

4-1-1989

Colorization: Removing the Green

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Recommended Citation

Richard T. Kilgore, *Colorization: Removing the Green*, 6 U. Miami Ent. & Sports L. Rev. 87 (1989)

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COLORIZATION: REMOVING THE GREEN

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I. INTRODUCTION

Is “old brown eyes” back? In the colorized version of the thriller *Suddenly*, Frank Sinatra’s famous eyes have gone from blue to brown.¹ Colorization is the process which results in the computerized coloring of films that originally were produced in black and white.²

The colorization process is essentially akin to painting by numbers, only with computer sophistication. A computer artist initially colors a single frame of a film assigning one of 50,000 available hues to each of the 525,000 pixels, or dots, that may constitute any given frame. Once this frame has been colored, the computer keeps track of each object as it moves from frame to frame, but only until the scene changes. When a new scene appears, the process must be repeated.³

The end result is a film that now has various colors where once there were only black, white, and shades of grey.

Colorization has been criticized roundly by filmmakers, performers, and critics for injecting unnatural and undesirable tones

1. G. Siskel, *Siskel & Ebert*, (Buena Vista, syndicated television program aired 5/2/87-5/8/87) (transcript on file with the University of Miami Entertainment & Sports Law Review).

2. See Note, *Artists’ Moral Rights and Film Colorization: Federal Legislative Efforts To Provide Visual Artists With Moral Rights And Resale Royalties*, 38 SYRACUSE L. REV. 965, 984 n.134 (1987); COLOR SYSTEMS TECHNOLOGY, 1987 ANNUAL REPORT 2 (1988).

3. Kohs, *When Art and Commerce Collide: Colorization and the Moral Right*, 18 J. ARTS MGMT. & L. 13, 14 (Spring 1988). For this reason, the colorization process is painstakingly slow—it sometimes takes several hours to complete just one minute of film.

into images that were designed to take advantage of the effects of light and shadow, and be viewed in black and white.⁴ For example, in a colorized *Yankee Doodle Dandy*, the colors bleed as James Cagney dances across the stage.⁵ Ginger Rogers, referring to her appearance in a colorized film, said she was embarrassed to be "painted up like a birthday cake."⁶ Director Elliot Silverstein has called the colorizing computer an "ingenious instrument of defacement,"⁷ another way filmmakers' "children" are "tortured and butchered."⁸ Yet, despite intensive criticism, the colorization industry has grown at a phenomenal pace.⁹ This growth has

4. See *infra* notes 32-35, and accompanying text.

5. G. Siskel, *Siskel & Ebert*, *supra* note 1.

6. *Film Integrity Act of 1987: Hearings on H.R. 2400 Before the Subcomm. on Technology and the Law of the Senate Comm. on the Judiciary*, 100th Cong., 1st Sess. (1987) (statement of Ginger Rogers, film performer), reprinted in *Colorization: The Arguments Against*, 17 J. ARTS MGMT. & L. 79, 86 (Fall, 1987) [hereinafter *Arguments Against*].

7. *Arguments Against*, *supra* note 6, at 93 (statement of Elliott Silverstein, film director, member of the Director's Guild of America).

8. *Id.* at 89. Movies are altered in other ways to make them suitable for broadcast television, including speeding the film up and employing a method known as "panned and scanned." Speeding up occurs when the film is transferred to tape; one or two frames per second are dropped from the film and several minutes over the course of the film are created for the insertion of commercials. "Panned and scanned" results from the difference in the width of a frame size when transferring the film from the wide screen of movies to the narrower screen of television. This method is achieved either by showing only one part of the frame or by moving a scanner across the film showing different parts of a frame at different moments. Silverstein states that this scanning process "imposes a rhythm, emphasis, movement and imagery foreign to the film makers idea." *Id.* at 89-90. Yet, normal panning and scanning and speeding up do not result in actionable copyright violation. Courts have held that cutting or editing *significant* portions of a film or television program before airing it is a violation of the original program producer's copyright. See *WGN Broadcasting Co. v. United Video, Inc.*, 693 F.2d 622, 625 (7th Cir. 1982); *Gilliam v. American Broadcasting Cos.*, 538 F.2d 14, 20 (2d Cir. 1976). Colorization does not involve the editing or cutting of any portion of the film; it merely involves adding color. But this is significant, for the intangible portion of the film—the film's artistic message or impact—may be seriously damaged by the addition of color. See *generally infra* notes 29-35 and accompanying text. For example, in the original version of Frank Capra's *It's A Wonderful Life* (RKO Radio Pictures 1942), the coldness and malevolent nature of Lionel Barrymore's banker character is presented and emphasized by the stark contrast of the harsh light on his stone, white face with the dark black of his suit and the background. Yet, in the colorized version of the film, Barrymore's face appears a soft flesh color which serves to humanize his character and diminish the impact upon the viewer of his indifference. See G. Siskel, *Siskel & Ebert*, *supra* note 1.

9. Presently, there are two major firms in the colorization field: Colorization, Inc. of Toronto, Canada and Color Systems Technology (Color Systems) of Marina del Rey, California. Allen, *Copyrights and Color Wrongs: Are Old Films Protected?*, CAL. LAW., Apr. 1987, at 12. The growth in this field has been tremendous. In one year, 1986 through 1987, revenues for Color Systems increased over 500%, from \$846,000 to \$5,207,000. COLOR SYSTEMS TECHNOLOGY, ANNUAL REPORT, *supra* note 2, at 3. The colorizing firms merely have skimmed the surface of the available film library. Buddy Young, the president of Color Systems, estimates that if output increased one-thousand percent there would still be twenty-

presented serious questions about the way that United States law offers artists protection for their work. This Comment proposes to address some of these questions. Part I explains the process of colorization and sets it in the background of the existing copyright law; Part II offers a discussion of the protections available to creators under European laws and contrasts these with United States laws; Part III discusses the protections that would have been available under the federal Film Protection Act, which was not adopted; Part IV is the conclusion of this Comment.

A. Copyright

On June 19, 1987, the Library of Congress' Copyright Office proposed that makers of colorized copies of black and white films could file for copyright protection as derivative works.¹⁰ This means that the colorized film's creator receives a copyright in the film entirely unique and separate from that of the original black and white version. The colorizer need never seek permission of the creator of the original before distributing, copying, exhibiting, or otherwise reproducing the colorized copy, though it is the same film—nothing has been altered but the tonal values.¹¹ Under this ruling, colorized movies are eligible for copyright if they "reveal a certain minimum amount of individual creative human authorship

five years of film to convert—in the domestic market alone. COLOR SYSTEMS TECHNOLOGY, THE COMPANY 3 (1988) (informational statement about Color Systems Technology, Inc.) (copy on file with the University of Miami Entertainment & Sports Law Review). Even with recent advances in technology, Color Systems has achieved only a 200 percent increase in productivity.

