

# COMMENT

## CONGRESSIONAL LIMITS ON TECHNOLOGICAL ALTERATIONS TO FILM: THE PUBLIC INTEREST AND THE ARTISTS' MORAL RIGHT

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## INTRODUCTION

The recent debate over the colorization<sup>1</sup> of films has polarized the film industry in what has been characterized as the biggest rift in Hollywood history.<sup>2</sup> Those who own film rights—typically studios, producers or colorizers—claim the ability to colorize to be fully within the scope of their property rights.<sup>3</sup> On the other hand, film artists—directors, actors and screenwriters—have sought to establish an artistic right to preserve their creations free from alterations.<sup>4</sup> Additionally, press coverage has revealed extensive public hostility to the colorization of film classics.<sup>5</sup> In response to these various concerns, Congress has enacted legislation designed to protect the authentic display of certain black and white films.<sup>6</sup>

The National Film Preservation Act of 1988<sup>7</sup> (NFPA) charges the National Film Preservation Board with choosing films representing the

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1. The term "colorization" is a trademark of Colorization, Inc. Official Gaz. Pat. Off., TM153 (Nov. 3, 1987). Colorization has become a generic term denoting the process by which black and white films are enhanced with color. GLENEX INDUSTRIES, INC., 1987 ANNUAL REPORT 5 discussed in Note, *Moral Right Protections in the Colorization of Black and White Motion Pictures: A Black and White Issue*, 16 HOFSTRA L. REV. 503, 503-04 (1988).

2. Easton, *Colorization Issue May Be Decided by Committee Today*, L.A. Times, Aug. 4, 1988, § VI, at 1, col. 1. (statement by Roger L. Mayer, Turner Entertainment Co.).

3. "[Steven] Spielberg and [George] Lucas can do whatever they want to with their movies, I ought to be able to do whatever I want to with our movies." BROADCASTING, Mar. 21, 1988, at 49. "I can do whatever I want to with them, and if they're going to be shown on television they're going to be shown in color." San Diego Union, Nov. 1, 1987, § E, at 6, col. 1 (statements by Ted Turner, Turner Broadcasting Systems).

4. Shannon, *Angry Movie Personalities Go to Washington*, L.A. Times, Mar. 16, 1988, § VI, at 3, cols. 1-3.

5. "Turner has come under particularly heavy fire for its plans to colorize a massive library of black-and-white classics. The Atlanta-based company recently scrapped plans to colorize the Orson Welles classic 'Citizen Kane' in the face of public outrage." States News Service, Mar. 15, 1989 (NEXIS).

6. National Film Preservation Act of 1988, Pub. L. No. 100-446, 1988 U.S. CODE CONG. & ADMIN. NEWS (102 Stat.) 1782 [hereinafter NFPA].

7. *Id.*

nation's historical and cultural heritage.<sup>8</sup> The NFPA requires that "materially altered" films be labeled with a disclaimer stating that the film has been altered without the participation of the creators.<sup>9</sup>

The NFPA approaches the question of film preservation from a novel perspective, which conflates a public benefit in film preservation with elements of an artist's moral right in her creations. A moral right is a personality right which inheres in the work and gives an artist certain cognizable interests in the display of her film.<sup>10</sup> A provision recognizing this moral right is included in the Berne Convention for the Protection of Literary and Artistic Works,<sup>11</sup> an international copyright convention to which the U.S. adhered a year ago.<sup>12</sup> Like a moral right, the NFPA promotes the unaltered display of both the original film and reproductions.<sup>13</sup> However, the NFPA is designed to safeguard the public interest in authentic film display rather than reflect a concern for artistic autonomy.<sup>14</sup> Additionally, unlike the moral right, the NFPA is enforceable by a government agency rather than the artist, and the artist retains no decision-making authority over the film.<sup>15</sup>

Part I of this comment will describe the technological aspects of film alteration as it is practiced today. Part II will explore the public interest in preserving films as cultural property, and in regulating the display of films, which lays the groundwork for the NFPA. Part III will discuss proposals for regulating alterations to film which pre-date the NFPA in the context of the artist's moral right. Part IV will analyze the new NFPA interest in encouraging the unaltered display of certain classic films.

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8. *Id.*

9. *Id.* at 1784-85.

10. Merryman, *The Refrigerator of Bernard Buffet*, 27 HASTINGS L.J. 1023, 1025 (1976) [hereinafter Merryman, *Buffet*].

11. Berne Convention Implementation Act of 1988, Pub. L. No 100-568, 1988 U.S. CODE CONG. & ADMIN NEWS (102 Stat.) 2853 (codified as amended in scattered sections of 17 U.S.C.) [hereinafter Berne Convention Act].

12. The United States Congress has amended Title 17 of the U.S. Code, which deals with copyright protection, to bring U.S. law into conformity with the Berne Convention for the Protection of Literary and Artistic Works. *Id.* Under this Act, the Berne Convention's provisions are enforceable only through actions brought pursuant to Title 17 or any other relevant federal or state law, not through the Convention itself. *Id.* Both the Convention and the Act entered into force under U.S. law on March 1, 1989.

The Berne Convention requires member states to recognize the moral rights of integrity and paternity. The paternity right is the right of the author to have the work attributed to him and the integrity right is the right of the author to prevent distortion or mutilation of the work. By declaring that the Berne Convention is not self-executing, and by providing that the obligations of the United States under Berne may be performed only pursuant to appropriate domestic law, the Amendments effectively prevent claimants from invoking the terms of the Berne Convention as an independent basis for relief. *Id.* § 2(2).

13. NFPA, *supra* note 6, § 4(d)(2).

14. *Id.* § 6.

15. *Id.*

Additionally, this section will explore potential barriers to broadening this interest. The comment will conclude with a proposal for expanding the NFPA's powers.

## I. COLORIZATION AND OTHER TECHNOLOGICAL ALTERATIONS TO FILM

While colorization is specifically included among the technologies covered by the NFPA, other technologies were left out of the Act pending a definition of "material alteration" under Section 3. The National Film Preservation Board is expected to produce a definition of material alteration in the spring of 1990.<sup>16</sup> The final regulations are not expected to be very different from the proposed guidelines currently in the Federal Register.<sup>17</sup> Colorization, panning and scanning, letterboxing, lexiconning and the computer generation of images are included as technological alterations in the proposed guidelines.<sup>18</sup>

Section 11 of the NFPA specifically excludes from the definition of "material alteration" changes "made in accordance with customary practices and standards and reasonable requirements of preparing a work for distribution or broadcast."<sup>19</sup> Such changes include the insertion of commercials and public service announcements for television broadcast.<sup>20</sup> The proposed guidelines additionally exclude from the definition of material alteration restoration activities undertaken to repair damage or deterioration, the removal of nudity, profane language or explicit violence and the inadvertent or unavoidable loss of *de minimis* amounts of material that occur through splicing and breakage.<sup>21</sup> Thus, the final NFPA regulations will probably focus on colorization, panning and scanning, lexiconning, and the computer generation of images.

### A. Colorization

In the process of film colorization, the film is copied onto videotape.<sup>22</sup> Black and white video signal information is then entered into a computer.<sup>23</sup> The computer divides the black and white video frame into a grid and establishes the luminance (brightness) and chrominance

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16. Telephone interview with Eric Schwartz, Policy Planning Advisor, U.S. Copyright Office (Mar. 8, 1990).

17. *Id.*

18. 54 Fed. Reg. 49310, 49312 [hereinafter Proposed Guidelines].

19. NFPA, *supra* note 6, § 11(5).

20. *Id.*

21. Proposed Guidelines, *supra* note 18, § 1(c), at 49313-49314.

22. See Duggan & Pennella, *The Case for Copyrights in "Colorized" Versions of Public Domain Feature Films*, 34 J. COPYRIGHT SOC'Y 333, 336 (1987).

23. *Id.* at 336, 338.

(color) values for each of the segments on the grid.<sup>24</sup> The art director then breaks the film into individual scenes in which the basic visual elements are the same. The art director chooses one frame in each scene as a constant or "key frame."<sup>25</sup> Colors for each of the key frame's elements are chosen.<sup>26</sup> The color information is then stored in the computer, which encodes the color from the key frame to each of the other frames in the sequence.<sup>27</sup> The art director then corrects any unwanted variations in color from frame to frame.<sup>28</sup>

The Copyright Office Report on technological alterations to film found that colorization adversely affects aesthetics.<sup>29</sup>

## B. Letterboxing and Panning and Scanning

Two techniques were developed to accommodate the variance in shape between rectangular movie theater screens and square television screens.<sup>30</sup> The first is letterboxing, in which the size of the original rectangular picture is reduced, and dark bands above and below the picture fill in the square shape of the television set.<sup>31</sup> The original aspect ratio of the film is retained and the film's theatrical composition is kept intact. For this reason, letterboxing is generally preferred by film directors and cinematographers.<sup>32</sup>

The second technique is panning and scanning, which involves the recomposition of the widescreen image.<sup>33</sup> A device similar to a camera scans the full screen image and follows the movements of the central characters.<sup>34</sup> This narrower picture then fills the square television set.<sup>35</sup>

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24. *Id.* at 338.

