MORAL RIGHTS AND THE MOTION PICTURE INDUSTRY

HEARING

BEFORE THE

SUBCOMMITTEE ON
COURTS, INTELLECTUAL PROPERTY,
AND THE ADMINISTRATION OF JUSTICE

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED FIRST CONGRESS

SECOND SESSION

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CONTENTS

HEARING DATE

OPENING STATEMENT

WITNESSES

LETTERS, STATEMENTS, ETC., SUBMITTED FOR THE HEARING

APPENDIX

MORAL RIGHTS AND THE MOTION PICTURE INDUSTRY

TUESDAY, JANUARY 9, 1990

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS, INTELLECTUAL PROPERTY
AND THE ADMINISTRATION OF JUSTICE,
COMMITTEE ON THE JUDICIARY,
Los Angeles, CA.

The subcommittee met, pursuant to notice, at 9:30 a.m., in the Moot Courtroom, UCLA School of Law, 405 Hilgard Ave., Los Angeles, CA, Hon. Robert W. Kastenmeier (chairman of the subcommittee) presiding.

Present. Representatives Robert W. Kastenmeier, Howard L. Berman, and Mike Synar.

Also present: Virginia E. Sloan, counsel; Joseph V. Wolfe, minority counsel; and Bari Schwartz, legislative director to Congressman Berman.

OPENING STATEMENT OF CHAIRMAN KASTENMEIER

Mr. KASTENMEIER. The meeting will come to order.

Mr. SYNAR. Mr. Chairman.

Mr. KASTENMEIER. The gentleman from Oklahoma.

Mr. SYNAR. I ask unanimous consent that the subcommittee permit the meeting to be covered in whole or in part by television broadcast, radio broadcast and/or still photography pursuant to rule 5 of the committee rules.

Mr. KASTENMEIER. Without objection, the gentleman's motion will be agreed to.

My colleagues, the gentleman from Oklahoma, Congressman Mike Synar, and the gentleman from southern California, from this very area, Congressman Howard Berman, and I are delighted to be here and to greet our constituents as well as others who are attending this hearing this morning.

Through movie making we have been entertained and educated by the magic of the big screen. We have watched with fascination as films have traveled the road from black and whites to color, from silent to talkies, to new technologies that permit basic changes in the original film to be made that ultimately have the potential to make the original film virtually unrecognizable.

By now some of these technologies—colorization, lexiconning, letterboxing, panning and scanning—are familiar to those of us who have seen movies on airplanes, on television or videocassette. The pace of a movie might need to be speeded up to compensate for

commercials or for a limited viewing period. Distributors might decide that more people will watch a film in color, even though it was originally created in black and white.

Since movie and television screens are different dimensions, the dimensions or composition of the picture might need to be changed. Technology is not standing still. And while these are the technologies of today, tomorrow will bring changes still more amazing and, at least to some, more problematic.

This period of amazing technological progress has generated continuing disagreement between those who believe that these changes further the art form and those who argue that the original is a work of art and that changes are only to its detriment. So long as technology advances, this dispute will confront us, and we are here today to continue this subcommittee's consideration of technological change and its impact on this country's best known and best loved art form.

We are pleased to do so in Los Angeles, the heart of the film industry, and are grateful to UCLA, and to the law school in particular for providing us with the facilities to hold this hearing, and for their assistance to the subcommittee.

Congress's constitutional mandate is to promote creativity. At its essence, the dispute before us today is about whether technological advances promote the creation of films or whether they discourage it. It pits, in some cases, artists such as film directors and screenwriters against copyright holders.

These artists argue that no matter who holds the copyright, they should have the right to object or even prevent unauthorized changes in films. Copyright owners, on the other hand, point to their significant role, both artistic and financial, in the creation of a film. They contend that the current law appropriately gives them the final say on whether a film should be altered.

We have held five hearings on this issue in the past. The first two led to the Congress's decision to join the Berne International Copyright Convention, which declares a certain level of protection for artists' rights.

Three hearings resulted from our decision that joining Berne did not require any changes in our current laws protecting artists' rights, but that the overall issue merited further discussion and deliberation. You have heard pleas from many artists, including painters, sculptors, film directors, and screenwriters, that our laws are deficient and that they should have additional rights to object to and prevent changes in their works.

In fact, along with my colleague, Howard Berman, I have introduced a bill to provide visual artists with the right to prevent changes in their works and to require that they be identified as the creators of those works. Visual arts are specifically defined to exclude film works.

There are critical factual differences between visual artists and film artists. Visual artists generally create only one or a limited number of works. They are generally not workers for hire. Film artists, on the other hand, are part of a collaborative effort to create multiple copies of a work and they generally are workers for hire.

These factual differences have important legal consequences. Our focus today will include the progress of continuing private negotiations, the Copyright Office report on this issue, the impact of the creation of the National Film Preservation Board, and the potential for creation of new technologies.

In our past hearings in Washington, we have heard from a fairly limited number of witnesses. We are, therefore, fortunate to be able to hold a hearing in Los Angeles where we will be able to hear from several other important groups who have an interest in the creation, distribution and exhibition of films.

We should not, however, make legal decisions in a factual void. Therefore, through a series of visits over the next few days, the subcommittee will see first-hand how some of these new technologies are applied, how films are made and how they are prepared for distribution in theaters, on television, on videotape, and the like.

No matter what the ultimate decision, I believe there are certain criteria that Congress must use in considering any dispute of this nature. First, we must ask the proponents of change to bear the burden of proving that the change is necessary, fair and practical. And second, we must recognize and balance the legitimate rights of creators, producers, copyright holders and the public interest. Third, a private solution negotiated by interested parties is always preferable to congressional intervention. We are aware that some negotiations are taking place now and are likely to continue. We will follow their progress with great interest and take their results into account in our own deliberations.

So, as a longstanding film fan, I am anxious to begin today's hearing and once again consider the hotly debated but always fascinating issue of artists' rights.

[The opening statement of Mr. Kastenmeier follows:]

OPENING STATEMENT

OF

THE HONORABLE ROBERT W. KASTENMEIER

OVERSIGHT HEARING ON ARTISTS' RIGHTS
IN THE CONTEXT OF MOTION PICTURES

JANUARY 9, 1990

THROUGH MOVIEMAKING, WE HAVE BEEN ENTERTAINED, WE HAVE BEEN EDUCATED, AND WE HAVE BEEN CAPTIVATED BY THE MAGIC OF THE BIG SCREEN. WE HAVE WATCHED WITH FASCINATION AS FILMS HAVE TRAVELLED THE ROAD FROM SILENT BLACK-AND-WHITES TO "TALKIES" TO COLOR, TO NEW TECHNOLOGIES THAT PERMIT BASIC CHANGES IN THE ORIGINAL FILM TO BE MADE, AND THAT ULTIMATELY MAY HAVE THE POTENTIAL TO MAKE THE ORIGINAL FILM VIRTUALLY UNRECOGNIZABLE.

BY NOW SOME OF THESE TECHNOLOGIES -- COLORIZATION, LEXICONNING, LETTER BOXING, PANNING AND SCANNING -- ARE FAMILIAR TO THOSE OF US WHO HAVE SEEN MOVIES ON AIRPLANES OR ON TELEVISION OR ON A VIDEOCASSETTE. THE PACE OF A MOVIE MIGHT NEED TO BE SPEEDED UP TO COMPENSATE FOR COMMERCIALS, OR FOR A LIMITED VIEWING PERIOD. THE DISTRIBUTORS MIGHT DECIDE THAT MORE PEOPLE WILL WATCH A FILM IN COLOR, EVEN THOUGH IT WAS ORIGINALLY CREATED IN BLACK AND WHITE. SINCE MOVIE AND TELEVISION SCREENS HAVE DIFFERENT DIMENSIONS, THE DIMENSIONS OR THE COMPOSITION OF THE PICTURE MIGHT NEED TO BE CHANGED. T E C H N O L O G Y I S N O T STANDING STILL. WHILE THESE ARE THE TECHNOLOGIES OF TODAY, TOMORROW WILL BRING CHANGES STILL MORE AMAZING AND -- AT LEAST TO SOME -- MORE PROBLEMATIC.

THIS PERIOD OF AMAZING TECHNOLOGICAL PROGRESS HAS GENERATED

CONTINUING DISPUTES BETWEEN THOSE WHO BELIEVE THAT THESE CHANGES FURTHER THE ART FORM, AND THOSE WHO ARGUE THAT THE ORIGINAL IS THE WORK OF ART AND THAT CHANGES ARE ONLY TO ITS DETRIMENT.

SO LONG AS TECHNOLOGY ADVANCES, THIS DISPUTE WILL CONFRONT US. WE ARE HERE TODAY TO CONTINUE THIS SUBCOMMITTEE'S CONSIDERATION OF TECHNOLOGICAL CHANGE AND ITS IMPACT ON THIS COUNTRY'S BEST KNOWN AND BEST LOVED ART FORM. WE ARE PLEASED TO DO SO IN LOS ANGELES, THE HEART OF THE FILM INDUSTRY, AND ARE GRATEFUL TO UCLA AND TO THE LAW SCHOOL IN PARTICULAR FOR PROVIDING US WITH THE FACILITIES TO HOLD THIS HEARING, AND FOR THEIR ASSISTANCE TO THE SUBCOMMITTEE.

CONGRESS'S CONSTITUTIONAL MANDATE IS TO PROMOTE CREATIVITY. AT ITS ESSENCE, THE DISPUTE BEFORE US TODAY IS ABOUT WHETHER TECHNOLOGICAL ADVANCES PROMOTE THE CREATION OF FILMS, OR WHETHER THEY DISCOURAGE IT. IT PITS ARTISTS SUCH AS FILM DIRECTORS AND SCREENWRITERS AGAINST COPYRIGHT HOLDERS. THESE ARTISTS ARGUE THAT NO MATTER WHO HOLDS THE COPYRIGHT, THEY SHOULD HAVE THE RIGHT TO OBJECT TO -- AND EVEN TO PREVENT -- UNAUTHORIZED CHANGES IN FILMS. COPYRIGHT OWNERS, ON THE OTHER HAND, POINT TO THEIR SIGNIFICANT ROLE -- OFTEN BOTH ARTISTIC AND FINANCIAL -- IN THE CREATION OF A FILM. THEY CONTEND THAT CURRENT LAW APPROPRIATELY GIVES THEM THE FINAL SAY ON WHETHER A FILM SHOULD BE ALTERED.

WE HAVE HELD FIVE HEARINGS ON THIS ISSUE IN THE PAST. THE FIRST TWO LED TO CONGRESS'S DECISION TO JOIN THE BERNE INTERNATIONAL COPYRIGHT CONVENTION, WHICH REQUIRES A CERTAIN LEVEL OF PROTECTION FOR ARTISTS' RIGHTS. THREE HEARINGS RESULTED FROM OUR DECISION THAT JOINING BERNE DID NOT REQUIRE ANY CHANGES

IN OUR CURRENT LAWS PROTECTING ARTISTS' RIGHTS, BUT THAT THE OVERALL ISSUE MERITED FURTHER DISCUSSION AND DELIBERATION. WE HAVE HEARD PLEAS FROM MANY ARTISTS, INCLUDING PAINTERS, SCULPTORS, FILM DIRECTORS, AND SCREENWRITERS, THAT OUR LAWS ARE DEFICIENT, AND THAT THEY SHOULD HAVE ADDITIONAL RIGHTS TO OBJECT TO AND PREVENT CHANGES IN THEIR WORKS.

IN FACT, ALONG WITH MY COLLEAGUE HOWARD BERMAN, I HAVE INTRODUCED A BILL TO PROVIDE VISUAL ARTISTS WITH THE RIGHTS TO PREVENT CHANGES IN THEIR WORKS, AND TO REQUIRE THAT THEY BE IDENTIFIED AS THE CREATORS OF THOSE WORKS.

THERE ARE CRITICAL FACTUAL DIFFERENCES BETWEEN VISUAL ARTISTS AND FILM ARTISTS. VISUAL ARTISTS GENERALLY CREATE ONLY ONE, OR A LIMITED NUMBER, OF WORKS. THEY ARE GENERALLY NOT WORKERS FOR HIRE. FILM ARTISTS, ON THE OTHER HAND, ARE PART OF A COLLABORATIVE EFFORT TO CREATE MULTIPLE COPIES OF A WORK, AND THEY GENERALLY ARE WORKERS FOR HIRE. THESE FACTUAL DIFFERENCES HAVE IMPORTANT LEGAL CONSEQUENCES.

OUR FOCUS TODAY WILL INCLUDE THE PROGRESS OF CONTINUING PRIVATE NEGOTIATIONS ON THE CONTROVERSY, THE COPYRIGHT OFFICE REPORT, THE IMPACT OF THE CREATION OF THE NATIONAL FILM PRESERVATION BOARD, AND THE POTENTIAL FOR THE CREATION OF NEW TECHNOLOGIES. IN OUR PAST HEARINGS IN WASHINGTON, WE HAVE HEARD FROM A FAIRLY LIMITED NUMBER OF WITNESSES. WE ARE THEREFORE FORTUNATE TO BE ABLE TO HOLD A HEARING IN LOS ANGELES, WHERE WE WILL BE ABLE TO HEAR FROM SEVERAL OTHER IMPORTANT GROUPS WHO HAVE AN INTEREST IN THE CREATION, DISTRIBUTION, AND EXHIBITION OF FILMS.

WE SHOULD NOT, HOWEVER, MAKE LEGAL DECISIONS IN A FACTUAL VOID. THEREFORE, THROUGH A SERIES OF VISITS OVER THE NEXT FEW DAYS, THE SUBCOMMITTEE WILL SEE FIRST-HAND HOW THESE NEW TECHNOLOGIES ARE APPLIED, HOW FILMS ARE MADE, AND HOW THEY ARE PREPARED FOR DISTRIBUTION IN THEATERS, ON TELEVISION, ON VIDEOTAPE, AND THE LIKE.

NO MATTER WHAT OUR ULTIMATE DECISION, I BELIEVE THAT THERE ARE CERTAIN CRITERIA THAT THE CONGRESS MUST USE IN CONSIDERING ANY DISPUTE OF THIS NATURE. FIRST, WE MUST ASK THE PROPONENTS OF CHANGE TO BEAR THE BURDEN OF PROVING THAT THE CHANGE IS NECESSARY, FAIR, AND PRACTICAL. SECOND, WE MUST ALWAYS RECOGNIZE AND BALANCE THE LEGITIMATE RIGHTS OF CREATORS, PRODUCERS OR COPYRIGHT HOLDERS, AND THE PUBLIC INTEREST. THIRD, A PRIVATE SOLUTION NEGOTIATED BY INTERESTED PARTIES IS ALWAYS PREFERABLE TO CONGRESSIONAL INTERVENTION. WE ARE AWARE THAT SOME NEGOTIATIONS ARE TAKING PLACE NOW AND THAT THEY ARE LIKELY TO CONTINUE. WE WILL FOLLOW THEIR PROGRESS WITH GREAT INTEREST, AND TAKE THEIR RESULTS INTO ACCOUNT IN OUR OWN DELIBERATIONS.

AS A FILM FAN OF LONG-STANDING, I AM EAGER TO BEGIN TODAY'S HEARING AND TO ONCE AGAIN CONSIDER THE HOTLY DEBATED BUT ALWAYS FASCINATING ISSUE OF ARTISTS' RIGHTS.

Mr. KASTENMEIER. The gentleman from Oklahoma.

Mr. SYNAR. Thank you, Mr. Chairman. As you have noted, all of us have grown up with movies and I also consider myself a very avid film fan. And while I cannot claim to understand all that goes into making a movie, I appreciate the skill and the talent and the hard work that is required to complete a film and to bring it to the public.

I am aware that there is a tremendous financial investment required. The return on these efforts has led, however, to the strongest entertainment industry in the world and I think that is something we can all be proud of.

As you pointed out, there have been so many hearings, particularly by this subcommittee, in which I have noted that there is an incredible amount of technological changes that affect our laws. The movie industry has not been immune to these technological changes. Now, while many have led to phenomenal special effects, better sound, film that does not disintegrate over time, other advances have spawned the controversy facing this subcommittee.

Now, I agree completely with the criteria articulated by you, Mr. Chairman. In addition to those criteria, however, let me add a few issues which I will be considering during the debate. In the past years, I have been involved in several debates involving the entertainment industry. Some of these have included video rental, videocassette recorders and satellite dishes.

Consistently, I have attempted to ensure that the public has the greatest access possible without harming other interested parties. Except in unique circumstances, I have not been in favor of legislation that has a retroactive impact. Now, thus, with respect to both sides in this issue, I think we should require that the proposed change be accompanied by substantial and convincing evidence that not only is a legislative change warranted, but it will benefit a particular interest that overrides other interests.

It is with pleasure I am here in Los Angeles again today and no matter what I learn today, it will not have an impact on my strong feeling toward this industry. And I am particularly glad to be here with my colleague and dear friend and someone whose counsel I take very dearly, and that is Howard Berman. And I am glad to be back in his area of the country, too.

[The opening statement of Mr. Synar follows:]

OPENING STATEMENT OF MIKE SYNAR
COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON COURTS, INTELLECTUAL PROPERTY AND THE ADMINISTRATION OF JUSTICE

OVERSIGHT HEARINGS ON ARTISTS' RIGHTS IN THE CONTEXT OF MOTION PICTURES

JANUARY 9, 1990

As the Chairman has noted, all of us have grown up with the movies and I, also, am an avid film fan. While I can not claim to understand all that goes into the making of a movie, I appreciate the skill, talent and hard work that is required to complete the film and to bring it to the public. I am aware that the financial investment required is enormous. The return on these efforts has led to the strongest entertainment industry in the world.

There have been so many hearings, particularly in this subcommittee, in which I have noted that there are incredible technological changes which affect our laws. The movie industry has not been immune to these technological changes. While many have led to phenomenal special effects, better sound, or film that does not disintegrate over time, other advances have spawned the controversy facing this subcommittee.

I agree completely with the criteria articulated by the Chairman. In addition to that criteria, however, let me add a few issues I will be considering during this debate.

In past years, I have been involved in several debates involving the entertainment industry. Some of these have included video rental, videocassette recorders, and satellite dishes. Consistently, I have attempted to ensure that the public has the greatest access possible without harming other interested parties. Except in unique circumstances, I have not been in favor of legislation that has a retroactive impact.

Thus, with respect to both sides of this issue, I require that any proposed change be accompanied by substantial and convincing evidence that not only is a legislative change warranted but that it will benefit a particular interest that overrides other interests.

It is a pleasure to be in Los Angeles. No matter what I learn and its impact on my legislative decision, I certainly intend to not let any of this interfere with my continued enjoyment of movies.

Mr. KASTENMEIER. Now we would like to hear from Howard Berman, the gentleman from southern California.

Mr. BERMAN. Thank you, Mr. Chairman. It is sort of nice to be back in this room. The last time I was here was on the other side of this, whatever this is, and it is more fun on this side.

But I want to welcome my colleagues to Los Angeles. You are not strangers to this city. In fact, Mr. Synar has been coming up here quite a bit lately and doing some recruiting in the area of candidates, maybe not from the industry but whose lives have been portrayed in the industry in recent weeks. And it is good to have you back.

And I want to commend you for holding this hearing, Mr. Chairman. It is a very significant issue before our subcommittee. And, I think, having this hearing in Los Angeles gives a chance for the parties most involved in the debate on this issue to be present. I take great pride in the fact that I represent on the subcommittee much of the community of studios and guilds, directors, producers, screenwriters, song writers, actors, cinematographers, all of the people involved in making films, all the collaborators that are so involved in enriching the lives of Americans and people around the world.

I do have grave concerns about trampling on the artistic integrity of the filmmakers' creation. I look forward to the testimony of the many talented witnesses who are scheduled to appear today to press a legislative approach to the issue of material alteration of films. I have been impressed by their sincerity and I have encouraged their efforts to develop practical solutions to the problems they face.

At the same time, I recognize that the creative process involves many different people in this whole endeavor. And we all know that the films would not be made in the first place but for the risk-takers who provide the necessary financial stakes for these creative efforts to achieve fruition. As somebody mentioned, even Michelangelo needed the Medicis.

I remain open, as you might gather, on this kind of an issue to the prospect that there might be a legislative resolution of this debate which is workable and achievable. And I look forward to hearing from the witnesses and the work we will do after this hearing in trying to fashion, if possible, some kind of legislative solution. Thank you, Mr. Chairman.

[The opening statement of Mr. Berman follows:]

STATEMENT OF CONGRESSMAN HOWARD L. BERMAN

ARTISTS' RIGHTS IN THE CONTEXT OF MOTION PICTURES

HEARING BEFORE THE SUBCOMMITTEE ON COURTS, INTELLECTUAL PROPERTY, AND THE ADMINISTRATION OF JUSTICE

January 9, 1990

Mr. Chairman: I want to commend you for holding this hearing. The topic is one of the most significant issues to come before our Subcommittee, and I am delighted that today's hearing provides the opportunity for the issue to be debated in Los Angeles.

The motion picture is a singularly American contribution to world culture; what is more, motion pictures are one of the most significant U.S. exports, contributing a net trade surplus in the billion dollar range each year.

I take great pride in representing on this Subcommittee much of the community of studios and guilds, directors, producers, screenwriters, songwriters, actors, cinematographers, film editors, set designers, art directors, and all the rest of the collaborators on the films that so enrich the lives of Americans and people around the world.

The creative process by which the fruits of talented imaginations emerge as feature films is one which fascinates and impresses us all. But we all know that films would not be made in the first place but for the risk takers who provide the necessary financial stakes for these creative efforts to achieve fruition. Even Michelangelo needed the Medicis.

I do have grave concerns about trampling on the artistic integrity of the filmmaker's creation, and look forward to the testimony of the talented witnesses who will appear before us today to press a legislative approach to the issue of material alteration of films. I have been impressed by the sincerity of the artists with whom I have met, and have encouraged their efforts to develop practical solutions to the problems they face.

But at the same time, I am convinced that those who take the financial risk in making motion pictures must be able to exploit these films in many markets. Getting American films made is in the interest of the entire creative community, and, equally important, in the interest of the filmviewing public around the world.

I remain open to the prospect that there may be a legislative resolution of this debate which is workable and achievable.

I want to welcome my Congressional colleagues to Los Angeles, and commend to you the testimony of today's witnesses.

Mr. KASTENMEIER. I thank my colleagues for their comments. The Chair will say that we have four panels today. The witnesses will speak rather briefly, but their submissions in their entirety, which will be somewhat longer and more explanative, will be, of course, accepted for the record.

