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FILM ARTISTS BUSHWHACKED BY THE COLOROIDS: ONE-HUNDREDTH CONGRESS TO THE RESCUE?

INTRODUCTION

The late, great film director, John Huston, in a videotaped speech prepared specially before his death for presentation at a Senate hearing on the issue of the colorization of black and white films, raged that he and other film artists, who had worked to produce such classic films as *The Maltese Falcon*, were being "bushwhacked by the coloroids," and he pleaded with Congress to step in to preserve that work.¹ This comment will trace the response of the One-Hundredth Congress to the pleas of John Huston and other film artists to preserve the original integrity of their films, and will attempt to evaluate the effectiveness of that response.

The issue of colorization has far-reaching implications for many areas of copyright law, on such issues as the moral rights of artists and U.S. adherence to the Berne Convention. These issues will, of necessity, be touched upon only to the extent of providing a context for the several legislative remedies proposed in the One-Hundredth Congress to deal with the colorization issue. The reader who wishes to explore these interrelated issues in more depth will find useful references at appropriate points in the comment.

BACKGROUND

Colorization² is the process whereby, through the use of recently developed computer and videotape technology, motion pictures that had been originally filmed in black and white are colored for presentation on television.³ The present controversy over colorization was given its seminal spark when the Turner Entertainment Company purchased Metro-Goldwyn-Mayer's vast library of old black and white films, then began to colorize them for presentation on Turner's Color Classic Network.⁴

¹ Transcript of the videotaped speech by John Huston, presented to the Subcommittee on Technology and the Law of the United States Senate Judiciary Committee, May 12, 1987. Thanks to the Directors Guild of America for providing a copy of the transcript for use in this comment.
² "Colorization" is a trademark of Colorization, Inc.. However, the term has become a generic term to denote any process by which black and white films are enhanced with color. Sessa, Moral Right Protection in the Colorization of Black and White Motion Pictures: A Black and White Issue, 16 Hofstra L. Rev. 503, n.3 (1988).
⁴ Kohs, Paint Your Wagon--Please! Colorization, Copyright, and the Search for Moral Rights, 40 Fed. Comm. L.J. 1, 5 (1988). Although Turner is not the only company involved in colorizing old films, its present stock of over 3,800 films purchased from the Metro-Goldwyn-Mayer library, which included many pre-1948 Warner Brothers and RKO Pictures films, makes it by far the major force in the colorization field. Id.
Many of the old black and white films now owned by the Turner Entertainment Company had come to be regarded as classics of American film art in their original forms. Film artists, critics, and scholars were enraged at what they saw as a mutilation of the art form and a distortion of history - as cultural vandalism. Proponents of colorization, on the other hand, hailed the process as a means of reviving interest in films that had lost their appeal to a public that had grown accustomed to seeing everything on television in color; colorization, they argued, gives these films a new and wider audience.

The battle over colorization has been waged in the public media, in legal journals, and even in the courts. The Copyright Office became the focus of the controversy on September 15, 1986, when it issued a "Notice of Inquiry" on the question of the copyrightability of colorized films as derivative works, inviting any interested parties to submit briefs in support of their views. Sensing, perhaps, that

5 Among the generally recognized classics now owned by the Turner Entertainment Company are Arsenic and Old Lace, King Kong, The Philadelphia Story, White Heat, Yankee Doodle Dandy, The Maltese Falcon, and Casablanca. Written Statement of Roger Mayer, for Submission to the Committee on the Judiciary -- Subcommittee on Courts, Civil Liberties, and the Administration of Justice -- United States House of Representatives, June 21, 1988. A copy was provided for use in this comment through the offices of Congresswoman Mary Rose Oakar (D-Ohio).

6 For a more extensive discussion of the views of opponents of colorization, see infra notes 15-39 and accompanying text.

7 For a more extensive discussion of the views of proponents of colorization, see infra notes 15-39 and accompanying text.


9 At least two suits have been filed stemming from the colorization controversy: Turner Entertainment Co. v. RKO General Inc., 86 Civ. 7340 TPG (SDNY filed Oct. 1, 1986); and RKO Pictures, Inc. v. Color Systems Technology, Inc., No. CV 86-6816 FFF (Gx) (C.D. Ca filed Oct. 23, 1986). In the first case, Turner sued to force RKO to turn over preprint materials required for the colorization process. Rudell, supra note 8. In the latter case, RKO sought to enjoin CST from further reproduction and adaptation of their films through colorization, alleging infringement of copyright. Id.

The colorization controversy has not been confined to the United States. Anjelica and Daniel Huston, daughter and son of director John Huston, were successful recently in enjoining a television presentation of their father's film, The Asphalt Jungle. See, French Showing of "Colorized" Films Is Enjoined Pending Moral Rights Hearing, 36 PAT., TRADEMARK & COPYRIGHT J. (BNA) No. 896, at 474 (Sept. 8, 1988).

10 51 Fed. Reg. 32,665. For a survey of arguments pro and con, see 33 PAT., TRADEMARK & COPYRIGHT J. no. 12, at 822; at 823 (March 19, 1989); Duggan and Pennella, supra note 3; Bader supra note 8.
CONGRESS STEPS IN

Congress’s first foray into the colorization controversy was on May 12, 1987, when the Subcommittee on Technology and the Law of the United States Senate Judiciary Committee held hearings on the subject at the request of the Directors Guild of America. Testifying in support of colorization were Roger L. Mayer, President of Turner Entertainment Co., Buddy Young, President and CEO of Color Systems Technology, Inc., and Rob Word, Senior Vice President, Creative Affairs, of Hal Roach Studios, Inc. Testifying in opposition were film directors Woody Allen, Milos Forman, Sydney Pollack, and Elliot Silverstein, and actress Ginger Rogers. Also presented to the subcommittee was a videotaped speech by late director John Huston.