25. *Id.* at 336-37.

26. *Id.* at 337-38.

27. *Id.* at 338.

28. *Id.*

29. UNITED STATES COPYRIGHT OFFICE, TECHNOLOGICAL ALTERATIONS TO MOTION PICTURES AND OTHER AUDIOVISUAL WORKS: IMPLICATIONS FOR CREATORS, COPYRIGHT OWNERS AND CONSUMERS 12, 59-60 (1989) [hereinafter COPYRIGHT OFFICE REPORT].

30. Under the Academy of Motion Picture projection standards, the projected image is 1.85 times as wide as it is high, creating a "aspect ratio" of 1.85:1. Some motion picture processes creating panoramic effects involve higher aspect ratios, such as Cinemascope and Panavision at 2.35:1. The National Television System Committee standard is set at 1.33:1. *Id.* at 11-12.

31. *Id.* at 45.

32. *Id.* at 45-46.

33. *Id.* at 47-49. See Nolan & Counter, *Statement of the Motion Picture Association of America, Inc.* in COPYRIGHT OFFICE REPORT, *supra* note 29, 121-22.

34. *Id.*

35. The process consists of a film-to-tape transfer on a telecine machine. A cathode ray tube (CRT) is used as a light source and the projected image passes through a series of mirrors that divide the picture into red, green and blue components. These components are picked up by photoelectric cells, which transform the photographic image into

Panning and scanning emerged in the early 1960s as a result of network television's refusal to show letterboxed films.<sup>36</sup>

Panning and scanning adversely affect film aesthetics by altering the artistic composition of each scene and cutting out important visual information.<sup>37</sup> Under the proposed NFPA guidelines, panning and scanning would be classified as a material alteration if it would be "clearly perceptible" to the average viewer.<sup>38</sup>

### C. Lexiconning

In lexiconning, the speed of a film is increased slightly in order to fit the film into a smaller time slot. Speed changes may be measured in hundredths of a frame per second, permitting changes of 6 to 7 percent of the total running time of the film. Generally, such changes are barely discernible to the naked eye. The alteration is accomplished by changing the rate at which the film frame runs past the light source.<sup>39</sup>

In the proposed guidelines, suggestions have been sought from the film industry as to what percentage of the overall running time of a film may reasonably be altered by lexiconning in preparing a work for distribution or broadcast.<sup>40</sup>

When it becomes perceptible, lexiconning alters the aesthetic composition of the film.<sup>41</sup> Under the proposed guidelines, reducing the running time of a film by more than a fixed percentage or lexiconning in such a way that the change would be perceptible to the average viewer would be classified as a material alteration.<sup>42</sup>

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electronic information. This information is then manipulated through computer-controlled electronics, which permits non-linear, as well as linear, "scanning" across the film image. *Id.* at 48 (citing Comment 5 in COPYRIGHT OFFICE REPORT, *supra* note 29, Tab C, at 3-4). The Directors Guild of America Basic Agreement allows directors the right to be consulted about, and to be present during, the panning and scanning process. DGA Basic Agreement § 7-509, COPYRIGHT OFFICE REPORT, *supra*, at 67.

36. *Id.* at 47.

37. *Id.* (Belton, *Pan and Scan Scandals*, 3 THE PERFECT VISION 40 (1987)).

38. Proposed Guidelines, *supra* note 18, § 2(b), at 49314.

39. COPYRIGHT OFFICE REPORT, *supra* note 29, at 52. Section 7-513 of the DGA Basic Agreement gives directors the right to be consulted about lexiconning. DGA Basic Agreement § 7513, in COPYRIGHT OFFICE REPORT, *supra*, at 67. However, the Copyright Office Report notes that, as lexiconning generally takes place at independent stations, it is hard to see how this consultation could effectively take place. COPYRIGHT OFFICE REPORT, *supra*, at 50 n.88.

40. Proposed Guidelines, *supra* note 18, § 1(d), at 49314.

41. Similarly—based on a lexiconned clip of "Casablanca" shown at the Copyright Office's September 8th hearing—the report found that, by subtly changing the speed, lexiconning can adversely affect film quality and film artists' contributions to a film. COPYRIGHT OFFICE REPORT, *supra* note 29, at 53.

42. Proposed Guidelines, *supra* note 18, § 1(d), at 49314.

#### D. Computer Generation of Images

Computer-generated representations of people or objects may be substituted in or added to videotapes of extant motion pictures.<sup>43</sup> Computer-generated images may be modeled on known personalities.<sup>44</sup> The sound track for the film could also be digitally updated.<sup>45</sup>

Colorization, panning and scanning, and lexiconning all impact film aesthetics and alter the original artistic statement of the film artists. For this reason, there is much concern that these technologies adversely affect the authenticity of important aspects of our national heritage.

### II. THE PUBLIC INTEREST IN THE AUTHENTIC DISPLAY OF FILMS

Films, particularly those recognized as the most significant artistic representations of their eras, are an important part of our cultural heritage. The interest in the authenticity of objects that make up a cultural heritage has been described as one of the most fundamental cultural property interests.<sup>46</sup> According to Professor Merryman, "[e]verything significant about cultural property flows from authenticity" and central to authenticity is the object's embodiment of "...the moral decisions made by its purported creator."<sup>47</sup> It is thus critically important that at a minimum certain classic films be preserved in their original forms to reflect this cultural heritage. Colorization, panning and scanning, lexiconning and the computer generation of images all impact the authentic display of film classics. For this reason, the use of these technologies must be regulated to safeguard the authentic display of films.

The primary argument advanced by these colorization proponents is that the public would rather see movies in color than in black and white. For example, Turner Broadcasting Systems of Los Angeles, a major exhibitor of colorized movies,<sup>48</sup> points to its own profits as

43. *Id.* § 1(b)(i).

44. Copyright Office Report, *supra* note 29, at 61.

45. Proposed Guidelines, *supra* note 18, § 1(b)(ii).

46. Merryman, *The Public Interest in Cultural Property*, 77 CALIF. L. REV. 339, 359 (1989) [hereinafter Merryman, *Cultural Property*].

47. *Id.* Professor Merryman has been credited with founding the field of Art Law. See *In Honor of John Henry Merryman*, 19 STAN. L. REV. 1076, 1086 (1987). Merryman is the Nelson Boman and Mavie Swietzer Professor of Law (Emeritus) at the Stanford Law School and an Affiliated Professor of Art at Stanford University.

48. Turner systematically colorizes films from a film library purchased from MGM. Films colorized by Turner include *Casablanca*, *David Copperfield*, *Key Largo* and *Somebody Up There Likes Me*. BROADCASTING, March 21, 1989, at 50.

evidence of the public's interest in colorized films.<sup>49</sup> If one were to accept Turner's argument, colorization, by increasing the viewing public, might actually increase the public's awareness of its cinematic cultural heritage.

However, it is far from clear that, in the long run, film colorization will increase either profits or audience size. Television programmers, who may be a more neutral source of data about the success of colorization, are generally less sanguine about the public's sustained interest in colorization.<sup>50</sup> They point out that, while by and large films do get an initial boost after being colorized, ratings may later drop to former levels.<sup>51</sup> It appears that early colorized films drew larger audiences because of their novelty, and that the first flush of interest is now wearing off.<sup>52</sup>

If colorization proves less popular than expected, the frequency of colorization may decrease. However, the controversies generated by other technological alterations to film will remain. The authenticity interest may still be implicated in the use of panning and scanning, lexiconing, and the computer generation of images.

#### A. U.S. Law: Film Preservation and Film Archives

The NFPA is not the first attempt to recognize film as cultural property. For example, film archives ensure that copies of films are preserved in their original forms, but they do not regulate the display of these films. The public interest in film authenticity is evidenced by the growing government support for film archives.<sup>53</sup>

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49. According to Turner, the black and white *Miracle on 34th Street* had brought in only \$30,000 during the two decades prior to colorization. In the two years after it was colorized, the film apparently brought in \$350,000. Easton, *supra* note 2, at 12, col. 4.

50. *Id.* at col. 3 (statement of John Von Soosten, Programming Director at KATZ-TV Group in New York).

51. *Id.*

52. *Id.* (statement of Don Searle, Research Director for KCOP-TV Channel 13 in Los Angeles; telephone interview Nov. 10, 1988). For example, the black and white version of *Miracle on 34th Street* reached between 4.3 and 8 million homes when it was shown during the holiday season in the 1980s. Those numbers jumped to 13.4 million in 1985, when the film was first shown in color, but dropped back down to about 8.7 million in 1987. Easton, *supra* note 2, §IV, at 12, col. 3-4. Further, a colorized version of *Maltese Falcon* that was aired in February, 1987, got only half the ratings that the original black and white version garnered in 1985. *Id.* at col. 4-5.