We would like to get through at least two panels this morning. Perhaps we can even get through a third panel. There are three witnesses in the first panel; two on each of the last three panels, so that we can see how we will proceed. But I did want to indicate to those people here how we are scheduled in terms of the hearing this morning.

I am delighted to call forward our first witnesses. We are very pleased to welcome back to the subcommittee Mr. Peter Nolan and Mr. Roger Mayer. Mr. Nolan is the vice president and counsel of the Walt Disney Co. and Mr. Mayer is the president and chief operating officer of the Turner Entertainment Co.

We are also pleased to welcome a new witness before the subcommittee, Mr. Charles FitzSimons. He is the executive director of the Producers Guild of America. We are delighted to have all three of you here. And you may proceed as you wish. Who would like to speak first—Mr. Nolan?

STATEMENT OF PETER NOLAN, VICE PRESIDENT-COUNSEL, THE WALT DISNEY CO.

Mr. NOLAN. Mr. Chairman and committee members. My name is Peter Nolan. I am vice president-counsel of the Walt Disney Co. I am pleased to be here today to represent not only the Motion Picture Association of America but Disney as well.

Mr. Chairman, in almost every city in this country and virtually all other nations of the world, consumers are watching, renting and buying American movies. The global market for American movies is exploding, thanks in large part, to the proliferation of the new video technologies. Video enables our motion pictures to go anywhere and everywhere.

Many of you passed the time during your flight to Los Angeles watching a movie adapted to video. A pay service provided in your hotel also allows you to order up recently released motion pictures. If you did not like the three or four motion pictures offered in your pay service, you had available to you free television. All of these require there to be a transfer by video technology.

Visit any shopping center and you will find movies recently in the theaters like Disney's "Who Framed Roger Rabbit" and Warner's "Batman" all available for rent and sale. Video gives millions of consumers the chance to see movies they may have missed in the theaters. Indeed, it is now clear that motion pictures in the video format make more revenues than the movies in theaters.

Video is also becoming essential to the business of making movies. It costs $20 to $25 million to make a motion picture today and 80 percent of these motion pictures do not make a profit in the U.S. theatrical market. Most producers must count on the subsidiary market—or I should say the primary market, the new primary market, of video to hopefully not only recoup their investment but to make a decent profit.

And it is not just here in the United States. Video markets are essential to us all around the world. Video deserves some credit for the film industry's $2.5 billion trade surplus, among the largest in all of U.S. industry.

Now, the consumers are happy. The U.S. film industry is flourishing. Indeed, we are dominant in the world. But there are those who say there is a problem. Some object to the way we producers, who own the film's copyright, adapt our films to video. They are using the term moral rights as a rallying cry for laws that would limit the copyright owner's ability to disseminate his works.

Producers find this mindboggling, quite frankly. We invest millions of dollars in advanced technologies which are applied skillfully and artfully to give the video viewer the best experience available on television.

We use some mysterious sounding processes like panning and scanning, time compression and time expansion. Some people make these terms drip with emotion, but really the truth is that for years, in fact for decades, we have customarily used these tools when adapting movies from the theater screen to the television screen.

Some witnesses will argue that we somehow deface our films when we make these changes. That simply does not make sense. The people who work at movie studios like Disney take great pride in our motion pictures. We have a great love for the motion pictures, especially films that carry our own name. Disney, for example, does not put its signature on any film unless it is the best it could be.

The other MPAA members are equally as proud of their creations. And as businesses, we have no incentive to distort or mutilate or make our works less attractive to the consumer. It just does not make any sense.

Producers make only those changes demanded by the marketplace. We use these technologies because we are forced to by the marketplace. They are essential to compensate for the differences between film and video. It is also one of the underlying reasons why there is a copyright law in the first place, and that is to provide our culture with the best and most works available.

The copyright law provides incentives for the widest dissemination of creative works possible. This serves the constitutional objectives of the copyright provision in the Constitution, promoting public access to cultural works.

But what about the interests of the creative contributors with whom we collaborate in making our motion pictures? The legitimate interests of these contributors are protected through collective bargaining contracts and through individual contracts. They are also protected under common law or principles of law as well as other statutory law. Congress reached that conclusion after an exhaustive study conducted during the Berne debate.

Take, for example, the desire to insure that a contributor gets credit for his or her work on the work itself, on the film. The credits you see at the end of a film and sometimes at the beginning of a film and on all newspaper ads and billboards demonstrate that industry agreements and individual agreements work.

How about the contributor's chance to control changes to the work he did on a film? Well, the director is an integral part of making a motion picture. And during the last round of collective bargaining in 1987 between the directors and the producers, the directors gained the right to consult in the adaptation of film to video.

And in a way that is even misleading, because the directors have been consulted on video transfers for many years. I do not know of any major studio that does not call and provide access to a director when there is a transfer from film to video.

This week the producers are in the middle of a new round in the negotiations with the directors. I understand both sides are committed to devising a plan that will further address the legitimate interests of the directors. And we look forward to informing the committee of progress as soon as possible.

For now, I would like to submit the testimony of Nick Counter, president of the Association of Motion Picture and Television Producers and the producers' chief negotiator, that he presented to the Senate during an October hearing. It highlights the creative rights assured the directors through our agreement.

[The prepared statement of Mr. Counter follows:]

Testimony of J. Nicholas Counter, III
President, Alliance of Motion Picture and Television Producers
"Moral Rights" and Collective Bargaining
Senate Judiciary Committee
Patents, Copyrights and Trademarks
October 24, 1989

Mr. Chairman, Members of the Committee, my name is J. Nicholas Counter III. I am the President of the Alliance of Motion Picture and Television Producers -- known as the AMPTP.

The AMPTP represents the companies that produce movies and television shows.[1/]

Our job is to negotiate and administer collective bargaining agreements with the guilds and unions which represent those employed to help make movies. We negotiate with the directors, writers, screen actors, musicians, art directors, cinematographers, editors, costume designers, make-up artists, sound engineers and set designers. The list goes on -- I've highlighted a few just to reflect the great variety of professionals who collaborate to make a motion picture.

I have been asked to testify today about the extent to which so-called "moral rights" are ensured through collective bargaining. The question of "moral rights" and collective bargaining was discussed in the last Congress during the debate

on the Berne Copyright Convention. After an exhaustive study, this Committee found that U.S. law, taken as a whole, provides American creators the equivalent of "moral rights" required by Article 6bis of Berne -- the rights of paternity and integrity. The Committee's Report states that those rights emanate from the Lanham Act, various state statutes, as well as common law principles such as libel, defamation, misrepresentation and unfair competition.

We agree with the Committee. The existing laws work together with America's flexible, open marketplace to ensure that the rights of artists, copyright owners, and other creators are adequately protected.

Collective Bargaining and Creative Rights

Many copyright experts recognize the collective bargaining process as a particularly effective means of addressing and resolving concerns about creative rights. The movie industry is the preeminent example of employees and employers actively negotiating to establish creative rights. And the contract between the Directors Guild and the producers that is negotiated by AMPTP provides a good example of how the process works.

Every three years, the directors and producers revisit their collective bargaining agreement. The parties last met for a

formal negotiation in 1987 and will sit down again in just a few months for the 1990 round. Note that the parties meet during the term of the agreement to discuss creative rights issues of mutual concern. The 250-page employment contract presents a comprehensive set of rights that a producer must provide a director, and covers everything from health and pension issues to "moral rights."

The Register of Copyrights observed in his March 1989 report on Technological Alterations to Motion Pictures that, "[L]abor relations in the motion picture industry have a long history and do not present a situation where the economic leverage of the employers dwarfs that of the employees." (p. 68) As the person who sits across the table from the DGA's negotiators, I can tell you that the Register couldn't be more correct.

I can also state with confidence that artists' rights can be best fashioned, shaped and given substance if they are the product of informed discussion between those who best know our highly specialized business. Indeed, 40 years of free market negotiations have made America's film industry one of our nation's strongest.

The Committee should note that once the DGA and the AMPTP reach agreement, the results are far-reaching and widespread. Our agreement is frequently adopted by production companies not affiliated with the AMPTP. In fact, the vast majority of

America's motion picture production companies -- and directors -- rely on the standard DGA contract.

Credit Where Credit is Due

The collective bargaining agreement (the "Agreement") guarantees that every director gets credit for his or her work. Those credits you see at the beginning and end of a film, and on all the newspaper ads and billboards, are assured as a result of extensive negotiation. The Agreement requires the director's name to be prominently displayed:

-- on the screen when a film is shown theatrically, on TV, or on videocassettes;

-- in advertising or publicity on most billboards, posters, newspapers and other media;

-- on the record jacket when a soundtrack from the film is released;

-- on the cover of a book identified with the film.

These rights are specified in great detail. The Agreement even prescribes:

-- the size of the type that must be used to spell out the director's name

-- that the credit read, "Directed by . . . "

-- that the director's on-screen credit must appear by itself

and other conditions that ensure visibility and publicity.[2]/ Each of these provisions is negotiated point-by-point, and each is valued by the director whose contribution is prominently noticed.

Producing, Editing and Releasing the Film

The Agreement goes well beyond the important issue of director credit and details the director's role in the production and release of a film. One of the chapters of the Agreement that sets forth a director's creative rights begins by noting that:

> The Director's professional function is unique, and requires his or her participation in all creative phases of the film-making process, including but not limited to all creative aspects of sound and picture.

> The Director's function is to contribute to all of the creative elements of a film and to participate in molding and integrating them into one cohesive dramatic and aesthetic whole.

The Agreement specifies the rights and responsibilities of the parties during the preparation of the film. For example,

> It guarantees the director's absolute right to make the "first cut" of the film without interference. Producers agree that directors have earned the right to present their employers with their vision of the work.
>
> It entitles the director to make recommendations to the producer for further changes to his cut of the film.
>
> It grants directors a reasonable opportunity to review and assess the version of the film that the producer intends to release in theatres.

The Agreement guarantees the director's right to consult with the employer throughout the entire post-production period.

And the Agreement extends to the post-release period, too:

-- The Agreement obligates the producer to endeavor to have a film broadcast without any edits. If changes must be

made to meet broadcast standards or a TV station's schedule, the director must be given the opportunity to make the initial effort at editing the film. The Agreement requires the producer -- in conjunction with the director -- to try to make the edits rather than allowing a broadcaster to do so.

The director's rights in the editing of a film for post-theatrical release extend to network television, domestic broadcast syndication, national pay television exhibition, and domestic home video.

If the producer needs to insert additional scenes into a film to ready the film for video release, the director has to be offered the chance to do the job.

When a film's producer hopes the Motion Picture Rating Board will give his film one rating -- say 'PG' -- and the Board gives it another -- say 'R' -- the director has the right to fully participate in the appeal proceedings and to make any changes necessary to achieve the desired rating.

Adapting Films from the "Big Screen" to the Video Screen

Videocassettes, broadcast TV, cable TV, satellite TV and the ai lines' in-flight movies give millions of consumers the chance

to see movies they may have missed in the theatres. These video formats offer a convenient and inexpensive way to view a great variety of movies.

Motion picture producers -- who usually own the copyright in films -- have always had the flexibility to adapt films from the "big screen" to the video screen. In 1987, during the most recent round of negotiations between the directors and producers, the parties agreed that the director will be consulted before a movie is adapted to meet the requirements of TV viewing.

The right of consultation covers "panning and scanning," "time compression," "time expansion," "colorization," and "3-D conversion."

The "consultation" process works well. The directors, producers, and technicians approach the adaptations in a professional and constructive way. The producer notifies the director when a film he worked on is being adapted for video, and the director comes in and discusses the adaptation with the producer and technician. Sometimes the director chooses to sit with the technician in front of the video console that controls the film-to-video transfer. I understand that in most cases, the director decides to give the technician some basic parameters and reviews the video version only after the adaptations have been made. And in many cases, the director does not seek any further refinement to the technician's adaptation. Everyone involved in the process

is committed to maintaining the integrity of the film while preparing it for unrestrained video distribution.

Dispute Resolution

The Agreement sets up a workable and effective process for addressing grievances that arise from alleged violations of the Agreement itself, or individual employment contracts. Disputes are resolved swiftly and at little expense to the Directors so that the project can get back on schedule.

The Collective Bargaining Agreement is a Floor -- Not a Ceiling

It is essential to remember that the collective bargaining agreement sets the minimum level of protection afforded all DGA directors. Most directors negotiate individual contracts that go beyond the terms of the Agreement. For example, Woody Allen has stipulated in some of his contracts that he will not consent to the "panning and scanning" of his films, and that is, of course, honored. Warren Beatty insisted that Reds not be "time compressed." Many decades ago, Orson Welles crafted a contract that, in the view of the film's current copyright owner, would not permit the "colorization" of Citizen Kane.

Individual employment contracts may encompass such things as the choice of cast members, crew, and composer. In some cases, a

director negotiates for the right to make the "final cut" -- the version that is ultimately released to the public in theatres.

I'll agree that the more established a director, the greater the leverage he or she has to expand upon the rights in the Guild agreement. But I also think that this long -- and incomplete -- list of rights shows that the producers who risk tens of millions of dollars in creating and marketing a film are in no way minimizing the contributions of the less established directors.

Conclusion

Mr. Chairman, we submit that the current system effectively protects the creative rights of those who contribute to the making of a motion picture.

It is fair to both producers and directors, both of whom are fully capable of looking after their own interests in the negotiating process.

It works because it has proven flexible and responsive. Over the years, the Guild Agreements and individual employment contracts have been adapted to meet the new technologies that have continually transformed our industry. This happened when television revolutionized the way entertainment programs were delivered to the home. The recent Agreement to provide consultation when a film is colorized, time compressed, time

expanded or panned-and-scanned is proof of the flexibility of the process now in place.

Above all, it works because for more than forty years the producers have conducted their business and settled their differences with their employers without Congress jumping in and taking sides. My testimony focuses on the directors, but we have to balance the rights of many contributors. Our agreements have to extend rights and privileges to a variety of parties -- some of whom have competing interests -- while retaining the practical ability to make a movie. That's where these gray hairs come from.

We believe, however, if federal "moral rights" legislation were enacted, the federal government will be unnecessarily immersed in the marketplace and the established business relationships between directors and producers will be drastically altered, perhaps irrevocably.

Congress should let this marketplace mechanism continue to operate. It should let these issues continue to be resolved through negotiation, not legislation. It should not step in and declare a winner as to issues better left to the collective bargaining process. We recommend that Congress not upset the current system and refrain from enacting "moral rights" legislation.

FOOTNOTES

1/ The AMPTP represents a variety of producers of TV programs and motion pictures, such as: Aaron Spelling Productions; The Burbank Studios; Columbia Pictures Entertainment Inc.; Embassy Television, Inc.; Four Star International Inc.; Hanna-Barbera Productions; Lorimar-Telepictures; MGM/UA Communications Co.; MTM Enterprises; Orion Television, Inc.; Paramount Pictures Corp.; Ray Stark Productions; Stephen J. Cannell Productions; Sunrise Productions, Inc.; Twentieth Century Fox Film Corp.; Universal City Studios, Inc.; Viacom Productions, Inc.; Walt Disney Pictures Inc.; Warner Bros. Inc.; and Witt/Thomas/Harris Productions.

2/ Section 8-201 provides, in part, that the director of a theatrical motion picture "shall be accorded credit on all positive prints and all videodiscs/videocassettes of the film in size of type not less than 50% of the size in which the title of the motion picture is displayed or of the largest size in which credit is accorded to any other person, whichever is greater." Similarly, TV directors are given credit on TV films, including the video release of such films. The director's name on the screen shall be no less than 40% of the size of the episode or series title, whichever is larger. [Sections 8-301 and 8-303]

As a general rule, theatrical film directors are to receive credit on all paid advertising issued or prepared by the employer in the Continental U.S. [Section 8-203] In addition, a producer of a theatrical motion picture is required to submit to the DGA for approval of a director's credit all press books and paid advertising campaign material prepared by the producer. [Section 8-210]

Theatrical film directors are entitled to have their names on any formal publicity if the name of the picture is mentioned. [Sections 8-204]

Mr. NOLAN. I would like to point out a section of his testimony that gets right to the heart of the problem with any moral rights legislation directed toward a collaborative work. "A movie gets to the screen because of the hard work of not just directors but hundreds of people, and that includes the artists represented here today, the director, the cinematographer, the editor, the producer, the writer, the screenwriter. And it also includes actors, art directors, musicians, choreographers, special effects people, costume designers and sound engineers, to name a few."

"The producer is responsible for extending the rights and privileges to a variety of parties and has to do a balancing act while retaining the practicability to make and distribute a motion picture."

Mr. Chairman, we believe that the existing laws and industry norms insure that the legitimate interests of the copyright owners, the creative contributors to films and consumers are balanced and protected. Congress should continue to let these issues be resolved through negotiation, not legislation.

The legitimate interests of creative contributors can best be fashioned, shaped and given substance through informed discussion between those who best know this highly specialized business. Indeed, 40 years of experience in an unfettered marketplace has made America home to the most successful film industry in the world. Thank you, Mr. Chairman.

Mr. KASTENMEIER. Thank you very much, Mr. Nolan. We will postpone questions to you until your colleagues also have had an opportunity to speak.

[The prepared statement of Mr. Nolan follows:]

Testimony of Peter Nolan
Vice President - Counsel, The Walt Disney Company
Before the Subcommittee on Courts, Intellectual Property,
and the Administration of Justice
House Judiciary Committee
January 9, 1990

Mr. Chairman, my name is Peter Nolan, and I am Vice President and Counsel of The Walt Disney Company.

It is a pleasure to appear before this committee representing my company and the Motion Picture Association of America, of which Disney is a member. The members of MPAA are the leading producers and distributors of motion pictures and television programs in the nation and the world.

I welcome the opportunity to explain to this committee how the so-called "moral rights" debate affects the American motion picture industry and the consumers who want our products. I hope that by better acquainting this committee with our business, we can more clearly make our point: that "moral rights" legislation would be unnecessary, unjustified, and an unwarranted encumbrance on our ability to broadly-distribute our copyrighted works.

In a word, the concept of "moral rights" implies the right of a person who has contributed to a creative work, but who does not own the copyright (or retain any copyright-based interest) in that work, to exercise some control over how that work is used.

Conceptually, defining "moral rights" involves highly subjective and highly arbitrary determinations, of the kind that are bound to breed extensive litigation in our litigious system.

The consequences of legislating "moral rights" would be wholly inconsistent with the public interest goals of the copyright clause of the Constitution and the Copyright Act. In our nation, the purpose of copyright is to benefit the public through encouraging the wide dissemination of creative works. That purpose would be contravened by granting personal benefits to non-copyright holders which could have the effect of keeping creative works out of the public's hands.

American Movies: A Global Success Story

Mr. Chairman, thanks to the quality of our product, the ingenuity of our marketing, and our ability to adapt films to video using state-of-the-art technology, the American motion picture is a global phenomenon. In almost every corner of the globe, at any given moment, American movies are on display.

American companies make the most popular, the most desirable film entertainment in the world. We have also invested substantial sums in pioneering more new ways to make our films available to consumers when and where they want them.

Choice, convenience, low cost, high-quality entertainment -- that's what we offer consumers, in America and all over the world.

And increasingly, the way consumers want their movies is through "video," which basically includes every medium other than a traditional theatre screen: broadcast and cable television... satellite transmissions to the home... hotel and airline exhibition... the rental or purchase of videocassettes and laser discs... and many other video media yet to come. Domestically and globally, video distribution of motion pictures today represents an essential part of our business.

Video is Essential to the Movie Business

Just how important is video to the motion picture industry? Consider these facts:

-- In 1988, revenues from the sale of videocassettes to consumers and to rental stores exceeded the box office revenues for all motion pictures. We expect an even greater ratio in favor of video sales and rentals for 1989.

-- The average motion picture may be seen in theatres by two-and-a-half million Americans over the course of its initial release

of 8-12 weeks. On broadcast television, the same motion picture may typically reach over 22 million Americans in a single evening.

-- In the not-too-distant past, when a motion picture had completed its initial theatrical run, consumers who missed the movie would be hard-pressed to find it again. Today, a consumer can readily choose from an extensive catalog of movie titles through local video stores, specialized cable TV channels and other sources.

-- With the privatization of broadcasting and cable television in foreign markets, we have new and exciting opportunities to expand our sales of American movies abroad... sales which currently create a surplus of over $2.5 billion per year for the nation's balance of trade.

Moviemaking has always been, and remains, an extremely high-risk enterprise. Two-thirds of motion pictures released by MPAA member companies never recoup their costs. Access to the ancillary video market is vital to our industry. It helps us recoup the literally billions of dollars we invest every year in the production, distribution and promotion of our movies.

Therefore, to continue making the best-quality motion picture entertainment, we need the flexibility to take advantage of every available market. Anything that restricts our ability to use those

market opportunities makes our risky business all the more so.

That is why we are particularly fearful about proposals to impose so-called "moral rights" legislation on our industry. We believe such laws are wrong in principle, and would hamper our ability to adapt motion pictures for the numerous markets that are essential to their financial success. We also believe they would be unfair to consumers whose access to films on video may be limited by such laws.

Consider the typical release pattern of a contemporary motion picture. Some weeks or months after initial theatrical release of a movie, it may be released in video for the first time on tape cassettes, pay-per-view cable, or some combination. Some time later, it may appear on a premium cable network. It may subsequently appear on a national broadcast television network, a basic cable network, and/or broadcast syndication. The ability to move unencumbered through these complicated release patterns is essential. Delays which might be occasioned by "moral rights" disputes would limit the distributor's ability to capitalize on the cumulative promotional build-up which takes place at each stage in the release pattern. In our business, delay means lost dollars and less public access.

The Technology of Preparing Movies for Video

What has given rise to calls for "moral rights" in this industry? They seem to be inspired largely by the techniques and processes we use in transferring motion pictures to tape for the many video markets I described earlier. Let me try to remove the cloud of emotion that looms over these issues, and describe factually just what is involved in the film-to-video transfer process.

The transfer of a motion picture to video is a challenge. The motion picture is originally produced for exhibition on the large theatre screen. Preparing it for exhibition on the video screen requires certain adaptations.

There are some fundamental differences between movies and video. The size and shape of the screens are different; movie screens tend to be larger and more rectangular in shape, while video screens tend to be much smaller and more square in shape.

