legislation was to "give the screenwriter and director of a film the right of consent for any alteration of their work. It leaves these artists with the right to decide whether the artistic integrity of their film is being violated." 133 Cong. Rec. E1922 (daily ed. May 13, 1987). Mr. Gephardt stated a "deep concern over the potential impact of technologies like colorization on America's film treasury," but asserted that the legislation "does not stand in the way of new advancements in film technology. It does not ban these changes. But it does restrain film editors and computer technicians who would distort the original intent of our films." *Id.*

H.R. 2400 sought to amend Title 17 by providing for a new Section 119, pursuant to which no published motion picture could be "materially altered" - including color encoded - without the written consent of the

163. *Hearings* at 10 (statement of Elliot Silverstein). *See also id.* at 12: "We hope that we can persuade the Congress to draw a guideline in order to restrain some citizens who perceive moral responsibilities rather narrowly and solely in terms of their own economic interests."

"artistic authors" of the work. "Artistic authors" were defined as the principal director and screenplay writer. The right to consent to material alterations was assignable, but only to other "qualified authors." Finally, the new version of films materially altered without the consent of the artistic authors would be ineligible for copyright protection. The term of the right was perpetual, in violation of Article I, sec. 8, cl. 8 of the Constitution.

No companion bill to H.R. 2400 was ever introduced in the Senate; however, on May 29, 1987, approximately two weeks after the Senate's "colorization" hearing, Senator Leahy introduced S. 1301, a bill to implement the Berne Convention. The approach to moral rights in S. 1301 was the same as that taken by Senator Mathias in the 99th Congress with S. 2942; *i.e.,* no express reference to moral rights, coupled with clear language on the non self-execution of Berne.

In his floor statement introducing the bill, Senator Leahy indicated his agreement with those arguing that current U.S. law provided sufficient moral rights to comply with Article *6bis* of Berne, and his belief that a moral rights provision would present a "contentious distraction from the effort to bring the United States into the Berne Convention."[164]

On December 18, 1987, Senators Hatch and Thurmond introduced the Administration's Berne Implementation bill, S. 1971. Unlike S. 1301, S. 1971 contained express references to moral rights. Section 2(a)(4) of S. 1971 declared "Title 17 of the United States Code does not provide an author with the right to be named as a work's author or to object to uses or changes to the work that would prejudice the author's reputation of honor." Section 2(b)(1) stated an intent of Congress that:

> any obligation of the United States to provide the author with the right to be named as a work's author or to object to uses or changes to the work as a consequence of adherence to the Berne Convention will be satisfied by United States law as it exists on the effective date of this Act whether such rights are recognized under any relevant provision of federal or state statutes or the common law and such rights shall be neither enlarged nor diminished by this Act.

Section 3 stated that no provision of Berne (e.g., Article *6bis*) would be directly enforceable and that, in essence, all actions for infringement were to be governed by Title 17.

In his floor statement introducing S. 1971, Senator Hatch, like Senator Leahy, took note of legal scholarship finding the totality of existing

164. 133 CONG. REC. S7371 (daily ed. May 29, 1987).

U.S. law sufficient to comply with Article 6*bis*,[165] and added that he hoped adherence without alteration of existing law would hopefully "ensure that concerns about moral rights provisions of the treaty be rendered fully unfounded."[166]

The Senate resumed hearings on Berne adherence two months later, on February 18, 1988, under the auspices of the Subcommittee on Patents, Copyrights and Trademarks, chaired by Senator Dennis DeConcini of Arizona. Testifying were Representative Robert W. Kastenmeier; the new Secretary of Commerce C. William Verity; Clayton Yeutter, the United States Trade Representative; Register of Copyrights Ralph Oman; and Irwin Karp, Esq.

In opening remarks at the hearing, Senator Hatch indicated that "[t]he major question to be answered before the United States ratifies the Berne Convention . . . deals with the moral rights required by article VI [sic] of the 1971 [Paris] text."[167] Senator Hatch noted that "the Reagan administration and a growing body of international legal scholarship find current federal and state law perfectly adequate for protection of an author's right to be acknowledged and for an author's right to object to a modification of artistic works."[168]

In his opening remarks, Senator Leahy noted the controversy on moral rights, *Id.* at 43, as did Representative Kastenmeier, the first witness. Recalling his floor statement in introducing H.R. 1623, Mr. Kastenmeier commented that after hearing from creators, producing employers, directors, artists, and others, he had:

> come to respect the view that the best course of action is to avoid statutory treatment of moral rights in the context of Berne. This conclusion rests in part on the political reality that legislation with a moral rights provision simply will not pass and, further, amendments to the Copyright Act are not mandated in order to secure U.S. adherence to Berne. This opinion is not based on any hostility to moral rights of authors.
>
> *Id.* at 46. See also *Id.* at 65-67, Statement of Representative Moorhead.

The next witness was Secretary of Commerce C. William Verity. Apparently aware of claims that corporate copyright owners were seeking adherence to Berne to combat international piracy while simultane-

165. 133 CONG. REC. S18408 (daily ed. Dec. 18, 1988).

166. *Id.* at S18410. *See also* "Sectional Analysis" of the bill, and the statement of Secretary of Commerce Malcolm Baldrige, *id.* at S18412.

167. *1988 Senate Berne Hearings* at 41.

168. *Id.*

ously attempting to evade perceived domestic disadvantages such as moral rights,[169] Secretary Verity stated business's concern that adherence to Berne with moral rights:

> could affect not only their commercial practices but their ability to insure that the product truly reflects their viewpoint. . . . Executives can not ignore a perceived threat to established business practices that go to the heart of their enterprises. That is not "selfishness" in the usual sense. *Id.* at 75.

Secretary Verity also indicated that the Administration would oppose future attempts to incorporate moral rights into the Copyright Act, *Id.* at 77, 116, 125-26, 128-29, although it must be noted that he could bind only the now-departed Reagan Administration.

Moral rights were also addressed by Commissioner of Patents and Trademarks Donald Quigg, who echoed the Administration's view that the "totality of current U.S. law, including federal statutes, certain common law tort and contract rights, and some state statutes, provides sufficient protection for the rights of paternity and integrity to comply with the Convention."[170]

Register of Copyrights Ralph Oman testified that the proposed bills "would not necessarily freeze moral rights, but they would state that U.S. law on the subject would not be changed, either by express language or by implication." The courts, the Register stated "would not go behind the language of the implementing legislation and current U.S. law in deciding what the rights of authors were under the copyright laws."[171]

In questioning Under Secretary of State for Economic Affairs Allen Wallis, Senator Hatch raised the question whether moral rights legislation would be unconstitutional as allegedly contrary to the goal of promoting the public good. After review by State Department legal advisors, the State Department concluded that the argument had little merit.[172]

The final, and only nongovernmental, witness was attorney Irwin Karp, the Chairman of the Ad Hoc Committee. Mr. Karp spoke out against the possibility of freezing moral rights at their then current level in the United States.[173] Of particular interest was Mr. Karp's inclusion

169. *See* the directors' testimony at the *1988 Senate Hearings* at 368, describing this position as "more outlandish or blatant than any film fantasy" and as a "massive act of self-service."

170. *Id.* at 87. *Cf.* testimony of USTR Yeutter, *id.* at 116-17, 131.

171. *Id.* at 160-62. *See also* the Register's further discussion of the issue, *id.* at 138, 154, 168-77, 186-89, 203-04, 205-08.

172. *Id.* at 112-13.

173. *Id.* at 209, 221-25.

of a June 12, 1987 letter from W.I.P.O. Director General Arpad Bogsch:

> In my view, it is not necessary for the United States of America to enact statutory provisions on moral rights in order to comply with Article 6*bis* of the Berne Convention. The requirements under this Article can be fulfilled not only by statutory provisions in a copyright statute, but also by common law and other statutes. I believe that in the United States the common law and such statutes (Section 43(a) of the Lanham Act) contain the necessary law to fulfill any obligation for the United States under Article 6*bis*.
>
> There are several countries of the common law system, and among them the United Kingdom (that joined the Convention exactly 100 years ago) that are bound by the Berne Convention, including its Article 6*bis*, which have never had and do not have at the present time statutory provisions on moral rights. *Id.* at 223.[174] But cf. U.K. Copyright Act.[175]

On March 1, 1988, Senator Hatch placed in the Congressional Record a proposed amendment to the Administration's Berne Implementation bill (S. 1971).[176] Senator Hatch explained that while he had previously believed provisions maintaining the status quo were adequate, to take care of concerns about moral rights, certain scholars "continue to harbor concerns that these provisions are not adequate to do the job. These scholars make excellent arguments that the door could be left ajar for pressure at the federal level to create an actual body of moral rights laws." *Id.* at S. 1670. Senator Hatch's amendment was intended to "restate in stronger, sharper language, the provisions of S. 1971 . . . to make clear that there is, in fact, a distinction between the substantial analogs of moral rights under current American law and the European body of moral rights."[177]

The proposed language was confusing, however. One section would have declared that the U.S.'s obligations under Article 6*bis* of Berne are satisfied by relevant provisions of federal or state statutes or the common law," while another provided that independent of an author's economic

174. This same letter had earlier been presented to the House. *See House Berne Hearings* at 205.

175. *See* Ch. IV, cls. 73-85 of the U.K. Copyrights, Designs and Patents Act of 1988 (Royal Assent received on Nov. 15, 1988, effective Spring 1989) which contain extensive provisions on moral rights. Section 43 of the 1956 U.K. Copyright Act did, moreover, have an express provision protecting against false attribution of authorship.

176. 134 CONG. REC. S1670-71 (daily ed. March 1, 1988).

177. *Id.*

rights, he or she would *not* be entitled "on or after the effective date of this Act to any moral rights under any federal or state statutes or the common law," and yet a third section stated that rights equivalent to moral rights "shall not, on or after the effective date of this Act, be expanded or enlarged either by federal or state statute or by judicial construction."

The final day of Senate hearings on Berne adherence was held on March 3, 1988, and was devoted to private sector witnesses, five of whom were from the motion picture industry: David Brown, representing the Motion Picture Association of America and the Zanuck/Brown Company; George Lucas, chairman of Lucasfilm Ltd.; Bo Goldman, on behalf of the Writers Guild of America; and, Steven Spielberg and Elliot Silverstein, on behalf of the Directors Guild of America.

The remaining witnesses also referred to moral rights in their testimony.[178] For this report, we will, understandably, focus on the testimony concerning the motion picture industry.

David Brown, representing the MPAA and his own production company, did not testify about moral rights, but did subsequently address the issue in answers to written questions posed by Senator DeConcini. The first question asked for a reply to the directors' criticism of motion picture companies for the "practice of requiring artistic authors to give up any moral rights or copyrights to the financing corporation."[179] In response, Mr. Brown noted that "given the strength and status of their powerful union, the directors have gained through collective bargaining myriad moral rights type protection in their DGA agreement." *Id.* These rights include the right to have the director's name prominently displayed in performances, distributions and advertisements of the work. Mr. Brown added that the DGA agreement represents only the *minimum* level of rights:

> *Many* directors have individual contracts with studios that give them "moral rights" type protections that go well beyond those contained in the guild agreements. These rights include whether or not the film should be shown on commercial TV or released on videocassette. In some instances, these rights even

178. *See* testimony of Kenneth W. Dam, Vice President Law and External Relations, IBM Corporation, and, especially, for rather strong statements in opposition to moral rights, the testimony of John Mack Carter on behalf of the American Society of Magazine Editors, Donald F. Kummerfeld, President of the Magazine Publishers of America, and the extensive testimony of the Coalition to Preserve the American Copyright Tradition.

179. *1988 Senate Berne Hearings* at 367.

include final "cut" — the determination of the version to be released.

These numerous provisions in the DGA agreement and myriad employment contracts belie any assertion that the directors are somehow routinely forced by the producers to give up any "moral rights" type protections. *Id.*

Mr. Brown also referred to the huge financial risks at stake in the motion picture industry, noting that "[t]he cost of producing a film to an MPAA member company is now $20 million dollars . . . [with an additional] $9 million for advertising and print costs," and that two thirds of these films never recover their production costs. In light of this, he concluded that "it is entirely reasonable for those who expend such enormous sums, with such a limited prospect of recovery, to have 'some say in how that project comes out.' " *Id.*

The directors testified in support of the principle of adherence to Berne, but bitterly complained about adherence without express provision of moral rights, challenging the view that the totality of existing law was sufficient to comply with the Convention's obligations.[180] The directors pointed out that:

countries where national legislation provide [sic] for artists rights have not had their court dockets inundated with moral rights cases, or their intellectual property industries collapse, as our opponents contend would happen. France, a country known for the most developed national legislation regarding the protection of artists, has maintained high artistic quality without sacrifice of its business system. *Id.* at 521.