53. These film archives function as museums for film. They recognize in films—whose primary purpose is entertainment—a secondary function as historical artifacts whose authenticity must be preserved. This latter function is cited by cultural scholar Hughes de Varine as one of the indications that objects have become "cultural property." De Varine, *The Rape and Plunder of Cultures: An Aspect of Deterioration of the Terms of Cultural Trade Between Nations*, 139 MUSEUM 152, (1983), cited in A. ELSEN & J. MERRYMAN, 1 LAW, ETHICS AND THE VISUAL, 46-50 (2d ed. 1987). The example used by de Varine of a "secondary function" is that of art objects and cultural artifacts being placed in museums. *Id.* Film

The establishment of film archives arose in response to the destruction of supposedly obsolete films. During the 1930s, the film industry saw film as an expendable commodity; older films were routinely dumped to save storage space or melted down to reclaim small amounts of silver.<sup>54</sup> In the words of one film critic, "[a] particularly cynical refinement of this activity is the practice of 'junking' older films to protect the exclusivity of a re-make."<sup>55</sup>

In response to this callous handling of "obsolete films" by film studios, the first film archive was established in Stockholm in 1933.<sup>56</sup> Soon thereafter, the Museum of Modern Art in New York became the first U.S. institution to collect and preserve copies of films.<sup>57</sup> The museum selected films based on their aesthetic merit.<sup>58</sup> Government sponsorship, through the National Endowment for the Arts and other funding sources, currently helps support the more than fourteen major film archives in the United States.<sup>59</sup>

The NFPA recognized this archival interest by creating a National Film Board Collection in which unaltered copies of the films in the National Film Registry will be preserved.<sup>60</sup> But the NFPA goes beyond the merely archival interest in film preservation. It also promotes the authentic display of the films themselves. Since the public's access to its film heritage is achieved through film display, this promotion is essential to ensuring the authenticity of our film heritage as it is perceived by the public.

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archives—the counterpart of art museums in the film world—provide a context for films "secondary function" as artifacts, much in the same manner as museums do for works of art. There are now over fourteen major film archives in the United States, including the American Film Institute, the UCLA Film Archives, the Museum of Modern Art, the Library of Congress, and the International Museum of Photography at George Eastman House. L. MALTIN, *THE WHOLE FILM SOURCE BOOK* 199-213 (1983).

54. Easton, *Eastman House*, 2 *ACADEMY LEADER* 18, 19 (1972).

55. *Id.*

56. Harrington, *Fade-Outs Never Meant to Be*, *LIFE*, July 1985, at 77.

57. L. MALTIN, *supra* note 53, at 205.

58. *Id.*

59. *Id.* at 199-213. Government sponsorship of film preservation can trace its beginnings to the Library of Congress film collection. The Library of Congress dates its film collection from the acceptance of the legal deposit of the Edison Kintoscope Record of a Sneeze in 1894. The collection now includes more than 75,000 titles. Direct and indirect government sponsorship of archives continued in the 1960s and that decade saw the creation of two great film archives on the west coast: the Pacific Film Archive and the UCLA Film Archive. The 1970s saw the birth of centers focusing on specific areas of film, such as the American Archives of the Factual Film and the National Center for Jewish Film. *Id.*

60. NFPA, *supra* note 6, § 3(3)(B)(c).

## B. International Precedents: National Cultural Identity and Film Display

Film archives are recognized as cultural property under the UNESCO Convention, to which the U.S. is a signatory.<sup>61</sup> The Convention has been a key instrument in establishing the concept of a national cultural heritage, which is contained in the recitals of the NFPA.<sup>62</sup> The premise behind the UNESCO Convention is that items of cultural property ought to be retained within their national borders, because people derive their sense of culture from such objects.<sup>63</sup> The Convention does not seek to regulate reproductions.<sup>64</sup>

European regulations of televised programming recognize a cultural integrity interest in the display of films that is in some respects analogous to that recognized by the NFPA, but that responds more closely to the UNESCO convention's concern for national cultural identity. In France, sixty percent of televised programming must be either in French or of common market origination.<sup>65</sup> The motivation for these regulations is a desire to preserve French culture.<sup>66</sup> Like the NFPA labeling protections, these French quotas are unrelated to cultural property interests in the preservation of the original films. Instead, they regulate only the televised display of films. However, similar to the UNESCO Convention, the French government justifies this quota system based on a public interest in the protection of French cultural integrity from foreign incursions.<sup>67</sup> The NFPA addresses a quite different concern in protecting the actual display of authentic U.S. cultural property free from alterations occurring within the culture.

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61. See Merryman, *Cultural Property*, *supra* note 46, at 341. A more expansive definition of cultural property is that of the 1970 UNESCO Convention, which includes sound, photographic and cinematographic archives. Individual films are not included in even this more expansive definition of cultural property. UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, art. 1, 823 U.N.T.S. 231, 236 [hereinafter UNESCO Convention].

62. NFPA, *supra* note 6, § 1(2).

63. See UNESCO Convention, *supra* note 61, §§ 234, 238, 242.

64. This concept that "culture" requires the interaction between cultural property and the people is used by other Ministers of Culture in support of retaining items of cultural property within national borders. Speaking of the Elgin Marbles, Melina Mercouri, Greek Minister of Culture, stated that "[t]hey are the symbol and the blood and the soul of the Greek people.... We have fought and died for the Parthenon and the Acropolis.... When we are born, they talk to us about all this great history that makes Greekness." Merryman, *Cultural Property*, *supra* note 46, at 349-50.

65. *Variety*, May 24-30, 1989, at 1, col. 2.

66. *Id.*

67. *Id.* According to the French Minister of Culture, "We simply want to protect our national cultural and artistic heritage." *Id.* at 4, col. 2.

In Europe, reproductions of films are protected not only by this unilateral action of the government in the public interest but also by various moral rights laws that address the rights of film artists in their productions.<sup>68</sup> To the extent that the NFPA seeks to regulate reproductions of films, it closely resembles the moral right of the artist.

### III. ARTISTS' PROTECTIONS AGAINST ALTERATIONS TO REPRODUCTIONS: THE MORAL RIGHT

The moral right of integrity, recognized in many European countries and in certain U.S. states, protects an author's work from alterations in a manner similar to the cultural authenticity interest described above.<sup>69</sup> However, unlike cultural authenticity interests, the moral right inheres in the "work" in whatever manner it is reproduced, much as U.S. copyright law inheres in non-literal aspects of the work.<sup>70</sup> While the NFPA applies to all reproductions of films that appear in the National Film Registry, it does not prevent alterations to reproductions, but rather requires that such altered reproductions be appropriately labeled.<sup>71</sup>

The moral right's recognition of the integrity of reproductions<sup>72</sup> makes it well suited to protect the authenticity of display by barring alterations to videocassettes of films. However, the moral right safeguards a very different interest from that protected by cultural

68. For a good explanation of French Law see Ginsburg, *Colors in Conflicts: Moral Rights and Foreign Exploitation of Colorized U.S. Motion Pictures*, 36 J. COPYRIGHT SOC'Y U.S.A. 81 (1988). For a summary of German Law pertaining to filmmakers see COPYRIGHT OFFICE REPORT, *supra* note 29, at 31-33.

69. The moral right is a composite right consisting of: 1) the right of disclosure, which entitles the author to decide when the work may be revealed to the public; 2) the right to withdraw or disavow, which allows the author to remove her name from the work; 3) the right of paternity, which gives the author the right to be recognized as author of the work and 4) the right of integrity, which entitles the author to disallow alterations to a work. Colorization opponents have looked to the right of integrity for protection. The Film Integrity Act of 1987, H.R. REP. NO. 2400, 100th Cong., 1st Sess. [hereinafter Integrity Act].

70. Kernan, *Art & Law: The Moral Rights of Artists Are Gaining in the Courts but Losing Ground to Technological Advances*, PRINCETON ALUMNI WEEKLY 35, 69 (Oct. 12, 1988).

71. NFPA, *supra* note 6, § 4(a).

72. Reproductions are protected under the integrity right, and in some countries poor quality color reproductions have been found to violate the integrity right. (Judgment of May 20, 1911, Trib. Civil, Seine, Am. 1911.1 271 (Millet) & Judgment of Mar. 13, 1973, Trib. gr. inst., Paris (unpublished) (Rousseau) noted in A. EISEN & J. MERRYMAN, *supra* note 53, at 155.