Color Systems recently entered into a joint venture with Coca-Cola Telecommunications, Inc. to form Screen Gems Classicolor (Screen Gems). COLOR SYSTEMS TECHNOLOGY, ANNUAL REPORT, *supra* note 2, at 2. Screen Gems will control a television and feature film library worth over one-hundred million dollars. Color Systems will share in the profits from the worldwide distribution of the library and will be paid by Screen Gems for colorizing black and white footage. Color Systems also entered into an agreement with Trafalgar Holdings, Ltd. to colorize over sixty public domain films—*i.e.*, films upon which there is no copyright restriction. See *infra* note 16. Through this agreement, Color Systems will earn a minimum of thirty-three million dollars over a three year period if all options are exercised. *Id.*

10. Notice of Registration Decision: Copyright Registration for Colorized Versions of Black and White Motion Pictures, 52 Fed. Reg. 23,443 (1987) (to be codified at 37 C.F.R. § 202); Molotsky, *Colored Movies Ruled Eligible for Copyright*, N.Y. Times, June 20, 1987, at 9 (arts/entertainment). See also ANNUAL REPORT, *supra* note 2. On August 9, 1988 the Copyright Office adopted a final deposit regulation. See Copyright Registration For Colorized Versions Of Black And White Motion Pictures; Final Rule, 53 Fed. Reg. 29,887, 29,887-890 (1988).

11. But this alteration is artistically, and perhaps legally, significant. See *infra* notes 32-35 and 78-158.

and are produced by existing computer-coloring technology."¹² They are ineligible if only a few colors are added to an existing black and white movie.¹³

The criteria for determining eligibility for colorization copyright include: (1) Human beings must make numerous color selections from a large inventory of color;¹⁴ (2) there must be more than a trivial variation in the range and extent of color; (3) the colorization must change the overall appearance of the movie; and (4) simply removing the color will not create eligibility.¹⁵

Colorizers whose films meet these criteria will receive a copyright in their derivative works, granting them protection against infringement for life plus fifty years or, in some cases, up to seventy-five years.¹⁶ They will have the right to distribute the work through theatres, network television, and cable television, and to sell or rent videotape copies.¹⁷

12. *Id.* at col. 5.

13. *Id.*

14. *See supra* text accompanying note 3.

15. *Id.*

16. Davis, *Computer-Colored Films Are Entitled To Copyright Protection*, Agency Rules, Wall St. J., June 22, 1987, at 30, col. 2. *See also* Molotsky, *supra* note 10. Most films are works for hire and therefore are entitled to 75 years of protection from the year of first publication under § 302(c). All other works automatically receive protection for life plus 50 years under the Act.

Copyrights may be renewed. If they are not, the copyrighted materials lapse into the public domain and may be copied, exhibited, distributed, or otherwise reproduced without the need to obtain permission of the artistic author, or to pay him royalties. *It's A Wonderful Life* (RKO Radio Pictures 1946) is an example of a film that lapsed into the public domain. *Film Integrity Act of 1987: Hearings on H.R. 2400 Before the Subcomm. on Technology and the Law of the Senate Comm. on the Judiciary*, 100th Cong., 1st Sess. (1987) (statement of Rob Word, Senior Vice-President of Hal Roach Studios, Inc.), reprinted in *Colorization: The Arguments For*, 17 J. ARTS MGMT. & L. 64, 72 (Fall, 1987) [hereinafter *Arguments For*].

The proposed Film Protection Act, discussed *infra* notes 159-164 and accompanying text, would have provided filmmakers with protection against undesired colorization even after the lapse of copyright on the film. The proposed Act was silent as to whether its protections would have been available to films that never were copyrighted.

17. Davis, *supra* note 16; Molotsky, *supra* note 10. This ruling is a major boost to the Turner Entertainment Co., a division of Turner Broadcasting Systems Inc., which acquired the entire MGM film library. Galbraith, *Mayer Says TEC Won't Option Remake Rights To MGM Library*, Variety, Apr. 9, 1987, at 1, col. 2. Since acquiring this library of old movies, Turner has been a leader in contracting to colorize black and white films. *Id.* The films then are slated for broadcast on Turner Broadcasting Systems's cable television superstation WTBS where millions of viewers see them. Significantly, because Turner owns the underlying library of MGM films as well as the colorized versions, Turner would be free to refuse to allow anyone to, or at least discourage anyone from, broadcasting, exhibiting, or otherwise using the original black and white versions of the film, instead offering only its colorized versions.

B. General Arguments For and Against Colorization

The debate over colorization has become a pitched battle between artists and the colorizing entrepreneurs (colorizers). Colorizers argue that there is a demand for colorized films. Arguing that the public prefers color, they point to polls conducted by Cable News Network and the *Today* show showing public support for colorization.¹⁸ In essence, colorizers argue that the market should decide¹⁹ by choosing whether or not to watch and buy colorized films.²⁰

It would seem that the public has decided in favor of colorized films: revenues for the colorized version of *Yankee Doodle Dandy*²¹ were greater in the first six months of sales than in the previous ten years of sales of the original black and white version.²²

The artists respond that “[i]f members of the public had the right to demand alterations to suit their taste, the world would have no real art.”²³ Great paintings would be repainted; novels and music would be rewritten to suit present tastes.²⁴ The artists argue that efforts should be directed toward elevating the artistic appreciation of the audience rather than trying to “doctor the film artificially to keep up with lowered tastes.”²⁵

The colorizers’ strongest argument is that they do not destroy the original black and white prints when colorizing a film.²⁶ The first step in the process is to make a videotape print from the black and white original.²⁷ This means that the original black and white

18. Secunda, *Is Movie Colorization A Moral Issue For Broadcasters?*, Broadcasting, May 25, 1987, at 20. The CNN call-in poll showed that more than 60% of the respondents favored colorizing. *Id.*

19. Krauthammer, *Casablanca in Color? I'm Shocked, Shocked!*, TIME, Jan. 12, 1987, at 82 (Essay).

20. Secunda, *supra* note 18; Krauthammer, *supra* note 19. Krauthammer responds to film critic Gene Siskel’s theory that colorizing should be proscribed (“It’s a decision the public shouldn’t have to make.”), by charging that the democratic solution is to let the public decide. He compares Siskel’s statement to something the Russian Minister of Culture might have said. *Id.*

21. (Warner Bros. 1942)

22. Galbraith, *supra* note 17.

23. *Arguments Against*, *supra* note 6, at 81 (statement of film director and actor Woody Allen).