The directors did, however, recognize that the producing companies have legitimate interests in ensuring that the film be released in a commercially successful form. They accordingly agreed to limit the protection sought to the following:

(1) "Moral rights" would entail no changes whatsoever in the production phase of moviemaking. To insure this, we recommend that statutory language be crafted to clarify that moral rights would obtain only after theatrical release, the first paid, public exhibitions of a film following previews, trial runs, and festivals, all of which provide input leading to the final release version of the film.

(2) "Moral rights" would be alienable. This is in accord with

180. *See* statement of George Lucas, *id.* at 487-88; testimony and statement of Steven Spielberg, *id.* at 502-03, 507-08; statement of DGA, *id.* at 516-24.

traditional American contract law. Some of my colleagues, who have made film in black and white, have stated they would have no objection to their work being colored by a computer. The choice should rest with the film's creative authors — the principal director and screenwriter.

(3) The Guild seeks no alteration of the traditional employer-employee relationship that is characteristic of relations between producers and directors. As far as copyright ownership, the work-for-hire doctrine should remain expressly intact. Moral rights, not economic rights, would be provided the principal director and principal screenwriter.

(4) To emphasize that our concern is for the integrity of the artist's work and not for any economic reward offered for granting permission to alter a film after release, we propose that the Congress limit any compensation for such permission to $1. 1988 Senate Hearings at 522-23.[181]

Reliance on contract law was believed to be inadequate because moral rights "will be given [only] to the privileged and the powerful. . . . That is like saying freedom of speech should be a contract, that it should be contract law." Testimony of George Lucas, *Id.* at 532. In a related vein, the directors disputed the claim that they could obtain more than the right of consultation through collective bargaining, and questioned whether "as a labor union the DGA could seek to effect its contract rights which exceed the employer/employee period."[182]

On April 13, 1988, the Subcommittee marked up S. 1301 and favorably reported it, as amended, to the full Judiciary Committee. One of the amendments to S. 1301 was the addition of the following language in Section 3:

(b) CERTAIN RIGHTS NOT AFFECTED. Any right of an author of a work, whether claimed under federal, state, or common law, to claim authorship of the work, or 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, shall not be expanded or reduced by virtue of, or reliance upon, the provisions of the Berne Convention, the adherence of the United States thereto, or the satis-

181. *Cf.* statement of David Brown, disputing the "compromise" nature of these proposals, Comment No. 4, Motion Picture Association of America, at 10.

182. Testimony of Elliot Silverstein, *id.* at 533-34, which unfortunately concluded the hearing and didn't allow sufficient time for follow-up questions.

faction of the United States obligations hereunder.[183]

On April 14th the Committee on the Judiciary, by voice vote, unanimously ordered S. 1031, as amended, to be favorably reported.[184] In discussing moral rights, the report states that the bill "together with the law as it exists on the date of enactment . . . satisfy U.S. obligations under Article *6bis* and that no further rights or interests shall be recognized or created for that purpose."[185] The amended Section 3, cited above, was "intended to preserve the status quo" with respect to the rights of authors to claim authorship or his or her right to object to distortion. *Id.* Rejecting the "freeze" approach sought by the Hatch amendment, the Committee stated:

> The provisions are intended neither to reduce nor expand any rights that may not exist, nor to create any new rights under federal or state statutes or the common law. Consequently, neither the interpretation of, nor the decisions in, prior cases should be changed or affected in any way because of the provisions of this Act, the action of our adherence to the Berne Convention, or our obligations under Berne. Courts should be as free to apply common law principles and to interpret statutory provisions, with respect to claims of paternity and the right of integrity as they would be in the absence of U.S. adherence to Berne. *Id.*

S. 1301 was not taken up on the floor of the Senate until October 5, 1988. Between April 14th and October 5, 1988, members and staff of the House and Senate subcommittees worked out a compromise implementation bill and were, therefore, able to avoid a conference. We shall return to the final version of the moral rights provisions in what became Public Law No. 100-568 after we review the hearings in the House.

b. Hearings in the House

Early in 1987, the Subcommittee formally began its deliberations on Berne adherence, with the introduction, on March 16th, by Chairman Kastenmeier of H.R. 1623. Representative Moorhead, the ranking minority member of the Subcommittee, co-sponsored the bill. Section 7 of H.R. 1623 would have amended Section 106 of the Copyright Act to provide a new Section 106, with language tracking that found in Article *6bis* of the Berne Convention. A special provision limiting moral rights

183. S. 1301 as amended on April 13, 1988, is reproduced in S. REP. No. 100-352, 100th Cong., 2d Sess. 30 (1988).

184. S. REP. No. 100-352, 100th Cong., 2d Sess. (1988).

185. S. REP. No. 100-352 at 310.

for works of architecture was included in a proposed Section 119. In his floor statement of H.R. 1623, the Chairman prefaced his discussion of moral rights by noting that "[t]here is no doubt that the Berne Convention requires recognition of these rights." The question, then, was "whether such rights exist with the degree of national uniformity and predictability which should be provided in order to fairly comply with Berne requirements." In remarks that were prescient, the Chairman concluded:

> While statesmanship and the spirit of political compromise may, in the final reckoning, work a different solution to the moral rights question, I am reluctant to reject at the outset the necessity of recognition of moral rights which may be a great interest to authors and artists, if not to those who deal with their works.[186]

On July 6, 1987, Secretary of Commerce Malcolm Baldrige transmitted proposed Berne implementation language to Speaker of the House Jim Wright. In a letter accompanying the proposal, Secretary Baldrige explained that no provision was made for moral rights, because the Administration was "proceed[ing] on the principle that the totality of our law, including the common law of torts, provides protection at a level sufficient to comply with the convention's requirements."[187]

On July 15, 1987, Representative Moorhead, on behalf of the Administration, introduced the proposed implementing legislation as H.R. 2962. Unlike H.R. 1623, but in accordance with Secretary Baldrige's July 6 letter, H.R. 2962 contained no provision on moral rights. In his statement on introducing the bill, Mr. Moorhead indicated that "[t]he Administration bill proceeds from the assumption that the totality of U.S. law, including the right to prepare derivative works under the Copyright law, the Lanham Act's proscription of false designation or origin — section 43(a) — and common law rights of contract and tort — especially defamation and invasion of privacy — provide protection for the rights of paternity and integrity sufficient to comply with the Berne Convention."[188]

During the 100th Congress, six days of hearings were held in the Subcommittee on the question of U.S. adherence to Berne. Two of these days — September 16 and 30, 1987 — were devoted to the specific issue of moral rights.

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186. 133 CONG. REC. S. 1293, 1294 (daily ed. March 16, 1987).

187. *See House Berne Hearings* at 1230.

188. 133 CONG. REC. E2897 (daily ed. July 15, 1987).

In his opening remarks at the September 16th hearing, Chairman Kastenmeier reviewed the differences in approach to moral rights taken in H.R. 1623 and H.R. 2962, and stated that he "welcome[d] . . . some diversity of statutory language so that we may fully explore this."[189] Mr. Moorhead stated both a belief that the differences could be worked out and a concern that if they were not, most likely, Berne adherence would not occur.[190]

The first witness was Peter Nolan, Vice President-Counsel, Walt Disney Productions, who appeared on behalf of the Motion Picture Association of America. After reviewing the benefits of Berne adherence, Mr. Nolan discussed moral rights, testifying that "[t]he members of the Motion Picture Association oppose in principle the establishment of any so-called moral rights laws. House Berne Hearings at 233. The MPAA agreed, however, that current law satisfied the minimal requirements of Article 6*bis,* but wanted it made clear that any Berne adherence legislation "should include, as an absolutely critical element, provisions similar to those found in Congressman Moorhead's bill. . . ." *Id.* at 233. *See* also *Id.* at 234, 241-42, 283-88, 308-11.

The specific claims of the directors were not addressed, however, either by Mr. Nolan or the other witnesses. *See* testimony of Kenneth W. Dam of the IBM Corporation, who noted that "in IBM's views, moral rights have not posed any serious problems for its business operations in foreign countries." *Id.* at 283.[191]

The witnesses on September 30th included representatives of the Directors' Guild of America and the Writers' Guild of America, who testified at some length on their position that federal legislation providing for moral rights was necessary to protect against post-production alterations to motion pictures, including by colorization, time compression, and panning/scanning.[192] The specific proposals made for legislation were identical in substance to those presented to the Senate in March 1988, with the exception that the directors agreed Berne was not self-executing.[193] Representatives of companies doing computer color encoding and other alterations to motion pictures did not testify.

During a congressional recess in November 1987, a delegation of

189. *House Berne Hearings* at 228.

190. *Id.* at 228-29.

191. *See also id.* at 308-31, and earlier remarks at 243-44, 249, 259-72, 283, as well as testimony of David Ladd, Esq. on behalf of the Coalition to Preserve the American Tradition and John Mack Carter (Magazine Publishers Association), *id.* at 331-71, 385-403 (opposing Berne adherence principally on moral rights issue).

192. *See 1987 Hearings* at 405-538, 1243-64.

193. *See House Berne Hearings* at 422.

five members of the Subcommittee as well as staff travelled to Geneva, Switzerland and Paris, France for consultations with foreign copyright experts to receive their views on "whether the United States should join the Berne Convention, and if so what changes would be necessary in our current law."[194] In Paris, the members and staff met with, among others, international film producers and directors. Predictably, the two groups had opposing views on the desirability of moral rights in the motion picture industry. *Id.*

A transcript of Geneva consultations is reproduced in the House Berne Hearings at 1135-217. The question of moral rights was raised and addressed by experts from Austria, England, the Federal Republic of Germany, France, Hungary, Israel, the Netherlands, Spain, and Sweden. *See* House Berne Hearings at 1146-47, 1151-75.

The first commentator on the issue was Margaret Moeller, Ministerial Counselor in the Federal Ministry of Justice, Federal Republic of Germany. Madame Moeller dismissed claims that moral rights would lead to decreased access to works, noting the "lively and vivid cultural industry" in Europe and the small number of moral rights cases that have been brought. In the motion picture field, there had, as of 1987, been only three moral rights cases in the preceding forty years involving the motion picture industry, "two of which were settled by agreement of the parties and, in the last case, the [novelist] lost and the film industry won." House Berne Hearings at 1152.

Madame Moeller also cited a provision of German law that limited moral rights in cinematographic works to situations where there are "gross distortions" or other "gross injuries," and even then, the owners of the moral rights "must take into account the respective legitimate interests of the other persons accorded this right as well as the legitimate interest of the producer of the cinematographic work." *Id.* at 1153. She stated a belief that this provision was of "great help" in protecting the producer's economic interests. *Id.*

Mr. J.A. Ziegler of France spoke next and submitted a written statement. *Id.* at 1156-58. In his statement, Mr. Ziegler addressed the question of moral rights and work made for hire:

> [W]ith regard to the United States in particular, my major concern is for the situation applicable to works made for hire, a highly important category of works in which authors are currently deprived of any moral right entitlement. This is doubtless a legal position which is incompatible with the protection

194. H.R. REP. NO. 100-609, 100th Cong., 2d Sess. 9 (1988).

provided under Article 6*bis* of the Berne Convention. *Id.* at 1157.

Dr. D.W. Feer Verkade of the Netherlands also spoke and submitted a written statement. *Id.* at 1160-63. Professor Verkade primarily addressed the arguments against moral rights made by former Register of Copyright David Ladd on behalf of certain magazine publishers, rejecting the claim that moral rights have interfered with publishing, and criticizing Mr. Ladd for "ask[ing] too much from any legislature and . . . not grant[ing] the trust that should be granted to competent courts." *Id.* at 1160.

c. Hearings on H.R. 2400

On June 21, 1988, the Subcommittee held hearings on H.R. 2400, "The Film Integrity Act of 1987," introduced by Representative Gephardt. The witnesses were the Register of Copyrights Ralph Oman, director Arthur Hiller, New York Times film critic Vincent Canby, Monroe Price (Dean, Cardozo Law School), producer David Brown, and Roger Mayer (President and Chief Operating Officer Turner Entertainment Company).