In *Millet*, reproduction "brightened the light in the painting making the objects look real and vulgar and changed an evening scene to daylight." Merryman, *Buffet*, *supra* note 10, at 1029. In *Rousseau*, the court found reproductions of *Rousseau* paintings containing altered color and altered images violated the artist's integrity right. *Id.* at 1030-31. Film colorization opponents hope that colorization of videotaped films will similarly be found to have altered the film author's work and violated the integrity right.

property laws. The moral right is essentially an artist's right rather than a cultural preservation interest.<sup>73</sup> It is seen as an extension of the artist's personality<sup>74</sup> and is enforceable by the artist.<sup>75</sup> Although in many countries<sup>76</sup> and certain U.S. states<sup>77</sup> the moral right may also be enforced by a public official or organization,<sup>78</sup> this public enforcement is always in addition to and on behalf of artistic enforcement.<sup>79</sup> The NFPA labeling provisions, which reveal that alterations such as colorization were made without the participation of the creators, are modeled in the spirit of the integrity right; however, these provisions are enforceable only by the public and not by the artist.<sup>80</sup>

Under European moral rights law, enforcement and ownership are not co-requisites,<sup>81</sup> thus, although a third party might own the film, the film's artistic author could sue for any violation of the integrity right in the property. However, problems exist with the definition of "author" in a collaborative medium such as film. U.S. directors and screenwriters have declared themselves the creative authors of the film, while producers assert that their work in bringing the film together entitles them to creative authorship.<sup>82</sup> In Europe, complex co-authorship arrangements—criticized by certain European scholars as unworkable<sup>83</sup>—have been created to reflect the moral rights of the various film authors.<sup>84</sup>

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73. *Id.* at 1025.

74. *Id.*

75. Strauss, *The Moral Right of the Author*, 4 AM. J. COMP. L. 506, 506-07 (1955).

76. Gantz, *Protecting Artists' Moral Rights: a Critique of the California Art Preservation Act as a Model for Statutory Reform*, 49 GEO. WASH. L. REV. 873, 889 (1981).

77. Massachusetts: MASS. GEN. LAWS ANN. 231, § 85S (West Supp. 1988) and New Mexico: N.M. STAT. ANN. § 13-4B-3 (1987).

78. Several European states provide a public officer with enforcement power. Gantz, *supra* note 76, at 889 (citing 2 UNESCO, COPYRIGHT LAWS AND TREATIES OF THE WORLD (1980)).

79. E.g., California Cultural and Artistic Creations Preservation Act, CAL. CIV. CODE § 989(c) (Deering Supp. 1988). The Act gives an "organization acting in the public interest" the right to "injunctive relief to preserve or restore the integrity of a work of fine art" from alteration or destruction. *Id.* See also MASS. GEN. LAWS ANN. 231 § 85S(e) (West Supp. 1988). This Act provides for enforcement by the artist and by "any bona fide union or other artists' organization authorized in writing by the artist." *Id.*

80. NFPA, *supra* note 6, §§ 4(d), 6(a).

81. Merryman, *Buffet*, *supra* note 10, at 1025.

82. Easton, *supra* note 2, § IV. at 1, col. 2.

83. Sarraute, *Current Theory on the Moral Right of Authors and Artists Under French Law*, 16 AM. J. COMP. L. 465, 468 (1968).

84. Under French law multiple co-authors are recognized: (1) the author of the scenario; (2) the author of the adaptation; (3) the author of the spoken text; (4) the author of the music composed especially for the film; and (5) the director. Law of March 11, 1957, Article 14.

The NFPA avoids the authorship quandary by making its provisions enforceable solely by the public.<sup>85</sup>

Unlike European governments, the U.S. Congress has never statutorily recognized the moral rights of film authors.<sup>86</sup> Although attempts have been made to find moral rights equivalents under laws such as defamation, privacy and unfair competition,<sup>87</sup> there are significant theoretical differences between these legal doctrines and moral rights.<sup>88</sup> Scholars conducting case-by-case analyses of the law relating to moral rights in France and the U.S. point to the purely pecuniary basis of U.S. law in contrast with the more expansive interests subsumed under French law.<sup>89</sup>

The theories which underlie U.S. copyright law—a statutorily limited grant in the work—and European copyright law—an innate interest in the work which includes a moral right—are very different. In the U.S., copyright protection grants a “monopoly” of a limited duration

85. NFPA, *supra* note 6, § 6(a).

86. These include *Vargas v. Esquire*, 164 F.2d 522 (7th Cir. 1947). *Vargas'* illustrations were published by *Esquire* magazine without attribution to *Vargas*. With regard to the moral right theory, the court said that it was not inclined to change law in this country to conform to that of other countries. *Id.* at 526. In *Crimi v. Rutgers Presbyterian Church*, 89 N.Y.S.2d 813 (Sup. Ct. 1949), a mural by the artist *Crimi* in the Rutgers Presbyterian Church was painted over by Church authorities. Like the *Vargas* court, the *Crimi* court did not attempt to make new law. *Id.* at 818. In *Shostakovich v. Twentieth Century Fox Film Corp.*, 196 Misc. 67, 80 N.Y.S.2d 575 (Sup. Ct. 1948), *aff'd*, 275 App. Div. 695, 87 N.Y.S.2d 430 (1949) the court stated that “[t]he wrong which is alleged here is the use of plaintiff’s music in a moving picture whose theme is objectionable to them in that it is unsympathetic to their political ideology... In the present state of our law the very existence of the right is not clear.” *Id.* at 70, 80 N.Y.S.2d at 578-79.

87. See Strauss, *The Moral Right of the Author*, 4 AM. J. COMP. L. 506, 537-38 (1955); Roeder, *The Doctrine of Moral Right: A Study in the Law of Artists, Authors and Creators*, 53 HARV. L. REV. 554, 575-78 (1940); Treece, *American Law Analogues of the Author’s Moral Right*, 16 AM. J. COMP. L. 487, 505 (1968). But see Merryman, *Buffet*, *supra* note 10, at 1035-39, and 1042.

88. Commenting on the articles referred to above, Professor Merryman has stated:

There is a curious aspect to some of the legal periodical literature on moral rights in the United States. Beginning with the 1955 article by William Strauss one finds both an effort to depreciate the actual extent of protection provided by the right in civil law countries and an earnest attempt to find functional equivalents—remedies that “amount to the same thing”—in our law.

Merryman finds that “both aspects of this position inaccurately state the law.” Merryman, *Buffet*, *supra* note 10, at 1037-38.

89. Merryman’s extensive comparison of American and French case law finds that American courts would not have recognized artists’ rights in any of the French cases analyzed, except one in which “the real interest claimed was a pecuniary one, rather than a mere personality interest.” Merryman concludes that “[t]he moral right of the artist, and in particular that component called right of integrity of the work of art, simply does not exist in our law.” *Id.* at 1037.

Similarly, Sarraute distinguishes between moral rights and U.S. law based on moral rights’ inalienable nature. Sarraute, *supra* note 83, at 466.

in a work which can be freely marketed by the copyright-holder.<sup>90</sup> By contrast, the moral right is a personality right that the artist retains in her work, regardless of ownership.<sup>91</sup> The U.S. Congress has found that copyright is granted in order to stimulate artistic creation and innovation for the ultimate benefit of society, and that the grant of copyright must always be designed to safeguard the public interest in the free exchange of information.<sup>92</sup> The moral right has no such limitations, and is innate in the work.<sup>93</sup> These differences between moral rights and the Copyright Act contributed to the failure of the moral rights-based legislation that preceded the NFPA.<sup>94</sup>

While case law, state statutes and international law suggest that the U.S. currently recognizes a limited form of moral rights in theory, moral rights of film authors have not had an impact on actual adjudication to date. A recent district court case, *Gilliam v. American Broadcasting Co.*,<sup>95</sup> offers significantly greater protection against "material alterations" of a creative work. However, commentators claim that it still fails to provide even the minimal protections against colorization offered by the labeling provisions and incentives of the NFPA.<sup>96</sup>

#### A. *Gilliam v. American Broadcasting Co.*

In *Gilliam v. American Broadcasting Co.*<sup>97</sup> the court ruled that deleting 27% of a Monty Python movie grossly altered the narrative and constituted a "mutilation" in violation of the copyright license.<sup>98</sup> The

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90. A. LATMAN, COPYRIGHT FOR THE EIGHTIES, 12 (2d ed. 1985).

91. Merryman, *Buffet*, *supra* note 10, at 1038.

92. LEGISLATIVE REPORT ON THE COPYRIGHT ACT OF 1909, H.R.REP. NO. 2222, 60th Cong., 2d Sess. (1909).

93. The Copyright Act derives its powers from the Constitutional clause empowering 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." U.S. CONST., art. I, § 8, cl. 8.

94. See Comment, *Film Artists Bushwacked by the Coloroids: One-Hundredth Congress to the Rescue?* 22 AKRON L. REV. 359, 368-69 (1989).

95. 538 F.2d 14 (2d Cir 1976).

96. See Note, *supra* note 1, at 514-17.

97. 538 F.2d 14.

98. *Id.* at 19. This violation was especially significant in light of contractual provisions that limited the right to edit Monty Python script material.