24. *Id.*

25. *Id.*

26. Krauthammer, *supra* note 19; COLOR SYSTEMS TECHNOLOGY, THE PROCESS (1988) (informational statement describing the colorization process) (copy on file with the University of Miami Entertainment & Sports Law Review).

27. Krauthammer, *supra* note 19; COLOR SYSTEMS TECHNOLOGY, THE PROCESS, *supra* note 26. The colorizers argue that, far from having reckless disregard for black and white films, they actually have restored and preserved many old black and white prints that have

print is always available.²⁸

At present, artists and others who oppose colorization have one very strong argument: the process currently produces a product that looks artificially colored rather than naturally colored. It is therefore generally unsatisfactory. "[I]n the colorized version of *Night of the Living Dead*²⁹ the sky, the woman's dress, the tombstones and the shirts on both men were all matching violet. . . ."³⁰

[Colorizing] starts not with a blank sheet as a color film does, but with a sheet that is already colored black and white, so [colorizers have] got to find colors they can lay on top so they will show up. So they tend to pick . . . light blues, light greens, pinks, violets, yellows³¹

However, as the process is improved, the quality will be less open to attack.

Perhaps the best argument, and the more enduring one, is that black and white photography "is not better or worse in general, but [that] it is *different*."³² Black and white movies are "not [simply] color photography with the color removed."³³ The techniques involved in making black and white movies are completely different from those for color movies.³⁴ Because the only colors the di-

deteriorated badly.

The first thing we did was discover in the vaults [of Hal Roach Studios] all the films that were deteriorating These movies were filmed on combustible nitrate stock. . . . There has been no economic reason, up until recently, to preserve those films. . . . The conversion of black and white to color has suddenly provided companies with an economic incentive to restore these films.

Arguments For, *supra* note 16, at 70-71 (statement of Rob Word, Senior Vice-President of Hal Roach Studios, Inc.).

28. Hack, *TeleVisions*, *Hollywood Reporter*, Apr. 28, 1987.

The market for the original black and white print does not remain untouched, however: "The only difference is now, if you want to see the original, the price has gone up." *Id.* (quoting Charles Powell, Executive Vice-President of Color Systems Technology).

For viewers or exhibitors unwilling to pay for the black and white print, colorizers advise them simply to turn down the color on the television to watch the film in black and white. Krauthammer, *supra* note 19. *But see* Collidge, *Letters: A Dissent And An Answer About Colorizing*, Director's Guild of America, *The Newsletter*, Apr. 1987. Many newer color sets do not have a color control knob; for those that do, certain added colors have a density that leaves a blurry shadow even after the color is turned down. *Id.* Therefore, turning off the color on a colorized print does not present a suitable alternative to the original black and white version.

29. (Image Ten 1968)

30. R. Ebert, *Siskel & Ebert*, *supra* note 1.

31. *Id.*

32. *Arguments Against*, *supra* note 6, at 85 (emphasis in original) (statement of film director Sidney Pollack).

33. *Id.* at 92 (statement of film director Elliot Silverstein).

34. *Id.*

rector has to work with are black, white, and infinite shadings of grey, shadow and the relationship between light space and darkness become important elements of the film. As a result of colorization then, integral portions of the artistic value of the film such as the use of lighting design and shadow to create a mood or express an element of the story can be lost.³⁵ Does the artist have any legal right to protect the integrity of his creation?

II. MORAL RIGHTS

The doctrine of copyright under United States law generally grants protection to the creator of artistic work who registers the work with the Office of the Register of Copyrights.³⁶ Copyright protection is a patrimonial, or property, right.³⁷ Copyright protection prevents anyone from copying, exhibiting, distributing, or otherwise reproducing the work without permission of the copyright owner.³⁸ Similar protections are available under the laws of many other countries.³⁹ United States copyright law does not recognize any right beyond the patrimonial rights—specifically, American law does not recognize moral rights.⁴⁰

35. One director has said:

If I had portrayed New York City in color rather than black and white in my movie *Manhattan*, all the nostalgic connotations would have vanished. . . . If I had filmed *Annie Hall* in black and white, all the scenes that now come off amusingly would take a giant step toward grim seriousness by mere virtue of them [sic] suddenly being grittier and less cartoonlike.

Arguments Against, *supra* note 6, at 87 (statement of film director and actor Woody Allen). Obviously, then, the change introduced by colorizers can change the original film substantially.

The colorizers point out that the directors themselves have altered the works of playwrights and novelists when converting their works into movies. Blum, *Emotion Pictures*, THE NEW REPUBLIC, Feb. 9, 1987. Frank Capra bought the story *It's A Wonderful Life*, along with three unsuccessful screenplays, and then rewrote them combining the four for the final film version. The ending of the movie *Little Shop of Horrors* was changed from the play because it was considered too depressing for preview audiences. *Id.* The artists respond that "a film is a new work, only based on a writer's work." *Id.* They argue that the reputation of a playwright or a novelist, as an artist, is not affected. Rosenfeld, *The Color Guard*, Washington Post, May 13, 1987, at F1, col. 2. In contrast, the colorization of a movie is an alteration of a present work and, consequently, colorization damages the reputation of the writer and director.

36. See generally 17 U.S.C. §§ 101-914 (1982 & Supp. V 1987).

37. Merryman, *The Refrigerator of Bernard Buffet*, 27 HASTINGS L.J. 1023, 1025 (1976).

38. 17 U.S.C. § 106 (1982). This restriction applies usually to reproductions for profit. The copyright law recognizes exceptions for educational and other similar uses. See 17 U.S.C. §§ 107-118 (1982).

39. *E.g.* France, Germany, and Italy. See Merryman, *supra* note 37, at 1025.

40. See generally Merryman, *supra* note 37.

Moral rights protect the honor and reputation of the artist⁴¹ from the presentation to the public of a deformed version of his work.⁴² Moral rights include the creator's right to prevent his work from being deformed or mutilated, to be acknowledged as the creator of his work, to prevent others from being credited with his work, to prevent being acknowledged as the creator of work not his own, to withdraw a published work if it no longer represents his views, and to prevent the use of his work or name in such a way as to reflect on his professional standing.⁴³

This doctrine protects the personal rights of the artist as distinguished from economic rights.⁴⁴ Moral rights are "an element of the author's personality rather than a property right."⁴⁵

The moral rights doctrine protects the rights of the creators and the public over those of the entrepreneurs and the performers.⁴⁶ The moral rights of the performer also are protected to the extent that he is a creator; but, given a direct conflict between the rights of the creator and the rights of one performing that creator's work, the creator's rights must be paramount,⁴⁷ for it is the creation of the original work which gives the performer a vehicle in which to display his talents.⁴⁸ If a work is to be modified, the artist's moral rights are implicated.