The picture quality is also substantially different. The image on a movie screen is essentially a single, solid, richly-colored picture. The image on a video screen, by contrast, is made up of hundreds of horizontal lines all squeezed together. Even the best of commonly-available video technology does not yet approach the picture quality of the movie screen, but we do all we can to

deliver the best possible picture.

Video places certain other constraints on the motion picture producer. Some video formats require that motion pictures be tailored to fit requisite lengths. For instance, for scheduling reasons, broadcasters like to have motion pictures fit within certain standardized time periods: say 1 1/2 or 2 hours. Otherwise, their viewers would find it extremely inconvenient to tune into a movie at 8:00 p.m., followed by a situation comedy at 9:37, followed by another motion picture at 10:07, followed by their local news at 12:16. And the next night's schedule would be different, and equally erratic. Certain other video formats, such as laser disks (which have a limited running time), also impose constraints that must be addressed.

Some video outlets (e.g., broadcasters and airlines) and some countries require, as a matter of law or policy, that motion pictures be edited to meet standards and practices which prevail in the medium. If a motion picture cannot be tailored slightly to be appropriate to the intended audience, it may not be seen at all.

All in all, the marketplace imposes a great many demands upon the motion picture producer seeking to distribute his work. If these demands are not or cannot be met, essential marketing opportunities are lost. This means that consumers lose access to motion pictures they want to see. This means motion picture

producers lose audiences and revenues. Neither of these outcomes further the underlying purposes of the Copyright Act: to stimulate creativity and to promote public access to creative works.

To meet the demands of the marketplace, motion picture producers use various techniques and processes to adapt films to video. When doing so, our priority is to maintain the qualities that made the film attractive to viewers in the first place:.

"Panning and Scanning": Since the early 1960s, the industry has used the process of "panning and scanning" in preparing movies for video. Using computer technology, highly-trained professionals select portions of the original motion picture image which will fit into the video screen's different shape while still conveying the "feel" of the original. Panning and scanning permits us to fill the video screen with the image. If we did not "pan and scan" films, our only alternative would be to "letterbox" them. This would mean showing the film in its original "rectangular" aspect ratio, with broad black lines at the top and bottom of the video screen. As a result, there would be less picture information reaching the viewer. With the smaller video screen, picture resolution, sharpness and detail would be lost. Experience shows that the average consumer who purchases a 20-inch TV set wants to see the biggest picture possible, and does not want to have precious inches taken up with distracting black bands.

Time Compression and Expansion: For the past decade, the industry has used techniques which slightly increase or decrease the running time of a movie. So-called "time compression" and "time expansion" are accomplished through electronic means and are imperceptible to the viewer; video and audio are perfectly synchronized to look and sound entirely natural. Through these techniques, motion picture producers can reduce their need to edit materials out of films to shorten them, or to add materials back in to lengthen them.

Editing: As noted, the needs of various media do sometimes require the editing of motion pictures. Broadcasters are sensitive to parents' desires not to have certain scenes in motion pictures delivered into the family's living room. Airlines that carry passengers of all ages also want their motion pictures to be appropriate for family viewing. When we edit films, we are always alert to preserve what made the movie appealing in the first place.

Color Correction: To ensure that colors are consistent throughout the video version of a motion picture, and to retain the fidelity of the original film image -- which can fade over time -- we apply a computerized process called "color correction," where, using computers, we go through the film frame-by-frame. Animators like Disney go to great lengths to ensure the vitality and trueness of our colors.

Foreign Markets: To prepare our motion pictures for foreign markets, we must frequently dub in new soundtracks or add subtitles. We also need to comply with widely varying foreign censorship laws if our movies are to be exhibited at all in certain markets.

Of course, under our collective bargaining and other contractual agreements, we undertake these film-to-video transfer techniques and processes in consultation with certain of the original creative contributors. The consultations among directors, producers and video transfer technicians is cordial and constructive, as you would expect them to be. After all, if a motion picture producer is going to put tens of millions of dollars at stake on a project, the producer must have a strong working relationship with the director, and will certainly not wish to put that relationship in jeopardy by ignoring the wishes of the director during the film-to-video transfer.

Are Criticisms of These Technologies Valid?

When we apply these and other technologies to the process of transferring films to video, we do so for one reason only: to give consumers what they want.

Consumers want to see our films. They want the best possible

picture and sound. They want full-screen video... they tell us that watching "letterboxed" movies is like peering at the picture through Venetian blinds. They want the convenience of watching movies on TV or cable, and the luxury of choosing from among thousands of titles at their video store.

Consumers have not resisted or rejected our use of the various technologies I have described. They have embraced them. They rent motion picture videocassettes by the millions. They clamor for more movies on broadcast and cable TV. Voting with their dollars, they have endorsed our efforts to keep them entertained.

The public interest -- as measured by what the public is interested in -- is clearly served by our industry's common-sense application of these various technologies and processes in the film-to-video transfer process.

If consumers rejected these practices, we would, too. That goes without saying. We are not in the business of chasing away business. But the marketplace is the best forum for resolving the issue of whether these technologies do or do not serve the public interest. The evidence is overwhelming that they do.

Technology is the Friend of the Motion Picture

To those who suggest that video technologies are the enemy of

the motion picture, I suggest they look again.

But for the growth and expansion of video technologies, much of our nation's cinematic heritage would lie moldering in dark vaults. Instead, Americans can readily view movies of every age and category. As film critic Vincent Canby recently observed, video increases consumer access to existing films and helps fuel increased production of new films:

> The development of the videocassette recorder has been the greatest boon to theatrical films since the refinement of sound -- I now find it difficult to imagine ordinary life without it. The videocassette has reclaimed audiences that had stopped going to movie theaters. It creates additional revenues that, in turn, insure further production.
>
> There once was a time when movies, having been seen in a theater, could be stored only as memories, often distorted ones... [Today] the videocassette... provides... virtually instant access to the entire heritage of movies... Today almost anybody anywhere can have a mini-festival devoted to the work of Greta Garbo, Abbott and Costello, Fritz Lang, John Hughes, Ingmar Bergman or Billy Wilder. ["Classics Thrive on Screen Test," New York Times, Sept. 10, 1989, at H-19.]

Indeed, video technology has often provided the commercial incentive for restoration of motion pictures.

Moreover, video technology is constantly and rapidly improving. Our companies apply state-of-the-art techniques to our video transfers, giving consumers the best possible picture and sound. Every time there is a new advance, we rush to incorporate it... 8 millimeter video, Super-VHS, surround-sound, and next,

perhaps, high-definition television (HDTV). With each technological improvement, consumers become even more eager to see and enjoy American movies.

Remember, too, that regardless of the processes involved in transferring a film to video, the original motion picture print or negative is in no way affected. In every instance, the original version of the motion picture is preserved. Because video distribution of movies creates new revenue opportunities, that means copyright owners have new incentives to preserve, restore and market motion pictures which might otherwise not be seen, or only be seen infrequently.

Therefore, I must ask: is the public benefitted or harmed by the technologies and processes used in bringing movies to video? Is the public interest better served by promoting consumer access to copyrighted motion pictures, or by keeping these movies stored away safe, secure, "pure" and unseen?

Legislated "Moral Rights" Is Inappropriate to Our Business

Beyond the adverse consequences that moral rights may hold for the availability of motion pictures in video, I believe it is imperative to note that attempting to confer "moral rights" by statute on particular contributors to a motion picture is simply

inappropriate.

The creation of a motion picture is a highly collaborative effort, perhaps uniquely so among creative enterprises. The concept for a motion picture may originate with a producer, a director, an actor, a writer, or any of a number of other participants in the creative process. Any of these players may act as a magnet for other talent to become involved. The producer may act as matchmaker, casting and script consultant, and visionary for the project; the producer also is responsible for the financing without which there is no picture.

An extraordinary number of creative contributions from a diverse range of players -- most certainly including the producer -- are subsumed into the final work, with virtually all such contributions credited in accordance with collective bargaining agreements and industry practice.

It is simply wrong to suggest that only the director, or only the screenwriter, or only the two in combination, or any other single creative contributor or combination of contributors should be deemed the "author" or "authors" of a motion picture for purposes of establishing rights of "paternity" and "integrity." This is particularly true since, in our industry as elsewhere. success has many fathers, but failure is an orphan. In fact, in the case of a motion picture, the responsibility -- at least the

financial responsibility -- for failure is firmly affixed to the producer.

While the other creative contributors are guaranteed their wage for their work on a failed film, none of these contributors must participate in the losses.

In summary, it would simply be incorrect to decree, as a matter of law, that any particular contributor or contributors to the making of a film are especially entitled to hold "moral rights" in the film. Under our current copyright law, authorship and all the rights associated therewith properly reside with the copyright owner -- generally the producer of the film -- without whose participation there would be no film.

It would be a terrible contortion to try to impose "moral rights" principles on filmmaking. And it would also be a waste of time and effort, particularly when established mechanisms for sorting out such rights are available to all creative contributors: the collective bargaining and contractual processes.

Evidence of the Nightmarish Complexities of Legislated "Moral Rights": The Copyright Office Report

The nightmarish complexities of the moral rights debate are nowhere better demonstrated than in the efforts of the Copyright Office to come to grips with them.

At the request of the chairman and ranking member of the House Subcommittee on Courts, Intellectual Property and the Administration of Justice, the Copyright Office took a broad look at moral rights in the motion picture context, and reached some perplexing and not altogether consistent conclusions.

First, the report suggested that the Congress "seriously consider a unified federal system of moral rights." It is not clear why the Copyright Office decided to make this gigantic leap which was well beyond the scope of the inquiry put to them by the House subcommittee leaders. Suffice it to say we strongly disagree with this conclusion. We believe Congress chose the prudent course in voting to bring the U.S. into the Berne Copyright Convention when it found that the totality of U.S. law -- federal, state statutory, and common law -- provided protections sufficient to satisfy Berne, and determined that moral rights should not be expressly incorporated in our federal copyright law.

Second, the report suggests that any legislative effort focussing on moral rights in the motion picture industry should begin with careful consideration of "whether the existing web of collective and individual bargaining is adequate to protect

directors' legitimate interests." Two points:

-- one, the report singles out one creative contributor -- the director -- to the production of a motion picture as holding "moral rights" of particular value. In so collaborative a business as movie production, this assumption is highly questionable, as the Copyright Office seems later to concede.

-- two, the test posed by the Copyright Office aptly recognizes that collective and individual bargaining are highly sophisticated in our industry. Motion picture production is characterized by a remarkably high degree of collective bargaining. This suggests not only that any legitimate moral rights of contributors are today adequately protected; it also indicates that the forum and the opportunity for raising other legitimate concerns are readily available to interested parties.

Finally, the report suggests the Copyright Office could "support... in principle" legislation to "grant a higher level of moral rights in the motion picture industry than now exists," and outlines the parameters which the Office believes would be appropriate. Here is a perfect example of the incredible hornet's nest raised by efforts to legislate in this complex arena. The Copyright Office would extend moral rights only to "works created on or after the effective date of the legislation." This addresses the retroactivity issue... or does it? If advocates of moral

rights are legitimately concerned about pre-existing motion pictures, how would such legislation affect those movies? If they are not concerned about pre-existing motion pictures, on what basis do they claim special treatment for future motion pictures?

Another concern: the "takings clause" of the U.S. Constitution prevents the government from taking away property without just compensation. Would retroactive legislation take away a copyright owner's rights in his movie? If Congress were to pass a moral rights law preventing certain adaptations, will the government compensate the copyright owner who has already distributed copies of his movie and made contracts for it to be shown on cable and broadcast television?

The Copyright Office further suggests that such rights should be "granted to authors of pre-existing works and to other creative participants in the motion picture (e.g., cinematographers, art directors, editors, and perhaps, actors and actresses)."

What is the rationale for stopping there? Doesn't a composer of a motion picture soundtrack make an important creative contribution to the final work? (After all, what's the first thing you think of when I say "Chariots of Fire" -- isn't it the distinctive theme song?) Isn't the contribution of a choreographer central to the success or failure of a musical or dance film such as "Fame" or "Flashdance"? And the animators of a cartoon --

mightn't they do as much as the director or editor or writer to give films their "character"?

Even if only selective contributors were accorded "moral rights," what would happen when the "moral rights" of one contributor collided with those of another? What if a director says "go ahead and edit that scene," but the screenwriter believes the scene should remain the way it is? Who is to sort out such claims? And what would the consequences be for the industry?

And what if there are multiple contributors to a work in various categories? Who decides who was the "principal director" or the "principal screenwriter" of a film? What happens if the "principal director" of a motion picture agrees with a film-to-video adaptation, but the "principal screenwriter" objects? If one screenwriter wrote 85 percent of the script, but the contribution of a second screenwriter -- who wrote only 15 percent -- is what really made the film "work"?

What would happen if a contributor got into a disagreement with the copyright owner over a matter totally unrelated to the film itself? He might object to any adaptation whatsoever. Would it be fair for one contributor to hold the interests of other contributors -- not to mention the consumer -- hostage by exercising his "venal veto"?

In short, Mr. Chairman, even the best efforts of the Copyright Office indicate that legislation in this area would be a morass. Better to focus on how the collective bargaining process -- the best, established forum for legitimate artistic complaints -- can resolve these disputes.

The Copyright Office did reach one conclusion with which I wholeheartedly agree: "[T]he proponents of change in the existing law should bear the burden of showing that a 'meritorious public purpose is served by the proposed Congressional action.'" That should be a sine qua non of Congressional deliberations on these issues.

Our Concerns with the National Film Preservation Act

A second example of the complexities and confusion engendered by "moral rights"-type legislation is the National Film Preservation Act, and the efforts of the Librarian of Congress to implement certain requirements of that Act.

As you know, Mr. Chairman, the members of the Motion Picture Association of America opposed the National Film Preservation Act.

Our companies are unparalleled supporters of film preservation. MPAA and various member companies have undertaken, financially supported, and otherwise assisted programs that advance the

goals of film preservation. And we are fully committed to the film preservation mission set forth in the Act. MPAA members are cooperating with the Librarian in his efforts to acquire gift copies of films selected for the National Film Registry. In addition, MPAA President and National Film Preservation Board member Jack Valenti rallied the Board to work toward increased federal funding for the department that repairs and preserves films archived at the Library of Congress.

However, the legislative requirements for the labeling of certain versions of commercially-released motion pictures troubled us greatly, for several reasons:

--First, the idea of the government requiring some films to carry a "warning label" is chilling. There is nothing "neutral" about the label; it suggests that a particular version of a particular film is no good, or not as good as it could be. Of course, such judgments are made every day... but by individual consumers, not by the government. That's the way it should be. We know that the members of this committee are always particularly sensitive to precious First Amendment concerns. Therefore, we know you would have especially grave concerns over government-mandated labelling requirements.

--Second, we reject the implication that copyright owners will not protect their own films. Among the 25 films initially selected

for the Film Registry is the Disney classic, Snow White and the Seven Dwarfs. It should go without saying that, with or without this legislation, Disney has expended and will continue to expend vast resources to preserve and protect Snow White and the other films in our library. We love these works, we respect the effort that went into making them, and, as a practical matter, we have a great financial incentive to make sure that all our films -- not just those chosen for the Registry -- sustain their value.

--Third, as I have previously noted, we have long been concerned that any legislation smacking of "moral rights" could tend to curtail public access to and enjoyment of our films.

All of these concerns have been borne out by the "proposed guidelines" recently released for public comment by the Librarian of Congress. These "guidelines" purport to help those who distribute or exhibit motion pictures which are part of the Film Registry to decide whether and when to apply certain statutorily-mandated labels on certain versions.

While, in our view, the National Film Preservation Act was not a good bill, it was nevertheless a fairly narrow measure. Clearly, Congress did not want to limit or belittle the "customary practices and standards" used to distribute films to the widest possible audience. The language of the statute and the legislative history make this clear.

Unfortunately, the Librarian's "proposed guidelines" steer away from Congress' clear direction.

One example: the Librarian simply ignores the way motion picture companies have done business for decades by declaring that "It is a material alteration to remove or edit out materials for all purposes including broadcast time slots." As anyone who has watched a movie on TV since the beginning of the medium knows, it is a "customary practice" to edit out materials to conform to broadcast time slots.

A second example: the Librarian ignores express agreement among all legislators who spoke about the Act on the floor of the Congress concerning "panning and scanning." Current House Judiciary Committee Chairman Brooks and Senate Copyright Subcommittee Chairman DeConcini both agreed that this practice is "not a material alteration under the Act." Representatives Yates and Mrazek -- who disagreed with Representative Brooks and Senator DeConcini on some matters -- said the same thing. Yet in the face of this unequivocal Congressional intent, the Librarian has proposed to limit the "panning and scanning" of certain films.

Finally, the legislation demonstrates how legislative intentions, however benign, may lead to unforeseen consequences in this area. The legislation mandates that any motion picture that

is "materially altered" within the meaning of the Act must bear one of the labels whose language is specified in the statute. The labels are to state that the "colorized" or "materially altered" version of the motion picture was adapted "without the participation of the principal director, screenwriter, and other creators of the original film." As many on this committee are no doubt aware, adaptations of motion pictures are regularly undertaken in consultation with creative contributors... yet it appears that any "materially altered" motion picture must bear a label, regardless of whether or not these contributors participated. Was it Congress' intent to require those who distribute or exhibit motion pictures to misinform the public?

This is a perfect example of how even a narrowly-drafted piece of legislation can create incredible uncertainty, difficulty of application, and the specter of litigation and public confusion.

Mr. Chairman, MPAA will file comments on the "proposed guidelines" with the Librarian next week. We encourage you and your colleagues in both houses to observe carefully whether the Librarian is faithfully carrying out Congress' intent when he crafts these guidelines.

The Foreign Experience with Moral Rights

Mr. Chairman, when I talk about the incredible complications

that legislated "moral rights" would create for the American motion picture industry, I am not talking about mere hypothetical situations. Actual experience with moral rights in foreign countries demonstrates just how devastating these concepts could be if imported into American law:

** Last fall, an Italian court ruled that placing even one commercial break in the television broadcast of a motion picture violates the "integrity" of the work and, thus, the "moral rights" of the film's director.

If that happened here, there is no question that "free TV' would abandon motion pictures. That would represent a tremendous loss to the nation's viewers.

I should point out that the situation in Italy before this latest ruling was no better. Italian courts used to consider these issues on a film-by-film basis, somehow balancing the so-called "quality" of the film against the number of commercial breaks inserted. Can you imagine thrusting American courts into such a role? And can you contemplate what the consequences would be for American broadcasters?

** A famed Russian composer [Dmitri Shostakovich] brought suit in both France and the United States to enjoin the use of one of his compositions -- which had lapsed into the public domain -- in a motion picture which he believed portrayed the Soviet Union in an uncomplimentary light. The American court rejected the claim, but the French court upheld it.

Again, imagine the producer of a film trying to determine how an author of a work -- particularly a public domain work (for "moral rights" in some countries also attach to such works) -- feels (or, if deceased, might have felt) about the otherwise authorized use of his work in a motion picture. And imagine if this were extended to the other elements incorporated in a film. This would impose intolerable creative restrictions on film producers... and on directors, too.

** While the next two examples do not directly involve motion pictures, the principles at stake are equally of concern.

-- A German operatic stage director sued when the conductor ordered changes in certain of his stage directions for a production of Wagner. The German court found that the conductor's changes offended the integrity of the stage director's work, and enjoined the production.

-- A French artist who painted the stage sets to be used in an opera sued when the producer decided, for artistic reasons, to delete a scene from a performance. The French court ruled that the artist's moral rights had been violated, and ordered that the public be given notice that the scenery in question was not being shown due to the fact that the scene in which it was to appear had been excised.

It is mind-boggling to contemplate what putting these principles into American law could mean for motion picture production. In order to edit a single scene in a motion picture, it could be necessary to obtain the approvals of the director, the screenwriter, the set designer, the stage manager, the choreographer, the cinematographer, and who knows how many other contributors... none of whom bore the financial risk of producing or marketing the film, and all of whom may claim "moral rights" which may well conflict with one another.

** In Brazil, the law requires that any person who uses an intellectual work created by another author, composer, lyricist or performer must identify these people in any broadcast of a film incorporating the work... no matter how insignificant the work may be to the film in which it is incorporated. Imagine the effect this could have on broadcast of films on U.S. television, particularly pre-existing films where it may be extremely difficult to identify the original contributors.

I believe these real-life examples -- which are representative, not anomalous, cases -- show the mischief that legislated moral rights can and would create.

The Practical Dilemma of Moral Rights

In the end, the extension of moral rights by statute to specific creative contributors in so highly collaborative a process as motion picture production is simply not justified in principle.

But let me put the issue in more practical terms: what might the extension of statutory moral rights mean in a day-to-day context for the motion picture industry?

-- It might mean that we will be unable to make as many motion pictures available to consumers in all the formats and through all the media that they enjoy today. Consumers who simply do not want to watch "letterboxed" films may have no choice if a creative contributor to a film can insist on it. Consumers who prefer to watch their movies on broadcast TV may simply get fewer movies if creative contributors can object to the way the films are edited or adapted for video.

-- It might mean that the release of motion pictures in video formats will be delayed or denied due to squabbles between competing "moral rights" claimants. If various moral rights claimants assert their potentially conflicting and mutually-exclusive rights, certain motion pictures may spend more time on

screens in courthouses than on screens in consumers' homes. And delay can sap the commercial life from a "hot" film.

-- It might mean that the massive financial risks we take in making a motion picture will grow even riskier. In addition to contending with the vicissitudes of the marketplace, we will also have to deal with continuing, disruptive objections to our video transfer efforts. That will tend to keep motion pictures out of video markets and out of the hands of consumers who want to see them.

-- It might mean that the exhibitors or distributors of motion pictures in video formats -- broadcasters, cable programmers, video store operators, airlines and hotels -- will eschew the risk of violating some unanticipated "moral right" claim by a creative contributor by simply not carrying as many motion pictures, or by carrying only those motion pictures where moral rights concerns are not present.

Moral rights will <u>not</u> mean anything except inconvenience and lost consumer access to movies. <u>Where is the public interest in that?</u>

Does it truly behoove the Congress to wander into the creative process in ways where it is arbitrating between creative contributors? Would the creation of statutory moral rights in the motion

picture context contribute in any meaningful way to the availability of motion pictures to the American public? Can Congress ever hope to draw clear and enforceable lines to indicate who has "moral rights" and what those rights are and where one contributor's rights end and another's begin? And having done so, would the Congress have made any meaningful contribution to the creative process?