Mr. Oman was the first witness. In his oral remarks, he focused on the proposals for a National Film Preservation Board, which at that time was proceeding, in a controversial manner, through the Interior Subcommittee. Mr. Oman noted that "[w]hatever title or characterization all of the bills and ideas may have, they are fundamentally about copyright or fundamentally affect the rights of authors and copyright owners, and it is this subcommittee that must subject them to careful scrutiny. No other forum has the accumulated experience in crafting balanced legislation."[195]

Turning to the specifics of those proposals, Mr. Oman stated that if there was to be a labelling requirement for motion pictures that have been altered subsequent to their theatrical exhibition, it was preferable for all such films to be labelled, and not just designated "classics." In reviewing the bill's limitation on the exercise of rights to the principal director and screenplay writers, Mr. Oman noted that while material alterations "affect the contribution of directors and screenwriters," such alterations "very often have a profound impact on the work of cinematographers, editors, art directors, and even performers, to name just a few."[196]

195. Unofficial Transcript at 10.

196. [sic].

In his written remarks, Mr. Oman elaborated on the Copyright Office's position on H.R. 2400. Due to the controversial nature of moral rights, and the importance of joining the Berne Convention under the "minimalist" approach, Mr. Oman stated the Copyright Office's opposition to any bill that explicitly accorded a high level of moral rights. The Register did, however, support further consideration of moral rights legislation after passage of the Berne implementing legislation.

Considering the provisions of H.R. 2400 independently of Berne adherence, Mr. Oman stated the Copyright Office's opposition to H.R. 2400 on technical grounds:

> The bill fails to establish a well-defined moral right of integrity, it may run afoul of the copyright clause in the United States Constitution, and its provisions regarding ownership, transfer, and other aspects of the right created are incomplete and raise interpretive questions.[197]

Unlike Article 6*bis* of the Berne Convention, which limits the author's right to object to changes that are prejudicial to his or her honor or reputation, H.R. 2400 prohibited *any* unauthorized material alteration, regardless of whether it had a negative consequence for the integrity of the work. In a detailed passage, Mr. Oman reviewed the effect of such a broad approach:

> The overly broad prohibition would surely raise the marketing problems regarding the distribution of a motion picture in the United States and abroad. Traditionally, United States copyright law has afforded the copyright owner of a motion picture the following right regarding alteration of the work: the right of authorizing the cutting or editing of the film for theatrical exhibition, broadcast exhibition, airline use, home video distribution, and preparation of noncommercial educational study materials; the right of authorizing the addition of subtitles, dubbing, or the addition of music for foreign distribution; the right of authorizing an adaptation of the work (the creation of a derivative work in another medium), a remake of the work, or a historic reconstruction of the work (i.e., to add footage or other material which the screenwriter or director arguably might have wanted in their version as published but which was excised by the producer prior to first release.) However, H.R. 2400 would require all these alterations of the motion picture, no matter how well intentioned and well done, to be cleared

197. [sic].

> with the artistic authors of the work in addition to the copyright owners.
>
> In addition to this interference with the ordinary marketing and distribution of motion pictures, the "material alteration" prohibition would interfere with, or perhaps eliminate completely, the exclusive rights of the copyright owner — such as novelizations — based on the copyrighted work. A more narrowly drafted definition of the right of the artistic authors of a motion picture that focuses on the material alterations that mutilate, distort or otherwise prejudice the integrity of the artistic authors would avoid this problem and would delineate the economic rights of copyright owners from the moral rights of the artistic authors.[198]

The next witnesses, comprising a panel supporting H.R. 2400 (or legislation supporting labelling of materially altered films), were director Arthur Hiller, representing the Directors' Guild of America, Vincent Canby, film critic for *The New York Times,* and Monroe Price, Dean of the Cardozo School of Law.

Mr. Hiller testified first, stating that H.R. 2400 represented a "modest and restrained approach that balances the interests of the copyright holders with the interests of the creative artists and the larger societal interest of protecting our country's social heritage."[199]

In the question period, Chairman Kastenmeier asked Mr. Hiller about the proposed limitations on rights to only the principal director and screenwriter. Mr. Hiller's response was that the "writer provides the basis from which . . . the rest of us work . . . and the director . . . is the only one who has the entire picture in his or her head."[200] Mr. Lungren of California asked a series of questions about the need to introduce younger audiences to classic movies through colorized versions, given that most of them, he believed, will not watch the black and white version. In reply, Hiller expressed a concern that if "you keep the black and white and you show the colorized version, that becomes psychologically in everyone's mind the version and the black and white doesn't exist even though it is somewhere away."[201]

Mrs. Schroeder of Colorado raised two concerns: (1) the utility of the proposed film commission; and, (2) whether producers and other fin-

198. Statement at 26.

199. Unofficial Transcript at 44.

200. *Id.* at 67.

201. *Id.* at 70. *Cf.* David Brown's response to the same line of questioning. *Id.* at 132.

anciers would put up the necessary capital for new films if the directors could prohibit exhibition on airlines and television.[202] Mr. Hiller testified that the directors regarded the film commission as only one step toward their goal, and that they understood the need to insert commercials and to edit for obscenity.[203]

Mr. Hyde of Illinois returned to the issues of editing for airlines and whether only the principal director and screenwriter should be the beneficiaries of the bill.[204] Mr. Berman of California then inquired into three critical areas: (1) whether reliance should be made on the collective bargaining process; (2) what constitutes a "material alteration"; and, (3) the rights of novelists and other authors of preexisting works to object to perceived material alteration of their works in motion pictures.[205] In response to the first inquiry, Mr. Hiller testified that he did not know whether any of the issues regarding material alteration had been brought up in collective bargaining, but that regardless of this, "we are talking about . . . a social issue . . . preservation of an art form. And that talks about our society as it is today and the society of the future, and I think that is beyond collective bargaining."[206]

Regarding the definition of "material alteration," it was established that cutting for commercials, dubbing in a foreign language, and inserting subtitles were not, but that colorization was.[207] Finally, on the question of the rights of novelists and others whose works are used in motion pictures, Mr. Hiller stated, in essence, that they had been paid and accordingly had no further rights. Mr. Berman followed up by asking why that same process shouldn't be applied to directors. Mr. Hiller did not directly respond, but merely noted that the directors sought to bifurcate economic and moral rights.[208]

Mr. Cardin of Maryland then inquired whether labelling requirements, including a right of a director to insist upon removal of his or her name from a colorized motion picture, would satisfy the directors' concerns.[209] Mr. Hiller replied they would not.[210]

The next witness was Vincent Canby, who, in a brief opening state-

202. *Id.* at 75-81.
203. *Id.* at 81.
204. *Id.* at 82-86.
205. *Id.* at 87-92.
206. *Id.* at 88. In earlier hearings, the Directors' Guild had testified that these issues had been the subject of protracted negotiations. *See 1988 Senate Berne Hearings* at 533.
207. *Id.* at 90.
208. *Id.* at 91-92.
209. *Id.* at 93-97. *See also* Mr. Lundgren's follow-up questions on this issue. *Id.* at 98-99.
210. *Id.* at 95.

ment, testified in favor of H.R. 2400 and against colorization.[211]

The final witness on the panel was Dean Monroe Price, who, while not expressly endorsing H.R. 2400, did testify in favor of all the films labelling approach raised by the Register of Copyrights in his testimony.

The final panel was comprised of David Brown, a film producer, and Roger Mayer, President and Chief Executive Officer of the Turner Entertainment Company. Mr. Brown began his testimony by emphasizing the role of the producer,[212] and others, including creators of special effects, cinematographers, musicians, composers, lyricists, and animators.[213] In Mr. Brown's opinion, the marketplace, combined with collective bargaining, was the proper forum for resolving the directors' complaints, not moral rights legislation, or a Film Preservation Board.[214]

Mr. Mayer, concluding the panel, began by testifying that "today's audiences are conditioned to look at movies in color. They simply cannot be cajoled or bullied into watching them in black and white, and we have tried."[215] By colorizing black and white movies, Mr. Mayer stated that Turner had "revitalized interest and found an audience for them, and we can show that."[216]

In any event, Mr. Mayer noted that the black and white version of the film remains available for purchase or rental.[217] Rejecting the directors' approach to motion pictures as "pure art," Mr. Mayer asserted that:

> This [is] really [not] a contest between art and commerce. These movies were made as entertainment in commercial ventures by production companies who assumed all the risk. Those who helped them took no financial risk and were paid, often handsomely. They did not return their salaries with an apology if the movie flopped.[218]

In his questioning of the witnesses, Chairman Kastenmeier inquired principally about possible objections to labelling requirements, and the possibility that directors and screen writers could, if they wished, disassociate themselves from an altered version of the film.[219] Mr. Mayer replied that his company did not object to reinforcing credits, but opposed

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211. *Id.* at 49-52.

212. *See* Ch. 1, *supra* text accompanying notes 4-18.

213. *Id.* at 106-07.

214. *Id.* at 108-09.

215. *Id.* at 112.

216. *Id.*

217. *Id.* at 113. *See also id.* at 116-17, for Mr. Mayer's testimony regarding Turner's preservation efforts and the use of profits from sales of colorized movies to fund these efforts.

218. *Id.* at 113-14.

219. *Id.* at 120-26, 141-46.

permitting directors, and screenwriters from disassociating themselves from a colorized film given the value of name associations to the exploitation of the film.[220]

Mr. Lungren then reviewed Turner's marketplace need for preservation and asked whether Turner had an objection to being required to retain a black and white copy of a colorized film. Noting the Copyright Office's then proposed deposit regulation to such an effect where a claim to copyright in a colorized motion picture is submitted, Mr. Mayer replied that Turner had no objection.[221]

Mr. Berman began his questioning by asking the panel whether there were any recent changes in the film industry that might be motivating the directors' complaints. Mr. Brown replied that motion picture production begins today "the way it did in the . . . first days of the motion picture industry. It begins with an idea and a story. . . . So it begins with a producer who has a vision of what he wants to make, and he takes that to a company which may well be owned by a conglomerate and sells that idea. But the creative process is unaffected."[222] Mr. Brown expressed the belief that the directors' motivations were sincere, but that they were misinformed about the issues, noting, "there has always been a kind of class warfare among directors and producers, and writers and directors themselves. I don't know why this internecine struggle goes on. It is very bizarre."[223]

The hearing concluded with a series of questions by Mr. Berman and Chairman Kastenmeier on labelling.[224]

d. Initial House Passage of Berne Implementing Legislation

On March 9, 1988, the Subcommitte marked up H.R. 1623. Following the approach outlined by Chairman Kastenmeier in his testimony before the Senate on February 18th, as marked up H.R. 1623 deleted express provision for moral rights. Berne was declared to be not self-executing. All of the United States' obligations under Berne were declared to be satisfied by and only enforceable pursuant to domestic law.

On March 28, 1988, a clean bill — H.R. 4262 — was introduced by Chairman Kastenmeier with twelve co-sponsors. On April 28, 1988, the Committee on the Judiciary debated and then reported out H.R. 4262

220. *Id.* at 125. *See also* Mr. Berman's questioning at 140-41.
221. *Id.* at 129.
222. *Id.* at 135-36.
223. *Id.* at 136.
224. *Id.* at 139-48.

with two amendments, one of which related to moral rights. As reported out H.R. 4262 contained the following provision on moral rights:

> The adherence of the United States to the Berne Convention, and satisfaction of United States obligations thereunder, do not expand or reduce any right of an author of a work — (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.

The Committee's report, H.R. Rep. No. 100-609, 100th Cong., 2d Sess. (1988), contains an extensive (and invaluable) review of the moral rights issue. *Id.* at 32-40, concluding that current U.S. law satisfies the requirements of Article 6*bis*. *Id.* at 38.