None of the opponents of colorization expressed opposition to the process of colorization per se; its potential use as a tool to restore or preserve the color of films originally made in color would, no doubt, raise little objection. What they did object to was the application of the process to black and white films without the consent of, or worse yet - as in the case of John Huston’s *The Maltese Falcon* - over the vehement, express objections of the person they believe is the primary creative artist in the making of a film - the director:

The whole art of directing is based entirely on a series of choices; . . . Each choice changes in some way the signals we are sending to the audience. Each area requires fluency in one of the vocabularies we use to communicate, a tool out of which we sculpt the finished film. It is made of nothing else. *Nothing.* Only the sum of these choices.

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11 On June 22, 1987, the Copyright Office dealt a major blow to opponents of colorization when it announced its decision to allow copyright registration of colorized films as derivative works. 52 Fed. Reg. 23,442. Subsequently, however, on August 9, 1988, the Copyright Office announced a “final rule” requiring that all applications for copyright registration of a colorized film be accompanied with a black and white print of the film sought to be registered. 53 Fed. Reg. 29,887. Thus, at least one copy of the original work would be protected from the vagaries of the market-place and preserved in the collection of the Library of Congress. For analysis of these rulings, see Copyright Office Will Register Colorized Films, 34 PAT., TRADEMARK & COPYRIGHT J. no. 836, at 214 (June 25, 1987); New Deposit Rule Requires Black and White Print with Colorized Films, 36 PAT., TRADEMARK & COPYRIGHT J. (BNA) no. 892 at 370 (Aug. 11, 1988).

12 *Colorization of Movies is Focus of Senate Hearing and House Bill, 34 PAT., TRADEMARK & COPYRIGHT J. (BNA) no. 830, nn at 33 (May 14, 1987).*

13 Statements are reprinted in *Colorization: the Arguments For, 17 J. Arts Mgmt. & Law 64 (1987)*; (hereinafter *For*).

14 Statements are reprinted in *Colorization: the Arguments Against, 17 J. Arts Mgmt. & Law 79 (1987)*; (hereinafter *Against*).

15 See supra note 1 and accompanying text.

16 See *For,* supra note 13, at 75 (testimony of B. Young).

17 See *Against,* supra note 14, at 84-85 (testimony of S. Pollack).
One of the key choices in the making of a film is whether the film will be in color or black and white. Proponents of colorization pointed out that, historically, this was not a matter of director's choice, but dictated by either budgetary or technological constraints: "There exist thousands of old black and white movies,... Almost all these movies were made before color was actually or economically available. There's little doubt that had color been available and affordable, it would have been used." 18

While granting that this might be true, opponents of colorization pointed out that what might have been done is irrelevant:

The real point to be addressed is that if films were made in black and white, for whatever reason, their creators designed them to take advantage of the unique opportunities and possibilities as well as the limitations offered by black and white photography.... [B]lack and white photography is not color photography with the color removed. It involves a completely different technique. 19

Because the use of black and white photography is so fundamental an aesthetic factor in the making of a film, to colorize the film would be to fundamentally alter what the film is. 20 Opponents of colorization argued that no one should have the right to alter a work of art except the creative author of that work; 21 in the case of a film, that creative author is the director. 22

Proponents of colorization disagreed with the view that the director is the creative author of the film: "... from the beginning, filmmaking has been a collaborative effort, relying on the creative contributions of many talented people. Movies are not solely the work of their directors." 23 If any one person is to be designated as the creative author of a film, it should be the producer, "...the old movie moguls and...staff producers who oversaw every aspect of each production, producers who worked on the script with the writer and then assigned all other jobs on the film, including the job of the director." 24 Because the artists involved in the making of a film contract to provide their services on a work-for-hire basis, the copyright ownership and rights vest in the employer (i.e., the producer or production company): 25

The question of ownership rights is indisputable. Because the studios

18 See For, supra note 13, at 67 (testimony of R. Mayer).
19 See Against, supra note 14, at 91-92 (testimony of E. Silverstein).
20 Id. at 85 (testimony of S. Pollack).
21 Id. at 83 (testimony of M. Forman).
22 The theory that the director is the primary author of a film, the Auteur theory, was first articulated by French critics writing in Cahiers du Cinema. See Kohs, supra note 4, at 14.
23 See For, supra note 13, at 76 (testimony of B. Young).
24 Id. at 65 (testimony of R. Mayer).
25 This is the traditional Hollywood view, which still holds, in form if not in substance: despite the common...
hired the directors and the actors and everyone else associated with the production of the films, they also owned the product. The decision on how to market these films, as well as the rights, belong to that company, not to the actors, writers, or directors.26

Proponents of colorization further objected to the characterization of colorization as a process that destroys the original film:

There has been a lot of talk about destroying the film. Nothing could be further from the truth. We never color the film. We first restore the original black and white film. We then transfer the film to videotape and, with the assistance of an art director, color the videotape. The movie is then released in videotape in black and white and in color.27

Because it is necessary to first have a good quality print of the black and white film in order to colorize the tape made from it, and because of the public demand for color films,28 the development of colorization "has suddenly provided companies with an economic incentive to restore these films."29 Proponents noted that, because colorization affects only a videotape of a film that will be viewed only on television, colorization does not affect the availability of the films elsewhere: "There's still a whole world of movie houses, film clubs, schools and museums where black and white films are perpetually available to film buffs."30

Proponents of colorization further asserted that it should be the public, speaking through the marketplace, that should determine how they will see films on television.31 "At issue here are simply matters of taste and choice.... If I and a majority of movie lovers prefer to watch [them] in color, we have every right to do so."32 For the minority who prefer to view the films in their original forms, "the vast majority of television sets have color knobs that can be turned down if a home viewer prefers black and white."33 Finally, proponents extolled the virtues of colorization as a service both to the public and to the films themselves:

Nothing has been lost in converting old movies to color since the movies are forever preserved in black and white and are available in their original form. I would think there would be general rejoicing that we practice today of identifying a film with the director in the titles and in advertising (e.g., a Milos Forman film), the Academy Award for Best Picture is still given to the producer of the film, not the director.