Let me ask a more fundamental, political question: who is genuinely concerned about this issue? The gripings of a small handful of creative contributors to motion pictures and a few film critics do not constitute the vox populi. Indeed, the vast and silent majority of Americans would prefer simply to go on enjoying their movies on video, and don't give two cents for all the whoop and holler raised by a very few in the name of "moral rights."

Indeed, if the general public were to understand some of the implications of the proposals put forward by "moral rights" proponents -- how putting such rights in copyright law could hamstring the release of movies on video or make various video outlets more reluctant to carry movies -- I predict that they would say to you, "Leave well enough alone."

Recommended "Criteria" for Analyzing These Issues

Mr. Chairman, in a statement you issued in conjunction with release of the Copyright Office report last spring, you aptly stated the three "criteria" that should be applied in assessing whether moral rights legislation pertaining to motion pictures should be pursued:

"First, we must ask the proponents of change to bear the burden of proving that a change is necessary, fair and practical.,"

"Second, we must always recognize, and balance, the rights of creators, producers or copyright holders, and the public interest.

"Third, a private solution negotiated by interested parties is always preferable to congressional intervention."

That is a very fair and eminently sensible series of criteria. I hope each of your colleagues on this Committee will also endorse them.

How Creative Rights Are Addressed Today

As I noted earlier, for over 40 years there has been in place a process to permit the discussion and resolution of concerns on the part of creative contributors to motion pictures regarding their "creative rights" in a production. That process is known as collective bargaining.

In testimony last October before your counterpart subcommittee in the Senate, J. Nicholas Counter III, the president of the Alliance of Motion Picture and Television Producers (AMPTP), provided a detailed overview of the collective bargaining process. I am submitting that statement for the record as an appendix to my testimony. Mr. Counter represents the producers at the bargaining table. His organization negotiates with the directors, writers, screen actors, musicians, art directors, cinematographers, editors, costume designers, make-up artists, sound engineers, set designers, and many more guilds and unions.

As Mr. Counter observed:

> Many copyright experts recognize the collective bargaining process as a particularly effective means of addressing and resolving concerns about creative rights. The movie industry is the preeminent example of employees and employers actively negotiating to establish creative rights. And the contract between the Directors Guild and the producers that is negotiated by AMPTP provides a good example of how the process works.

Mr. Counter also recalled the remarks of the Register of Copyrights in his March 1989 report entitled "Technological Alterations to Motion Pictures": "[L]abor relations in the motion picture industry have a long history and do not present a situation where the economic leverage of the employers dwarfs that of the employees." Clearly, as Mr. Oman and other experts have recognized, collective bargaining is an entirely appropriate forum for contending interests to work out their differences on matters such as creative rights.

I commend to you Mr. Counter's extensive comments on the breadth of creative rights assurances contained in these collective bargaining agreements. Basing these arrangements in contract law and labor law has given us a flexible and responsive system that is best suited to the unique characteristics of our industry.

Mr. Chairman, as we speak here today, representatives of AMPTP and the Directors Guild of America are meeting in closed session to negotiate the terms of the next collective bargaining contract. I am confident that the opportunity will again arise to address creative rights issues in a constructive fashion. I an sure that Mr. Counter will be anxious to inform this subcommittee of the progress of these negotiations within the next several weeks.

Conclusion

Mr. Chairman, your subcommittee has examined "moral rights" issues in this and other contexts. I am sure you have found them to be vexatiously vague and complicated. That is particularly true, I submit, when applied to the motion picture industry.

But getting beyond the academics' contemplation of great legal principles and bringing the issue down to basics, the idea of legislating "moral rights" for motion pictures is simply coun-

terproductive. For the reasons outlined above, ladening movie-makers with "moral rights" obligations can only serve to confuse the industry and ultimately to reduce the diversity and variety of motion pictures reaching consumers.

This is bad for our business. This is bad for our nation's balance of trade. This is bad for the public. On the whole, that makes the pursuit of legislated "moral rights" for motion pictures simply a bad idea. We hope you will so conclude, and that you will agree to leave creative rights matters to their most appropriate forum: the collective bargaining table.

Thank you.

Mr. KASTENMEIER. Next, Mr. Roger Mayer.

STATEMENT OF ROGER L. MAYER, PRESIDENT AND CHIEF OPERATING OFFICER, TURNER ENTERTAINMENT CO.

Mr. MAYER. Thank you, Mr. Chairman. My name is Roger Mayer and I am president and chief operating officer of Turner Entertainment Co., a wholly owned subsidiary of Turner Broadcasting System. I want to thank you for the opportunity of testifying as we really consider this a vital matter not only for our industry but for the particular part of it that we represent.

We look at the problem from a little bit different point of view in that we first entered the motion picture part of the industry by buying a library of film. We own over 3,300 motion pictures, over 4,000 shorts and cartoons and over 2,000 hours of television programming. And we have been the company that has been colorizing pictures more than other companies have. And I think we deserve either the credit or the blame for starting a lot of this controversy.

We are prepared to discuss that aspect with you, because what has happened is that of these 2,000 feature motion pictures which were originally photographed in black and white, we have colorized approximately 112 at this point and are colorizing at the rate of 2 or 3 a month and will possibly do another 100 pictures. That gives you, perhaps, the size of what we are involved with and perhaps puts it in a better perspective.

What we have found is, that indeed, this process has resulted in several things; but the most important thing from our point of view is, it has taken these motion pictures which were seldom, if ever, seen in black and white and has enabled us to market them in color on prime time television and on videocassettes throughout the world.

And despite the worry that many people had that this would result in the black and white motion picture, the black and white version of that motion picture, no longer being available, exactly the opposite has occurred. We have marketed them together. We advertise them together and they are both being shown on television and on videocassettes. And, as a matter of fact, in what they call the sell through market in the sale of videocassettes the black and white versions of these pictures, in the main, have been outselling the colorized versions, a result which is totally satisfactory to us.

We are only interested in this library being seen. So, I thought perhaps that would give this a little perspective and, of course, I would be happy to answer any questions about that particular process, although we do not want to overemphasize it.

I would like to make a few general comments along the line of some of the same ones that Mr. Nolan made but perhaps a little bit more from our point of view which, as I say, is a bit different. We got into this business—I, myself, worked for MGM for 25 years before I went with Turner. And during that period of time with MGM, I was in charge of the preservation and restoration of that library of film which resulted in it having this great asset value. I do not mean I personally did it, but a group of people did. It result-

ed in having this great value and it resulted in it being and continuing to be, in my opinion at least, a part of the culture of this country and having it available to everyone in every type and method of distribution throughout the world. And that is what is still going on.

As Peter has previously said, Congress seemed to have decided that the existing network of Federal, State and common law provided sufficient protection for artists to enable us to join the Berne Convention. The current system, the current copyright system, including these protections, has enabled the American creative industries to dominate in their fields throughout the world. And we are talking about not just the motion picture industries, but publishing and other industries as well.

Our copyright system promotes public availability of creative works. And we think that some of the things that Mr. Nolan was talking about, panning and scanning and so forth, and some of the things that we have done, has in fact, promoted public availability by providing economic incentives which spur the creation and dissemination of new works, giving copyright owners the financial incentive to produce and distribute creative works and allowing copyright owners and users the flexibility to enter into business arrangements that makes works available to the public.

And I can show this specifically in our case. We went into this business. We bought a library for $1.3 billion. We went out and marketed it successfully. It turned out to be as valuable as our people thought it was. And the next move our company made, and I am just giving it because it is typical of what goes on in the entertainment business, is we went into the production of new product.

And our company is now producing two new motion pictures a month, in this case for television, but we will soon be in the theatrical business as well, utilizing the revenues that we have been able to get from distributing this library throughout the world. So, we will be a major factor or already are a major factor, in the production of new motion pictures as well and we will be involved in the collective bargaining process and we will be involved in all the things that the other major companies are now involved with. And we hope to be working with the Disneys, Paramounts, and Universals of this world very soon.

This subcommittee is being asked to consider legislation which would import the European style moral rights regime into the country. First of all, we do not think there is any clear consensus as to what the system is; which, I think, does present a problem. The various European systems differ greatly among themselves. Some systems waive, ignore or restrict the application of moral rights to such an extent as to make their usefulness highly questionable.

In the old days of the Hollywood studio system, creative contributors were almost all hired on salary to effect the vision of the studio mogul. The studio stood the entire financial risk and the employees were paid regardless of whether a movie succeeded or failed. In today's Hollywood, as we call it, filmmaking is an even riskier business with the average cost per picture, and Peter used 20 million, I use 30 because we include marketing costs but you can

look at it either way, and if you include the marketing cost aspect of it as well, only 10 percent of today's films recoup their cost during the first run theatrical, on an average.

Access to the secondary markets, such as broadcast and cable television, foreign distribution, videocassette sales and rentals and airlines, is thus absolutely crucial to investment decisions. We agree with the Library of Congress that the retroactive application of European style moral rights to films produced prior to the enactment in all likelihood would violate the takings clause of the fifth amendment.

In addition, retroactive application or moral rights to bar practices such as colorization raises first amendment concerns. The ability of creative contributors to object to adaptations or derivative uses could result in decreased incentive to invest in new technology. We think it would.

It could also result in decreased availability to invest in new creative talent and ideas, because the foreclosure of secondary markets or any ability to have additional revenues places increased pressure on the success of the first run theatrical release, meaning a greater use of established stars, established formats with proven box office appeal.

We would like to make a couple of points about the impact of the National Film Board's legislation which you mentioned before, Mr. Chairman. We feel that this legislation has had a positive effect. Among other things, we feel that it has brought not just to the public, but to the industry, the importance of preservation and restoration. I happened to have worked for a company that spent more than $30 million in that area and it is one of the things that made that library so valuable. But it has brought preservation, I think, to the forefront throughout the industry, throughout the world.

I notice today this committee is meeting with film preservationists at lunch time and I think that that piece of legislation is responsible for getting people to say, "Look, some of this money should be used for that." We take pride in the fact that we have already done it, but we think it has had a very positive effect.

We think the moral rights debate has had a positive effect on negotiations and the types of things we are now arguing about are now much more on the daily basis in private negotiations and very much so in the negotiations presently occurring with the Directors Guild and other members of the community.

And finally, I think that the legislation has given the public a feeling that an art form is being created in this country, has been created in this country and there is something to be proud of. And all I can tell you is, we were terribly proud. Of the first 25 films, 7 of them were ours. So, all of that, I think, has had a positive effect.

I did want to make the point, from our point of view, that that legislation also required that labeling be done, that there be labeling on colorized or any changed versions if it became a part of the list chosen by the board. We took a look at that and felt that since your committee and the Congress generally seemed to think that the point was to make absolutely certain that no one be misled, we decided to label all colorized versions, and we do.

So, it does not have to be on the National Film Board's list in order for us to label it. That has seemingly been quite acceptable to the public and we have a few people writing to us to say, "Thank you; now we understand." So I think that it also had a positive effect from that point of view.

So, in conclusion, Mr. Chairman, I just think the system has worked very well and as several of you stated, the burden would seem to be, and we hopefully think it should be a substantial one, of proving that changes are necessary in a system that seems to work very well at this time. Thank you very much.

Mr. KASTENMEIER. Thank you, Mr. Mayer.

[The prepared statement of Mr. Mayer follows:]

Summary Statement
Roger L. Mayer - Turner Entertainment Co.
Subcommittee on Courts, Intellectual Property,
and the Administration of Justice
January 9, 1990

Congress has decided that the existing network of federal, state and common law provides sufficient protection for artists' rights to enable us to join the Berne Convention. The current American copyright system, including these protections, has enabled American creative industries to dominate in their fields throughout the world. Our copyright system promotes public availability of creative works by providing economic incentives which spur the creation and dissemination of new works, giving copyright owners the financial incentive to produce and distribute creative works, and allowing copyright owners and users the flexibility to enter business arrangements that make works available to the public.

This Subcommittee is being asked to consider legislation which would import a "European-style moral rights" regime to this country. But there is no clear consensus on what this system is. The various European systems differ greatly among themselves, and some systems waive, ignore, or restrict the application of moral rights to such an extent as to make their usefulness highly questionable. Certain aspects of "European-style moral rights" would conflict violently with long held and valuable American concepts such as the exclusivity of copyright, the fair use doctrine, the "limited time" restriction of the Constitution, and the dependability of contractual relationships.

In the old days of the Hollywood studio system, creative contributors were almost all hired on salary to effect the vision of the studio "moguls." The studio took all the financial risk, and the employees were paid regardless of whether a movie succeeded or failed.

In today's Hollywood, filmmaking is an even riskier business, with an average per picture cost of $30 million. Only 10% of today's films recoup their costs during first-run theatrical release. Access to secondary markets such as broadcast and cable television, foreign distribution, videocassette sales and rentals, and airlines is thus crucial to investment decisions.

We agree with the Library of Congress that the retroactive application of "European-style moral rights" to films produced prior to enactment in all likelihood would violate the takings clause of the Fifth Amendment. In addition, retroactive application of "moral rights" to bar practices such as colorization raises First Amendment concerns.

The ability of creative contributors to object to adaptations or derivative uses could result in decreased incentive to invest in new technology. It could also result in decreased ability to invest in new creative talent and ideas, because foreclosure of secondary markets for films places increased pressure on the success of first-run theatrical release, meaning greater use of established stars and formats with proven box-office appeal.

In conclusion, our system works very well, and those who would change it bear the substantial burden of proving that changes are necessary.

Statement of Roger L. Mayer

Turner Entertainment Co.

January 9, 1990

Mr. Chairman, my name is Roger Mayer. I am President and Chief Operating Officer of Turner Entertainment Co. (TEC), a wholly owned subsidiary of Turner Broadcasting System, Inc. (TBS). Thank you for this opportunity to testify before your Subcommittee as you consider the question of moral rights in the film and entertainment industry.

I have been an executive in the motion picture and television industries for approximately 36 years, first with Columbia Pictures, then MGM, and now with TEC. I was with MGM for 25 years, most notably as Senior Vice President of Administration and as President of the MGM Laboratory. My main duties included administrative control of the MGM studio and the MGM library. For the last 3 years I have supervised the Turner subsidiary which distributes, services and preserves the great MGM, RKO and Warner Bros. film libraries.

TBS now owns, at a cost of over $1.4 billion, the world's largest film library, composed of over 3,600 motion pictures, 1,700 hours of television programming, and 4,000 short subjects and cartoons. These properties are marketed both in the United States and throughout the world via cable and broadcast television, videocassette sales and rentals, and theatrical distribution. Our ability, as the copyright owner, to adapt these properties to the various markets is crucial, not only to our business but to our capacity to fulfill the constitutionally grounded public policy of the widest possible dissemination to the public of creative works.

My testimony today will cover the following subjects: the nature of the proposed changes in current law you are being asked to consider; the nature of the "European system of moral rights;" the old Hollywood studio system, under which most of the films in our library were made; the modern filmmaking industry; constitutional questions; public policy issues respecting retroactive legislation; and public policy issues respecting prospective legislation.

The nature of proposed changes in American copyright law

As we understand it, this Subcommittee is being asked to explore the possible enactment of so-called "moral rights," similar to provisions thought to be in place in Europe, which would be applicable to the motion picture industry. The basic premise appears to be that film directors and perhaps many others would be given the right, perhaps inalienable, to veto a multitude of post-production or post-release modifications made to films during the various distribution processes. The types of practices involved may include subtitling and dubbing for foreign distribution, panning and scanning so that a film may be shown on television, time compression and expansion, various types of editing, and colorization, as well as various processes not now known or contemplated.

Under current law, a director can obtain these veto rights, but only through individual contract negotiations or collective bargaining. Typically, and for good reason, these rights are retained by the production company or studio, although there have always been exceptions for directors or producers of unusual stature, from Orson Welles to David O. Selznick to Steven Spielberg.

Last year, during consideration of the bill to implement the Berne Convention in the United States, Congress found that this country already protects the rights of authors to an extent sufficient to allow us to join Berne. This finding was based on a close examination of various federal statutes, state statutes, and common law. Copyright law, the Lanham Act, and common law concepts such as libel, unfair competition and false advertising, taken as an amalgam, all converge to protect the basic integrity of an author's work, as required by article 6(bis) of the Berne Convention. In addition, creative contributors have the ability to negotiate for additional rights through the collective and individual bargaining processes.

It is no exaggeration to say that American copyright-intensive businesses are the healthiest and most productive in the world. We dominate the world in the fields of filmmaking, magazine publishing, data base services, music publishing and textbooks, to name a few. In an era of staggering trade deficits, the American copyright industries combined contribute a surplus of over $13 billion annually to the U.S. trade balance.

American films dominate theatre and TV screens throughout the world and contribute a surplus of $2.5 billion to the U.S. trade balance. In contrast, as The Washington Post recently reported, "foreign-made films barely make a ripple in the United States," and are in serious economic difficulty in their own markets. Indeed, the French government has recently announced its intention to provide a direct annual subsidy of $30 million to promote domestic production of motion pictures. The House report on the Berne Convention confirms the financial distress of the foreign film industries, noting that foreign film producers feel that moral rights have hurt foreign film production. (H.R. Rept. No. 100-609, 100th Congress, 2nd session at 36 (1988).)

American creative industries have reached this position in large part because of the nature of our copyright system. This system promotes the public availability of creative works by providing economic incentives which spur the creation and dissemination of new works. The current Copyright Act gives copyright owners, whether business entities or individuals, the financial incentive to devote resources and energy to producing and distributing creative works, allows copyright owners and users the flexibility to enter freely into business agreements that make works available to the public, and provides both copyright owners and users with the certainty that their business activities will be governed

by the objective terms of such traditional business agreements and will not be hindered by the subjective judgments inherent in the "European system of moral rights."

In light of the undeniable success of the current copyright system, a very large burden of proof rests with those who would change the system.

In considering the wisdom of grafting a "European-style moral rights system" onto American copyright law, we urge the Subcommittee to carefully examine the precise nature of moral rights and how they are implemented in other countries. We are concerned that advocates of adopting broad-ranging moral rights legislation may not have a thorough understanding of how such mechanisms work elsewhere. We are confident that such a review will underline the minimal benefits and high potential costs of altering the legal foundation of our film and video industries.

The nature of the "European system of moral rights"

It should not be a foregone conclusion that because different systems of moral rights have long existed in Europe, alien European concepts can necessarily be grafted onto the American system, or that they are necessarily superior. Nor should it be assumed that moral rights have had a benign effect abroad. This notion requires analysis in two parts: first, the nature of moral rights in Europe, and second, the practical impact if these European concepts are imported and superimposed on our current system.

As to the nature of moral rights in Europe, it appears to be far from a settled question what rights do in fact exist in any uniform, coherent sense. Some countries' statutes condition the exercise of the paternity right on the presence of "reasonable" circumstances or "fair" practices, or words to that effect, so that the element of objectivity is introduced. Some countries allow moral rights to be waived in a signed writing, after which they may not be reasserted by the author. Even France, generally regarded as having the most vigorous moral rights regime of all, prohibits the exercise of the integrity right in an "absolute" or "arbitrary" manner. Many countries prohibit moral rights objections to changes made in the process of adaptation or creation of a derivative work. France has even prevented the application of moral rights to their computer software industry, apparently in order to promote its growth.

These and many other examples of the very uncertain nature of moral rights in Europe are well documented in the paper submitted by Ambassador Nicholas Veliotes during the September 20, 1989 hearing conducted by the Senate Subcommittee on Patents, Copyrights and Trademarks, entitled "Preserving the Genius of the System; a Critical Examination of the Introduction of Moral Rights into United States Law." This paper has also been submitted to your Subcommittee.

Indeed, it may be that at least in some cases the "European system of moral rights" is actually moving closer to the American system. As an example, I would draw your attention to the recent decision by the French Court of Appeals in Huston v. Societe d'Exploitation de la Cinquieme Chaine de Television, Le Cinq, (Paris Appeals Court, decided July 6, 1989). In this case, the heirs of the renowned American director John Huston brought suit to prevent a French broadcast of the colorized version of "Asphalt Jungle," to which Turner owns the copyright. Their claim was based on Mr. Huston's moral right to prevent an adaptation of his movie to which, during his lifetime, he had clearly objected. The plaintiffs were successful in the trial court, but that decision was overturned on appeal. The Appeals Court held that, under the rules of international conflicts of laws, American law must be applied, and that under American law, colorization was permissible. The Court then proceeded to hold that "colorization, in itself, cannot be criticized by the heirs of Huston ... even if they could invoke a moral right in the film in black and white." (Page 15.) In other words, colorization is not an affront even to French moral rights.

This opinion illustrates that the scope of enforceable "moral rights" in Europe may be far more narrowly circumscribed than the Directors Guild and other advocates of importing "moral rights" to this country understand them to be. I include a translation of this decision as part of my testimony.

Perhaps the most fundamental difference between the various European systems and ours is that, unlike the United States, most European countries have developed a situation where the various copyright intensive creative industries have evolved over hundreds of years alongside the doctrine of moral rights. These industries, such as publishing, filmmaking, broadcasting, and the like, have arrived in the 20th century with a history of accommodation, both statutory and judicial, to the prevailing concept of the rights of creative contributors. When motion pictures were invented in the early years of this century, European countries where would-be filmmakers lived already had moral rights systems, within the confines of which a new industry was conceived.

Quite the opposite is true in the United States. Our copyright-intensive industries have matured in a system which relies on contracts and property rights, which safeguards the predictability and certainty of business transactions, and which does not recognize the subjective opinion or caprice of a contracting party.

The Directors' Guild position, as we understand it, would conflict with the long-standing American notion of the exclusivity of copyright by allowing an author, after he has sold the exclusive right to reproduce his work and make derivative uses of it, to prevent the creation of such derivative uses. Moral rights would restrict the fair use doctrine by allowing an author to prevent the use of his work in such valuable

activities as teaching, scholarship, news reporting, parody and critical commentary. Because many countries regard moral rights as continuing in perpetuity, these rights may violate both the "limited time" restriction of the Constitution as well as the prevailing notion here that personal torts, such as defamation and invasion of privacy, expire with the death of the complainant. And then there is the basic and proper refusal of the American judiciary to make what are essentially subjective assessments regarding matters of taste and sensibility.