The issue of who has the burden of extracting an agreement relating to the right to modify a work varies between Europe and the United States.⁴⁹ In France and Italy the burden is on the purchaser; any modification not only must be reasonable, but also the artist must have agreed to the specific proposed modification.⁵⁰ A less protective position is found in the Berne Convention and

41. Moral rights accorded to the artists by implication also are accorded to film directors. This is so even though filmmaking is a collaborative process, unlike other art forms such as writing, painting, sculpting, or composing, in which one envisions a lone artist working in his studio, perhaps by candlelight in the dark of night. Often, several hundred people are involved in the production of a film. "Under the *auteur* theory of film making, the director is the primary artist. The completed film is ascribed to the director, and he is responsible for its artistic successes and failures." Greenstone, *A Coat of Paint on the Past?*, ENT. & SPORTS LAW., Fall 1986, at 24 n.80. Therefore, it is the director who may consent to make changes. 2 M. NIMMER, NIMMER ON COPYRIGHT, § 8.21(a), at 8-247, 8-249 (1986).

42. Roeder, *The Doctrine of Moral Right: A Study in the Law of Artists, Authors and Creators*, 53 HARV. L. REV. 554, 569 (1940).

43. 2 M. NIMMER, *supra* note 41, at 8-247.

44. *Id.*

45. 2 M. NIMMER, *supra* note 41.

46. *Id.*

47. Roeder, *supra* note 42, at 577-78.

48. Roeder, *supra* note 42, at 578.

49. Merryman, *supra* note 37, at 1045.

50. *Id.*

under German law: the purchaser has the burden of obtaining the creator's consent to modify, though the artist does not have to give approval to specific modifications.⁵¹

In the United States the burden traditionally has been on the artist to extract an agreement on modification permission from the purchaser.⁵² If the artist failed to secure an agreement, he will have no right to govern the fate of his work. Over the last few decades there has been a movement in the courts towards a requirement of reasonableness in the modification,⁵³ and one court has accorded full copyright status to the author's right to prevent distortion or excessive editing of his work.⁵⁴ Overall, however, some critics believe American law on the subject is still sorely lacking. One has said, "Little can be said in favor of the United States rule. . . ."⁵⁵

A. *Moral Rights in Europe*

The doctrine of moral rights developed in Europe over several centuries.⁵⁶ It is considered most important in France, Germany, and Italy.⁵⁷ In the latter half of the nineteenth century the French civil courts expanded the doctrine to include the right to prevent deformation of the artist's work.⁵⁸

This doctrine was partially adopted in 1928 at the Berne Convention, as revised in Rome, Article 6 *bis*⁵⁹ as follows:

(1) Independently of the patrimonial rights of the author and even after the assignment of the said rights, the author retains the right to claim the paternity of 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 to his reputation.

(2) It is left to the national legislation of each of the countries of the Union to establish the conditions for the exercise of these

51. *Id.*

52. *Id.*

53. *See, e.g.,* *Preminger v. Columbia Pictures Corp.*, 148 U.S.P.Q. (BNA) 398, (N.Y. Sup. Ct.), *aff'd*, 149 U.S.P.Q. (BNA) 872 (N.Y. App. Div.), *aff'd*, 150 U.S.P.Q. (BNA) 829 (N.Y. App. Div. 1966); *Stevens v. National Broadcasting Co.*, 148 U.S.P.Q. (BNA) 755 (Cal. Super. Ct.), *aff'd*, 150 U.S.P.Q. (BNA) 572 (Cal. Super. Ct. 1966); *Autry v. Republic Prods., Inc.*, 213 F.2d 667 (9th Cir. 1954).

54. *Gilliam v. American Broadcasting Cos.*, 538 F.2d 14 (2d Cir. 1976). *See infra* notes 87-130 and accompanying text.

55. Merryman, *supra* note 37, at 1045.

56. Roeder, *supra* note 42, at 555.

57. 2 M. NIMMER, *supra* note 41, at 8-247 n.1.

58. Roeder, *supra* note 42, at 556.

59. *Id.*

rights. The means for safeguarding them shall be regulated by the legislation of the country where protection is claimed.⁶⁰

The Berne Convention governs the Union for the Protection of Literary and Artistic Works (Union).⁶¹ Although the United States became a signatory to the Berne Convention in 1988, the provisions relating to moral rights is not in force for the United States.⁶²

In most European countries the moral right is perpetual; not even heirs of a deceased artist can change his work.⁶³ In fact, the moral right continues even if no heirs exist.⁶⁴

The European countries' recognition of moral rights arises from their acknowledgement that society has several interests in preventing undesired alterations.⁶⁵ One interest is the public's desire to see the authentic work as the artist intended it, not a distorted version.⁶⁶ A second interest is in the preserving of art as part of culture and history.⁶⁷ To alter the artist's work is to "falsify a piece of culture."⁶⁸ Society has a responsibility to pass on these works to the next generation.⁶⁹ "[W]e should not break . . . into the future by greedily devouring—in fact, cannibalizing—our own past."⁷⁰

60. *Id.*

61. *Id.* at 557.

62. The United States has taken the position that the Convention is not self-executing; Congress, therefore, passed the Berne Convention Implementation Act (BCIA) of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (Oct. 31, 1988) to give the treaty the force of law in the United States. 1 M. NIMMER, *supra* note 41, at Berne Convention Implementation Act of 1988 Supplement. The BCIA specifically left off the list of Berne provisions enacted as law article 6 *bis*. *Id.* In fact, the Act specifically stated, "The adherence of the United States to the Berne Convention and passage of new law 'do not expand or reduce any right of an author' to assert moral rights in any copyrightable work." Berne Convention Implementation Act, § 3(b), *supra*, quoted in 1 M. NIMMER, *supra* note 41, at Berne Convention Implementation Act of 1988.

In March of 1989, the Office of the Register of Copyrights recommended that the Congress consider a unified federal system of moral rights protection. The model used in developing this position was the effect upon existing films' copyrights of new technologies including colorization. Technological Alteration To Motion Pictures And Other Audiovisual Works: Implications For Creators Copyright Owners, And Consumers, A Report Of The Register Of Copyrights (March 1989) (copy on file with the University of Miami Entertainment & Sports Law Review).

63. Merryman, *supra* note 37, at 1041. Germany does not ascribe to this theory.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Arguments Against*, *supra* note 6, at 92 (statement of film director Elliot Silverstein) (commenting that black and white films must be allowed to stand unaltered as a legacy of the black and white era in filmmaking and as cultural symbols).