26 See For, supra note 13, at 77 (testimony of B. Young).
27 Id. at 71 (testimony of R. Word).
28 "[T]oday's audiences are conditioned to looking at movies in color and cannot be persuaded, cajoled, or bullied into watching them in black and white." Id. at 67 (testimony of R. Mayer).
29 Id. at 71 (testimony of R. Word).
30 Id. at 68 (testimony of R. Mayer).
31 This is to be expected because of the tremendous public response to colorized films. Id. at 72-73 (testimony of R. Word).
32 Id. at 69 (testimony of R. Mayer).
33 Id. at 68.
are providing entertainment and fun for a large audience that would otherwise not have existed. Since many people watch movies in color that they would have shunned in black and white, I feel we have made a distinct contribution not only to the pleasure of the public but to the well-being of the movies themselves.\textsuperscript{34}

Opponents of colorization argued, however, that the choice of how a film will be seen is not a matter for the public to decide: ‘The choice of the appearance of any work of art does not rest with the reader, the listener, the viewer, or the audience. It rests with the artist. It is perhaps the most basic right of the artist.’\textsuperscript{35} They disputed the assertion that colorization is in any way a service to the films themselves: ‘The presumption that the colorizers are doing [the director] a favor and bettering his movie is a transparent attempt to justify the mutilation of art for a few extra dollars.’\textsuperscript{36} Ultimately, ‘‘colorization’ represents the mutilation of history, the vandalism of our common past, not merely as it relates to film, but as it affects society’s perception of itself. ‘Colorizing’ is a rewriting of history, which we believe to be inherently dangerous.’\textsuperscript{37}

Because of the national interest in the preservation of its cultural heritage, those who own films must be made aware of ‘a moral component in their ownership right - a custodial responsibility to pass on the works they hold to the next generation, unchanged and undistorted.’\textsuperscript{38} Finally, the opponents of colorization called on Congress to find the proper balance between ownership rights and the public interest:

[T]hrough our national history, many adjustments in the law have been made in order to bring property ownership into greater harmony with legislators’ perception of the public interest. And so, 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.\textsuperscript{39}

As is evident from the above discussion, the opponents of colorization were forced to rest the bulk of their argument on the moral aspects of colorization. While decrying the immorality of altering the personal expressions the artist without his permission, they begrudgingly conceded the legality of such action.\textsuperscript{40}

Historically, the concept of artists’ moral rights has not been recognized in American law. ‘‘American copyright law, as presently written, does not recognize moral rights or provide a cause of action for their violation, since the law seeks to

\textsuperscript{34} Id. at 69.
\textsuperscript{35} See Against, supra note 14, at 91 (testimony of E. Silverstein).
\textsuperscript{36} Id. at 80 (testimony of W. Allen).
\textsuperscript{37} Id. at 91 (testimony of E. Silverstein).
\textsuperscript{38} Id. at 92.
\textsuperscript{39} Id. at 93.
\textsuperscript{40} Id. at 92 (testimony of W. Allen).
vindicate the economic, rather than the personal, rights of authors.\textsuperscript{41} Thus opponents of colorization were at a formidable disadvantage in their fight against film owners to protect the integrity of their works:

Unfortunately, in the United States the impersonal rules of the marketplace have invaded the creative realm of the artist, promoting an ethic of economic rights in place of moral rights. The proposed approach to considering moral rights is contrary to traditional American notions of both property and economic rights. These notions do not acknowledge sympathy for artists’ problems, nor is there much sensitivity to destructive assaults on the integrity of works of art.\textsuperscript{42}

In contrast to the American position, the concept of artists’ moral rights is recognized in the laws of most European countries:

Rights of personality are classified in civil law countries as \textit{droit moral}. The doctrine of \textit{droit moral} developed largely through the efforts of nineteenth century French and German jurists. \textit{Droit moral} is a composite right which includes: the right of paternity, or the right to claim or disclaim authorship of a work of art; the right of disclosure, which permits the artist the privilege of determining when to release a work; the right of withdrawal, which permits an artist to retract a work from its owner; and the right of integrity, which gives artists the right to prevent a work from being altered, distorted, or mutilated. The components of moral rights are predicated on the idea that they accrue to the artist rather than the work itself.\textsuperscript{43}

\textbf{Moral rights are expressly granted to artists in the Berne Convention for the Protection of Literary and Artistic Works,}\textsuperscript{44} a treaty to which most European countries adhere, and to which the Congress has only recently cleared the way for the United States to become a signatory.\textsuperscript{45} In striking contrast to the American view, the Berne Convention provides:

Independently of the author’s economic rights, and even after 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

\textsuperscript{41} Gilliam v. American Broadcasting Co., 538 F.2d 14, 24 (2d Cir. 1976).

\textsuperscript{42} Gibaldi, supra note 8, at 971.

\textsuperscript{43} Id. at 970-71. For more thorough discussion of moral rights of artists, see also Sessa, supra note 2; Cook, supra note 8; Kohs, supra note 4; Bader, supra note 8.

\textsuperscript{44} September 9, 1886, as revised at Paris on July 24, 1971; reprinted in Practicing Law Institute, \textit{Current Developments in Copyright Law} (1988), at 275 (hereinafter \textit{Berne}).

\textsuperscript{45} The Berne Convention Implementation Act of 1988, H.R. 4262, 100th Cong., 2d Sess., was signed into law by President Reagan on October 31, 1988.
would be prejudicial to his honor or his reputation.\textsuperscript{46}

Even though many economic advantages would accrue to American artists from United States adherence to Berne, the major obstacle to such adherence had been its provisions expressly granting moral rights to artists.\textsuperscript{47} However, despite the historic - and still well-entrenched - antipathy to moral rights for artists in the United States, the pleas of film artists did not go unheeded. Subsequent to the Senate hearings on colorization, several members of Congress responded by introducing three separate bills dealing with colorization, each of which took a different approach to the issue.\textsuperscript{48}

\section*{The Film Integrity Act of 1987}

On May 13, 1987, one day after the Senate hearings on colorization, Congressman Richard Gephardt (D-Mo.) introduced "The Film Integrity Act of 1987."\textsuperscript{49} The stated purpose of the bill was to "provide artistic authors of motion pictures the exclusive right to prohibit the material alteration, including colorization, of the motion pictures."\textsuperscript{50} The Integrity Act was the first legislation proposed in Congress to specifically address the colorization issue. It was also the most ambitious and far reaching in its implications; it proposed to introduce, for the first time in American history, a moral right of integrity into United States law.\textsuperscript{51}

The key provision of the Integrity Act was its proposal to amend chapter 1 of title 17 of the United States Code (the Copyright Act) by adding a new section 119, which would provide that "in the case of a motion picture, once the work has been published, no material alteration, including colorization, of the work shall be permitted without the written consent of the artistic authors of such work."\textsuperscript{52} The

\textsuperscript{46} Berne, Article 6 bis, supra note 44, at 285.