On May 10, 1988, the House, by a vote of 420-0, passed H.R. 4262 as reported out by the Judiciary Committee. In floor comments on the bill, Chairman Kastenmeier noted his decision that:

> The best course was to avoid statutory treatment of moral rights in the context of Berne. This conclusion rested in part on the political reality that legislation with a moral rights provision simply would not pass. Furthermore, amendments to the Copyright Act relating to moral rights are not required in order to secure U.S. adherence to Berne.[225]

This view was shared by Mr. Moorhead in his remarks, who noted that he was "aware that the directors of motion pictures feel strongly that the use of colorization, panning and scanning, and time compression have impaired the integrity of the art of film making." *Id.* at H3083. Mr. Berman, however, stated a concern with the bill's approach to moral rights:

> I am troubled, however, that we may not be intellectually honest when we conclude that we can join Berne by deeming U.S. laws to be in compliance, but assuming none of the responsibilities under the Convention to enhance the rights of authors.
>
> . . .
>
> With regard to protecting films in particular from material alteration, the approaches to the issue which have been broached thus far by directors and screenwriters strike me as unworkable. We are not really solving any perceived problem if

225. 134 CONG. REC. H3082-3083 (daily ed. May 10, 1988).

> screenwriters and directors can effectively be coerced into waiving the rights afforded by statute.
>
> Those directors and screenwriters who are sufficiently prominent can achieve the rights in question through the vehicle of their contracts, and those who are not strong enough in their respective fields can easily be coerced into relinquishing those rights as a condition of being hired. I continue to have concerns on this point, and have not seen a statutory approach that addresses my concerns.
>
> At the same time, I am convinced that it is essential that those who put up the money and take the financial risk in making motion pictures be able to exploit those films in many markets. Getting American films made is in the interest of the entire creative community, and equally important, in the interest of the filmviewing public around the world.[226]

Mr. Fish of New York spoke next in favor of the approach to moral rights taken in the bill,[227] as did Chairman Rodino of New Jersey.[228] Mr. Lungren noted the complexity of the issue and expressed a hope that it would be revisited.[229]

The Senate did not pass Berne implementing legislation until October 5, 1988; however, this legislation represented a compromise bill, worked out in advance by Members of both Houses and their staff. The provisions on moral rights were contained in Section 3(b) of the bill, which did not amend the Copyright Act, but instead represented "notes" to Title 17.[230]

> 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 of a work, 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 derogatory action in relation to, the work, that would prejudice the author's honor or reputation.
>
> Section 2 contains Congress' declarations that Berne is not self-exe-

226. *Id.* at H3084.

227. *Id.*

228. *Id.* at H3085.

229. *Id.*

230. This is also true of the implementing legislation. *See* §§ 2 and 3 of P.L. 100-568, 102 Stat. 2853, 100th Cong., 2d Sess. (1988).

cuting and that the United States' obligations under Berne are satisfied and may be performed only under domestic law. In his floor statement on S. 1301,[231] Senator Leahy noted his conviction that under the minimalist approach "no change in our law on artists' rights is needed to meet Berne standards."[232] Senator Leahy inserted into the Congressional Record a "Joint Explanatory Statement on Amendment to S. 1301," explaining the amendments made to S. 1301 since its April 14, 1988, reporting out by the Committee on the Judiciary. Moral rights were "redrafted to conform to the language adopted by the House without substantive change."[233]

Senator Hatch inserted an extended statement on moral rights endorsing the compromise, but adding:

> In the future there will no doubt be substantial efforts to expand moral rights in the United States. You can already see that beginning to happen with hearings that will be held in the other body later this month on colorization and moral rights for fine artists. While I continue to entertain some significant reservations about the concept of moral rights, the discussion will be wholly on the merits of this difficult policy question.[234]

On October 12, 1988, the House took up H.R. 4262 as passed by the Senate. Chairman Kastenmeier and Representative Moorhead inserted into the Congressional Record their "Joint Explanatory Statement on House-Senate Compromise Incorporated in Senate Amendment to H.R. 4262" (Berne Implementation Act of 1988).[235] This statement merely noted the previous drafting differences between the House and Senate approaches. No other references to moral rights were made.

On October 31, 1988, in Beverly Hills, California, President Reagan signed H.R. 1462 into law as P.L. 100-568. It became effective on March 1, 1989, with United States adherence to the Berne Convention.

6. The Directors' Claims for Moral Rights

In their testimony before Congress, and in submissions to the Copyright Office and the Patent and Trademark Office, the Directors' Guild of America (DGA) has argued that federal moral rights legislation is neces-

231. In a parliamentary move, H.R. 4262 was immediately passed as an amendment to S. 1301 in order to give the implementing legislation a House bill number. 134 CONG. REC. S14567.

232. *Id.* at S14551.

233. *Id.* at S14555.

234. *Id.* at S14557.

235. 134 CONG. REC. H1009-10097.

sary to control certain "material alterations" to theatrical motion pictures. The purpose of these rights is twofold: (1) to prohibit alteration of directors' work without their permission; and, (2) to make possible, for the benefit of society, the preservation of our nation's theatrical film heritage. Because only approximately 5 percent of the directors have sufficient bargaining power to contractually obtain such power, and their conviction that larger societal interests were at stake, the Directors rejected collective and individual bargaining as a realistic means of protecting artists' rights and those of the public.

While the point at which these rights would attach is fairly clear,[236] the form and scope of those rights is not. In his opening remarks to the Copyright Office at its September 8, 1988, hearing, Arnold Lutzker, Esq., representing the DGA, testified "[i]n the simple statement of Article *6bis* [of the Berne Convention] lies the potential for protection,"[237] adding:

> The National Film Preservation Board . . . is but a modest beginning [but] [i]t in no way satisfies the concern of the directors of the films. Only the clearest statement that faithful adherence to the Berne principles of moral rights, and the entitlement of the principal director and principal screenwriter to prevent material alteration of the film without their consent will sufficiently answer their plea.[238]

Later, during questioning, Mr. Lutzker testified that either Representative Gephardt's H.R. 2400 or Chairman Kastenmeier's initial Berne Implementation bill, H.R. 1623:

> express [ ] as far as the film community — film director is concerned — the parameters of the type of legislation they would like to see. There can be changes in that. That would be the general framework.[239]

Beyond prohibiting colorization, the scope of these moral rights is unclear, perhaps necessarily so. In response to a question from Copyright Office General Counsel Dorothy Schrader, Mr. Lutzker testified that:

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236. Although formulated in slightly different ways, the point at which the directors wish the rights to attach is after the "theatrical release." *See* Transcript of Copyright Office Hearing at 125126; DGA submission to the Patent and Trademark Office, Doc. No. 80743-8143 at 6 ("the theatrical release or the first paid exhibition of the film following previews, trial runs, and festivals . . . ;" *House Berne Hearings* at 422; *1988 Senate Hearings* at 522-23).

237. Transcript at 107.

238. *Id.* at 111.

239. Transcript at 135. In its submission to the Patent and Trademark Office, the DGA also called for amendments to section 43 and 45 of the Lanham Act to prohibit defined "material alterations."

> [P]anning and scanning . . . also has some problems. Time compression . . . —the example with the closing scene from "Casablanca." The changes that are made in the pauses and the like, constitute things that they feel are materially—potentially materially—changing the integrity of the film.[240]

Ms. Schrader then followed up by asking:

> Are you saying then that every colorized film is objectionable—that every act of panning and scanning is objectionable? You are not really saying the alteration has to be material?
>
> MR. LUTZKER: No. Material is a word which the courts do grapple with in various degrees. The incidental use of panning and scanning may not be material. Colorization is something which is done to the entire work of art, and that's a little different.
>
> MS. SCHRADER: You are using "material" in the sense of the quantity of the film that has changed?
>
> MR. LUTZKER: I mean there are examples—yes . . . [Y]ou can quantify materiality in some respects. There may be other standards that may need to be—a simple pan and scan may not necessarily be material with respect to a particular film.[241]

Mr. Lutzker also agreed, however, that directors have contractually permitted panning and scanning to go on for over 20 years and that "would obviously be a factor that would have to be dealt with."[242]

The duration of the proposed moral rights is also unclear. H.R. 2400 had a perpetual term, in violation of Article I sec. 8 clause 8 of the U.S. Constitution. Mr. Lutzker testified before the Copyright Office that the directors "would like as long a period as would be legally appropriate. To say forever less a day might satisfy them, might be subject to go on forever. . . . I think they are certainly looking to some distance in the future, minimally the term of copyright which is 75 years."[243]

Directors clearly wish these rights to apply to *existing* works, in-

240. *Id.* at 133-34.

241. *Id.* at 134-35.

242. *Id.* at 130. Nevertheless, in their submission to the Patent and Trademark Office, the DGA proposed that "*any* change in a motion picture by virtue of . . . process, including but not limited to colorization, panning and scanning, time compression and extensive editing for noncontinuity acceptance purposes" would be prohibited under the Lanham Act. Statement at 5 (emphasis added).

243. *Id.* at 132.

cluding those in the public domain,[244] and that they are to be vested only in the principal director and principal screenwriter[245] without regard to the employer's status in respect to all other rights.[246] Authors of preexisting works used in motion pictures, such as novels and musical compositions, would not be accorded moral rights with respect to material alterations of their works in the motion picture, but would instead have to rely on contractual provisions.[247]

7. The Producers' Response

The producers'[248] response to the directors' claims rests on the assertion that their activities are consistent with the purposes of the Copyright Act and the rights they have fairly obtained through collective and individual bargaining. Additionally, they argue that imposition of restrictions on existing works would violate the "takings" clause of the Fifth Amendment. The producers rejected the directors' attempts to invoke a societal interest, arguing that "the only interests [being] advanced [are] private, not public — the arbitrary aesthetic desires of a handful of individuals who in most cases had no hand in the making of the [particular] films [at issue]. . . ."[249]

Specifically, the producers assert that colorization performs a valuable public service by bringing before the public works that would not otherwise have an opportunity to be viewed. They note that 96 percent of the programs on television are in color, leading to great resistance in black and white programming on the networks and the public:

> [I]t's not that there are no black and white programs available. It's just that the stations refuse to buy them; because as I said, it's a very commercial enterprise. They have their viewers, and they want as many of them as they can. They just don't get them in black and white.[250]

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244. DGA Statement to the Patent and Trademark Office at 6-7; Transcript of Copyright Office Hearing at 130.

245. *See* H.R. 2400; Transcript of Copyright Office hearing at 121-22.

246. DGA Statement to Copyright Office in connection with this inquiry, Comment No. 8 at Tab I.

247. *Id.* at 121-22.

248. For simplicity's sake, the term "producer" is being applied here loosely to include not only those who produced the original theatrical form of the motion picture, but also to studios, distributors, those who, like the Turner Entertainment Company, who have purchased rights from producers, and to the computer color encoding companies. *See* discussion in the Appendix to this report, written by Mr. Schwartz, entitled "The Financing of Motion Pictures."

249. Comment No. 4, Statement of the Turner Entertainment Company at 31.

250. Testimony of Rob Word, Quintex Corporation before the Copyright Office, Sept. 8, 1988, Transcript at 15. *See also* testimony of Roger Mayer before the Subcommittee at its June

The producers further argue that by restoring the black and white version of motion pictures and making them available in videocassette form along with the colorized version, they are furthering the purposes of the Copyright Act by providing the public access to works of authorship.[251] The increased revenues derived from colorization provides necessary funds for preservation. The Turner Company notes that from 1976 to 1986, it spent approximately $30 million to "maintain the film elements in its library and to transfer to safety film those materials produced before 1950."[252]

Due to the fact that almost two thirds of the motion pictures made by Motion Picture Association members lose money,[253] motion pictures must be delivered to the public in a wide variety of nontheatrical markets, and must be "adapted to meet the particular needs of each of these delivery systems."[254] The form of these adaptations has been the subject of intense, protracted collective bargaining,[255] through which the DGA has achieved some of its goals. Moreover, individual directors with proven track records and bargaining leverage have obtained some of these goals — in particular, significant control over the form of post-theatrical distribution of their works. Legislation mandating such control for all directors will, the producers assert, result in a reduction in opportunities for young directors.

In short, the producers argue that the marketplace is the best forum to resolve the issues.

21, 1988, hearing on H.R. 2400, Unofficial Transcript at 112: "[t]oday's audiences are conditioned to look at movies in color. They simply cannot be persuaded, cajoled or bullied into watching them in black and white, and we have tried." *Id.* at 69-70 (remarks of Rep. Lungren) and Comment No. 4, Statement of Turner Broadcasting Company at 7-8 (noting audience support for colorized versions).

251. *See* Comment No. 4, Statement of Turner Broadcasting Company at 9. The producers also argue that those members of the public who do not wish to view a colorized version of a work may simply turn off the color on their television set. Not all television sets have such knobs, however. Furthermore, contradictory evidence was presented regarding whether the black and white "version" of the motion picture resulting from turning the color off in this manner is the same as from a noncolorized black and white copy, due to a difference in the grey scale contrast. Of course, even black and white copies that have never been colorized vary greatly in the quality of this contrast.