70. *Id.*

B. *Moral Rights in the United States*

Despite these sound policy reasons, several courts have stated that moral rights are not recognized in the United States.⁷¹ In *Geisel v. Poynter Products, Inc.*⁷² the court stated “[t]he doctrine of moral right is not part of the law in the United States . . . except insofar as parts of that doctrine exist in our law as specific rights”⁷³ In *Gilliam v. American Broadcasting Companies, Inc.*⁷⁴ the court held that the “American copyright law, as presently written, does not recognize moral rights or provide a cause of action for their violation since the law seeks to vindicate the economic, rather than the personal rights of authors.”⁷⁵ However, case law in the United States has recognized some of the substance of moral rights in the guise of the doctrines of unfair competition, defamation, invasion of privacy, and breach of contract.⁷⁶ And, some courts have prohibited editing of films on grounds other than moral rights to protect the director’s creation.⁷⁷

C. *The Moral Right to Prevent Deformation and Unfair Competition*

The right to prevent deformation is the oldest and best known of the moral rights.⁷⁸ It often is regarded as composing the entire doctrine.⁷⁹

71. See, e.g., *Stevens v. National Broadcasting Co.*, 148 U.S.P.Q. (BNA) 755 (Cal. Super. Ct.), *aff’d*, 150 U.S.P.Q. (BNA) 572 (Cal. Super. Ct. 1966); *Gilliam v. American Broadcasting Cos., Inc.*, 538 F.2d 14 (2d Cir. 1976).

72. 295 F. Supp. 331 (S.D.N.Y. 1968).

73. *Id.* at 339 n.5. The plaintiff Geisel is better known by his *nom de plume* Dr. Seuss. In the 1930s, he prepared a series of illustrations with accompanying text for Liberty Magazine. Some thirty years later, defendants manufactured dolls based on the characters Geisel drew in the Dr. Seuss illustrations. He sued, claiming that the dolls were “tasteless, unattractive and of inferior quality.” *Id.* at 333 (quoting Plaintiff’s Complaint at ¶¶ 41 and 23). He pleaded violations of the Lanham Act, 15 U.S.C. § 1125 (a)(1982); unfair competition; violation of his right to privacy; and tortious conspiracy to injure him. The *Geisel* court held that none of these theories were applicable to Geisel’s particular claim. Therefore, because there was no other available right in United States law, and because moral rights are not recognized in the United States, Geisel was not entitled to either damages or an injunction.

Geisel’s allegations sound strikingly similar to the charges leveled against colorizers by film directors. A case in which colorizing destroyed the character of a film would present a court today with the opportunity to depart from the result in *Geisel* and, perhaps, recognize moral rights.

74. 538 F.2d 14 (2d Cir. 1976).

75. *Id.*

76. M. NIMMER, *supra* note 41, at 8-248.

77. Greenstone, *supra*, note 41 at 18.

78. Roeder, *supra* note 42, at 565.

79. *Id.*

American courts have recognized under another name the right to prevent deformation. In *Prouty v. National Broadcasting Co., Inc.*,⁸⁰ the author of the novel *Stella Dallas* brought suit when her character was used by the defendant in broadcasts "of inferior artistic and commercial quality."⁸¹ The court held that this portrayal was damaging to the plaintiff's reputation and could come within the tort of unfair competition in the guise of passing off defendant's work as that of the plaintiff, at once both capitalizing on the plaintiff's name and injuring it.

Though this right applies to the creator's name and reputation, it does not apply to the destruction of the artist's work.⁸² In *Crimi v. Rutgers Presbyterian Church*,⁸³ the artist did a fresco painting for a church. He agreed to obtain and assign a copyright to the church. Eight years later the church redecorated, painting over the fresco without Crimi's consent. The court held that although the mural legally could not be mutilated, the law would not object to its being destroyed.⁸⁴ This seemingly inconsistent result reflects the policy concern of the doctrine of deformation: the basis of the right to prevent deformation of the artist's work is to protect his honor and reputation from being damaged by having work that is not his own attributed to him in the eyes of the public.⁸⁵ If the work is destroyed, there is no possibility that the public will mistake it for the creator's work.⁸⁶

The courts have not articulated a uniform standard as to what actually constitutes deformation. In *Granz v. Harris*,⁸⁷ Judge Frank in his concurring opinion stated that "[w]hether the work is copyrighted or not, the established rule is that, even if the contract with the artist had expressly authorized reasonable modifications . . . it is an actionable wrong to hold out the artist as author of a version which substantially departs from the original."⁸⁸ Judge

80. 26 F. Supp 265 (D. Mass 1939).

81. *Id.* at 266.

82. Treece, *American Law Analogues of the Author's "Moral Right,"* AM. J. COMP. L., 487, 498 (1968); Roeder, *supra* note 42, at 569.

83. 194 Misc. 570, 89 N.Y.S.2d 813 (N.Y. App. Div. 1949).

84. *Id.* at 570, 89 N.Y.S.2d at 813; Treece, *supra* note 82.

85. Roeder, *supra* note 42, at 569.

86. *Id.* Of course, this seems to answer only part of the question. Another identified policy of the doctrine of moral rights is to preserve art as part of culture and history. See *supra* notes 67-70 and accompanying text. Clearly, this policy goal is not served by a rule that allows destruction of the work without penalty. The *Crimi* rule therefore seems imprudent.

87. 198 F.2d 585 (2d Cir. 1952).

88. *Id.* at 589 (Frank, J., concurring).

Frank's concurrence is often cited for the proposition that to do so would be a form of unfair competition.⁸⁹

In *Autry v. Republic Productions*,⁹⁰ actor Gene Autry sought to prevent the editing of his films for television.⁹¹ Autry had signed a contract giving the producer the sole and exclusive right to exploit the character he portrayed.⁹² In holding for the producer, the court noted that the film was only reduced by approximately seven minutes for each hour of broadcasting, which indicated that the edits did not work a substantial change in the film.⁹³ However, the court went on to state that "we can conceive that some such cutting and editing could result in emasculating the motion pictures so that they would no longer contain substantially the same emotion and dynamic and dramatic qualities which it was the purpose of the artist's employment to produce."⁹⁴ The court did not define "substantially" and stated that it would leave open the question of emasculation.⁹⁵

A California Superior court attempted to define "substantially" in *Stevens v. National Broadcasting Co.*⁹⁶ Producer/director George Stevens brought an action under the theory of unfair competition against NBC to prevent commercial interruptions of his film *A Place in the Sun*.⁹⁷ The court stated that the manner in which the commercials were inserted could result in emasculation of the movie.⁹⁸ The court enjoined the defendants from editing the movie in a manner that would "so alter, adversely affect or emasculate the artistic or pictorial quality of said motion picture so as to destroy or distort materially or substantially the mood, effect, or continuity of said motion picture as produced and directed by the plaintiff."⁹⁹ Under this court's holding, a film is emasculated if the mood, the effect, or the continuity is altered.