\textsuperscript{47} As an example of the strength of opposition to the acceptance of the moral rights aspects of Berne, Congressman Robert W. Kastenmeier (D-Wis.), the initial sponsor of the Berne Implementation Act, cited the fact that the bill was in danger of not passing until strong provisions protecting the moral rights of artists were deleted, whereupon the bill was approved in the House by a vote of 420-0. 134 Cong. Rec. E2242 (1988). Acceptance of Berne was predicated upon a "minimalist approach" to compliance with its moral rights provision. This approach stressed that only minimum changes in existing American laws be made in order to comply with the terms of Berne. 134 Cong. Rec. S14549, S14552 (1988). For a discussion of the implications of Berne for the motion picture industry, see Smith, Should the Motion Picture Industry Support or Oppose U.S. Adherence to the Berne Convention?, 6 ENT. & SPORTS LAW 1 (1987).

\textsuperscript{48} In addition to these three bills, discussed through the remainder of this comment, The Visual Artists' Rights Amendment attempted to introduce a measure of moral rights for fine artists, but excluded film artists from its scope. For a discussion of this proposed bill, introduced by Senator Edward M. Kennedy (D-Mass.), S. Rep. No. 1619, 100th Cong., 1st Sess. (1987), and a similar bill introduced by Congressman Edward J. Markey (D-Mass.), H.R. Rep. No. 3221, 100th Cong., 1st Sess. (1987), see Gibaldi, supra note 8.

\textsuperscript{49} H.R. Rep. No. 2400, 100th Cong., 1st Sess. (hereinafter Integrity Act).

\textsuperscript{50} Id.

\textsuperscript{51} Statement of Ralph Oman, Register of Copyrights, Before the Subcommittee on Courts, Civil Liberties and the Administration of Justice, House Committee on the Judiciary, 100th Congress, Second Session, June 21, 1988, at 22 (hereinafter Oman).

\textsuperscript{52} Integrity Act, supra note 49, at § 119(a).
"artistic authors" of a film were defined as the "principal director and principal screenwriter" of the film. Most significantly, this "right of consent" held by the artistic authors "...shall not expire when the copyright expires in such work,...", thus giving artistic authors a measure of control of the film even after it has passed into the public domain. The artistic authors would be "deemed to be the legal or beneficial owners of an exclusive right under a copyright with respect to such motion picture," and thus the remedies for copyright infringement would be available to artistic authors for material alterations made without their consent. In addition, if any material alterations occur without the consent of the film's artistic authors, no copyright could be granted to such altered version of the film.

On June 21, 1988, the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the House Committee on the Judiciary held hearings on pending legislation dealing with colorization and the broader issue of moral rights, with special focus on the Integrity Act. Opponents of colorization applauded the bill as a "restrained approach that balances the interests of the copyright holder against the larger societal interest of protecting our country's film heritage." Citing imminent United States adherence to the Berne Convention, they asserted that "[o]ur national position is no longer that moral rights do not exist," and that the time had come to articulate these rights legislatively.

However, negative reaction was strong from proponents of colorization. One particularly disturbing aspect of the Integrity Act was the undefined, potentially overbroad sweep of the term "material alteration":

The overly broad prohibition would surely raise 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 rights 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

53 Id. at § 3.
54 Id. at § 119(c).
56 Integrity Act, supra note 49, at § 119(d)(1).
57 Id. at § 119(d)(2).
58 House Panel Hears Testimony on Film Colorization Legislation, 36 PAT., TRADEMARK & COPYRIGHT J. (BNA) no. 886, at 200 (June 23, 1988).
59 Summary Statement of Arthur Hiller.
60 Statement of Monroe E. Price, Dean, Benjamin N. Cardozo School of Law of Yeshiva University, Before the House Subcommittee on Courts, Civil Liberties and the Administration of Justice, House Judiciary Committee, June 21, 1988, at 2.
the addition of music for foreign distribution; and the right of authorizing... 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 exercised [sic] by the producer prior to the first release). However, H.R. 2400 would require all these alterations of the motion picture, no matter how well intentioned and how well done, to be cleared with the artistic authors of the work in addition to the copyright owners. In addition to this interference with the ordinary marketing distribution of motion pictures, the ‘material alteration’ prohibition would interfere with, or perhaps eliminate completely, the exclusive right of the copyright owner of a motion picture to prepare certain derivative works - such as novelizations - based on the copyrighted work.61

Proponents of colorization also expressed concern over what they termed the “radical alteration” that the Integrity Act would work on existing copyright law:

The proposal stands the Copyright Act on its head by endowing non-copyright owners with rights generally reserved for copyright owners. It permits non-copyright owners to sue copyright owners who alter a movie without the written consent of the so-called ‘artistic authors.’ The bill also takes the extraordinary step of denying copyright status to a motion picture that is altered without the consent of the ‘artistic author’.... Thus, not only can the producer be sued as if he were a copyright infringer, he is also denied the ability to exploit his work!62

The Integrity Act also raised questions about the constitutionality of its provision that the right of consent given to artistic authors outlives the life of the copyright in the film.63 “Given the constitutionally-limited term of copyright,64 can Congress amend the Copyright Act to grant rights that exist in perpetuity?”65 Further constitutional problems were raised concerning § 119(d) of the bill, which