A subsequent court may have taken the theory that certain deletions may constitute copyright violation even further. See *WGN Continental Broadcasting Co. v. United Video, Inc.*, 693 F.2d 622 (7th Cir. 1982). WGN was leasing satellite space and relaying television "superstations" signals to cable television systems. WGN was using its vertical blanking interval (the space between one picture and the next on the television screen) to transmit an overlay of "teletext" information about local news onto the main program. United Video deleted WGN's signal and substituted another teletext. *Id.* at 624. WGN successfully sued to enjoin this practice as copyright infringement.

court stated that the moral rights asserted by the plaintiff do not exist under U.S. law.<sup>99</sup> Instead, the *Gilliam* court found that:

the economic incentive for artistic and intellectual creation that serves as the foundation for American copyright law, cannot be reconciled with the inability of artists to obtain relief for mutilation or misrepresentation of their work to the public on which the artists are financially dependent.<sup>100</sup>

Despite this explanation of its holding on economic rather than moral rights grounds<sup>101</sup> many scholars feel that *Gilliam* represents a new incursion of the integrity right into U.S. law.<sup>102</sup>

However, commentators feel it is unlikely that colorization will be limited under *Gilliam*,<sup>103</sup> given that colorization does not alter the plot of the film, and generally appears not to hurt artists financially.<sup>104</sup> The National Film Preservation Board's forthcoming definition of "material alteration" may help advocates allege that such "material alteration" should be protected under *Gilliam*.<sup>105</sup> However, even if such an argument is successful, film directors and screenwriters seeking to prevent material

Citing *Gilliam*, the court in *WGN* ruled that any deletion may constitute copyright infringement. *Id.* at 625. The court stated that "[t]he copyright is in the programming rather than in the method by which it is transmitted" and thus, if the teletext images and the news are "related images," the teletext may have copyright protection as part of the news. *Id.* at 628.

Professor Barnett goes on to distinguish between simple deletion and deletion that impairs or mutilates the work. The *WGN* court held that any unauthorized deletion constitutes infringement, although Professor Barnett points out that "in light of the *de minimis* principle the [*WGN*] court presumably did not mean that literally 'any' unauthorized deletion or alteration constitutes infringement; it presumably meant any *material* deletion or alteration, as distinct from trivial ones." Barnett, *From New Technology to Moral Rights: Passive Carriers, Teletext, and Deletion as Copyright Infringement—the WGN Case*, 31 J. COPYRIGHT. SOC'Y. U.S.A. 427, 439 (1983) (emphasis in original).

99. *Gilliam*, 538 F.2d at 24.

100. *Id.* (citations omitted). The court also stated that "[t]he law seeks to vindicate the economic, rather than the personal, rights of authors." *Id.*

101. *Gilliam* relies heavily on the existence of a license to uphold the economic rights sought. The *Gilliam* court justified its holding by stating that "the ability of the copyright holder to control his work remains paramount in our copyright law. ...[U]nauthorized editing...would constitute an infringement of the copyright." *Id.* at 21. The court also found that presenting a distorted version of the work to the public should be recognized as stating a cause of action under the Lanham Act § 43(a). *Id.* at 24-25.

102. Barnett, *supra* note 98, at 439.

103. Note, *supra* note 1, at 517.

104. *Id.* at 514-17. A plausible argument could be made for defining colorization as a "material alteration," as it does alter the entire film. Also, screen actors and directors have referred to the cartoonish look of the colorized movies and the caricature of the film artists talents. See *Legal Issues that Arise When Color is Added to Films Originally Produced, Sold, and Distributed in Black and White: Hearings Before the Senate Subcomm. on Technology and the Law of the Senate Comm. on the Judiciary*, 100th Cong., 1st Sess. 25-26 (1987).

105. The argument might run that if such definition was made at the direction of and within the guidelines created by the legislature, it could be alleged that the legislature consciously chose this language to fit within *Gilliam*.

alterations generally do not own the copyright license to films, as did the Monty Python group. Under the U.S. Copyright Act only a copyright owner can sue to enforce a license violation.<sup>106</sup> Thus, most film artists fighting colorization would be without recourse under *Gilliam*.

## B. States Moral Rights Legislation

While looking for federal laws that would offer protections analogous to moral rights in colorized films, commentators have largely ignored the protections offered under state moral rights legislation.<sup>107</sup> The reason for this may be that state moral rights have not yet been tested in court for preemption by federal copyright law. Nevertheless, there has been a growing trend towards moral rights legislation by the states.<sup>108</sup>

Of the ten states that have passed legislation recognizing integrity rights for visual artists,<sup>109</sup> only Massachusetts and New Mexico include film among the protected visual arts.<sup>110</sup> In both New Mexico and Massachusetts, the film must be a "quality" work in the opinion of film experts in order to receive statutory protection.<sup>111</sup> Under Massachusetts law, only authors who are independent contractors, rather than employees, are given protection; the artists of independent or self-produced films may enforce their rights while those who are employed by studios may not.<sup>112</sup> Thus it is doubtful whether many of the studio-produced classics contemplated for protection under the NFPA are protected under these state laws.

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106. See 17 U.S.C. § 501(b) (1988).

107. See Comment, *supra* note 94.

108. See *infra* note 109.

109. California: CAL. CIV. CODE §§ 987-990 (West 1988); Connecticut: 1988 Conn. Acts 284 (Reg. Sess.); Louisiana: LA. REV. STAT. ANN. §§ 51.2151-56 (West 1987); Maine: ME. REV. STAT. ANN. tit. 27, § 303 (1988); Massachusetts: MASS. GEN. LAWS ANN. 231, § 85S (West Supp. 1985); New Jersey: N.J. REV. STAT. § 2A:24A-1 (1987); New Mexico: N.M. STAT. ANN. § 13-4B-3 (Mitchie 1987); New York: N.Y. ARTS & CULT. AFF. LAW § 14.01 (McKinney 1984); Pennsylvania: PA. STAT. ANN. 73 §§ 2101-2110 (Purdon Supp. 1989); and Rhode Island: R.I. GEN. LAWS §§ 5-62-6 (1987). States never explain what integrity would mean in the context of film. One scholar points out that these laws were written mainly as artist's moral rights bill and that extending coverage to film was an ill-defined afterthought. Note, *supra* note 1, at 513.

110. Most state statutes contain specific language excluding commercial enterprises. See CAL. CIV. CODE § 987(b)(2) (commercial use exclusion); and LA. REV. STAT. ANN. § 51:2155 (advertising or trade use exclusion). In California, additional provisions for contractual modification were added to stem off opposition to the bill from the motion picture and television industries. Professor Goetzl, of Golden Gate University School of Law, drafted the bill on behalf of the Northern California chapter of Artists' Equity Association. Telephone interview with Professor Goetzl, Golden Gate University School of Law, (Oct. 30, 1988). There is no significant written history of the act.

111. N.M. STAT. ANN. § 13-4B-3(d); MASS. GEN. LAWS ANN. 231, § 85S(f).

112. MASS. GEN. LAWS ANN. 231, § 85S.

These state statutes face further barriers to enforcement, including the fact that there is no definition of film authorship in the statutes so that film producers, who frequently own film rights, may argue that they are the authors of the films.<sup>113</sup> Additionally, the state legislation has not yet been tested in court for preemption by federal copyright law.

### C. U.S. Adherence to the Berne Convention

In 1989, the U.S. joined the Berne International Copyright Convention.<sup>114</sup> Originating in 1886, the Berne Convention is adhered to by 80 nations and recognized as the most extensive international copyright convention to date.<sup>115</sup> Its broad guidelines include language recognizing moral rights.<sup>116</sup> Article 6(1) of the Berne Convention provides that:

Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to the said work, which would be prejudicial to his honor or reputation.<sup>117</sup>

The first moral rights measure supported by colorization opponents included language stating that the U.S. recognized moral rights.<sup>118</sup> This effort failed as a result of intense lobbying against the inclusion of moral rights, recommendations to Congress that current U.S. law is adequate for

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113. See MASS. GEN. LAWS. ANN. 231, § 855, and N.M. STAT. ANN. § 13-4B-3.

114. Berne Convention Act of 1988, *supra* note 11.

Efforts to secure U.S. adherence to Berne have occurred periodically since Berne's inception. The United States participated in the original Berne Convention and the initial revisionary conferences as an observer only. At the time, the executive branch of the U.S. Government favored the Berne Convention, however, the question of international copyright had not advanced far enough in the legislature to permit joining the treaty. However, the possibility of future U.S. accession to Berne was expressly mentioned in President Cleveland's annual message to Congress at the end of 1886, and was included in the International Copyright Act of 1891. Hamish, *Berne and the Universal Copyright Convention*, 11 COLUM. J. L. & ARTS, 89, 102 (1986). Despite the increased differences between the United States and Berne, efforts continued to achieve U.S. adherence. Between 1922 and 1940 a series of copyright bills were introduced with this purpose. *Id.* at 102-03.

Moral rights objections by the motion picture and television industries played a large part in U.S. resistance to joining the Berne Convention. Nimmer, *Implications of the Prospective Revisions of the Berne Convention and the United States Copyright Law*, 19 STAN. L. REV. 499, 524 (1967).