In *Preminger v. Columbia Pictures Corp.*,¹⁰⁰ producer/director

89. *Id.*

90. 213 F.2d 667 (9th Cir. 1954).

91. *Id.* at 668.

92. *Id.*

93. *Id.*

94. *Id.* at 669.

95. *Id.* at 670.

96. 148 U.S.P.Q. (BNA) 755 (Cal. Super. Ct.), *aff'd*, 150 U.S.P.Q. (BNA) 572 (Cal. Super. Ct. 1966).

97. *Id.* at 758.

98. *Id.* at 755. NBC wanted to insert some thirty to fifty commercials throughout the film.

99. *Id.* at 758.

100. 148 U.S.P.Q. (BNA) 398 (N.Y. Sup. Ct. 1966), *aff'd*, 149 U.S.P.Q. (BNA) 872 (N.Y. App. Div. 1966), *aff'd*, 150 U.S.P.Q. (BNA) 829 (N.Y. App. Div. 1966).

Otto Preminger brought an action to prevent his movie *Anatomy of a Murder*¹⁰¹ from being edited for television.¹⁰² The court first determined that Preminger's contract with Columbia, which gave him final cutting and editing rights, did not include television versions of the film.¹⁰³ The court then stated: "We begin with the proposition that the law is not so rigid, even in the absence of contract, as to leave a party without protection against publication of the garbled version of his work."¹⁰⁴ In this case, the court held that minor cuts were the industry standard and not a mutilation of the work.¹⁰⁵ There was no evidence that the proposed editing for the insertion of commercials would affect the story line.¹⁰⁶ The court did state that "excessive cutting" could be mutilation of the movie.¹⁰⁷ Under the standard set by this New York court excessive cutting could be mutilation where the story line is affected.

This Comment next analyzes whether an artist whose film is colorized, effecting a substantial change, can object to the colorization.

1. When the Artist Has Consented to Modification

Once the artist has granted the authority to alter his work, he is bound, as are his successors in interest.¹⁰⁸ This authority should be non-transferable unless expressly agreed to by the artist.¹⁰⁹

These powers to modify should not be unlimited. The intrinsic aesthetic quality of the work should not be altered; for example, a tragedy should not be made into a comedy.¹¹⁰

Several cases in the United States have limited this power to modify. In *Granz v. Harris*,¹¹¹ the court stated that "[w]hether the work is copyrighted or not, the established rule is that even if the contract with the artist had expressly authorized reasonable modifications, . . . it is an actionable wrong to hold out the artist as

101. (Columbia 1959)

102. *Id.* at 398-99.

103. *Id.* at 400. The practice of permitting a director to produce a final edited version, or "director's cut" which reflects his unadulterated artistic vision of his film, is common in the industry. *Arguments Against*, *supra* note 6, at 89 (statement of film director Elliot Silverstein).

104. *Id.* (citing *Granz v. Harris*, 198 F.2d 585, 589 (Frank, J., concurring)).

105. *Id.* at 401.

106. *Id.* at 400.

107. *Id.* at 402.

108. Roeder, *supra* note 42, at 571.

109. *Id.*

110. *Id.*

111. 198 F.2d 585 (2d Cir. 1952).

author of a version which substantially departs from the original."¹¹² In *Autry v. Republic Productions*,¹¹³ where the actor and producer had entered into a contract giving the producer sole and exclusive rights,¹¹⁴ the court stated that it recognized there could be a circumstance in which the motion picture could be emasculated by cutting and editing that substantially effects the motion, dynamic, and dramatic qualities of a motion picture. In *Preminger v. Columbia Pictures Corp.*¹¹⁵ the court held that although the film was not mutilated by minor editing,¹¹⁶ "excessive cutting" could be mutilation.¹¹⁷

In *Gilliam v. American Broadcasting Companies, Inc.*,¹¹⁸ the Second Circuit raised excessive modification to the level of copyright infringement.¹¹⁹ The court found "that unauthorized editing of the underlying work, if proven, would constitute an infringement of the copyright in that work similar to any other use of a work that exceeded the license granted by the proprietor of the copyright."¹²⁰

The colorization of a movie may be compared to the mutilation caused by editing.¹²¹ Of course, both acts are committed to increase the marketability of the movie.¹²² The editing is generally done to incorporate commercials and, therefore, increase revenues.¹²³ Similarly, the colorizers hope to increase the popularity of the movie and, consequently, increase sales.¹²⁴ Despite this seemingly noble goal, the method the colorizers use may be detrimental to the film, particularly where the mood and artistic quality of the film are destroyed by the addition of color. For this reason,

112. *Id.* at 589 (Frank, J., concurring).

113. 213 F.2d 667 (9th Cir. 1954).

114. *Id.* at 668. See *supra* notes 90-95 and accompanying text.

115. 148 U.S.P.Q. (BNA) 398 (N.Y. Sup. Ct.), *aff'd.* 149 U.S.P.Q. (BNA) 872 (N.Y. App. Div. 1966), *aff'd.* 150 U.S.P.Q. (BNA) 829 (N.Y. App. Div. 1966).

116. *Id.* at 401.

117. *Id.* at 402.

118. 538 F.2d 14 (2d Cir. 1976).

119. 2 M. NIMMER, *supra* note 41, at 8-249. The court also found that this was unfair competition under the Lanham Act, 15 U.S.C. § 1125(a) (1982), because there was injury to plaintiff's name, see *infra* notes 149 & 150, even though there was no competition between the parties. *Gilliam*, 538 F.2d at 24, *construed in* H.B. Halicki v. United Artists Communications, Inc., 812 F.2d 1213, 1214 (9th Cir. 1987).

120. 538 F.2d at 21. See also *WGN Continental Broadcasting Co. v. United Video*, 693 F.2d 622 (7th Cir. 1982) ("[U]nauthorized editing of the underlying work . . . would constitute an infringement of the copyright . . .").

121. Greenstone, *supra* note 41, at 19.

122. *Id.*

123. *Id.*

124. *Id.*

colorization is akin to editing brought to the level of mutilation. As a consequence, even where a filmmaker has agreed through contract to allow modification, unless he has expressly agreed to allow colorization, the contract must be interpreted to prohibit it.

2. When The Contract Is Silent As To Modification

If the contract is silent as to modification, the question arises whether the purchaser must obtain the permission of the artist to modify the work. In *Gilliam*,¹²⁵ the British comedy group Monty Python brought suit to enjoin the broadcast of a severely edited version of their work.¹²⁶ The court held that “[s]ince the script-writer’s agreement explicitly retains for the group all rights not granted by the contract, omission of any terms concerning alterations in the program after recording must be read as reserving to appellants exclusive authority for such revisions.”¹²⁷ By this holding, the court assumed that “such rights must reside in the authors.”¹²⁸ The court reasoned that, unless the artist has expressly authorized the changes, the grantee cannot materially alter the work from the form in which it was created by the artist.¹²⁹ In those situations where the writer or director still has a copyright in the film, and has not expressly authorized the colorization, he may claim that the right to allow colorization resides with him alone.¹³⁰

3. When The Artist No Longer Has Rights To The Work

Directors and writers who no longer are protected by copyright may argue that the colorization of their films is a mutilation which constitutes the tort of unfair competition. The moral rights that would be protected under this theory would be the artist’s

125. *Gilliam v. American Broadcasting Cos.*, 538 F.2d 14 (2d Cir. 1976).