The old Hollywood studio system

Until the 1950's, Hollywood movies were conceived, financed, executed, and distributed for the most part by the giant studios run by the well-known Hollywood "moguls." Of course, there was an occasional rare exception, such as Orson Welles. But in the overwhelming majority of cases these movies were the "children" of the studio heads. They were not the "children" of the scores of salaried collaborators, including directors, who, to implement the studio head's vision, were traded among studios, hired and fired, assigned projects by the mogul or a staff producer, and replaced during shooting if their work didn't satisfy. (A famous example is "The Wizard of Oz." In short order three directors were assigned to the movie, and removed from it, before a fourth director finished the film.) These movies were produced by large companies as commercial ventures in order to entertain the public and thereby make money for all concerned. The broadest possible ownership rights were obtained from directors, writers and other personnel, by collective and individual bargaining under employment agreements, in exchange for large salaries and sometimes profit percentages. For their part, the owners received control of the methods and manner of distribution, advertising, and use in the various secondary markets. In these business ventures, it was the studio's money at stake. Directors and others did not return their salaries if a film was unsuccessful. They were (and are) paid regardless of the quality of the resulting product.

It is the successors to the original studios, such as TDS, who have both the contractual right and the greatest incentive to preserve and distribute these old movies, in order to maximize their investment. The greater our freedom to adapt to changing markets, the greater the benefit to the public through the broadest possible access to the great film heritage we own.

The modern Hollywood system

The business of modern filmmaking has become even riskier than in the heyday of the studio system. Today a feature film costs an average of almost $30,000,000 to produce and distribute. Only 10% of today's feature films recoup their investment through first-run world-wide theatrical release. In all other cases the only hope for breaking even is through full exploitation of all additional markets.

The willingness of a potential investor (including major studios) to finance a film is directly related to the investor's perceived ability to exploit the film in all possible ways and places. Under current law, the owner of the copyright in a film knows that if, as is almost certain to be the case, the picture is still in the red after first-run theatrical release, he can license it to cable or broadcast television, rent and sell it in videotape format, license it for in-flight use on airlines, and distribute it to foreign countries after having it dubbed or subtitled. With these tools, he has a much better chance, although still no guarantee, of redeeming his investment. The ability of even one, let alone several, creative contributors to stop or even delay the use of these markets will chill the desire of investors to gamble on the vagaries of the movie business (and all other creative businesses including television, music, records, book and magazine publishing, etc.).

As an indication that "European-style moral rights" can have a negative impact on investment in entertainment programming, I would point out that last October an Italian Court ruled that it is a violation of a deceased director's moral right for a television station to insert commercials during the broadcast of his film. In addition, the court ruled that the director's heirs can dictate whether, how many, and where commercials may be inserted. Italian directors themselves note that this decision may result in reduced funding for future films. I enclose an article on this decision from the October 18, 1989 edition of Variety.

The role of labor negotiations has also changed. The various guilds representing creative contributors are among the strongest unions in the country. Agreements with members of the Directors Guild of America, for example, typically run to hundreds of pages, containing dozens of hotly negotiated provisions ranging from precise credit rights to profit participation to adaptive consultation. There is no question but that these guilds enjoy bargaining power relatively equal to that of the studios and independent producers who employ their members. We all remember the havoc wreaked on the television industry when the television writer's union went on strike in 1988.

In the modern system of making films, parties of relatively equal bargaining power engage in protracted negotiations in which each side seeks to maximize their profit and control. The producer, facing greater investment risks than ever before, negotiates with various creative contributors, who enjoy greater autonomy and influence than ever before. The result is a balanced, productive working relationship in no need of legislative interference.

Constitutional issues

Legislation to allow the exercise of "European-style moral rights" with regard to works copyrighted prior to the date of possible enactment of new legislation must undergo severe constitutional scrutiny. There is

a very high degree of probability, for example, that colorization legislation which bans the distribution and exhibition of colorized versions of movies copyrighted prior to enactment would violate both the First and Fifth Amendments to the Constitution.

In his recent report entitled "Technological Alterations to Motion Pictures," (March 1989) the Register of Copyrights states that "(a) new federal moral right affecting preexisting works, the copyright of which is owned by individuals other than the beneficiary of the new right, raises serious constitutional issues under the 'takings' clause of the Constitution," (page 159) and thus concludes that "(a)ny future legislation should extend moral rights prospectively only to works created on or after the date of enactment ..." (page 182).

Indeed, these doubts about the constitutionality of a retroactive ban caused the Register to call into question "the need for <u>any</u> legislation, since very few motion pictures are now created in black and white, and those that are will probably be created by directors with sufficient individual bargaining leverage to prohibit colorization." (Emphasis in original.) (Page 160.)

Our attorneys have also looked into this question, and have concluded that a retroactive ban on colorization would also violate the free speech guarantee of the First Amendment. We also agree with the Register that such action would violate the takings clause of the Fifth Amendment.

<u>Public policy issues respecting retroactive legislation</u>

Our company is greatly concerned about all the technologies that could be affected by the "European system of moral rights," including colorization. During the consideration of the National Film Preservation Act 1988, we made a commitment to voluntarily label <u>all</u> movies that we colorize, regardless of whether they are chosen for the National Film Registry, using the labeling language contained in that law. We have and will continue to actively market and make available the black-and-white versions of the movies we colorize. In addition, Turner enjoys the reputation of being one of the most active copyright owners in the field of film restoration and preservation, spending more than $30,000,000 in recent years in this area. Thus, in terms of "truth in advertising" and film preservation, our company is already doing much more than is required by current law. A major motivation to make these large expenditures is our freedom to distribute our movies and hopefully recoup the investment.

An important public policy question raised by retroactive legislation concerns future development of entertainment technology. While technologies such as panning and scanning, time compression and foreign-language dubbing and subtitling have existed for decades,

colorization was invented only a few years ago. We are currently witnessing the rapid growth of relatively new industries such as direct broadcast satellites and high-definition television. The pursuit of technological innovation in the media is grounded in the assurance of the current system that when a better mousetrap is invented, there will be cheese with which to bait it. Uncertainty as to whether individual creative contributors may lodge protests against the adaptation of their work to new uses may prove to have a chilling effect on the development of technologies as yet undreamt.

Public policy issues respecting prospective legislation

While a large part of our concern about the "European system of moral rights" involves our ability to distribute our old films to the public, we are also concerned about restrictions on the distribution of new works. Our newest cable network, Turner Network Television (TNT), now one year old, has become a major player in the Hollywood production community, and we plan to spend almost $1 billion over the next 5 years on original series, mini-series, and movies produced exclusively for TNT. We hope to enter other new creative fields as the opportunity arises. Our TNT product and other projects will require freedom of distribution in other media throughout the world to recoup its cost and enable us to continue to finance future productions and give employment to many creators.

There is a high probability that, depending on the precise nature of the proposal, "European-style moral rights" legislation of a prospective nature affecting the motion picture industry could drastically alter the nature of that business. Such legislation could deprive copyright owners of the unfettered ability to distribute their property, or at minimum, subject that ability to substantial uncertainty. Thus, a vastly increased financial risk is introduced into the investment process. When an investor faces increased financial risk, he is understandably less willing to invest in an experimental, untried, but nevertheless creative and possibly useful enterprise. This may mean that, because the prospective investor in a filmmaking venture knows he must rely more heavily on the success of a first-run theatrical release, he is more likely to rely on safer, more "bankable" material or participants. It is quite possible that moral rights legislation may thus redound to the benefit of established artists, "name directors," and formula scripts, and to the detriment of unknown talent and creative but untried techniques.

Conclusion

This Subcommittee is being asked to consider the importation of concepts from other countries, whose effectiveness is highly questionable and whose antecedents are antithetical to our own system, in order to change an industry which is clearly the most successful, productive and

competitive in the entire world and which enjoys an extremely favorable balance of payments. The retroactive application of these concepts is in all likelihood unconstitutional, and their prospective application raises serious public policy questions. We urge this Subcommittee to carefully consider these issues during any future deliberations on the "European system of moral rights."

APPEAL AGAINST THE JUDGMENT OF
THE TRIBUNAL DE GRANDE INSTANCE DE PARIS -
1ST CHAMBER - dated 23rd November 1988

COURT OF APPEAL OF PARIS

4th Chamber, section B

Decision of 6th July 1989

TURNER ENTERTAINMENT CO.

Vs.

1) Madame Angelica HUSTON
2) Monsieur Daniel HUSTON
3) Monsieur Walter HUSTON
4) Monsieur Ben MADDOW
5) La Société des Réalisateurs de Films (S.R.F.)
6) Le Syndicat Français des Artistes-Interprètes (S.F.A.)
7) La Fédération Européenne des Réalisateurs de l'Audiovisuel (F.E.R.A.)
8) Le Syndicat Français des Réalisateurs de Télévision C.G.T.
9) Le Syndicat National des Techniciens de la Production Cinématographique et de télévision
10) La Société des Auteurs et Compositeurs Dramatiques (S.A.C.D.)

Vs.

The Public General Prosecutor before the Paris Court of Appeal

FACTS AND PROCEDURE OF 1ST INSTANCE)

On the 2nd May 1950, the American company, LOEW's Inc, parent of the film company METRO-GOLDWYN-MAYER (M.G.M.), obtained from the Copyright Office in the UNITED STATES a registration certificate conferring on the company the copyright in the film "ASPHALT JUNGLE" directed by John HUSTON and filmed following a screenplay written by himself and Ben MADDOW ;

The copyright was renewed on 2nd May 1977 by M.G.M. after a change in the corporate structure of LOEW's. Succeeding to the rights of M.G.M. in its "library" on 5th August 1986, the company TURNER ENTERTAINMENT Inc. made a colorised version of the "ASPHALT JUNGLE" for which it was granted on 20th June 1988 by the American Copyright Office a registration certificate ;

It is in these circumstances that the 5th Television Channel (LA 5) announced on 28th June 1988 the broadcast of the colorised version of the film which, however, the judge of summary committal prevented by an order dated 24th June 1988, at the request of the HUSTON heirs and Ben MADDOW, on the grounds that such a broadcast would lead to intolerable and irreparable damage against those defending the integrity of the work of HUSTON ;

This decision was confirmed by a decision of the Court of Appeal of Paris on 25th June 1988 ;

Moreover, by an action dated 30th June 1988, Angelica HUSTON, [widow] of the deceased director, Daniel and Walter HUSTON, his sons, and Ben MADDOW sought a fixed hearing in order to obtain an injunction against LA 5 preventing it from proceeding to broadcast in its colorised version, not only the "ASPHALT JUNGLE" but also any work of which John HUSTON was the author ;

LA 5 contested the admissibility of the claim, and TURNER, voluntarily joining the action as principal party, claimed that as sole author of the litigated work, it had the sole right to exercise the moral right in the work in France ;

For the other side, the SOCIETY OF AUTHORS AND DRAMATIC COMPOSERS, the French Syndicate of ACTORS, the European Federation of AUDIOVISUAL DIRECTORS, the Society for DIRECTORS OF FILMS, the French Syndicate of TELEVISION DIRECTORS and the National Syndicate of TECHNICIANS FOR FILM PRODUCTION and TELEVISION intervened to oppose TURNER on the grounds that TURNER's arguments attacked the rights of creators and artists ;

THE APPEALED JUDGMENT

By its judgment of 23rd November 1988, the Tribunal de Grande Instance de Paris :

- declared admissible so far as it concerned solely the television broadcast of the colorised version of "ASPHALT JUNGLE", the action of the HUSTONS and Ben MADDOW and the voluntary intervention of TURNER
- declared at the request of LA 5 that LA 5 renounced any broadcast of the said version and, so far as necessary, injuncted LA 5 from proceeding to such television broadcast
- rejected the remainder of the claim
- rejected the claim of TURNER

APPEAL

On 5th January 1989, TURNER appealed against the judgment and was authorised to take a fixed day, which it did on 25th January 1989, requesting all of the parties to appear at a hearing before this chamber on 12th May 1989 ;

The summons asked the Court to overrule the judgment on the principal grounds that the HUSTONS, who did not qualify as authors of the film "ASPHALT JUNGLE", were inadmissible to invoke a moral right which they did not possess, and secondarily that colorisation constitutes an adaptation in legal terms, that the right to adapt is a patrimonial right which belongs to TURNER and which the HUSTONS, in the absence of a defective adaptation, which was never alleged, could not paralyse the exercise of the right by invoking the moral right to which, in itself, colorisation caused no harm ;

TURNER claimed from the HUSTON estate the sum of 50 000 Francs on the basis of Article 700 of the New Code of Civil Procedure ;

In other written arguments submitted on 9th May 1989, TURNER asserted again the above arguments specifying that the identification of the author of the litigated film must be carried out by applying the law of the United States of America, the country of creation, and requesting the Court to judge that by virtue of the above mentioned law and agreements, the identity of the author belonged

not to the HUSTONS and Ben MADDOW, but to TURNER, the successor in title to M.G.M./LOEW's, and that the recognition of TURNER as the author did not cause any harm to the conception of French Public Order in the realm of author's moral rights ;

On 10th May 1989, LA 5 asked the Court to overturn the appeal judgment, by saying that it was not contested that the protection of the integrity of the work "ASPHALT JUNGLE" in the French territory was dependent on French law, but that the question of the identity of the author was a matter for the country of origin of the work, CALIFORNIA, and secondly that French Public Order could not be used in effect to challenge in FRANCE a Californian law which determined the identity of the author of the film "ASPHALT JUNGLE" ie. TURNER, and not the HUSTONS/Ben MADDOW, who cannot invoke any moral right in FRANCE ;

It was also claimed that colorisation constitutes a legal adaptation in the sense of the law and conventions and that in the absence of any particular harm spelt out by the plaintiffs, the Tribunal could not consider the concept of colorisation itself as an affront to moral rights. LA 5 concluded that it would give the following undertakings :

- to set out before any broadcast, in a special declaration, that the colorised version of "ASPHALT JUNGLE" produced by TURNER is an adaptation of an original work filmed in black and white ;

- to broadcast, at the time the film is scheduled, a notice reminding television viewers that they have the ability not to watch the film in colour by using the colour control knob on their television ;

LA 5 brought an action against the HUSTONS/MADDOW and the intervening parties for the payment of 1 Million Francs in damages and 50 000 Francs under Article 700 of the New Code of Civil Procedure ;

The HUSTONS/MADDOW sought for the re-affirmation on 11th May 1989 of the appealed decision and for the condemnation of TURNER to a payment of 100 000 Francs pursuant to Article 700 of the New Code of Civil Procedure. They emphasized that the solution adopted by the first judges in granting the benefit of a moral right under French law to the physical person who contributed to the creation of the work was an imperative whether on the basis of the body of international conventions applicable to copyright, or even outside such conventions. In particular, they emphasized that the United States of America had just adhered to the Berne Convention which took effect immediately with respect to contentious issues which were not yet resolved as well as extra-contractual situations arising subsequently to its entry into force and they based their claim to authorship on a sole reference in Article 14 bis-2-a of the said Convention under the terms of which "the determination of the holder of the copyright in a cinematograph work is reserved to the legislation of the country in which the protection is sought" ;

In addition, defining colorisation not as an adaptation but as a distortion, they claimed that this procedure was totally unforseeable by the parties at the time when HUSTON and MADDOW contracted with M.G.M., and they therefore could not be deemed to have authorised such a process and that even if they had done so, the gravity of the harm done to the work must lead one to judge that the character of international Public Order in relation to moral rights would render void any contractual stipulation to the contrary ;

On 11th May 1989, the society of Authors and Dramatic Composers, which sought permission from the Court to have its intervention admitted voluntarily, stated that it granted to the HUSTONS/MADDOW the entire benefit of its support ;

On 12th May 1989, five other associations or syndicates made the same statement in order to support the claims of the HUSTONS/MADDOW and each sought from TURNER and LA 5, on the basis of Article 700 of the New Civil Procedure Code, the sum of 10 000 Francs ;

On the same day, in its concluding reply, TURNER asked the Court to declare that the adherence of the United States to the Berne Convention only took effect from 1st March 1989 and that this adherence did not alter the effect of the American contracts entered into before the said date between American nationals for works born and created in the United States and that such adherence was without any impact on the identification of the author of the "ASPHALT JUNGLE", and that, secondly, the application of Article 14 bis-2-a of the Berne Convention did not exclude the application of American law by the French judge in order to identify the author ;

In the final written evidence of 12th May 1989, the HUSTONS/MADDOW claimed that the appeal by LA 5 was inadmissible on the grounds of the undertakings given to the first judges in relation to its renunciation of any broadcast of the colorised version, and also because of the late delivery of its evidence ;

In addition, the President of the Court, having on 27th April 1989 given an order to the parties obliging them to explain before 10th May various matters concerning the production of the litigated film, they claimed that they have been in an impossible position to reply to this request and to TURNER's conclusion of 9th May and that of LA 5 which, on 11th May, opposed any rehearing and claimed the admissibility of its appeal by asking the Court not to make a judgment on the issue of non-admissibility raised by the HUSTONS/MADDOW who asked the Court to ignore the substantive issues and to declare exclusively on the latter, seeking secondarily, in the event that LA 5's appeal would not be judged inadmissible, to rehear the matter in order to make a reply ;

THE COURT

Which in order to more fully understand the facts, the proceedings and the arguments of the parties, referred to the appealed judgment and to the appeal evidence

WITH REGARD TO THE APPELLANT

Whereas the HUSTONS/MADDOW appointed lawyers on 6th February 1989, that is to say more than 3 months before the audience on the 12th May indicated in the summons for a fixed day hearing served at the request of TURNER ;

That they have therefore had all the time necessary to prepare their reply to the arguments of the appellant ; that notwithstanding, the litigation would have been presented in appeal in the same conditions as at first instance if they themselves had not extended their previous arguments by reference to the Berne Convention in the written evidence received only the day before the pleadings and to which TURNER could only reply on 12th MAY ;

In addition that, the order given to the parties 15 days before the pleadings could not have taken the HUSTONS/MADDOW by surprise since the role effectively played by John HUSTON in the creation of "ASPHALT JUNGLE" occupied an eminent place in the argument in the judgment which is being appealed ;

That, finally, LA 5 finding itself cited in the appeal of TURNER, its submissions, tending to give to its renunciation of any broadcast of the litigated work a simply provisional character, were not unexpected and in addition did not change the essential facts of the argument on the moral right invoked by the HUSTONS /MADDOW which do not, to the extent of their opposition to a seriously motivated decision on non-admissibility, give grounds for any complaint of any violation to their detriment.

ON THE ADMISSIBILITY OF THE APPEAL IN RELATION TO LA 5

Whereas in its written evidence at first instance, LA 5 had opposed as being without object the claim of the HUSTONS/MADDOW since the order forbidding it to broadcast the colorised version of "ASPHALT JUNGLE" was confirmed by the decision of 25 June 1988 and it had respected this injunction ;

That the renunciation which it had asked the Tribunal to declare could no longer have any impact on the decision at law to which it was connected, as confirms the tense applied to the verb "to renounce", that is to say, the past composite which concerns what has been done and not the present which expresses that which is valid for all times ; in addition the tribunal judged it pointless to forbid, in so far as was necessary, the broadcast of the said version ; that having an interest in having an anulement of such a provision, it has a claim incidental to the appeal, the admissibility of which cannot be contested ;

ACCESSORY INTERVENTIONS

Whereas the admissibility of the interventions of the six companies being associated with the arguments of the HUSTONS/MADDOW is not disputed ;

ON THE CONFLICT OF LAWS

Whereas the appealed judgment recognised in the HUSTONS/MADDOW characeristics enabling them to demand in FRANCE the protection of their moral right in "ASPHALT JUNGLE" on the grounds that even if TURNER is the sole holder of the patrimonial right in the work, it could not also be the holder of the moral rights which attach to the actual individual creators who were, in spite of the American law and contractual stipulations, HUSTON and MADDOW, these arguments being based on the benefit of the provisions of the Universal Convention of Geneva which does not exclude from its field of application moral rights, and by virtue of which the benefit of the law of 11th March 1957, specifically Article 6, ensures national treatment to foreign authors of litigated films which are shown in our country ;

Whereas the appellant and LA 5 were justly aggrieved by the above reasoning which ignored the conflict of laws clearly outlined by TURNER whose conclusions claimed that according to the law of first publication of the work in the UNITED STATES, the quality of authorship in "ASPHALT JUNGLE" was solely vested in the person of LOEW's. In addition, although the Geneva Convention does not concern moral rights, it does protect works, but without intervening in determining the identity of their authors ; it therefore does not derogate from the rule according to which it is the law of the country of origin that must be referred to in order to identify the author ;

Whereas it is true that the arguments presented before the Court are to be seen in a new light since at the end of 1988, the UNITED STATES became a party to the Berne Convention which takes effect from 1st March 1989, and from which American nationals may derive benefits in France, despite certain reservations, the exact effects of which remain unknown, the consultation of Professeur FRANCON submited by the HUSTONS/MADDOW more than a month after the hearings only cites extracts from the American law of ratification dated 31st October 1988 ;

Whereas it is claimed by the HUSTONS/MADDOW that their argument in favour of their recognition as having the characteristics of authors derives from the said Convention and in particular Article 14 bis-2-a, under the terms of which, the determination of the holders of the copyright in the cinematograph work is reserved to the legislation of the country from which the protection is sought ;

Whereas even to admit that the use of the plural (the title holders) does not signify that the text only concerns works of collaboration, which would exclude those in which the producer exercises all of the rights, it is vital to emphasize that the BERNE CONVENTION, conceived as an instrument of harmony between the contracting states, with a view to the best protection for artists and creators, would see its authority gravely undermined if the law of the country where protection is claimed was to become a means to overrule the norms of another signatory state, and the rights acquired under that other regime ; it would follow from this that one could only extract from such an operation positive benefits for authors ; as a consequence, in determining the holder of the moral right, French law can certainly benefit an American citizen, but on condition that the advantage accorded by virtue of the principle of assimilation does not lead to any negation of any right acquired in a work in the UNITED STATES under American law by a person other than the claimant ;

Therefore one cannot, on the facts, ignore that TURNER holds the copyright wich it received from M.G.M./LOEW's in "ASPHALT JUNGLE" and that the BERNE CONVENTION itself insists that this be respected ; that these rights bear, under American law no restriction flowing from any moral right, and the film being therefore something which TURNER is free to modify as it sees fit, one cannot see how the arguments of the HUSTONS/MADDOW on the exercise in FRANCE of moral rights in relation to the integrity of a work could be upheld without injuring the legitimate patrimonial interest that it is incumbent on a French judge to protect ;