252. Comment No. 4 at 13.

253. We noted in Chapter Two that it has been estimated that only 10% of a film's total audience views the work in the theatre: of the remaining 90%, 20% see it on videocassette or cable television, while 70% view it on free broadcast television.

254. Comment No. 5, Statement of Motion Picture Association of America at 2-3.

255. *See* Chapter Four, *supra*.

8. Copyright Office Analysis

In a 1985 article on the Semiconductor Chip Protection Act of 1984, Chairman Kastenmeier and Subcommittee Chief Counsel Michael Remington wrote that "the proponents of change should have the burden of showing that a meritorious public purpose is served by the proposed congressional action."[256] If that showing is made, Congress is then faced with "the delicate job of bartering between what are often contrary interests."[257]

The directors premise their arguments in satisfaction of the first threshold — a meritorious public purpose — on the assertion that promoting enduring works of art for society's benefit is best achieved by giving to artists rights to prevent, without consent, the alterations of their works in a manner that injures the artist's reputation; and that society has a special interest in ensuring that motion pictures are preserved in their original, unaltered form. Colorization, and at least certain types of panning/scanning, and time compression or expansion, they argue, injure the creators' reputations, give the public a distorted view of their work, and may displace the ready availability of the original works upon which they are based.

In Chapter 3, we analyzed these technologies, how they are applied to theatrically released motion pictures, and how they affect the aesthetics of the work. We concluded that colorization does adversely affect the aesthetics of black and white motion pictures. With regards to panning/scanning, we noted that there has been considerable improvement in the technique and that directors and cinematographers have avoided the need for intrusive panning/scanning by shooting within the "safe areas"; viz., an area that roughly corresponds to the available composition space on a television screen. Regarding lexiconning (time compression or expansion), given the presence of some egregious examples, we concluded that it can adversely affect the aesthetics of theatrical motion pictures, and that the creative participants of the theatrical version cannot, at the time that version is shot, protect the film against subsequent lexiconning. We also stated, however, that no information was presented about the extent of lexiconning, nor do we have any idea how often it results in noticeably adverse effects.

In Chapter 4, we reviewed the impact of collective and individual bargaining on the development and distribution of motion pictures. We noted that the technologies at issue have been the subject of protracted

256. 70 MINN. L. REV. 417, 440 (1985).
257. *Id.* at 467.

collective bargaining through which the DGA has achieved some, but certainly not all, of its goals, including, importantly, the absolute right to control the material alteration of theatrically released motion pictures for non-theatrical markets. It has been estimated that only approximately 5 percent of the directors can achieve such rights in individual bargaining. We also observed that in 1960 the DGA and three other principal motion picture industry guilds gave up the collective right to compensation for pre-1960 theatrical motion pictures shown on network television in return for a cash settlement to be applied to a newly established pension.

With U.S. adherence to the Berne Union, we have accepted the existence of moral rights.[258] Accordingly, to the extent that the particular technologies at issue here alter the aesthetics of motion pictures in a manner that injures the honor or reputation of directors and other creative participants in the motion picture,[259] the prevention of such injury serves, at least abstractly, a recognized "meritorious public purpose."

The directors' invocation of the public interest may, however, require more careful thought. The root of such confusion is, perhaps, best revealed in the following colloquy that occurred at the Copyright Office's September 8, 1988, hearing:

> MR. PATRY [COPYRIGHT OFFICE]: The DGA wants to have final say in alterations — material alterations — because its members believe they are in the best position to protect the aesthetic value of the film; is that correct?
>
> MR. LUTZKER [DGA COUNSEL]: Yes.
>
> MR. PATRY: But the DGA doesn't mind if individual directors permit their films to be materially altered: Is that correct?
>
> MR. LUTZKER: Yes.
>
> MR. PATRY: . . . Now, my question is this: Since that's true, the desire that we are really talking about — of preserving the original aesthetic value of the film — is not for the public, at all. If the public objects — let's say that an individual director permitted his or her film to be mutilated, and the public objected and said, "We wanted to see this film in its original form," then the DGA would basically say tough luck?
>
> MR. LUTZKER: . . . The bottom line answer is yes. If a film director agrees that this is the way the film should be, that is

258. Whether such rights, in whatever form, should be codified in a unified federal statute is a different question, and is addressed in Chapter Six below.

259. *See* Article 6*bis* of the Paris text of the Berne Convention.

> the way the film should be. It is to an extent the dictatorship of the creator.[260]

Given this attitude, Congress may well ask whether the interest for which protection is sought is, in fact, purely personal. If so, it may then be asked why the directors should not rely exclusively upon collective and individual bargaining.

An additional significant factor in analyzing the public interest (at least with respect to videocassettes of colorized films and videocassettes issued in letterboxed form) is that the public is provided with both the original form of the work and the altered version, and is thereby afforded the opportunity to choose between them. Under the approach advocated by the directors, the public would be deprived of this choice. Contrary to the directors' claim, under such circumstances, Congress may well doubt that a dictatorship of the directors serves a meritorious public purpose.

Assuming the directors can satisfy the first threshold test set forth by Chairman Kastenmeier and Chief Counsel Remington, a "delicate job of bartering between contrary interests" is then necessary. Moreover, any legislation would have to pass constitutional muster. A new federal moral right affecting preexisting works, the copyright[261] of which is owned by individuals other than the beneficiary of the new right, raises serious constitutional issues under the takings clause of the Constitution. For this reason, if new federal moral rights are granted in the motion picture industry, Congress may find it advisable to draw a clear distinction between works in which copyright subsists prior to enactment, and those works created on or after enactment, with the rights granted only to the latter category of works.

The elimination of new federal moral rights for pre-enactment works may have the result of calling into question the need for any legislation, since very few motion pictures are now created in black and white, and those that are will probably be created by directors with sufficient individual bargaining leverage to prohibit colorization. Additionally, since most theatrical motion pictures in the last twenty-five years have been shot in the television "safe area" to avoid extensive panning and scanning, legislation may be unnecessary for this technology.

If Congress concludes legislation is desirable to protect future mo-

260. Transcript at 119-20. *See also* testimony of Steven Spielberg, *1988 Senate Berne Hearings* at 503 ("[t]he public has no right to vote on whether a black-and-white film is to be colored. . . ."); *cf.* statement of George Lucas, *id.* at 488 ("[t]he public's interest is ultimately dominant over all other interests.").

261. With respect to works in the public domain, no fifth amendment rights are raised; however, an entire set of new constitutional issues are raised.

tion pictures from material alterations, there is a wide array of interests that must also be protected, or at least considered. These interests include:

(1) *Producers, studios, and others financing motion pictures.* Any new right should not inhibit the creation of new motion pictures;

(2) *Broadcasters, cable systems and video retailers.* Since the vast majority of the public views theatrical motion pictures on television screens, those who deliver motion pictures to this market serve a critical public purpose that must be protected;

(3) *Other creative collaborators.* This group includes cinematographers, art directors, editors, and actors.[262] We appreciate the directors' role as the single unifying force in the actual shooting of theatrical motion pictures; however, in insisting that only the principal director and principal screenwriter be accorded moral rights, we conclude that these other creators' contributions are being unfairly disregarded, in what is quintessentially a collaborative effort. It is one thing to be in charge; it is quite another thing to say that because you are in charge you are the only person entitled to any rights;[263]

(4) *Authors of preexisting works.* This group includes novelists, short story writers, composers, and others whose existing works are later incorporated in motion pictures. Directors have argued that these authors should have to rely on contractual protections for material alterations to their works in motion pictures. This position is fundamentally at odds with the directors' argument that they should not have to rely on contractual protections in their dealings with producers. The assertion that motion pictures represent a different medium misses the whole point of moral rights: *All* artists should have the right to protect the integrity of their works. We fail to see how a material alteration in a different medium that injures the author's reputation is less worthy of protection. We find support for this proposition in the way many Berne member countries, including France[264] and Italy,[265] assimilate authors of

262. The copyright status of actors' contributions is a difficult one that needs to be carefully examined.

263. We are aware that actors have expressed a willingness to place their rights in the "trust" of the directors. This is a fact Congress should consider should it find legislation desirable.

264. *See* Article 14 of the French Copyright Act.

265. *See* Article 44 of the Italian Copyright Law.

preexisting works as co-authors of the motion picture, for economic *and moral rights purposes.* We also note a certain irony in the directors' reliance on France's and Italy's treatment of unauthorized colorization as a violation of the author's moral rights, but their apparent unwillingness to accept the full consequences of those laws — the grant of moral rights to authors of preexisting works used in motion pictures.

9. Conclusion

Any congressional decision to accord a new federal moral right in the motion picture industry should take into account the strong interests of producers, studios, distributors, authors of preexisting works, and consumers. The directors' claim for such a moral right is not without merit, but, as currently proposed, it is subject to criticism on a number of grounds.

First, except as applied to the works of other directors from Hollywood's "Golden Era," invocation of the public interest by some of the directors gives rise to a degree of ambiguity, since they do not strictly speaking seek to preserve the original version of motion pictures, but instead seek to obtain rights for individual directors to decide whether the theatrical version should be materially altered.

Second, by proposing to vest the proposed higher levels of moral rights only in the principal director and principal screenwriter, the directors are unfairly disregarding the contributions of other artists, including cinematographers, art directors, editors, and actors and actresses.

Finally, the directors' argument that authors of preexisting works used in motion pictures should rely on contractual protections for material alterations of their works, is fundamentally at odds with their assertion that they should not have to rely on contractual protections in their dealings with producers.

CHAPTER 6: FILM PRESERVATION

Film preservation is not directly related to copyright, nor is the federal government generally required to preserve works of authorship or art in its custody. Likewise, copyright owners are under no duty to preserve works they own. The fact that responsible individuals as well as corporations and archives, in particular the Library of Congress, strive to preserve motion pictures is noteworthy, especially given ever increasing costs. Issues of preservation are important because of the decreasing number of original unaltered works.

Film preservation[266] and restoration is extremely expensive and time-consuming. It is, however, an important undertaking, for only half of the more than 21,000 feature-length films produced in the United States before 1951 exist today.[267] The remainder have either been lost, destroyed or allowed to deteriorate beyond repair. Most of the deterioration is the result of the use, until 1950, of unstable nitrate-based film stock.

Turner Broadcasting System, Inc. provided us with a description of the methods they employ to save old films and the problems they encounter:

> Before 1950, almost all professional motion pictures were produced and duplicated on film that used a mixture of cellulose nitrate and camphor. Although this type of film is very durable in heavy use and easy to splice, it is also highly flammable and has a limited life span. Once ignited, a roll of nitrate film is impossible to extinguish, even by submersion in water.
>
> A nitrate-based film passes through five stages of deterioration. These stages include fading and discoloration, stickiness, appearance of bubbles, spread of bubbles and brown froth, and finally deterioration into brown powder. During the deterioration process, the film itself releases gases with nitrogen and oxygen compounds which attack the film's image and base.
>
> Restoring discolored black and white films is possible if the discoloration is not too far advanced. The silver image may be bleached in an oxidizing bath of potassium hexacyanoferrate (III) and the image may be brought out through use of a fast developer. Films at a more advanced stage of discoloration, however, cannot be completely restored. Images will contain a reddish or brownish tint after the restoration process is completed. Film material that has been irreparably damaged is worthless and must be destroyed immediately. Nitrate-based films can be restored through the first three stages of deteriora-

266. Film archivists regard "preservation" as activities needed to retain, and properly store the original negative, and a fine grain master positive or interpositive. These "preprint" materials are different from the print materials retained by private companies.

267. *Report of the American Film Institute: Twenty Years of Preserving, Nurturing and Celebrating America's Art Form,* at 18 (1987). For newsreels, documentaries and television programs, the AFI estimates that the "survival rate" is less than half.

It is also estimated that there is a total of 16,000 black and white (monochrome) feature films and 22,000 hours of black and white television tape in the vaults of the studios in Hollywood. The Wall St. J., Sept. 11, 1984, at 37, col. 3.

tion, but during the last two stages the film can no longer be repaired.