115. See *The Berne Convention: Hearings before the Subcommittee on Patents, Copyrights and Trademarks of the Senate Committee on the Judiciary*, 99th Cong., 2d Sess. 46-51 (1988) (Statement of Barbara Ringer, Former U.S. Register of Copyright) [hereinafter Senate Committee].

116. Berne Convention Act, *supra* note 11, art. 6.

117. *Id.*

118. Molotsky, *Artists Want Work Protected*, N.Y. Times, Oct. 1, 1988, § C, at 21, col. 4.

compliance with Article 6,<sup>119</sup> and the desire of Berne members for U.S. adherence and their willingness to tolerate the U.S. status quo.<sup>120</sup> The status quo argument advanced by the Berne leaders recognized the recent expansion of moral rights in the U.S., both under state law and in *Gilliam*, and stated that proposed adherence to Berne did not in any way hinder or hasten this expansion.<sup>121</sup>

#### IV. THE NATIONAL FILM PRESERVATION ACT

The unorthodox way in which the NFPA of 1988 was introduced may account for its success where other colorization legislation failed. The bill was added to Interior Department funding legislation on June 16, 1988, by the House Appropriations Committee.<sup>122</sup> It was authored by Representative Robert Mrazek. Originally, the bill would have created a National Film Commission to choose "artistically significant" films.<sup>123</sup> The bill's original labeling requirement would have disclosed the principal director or screenwriter's wish to be disassociated from the altered version of any artistically significant films. The Mrazek bill would also have added a new section to the Copyright Act, providing that the

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119. The Author's League, at the urging of the State Department, formed an Ad Hoc Working Group on U.S. Adherence to the Berne Convention. The group was a pro bono effort consisting of private sector copyright experts. Its membership consisted of authors, musicians, producers, librarians and members of the high technology and recording industries. Senate Committee, *supra* note 115, at 21 (statement of Harvey Winter). The only two members of the Ad Hoc Committee representing the motion picture and television industry were Norman Alterman (Motion Picture Export Association of America, Inc.) and I. Fred Koenigsberg (American Society of Composers, Authors & Publishers). *Id.* at 429.

The Report of the Ad Hoc Committee on Berne Adherence recommended that current U.S. law is adequate for compliance with article 6. The Ad Hoc Committee Report relied upon scholarship which cited the Copyright Act, the Lanham Act and State common law principles as providing moral rights protections.

The report has been criticized for its weak support of its position by comparison with other countries which have even weaker moral rights laws. See Brown, *Adherence to the Berne Copyright Convention: The Moral Rights Issue*, 35 J. COPYRIGHT SOC. U.S.A. 196 (1988). Brown criticizes the Committee Report's line of reasoning: "[a]n oblique justification for the currently dominant view that our skimpy moral rights garment will not embarrass us in Berne comes from the observation that other Berne countries, notably Great Britain and Australia, offer even less." *Id.* at 205.

120. The House Committee on the Judiciary's visit with the World Intellectual Property Organization (WIPO) Roundtable in Geneva was influential in the decision to exclude moral rights from the Berne Adherence Legislation. See *Berne Convention Implementation Act of 1987: Hearings Before Subcommittee on Courts, Civil Liberties and the Administration of Justice of the House Committee on the Judiciary*, 100th Cong. Sess. Appendix 111 (Roundtable Discussions on United States Adherence to the Berne Convention), 135-1213.

121. See Berne Convention Act, *supra* note 11, § 3(b).

122. H.R. REP. NO. 4867, 100th Cong., 2d Sess. (1988).

123. *House Passes Measure to Create National Film Preservation Board*, PAT. TRADEMARK & COPYRIGHT J. (BNA), July 24, 1988, at 267.

public dissemination of the chosen films without the required disclosure would constitute copyright infringement.<sup>124</sup> The bill also would have prohibited the public dissemination of colorized films under their original titles.

Representative Sidney Yates subsequently offered a substantially amended version of the bill, which was signed into law as part of the Interior Department funding packet.<sup>125</sup> Rather than amending the Copyright Act, the Yates bill called for the establishment of a National Film Registry<sup>126</sup> for films that were deemed "culturally, historically or aesthetically significant,"<sup>127</sup> rather than "artistically significant," as in the Mrazek bill. No film could be registered until 10 years after theatrical release, further emphasizing the historical value of the registered films.

Additionally, 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."<sup>128</sup> As this seal could only be displayed in connection with an unaltered film, the bill created an incentive to show films in their unaltered state.<sup>129</sup> A National Film Preservation Board<sup>130</sup> was to select the films for the Registry and to establish criteria for determining "whether a registered film had been materially altered or colorized."<sup>131</sup> Materially altered films were to display a disclaimer similar to that required for colorized movies:

124. *Id.*

125. NFPA, *supra* note 6.

126. NFPA, *supra* note 6, § 2.

127. The determination of whether a film is culturally, historically or aesthetically significant is made with reference to the Proposed Guidelines. *Id.*

128. The final selection of the films from the list nominated by the panel was made by James L. Billington, Librarian of Congress on Sept. 19, 1989. The list consisted of *The Best Years of Our Lives* (1946), director William Wilder; *Casablanca* (1942), director Michael Curtiz; *Citizen Kane* (1941), director Orson Welles; *The Crowd* (1928), director Kin Vidor; *Dr. Strangelove (or, How I Learned to Stop Worrying and Love the Bomb)* (1964), director Stanley Kubric; *The General* (19xx), director Buster Keaton; *Gone With the Wind* (1939), director Victor Fleming; *The Grapes of Wrath* (1940), director Fred Zinnemann; *Intolerance* (1916), director D.W. Griffith; *The Learning Tree* (1969), director Gordon Parks; *The Maltese Falcon* (1941), director John Huston; *Mr. Smith Goes to Washington* (1939), director Frank Capra; *Modern Times* (1936), director Charlie Chaplin; *Nanook of the North* (1921), director Robert Flaherty; *On the Waterfront* (1954), director Elia Kazn; *The Searchers* (1954), director John Ford; *Singin' in the Rain* (1952), directors Gene Kelly and Stanley Donen; *Snow White and the Seven Dwarfs* (1937), Walt Disney; *Some Like it Hot* (1959), director Billy Wilder; *Star Wars* (1977), director George Lucas; *Sunrise* (1927) director F.W. Murnau; *Sunset Boulevard* (1950), director Billy Wilder; *Vertigo* (1958), director Alfred Hitchcock; *The Wizard of Oz* (1939), director Victor Fleming. N.Y. Times, Sept. 19, 1989, at B1, col. 5.

129. The term unaltered means free from "material alterations," to be defined by the National Film Preservation Board. NFPA, *supra* note 6, § 3(a)(c).

130. NFPA, *supra* note 6, § 8.

131. Material alterations may include time compression, panning and scanning, where perceptible, and certain types of editing. Proposed Guidelines, *supra* note 18, §§ 1(c), 2(b).

This is a colorized version of the film originally distributed in black and white. It has been altered without the participation of the principal director, screenwriter, and the other creators of the original film.<sup>132</sup>

A pattern of failure to affix this label, in willful violation of the Act, could result in fines of up to \$10,000 and appropriate injunctive relief. Violations were to be prosecuted by the Attorney General. The success of the NFPA may be attributed in part to the fact that, unlike earlier measures, it restricted the definition of a material alteration and proposed the gathering of a cross-section of the industry to further define this term. The NFPA addresses some of the concerns underlying international moral rights legislation while primarily protecting public interest in authentic film display.

### A. Public Enforcement and the Moral Right

There are many differences between the NFPA and the notion of a moral right. Perhaps the most significant is the public rather than artistic enforcement of the Act. There are domestic and international precedents for public enforcement of moral rights in conjunction with enforcement by the artist. In the Massachusetts<sup>133</sup> and California<sup>134</sup> moral rights statutes, both public interest organizations and the artist may seek injunctive relief to preserve or restore the integrity of a work. Several European statutes provide a public officer with enforcement power, as is the case with the NFPA.<sup>135</sup> However, unlike the NFPA, these European statutes also contain artistic enforcement provisions.<sup>136</sup> The NFPA is novel in that it asserts a public interest in a right which governs the integrity of all reproductions of a work and that may only be asserted by the state and not by the artist. Thus, the NFPA does not in a formal sense

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132. The labeling provisions are similar to those of another unsuccessful bill, KASTENMEIER'S FILM DISCLOSURE AND PRESERVATION ACT OF 1988. H.R. REP. NO. 4897, 100th Cong., 2d Sess., June 22, 1988 [hereinafter Disclosure Act]. The Disclosure Act would have required each materially altered or colorized film to contain a disclosure a) that the film has been altered, b) the nature of that alteration, c) the fact of any objection by an aggrieved party to any such alteration. *Id.* § (c)(1)(A). An aggrieved party was defined as "the principal director, screenwriter, editor or cinematographer." *Id.* § (c)(3)(B)(1). The Disclosure Act also required a good faith effort to notify aggrieved parties before materially altering a film. *Id.* § (c)(1)(B). There were vigorous objections to its lack of definition of the term "material alteration." Comment, *supra* note 94, at 370-71.