In addition, no one could claim to be an author in FRANCE without satisfying the rules set out in the law of 11th March 1957 which relate to the manner of acquisition of this benefit ; in this respect it is appropriate to recall that the first prerogative of the author, that which conditions all others, is the right of publication which, according to Article 19 of the said law, only belongs to the author ; it is consistent throughout the documents furnished during the debates that neither MADDOW nor John HUSTON published "ASPHALT JUNGLE" in

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Cameron McCracken

the original black and white version ; likewise, it has not been established, or at least only alleged, that this version was, before its publication, preceded by an agreement between the producer and the co-authors, analogous to that foreseen in Article 16 of the law of 11 March 1957 (as modified by the law of 3rd July 1985) ;

Whereas in addition, the rights held by TURNER in the black and white version are the unavoidable consequence of the agreements entered into between the American parties , M.G.M./LOEW's on the one part, HUSTON and MADDOW on the other part, in the state of CALIFORNIA ;

That on this point, it is necessary to remark that if American law ignores moral rights, it does not prohibit their recognition by a particular contractual provison ; in this respect, HUSTON and MADDOW worked, not under an agreement relating to a particular film, but pursuant to work contracts under which they were engaged to provide to the producer/employer such artistic services as they demanded ; the employer was the holder of the right to modify and/or revise the "litterary materials" destined for filming, would decide whether the production should proceed on the basis of the prepared material, whether to entrust to persons other than the employees contributions otherwise due from them, be that litterary material or filming ; the employer was the sole beneficiary of all of the fruits of the services of his employees, including their rights, throughout the world, in production, broadcast, and reproduction by whatever technical means or method, without any reserve, condition or limitation ;

It follows from the above stipulations that M.G.M./LOEW's did not become the holder of the copyright simply by reason of an assignment agreed to by HUSTON and MADDOW of the completed work and which, as patrimonial rights, according to French conceptions, preserved a principle of moral rights ; it is to the contrary perfectly clear that at no moment did HUSTON and MADDOW have the least right in the film during its creation for which the will, however capricious, of the producer could exclude them at any moment and replace them with any other person and M.G.M. LOEW's would judge when the work was in their opinion complete and would also decide whether or not to publish or carry out, after publication, any modifications which seemed to them appropriate ;

That in referring to the French law in order to claim the exercise in FRANCE of a moral right in "ASPHALT JUNGLE", the HUSTONS/MADDOW are attempting to escape from the contractual agreements entered into in CALIFORNIA, thereby placing in danger the legal security to be expected in contracts and this is even more unacceptable when such a repudiation concerns a cinematograph work of which neither HUSTON nor MADDOW could deny that it was given a large circulation outside the United States and in particular in our country where "ASPHALT JUNGLE" was projected under the title "QUAND LA VILLE DORT" in a synchronised version ;

That nothing in the BERNE CONVENTION permits the invocation of the legislation of one State in order to undermine contractual obligations subscribed to in another State ;

Whereas it is true that in order to render meaningless the efficacity of contractual stipulations, one is forced to admit that such provisions must be overridden by the fact of creation ;

That the judgment welcomes this argument ;

That however, the lower courts' search for the reality hidden under the fiction is fragile since, without researching how the contracts actually operated, it denies the role of the producer in the creation of the film by relying on false premises which reflect the traditional views in France of the relationship between producer/director, certainly accurate for French cinema for some decades, but which can not be transposed, without damage to the truth of what actually happened, to the epoch in which "ASPHALT JUNGLE" was created according to the practice of large Californian studios ;

Whereas the documents introduced in the discussions do not contradict the letter of the contract which itself corroborates what is public knowledge that is to say

- that the producers, such as M.G.M. - LOEW's, were not simple providers of funds, often strangers to the world of cinema, bringers of capital permitting a director to make, with sole authority, a film conceived by him and created with collaborators chosen by him, but rather these producers were commercial men placed at the head of companies with the object of generating profits purely through the production and broadcast of films ;

- that these authoritarian financiers, who did not have any time for fantasy, were geared to a rigourous control and containment of artists and technicians with a view to enforcing respect for filming time limits, restricting the length of films to the projection time customarily expected, and surveillance to ensure that no failure to observe current aesthetic or moral rules would compromise the desired success ;

Whereas nothing in the supplied documentation would lead one to believe that the standing of John HUSTON rendered contractual provisions meaningless or that the producer was not totally involved in the conception and creation of the film and had the final word in all matters from the choice of the subject matter provided by BURNETT's novel which he decided to adapt, right up to the definitive editing, and in particular with regard to the script on which the director operated ;

Whereas it has not been established that the contracts were only legal shams hiding the reality of creation of which it was vital to take account ;

Whereas, at the very least, all of the elements taken together, whether of fact or of law, and submitted to French legal analysis, forbid the abandonment of American law and the setting aside of the contracts and as a result leads one to deny to the HUSTONS/MADDOW any possibility of being the beneficiary of a moral right

under the law of 11th March 1957, this the law of conflict decides, the only remaining question being whether the demands of Ordre Public in FRANCE would justify the rejection of the foreign legislation which is normally applicable ;

ON ORDRE PUBLIC

Whereas in international private law, the exception of Public Order is a reaction of intolerence to foreign law which must be exercised with great care and not simply on the occasion of any serious divergence from the law of another State ;

That the requirements of French Public Order are to be analysed in a more rigorous manner than ordinary laws and must only be upheld when to do otherwise would undermine the very foundation of the law on which French society rests in relation to political, social or family order ; recourse to the exception obliges one to show the very high value of what one wishes to preserve, the absence of any damage that might be caused to other principles no less respectable and recognised in France, and finally, that the gravity of the harm which would otherwise result is beyond what is acceptable ;

Whereas it is necessary to note that the first Article of the Law of 2nd January 1968 as amended, in relation to trademarks, attributes to the employer the ownership of the invention made by an employee in the execution either of a contract of work, incorporating a duty to create inventions which corresponds to his actual activities, or of studies and research which are explicitly entrusted to him ;

That in the same domain of artistic and literary ownership, the rule so adopted for the inventions of employees has inspired the drafters of the law of 3rd July 1985 with regard to the treatment of software ; in addition, if article 14 of the law of 11 March 1957 makes an audiovisual work a work of collaboration of which the co-authors are physical persons, this is only a presumption, subject to contrary proof, and there is nothing to prevent the recognition, in the present case, of a film as having the character of a collective work in which the company could claim at law the quality of an author on the basis of having taken the initiative, directed the creation and proceded to its publication ;

Whereas in the light of the above observations, one can doubt that the copyright granted to LOEW's in 1960 in "ASPHALT JUNGLE", a film created in conditions bringing it within the definition of a collective work under French law, is of such a nature as to conflict violently with the sentiments which in our country are the basis of protection of works of the spirit ; in addition, it is not without an element of self-flattery for French realities that the opponents of TURNER oppose, in a manichean way, the UNITED STATES as being exclusively concerned with profit

and with forcing producers to acts of vandalism on black and white films, as compared to FRANCE, presented as the guardian "par exellence" of the rights of creators, in spite of the proliferation of ghost-writing in litterature and, with regard to cinema, abuses of censorship, generating a heavy self-censorship and consequently an unfortunate inhibition in the choice of subject matter;

Whereas in addition, even under domestic laws, the character of Ordre Public inherent in moral rights is of a variable intensity, the right of paternity being imposed with more force than that of integrity in the work, which infringes upon the exercise of the patrimonial right ;

That to prevent TURNER from exploiting the colorised version of "ASPHALT JUNGLE" in FRANCE, for which a new copyright was granted, would end in depriving the company of its rights in the incorporeal property which benefits from constitutional protection and such an injury could only be justified if in the general interest and on condition of an indemnity, the constitutional norm being attached to the conditions set out in article 32 of the law of 11 March 1957 relating to the exercise by the author of his right to withdraw ;

That another counter-weight to the moral right resides in the necessity to guarantee to the public access to developments carried out in audiovisual communication, LA 5 emphasizing on this point that the great majority of television viewers are rejecting old films made in black and white, and only colorisation will be able to lead them to become familiar with these works, which are at present greatly ignored ;

Whereas, finally, John HUSTON and Ben MADDOW freely and in full possession of their faculties signed the contracts by virtue of which colorisation, unforseeable in 1948, has been nevertheless carried out in the UNITED STATES, in a legal manner, and not, it must be emphasized, on French territory where TURNER has limited itself to broadcasting the colourised version of "ASPHALT JUNGLE" ; HUSTON and MADDOW are therefore subject to the authorianism of M.G.M., that is to say, they weighed-up the value of the advantages which would flow to them from the strong organisation of a large studio and the effect on their reputation which would not be that which it became without the resources for diffusion for which the films on which they worked benefitted throughout the world ; in the interest of exporting these films, they did not fail to expressly consent to all procedures known at the time of the contract, or which were by nature to the film's advantage, and in particular dubbing, for which they could not pretend not to know that it would distort an English-speaking film ;

That as a question of the protection of public order, it would be excessive to liken the harm alleged here to the integrity of the work to the damage that foreign nationals, in particular children, without any contract, might be subjected by the application of customs that our civilization rejects as harmful to the most sacred attributes of the human person, for example physical integrity or freedom of mariage ;

Considering all of the above arguments, it is necessary to conclude that the concerns invoked by the HUSTONS/MADDOW are not at the level of principles permitting the application of an exception to public international order ; it follows from this that the French law cannot be substitued for that which provides a correct solution to the conflict of laws ; as a result, no moral right could, on the basis of the law of 11th March 1957, oppose broadcast in France and, in particular, by LA 5, of the colorized version which will in any event be subject, if it is mediocre, to the sanction of the market place ;

ON COLORISATION

Whereas the procedure adopted by TURNER for the colorisation of "ASPHALT JUNGLE", apart from adding colour, also involves alterations which are to take into account the destination of the work so created which, in principle and in fact, is to be television broadcast and not projected in the commercial theatres ;

Whereas COLOR SYSTEMS TECHNOLOGY, used in this case, is, according to the Bureau of Authors at the Congress of the UNITED STATES, sufficiently creative for registration to be granted to colorised films, thus treated as an adaptation of the work in black and white, which should be so recognised by French law thereby opening up a different form and giving new access to situations and characters ;

Whereas the copyright granted to TURNER in 1988 on the derived work would remove from the HUSTONS/MADDOW, if they had a valid moral right, any possibility of declaring the latter a distortion of the first work, except, which is not the case, where they alleged a defect in the quality of the adaptation ;

That one could not close the discussion of these badly founded arguments, which will be rejected by overturning the judgment referred to us, without stating that LOEW's - M.G.M., TURNER, who ensures the good conservation of films, left in the UNITED STATES to private initiative, has neither distroyed nor altered the work in black and white which it could commercialize again in cinemas if there was a public demand ;

Whereas it will be ordered at LA 5's request that LA 5 will broadcast a notice reminding the television audience of the possibility of watching the colourized film in black and white in the terms indicated in the judgment ;

Whereas the heirs of John HUSTON, even if they are not included in the copyright succession, are the guardians of his memory ; in this respect, and to the extent that they estimate that the prestige that John HUSTON enjoyed as a director could be damaged by the new impressions given by colorisation in which he has no role, it is appropriate to grant them the right to make the public aware

by applying a "meta-legality" which intervenes in matters which touch the most personal attributes of the human being, but without harming the patrimonial right of the third party, as, in this case, TURNER ;

That natural law finds some support here from the positive law of the UNITED STATES which, whilst not recognizing the right of paternity and integrity in the work, tends to disapprove of the false attribution to someone of participating in a creation ;

Whereas, as a result, in making the order requested by LA 5 so that it is obliged to announce to television viewers that what is going to be presented to them is the adaptation in colour of a film made in black and white, there should be space to add to the warning a statement of the opposition shown by the HUSTONS to the colorisation of "ASPHALT JUNGLE", the information being given in fixed terms on the positive copy of the film and for all broadcasts in FRANCE ;

ON THE COUNTER CLAIM OF LA 5 AND
THE APPLICATION OF ARTICLE 700 OF THE N.C.P.C.

Whereas LA 5 could not justify any harm susceptible of giving rise to an award of damages ;

Whereas it is not inequitable to leave each party to bear their own fees not included in the fees borne in the present hearing, and the same will apply to expenses ;

ON THE BASIS OF THESE ARGUMENTS

Declaring admissible the incidental appeal of LA 5 and finding it well-founded as well as the principal appeal of TURNER,

Held that the author of the film "ASPHALT JUNGLE" is TURNER and that the heirs to John HUSTON as well as Ben MADDOW have no moral right in this work filmed in black and white ;

Declares that the colorised version of the said film is according to American law an adaptation for which TURNER has obtained a certificate of registration dated 20 June 1988 ;

Held that colorization, in itself, cannot be critized by the heirs of HUSTON and Ben MADDOW, even if they could invoke a moral right in the film in black and white ;

As a result , in granting the appeal,

Rejects the claims of the HUSTONS and Ben MADDOW and finds admissible but badly-founded the interventions of the six companies associated with their argument ;

Authorises LA 5 to broadcast the colorised version of the film "ASPHALT JUNGLE" on condition of the following requested orders ;

That as far as necessary before any broadcast a warning to television viewers that they have the ability not to watch the film in colour by using the colour control knob on all televisions ;

That in addition, for all use in FRANCE of whatever kind, the colorized version of the film "ASPHALT JUNGLE" (titled in French "QUAND LA VILLE DORT") must bear the following warning :

"In respect for the memory of John HUSTON, screenplay writer and director of this film made in 1950 in black and white, his heirs oppose the projection in FRANCE of this colorised version created in 1986.

Ben MADDOW, co-screenplay writer, joins in this declaration.

By a decision of 6 July 1989, the COURT OF APPEAL of PARIS, 4th Chamber - B, rejected the above opposition but stated that the spectators or television audience would be informed of the opposition of the HUSTON estate".

Held that this warning must figure at the beginning of the film, immediately after the title, and at the end, after the word "fin", in the same characters as those used for the credit indicating the role played by John HUSTON in the black and white film and that it shall stay on the screen for 20 seconds ;

Held not to award damages to LA 5 ;

Rejects all claims formed pursuant to Article 700 of the New Civil Code ;

Held that each of the parties will bear their own expenses of the earlier hearing 4 and the appeal to which they have been exposed.
..."

END OF TRANSLATION

SERRA & ASSOCIES
Cameron McCracken

VARIETY Wed., Oct. 18, 1989

Italo Court Bars Tv Blurbs In Pic

By JENNIFER CLARK

ROME — The Court of Appeals handed down a precedent-setting ruling with potentially devastating consequences for private tv operators in Italy and every other country that adheres to the Berne Convention, which as of March 1, 1989, includes the U.S.

The Rome magistrates decided in favor of Francesco Germi, who charged Reteitalia (the software division of Silvio Berlusconi's Fininvest) with damaging the integrity of his father Pietro Germi's film "Serafino" by interrupting it with ad breaks.

The Court of Appeals magistrates ruled that according to the Berne Convention even a single commercial break in a film constitutes an alteration of the work's integrity and

Wed., Oct. 18, 1989.

Berne Ruling Raises Specter Of Pic Blurb Bans On Euro Tv

(Continued from Page 1, Column 3)

therefore violates the director's moral rights.

The "moral rights" provision of the Berne Treaty provides that artists have the right to object to any "material alteration" of their works that would prejudice their "honor or reputation."

Interpretation of this provision, however, varies widely from country to country. In the U.S., this provision was deleted entirely last year when Congress approved changes in U.S. copyright law that brought the U.S. into compliance with the Berne Treaty.

Directors Guild of America spokesman Chuck Ware called the Italian court's ruling a "tremendous victory for artists' rights." He noted that director George Stevens lost a similar case in the U.S. Supreme Court some 30 years ago when he tried to stop the insertion of commercials into his "A Place in The Sun" when it was shown on tv.

Francesco Germi originally filed charges against Reteitalia in 1984 after the first tv broadcast of "Serafino." The Court of Rome ruled at the time that damage to the film should be determined individually case by case, according to the artistic quality of the film on one hand and the number and length of ad breaks on the other hand. Germi appealed.

The new ruling completely upsets the status quo, whereby an offended party had to somehow convince the magistrates that his film was "worth" saving from the ravages of commercial breaks, and states that the integrity of each and every film is altered by advertising.

Naturally, the ruling refers specifically to Germi's "Serafino," which will not be shown on Berlusconi's Fininvest webs in the future, and of course is not valid outside of Italy.

But the ruling could open a Pandora's Box of ills for private broadcasters at a time when commercial television is beginning to penetrate European markets traditionally dominated by public broadcasting monopolies.

The 30-page ruling from the magistrates of the Court of Appeals cites the Berne Convention norm that protects a director's copyright from an "instrumental use of the work for merely commercial ends, which offends the dignity of the work itself." A director or producer can sell the economic rights to their product, but under the Berne Convention they still retain "moral rights."

Regarding the previous decision of a lower court to examine each case separately according to the film, the Court of Appeals observes: "A hierarchy of artistic quality of this sort cannot be left to the judge's discretion."

In any case, the ruling continues, "it is illicit for a third party to decide the number and placing of commercial breaks against the director's will."

Under this interpretation, if the simple act of interrupting a film with a commercial violates a director's moral rights under the Berne Convention, then in theory the same thing holds true for any country adhering to the Convention. It remains to be seen whether other magistrates, in other countries, will follow the same line of reasoning as those of the Rome Court of Appeals.

Anti-ad break sentiment in Italy has been building since the beginning of the year, when it became a political issue after a group of noted Italo directors (including Federico Fellini, Ettore Scola, the Taviani brothers and Lina Wertmuller) banded together to demand that private channels broadcast their films "commercial-free."

Not surprisingly, the Court of Appeals ruling has received mixed reviews.

A loud rumble of irritation has erupted from the Fininvest headquarters, where a spokesman announced that the corporation will appeal the decision to Italy's highest court and said the decision made by the Court of Appeals affects only the film "Serafino" and has no general significance.

Germi's lawyer, Niccolo Paoletti, told *Daily Variety*: "This ruling has a political and cultural significance beyond its purely judicial one. It could force the private stations to start respecting the integrity of a film."

Director Lina Wertmuller notes, "Without production funds from Fininvest, a lot of Italian films would never get made in the first place. I think we should reach an agreement together for an acceptable amount of breaks."

Mr. KASTENMEIER. I'd like to call on our last witness in this panel, Mr. Charles B. FitzSimons.

STATEMENT OF CHARLES B. FITZSIMONS, EXECUTIVE DIRECTOR, PRODUCERS GUILD OF AMERICA, INC.

Mr. FITZSIMONS. I will make a short address and give a longer statement for the record.

Mr. KASTENMEIER. Without objection; incidentally, all statements presented today will be reprinted in full in the record and witnesses may abbreviate their oral presentations if they wish.

Mr. FITZSIMONS. My name is Charles B. FitzSimons. I am the executive director of the Producers Guild of America, Inc., and a professional career producer. The Producers Guild of America represents the interests of a substantial number of professional career producers in the motion picture and televisions industries.

Our interests must be examined separate and apart from those of the production companies, which confusingly also refer to themselves as the producers. We are the hands-on, career professionals who, on a day-to-day basis, actually exercise the various individual producer functions for the production companies throughout the entire motion picture making process.

We claim the career producer, as a prime creative contributor to the motion picture making process, is entitled to the moral rights of attribution and integrity under article 6 of the Berne Convention. That these rights must not be restricted to the director and screenwriter, whom we acknowledge are also entitled.

The career producer members of the PGA vary from the strict employee producer, whose moral rights may be the only rights the producer has, to the influential entrepreneur producer, who as a copyright owner, coventurer or profit participant, has a vested interest in protecting the marketing rights of the copyright owner. Their guild must serve them both and strive for a balance that is both pragmatic and fair.

It is our position that moral rights cannot be adequately protected by collective bargaining or personal contract. Collective bargaining is not universally available. The professional career producer has been specifically denied the right to collectively bargain, reinforced by an adverse decision of the NLRB. So, has the motion picture composer.

A large proportion of motion picture making is not unionized. Successful collective bargaining and individual contract negotiations depend completely on clout. Moral rights should not be dependent on clout.

New legislation of a unified Federal system of moral rights is necessary and there is a meritorious public purpose to be served. Existing legislation is incomplete and inadequate. The facts speak for themselves. If the law were sufficiently clear and explicit, as it currently exists, there would not now be so many divergent points of view. Confusion of law is never in the public interest. Neither is it in the best interests of the copyright owner nor the creative contributor.

The legislative achievement of the benefits of membership in the Berne convention brought with it the responsibilities of article 6

and set the stage for inevitable conflict between the economic rights of the copyright owner and the moral rights of the creator. It was expedient to evade this at the time. It must be resolved now.

Since the problem is caused by the inherent limitations of the existing marketplace and not by the copyright owner or creative contributor, per se, it would seen that Congress has two options; one, to regulate the marketplace by requiring, for instance, that motion pictures filmed in incompatible aspect ratios be letterboxed instead of panned and scanned, that fixed time TV scheduling be forced to adapt to original motion picture length instead of vice versa, and that black and white motion pictures either not be colorized or that both versions be exhibited in proportion to demand. But this must be legislated by Congress and not delegated to the veto of any special interest group.

Alternately, Congress must accept existing marketing conditions and legislate a fair and pragmatic balance between the economic rights of the copyright owner and the moral rights of the creative contributor in the arena as it exists.

For such a pragmatic and fair balance, we have suggested the following: That the copyright owner must have the absolute right to colorize and to make the minimum alterations to the content of motion pictures necessary to exploit all markets. But, that active participation of the career producer and director in all changes be required and in the case of colorization, of the cinematographer. Such motion pictures should be labeled as colorized, or as being altered in content from the version first released.

The professional career producer has a separate and special interest in the moral right of attribution, which has been largely overlooked in hearings to date, because of the concentration on the right of integrity. Since there is no collective bargaining agreement to protect producer credits, they have become a negotiating tool offered and demanded as part of the negotiating process with total disregard for the ability or intention to perform the producer function.

The true producer's identity is lost in a maze of misattribution. This misattribution is rampant in motion pictures and television and needs to be addressed in any new moral rights legislation.

I would like to make an overall comment on the nature of moral rights. It would appear to me that moral rights are an inherent right of man. Moral rights cannot be bargained for, nor can they be bargained away.

Moral rights cannot be granted by Congress. Moral rights can only be affirmed and defined by Congress. God beat them to it. Creativity is what has progressed the world and man. And moral rights are part of man's soul.