Acetate films are much more stable than nitrate-based film, since the acetic acid is not flammable. The process of preparing a nitrate film for copying onto an acetate-based film, however, is slow and expensive. First, to preserve a nitrate-based film until it may be transferred to an acetate safety film, the process of deterioration must be retarded. The films must be stored at temperatures that do not exceed 6 degrees Centigrade or 42.8 degrees Fahrenheit. The humidity level must be carefully monitored since excessive moisture stimulates the production of damaging nitrate gases and accelerates the disintegration process. If the atmosphere is too dry, however, the film will shrink and become brittle. It is difficult to create storage conditions that retard deterioration yet do not produce shrinkage or brittleness. Because of the possibility of explosion, nitrate films cannot be stored in buildings that are used for living or working quarters.

Transferring the film from nitrate to acetate is time-consuming. The films must first be examined foot by foot on a rewind table. If there are any splices or defects in the film, it must be respliced and repaired so that the nitrate film can run smoothly through the printer. The film is copied at a speed slow enough to make a clear image on the acetate copy. It may require printing at speeds as low as ten or twenty feet per minute.

Although acetate-based films are much safer than nitrate films, they too require extensive care in storage. If the storage area is too dry, the plasticizer will escape and eventually cause the film to shrink and crack. At that point, it is no longer possible to project the film. Excessive humidity, on the other hand, will also damage the film.[268]

The cost of restoring a single black and white film typically exceeds $12,000; the cost of restoring a color film print more than $30,000. The costs can, however, exceed $100,000, as the recent restoration of "Lawrence of Arabia" demonstrates. Private sector restoration efforts are generally undertaken with the hope that the cost may be recouped through exploitation of the restored work. Some of the most extensive private sector restoration efforts have been those of the Turner Entertainment

268. Comment No. 4 at 11-12.

Company. Turner is the owner of one of the largest private film libraries, consisting of over 3,000 titles, including the MGM library (2200 features), the pre-1948 Warner Brothers library (750 films), and the RKO film library (700 features). From 1976 until 1986, MGM (now owned by Turner Entertainment Company) spent $30 million to maintain film elements in its library and to transfer to safety film those materials produced before 1950. In the past two years, Turner Entertainment Company has spent $2.8 million in restoration and preservation of its library. Turner predicts a "chilling effect" on current private film restoration activities if Congress restricts its rights to exploit the restored works.

One important method of exploitation used to recoup those costs is computer color encoding. The Turner Company has indicated that the opportunity to distribute colorized films has provided a great economic incentive for restoration. Turner's colorization activities are a byproduct of its efforts to restore the films in its extraordinarily valuable collection.

Many of the films now being colorized had little or no commercial life without the addition of color according to their copyright owners. Joseph Adelman, Senior Vice President of Color Systems Technology, stated: "this revitalization of a dormant product through application of a newly-developed technology will encourage future owners of film to always preserve the original material for availability to distribution/exhibition technologies yet to be invented."[269]

Colorization does result in an improved black and white version, since the colorizers often splice together segments of several copies of the same film in order to come up with the best possible copy. This represents an important form of restoration. However, colorization does not always require restoration of a black and white print, and thus in many cases, the new copy is only a videotape or a single black and white print with no preservation of preprint materials.

Copyright owners are obviously not the only group concerned with film preservation.[270] The federal government currently has two major archives for film storage — the Library of Congress, which contains the largest archive of film in the United States, and the National Archives and Records Administration. Both of these facilities have their own preservation activities, and in addition, the Library provides assistance to the American Film Institute in the preservation and storage of the AFI's

269. Comment No. 3 at 6.

270. For information concerning the preservation efforts of the Directors Guild of America and its members, *see* Comment No. 8A.

film collection.[271]

The Library of Congress is not only the largest archive of film, with over 100,000 titles, but it is also the largest converter of nitrate film to acetate "safety stock." Since 1971, the Library has converted almost 12,000 titles to safety stock. It is estimated, however, that there remain over 60 million feet of nitrate stock that still must be converted. At the current rate, the Library will not complete its conversion project for another twenty years.[272]

In addition, the Museum of Art in New York City, the University of California at Los Angeles, and the George Eastman House (International Museum of Photography) in Rochester, New York carry on film preservation activities.[273] The American Film Institute also carries out important preservation activities by raising and distributing millions of dollars to archives nationwide for preservation projects.[274]

Although private sector preservation has created new markets for old films, public archives, including the Library of Congress, cannot market copyrighted films, and are not set up to market public domain films. They may, however, allow their collections to be studied and may, under certain circumstances, make video tape copies available.

Educators have indicated that videotape is an inadequate teaching format since it does not represent the original composition of the motion picture. Instead, educators prefer the 16mm format. Unfortunately, the number of companies providing films in this format and the number of titles available has decreased steadily over the years. Yet, representatives of the Turner Company inform us that they have a large library of 16mm films which they would be delighted to license, more or less at cost.

This chasm between demand and supply points out the need for better coordination of private sector and public interests. Preservation is an expensive, time-consuming process that requires both the incentives of copyright and the free market as well as the efforts of expert archivists.

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271. For a detailed look at the amount of materials contained in the largest public and private archives, *see* material of Gregory Lukow, Acting Co-Director, The National Center for Film and Video Preservation, The American Film Institute, reproduced in Comment No. 20.

272. The Library also preserves television programming in its American Television and Radio Archives, established under the 1976 Copyright Act. *See* P.L. No. 94-553, 90 Stat. 2541, § 113 of the Transitional and Supplementary Provisions. *See also* H.R. REP. NO. 94-1476, 94th Cong., 2d Sess. 182-83 (1976).

273. Film preservation is not limited to black and white films on nitrate stock. Technicolor film prints were beginning to fade as early as three years after initial use. Eastman Kodak, in response to the efforts of director Martin Scorsese, developed an improved color print in 1982 that is expected to last between 88 to 100 years before fading.

274. The National Film Preservation Board, established during the 100th Congress may play a role in educating the public about classic works of film.

Greater collaboration between these groups would, no doubt, lead to improved preservation and access. Congress may well decide that a forum at which both of these groups can coordinate their efforts would be valuable to present and future film preservation activities. In 1976, the House Committee on the Judiciary noted the "deplorable fact that in a great many cases the only existing copy of a film has been deliberately destroyed . . . ." It noted that the efforts of the Library of Congress, the American Film Institute, and other organizations to "rescue this irreplaceable contribution to our cultural life are to be applauded, and the making of duplicate copies for purposes of archival preservation certainly falls within the scope of 'fair use.' "[275]

Thirteen years later, these efforts are no less worthy of support.

CHAPTER 7: CONCLUSIONS

In reaching our conclusions, we have had benefit of detailed, informative written comments, a full day of testimony from a wide cross-section of industry, academic, and public interests, as well as four years of congressional hearings that touched on the question of moral rights.

The term "moral rights" does not have a precise definition; in general, it refers to noneconomic rights permitting a creator to ensure that his or her personal vision, as embodied in a work of authorship, is respected. The principal moral rights are those of the right to claim (or disclaim) authorship and the right of integrity. The right to claim or disclaim authorship protects an author's ability to receive credit for his or her creations, or to disclaim authorship of works that he or she did not, in fact, create. The right of integrity permits an author to prevent changes in his or her work that are injurious to his or her reputation; for example, changes which distort or mutilate the author's vision.

Motion pictures are the result of technological innovation. As that technology has improved, the industry and the public has benefitted. Technology, however, has also been used to alter motion pictures after their theatrical release. This has principally occurred in transferring films for broadcast on television and cable systems, and for the home videocassette market. These alterations include the electronic compression or expansion of the running time of the film in order to fit it into broadcast time slots, as well as "panning and scanning" — an older form of technology used to compensate for the different size of theatre and television screens. A recent technology, introduced commercially in 1985, is computer color encoding ("colorization") of black and white

275. H.R. REP. No. 94-1476, 84th Cong., 2d Sess. 73 (1976).

films. This technology is now used only for the home videocassette market, and for cable and broadcast television.

The Directors Guild of America, and some actors, writers, and cinematographers, have protested these post-theatrical changes to motion pictures and have sought federal legislation granting them a higher level of moral rights than they now enjoy, which they would use to prevent (or permit) these alterations. The motion picture producers and corporations doing the computer color encoding, as well as broadcasters and video retailers have all resisted these efforts. These groups argue that the marketplace and individual and collective bargaining adequately protect the rights of all involved, including the public, and that legislation along the lines advocated by the directors would adversely affect both the creation of motion pictures and the public's access to existing motion pictures.

Predictably, some of the evidence presented to us was speculative; e.g., the effect of an increase in the level of moral rights on the marketplace for motion pictures. Not surprisingly, the parties offered opposing opinions on the nature of that effect. Of course, absent actual implementation of such increased rights, hard data will not be available. We are not bereft, however, of any evidence. In the past, directors and others involved in the creation of motion pictures have collectively bargained for increased artistic control of their contributions to the film, while the producers have fought these demands tooth and nail, claiming that if they were adopted, the industry would suffer irrevocable damage. In some instances, the directors and other creative participants won the battle for increased artistic control, and in these instances, the predicted damage did not occur. As a consequence, we have not uncritically accepted either side's predictions that civilization as we know it will cease to exist if their respective positions are not completely adopted.

We have also had the benefit of the experiences of foreign countries that have both developed motion picture industries and a high level of moral rights.

Accordingly, the conclusions we have reached are based upon a careful analysis of the best available evidence, with the realization that evidence is, of necessity, partially incomplete. It is not so incomplete, however, that informed judgment is impossible.

Before proceeding to our conclusions, we pause to note a fundamental assumption we have made — namely, that in adhering to the Berne Convention, the United States has affirmatively declared its acceptance of moral rights. This assumption is based on Article 36(2) of the Paris text of the Berne Convention, which states that "at a time a country becomes

bound by this Convention, it will be in a position under its domestic law to give effect to the provisions of this Convention," and on Section 2(3) of the Berne Implementation Act of 1988, P.L. 100-568, 102 Stat. 2853, which declares that "[t]he amendments made by this Act, together with the law as it exists on the date of enactment of this Act, satisfy the obligations of the United States in adhering to the Berne Convention . . . ."

Article 6*bis* of the Berne Convention mandates the provision of the right to claim authorship and of the right of integrity. The legislative history of the Berne Implementation Act of 1988 is replete with references to existing federal and state law as providing a sufficient level of moral rights to fulfill our obligations under Article 6*bis*. While there has been a healthy debate over the accuracy of this opinion, it nevertheless reflects Congress' considered judgment, and our charge from the Subcommittee did not include reexamination of this question.

The issue then, is not whether there should be moral rights at all — Congress has already answered that question affirmatively — but, whether there should be changes in existing law, at least with respect to the motion picture and television industries. Our conclusions on that issue follow:

(1) The Subcommittee should seriously consider a unified federal system of moral rights protection.

Isolating the motion picture and television industries from the larger context of moral rights for all forms of authorship is difficult, if only because of those industries' pervasive use of other forms of authorship, including novels, short stories and musical compositions. Beyond this, we conclude that the fundamental policy reasons supporting moral rights in the motion picture and television industries apply with equal, if not greater, force to other forms of authorship, and exist independently of industry-specific problems.

While much can be said for permitting a diversified approach to moral rights to develop in the states, strong arguments can be made for creating a unified federal system. As the Register of Copyrights wrote in his 1965 Supplementary Report on the general revision effort:

> A single federal system would carry forward the basic purposes of the Constitution which, as Madison's famous statement in "The Federalist" shows, was to promote national uniformity and to avoid the practical difficulties of determining and enforcing an author's rights under the differing laws and in the separate courts of the various states. Today, when works can be disseminated instantaneously throughout the world, this uniformity is not only a positive advantage with respect to the use

> of works on national scale, but it also has tremendous importance when it comes to international dealings.
>
> Register of Copyrights' Supplementary Report on the General Revision of the U.S. Copyright Law: Copyright Law Revision Part 6 at 82 (1965).

These sentiments ring ever more true today, twenty-four years later, and especially after our adherence to the Berne Convention.

(2) If Congress adopts a unified federal system of moral rights, it should partially preempt state moral rights protection.

Adoption of a federal moral rights regime necessarily requires at least consideration of preemption of moral rights under state statutory and common law. Congress could adopt a number of possible approaches in resolving this issue. First, it could provide that nothing in the Copyright Act as amended would preempt any state law, thereby giving the states the freedom to provide variations on moral rights found in the federal statute as well as permitting them to provide additional rights. Second, Congress could preempt all efforts by the states in the entire field of moral rights, regardless of whether such rights were provided in the Copyright Act. And, third, Congress could preempt state efforts only in the areas covered in the Copyright Act, as amended, while permitting the states to accord other rights.