133. MASS. GEN. LAWS ANN. 231, § 85S (West Supp. 1988).

134. CAL. CIV. CODE § 989(c) (Deering Supp. 1988).

135. Gantz, *supra* note 77, at 889 n.117 (citing 2 UNESCO, COPYRIGHT LAWS AND TREATIES OF THE WORLD (1980)). See also Stat. of Apr. 22, 1941, no. 633, art. 23, Gaz. Uff. (Italy).

136. Language similar to these European statutes was included in the original draft of the New York moral rights statute. N.Y. Assembly 7157, 204th Reg. Sess. § 9-205(4) (1981). Under this statute, the state attorney general would have been able to sue on behalf of the artist. The inclusion of such a provision in the California statute has been urged by some commentators. Gantz, *supra* note 76, at 889-90 n.117.

protect the moral right of the artist at all, but rather promotes the unaltered display of films.

## B. Existing Legislative Models

The National Film Preservation Board looks more to the public interest than to moral rights for its mandate. This aspect of the Act can be seen by comparison to the National Historic Preservation Act, which it closely parallels in language and structure.<sup>137</sup> Both Acts establish government boards which select objects of historical value, which are then given certain limited protections.

The National Historic Preservation Act recognizes that "the historical and cultural foundations of the Nation should be preserved as a living part of our community life and development in order to give a sense of orientation to the American people."<sup>138</sup> The NHPA similarly begins "[w]hereas motion pictures are a vital and integral part of American life and have enriched the lives of the American people, and people throughout the world."<sup>139</sup> Thus, both Acts refer to the function of protected objects as cultural property in helping to "satisfy a basic need for cultural identity, symbolize shared values and experience."<sup>140</sup>

Similarly, both Acts refer to "traditional values," the concern for "continuity" and the search for "cultural roots."<sup>141</sup> The National Historic Preservation Act refers to the public interest in protecting "historic properties significant to our nation's heritage," while the NHPA refers to the interest in protecting film as an "enduring part of our nation's historical and cultural heritage."<sup>142</sup> The National Historic Preservation Act also states that "preservation of this irreplaceable heritage is in the

137. The federal government passed the National Historic Preservation Act in 1966. 16 U.S.C. § 470 (1980) [hereinafter NHPA]. The statute states that:

(b) the Congress finds and declares that—

(1) the spirit and direction of the Nation are founded upon and reflected in its historic heritage; (2) the historical and cultural foundations of the Nation should be preserved as a living part of our community life and development in order to give a sense of orientation to the American people; (3) historic properties significant to the Nation's heritage are being lost or substantially altered, often inadvertently, with increasing frequency; (4) the preservation of this irreplaceable heritage is in the public interest so that its vital legacy of cultural, educational, aesthetic, inspirational, economic, and energy benefits will be maintained and enriched for future generations of Americans.

*Id.* § 470(b).

138. *Id.* § 470(b)(2).

139. NHPA, *supra* note 6, § I(A).

140. See Merryman, *Cultural Property*, *supra* note 46, at 349.

141. These are seen as important factors in the recognition of cultural property. De Varine, *supra* note 53.

142. Both acts limit the extent of alterations for which protections are offered, the NHPA being limited to "substantial alteration" NHPA, *supra* note 137, §470(b)(3) and the NHPA to "material alterations" NHPA, *supra* note 6, § 4.

public interest," while the NFPA describes motion pictures as a "significant American art form deserving of protection."<sup>143</sup>

Despite these similarities in language and stated intentions, the National Historical Preservation Act has the clear purpose of preserving the physical presence of historical buildings, while the NFPA does not focus solely on "film preservation" in the traditional sense. The NFPA does recognize this film preservation interest by mandating the preservation of the selected films in the "National Film Board Collection" of the Library of Congress. However, the NFPA extends further to copies of the original film. The labeling protections of the NFPA are unrelated to the preservation of the original film. Instead, these provisions govern the altered display of videotaped copies of the film.

### C. Implications of the National Film Preservation Act

There are certain political and theoretical advantages inherent in the NFPA over either the public interest in unaltered film display or the artist's moral right in their pure forms. Most significantly, the publicly enforceable right to have altered films labeled avoids the difficult decisions over who is the author of the film, which occur if the film "author" for moral rights purposes is different from the film "author" under U.S. copyright law. The solutions developed in European countries consist of complex co-authorship arrangements that have been criticized as impractical by European scholars.<sup>144</sup> The NFPA neatly avoids this issue through public enforcement and likewise avoids the resultant political confrontations over the definition of authorship that have held up moral rights legislation in the past.<sup>145</sup>

Further, the Film Board addresses concerns about overbreadth by limiting itself to films of cultural and historical significance. While from a moral rights perspective this limitation curtails the rights of certain filmmakers, it does pay heed to the public concern over the colorization of black-and-white film classics.<sup>146</sup>

On the other hand, critics have questioned the appropriateness of a governmental body judging the quality of the arts.<sup>147</sup> However, it has

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143. NFPA, *supra* note 6, § 3.

144. Sarraute, *supra* note 83, at 467.

145. See text accompanying notes 81-85.

146. Farber, *Will Colorizing Revitalize Old TV Series?*, N.Y. Times, June 7, 1987, § 2, at 35, col. 1. "So far there has been no public outcry about the plans to colorize these old (television) series. I expect less criticism over the colorizing of television fare." *Id.* (statement by Charles Powell, executive vice president of Color Systems Technology, one of the first firms to get involved in colorizing).

147. Molotsky, *Film Protectors Try to Define Terms*, N.Y. Times, Jan. 24, 1989, at C19, col. 5. "I don't think this body or any other Government body ought to be selecting anything

been pointed out that the exercise of governmental judgment in connection with the National Endowment for the Arts and the selection of a National Poet Laureate are longstanding.<sup>148</sup> Also, the procedure for receiving nominations from the public and the selection of Board members from the film industry counter charges of government incompetence or overreaching.<sup>149</sup>

The NFPA is consistent with the dual artistic and public interests present in many states' moral rights laws. It also brings U.S. law closer to European law—both cultural property and moral rights law—although it does not address the claims of certain critics that the U.S. should go further in fulfilling its moral rights obligations under the Berne Convention.<sup>150</sup> The NFPA does not create a moral right, even though it responds to similar artistic concerns; the right it creates is not exercisable by the artists and the labeling incentives and disincentives do little to deter those who seek to colorize films.

A potential problem with this combination of public and artistic interests in the NFPA is that all materially altered films must carry a disclaimer regarding the creators' lack of participation, even if the film author has in fact participated in the alteration of the film.<sup>151</sup> Although many of the directors of films chosen for the film registry this year have strenuously protested against colorization,<sup>152</sup> there has been at least one case of a world-renowned film director permitting the colorization of his film.<sup>153</sup> Also, the labeling provision is problematic in that it specifies that the director, screenwriter and other creators of the original film have not participated in the alteration process, without considering the possibility

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for a list," *Id.* (statement by Mr. Jack Valenti, of the Motion Picture Association of America).

148. Easton, *Valenti Refuses His Vote in Pushing Campaign Against Film Preservation Board*, L.A. Times, July 21, 1989, § VI, at 10, col. 1 (statement by James L. Billington, Librarian of Congress), see also Molotsky, *supra* note 147, at C19, col. 5.

149. Section 3(a)(1)(B) of the act calls for the establishment of procedures by which the general public may make recommendations for Film Registry films. NFPA, *supra* note 6, § 3(a)(1)(B). Nine hundred sixty-two nominations from the public were received last year. Proposed Guidelines, *supra* note 18, at 49311.

150. Brown criticizes the Committee Report's line of reasoning. "An oblique justification for the currently dominant view that our skimpy moral rights garment will not embarrass us in Berne comes from the observation that other Berne countries, notably Great Britain and Australia, offer even less." Brown, *supra* note 119, at 205.

151. This is pointed out in the Proposed Guidelines, *supra* note 18, at 49311. Also, in cases where the film has been materially altered or colorized with the participation of the principal director, screenwriter or other creators of the original film, the law does not allow flexibility and the relevant label must be affixed to the film. *Id.*

152. *The Maltese Falcon*, *Mr. Smith Goes to Washington*, *Citizen Kane*, and *High Noon*. Proposed Guidelines, *supra* note 18, at 49311.

153. Director Jean-Luc Godard recently had his classic film *Breathless* colorized by Color Systems Technology. Telephone Interview with Eric Schwartz, *supra* note 16.

that one creator might agree to an alteration to which others object. Finally, the definition of the original film as the first theatrically released version is problematic.<sup>154</sup> Under this definition, the widely acclaimed re-release of *Lawrence of Arabia*, in which the director's original unreleased edit had been restored, would require a misleading label if chosen by the Board.<sup>155</sup> As a result, the NFPA does not fully meet the concerns underlying moral rights legislation, and may in fact lead to undesirable results.