126. *Id.* Twenty-four of the original ninety minutes were deleted. *Id.* at 18. The deleted portions were thought to be too strong or too raunchy for American audiences. *Gilliam* argued that this material was representative of the character of the Monty Python troupe. The broadcast was to be American audiences’ first exposure to the British comedy group, and *Gilliam* argued that, as first impressions often determine whether an audience will cotton to a performer, the excessive edits of some of Python’s best material would forever deprive Python of the opportunity to win over much of its American target audience. See *infra* notes 146-155 and accompanying text.

127. *Gilliam*, 538 F.2d at 22.

128. 2 M. NIMMER, *supra* note 41, at 8-251.

129. *Id.* at 8-252.

130. On the other hand, if the contract specifically reserves only the specified rights, granting all others to the purchaser, then this same argument cuts the other way, favoring the purchaser.

right to prevent his work from being deformed or mutilated,¹³¹ and the right to prevent the use of his work or name in such a way as to reflect on his professional standing.

The artist may have a cause of action under the tort of unfair competition when the mutilation of his work damages his reputation.¹³² In *Prouty*,¹³³ the court held that the defendant's appropriation of characters known to the public as having been created by the plaintiff for use in an "inferior grade" radio program constituted unfair competition.¹³⁴ The court went on to state that unfair competition was "'only a convenient name for the doctrine that no one should be allowed to sell his goods as those of another.'"¹³⁵

In *Preminger*,¹³⁶ the court stated: "We begin with the proposition that the law is not so rigid, even in the absence of contract, as to leave a party without protection against publication of the garbled version of his work."¹³⁷

Under the tort of unfair competition, the writer or director of a colorized film may claim that his reputation is being damaged by the use of colorization which mutilates his work by making it different from the original work. Where the mutilated work is accompanied by the artist's name, the strongest argument may be that there is a misrepresentation under section 43(a) of the Lanham Act.¹³⁸ The Act reads in part:

(a) Any person who shall affix, apply, or annex, or use in connection with any goods or services, or any containers for foods, a false designation of origin, or any false description or representation, including words or other symbols tending falsely to describe or represent the same, and shall cause such goods or services to enter into commerce, and any person who shall with knowledge of the falsity of such designation of origin of description or representation cause or procure the same to be transported or used in commerce or deliver the same to any carrier to be transported or used, shall be liable to a civil action by any

131. The right to prevent deformation and mutilation is the French moral right most likely to develop in the United States. *Id.*

132. 2 M. NIMMER, *supra* note 41, at 8-253.

133. *Prouty v. NBC*, 26 F. Supp. 265 (D. Mass 1939). *See supra* notes 80-82 and accompanying text.

134. *Id.* at 266.

135. *Id.* (quoting *Vogue Co. v. Thompson-Hudson Co.*, 300 F. 509 (6th Cir. 1924)).

136. *Preminger v. Columbia Pictures Corp.*, 148 U.S.P.Q. (BNA) 398 (N.Y. Sup. Ct.), *aff'd*, 149 U.S.P.Q. (BNA) 872 (N.Y. App. Div.), *aff'd*, 150 U.S.P.Q. (BNA) 829 (N.Y. App. Div. 1966). *See supra* notes 100-107 and accompanying text.

137. 148 U.S.P.Q. (BNA) at 400.

138. 15 U.S.C. § 1125 (a) (1982).

person doing business in the locality falsely indicated as that of origin or in the region in which said locality is situated, or by any person who believes that he is or is likely to be damaged by the use of any such false description or representation.¹³⁹

In *Metric & Multistandard Components Corp. v. Metrics, Inc.*,¹⁴⁰ the court stated that the Lanham Act is a federal remedy "for the particular kind of unfair competition which results from false designation of origin or other false representation used in connection with the sale of a product."¹⁴¹

The *Autry*¹⁴² court held that there is no cause of action under the Lanham Trade-Mark Act where the plaintiff has consented to the alteration.

The court in *Jaeger v. American International Pictures, Inc.*¹⁴³ considered the application of the Lanham Act to a suit involving a mutilated and garbled film. The plaintiff claimed that major parts of the movie had been cut and that a twenty-five minute segment had been inserted causing a "gross distortion and mutilation of the original screenplay."¹⁴⁴ The court denied a motion to dismiss, holding that "[i]t is at least arguable that there is a claim under the Lanham Act . . . in the charge that defendant represents to the public that what the plaintiff had nothing to do with is the plaintiff's product"¹⁴⁵

In *Gilliam*,¹⁴⁶ the court held that even if the action does not involve a registered trademark, the Lanham Act may be used to prevent injury to the plaintiff's business or personal reputation from misrepresentations.¹⁴⁷ The court stated that "[i]t is sufficient

139. *Id.*

140. 635 F.2d 710 (8th Cir. 1980). Plaintiff Metric & Multistandard sued Metrics, Inc. for violations of the Lanham Act arising from Metrics, Inc.'s production of a catalogue for its metric industrial supplies. The catalogue was assembled by cutting and pasting portions of plaintiff's catalogue, using typefaces that were the same as those used by plaintiff, and binding the catalogue so that the spine read "Metric's," just as plaintiff's read "Metric." *Id.* at 712. Not surprisingly, the verdict was for plaintiff: consumers were confused as to which company they were dealing.

141. *Id.* at 713.

142. *Autry v. Republic Productions*, 213 F.2d 667 (9th Cir. 1954).

143. 330 F. Supp. 274 (S.D.N.Y. 1971). Plaintiff Jaeger was a principal in a German film company that produced the film *Kamasutra—Perfection of Love*. Plaintiff alleged that American distributors substantially edited the film, removing some 16 minutes of the original film and splicing in nearly 25 minutes of explicit erotic material. *Id.* at 275, 278. The court held the plaintiff stated a cause of action for unfair competition.

144. *Id.* at 275.

145. *Id.* at 278.

146. *Gilliam v. American Broadcasting Cos.*, 538 F.2d 14 (2d Cir. 1976).