There are advantages and disadvantages inherent in each approach. The first approach permits states free rein to experiment and adopt rights fitting local conditions; however, by so doing, Congress creates the possibility of a patchwork quilt of treatment for the same right. For example, Congress could amend the Copyright Act to provide for a right to claim authorship for certain works but deliberately exclude computer programs. California could then provide a right to claim authorship for computer programs. Since computer programs are marketed nationally, the practical effect would be national adoption of the California statute. For this and other reasons, the first approach has serious drawbacks.

The second approach — preempting all state moral rights regardless of whether the federal statute provides the right — appears to interfere needlessly with the valuable role states play in experimenting with new rights. The need for national uniformity is not so strong that it need preempt state efforts in areas outside the right to claim authorship and the right of integrity. Indeed, Congress may well benefit from state experimentation in such areas. A possible disadvantage with this approach, though, is that such state rights might conflict with economic rights pro-

vided in the Copyright Act. Of course, should such conflicts arise, Congress is free to pass legislation preempting the state right.

(3) If the Subcommittee prefers an industry-by-industry approach to moral rights, it should carefully consider whether the existing web of collective and individual bargaining in the motion picture industry provides an adequate network for resolution of the issues.

We recognize there are good arguments supporting a cautious, industry-by-industry approach, one that accords rights only to particular types of subject matter, *e.g.*, works of the fine arts. Rights and exemptions could be crafted with some precision and experience could be gained about the practical effects of a higher level of moral rights in the marketplace.

Should the Subcommittee opt for this approach, we are not convinced directors have necessarily made out a sufficient case to warrant extraordinary treatment outside of omnibus moral rights legislation. Of all categories of authors, directors are, in many ways, in the best position to obtain the desired rights through individual negotiation or collective bargaining. That such rights have not been fully obtained does not automatically indicate that legislation is needed. In any individual or collective bargaining negotiation, priorities are established and compromises are made. We are not convinced that the present situation is the result of inequitable bargaining strength, at least if one compares the present rights and income enjoyed by members of the Directors Guild in contrast with those of the U.S. workforce as a whole.

The evidence also suggests that directors do not seek moral rights legislation strictly for the purpose of preserving the original theatrical version of the motion picture, but rather seek increased rights for the purpose of giving individual directors the option to permit or prohibit alteration of their work.[276] While there is nothing wrong with such a desire, it does undercut the directors' invocation of the public interest as a basis for legislation.

Nor do we conclude that the public interest has suffered under the present structure. Never before in the history of the motion picture industry have so many works been so readily available in so many formats. It is true that the marketplace is not perfect and that some of these formats may represent alterations of the original work that directors and others decry. However, there is no evidence suggesting that copyright owners are withholding or intend to withhold the original forms of these

276. This does not, of course, apply to directors' attempts to prevent material alterations to works of other directors created during Hollywood's "Golden Era."

works from the marketplace for aesthetic reasons, or because they supposedly want to "push" the "colorized" version of the work. The number of original works is decreasing due to other market forces.

Nevertheless, moral rights do serve a valuable public purpose, and the Subcommittee may conclude, therefore, that legislation to increase the rights is appropriate.

(4) If the Subcommittee chooses to increase moral rights in the motion picture industry, such rights should be prospective and should be granted to authors of preexisting works as well as to other creative participants in the motion picture.

If the Subcommittee chooses to increase the level of moral rights protection in the motion picture industry apart from omnibus moral rights legislation, the Copyright Office could, in principle, support appropriately drafted constitutional legislation. Due to the likelihood that the takings clause of the Fifth Amendment would prevent Congress from enacting restrictions on existing motion pictures, Congress might want to encourage the establishment of a voluntary industry-wide steering committee apart from the collective bargaining apparatus to work toward establishing voluntary standards or industry guidelines that would identify practices that are acceptable and those that are not. Congress should leave this to those in the industry with the technical knowledge to spell out the exact nature of the differences between copyright owners and those opposed to the alterations being made to present and future works.

Any future legislation should extend moral rights prospectively only to works created on or after the date of enactment and would extend those rights to authors of preexisting works used in motion pictures created on or after the date of enactment (*e.g.*, to authors of novels and short stories and to composers), as well as to all participants who make copyrightable contributions to the actual creation of the motion picture (*e.g.*, cinematographers, art directors, editors, and perhaps, actors and actresses).

On an issue not directly related to copyright, we received evidence suggesting that the economics of the marketplace has resulted in reduced general availability of unaltered theatrical and post-theatrical forms of motion pictures. This trend will most likely continue. Accordingly, Congress should encourage preservation so that the public will have continued access to what, all agree, constitutes a significant part of our cultural heritage. Such steps might include coordinating existing government, private sector, and academic preservation efforts, as well as studying ways to improve and fund future preservation efforts.

The issues raised by the present study are manifold, complex, and

not susceptible of "sound bite" conclusions. The conclusions we have reached represent possible legislative responses to these issues.

APPENDIX: THE FINANCING OF MOTION PICTURES

In this appendix, Mr. Schwartz describes how motion pictures are financed — who bears the burdens of the financial risks and under what conditions.[1] Although not central to our assignment, this topic bears importantly on the environment in which the parties must operate. Many of the parties involved today in film financing are new, but today, as always, motion pictures are still prepared as works made for hire. The people who own the copyright are not necessarily the same people who bear the financial risks in a work. This fact of copyright ownership does, however, explain who has the basic creative control over the work itself, and any subsequent derivative works, outside of any formal contract specifying creative control.

The courts have applied contract principles to interpret the rights retained by creative artists or the rights assigned by the copyright owners. "Once the rights of ownership are transferred by the original filmmaker, the copyright statute will not protect the integrity of the original film, unless the filmmaker provides for protection[s] in the contract."[2]

Of course, under the traditional copyright principle of the divisibility of rights, 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. In the case of motion pictures, sometimes as many as five hundred prints are issued for the first theatrical release, and it is possible for all five hundred to be of different lengths and variations within a year, due to editing and post-production changes in the various theaters, not to mention the different copies owned or leased by television studios and the various videocassette formats offered for sale or rental.

The financing of motion pictures is risky in an investment sense — most films lose money. Producers argue that since they take the brunt of the financial risks, they should generally own the rights to exploit the works using every available technology in every available marketplace.

The Producer and the Economics of Filmmaking

The role of a film producer has become somewhat blurred today because, in part, there are so many different ways of crediting production functions in a film including: "produced by," "presented by," "execu-

1. For a full discussion of these issues, *see* J.E. SQUIRE, THE MOVIE BUSINESS BOOK, (1983), which is a collection of 42 essays about the movie business written by individuals in the industry.

2. E. K. Bader, *A Film of a Different Color: Copyright and the Colorization of Black and White Films*, 5 Cardozo Arts & Ent., 497, 531.

tive producers," "associate producers," and "executive in charge of production." All of these terms have no meaning without understanding what role the individual or company plays, whether this "producer" is a financial arranger and investor, or a packager of creative material with the artists, directors and studios all pre-arranged, or an agent of the film's star, or something else altogether.[3]

Basically, there are five stages of picture making: research and development, pre-production, production, post-production and marketing. The difference between the "pure producer" and the "packaging producer," is how far along in this process the producer continues to maintain a financial risk.[4]

Since it is too difficult to describe the whole array of possible roles a producer might have, what follows is a somewhat traditional explanation of the functions and financial risks incurred. In most instances, the producer starts work on a film project (the research and development stage) with the purchase and clearance of copyrighted material in the form of a book, a screenplay or a treatment (a long synopsis of the events of a story). This can be done either by purchasing or optioning the material from the author or screenplay writer.[5] In some instances, a well-known screenwriter can enter into a partnership with the writer and jointly negotiate with the producer for a share of his profit.

> Under such an arrangement, the writer takes a risk along with the producer, but he also stands to be rewarded along with the producer if they're successful. This doesn't mean that the pooling and division necessarily result in a 50/50 split. It could be 66/33, 75/25, 60/40, or some other percentage. But the pooling and division partnership has become a rather frequently used device to accomplish a deal between a producer and a writer or the owner of a piece of material when the producer doesn't want to lay out a lot of money and the writer doesn't want to accept short money up front without a commensurate

3. W. GOLDMAN, ADVENTURES IN THE SCREEN TRADE, 60 (1983).

4. Robert Evans, *The Producer* contained in *ibid* Squires, 14.

5. Options are usually for a period of time, for example one year, with a renewal period, often an additional year, after which the author/screenwriter can sell his work to another buyer if the purchaser of the option doesn't exercise the option. The second year of the option is usually necessary to give the producer time to start the production and to secure financing. How much money the author/screenwriter gets for the option depends of course on the material itself, the reputation and success of previous works by this author, etc. Usually, there is a cash payment for the option and a bonus if the option is exercised. The latter provision is either in the form of cash and/or a "back end" deal to provide a percentage of the picture's net profits to the writer. From Norman H. Garey, *Elements of Feature Financing,* contained in *ibid.* Squire, 96-106.

back-end reward for doing so.[6]

Work for hire development deals are the most common methods for producers to hire screenwriters, either paying the writer with the studio's development money or with the producer's own money. Often the writer will be paid more than the Writers Guild minimum by giving the writer a large cash fee and a share of the profits and a share of the subsidiary or separated rights (such as theatrical and television sequel, print-publishing, and merchandising rights).[7]

After the copyrighted material is obtained and cleared and the screenwriter is paid, the producer must obtain production financing to begin developing the picture. The producer can act as a packager of the creative material (consisting of the script and the rights), and of the creative talent (actors and/or director) and sell the package deal to the financier, either an independent production company or a major studio.[8] Or the producer can create a "mini-package" consisting of the script, rights, and producer's services and sell that to the studio. The studio then must hire the director, the actors and actually shoot the picture and take the development risk (that the picture will even be made at all) based on what they purchase, which is a script and the copyright to the script plus any other production services the producer is selling.

> The further a producer has moved the project — that is, the greater the investment he has made in terms of time, effort, and money and the more finished the product he is delivering — the more he's going to get for it both in cash and in back-end contingent interest. If he's in a position to bring in what is nearly a completed movie that just hasn't been shot yet, he's going to be able to make the best deal with the financier. However, there are some risks to this approach, both strategic and financial.[9]

All the activities that precede the actual setting of a starting date are part of the research and development stage. Once they set a start date for shooting the pre-production stage begins.[10] One of the highest financial risks for producers in film production is the completion guarantee — actually getting a picture made after beginning the development deal.

A completion guarantor is a kind of cost insurer, or insurance

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6. *Ibid.*, Garey contained in Squire, 97.

7. *Ibid.* Garey/Squire p. 98.

8. The difference between these two entities is that only the major studios have distribution arms, which is necessary to get every film from the production/post-production stage out to the general public.

9. *Ibid.* Garey/Squire at p. 99.

10. *Ibid.*, Evans contained in Squire, p. 16.

> company. He agrees (for a premium usually computed as a percentage of the picture's production costs) that out of his resources or financial contacts, he will guarantee the money necessary to complete the picture if the money that has been raised from other sources turns out to be inadequate; for example, if the picture runs well over the original budget.[11]

The longer the producer stays in the process and guarantees completion the more financial rewards he or she is entitled to, including copyright ownership. Generally, if the producer simply packages the deal, then signs a contract with a studio to have the studio actually make the picture, with the producer providing personal services, the studio will own the copyright. This is the case with a "packaging producer," who is in a work made for hire agreement with the studio/copyright owner.

If however, the producer acts as a "pure producer" and continues to make the picture with independent financing, renting equipment, hiring the actors — generally financing both "above the line" and "below the line" costs,[12] then the producer will own the copyright and will then have to assign the rights to the distributor. Here the producer is at great risk, assuming all of the production costs, and he or she is rewarded with copyright ownership. He or she will be able to make more money, however, by negotiating for ancillary rights, including the soundtrack album and publishing rights to the film's music, merchandising rights, and any book publishing rights associated with the film. The risks involved in filmmaking have increased for producers and studios as fewer pictures make profits and as costs rise. For example, "below the line" costs have tripled since 1967.[13]

The actual production costs of a film include studio overhead, which is computed as a percentage of the total production costs. The amount is charged by the studio for the costs of producing the film itself and must be figured into the film's budget.[14] On independent pictures (i.e., not

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11. *Ibid.*, Garey contained in Squire, p. 100-101.