## V. PROPOSAL FOR EXPANSION OF THE NFPA

### A. Strengthening the NFPA

Questions remain regarding the practicality of public enforcement of the NFPA. The vigor of the Attorney General's pursuit of Film Registry outlaws may be less than desirable, given the variety of crimes against the public under his jurisdiction. The Act gives the Librarian of Congress a watchdog role in submitting applications to the Attorney General, which should prevent labeling abuses from going entirely undetected.

Organizations of film artists should be allowed to submit applications to the Attorney General, much as arts organizations may enforce the Massachusetts and California moral rights statutes.<sup>156</sup> This would result in better detection of violations through the involvement of organizations knowledgeable about film alterations and familiar with film distribution systems. Manageability concerns might be addressed by specifically limiting the number of organizations that may submit applications to the Attorney General to those groups represented on the Film Board.

In addition to strengthening the public enforcement mechanism of the NFPA, the remedies that the Act offers should be strengthened. The "incentives" and "disincentives" created by the Act do little to deter those who seek to profit from colorizing films. The Board should take an active role in the adoption of industry-wide standards for material alterations.

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154. The definition does at least allow for the hand colorizing that many experimental filmmakers, such as Stan Brackage, have done to their films before theatrical release. Interview with Kathy Geritz, Assistant Film Curator, Pacific Film Archive (Oct. 4, 1989).

155. The types of changes made in the re-editing of *Lawrence of Arabia* to recreate the director's original unreleased version involve "[f]undamental changes in theme, plot and character, including...[t]he addition of any other new materials, by digital or other technological means, into preexisting films...." Proposed Guidelines, *supra* note 18, § 1(b)(ii). Thus, the changes made would be considered material alterations under the act. Telephone interview with Eric Schwartz, *supra* note 16.

156. See *supra* note 109.

Certain intermediate measures might be taken to strengthen the Board's powers. For example, the NFPA will probably place limits on the percentage of a film that may be altered through lexiconning before a label is attached.<sup>157</sup> The Film Board may also create regulations regarding alternatives to panning and scanning that encourage the use of techniques, such as letterboxing, which preserve film aesthetics. In the interests of authentic film display, the Board should be given a role in the formation of industry-wide standards to govern these technologies.

It is not practical to limit colorization to a certain percentage of a film. However, a middle ground could be reached by limiting the markets available for colorized classics. For instance, the display of colorized Film Registry films might, at a minimum, be disallowed on television broadcasts, which are federally regulated. This marketing limitation would more effectively promote the interest in authentic film display, but at the cost of reduced consumer choice. Thus, the television viewer's choices would be more limited than the videotape renter's options, if both the colorized and unaltered versions were available for rental.

The Film Board's three year tenure and twenty-five film per year selection limit effectively give it the task of choosing the seventy-five films which best represent our nation's heritage.<sup>158</sup> Difficulties within the Board have developed as members grappled with the numerous film genres (silent, musical, comedy, drama, docudrama) and eras that should be included in such a film registry.<sup>159</sup> While academics on the Film Board asserted the importance of the less popular genres, other Board members advocated film favorites.<sup>160</sup> A more complete assessment of our nation's film heritage would be obtained if the Film Board's tenure were extended. This would also provide a more meaningful extension of the protections offered by the Act. Using the National Historic Building Act as a model, the Board might be continued on a regular basis to choose a body of films for inclusion in the Film Registry.

Finally, the Act contains a ten-year waiting period before films may be evaluated by the Board. This should be eliminated, as should the Act's exculpatory clause for preexisting alterations. The combination of these two clauses makes the Film Act virtually useless at discouraging alterations. With the rapid changes taking place in the video market, many films will have been materially altered prior to ten years after their release, and thus, will not be affected by the NFPA. Lexiconning and

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157. Proposed Guidelines, *supra* note 18, § I(d).

158. *Id.*, §§ 3(a)(2)(A) & 8(a)(2)(C). This limit allows for less than one film to represent each year of American film history.

159. L.A. Times, July 7, 1988, at VI1, col. 2.

160. Easton, *supra* note 149.

panning and scanning for the television market would almost certainly occur less than ten years after release. Currently, these clauses have exempted three designated classics—Casablanca, High Noon and The Maltese Falcon—which had been colorized before their selection for the film registry.

### B. Barriers to Expansion of the Act: The Takings Clause

If colorization were prohibited entirely for films appearing in the Registry, takings clause<sup>161</sup> problems might be raised, as they have been with historic building statutes. The National Historic Building Act avoids takings clause challenges through a 1980 amendment by which the government will not designate a property historic if a landowner objects to such a designation.<sup>162</sup> State historic property statutes,<sup>163</sup> which often do not require landowner approval,<sup>164</sup> have successfully survived takings clause suits.

In the leading case in this area, *Penn Central Transportation Co. v. City of New York*,<sup>165</sup> the owners of Grand Central Terminal were prevented from building a 50 story office building atop Penn Central, which had been declared a historic landmark in 1967. The U.S. Supreme Court held that if a regulation's restrictions are substantially related to promoting the public welfare and permit "reasonable beneficial use," then there is no "taking."<sup>166</sup> Investment-backed expectations (expectations of benefit by property owners when investing in property) were mentioned as one of the factors to be considered by courts in such takings cases.

In another recent case in this area, *Keystone Bituminous Coal Assoc. v. De Benedictis*,<sup>167</sup> Pennsylvania enacted coal mining restrictions requiring mining companies to keep in place fifty percent of the coal in the land on top of which there are buildings.<sup>168</sup> The Supreme Court held that to succeed in a facial attack of the statute, the challenger must show the

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161. The takings clause of the fifth amendment states that "[n]o person shall...be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. The fifth amendment takings clause was made applicable to the states through the fourteenth amendment in *Chicago, B. & O. Ry. Co. v. Chicago*, 166 U.S. 226, 239 (1897).

162. 16 U.S.C. § 470a (6) (1980).

163. Some form of legislation preserving America's architectural past exists in all 50 states. J. MORRISON, *HISTORIC PRESERVATION LAW* 133 (1965).

164. New York, for example, does not require landowner approval. See *F.G.L.&L. Property Corp. v. City of Rye*, 66 N.Y.2d 111, 485 N.E.2d 986, 992 (N.Y. 1985).

165. 438 U.S. 104 (1978).

166. Note, *Preserving the Past: Historic Preservation Regulations and the Taking Clause*, 34 J. OF URB. & CON. L. 297, 302 (1988).

167. 107 S. Ct. 1232 (1987).

168. The statute was enacted to prevent subsidence problems, including damage to existing structures. *Id.* at 1237.

statute denies him all "economically viable use of his land." In making this determination, a court must examine whether any viable use remains. In *Keystone*, the court considered the mining companies' reasonable investment-backed expectations. Because the regulation required that only a "small percentage" of the coal remain in place, it was found not to violate the owner's investment-backed expectations.<sup>169</sup> The court further considered the fact that the Pennsylvania legislation only regulated a small part of the company's total land.<sup>170</sup> Thus, the statute was upheld.<sup>171</sup>

If the Supreme Court were to apply a similar takings clause analysis to the NFPA, it seems unlikely that a company such as Turner Entertainment Company could successfully prove a takings clause violation. Given the market for unaltered black-and-white film classics, as is evidenced by the popularity of the American Film Classics cable station,<sup>172</sup> it would be difficult for Turner to prove that he had been denied all economically viable use of the films on the Registry. Also, much as with the owner in *Keystone*, the "historically, culturally, or aesthetically significant" films chosen by the film board would amount to a small portion of the vast MGM library owned by Turner. As stated above, only by directly limiting colorization and other technological alterations will the NFPA fulfill its stated purpose: "to recognize motion pictures as a significant American art form deserving of protection."<sup>173</sup>

## CONCLUSION

The precedents set by the NFPA include (1) expanding the notion of national cultural property to include film; (2) providing disincentives to materially alter films, thereby supporting the integrity of classic films through a public trust; and (3) providing the first government body to select classic films for "preservation" and to define "material alteration."

Certain extensions of the NFPA are needed before the National Film Preservation Board can more effectively recognize and protect our national film heritage. The Board should be extended beyond its three-year tenure and disincentives to film alteration should go beyond disclosing the artists' dissatisfaction. Finally, to bolster public

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169. *Id.* at 1249-50.

170. *Id.* at 1250-51.

171. *Id.* at 1253.

172. American Movie Classics shows unaltered versions of classic films. Several years ago, AMC became part of a basic cable package, due to its popularity, and now has 26 million subscribers. According to Jim Weiss, publicity manager for AMC, the fact that AMC was added to the basic service reflected its popularity. Telephone Interview with Jim Weiss, Publicity Manager, American Movie Classics, (Mar. 9, 1990).

173. NFPA, *supra* note 6, § 1(3).

enforcement and increase public participation, film organizations should be given a role in protecting our national film heritage through the NFPA.