In moral rights discussions, you have heard and I have heard talk of creators for hire. When a creative person such as a career producer or a director or a writer or whoever is hired, they license their creativity to an employer for a specific purpose, for a specific period of time. They do not assign their creativity itself. Their moral rights accrue to their creativity. Their creativity was there before they were hired. Their creativity will be there after they are no longer hired.

The moral rights of man, even though they are part of the persona, do not die with the creator. The creator's honor and professional reputation continue even after death. Moral rights, as an inherent right of man, must be given their proper attention in examining the relationship between moral rights and economic rights. Economic rights must also be respected.

In dealing with alternations to motion pictures, when one talks about the production companies having respect for their own reputation and having a love for their films, it cannot match the respect that the creator has for his or her reputation or the love that the creator has for his or her work. And it certainly cannot match the expertise and experience of the creator and the knowledge the creator has of every frame of that film. Where alternations are involved, the creator knows better than the production company what to do with the film.

When a production company stresses the fact that the subsidiary markets are so important to recoupment today, I have to agree with that in principle, but one must remember in examining numbers that the accounting figures in the theatrical market are not always what they seem.

The income of a motion picture is not only the net income accruing as against the production budget. Some of the income of a motion picture is in the production budget itself, and a major part of the income of a motion picture is in the distribution receipts received by the production company. Numbers can be an unfair argument. However, the subsidiary rights in all motion pictures are enormously important to the progression of the industry. They are as important for the future of the creator, as they are important for the success of the copyright owner.

I really believe that Congress has the two options I outlined. Either it must regulate the marketplace or it must legislate a balance between moral rights, which it must accept and acknowledge, and the economic rights of the copyright holder, both of which are deserving of equal respect. Thank you very much.

Mr. KASTENMEIER. Thank you, Mr. FitzSimons, for your presentation.

[The prepared statement of Mr. FitzSimons follows:]

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~~October 30, 1989~~ JANUARY 9 1990

THE PRODUCERS GUILD OF AMERICA

MORAL RIGHTS AS THEY APPLY TO THE MOTION PICTURE INDUSTRY

My name is Charles B. FitzSimons. I am the Executive Director of the Producers Guild of America, Inc., and a professional career producer.

The Producers Guild of America, Inc. represents a substantial number of career producers in the motion picture and television industry. Career producers are not to be mistaken for production companies, which frequently indentify themselves collectively as "the producers". This is an historical misnomer in the motion picture and television industry that has led to considerable confusion. It is important that you recognize our separate identities and viewpoints.

We are the hands-on career professionals who, on a day to day basis, actually exercise the individual producer functions for the production companies. We initiate, co-ordinate and supervise, on their behalf, all aspects of the motion picture making process, creative, technological, financial and administrative, throughout all phases from inception to completion, including the co-ordination and supervision of all other creative talents and crafts.

The professional career producer, as a prime creative contributor to the motion picture making process, claims to be entitled to the moral rights of attribution and integrity granted under Article 6 of the Berne Convention.

The members of the Producers Guild of America vary from the strict

employee producer, whose moral rights may be the only rights the producer has, to the influencial entrepreneur producer, who, as a copyright owner, co-venturer, or profit participant, has a vested interest in protecting the marketing rights of the copyright holder.

As their Executive Director, I must serve them both and strive for a balance that is both pragmatic and fair. In this we share a common purpose, and have the same basic questions to resolve.

To that end, the following are my suggestions. In certain instances they are at variance with the positions adopted by the production companies, in other instances at variance with the positions adopted by the Directors Guild of America. In some instances, at variance with both.

MORAL RIGHTS - THEIR APPLICATION

Moral rights should apply to all motion pictures, good and bad. They should not be restricted to a select number of "classics".

All creative contributors to the motion picture making process should be entitled to moral rights, not merely the principal director and screenwriter. Motion picture making is a collaborative process. However, the creative contributions of some may be subject to the creative authority of others. In the motion picture making process, ultimate creative authority lies in the career producer and director.

In the case, of all motion pictures made, the list of creative contributors should include the career producer, the principal director, the writer of both the original source material and the screenplay, the actor, the cinematographer, the art director/production designer, the editor, and the composer.

In the case of individual specialty motion pictures, this list could be expanded to include choreographers, special optical effects, special

mechanical effects, make-up and hair, costumers, set decorators, sound recorders and mixers, and any one of the many other talents involved, depending on the extent and impact of their individual creative contributions.

COLLECTIVE BARGAINING AND INDIVIDUAL CONTRACT

Can moral rights in the motion picture industry be adequately protected by collective bargaining, or individual contract? The answer is unequivocally, NO!

Moral rights and negotiation are a contradiction in terms. "Rights", if indeed they are "rights" (like civil rights) must exist without the need to be bargained for, nor should they be able to be bargained away. True "rights" can neither be acquired, nor waived. Only privileges, in excess of rights, can be negotiated.

More specifically, in the motion picture industry, collective bargaining is neither universal, nor uniform. It does not apply to all creative contributors, and where it does apply it does not apply equally. Nor is it immune from roll-back.

Moral rights must apply equally and to all.

The career producer, who is a prime creative contributor, is not entitled to collective bargaining! His right to collective bargaining has been repeatedly and consistently denied by those same production companies that would have you believe that moral rights can be adequately protected by collective bargaining. By claiming that the career producer is a supervisor and part of Management they have been able to deprive him of that right. The denial has been legally re-inforced by an adverse decision of the NLRB, from which there is no appeal.

The same applies to composers. They too have been denied the right to Collective Bargaining. Also re-inforced by an adverse decision of the NLRB. And who is to say, that at some time in the future, directors and cinematographers may not become similarly deprived, on the basis of that same claim, that they too are supervisors. The NLRB has already made this ruling in the case of directors.

Moral rights must not be dependent on the goodwill of Management, or the endorsement of the NLRB.

In addition to the fact that collective bargaining does not apply universally, it also does not apply uniformly. Successful collective bargaining is always a matter of "clout". "Clout" comes in varying degrees. Some have it, some don't. Moral rights must not be restricted to those who do.

The same argument applies to individual contract. It too depends on "clout". In negotiations, the disadvantaged inevitably become the deprived.

Moral rights must never be dependent on "clout".

NEW LEGISLATION - A UNIFIED FEDERAL SYSTEM OF MORAL RIGHTS

Is new legislation of a uniform federal system of moral rights necessary and is there a "meritorious public purpose" to be served? My answer would have to be YES!

The facts speak for themselves. If the law were sufficiently clear and explicit, as it currently exists, there would not now be so many divergent points of view.

Confusion of law is never in the public interest. Neither is it in

the best interests of the copyright owner, nor the creative contributor. Moral rights in the motion picture industry need to be conclusively defined and their application clearly stated, in all of the areas in dispute.

When proposing the implementing legislation that brought the United States into the Berne Convention, the Legislature was faced with a very real problem. Unless it could successfully sidestep the inclusion of specific moral rights clauses, the legislation would never pass.

So, the proponents limited themselves to two very general pronouncements:

(1) that moral rights under the existing body of American law - Federal, State and Common Law - at the time of joining the Berne Convention, were not less than those required under the Berne Convention, and

(2) that by virtue of joining the Berne Convention, these moral rights were neither expanded nor reduced.

All that these pronouncements tell us is, that our moral rights, whatever they may be, are now not less than the moral rights guaranteed by the Berne Convention, whatever they are, and not more than the moral rights we already had, whatever they were!

They tell us nothing about the moral rights themselves, or how they would apply to specific motion picture industry practices. Discussion and dissent ever since have shown that this can not be evaded forever. Existing legislation is incomplete. Additional legislation is required. The need won't just go away.

Although it is true that certain aspects of moral rights in motion pictures could be litigated under the overall blanket of the Lanham Act, this does not obviate the need for new legislation. It would

take a body of case law, developed over a long period of time (if ever), at great public and private expense, to achieve what could be achieved instantaneously by one legislative act. Motion picture practices are so complex and so singular in nature that something more than blanket legislation is required.

The Lanham Act merely invites litigation. New legislation should deter breach!

In the final analysis, in order to avoid any suspicion of continued evasion, the real question should not be "is the current situation adequate", but "can it be improved"?

MORAL RIGHT OF INTEGRITY -
TECHNOLOGICAL ALTERATIONS TO MOTION PICTURES

I will deal with the moral right of integrity first, because it has raised the most controversy to date.

In the area of technological alternations to motion pictures, there has been exhaustive discussion as to how the marketing rights and practices of motion picture copyright owners should, or should not, be affected by this moral right.

This has led to an attempt to distinguish between alterations to motion pictures on a basis of whether or not the alteration involved is a "material" alteration. Since this is a matter of opinion, between widely conflicting interests, it, in turn, has led to inevitable discussion and dissent, to which there may be no satisfactory resolution.

For this reason I propose to examine motion picture marketing practices simply on the basis of whether or not a change of ingredients or an alteration of content is involved (fact) and with

this as the sole criterion to decide whether or not a particular marketing practice should be permitted and, if permitted, what conditions, if any, should be imposed.

Where there has been no change of ingredients or alteration of content it would be hard to see how the professional reputation of the creative contributor could reasonably be jeopardized. For example, insertion of commercial messages etc., is merely an interruption in transmission, not a change of ingredients or an alteration of content. No matter how disruptive, distasteful or inexpertly performed, the professional reputation of the creative contributor is not at stake. Similarly, "letterboxing" is merely an exhibition format and not a change of ingredients or an alteration of content.

However, "colorization" is a change of an ingredient. "Editing for length" and "lexiconning" are alterations in content. So also, is "panning-and-scanning"! Each of which I will deal with separately later.

In the existing market place, where colorization is in public demand, where aspect ratios are dictated by limited screen size, and where television programming operates on a fixed time schedule, I propose, as a general principle, that the copyright owner must have the absolute right, at his/her discretion, to "colorize" and to make the minimum alterations to content necessary to exploit all markets.

This is not only in the selfish interests of the copyright owner, but in the best interests of the public and, ultimately, the long-term interests of the creator.

Those who supply the very considerable financing on which the creator will again depend for future creations, must have an un-

restricted right to recoup and make a profit, otherwise the financing will eventually dry up.

"Colorization" could not exist commerically, unless there was a demand for it. Motion pictures are not made as art objects for a limited coterie of sophisticates to admire. They are made for general consumption. Otherwise, they would never be financed. It is unrealistic for the creative community to expect the potential mass audience to be as creatively perceptive as they are.

Either by choice or by compulsion, members of a vast section of the public prefer to watch an altered version of a motion picture in their own homes, rather than a pristine version in a theatre. They may not have the money, or the time. They may not have the transportation. They may be disabled, or fear crowds. They may prefer the convenience, or just not be motivated. They should not be deprived of that right.

On the other hand, it is also in the public interest and the interest of the creative contributors that those same audiences should not be abused by "colorization" that could have been improved, or alterations in content that are not necessary, or not made as expertly as they should.

On this basis, even though the copyright owner must have the absolute right, at his/her discretion, to "colorize" and to make the minimum alterations in content necessary to exploit all markets, these should be done only with the direct participation of the career producer and director, and in the case of "colorization", with the participation also of the cinematographer. Where this is impossible, it should be their nominees, or the nominees of their Guilds.

In short, the copyright owner should have the right to decide <u>if</u>

a motion picture is to be "colorized", or if alterations in content are to be made, but the career producer and director, and where applicable the cinematographer, should have the right to decide how.

A mere right of consultation by the director, as achieved by the Directors Guild in collective bargaining, is not sufficient. Consultation can mean everything and nothing, and anything in between. Additionally, the career producer must also have the right to be involved.

Unfortunately, past experience of the creative community has been that alterations to content made without the direct participation of the career producer and director have been unnecessarily uncreative, uncaring and inexpertly performed.

COLORIZATION

"Colorization" of certain black and white motion pictures, where shadings and contrast were deliberately planned for cinematic effect, will always be a creative affront. But as long as the original black & white version is preserved, as it now must be by law, and prints available to view, it must be tolerated.

"Colorization" of many black and white motion pictures is inconsequential. "Colorization" of others may actually be a creative improvement! I deliberately watched the colorized version of the original "Mutiny on the Bounty". I was interested to find out what they had been able to achieve with the blue of the sky, the grey-green of the sea, the texture of the wooden sailing ships, the costumes of the crew and the lush vegitation of the tropical island, all of which would have contributed so much more to the original production had they been in color. I must confess that it worked admirably for me.

Black and white motion pictures in the future will be few and far between and will undoubtedly have "colorization" fully covered by contract.

I would like to divert for a moment to call attention to the reverse of "colorization" - desaturation, due to age, of motion pictures originally filmed in color. The transmission on television of faded, worn-out color prints of motion pictures carefully crafted in color, is a professional affront to the cinematographer, career producer and director and the many other creative contributors to the original color motion picture.

PANNING-AND-SCANNING

"Panning-and-scanning" involves a very definite and quite extensive alteration in content and will always be creatively deficient. It is a particular assault on the craft of the director, who will have deliberately composed each frame dramatically and cinematically for the original aspect ratio. To contend that "panning-and-scanning" is not a material alteration to a motion picture is absurd when one considers the extent and amount of change involved. Such a contention would appear to be either self-serving or uninformed.

However, where "panning-and-scanning" is required, the degree of creative deficiency can vary widely with the creativity and professional expertise of those who plan and execute the process. Obviously, the director and career producer would be the best choice.

Currently, the extreme wide screen aspect-ratio is out of vogue, but it could return. The problem should not be ignored.

EDITING TO LENGTH AND LEXICONNING

A change in the length of a motion picture, either by editing out footage or by "lexiconning" is a change in content and should only be done with the direct participation of the career producer and director. They are the most familiar with the film and are the best equipped to know what footage can be lost and how to lose it, with the least creative damage. Alternately, they are also the best equipped to know what footage, if any, can be speeded up, and to what extent, and what can not.

LABELING OF ALTERED MOTION PICTURES

If the content of a motion picture has been altered, or, if a motion picture has been "colorized", it should be labeled as such. This should apply in all instances, to motion pictures good and bad, and not merely to a select number of classics. The labeling, however, should be limited to a simple statement of fact, i.e., that the motion picture has been "colorized", or that its content has been altered from the version first released, and no more.

It is the "fact" of "colorization" and the "fact" of alteration of content that should be brought to the attention of the viewer, not whether or not it had, or didn't have, the consent of specified or unspecified creative contributors.

The statement of fact adequately protects both the creative contributors' moral rights and the public's right to be informed.

THE MORAL RIGHT OF ATTRIBUTION

This is the basic moral right that in effect protects the creative contributor to a motion picture from non-attribution of credit for

his/her creative contribution. Equally important, it also protects the creative contributor from mis-attribution of that credit, in whole or in part, to somebody else.

To date, the moral rights controversy in Washington has concentrated on the moral right of integrity. The right of attribution has largely been overlooked. This is because the concentrated campaign against "colorization" and material alterations to motion pictures has been carried forward by labor organizations whose right of attribution is adequately protected by the credits clauses in their collective bargaining agreements. They have had no need to bring it up. They are already assured that they, and only they, will receive the credit for their work.

This is not so with the career producer. As I have previously stated, the career producer does not have a collective bargaining agreement. As a result, in negotiations the producer credit has become a "contractual cookie", offered by Management to all and sundry as an added inducement to make a deal, and demanded by non-producers with bargaining "clout" as a "bonus", with total disregard for the ability or intention to perform the producer function.

Because of this, unjustifiable producer credits have proliferated to such a ridiculous extent that as many as thirteen producer credits have been counted on one television project. The true producer, entitled to the credit, gets hopelessly lost in the crowd, with no way for the viewer to identify which one the true producer is.

The proliferation of producer credits has created so much "clutter" that the AMPTP has had to request its member companies, and the CBS Television Network has had to request its program suppliers, that they "restrict producer credits to those who actually perform producer functions".

This blatant mis-attribution of producer credits is obviously in flagrant breach of Article 6 of the Berne Convention. It is ineligible for redress through collective bargaining, and can only be dealt with by specific moral rights legislation.

CONCLUSIONS

I respectfully submit, on the basis of the arguments I have presented:

(1) that moral rights in the motion picture industry cannot be adequately protected by collective bargaining or individual contract.

(2) that moral rights in the motion picture industry are not adequately defined by the Berne Implementation Act and the existing body of American Law - Federal, State and Common Law.

(3) that new legislation of a federal system of moral rights is needed, and there is a "meritorious public purpose" to be served.

* * *

Mr. KASTENMEIER. I should ask Mr. Nolan first. I assume that at the present time Disney productions and, indeed, all major studios are employing a number of technological changes for various reasons. In part, perhaps, to deal with the prospective market.

I notice that on Sunday, Vincent Canby wrote an article in which he suggested that producers were increasingly mindful of the market in videocassettes and the difference in screen size. And that the result is that movies are now likely to be produced at the outset to accommodate other sizes than the typical screen in the motion picture theater. To what extent is that true and to what extent is contemporary production altering itself to accommodate other media at the production phase, rather than the post-release phase?

Mr. NOLAN. It is a very interesting question. The answer is, at least the research I did in calling a number of other studios, was that approximately 85 percent of the new motion pictures being produced now have an aspect ratio very similar to what television has. So there is no longer the need for those motion pictures to be panned and scanned.

I might just comment on letterboxing a little bit. Some motion pictures are available in letterboxing. Letterboxing costs the studio a lot less. If letterboxing worked, we would love it because of the costs related to panning and scanning. We do not pay the director extra money to sit in on those transfers, but we also ask cinematographers to be present for that transfer.

We would like the video transfer process to work. We are not after trying to distort a motion picture so that it looks terrible on a television screen, just the exact opposite. And you can see the trend now toward the filming in the first place having an aspect ratio similar to the television screen so that you do not even get into panning and scanning. You do not have to.

Mr. KASTENMEIER. This issue, at least in this subcommittee, actually preceded the issue of adherence to the Berne Convention and they happened to merge in terms of "moral rights" in the context of adherence to the Berne Convention. The contemporary or preexisting concern among directors, perhaps arising out of the colorization controversy, may have been triggered by concerns that had already existed with respect to the alteration of films to fit subsequent markets—to the chagrin of, in many cases, the director and others.

I assume you are mindful of that. The fact seems to be that many people who wear many hats and are very successful in your industry and would not need to enlist in the cause of the Directors Guild and others, nonetheless, do so because of their deep feeling about it. I can mention some names of prominent people who write, direct, sometimes even act and produce films and can write their own ticket, so to speak. They need not be concerned about their own productions, at least prospectively. They can usually determine those terms.

But they are concerned enough to join up with the battalion of others who are expressing concern about this. And I am wondering, Mr. Nolan, in representing Disney or the Motion Picture Association, how you assess that? Are they mistaken or do they have a point? In what sort of context do you put this concern?

Mr. NOLAN. Well, there are more elements to it than you mentioned. We do have a love for our films. We believe it is matched by some of the contributors, other contributors to the motion picture. Seventy-five percent of the time that we ask a director to be part of the process of transferring film to tape, the director is there. We are there 100 percent of the time.

We care about our films, but there is an additional point that I would like to focus on, and that is an economic one. As Mr. Mayer pointed out, I gave the figure of $20 million as the average cost of making a movie today. In order to get a motion picture actually into the theater, you are, however, talking probably 50 percent more than that, maybe $30 million on the average. That is a big investment.

And there are only a handful of people in this community who are directors that you would want or we feel we would want to put in his or her hands that kind of investment. We have to kow tow to these people, whether we wanted to or not. We happen to think it is consistent with our respect for what we're doing.

But it also is required because of the limited pool of people with whom we can deal with in this very highly risky investment area. So, we are forced to.

Mr. KASTENMEIER. But my question is really how you view their concerns? Do you think they are misdirected in asserting for themselves a right to express, post-release, a concern about how their films are dealt with?

Mr. NOLAN. I think that the way it now works through a voluntary participation of all the parties, it works very well. We are concerned about keeping them happy and their interest, which we think are, in many respects, consistent with ours.

Mr. KASTENMEIER. Now I know that often negotiations between all sorts of entities are considered confidential. But to the extent possible, can you describe whatever progress may have been made among the parties to reach some accommodations or compromise on these issues? Are there ongoing negotiations?

Mr. NOLAN. There are negotiations currently. I believe today is a day off for the negotiating teams. But they have been working for the last week and were in negotiations yesterday. I am not privy to those negotiations, I think purposely so, because there is an agreement between the parties to keep them private. But we would be very pleased, when it is possible to do so, to present you with a progress report.

Mr. KASTENMEIER. Well, I appreciate that and I want to encourage such negotiations. Mr. Mayer, with respect to the library that was acquired by the Turner Co., you mentioned there are some 2,000 films, of which perhaps 112 have been colorized to date.

The black and white films that you acquired in the library, are you now displaying them as black and whites, those that have not been treated yet in terms of colorization?

Mr. MAYER. Yes, we are where there is a market demand for them. The ones that we have colorized are ones that we think are more classic films and work better in the marketplace today. But we have a channel called TNT that plays motion pictures 24 hours a day, 7 days a week, and we have been pleased to find out that

there is an acceptance of pictures in their original black and white. And so those are played as well.

In general, however, the television audience does not respond as well to a black and white picture as a color one. So we have had greater success with the pictures that we have colorized.

I would like to comment, if I may, Mr. Chairman, on a question you asked Mr. Nolan. And that is in connection to what the basic problem is between the creator and the owner of the copyright. I think it really does become basic and not because we do not understand each other's position. But one of the things I have noticed over the years is, that the position of the creator is that he or she created something and no change should be made for any purpose that that creator does not agree with.

It is a perfectly valid creative point of view. It is an invalid point of view from the point of view of the copyright owner and investor. So, I think no matter how much you negotiate and compromise is absolutely possible, and there are ways to work this out, I do think that when we look at this situation, and what I have found over the years, is that there is almost a basic problem, and certainly one if I were good enough to be a writer or director I would agree with completely, and that is "I did it. This is the way I want it and I do not care what your problems are, I want it that way."

Without identifying anybody, we are having that problem with a creator at this moment where we feel that a piece of material that has been delivered to us is excellent but too long. He does not agree. There is an impasse. And we are trying to convince one another, but it is the sort of thing that goes on all the time. And I thought it really should be mentioned because I do not think any legislation or any understanding of this thing should fail to understand the fact that there is a philosophical difference.

One other thing I would like to comment on, if I may, and that is you were asking about Canby's comments about different, sizes of screens. I think there is something to that. There is a new process where the film goes at a different number of frames per second through the camera and also is shown at a different number of frames per second. It is called Show Scan. And that results in a special kind of projection and in a very, very interesting kind of presentation on a very large screen.