12. Above the line costs are: the fixed costs of the key creative costs prior to the beginning of shooting, including the personnel costs (and all travel expenses for location pictures) for the producers, writers, actors, directors and the purchase costs of the story and other rights connected with the acquisition of the underlying literary material including the screenplay costs. Below the line costs are: the costs incurred in physically making the picture including all the other personnel and materials. Usually, below the line is broken down into three sections, production period, post-production period, and "other charges." From Paul Maslansky, *The Line Producer* contained in *ibid.*, Squire, p. 209.

13. *Ibid.*, Evans contained in Squire, p. 16.

14. "It covers services from preparing legal contracts, researching copyrights, making out payroll and accounting for production and distribution to simple janitorial and maintenance services. Most studios also provide cameras, lights, grip equipment, editorial and transporta-

made by studios), there is no overhead charge but, instead, a charge for the rental of all the studio facilities and services (usually charged on a per studio day basis).

The production stage concludes when filming is completed. Next comes the post-production stage involving the editing of the film, the scoring of music and the synchronizing of sound, and finally the making of prints for distribution into theaters. The director, by contract, has the right to edit the film and turn in his version, known as the "Director's Cut." After that, the producer can edit the film into its final version usually in some collaborative effort with the director and editor. As producer Robert Evans says,

> In post-production, I work most closely on the editing. It's taken me many years to build respect with directors and editors, and this, too, is very much a collaborative effort. The director has the prerogative to mold and shape the film in his cut. Then, I work with him and the editor to fine tune the editing process, which is critical to the form and impact of the final picture.[15]

The fifth and final stage of filmmaking is the marketing stage, which involves the advertising and distribution of the picture. For distribution a major distributor (all the major studios have distribution arms) must be used to make the "teaser" (the coming-attractions) for theaters and television, to organize the print advertising campaigns, to set the dates, terms and theaters for release of the picture, to make foreign language copies (dubbed or subtitled), to preview the film, and finally, open the film. Because of the huge risks and expense involved in distribution, a large presentation of the film costs, including returned profits, goes to the distributor. The domestic box-office gross on all films released in 1980 was over $2.7 billion, and the costs of marketing films was about 25 percent of that or a little over $700 million, which includes advertising, promotion, and market research.[16]

> The more studio money the producer accepts and the earlier he accepts it, the greater the risk he asks the studio to take and the more the studio will expect to be rewarded for it. Again, the risk/reward ratio operates. If the financier-distributor is asked to take the entire production risk, the best the producer can expect — assuming he's assembled all the elements

tion equipment, offices, and projection facilities for the overhead charge." From Roger L. Mayer, *Studio Operations*, contained in *ibid.*, Squire, p. 159.

15. *Ibid.*, Evans contained in Squire, p. 18.

16. Richard Kahn, *Motion Picture Marketing*, contained in *ibid.*, Squire, p. 264, 270.

> and has paid the entire development cost — is usually a 50/50 net profit deal. For that much risk, the financier-distributor is generally considered to be entitled to at least 50% of the net profits, and perhaps more, and to insist on the standard distribution fee of 30% for the U.S. and Canada.[17]

For all the risks associated with the making of motion pictures, the producer usually ends up with 10-20 percent of the net profits and often less after paying for profit participation by others, especially the distributor and the creative participants, including the writer and the director and, in some cases the star.[18] Of course, because of the producer's role in making a motion picture, and because of the financial risks he or she takes, "pictures with runaway costs can be traced to negligent producers or financing sources."[19]

The Director, Screenwriter and Other Creative Participants

> Making the movie is analogous to building a building on a lot. The literary property is the lot, the piece of real property. The movie is analogous to the building. The screenwriter is the architect, the director is the contractor, and the producer is theoretically the owner. The major studio (if one is involved) can variously represent a lending institution, equity partner, and/or leasing agent for the finished building (in its capacity as distributor).[20]

The director is hired by the producer (or the studio if it is the producer) in most cases as an employee in a work made for hire situation. The director signs a service contract and gets a flat fee and may also receive net profit participation.[21] Many actors and directors also get

17. *Ibid.*, Garey contained in Squire, p. 103. An excellent example of the breakdown of profits is provided at the bottom of p. 103 continued on p. 104.

18. *Ibid.*, Garey contained in Squire, p. 103.

19. *Ibid.*, Evans contained in Squire, p. 15. For additional information on the financial and accounting practices in the motion picture industry, *see ibid.*, VOGEL, ENTERTAINMENT INDUSTRY ECONOMICS, Ch. 4, especially part 4.4, beginning at p. 101. Vogel describes the production-financing-distribution (PFD) agreements used by most producers, participation deals (including "pick-ups" of incomplete projects), and producers' participation and cross-collateralization deals which are used in this industry today.

20. *Ibid.*, Garey contained in Squire, p. 102.

21. "There may be half a dozen directors in the world who command first dollar *gross* participation of a significant kind, and hardly any writers who can. However, there are many actors and directors, and even a few writers, who are given gross participation from break-even, that is, once break-even is achieved." From Garey contained in Squire, p. 105. In addition, directors, writers and actors get fringe benefits under their guild contracts which can add as much as 20% to the labor costs of making a picture. From P. Maslansky, *The Line Producer*, contained in Squire, p. 209.

"holding money" or option money. Since star actors and directors will not agree to undertake a project in development unless they are certain they will get compensated, they are paid this money to pledge their availability.

By signing net profit participation schemes (and, only very rarely, gross profit arrangements), directors, like producers, share the risk of financial failure on the pictures they direct. But, in most cases, they are compensated primarily as employees under work made for hire arrangements so they are paid whether or not the picture is a success. But damage to their reputation can have several economic consequences for the future of their directorial careers. Operating as Hollywood does under the motto — "You're only as good as your last picture" — directing a bad picture can have severe career consequences.

If the commercial failure of a picture is blamed on a pre-production or production problem such as a poor script or a low budget, the director has no one to blame but himself or herself, since they agreed by contract to the script and budget and the actual filming when they signed onto the project. But post-production changes, only provide for minimal rights of "consultation" (though the directors have agreed to this consultation right by contract)[22] for any editing, colorization, panning and scanning, or lexiconning which the producer/copyright owner agrees to. Worse yet, a poor or nonexistent marketing scheme on a picture can ruin its financial chances. Obviously, if the picture is going to be a commercial success, the studio marketers know it and will spend the money on it. But often the directors bear the brunt for failures. In a just world they might share the blame with the producers, but most often the finger of blame points at them. Often the directors of today "function as their own producers, though they are not credited as such."[23] This is because of the fact that many "producers" are simply business dealmakers with no creative experience — and this vacuum must be filled by the director.[24]

Screenwriters have even fewer financial risks than directors and have even less influence in the creative process. Usually they are compensated, often well compensated, up front, bearing few of the financial risks of picture-making, unless they participate in profit participation agreements. William Goldman, a well-known screenwriter says that screenwriters are not supposed to have collaborative powers in creating

22. Article 7, 1987 Agreement of Basic Minimum Rights between the Directors Guild of America and the Alliance of Motion Pictures and Television Producers.

23. *Ibid.*, Sydney Pollack, contained in Squire at p. 28.

24. *Id.*

films. "Long ago, Hollywood decided that the way to keep people quiet is to overpay them. An author paid all that money should go home and count it and be content."[25]

According to Goldman, only the well established screenwriters have the power to influence the details of a production of a film.

> Generally, the answer is that the writer gets as close to the production as his director allows. The production is really the director's baby. If he has faith in the author's judgment, the director will be more willing to tolerate his presence during filming. If the director doesn't want him, there is nothing the writer can do about it.[26]

Goldman says that an author is "blessed" if the director is interested in working with him in production (and pre-production). The situation for screenwriters is very different than for playwrights.

> The motion picture producer acquires all rights necessary to alter or change the screenplay in any manner he feels it appropriate and . . . requires the writer to waive rights of 'droit moral.' Except in rare instances, he will be authorized to produce the picture using his directorial, acting and other talent which he determines. Conversely, the producer of a play generally acknowledges that the play is an artistic creation of the author and agrees that the author is entitled to approval over the cast and director, and when appropriate, conductor and dance directors. Further, once the completed script has been delivered, no addition, alteration, or omission may be made without both the author's and producer's consent.[27]

Compare this situation to what director and screenwriter Mel Brooks says in acknowledging the different amounts of creative control his different roles afford him. "I direct a film to protect the writing. I produce the film to have total business control as well as creative control over the film's future."[28]

For screenwriters, as with directors, however, once they lose control — whether creative or commercial — they feel powerless to salvage the

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25. WILLIAM GOLDMAN, *The Screenwriter,* contained in *Ibid.,* Squire at p. 58.

26. *Id.,* at 59.

27. Michel I. Rudell, *Behind the Scenes: Practical Entertainment Law,* LAW & BUSINESS, INC., p. 123 (1984). According to Rudell, since movies rarely make money, profit participation agreements are of little value to screenwriters, while playwrights, often sharing in *gross* box office receipts often profit handsomely (so long as the play is running). *Id.,* at 124.

28. Mel Brooks, *My Movies: The Collision of Art and Money,* contained in *Ibid.,* Squire at p. 36.

work or their reputation. Goldman says that when *Butch Cassidy and the Sundance Kid,* for which he wrote the screenplay, opened in New York, the reviews in the three daily papers were split — "two terrific, one pan. In neither of the laudatory reviews was my name even mentioned. But you better believe I got top billing in the pan. I had screwed up [director] George Hill's movie."[29]

If producers take the primary financial risks, then directors and writers primarily take reputational risks. The producer is most worried about completing a picture and he or she gambles on the creative participants to do this. Returning to the building metaphor, one commentator has compared a director to a general contractor. "He's responsible for building the building, and if the costs are going to run over, it'll probably be because of him."[30]

All of the other creative talents — the cinematographer, editor, art director and the "crew" — are employees for hire paid under service contracts for single pictures, or multiple service contracts. Because films are by nature "research and development products . . . they are perishable and cannot be test marketed in the usual sense."[31] Since most of the creative talent, including the directors, screenwriters, and "below the line" employees, are paid as employees, their share in the financial risks is reduced considerably. Only for directors and screenwriters with profit participation agreements are the rewards for financial success tied to the picture's success. But the downside is that these two creative artists share in the reputational hazards of unsuccessful pictures as well. The increase in other financial markets, such as the videocassette market, and twenty years ago, the television market, has rewarded the producers more than any other participants in filmmaking. But the directors and screenwriters share in the profit-making from these other markets, especially television.[32]

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29. WILLIAM GOLDMAN, ADVENTURES IN THE SCREEN TRADE, 79 (1983) p. 79.

30. *Ibid.,* Garey contained in Squire at p. 101.

31. HAROLD L. VOGEL, *Entertainment Industry Economics: A Guide for Financial Analysis* 89 (1986)

32. In 1960 four guilds (the Directors Guild of America, Screen Actors Guild, Writers Guild of America and the American Federation of Musicians) signed collective bargaining agreements with the Association [now call the Alliance] of Motion Picture and Television Producers which waived the guild's rights to revenues in theatrical motion pictures made prior to 1960 and released on free television. In exchange each of the guilds was given a cash settlement for the establishment of pension plans for their members. For theatrical motion pictures made since 1960, which are released on free television, the guilds divide up a total of 12½% of the gross revenues from those pictures (the guilds share is: 1.2% each for the DGA and WGA, 3.6% for the SAG, 1% for the AFM and 5.4% for the International Alliance of Theatrical and Stage Employees (IATSE)).

In sum, the directors, arguing for all creative artists, said, "it is not entrepreneurs alone that rely on the developed systems of publishing, marketing, licensing, reproducing, and syndicating artistic materials. Artists rely on these systems, too."[33] And artists clearly have a stake in the economic well-being of the industry upon which they depend for their livelihood, and generally can be relied on to act accordingly.

33. Statement of the Directors Guild of America before the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the House Judiciary Committee, Sept. 30, 1987, p. 6, reprinted in the Directors Guild of America prepared statement for the Copyright Office hearing of Sept. 8, 1988, docket RM 88-3, comment letter 8, Aug. 24, 1988.