61 Oman, supra note 51, at 26. The use of the term, “material alterations, including colorization” was an apparent attempt to include practices other than colorization, which is merely the most publicized of the many alterations routinely done to films for presentation on television. Among these are panning and scanning (i.e. eliminating sizeable portions of the frame of the film image to fit the television format), time compression and expansion (where the rate of frames per second is altered to fit time format requirements), and editing of “objectionable” material for television. For a discussion of these practices, see Belton, The Shape of Money, Sight & Sound, Winter 1987-88, at 44.
62 Statement of David Brown, on Behalf of the Motion Picture Association of America, Before the House Judiciary Subcommittee on Courts, Civil Liberties and the Administration of Justice, June 21, 1988, at 3.
63 Integrity Act, supra note 49, at § 119(c).
64 Article I, cl. 8, § 8 of the United States Constitution authorizes Congress to “promote the progress of science and the useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.”
65 Brown, supra note 62, at 4.
would allow the remedies for copyright infringement to be applied to acts of unauthorized material alteration:

With respect to criminal remedies, application of section 506 would make criminal an act of willful unconsented material alteration of a motion picture for purposes of commercial advantage or private financial gain. Given the overbreadth of the concept of 'material alteration,' rendering such acts criminal raises constitutional due process concerns. Even if the provision is constitutionally permissible, there remains a policy question as to whether potential criminal liability would inhibit any sort of alteration of a film regardless whether it is permissible under the material alteration provision. Such a chilling effect on expression might raise First Amendment problems.

Finally, proponents of colorization argued that creating moral rights via legislation is unnecessary in view of many rights already granted to directors and screenwriters in their respective guild agreements. Granting moral rights to directors and screenwriters via legislation that would supercede the guild agreements would cripple the film industry and would result in a diminished body of work available to the public:

[M]oral rights legislation would hamper the ability of the motion picture industry to respond to new demand by giving non-copyright owners broad power to veto alterations deemed necessary by the copyright owner to successful marketing. This would result in the constricted availability of film and television material to the public, and thereby ultimately undermine the key goal of promoting public access to creative work.

Whatever the merits of these arguments, it is evident that they had their desired effect: the Integrity Act never made it out of subcommittee for consideration on the floor of the House. Opponents of colorization would have to look to other legislative efforts, less sweeping and ambitious - and, in their view, far less satisfactory - for help in curtailing the onslaught of the "coloroids."

THE FILM DISCLOSURE AND PRESERVATION ACT OF 1988

A far less ambitious attempt to deal with the colorization issue was made by Congressman Robert W. Kastenmeier (D-Wis.) in his "Film Disclosure and
Preservation Act of 1988.\textsuperscript{70} As chairman of the Subcommittee on Courts, Civil Liberties and the Administration of Justice, and as chief sponsor of the Berne Implementation Act,\textsuperscript{71} Congressman Kastenmeier would have been well aware of the opposition to moral rights legislation which kept the Integrity Act bill languishing in subcommittee. Thus, rather than approaching the issue via the copyright law, as Congressman Gephardt sought to do with the Integrity Act, Congressman Kastenmeier thought it "wiser" to approach the issue by proposing an amendment to the trademark law as embodied in the Lanham Act.\textsuperscript{72}

The key provision of the Disclosure Act was its proposal for creation of a new § 43(c) of the Lanham Act:\textsuperscript{73}

(c)(1)(A) Each public exhibition of a materially altered film, including a film that has been colorized, and all promotional activity and rental activity relating to that film, shall include a clear and conspicuous disclosure of the following:

(i) That the film has been materially altered from the form in which it was first released to the public.
(ii) The nature of that alteration.
(iii) The fact of any objection, if any, by any aggrieved party to any such alteration.

The Disclosure Act would require anyone proposing to exploit a materially altered film to make a "good faith effort to notify" anyone who might be an "aggrieved party" by such action, so that such party can indicate any objections to such alteration.\textsuperscript{74} "Aggrieved party" is defined as "the principal director, principal screenwriter, principal editor, or principal cinematographer of the film."\textsuperscript{75} If there is failure to include "clear and conspicuous disclosure," a court may allow the aggrieved party appropriate equitable relief, actual or statutory damages, as well as court costs and attorney fees.\textsuperscript{76} Punitive damages may be awarded when there is no good faith effort to notify.\textsuperscript{77}

Despite the vigorous protests to the lack of definition or limitation to the term

\textsuperscript{71} See supra notes 45 and 47.
\textsuperscript{73} To be designated as 15 U.S.C. 1125(c). Disclosure Act, supra note 70, at § 2.
\textsuperscript{74} Disclosure Act. supra note 70, at § (c)(1)(B).
\textsuperscript{75} Id. at § (c)(3)(B)(I). Also designated as "aggrieved party" is an agent of any of the principal artists, § (c)(3)(C)(II), or a representative of the appropriate professional guild in the absence of the artist or agent, § (c)(3)(B)(III).
\textsuperscript{76} Id. at § (c)(3)(B)(I).
\textsuperscript{77} Id.
“material alteration” in the Integrity Act, this term was also left undefined in the Disclosure Act. Congressman Kastenmeier made it clear, however, that this was due only to the fact that such a term was very difficult to define, and called for discussion of what practices should be specifically included or exempted from the definition of the term. Also left open was the form that the required disclosure would take:

The bill does not set forth specific examples of disclosure that would satisfy its requirements. Instead, it seeks the cooperation of the various parties who have a stake in the disclosure, and in the creating and exhibiting of these films, in developing and agreeing upon appropriate disclosure standards. It is these parties, rather than the U.S. Congress, who know the intricacies of the art - and the business - of making and distributing a film, and they are the ones who know what kind of disclosure makes sense.

Further provisions of the Disclosure Act sought to establish a National Film Preservation Commission to “determine methods to encourage the restoration and preservation of films.”

Perhaps in an attempt to deflect criticism of the bill on moral rights grounds, Congressman Kastenmeier characterized his bill as a “consumer protection measure”:

The purpose of the disclosure requirement is twofold: First, it permits viewers of films to know what they are seeing. While it may be current practice to advertise a film as the “colorized version,” or to advise that a film has been edited for television or airline viewing, my bill would require such disclosure in all cases of material alteration, and ensure that it is made clearly and conspicuously. In this sense, then, the bill is a consumer protection measure.