147. *Id.* at 24.

to violate the Act that a representation of a product although technically true, creates a false impression of the product's origin."¹⁴⁸

The *Gilliam* court found that the extreme editing of the program would inflict serious injury on the plaintiff's professional reputation.¹⁴⁹ Because this was the plaintiff's first broadcast before a nationwide audience in this country, the court determined that the editing could have damaged the Monty Python troupe's opportunity to develop the large following necessary for its success.¹⁵⁰ The court ordered that the defendant be enjoined from showing the edited version.¹⁵¹

Significantly, the *Gilliam* court also stated that a disclaimer of the plaintiff's approval of the edited version would not be sufficient to remedy the harm done.¹⁵² The court did not believe that the disclaimer would effectively contradict the impression the edited film would leave on the viewer.¹⁵³ The court also pointed out that the viewer might tune in late and miss the disclaimer.¹⁵⁴ It is for these same reasons that a director would be able to state a claim when his film is colorized.

Even where the artist's name is not used directly, he still may be able to state a cause of action under the Lanham Act.¹⁵⁵ The

148. *Id.*

149. *Id.* at 19.

150. *Id.*

151. *Id.* at 26.

152. *Id.* at 25 n.13.

153. *Id.*

154. *Id.*

155. One of the most recent decisions construing the Lanham Act would seem, at first blush, to throw a roadblock into the path of a director using this theory. In *H. B. Halicki v. United Artists Communications, Inc.*, 812 F.2d 1213 (9th Cir. 1987), the court held that for the plaintiff to maintain an action under the Lanham Act he must show not only that the conduct was unfair, but also that it was competitive. *Id.* at 1214. Plaintiff Halicki produced the film *The Junkman* and tailored it with numerous car chases and collisions to appeal to a teenage audience. Plaintiff alleged that in his distribution agreement with defendants, all defendants agreed to market the film under the *PG* rating which the film had been awarded. However, the defendants marketed the film as an *R* movie. Most of the audience that Halicki intended to attract could not be admitted into the *R* film. As a result, the film was a box office disaster.

Upon closer examination, *Halicki* is distinguishable on two grounds. First, the court found that the plaintiff probably was adequately served by a breach of contract claim. *Id.* at 1215. The court specifically distinguished between *Gilliam*-type situations and the circumstance before it in *Halicki*: defendants in *Gilliam* had engaged in passing off, or creating a false impression as to the film's origin, not present in *Halicki*. *Id.* at 1214. In the case of colorized films, the distributors of colorized films still are marketing their films as the original films; they are merely in color. As this Comment noted *supra* notes 5-8 and 29-35 and accompanying text, the film can be changed substantially by the addition of color, just as *Gilliam's* *Monty Python* film was changed by editing out material that was the hallmark of the group's humor. Consequently, an argument can be made for passing off.

artist may argue that selling the movie after his or her name has been implied is reverse passing off. This occurs when the wrongdoer removes the name of the source and sells it in an unbranded state.¹⁵⁶ In making his case, the artist would point out that "an author who sells his work still has a right to have his name on it unless the contract of sale specifically gives the publisher unrestricted rights to change the name." Once the artist establishes that his or her name must be on the work, then the artist may argue that the colorization is a misrepresentation under the Lanham Act. When the film is so unique as to be easily identifiable as the work of a particular artist,¹⁵⁷ the artist also may claim injury based on a false representation.¹⁵⁸ In those situations where the name of the writer or director is used, or the work is easily identifiable as to its creator, the artist may use the Lanham Act, claiming that the mutilation of the film by the addition of color creates a false impression of the movie's origin and could damage his business or personal reputation.

III. THE PROPOSED STATUTORY RIGHT

The proposed federal Film Integrity Act of 1987¹⁵⁹ would have provided the greatest protection against colorization. This bill would have prohibited the material alteration of a film, including colorization, after the film had been published, without the written consent of the "artistic authors."¹⁶⁰ The bill defined "artistic authors" as the principal director and principal screenwriter of the work.¹⁶¹

The bill further stated that the artistic author could assign the right of consent only to another qualified artistic author. In the event of death or disability, the right of consent could be transferred to a qualified artistic author. The bill also would have protected the films of those artistic authors who were deceased on the

156. *Cf. Smith v. Montor*, 648 F.2d 602 (9th Cir. 1981) (plaintiff, actor Paul Smith, sued distributors of the film *Convoy Buddies*, in which he starred, because they removed his name from the credits and advertisements for the film, and substituted the name of Bob Spencer, another actor; the court held that plaintiff stated a cause of action for express reverse passing off, violating Lanham's prohibition on the use of false designation of origin, false representation, and false descriptions).

157. Roeder, *supra* note 42, at 569.

158. *See Prouty v. NBC, Inc.*, 26 F. Supp. 265 (D. Mass. 1939). *See supra* notes 80 & 81 and accompanying text.

159. H.R. 2400, 100th Cong., 1st Sess. (1987) (introduced by Representative Gephardt).

160. *Id.* at 2.

161. *Id.* at 3.

effective date of the bill by stating that a successor or heir may assign the right "only to a third party who is a qualified artistic author."¹⁶² Only a qualified artist would be able to exercise the right of consent.¹⁶³

Further, the artistic author would have been protected against expiration of the copyright. The bill stated that the right of consent "shall not expire when the copyright expires . . ."¹⁶⁴ One of the bill's greatest weaknesses however, was that it was silent as to whether it would provide protection to films that never had been copyrighted. This weakness points to the need for the United States to adopt the doctrine of moral rights forthright, rather than trying to accomplish its goal under other names, where the rights are bound by the constraints of other, perhaps inappropriate, doctrines as is the case when an artist suing under unfair competition doctrines may have to show that he is in actual competition with those he is suing.

IV. CONCLUSION

The decision faced by Congress in dealing with the Film Integrity Act of 1987 was whether the United States would recognize the moral rights of the film artist. As this Comment has pointed out, the only protection now afforded the artist is in those instances when the artist can show economic damage by means of copyright infringement, unfair competition, or the like. Through the case law in the United States, the substance of moral rights has been recognized under the doctrines of unfair competition, defamation, invasion of privacy, and breach of contract.¹⁶⁵ This is not enough. The law also must protect the artist against non-economic damages, such as the destruction of the impact and integrity of his work, if not the work itself.

James Thurber once said, "A nation in which a congressman can seriously ask, 'Do you think the artist is a special person?' is a nation living in cultural jeopardy."¹⁶⁶ In failing to pass the Film

162. *Id.* at 2.

163. *Id.*

164. *Id.* at 3.

165. 2 M. NIMMER, *supra* note 41, at 8-248.

166. L. PETER, *PETER'S QUOTATIONS: IDEAS FOR OUR TIME* (1980).

Integrity Act, and in failing to adopt the Berne Convention's moral rights provision, Congress answered Thurber's question with a resounding "no".

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