While careful not to attempt to curtail copyright owner’s rights to commercially exploit their films, Congressman Kastenmeier sought to give the creative artists involved at least a modicum of rights in preserving the integrity of the films, again justifying it as a consumer-oriented measure:

[T]he bill gives certain creative interests in the film the right to object to those material alterations. These parties generally do not now have such a right. Their objections would not serve to stop exhibition of
films, because under our copyright laws they are not the owners of the films. This provision is therefore a careful balance between the creative integrity of these artists and the copyright interests of the films’ owners. In addition, I believe that many consumers would wish to know whether the director, screenwriter, cinematographer, and editor agree with the alterations. In this sense as well, then, the bill protects the consumer. 83

Such a modest approach - avoiding the more controversial aspects of the moral rights issue, avoiding any attempt to interfere with the well-established economic rights of copyright ownership, while emphasizing the consumer-protection aspects of the bill - is understandable in view of Congressman Kastenmeier’s experience with the Berne Implementation Act. 84 In keeping with the prevailing “minimalist” view regarding U.S. adherence to the Berne Convention, 85 the Disclosure Act was a carefully drawn attempt to deal with colorization by slightly modifying existing laws. 86

Understandably, support for the Disclosure Act from opponents of colorization fell far short of being enthusiastic. At the request of Congressmen Kastenmeier and Carlos J. Moorhead (R-Calif.) on behalf of the Subcommittee on Courts, Civil Liberties and the Administration of Justice, the Copyright Office held hearings on September 8, 1988, to explore the impact of colorization and related technologies on consumers, artists, producers, and distributors. 87 Comment on the Disclosure Act was noticeably absent; rather, opponents of colorization continued to press for regulations or legislation to prevent colorization altogether.

As with the Integrity Act, also under the jurisdiction of the Subcommittee on Courts, Civil Liberties, and the Administration of Justice, the Disclosure Act did not make it out of subcommittee for consideration on the floor of the House. This was not due to any strenuous objections to the bill. Rather, it was because of the surprise introduction of the “National Film Preservation Act of 1988” 88 through an entirely unrelated committee, 89 which drew the attention of opponents and proponents of colorization, and the entire Congress itself.

83 Id.
84 See supra note 47.
85 Id.
86 Some precedent for applying existing laws to vindicate the moral rights of artists was established in Gilliam v. American Broadcasting Co., 538 F.2d 14 (2d Cir. 1976). In that case, the court ruled that the artist had a cause of action under section 43(a) of the Lanham Act to prevent mutilation of his original work. The Gilliam court suggested other areas of existing American law that might be used to prevent such alterations, such as contract law, or the tort of unfair competition. Id. at 24. For an assessment of the potential effectiveness of these and other existing federal and state laws in preserving the integrity of artistic works, see generally Sessa, supra note 2; Kohs, supra note 4; Bader, supra note 8; Schiller, supra note 8.
87 Hearing Explores Film Colorization and other Audiovisual Technologies, 36 PAT., TRADEMARK & COPYRIGHT J. (BNA) no. 897, at 493 (Sept. 15, 1988).
88 See infra note 90.
89 See infra note 90 and accompanying text.
The "National Film Preservation Act of 1988" was initially introduced by Congressman Robert Mrazek (D-NY), and added to the Interior Department funding legislation on June 16, 1988, by the House Appropriations Committee. The Mrazek bill sought to create a National Film Commission, under the jurisdiction of the Secretary of the Interior, which would determine films that were "artistically significant," and then provide these films with limited protection against material alteration. Protection would come in the form of a labeling requirement to disclose if the principal director or screenwriter wished to be disassociated from the film in its altered version. The Mrazek bill would have added a new section 119 to the Copyright Act, making it an infringement to publicly disseminate such films without the required disclosure, and in the case of colorized films, to publicly disseminate such films under their original title.

To alleviate the concerns of senior members of the Judiciary Committee that the Mrazek bill would give the National Film Commission power to amend the copyright laws, Congressman Sidney Yates (D-Ill.) offered a substantially amended version of the bill. The Yates amendment deleted the provisions in the Mrazek bill that amended the Copyright Act, and called for the establishment of a National Film Registry in the Department of the Interior for films that were "culturally, historically or aesthetically significant." Rather than make it illegal to show materially altered films without proper labeling, as the Mrazek bill had done, the Yates amendment provided for the creation of a seal indicating that the film had been selected for inclusion in the Registry as "an enduring part of our national cultural heritage." This seal could only be displayed in connection with a film that was included in the Registry and that had not been materially altered. Where the Mrazek bill would have automatically required labeling for any material alteration to films determined to be artistically significant, the Yates amendment required the Secretary of the Interior to establish criteria for determining "whether a registered film had been materially altered or colorized."

Perhaps because it had been approved by the Appropriations Committee and attached to the Interior Appropriations bill just a few days earlier, very little attention was given to the amended Mrazek-Yates bill at the subcommittee hearings of June 1988.

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91 House Passes Measure to Create National Film Preservation Board, 36 PAT., TRADEMARK & COPYRIGHT J. (BNA) no. 888, at 267 (July 14, 1988).
92 Id.
93 Id.
94 Id.
95 Id. at § 3(C).
96 Id. at § 5.
97 Id. at § 5.
98 Id. at § 5.
99 Id. at § 3(D).

However, reaction to the Mrazek-Yates bill on other fronts was vehement. Proponents of colorization were "stunned" by the attachment of the bill to Interior Appropriations legislation. They objected to the fact that this had occurred without any notice to interested parties or to the public, and without any public hearings. More seriously, the measure had been attached in violation of House rule XXI, clause 2, which prohibits appropriations bills from carrying substantive legislation. Not only proponents of colorization, but many members of Congress complained that this was an attempt to circumvent normal congressional channels. Members of the Judiciary Committee complained that their jurisdiction over the subject matter of the bill had been usurped.

Nonetheless, on June 29, 1988, the House Rules Committee introduced a resolution "Waiving Points of Order Against Consideration of H.R. 4867." Because the Yates amendment had circumvented the thorny copyright issues of the original Mrazek bill, the Rules Committee recommended waiver of points of order against the bill so that it could be considered for House approval. In subsequent debate on the resolution, Congressman Don Edwards (D-Calif.) objected to substantive, rather than procedural, aspects of the bill:

[E]stablishing a national film commission to pass on the merits or value of a film... is an unprecedented and unwarranted extension of Federal power over privately produced works of art. ... We should not have an agency or a commission of the Federal Government judging private works of art, films. ... This provision creates a commission that will be a new arm of the Federal Government, paid for by the Federal Government, that will judge films and rate them as classics or nonclassics, granting and denying certain protections accordingly. This is content-based Government regulation of speech. In simple terms,... it smacks

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99 See supra note 48 and accompanying text.
100 See supra note 59.
101 See supra notes 61-69 and accompanying text.
103 Id.
105 See Easton, supra note 102.
of censorship.\textsuperscript{109}

In response, Congressman Yates emphasized that the commission would not be composed of government officials, but of members of various private organizations connected with film industry interests.\textsuperscript{110} As for making aesthetic judgments, Congressman Yates pointed out that there is substantial precedent for such action in the Historic Preservation Program, which evaluates and selects certain buildings to be preserved as historic national landmarks.\textsuperscript{111}

Despite the protests, the House passed the resolution by a vote of 342-57;\textsuperscript{112} H.R. 4867, with the Mrazek-Yates bill attached, was then passed by a vote of 361-45.\textsuperscript{113}

The Mrazek-Yates bill met further obstacles when it was referred to the Senate Appropriations Committee. The Senate passed H.R. 4867 on July 13, 1988, but with the Mrazek-Yates bill deleted.\textsuperscript{114} However, after a House-Senate conference on H.R. 4867, members of both committees reached agreement on an amended version of the Mrazek-Yates bill, and reported the bill for approval of Congress on August 10, 1988.\textsuperscript{115}

The National Film Preservation Act of 1988, in this final form, began with several "findings": "(1) motion pictures are an indigenous American art form that has been emulated throughout the world; (2) certain motion pictures represent an enduring part of our Nation’s historical and cultural heritage; and (3) it is appropriate and necessary for the Federal Government to recognize motion pictures as a significant American art form deserving of protection."

Instead of the Secretary of the Interior, who had been given jurisdiction for the sole purpose of justifying inclusion of the Measure in the Interior Appropriations bill, it was now the Librarian of Congress who was empowered to establish a National Film Registry "for the purpose of registering films that are culturally, historically, or aesthetically significant."\textsuperscript{116} The Librarian would have the responsibility of establishing criteria for guidelines under which films could be included in the Registry, the only restriction being that no film could be included until ten years after its initial theatrical release.\textsuperscript{117} The Librarian would establish procedures by

\textsuperscript{109} Id. at H4855.
\textsuperscript{110} Id.
\textsuperscript{111} Id.
\textsuperscript{112} Id. at H4856.
\textsuperscript{113} See supra note 91.
\textsuperscript{116} Id. at § 1.
\textsuperscript{117} Id. at § 2.
\textsuperscript{118} Id. at § 3(a)(1)(A).
which the public could recommend films for inclusion, and general guidelines by which owners and distributors of registered films could determine whether they have been materially altered.

The Librarian would establish a National Film Preservation Board to be comprised of thirteen members, to review films nominated for the Registry and to consult with the Librarian regarding the choice of films to be included, the criteria to be established, and other duties of the Librarian. The Board would be limited to nominating twenty-five films per year, and the Librarian limited to including a maximum of twenty-five films per year in the Registry.

For films included in the Registry and which are presented or sold to the public without any material alterations, the Librarian will provide a seal indicating its inclusion in the Registry as "an enduring part of our national cultural heritage." It is a violation of the Act for any person to "knowingly distribute or exhibit to the public a version of a film which bears a seal" if that film is not included in the Registry, or if it is included but has been materially altered.

For any distribution or exhibition of a registered film that has been materially altered, the Act requires a label to appear in the form of a panel card immediately preceding the film which reads: "This a materially altered version [or, in the case of a colorized film, a 'colorized version'] of the film originally marketed and distributed to the public. It has been altered [or 'colorized'] without the participation of the principal director, screenwriter, and other creators of the original film."

The remedies for misuse of the seal and for violations of the labeling requirement remained the same as in the original Mrazek-Yates bill: upon application by the Librarian to the Attorney General, the United States District Courts have jurisdiction to prevent such violations. Except for cases in which a pattern of willful violation is found, for which civil fines up to $10,000 and appropriate

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119 Id. at § 3(a)(2)(B).
120 Id. at § 3(a)(1)(C). Provisions in the Mrazek-Yates bill that would have created procedures for removing films from the Registry were deleted.
121 Id. at § 8(a)(1). One member would be selected from each of the lists of candidates submitted by thirteen named organizations, including professional organizations of producers, directors, actors, broadcasters, critics, and several film schools.
122 Id. at § 10(a). There were also provisions to establish procedures for appeals to the Librarian by owners, exhibitors, or distributors of a film regarding its inclusion in the Registry, or a determination that it had been materially altered. Id. at § 3(c)(1).
123 Id. at § 10(b).
124 Id. at § 3(a)(2)(A).
125 Id. at § 3(a)(2)(C).
126 Id. at § 5.
injunctive relief is authorized. In "relief shall be limited to the prospective inclusion or application of, or removal of, a label as appropriate." The most significant alteration in the final form of the bill is in its definition of "material alteration." In the Mrazek-Yates bill, this term specifically included "fundamental changes in the film such as colorization, substitution of characters' bodies and faces, significant changes in theme, plot and character." Specifically excluded were the insertion of commercials or public service announcements. As amended by the House-Senate conferees, "material alteration" now means "to colorize or to make other fundamental post-production changes in a version of a film for marketing purposes but does not include changes made in accordance with customary practices and standards and reasonable requirements of preparing a work for distribution or broadcast."

The original language in the Mrazek-Yates bill would have included practices such as panning and scanning, time expansion and compression, and editing for television beyond the requirements of the Federal Communications Commission, within the scope of "material alterations." In its present and final form, the term does not apply to those changes made in accordance with 'customary practices and standards....' By inclusion of this language excepting these normal practices, the conferees intended to grandfather-in the standard procedures used to prepare a film for broadcast.... For example, practices such as panning and scanning, time compression, time expansion, and customary editing to meet time formats are common in the preparation of films for broadcast television, videocassette sale and rental, and cable viewing. These practices,... are not intended to be 'material alteration' under this definition.

A further amendment to the Mrazek-Yates bill assures that any broadening of the meaning of "material alteration" could only be achieved through congressional action. The Mrazek-Yates bill called for the periodic convening of a panel of experts culled from representatives of professional film organizations, "solely to advise the Board on a definition of 'material alteration'." In its final form, the provision reads, "solely to advise the Board on whether it is necessary to petition Congress to revise the definition...."
In its final form, the Preservation Act has further limitations on its reach and effectiveness in that the Act will be effective for only three years from the date of its passage. However, the Preservation Act expanded the potential number of films within its scope by amending the original provision that "this Act shall not apply to any films materially altered prior to said effective date." Now the Act excludes only those films materially altered prior to the effective date if such film is owned by an individual for personal use, or is already in the inventory of manufacturers, packagers, distributors, or retailers of video cassettes at the time of passage of the Act. Thus, any film that has been altered or colorized for broadcast on television prior to the effective date of the Act, would be required in the future to display the appropriate label if it has been included in the film Registry.

The House and the Senate both approved the conference report on September 8, 1988; President Reagan signed the National Film Preservation Act of 1988 into law on September 27, 1988.

CONCLUSION

Colorization per se was the most publicized aspect of the larger issue of the material alteration of films. While the fight for moral rights legislation to curtail the material alteration of films will no doubt continue, the real battle over colorization was probably lost when the Copyright Office decided to register colorized films for copyright protection as derivative works. Had the Copyright Office decided otherwise, it is doubtful that the colorizers would have continued to invest the substantial sums of money required to colorize even a single film.

With passage of the National Film Preservation Act, opponents of colorization achieved a small moral victory, if not the vindication of their moral rights which they sought. The Act ultimately does little to satisfy the concerns of colorization opponents, because it does little to restrict the continued colorization of old black and white films:

In its present form, the National Film Preservation Act does little more than honor a small number of films as being culturally significant and

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138 Id. at § 13.
139 Mrazek-Yates supra note 95, at § 13.
140 Preservation Act supra note 115, at § 13. There is, however, a provision to include such films within the scope of the labeling requirements if the packaging of the film has been accelerated in contemplation of imposition of this requirement. Id. at § 4(c)(1).
141 The effective date would be 45 days after the publication of the name of the film in the Federal Register, indicating its inclusion in the Film Registry. Id. at § 4(b).
142 See supra note 91.
143 Pub. L. No. 100-446.
144 See supra note 11.
145 It costs an average of $250,000 to $300,000 to colorize the normal-length feature film. Kohs, supra note 4, at 4.
require that a very few colorized films be labeled as such. Since the owners of colorized films are perfectly willing, if not eager, to publicize the fact that these films are colorized, then this requirement is rather superfluous.\textsuperscript{146}

Nonetheless, proponents of colorization still seem troubled by the legislation. In commenting on the Preservation Act, Roger Mayer of Turner Enterprises expressed concern that the required labeling would have a "negative effect" on the commercial market ability of the colorized films.\textsuperscript{147} Proponents of colorization all invoke the right of the public, speaking through the marketplace, to decide what it will see.\textsuperscript{148} If this is truly what they seek, proponents of colorization should not be afraid of laws that require giving the public full notice of what they are viewing, and that allow it to evaluate for itself the positive or negative effects.

It is just such a "negative effect" on the perception of the public toward altered films that would be the true victory for film artists, and ultimately for all artists. In responding to the argument that the public does not want to see films in black and white, Woody Allen asserted that the proper focus should be to "cultivate the audience back to some level of maturity rather than to doctor the film artificially to keep up with lowered tastes."\textsuperscript{149} The Preservation Act should be viewed by opponents of colorization as a first step in such a process.

From the viewpoint of colorization opponents, the Integrity Act, with its bold assertion of moral rights for film artists, would obviously have been the most satisfying legislation. But even if the United States had already been a long-standing member of the Berne Convention, it is doubtful that such a measure could have passed, for the Integrity Act went beyond the scope of the Berne Convention in its grant of moral rights. The artist's right to object to alteration of his work under Berne is limited by the language, "...which would be prejudicial to his honor or reputation."\textsuperscript{150} The Integrity Act would have allowed the artist to object to any alteration, without any such limitation. Despite its failure to attract much support in the One-Hundredth Congress, there is some speculation that the Integrity Act will be reintroduced in the One-Hundred-First Congress.\textsuperscript{151} If so, it will need to be substantially revised and clarified for any realistic chance of passage.

In comparison to the Preservation Act, the Disclosure Act held certain advantages for opponents of colorization. First, it would have applied to all films, regardless of subjective perceptions of aesthetic value. Further, as with the Integrity

\textsuperscript{147} See supra note 87.
\textsuperscript{148} See supra note 31 and accompanying text.
\textsuperscript{149} See Against, supra note 14, at 80 (testimony of W. Allen).
\textsuperscript{150} See supra note 46 and accompanying text.
\textsuperscript{151} Telephone conversation with Fred Klipper, of the Motion Picture Association of America.
Act, the Disclosure Act would have provided for private remedies for violations of its provisions, thus allowing interested parties a direct means of enforcing the law. The Preservation Act provides for action on the part of the government only, thus raising the question of how effective or conscientious enforcement of the Act will actually be. Opponents of colorization would be wise to press for reintroduction and passage of the Disclosure Act in the next Congress. The provisions of the Disclosure Act, with some modifications, would be a complement to the Preservation Act, and would mark another step in the march toward recognition of moral rights for artists in general.

The real significance of the National Film Preservation Act is in its recognition of a national interest in the preservation of films as cultural landmarks, and in its recognition, however slight, of the artist's moral right to have his audience aware of the original and intended form of his work. The passage of this Act, along with recent passage of the Berne Implementation Act, may signal the beginning of a gradual development of a substantial body of moral rights protection for artists in American law.

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