Would there be many directors and cameramen and so forth that would not like it? Yes, I think so. And contrarily, there will be many that do like it. We are currently working with a process whereby, through a special projection process, a 70-millimeter print can be now shown in an amphitheater or out in a park or in a stadium. And there is a new sound process which makes it possible that you can actually understand the dialog.

And we think that this is something that could be quite exciting for the future for a special kind of movie. Everybody is working on the idea of beaming movies from satellites in some way, either directly to television stations, well, really that happens now, or directly to screens in theaters. This could result in a better picture or a worse picture. Everybody argues about the degrading of the picture or the sound or whatever.

It is this kind of dialog that, I believe, should be left to the marketplace. It is the kind of thing that, I believe, should be allowed to

go on, because on an overall basis, these things tend to cure themselves. If it is not good, it does not last.

Cinerama was a good example, the three strips of film that jiggled all the time. For awhile, the public loved it but they gradually got sick of it and then we came up with the 70 millimeter process, which was better. So, I do not mean to lecture, but I did think that your point was well taken and I wanted to respond to it.

Mr. KASTENMEIER. Mr. Mayer, you have been on both sides, in a sense. You have a background with production companies or a studio and then a background with an assignee of the rights in a number of motion pictures, as contrasted to actually producing them. Are the original production companies ever concerned about alteration of their films when they sell subsequent rights?

That is to say, supposing MGM had sold 1,000 of its library, not 2,000 or whatever, and was still in existence and concerned about its reputation. And, of course, the contract provides what an assignee may do with the film in terms of those rights. But if it came to pass that the films were shown in a way that brought discredit on the films, would the original production company complain about that or would they have the same feeling that some of the directors do?

Mr. MAYER. They would not complain. It would not be part of the bargaining process that they would attempt to retain any control. And I do not know how they would feel about that ethically or morally, but as a practical matter, in that type of arrangement the buyer or the assignee is going to want to have all rights that the assignor had so that that person can operate as freely in the marketplace as the owner did. So, I have never seen a negotiation where that was taken into account.

Mr. KASTENMEIER. Thank you. I would like to ask Mr. FitzSimons a question. What in motion pictures would we regard as creative contribution? You have indicated, obviously, executive producers. Certain producers, as individuals, can make and do make creative contributions. How would you define or describe which persons or what types of contributions are creative to a film? That is to say, directors, assistant directors perhaps, screenwriters, maybe cinematographers, producers, there may be a long list of people who have made a creative contribution. In your view, can a contribution be centered in any one of these entities?

Mr. FITZSIMONS. In the motion picture making process, there are numerous creative contributions that, from motion picture to motion picture, would vary in their extent. But you must remember that in all motion pictures there is a creative authority and there is a creative vision. There is an integrated work.

The moral rights in the integrated work would accrue to the career producer, the screenwriter, the director, possibly the original author. But because certain people have creative authority over the creative contribution of others does not deny the fact that the person who makes the creative contribution is also entitled to moral rights in respect of that contribution.

The motion picture industry is made up of an enormous number of creative people. Moral rights are an inherent right of man. If you make a creative contribution, you have the moral right to preservation of your honor and your creative reputation in respect of

that contribution. But the motion picture making process could not survive if there were not creative authorities, creative contributors who exercise authority over all of the others. And the creative authority is basically in the hands of the career producer and the director.

Mr. KASTENMEIER. You indicate that the Producers Guild has a somewhat different point of view than the Directors Guild.

Mr. FITZSIMONS. We have a difference because we believe that the career producer is a prime creative contributor to the motion picture from beginning to end. That is an important difference.

Secondly, the Directors Guild, and I can understand creatively why it is doing so, is basically seeking, as it were, a veto over alterations to motion pictures. We believe that that decision must be made by the American people. The decision must be made by Congress. As I said earlier on, if Congress wishes to regulate the marketplace and say certain things must be done a certain way, that is the province of Congress.

However, I do agree that changes to motion pictures must be done in conjunction with those who have the moral rights. The question of a Directors Guild veto is where I differ with the Directors Guild. I agree with the objective they have in mind. I do not agree with the machinery.

Another difference would be that I have to be pragmatic. If Congress does not wish to regulate the marketplace and if we have to examine alterations to motion pictures as against the existing marketplace, then there must be a balance between the property rights of the copyright owner and the moral rights of the creator. I do not think that either one of them can disregard the other. That was why I suggest that in the current marketplace the possible solution is that the owner of the property rights or the owner of the copyright have the right to colorize and have the right to make the minimum alterations necessary to exploit all markets, not arbitrary changes, but that those changes be made in conjunction with the career producer and the director, and in the case of colorization, in conjunction with the cinematographer. It is they who best know the film and who can best give the public the least damaged altered version of the movie.

There is one thing that Mr. Mayer touched on that I think is very important. I think it is very important for everybody to realize that there is no battle between the creative forces and the copyright owners. They both have a problem because of the limitations of a marketplace. Had television grown up with a different kind of television screen, we would not be talking about panning and scanning.

Had color film been available in the early days of motion pictures, we probably would not be talking about colorization. It is the market that is creating the problem and the answer must be found by deciding whether the market is to be changed or whether a balance must be found, a pragmatic balance, that is fair, that takes into consideration the rights of both copyrightowner and creator. That pragmatic balance has to be found in order to exploit the existing market. The existing market cannot be denied. The copyright owner has his specific property rights.

Mr. KASTENMEIER. Well, one of the problems is, indeed, if there were to be legislation, and I would not say that that is necessarily what would ensue, but one of the problems is to define who is a creator. Who should have that authority? That is why I asked you the question. Apparently different people have different views about who has creative rights or what moral——

Mr. FITZSIMONS. I think in the overall you have to say a creator has moral rights in respect of his creativity, whoever that creator is. But I think that when we are talking about the enforcement of moral rights, I do not believe that there is going to be a lot of frivolous litigation in order to enforce moral rights by all kinds of people who say that, "I did so and so on the movie" or "I did so and so."

I think any form of litigation that would occur on moral rights would be minimal and I think basically you would find it would come from a career producer or a director or possibly a screenwriter or a cinematographer. But I do not think you can deny the inherent moral rights of any creative human being.

Mr. KASTENMEIER. Thank you, Mr. FitzSimons. The gentleman from Oklahoma.

Mr. SYNAR. Thank you, Mr. Chairman. I only have a few questions for our panel. Let me start off with you, Mr. Mayer. You do retain the originals of all the films that you own.

Mr. MAYER. Oh, yes, absolutely. The original negative or what we call printing material of every picture is retained and no matter what change is made, whether a pan, a scan, a colorization or anything else, we retain the original versions in their original state and they are available for distribution and, in fact, are distributed.

Mr. SYNAR. All right. You also stated that Turner has decided as a matter of voluntary policy, to label all the films. Do you think that will be the policy in the future of all the films that are in any way altered?

Mr. MAYER. We have adopted that policy in connection with colorization. And the manner of labeling other alterations to film is currently in discussion with the Copyright Office. And we are planning to work with the Copyright Office and work out some system that is acceptable to people other than we to do this.

Mr. SYNAR. Now, Mr. Nolan, in your testimony, on page 21, you go to great length, and a terrible lot of detail, about your concerns with respect to labeling. In fact, one would even make the argument you have never seen a label you like. If the two sides are to come to an agreement where labeling may be one of the potential solutions, how would you all change the wording of an acceptable label and what kind of a label would your company agree to?

Mr. NOLAN. Well, first of all, we do label some of our movies that we have, for example, colorized. We only have two. So, we do label. And where we have substantially altered a motion picture, we have labeled it as well. So there can be some labeling. An example, though, of Government imposed labeling is found in the Film Preservation Act. And it requires a label if there has been a material alteration, however that is defined, of one of these listed motion pictures. And the label says that the director had nothing to do

with the material alteration or the people who contributed, I have forgotten the exact working of it.

But there are situations where a listed has been materially altered under that act, where the collaborators have been involved in the process. And, in fact, as I mentioned earlier it's a sine quo non for doing business in this industry, that you at least involve the director, probably also the cinematographer. The statute requires a label under those circumstances, but the governmentally imposed language on the label is false.

What we object to is a Government imposed labeling. I think some could argue also that there is—in fact, case law under the Federal Lanham Act to state that some sort of labeling is required under circumstances such as where you have drastically changed a motion picture.

Mr. SYNAR. Well, help me here a little. I hear what you are saying. I want to know what kind of words and what kind of type of labeling you find satisfactory. Give me the magic words. Give me when you would apply it, give me the type and give me the words.

Mr. NOLAN. I think you would have to look at many different circumstances. I do not think there is one label for everything. I think you have to look at what the alteration is, whether it requires a label, in your judgment and what kind of label it is.

Mr. SYNAR. Is there a way to do that without legislation or, I mean, are you suggesting that there should be a standard by which labels trigger, that if this kind of alteration is done, that label applies? I mean, I am trying to figure when and where they apply and what kind of wording we should have in it, if at all.

Mr. NOLAN. Well, that is one of the problems. I think to a large degree, the marketplace forces us to label as well as the law. There are so many different contingencies that it is very difficult to come up with labeling requirements. A good example is the Film Preservation Act, where the Library of Congress is trying to come to terms with the language in that statute and the legislative history behind that statute.

And it is an extremely difficult job to do.

Mr. SYNAR. Let me ask you another line here. Who is the artistic author or principal screenwriter or director of "Snow White and the Seven Dwarfs?"

Mr. NOLAN. That I would have to look at the credits. I know the producer and director was——

Mr. SYNAR. Can you pin that down?

Mr. NOLAN [continuing]. Walter E. Disney was the individual producer and the individual director. There were a lot of animators involved. There were a lot of story people involved, music people involved.

Mr. SYNAR. Are you capable of giving a principal screenwriter distinction to this?

Mr. NOLAN. Oh, sure, but there was more than one.

Mr. SYNAR. Even though there were all the various——

Mr. NOLAN. Yes, you have people who are the principal—there may be three principal writers to a motion picture such as that and then there would be a number of other writer contributors.

Mr. SYNAR. Mr. FitzSimons, help me here. Again, as I said in my opening statement, I am not as familiar with this industry as I

should be. If I come into Los Angeles today from Muskogee, OK, and I want to produce a film and I am in it for the first time, I am producing my first film, do I qualify for your definition of a career producer?

Mr. FITZSIMONS. Absolutely not. That is what we are trying to stop.

Mr. SYNAR. All right. Define for me what a career producer is.

Mr. FITZSIMONS. A career producer is the hands-on professional who, and I will spell them out for you in a moment, who actually exercises the producer functions.

Mr. SYNAR. But if I come in from Muskogee——

Mr. FITZSIMONS. Wait a minute, just a moment, I will explain, in the making of the motion picture, initially. The producer, if he is an entrepreneur producer, may be the one who has had the original idea to make that motion picture. He may be the one who has purchased that original literary property. He may be the one who has worked with the initial writer or writers to develop a screen play from that original property.

Alternately, he may be somebody who is hired by a production company which has performed the prior services. The production company may have purchased a best seller, whatever. From that stage on, the producer is involved with choosing the director, choosing the principal performers, working with the director on how to get that screen play into what will become a shooting script. That screen play will be modified many times to satisfy creative requirements or eccentricities of performers.

That producer will work with the director in briefing an art director on what the set requirements are, in deciding what locations will be picked for the motion picture and selecting from a great number of them. That producer will be involved, if I may continue, with deciding what costumes, what clothing will be worn, how they will be designed, how the sets will be designed. This will be done in conjunction——

Mr. SYNAR. Mr. FitzSimons, if I could just interrupt you for a second.

Mr. FITZSIMONS. Yes.

Mr. SYNAR. I understand what a producer does. I am trying——

Mr. FITZSIMONS. That is why I said you would not be accepted.

Mr. SYNAR. Well, the point is, is that if I come in and I understand that is my responsibility, that broadness of responsibility, which I think I clearly understand, why is it I do not qualify if it is my first film?

Mr. FITZSIMONS. Because you do not have the technological knowledge.

Mr. SYNAR. How do you know that? I mean, if I produce an award winning film the first time out as a producer and put all that together, why am I not——

Mr. FITZSIMONS. No, you said, "to put all that together." You are now talking as a promoter. You are not talking as a professional career producer.

Mr. SYNAR. I am having a hard——

Mr. FITZSIMONS. Would you know how to sit in a projection room and look at the day's dailies and know from what you look at that you had better go down and talk to the director because certain

things were not coming off or because certain angles might be missing? Or would you feel qualified to decide whether a performer is delivering the performance that he or she should deliver? Or whether the camera operator is getting the proper framing of the motion picture?

These are some of the little things that the career producer does. Would you——

Mr. SYNAR. But, Mr. FitzSimons——

Mr. FITZSIMONS [continuing]. Would you, yes.

Mr. SYNAR. Mr. FitzSimons, let me interrupt you. I think that is a little bit arrogant——

Mr. FITZSIMONS. No, it is not.

Mr. SYNAR [continuing]. That you think someone who has to have been here for some length of time. I got elected to Congress at the age of 27 years old. Now, are you telling me that I did not have the right to try to run for office because I did not have, "the experience of a Bob Kastenmeier or the age or the experience in life?"

Mr. FITZSIMONS. No, I am saying you had the right to run for Congress, but you did not have the same experience in Congress as Bob Kastenmeier.

Mr. SYNAR. I am trying to figure out how you define career producer. I mean——

Mr. FITZSIMONS. I have tried to——

Mr. SYNAR [continuing]. Take for example—I gave you your piece. We had a film this year entitled "Sex, Lies and Videotapes" from someone who was completely unknown till this year, who would arguably say had not really been involved in the industry to any great extent. I am not sure that is the most appropriate film I could use, but obviously, a first-time filmmaker. You would not define him as a career producer——

Mr. FITZSIMONS. I would not.

Mr. SYNAR [continuing]. Therefore, entitling them to protection.

Mr. FITZSIMONS. I would not define them as a career producer. I would define them as an entrepreneur. I would define them as a——

Mr. SYNAR. So they do not deserve the same protection that you would in the bargaining table.

Mr. FITZSIMONS. Wait now, if they perform a creative function, if they make a creative contribution to that motion picture, they have the inherent right, moral right, of any creator.

Mr. SYNAR. All right, let me take that to the extent. I think Mr. Kastenmeier was going on a question which I really am interested in, is that you talked about creative vision, creative authority. You talked about it in a sense of almost a pecking order of a hierarchy of who deserved the type of protection. Now, you do not disagree with the testimony of the two gentlemen to your immediate right that only about 30 percent of all films produced are successful. You do not dispute that, do you?

Mr. FITZSIMONS. I have to say to you that you have to examine the meaning of successful. If you are in the business of running a motion picture production company, there are various sources of revenue and there are various ways of defining success. You may have a motion picture that may have a negative cost on the company's books of $20, $30 million.

A portion of that negative cost will be overhead. A portion of it will have absorbed costs that would have been ongoing costs of the company anyway. That company then, in the main—I am not talking about the independent producer who has to make a deal—that company is the distributor.

The distribution revenue is subject to a distribution fee. The revenue to the company from the distribution fee may be an enormous revenue and yet the motion picture, in accounting on the books, can be in the red.

Mr. SYNAR. All right, let me go at this a different way——

Mr. FITZSIMONS. Yes.

Mr. SYNAR [continuing]. Because you are going off into an area I really did not want to go off into. You will agree that some films do make money and some films do not make money.

Mr. FITZSIMONS. Absolutely.

Mr. SYNAR. OK. And will you agree with a basic premise that having a big name actor, who has a good track record, may improve your chances of having that success?

Mr. FITZSIMONS. May but will not guarantee.

Mr. SYNAR. I understand that, OK. Now, therefore, given that fact is there, we may pay an actor $1 million, $5 million, $10 million, a percentage based upon to get their participation in a film "enhance the potential opportunity for success."

Do you believe that because of that basic premise and assumption that they are brought into the project for that potential success, that their creative contribution should be any less protected than the producer, "career producer?"

Mr. FITZSIMONS. The creative contribution of the actor is entitled to the protection of the inherent moral rights of that actor. It has nothing to do with whether the actor gets $20 million or whether the actor gets $20. And when that actor is performing in the motion picture process, that actor is subject to the creative authority of the director and the creative authority of the career producer.

Mr. SYNAR. Well, again——

Mr. FITZSIMONS. That does not mean that the actor——

Mr. SYNAR [continuing]. Who protects their rights? You are saying that their rights should be protected in a hierarchy by directors and producers?

Mr. FITZSIMONS. What rights are you talking about?

Mr. SYNAR. Their moral rights, to protect their image or whatever.

Mr. FITZSIMONS. They have an inherent right to their moral rights. If you were to take the performance of that actor and subsequently change the film electronically so that the actor is in the nude or something like that, that actor's moral rights are infringed.

Mr. SYNAR. And who should protect those, the actors themselves or the producer?

Mr. FITZSIMONS. In that instance, the actor should protect the actor's moral rights for that creative contribution.

Mr. SYNAR. OK, so getting back to Mr. Kastenmeier's question, when we decide moral rights issues, who should be at the table?

Mr. FITZSIMONS. When you decide moral rights issues, you should, which hopefully you are doing, get the input of all creative contributors to the motion picture making process.

Mr. SYNAR. That is not the question I asked you. Does the actor have veto power over any changes? Does the cinematographer have veto power? Does the producer? Does the director? I mean, are there so many people at the table that any one person vetoing what is going on guarantees that no changes will ever be done? I am asking you, who should be at the table and who should have veto power?

Mr. FITZSIMONS. I think that you are being unrealistic.

Mr. SYNAR. Well, I will tell you, having sat in Washington and watched the troop of people from Los Angeles and from this industry come through, each one of the parties that I have said, believes that they have a piece of this pie and a right to some type of authority over that pie.

Now, I got to tell you, I have seen actors. I have seen producers. I have seen directors. I have seen cinematographers. And we are going to have people testify today in all these areas who believe they rightfully should be at that table, and that they should have input, if not veto power, over the decision of what happens in the film. And I am trying to figure out, and I think Mr. Kastenmeier was trying to pursue it—very frankly, you said only the career producer. I tried to figure out who that was.

And then I asked you about actors. I mean, who should be at this table and what kind of authority and how much veto power should they have? Do you get a percentage of veto power depending on what your contribution is and then how do you, as you just said, define contribution? Is a great acting performance that is only paid standard wage but makes this person a star any less important than the person who was paid $10 million but really did not pan out to be the star of the film?

I mean, how do we measure all this? I mean, how do we get to this?

Mr. FITZSIMONS. I think you have to look at it from the point of view that, if there is an infringement of the moral rights of any creative contributor, that that creative contributor would have the right to litigate the infringement of those moral rights.

I do not think you can say that some are entitled and some are not. However, as a matter of realism, I do not for one moment, believe that if moral rights are legislated, that you are going to have people coming out of the walls and trying to litigate moral rights. It is a very expensive process. I do not believe that it would be approached from a frivolous point of view.

I think I said earlier that, if there is an infringement that would impugn honor or professional reputation, that the most likely people that would question it would be the career producer, the director, the screenwriter and in the instance of cinematography or possibly panning and scanning, the cinematographer.

I do believe that the other creative contributors would be, in the main, silent.

Mr. SYNAR. Then if I get a group of people who are a first-time screenwriter, first-time director or first-time producer or first-time gripper, first-time actor, then none of them get protection, correct?

Mr. FITZSIMONS. A person——

Mr. SYNAR. If I put together a group of people that have never been involved in films; first-time director, first-time screenwriter, first-time producer, first-time actor, and we come together and we get somebody from Oklahoma to finance the film, we do not qualify under career producer for that protection.

Mr. FITZSIMONS. Any of those people who have made creative contributions have a moral right in their creativity.

Mr. SYNAR. So they would be career producers, then, under your definition.

Mr. FITZSIMONS. Only if they have performed the functions and have made the creative contribution.

Mr. SYNAR. Thank you, Mr. Chairman.

Mr. KASTENMEIER. The gentleman from California.

Mr. BERMAN. Thank you, Mr. Chairman. There is an impression, Mike, that there is no such thing as a first-time producer, first-time director, first-time writer, first-time gripper. No one had the first time, but that is not true.

Someone handed me a note which, I think, makes an important point that we are sort of sloughing over, and it is the distinction between who has creative control and this question of moral rights or the right to rectify damage to honor or reputation.

And in a sense, this points out the distinction that I think has been sloughed over since the first legislation I have seen in this area, since the initial introduction of the Gephardt bill. Moral rights in its traditional understanding involves a third party being able to judge whether or not an author's honor or integrity was damaged by some gross alteration in his work of art or in his creation.

I guess I would ask Mr. Nolan, just to start off with, is there, as Mr. FitzSimons puts it, this God-given right to honor and reputation for an author?

Mr. NOLAN. I do not know whether there is, but we are a country of laws, not men. And I think we have to follow our Constitution and the legal process to determine what legal rights we have in order to have access. Whether God gave us moral rights, I really do not know.

Mr. BERMAN. Well, there are so many problems in this whole area. I mean, here you are talking about a collaborative effort, as Mr. Synar pointed out, not an individual author or work of art. Even if you accept the premise that there should be some avenue for a creator to rectify a gross violation of his right to honor or reputation, how you legislate that is very tricky.

I just want to make a couple of points here. One is, I would say to both of you, Mr. Nolan and Mr. Mayer, to some extent it is a little unfair to use our adherence to the Berne Convention as an argument against our getting into this area. We got in and decided to adhere to the Berne Convention because we thought it was in America's interest. Every single person we talk to about adhering to the Berne Convention said—it was not our effort to arbitrate the proper relationship between the copyright owner and the authors in these kinds of works.

It was essentially an economically motivated decision to some extent, that we could do a better job of enforcing our creative

works and our copyrights overseas and help to enhance our trade balance in this area. So, it becomes almost a tautology. And we now say, "We adhere to Berne; Berne provides this right. We, therefore, have decided that we have done enough in this whole area, and that settles the issue."

We decided not to use our adherence to Berne as a chance to revisit the relationship between copyright owners and authors. And I do not think it argues one way or another about whether we should do anything now.

The second point, I guess I would like to make is this whole question of recoupment. Much of the argument, and I find it a very important argument, this question of not killing the goose that laid the golden egg, the question of how do you put together the financial commitments to engage in this massive $20 to $30 million undertaking where you have put in a legislative scheme that is so cumbersome and awkward and so restrictive and perhaps allows someone on a whimsical basis to so affect the salability of the product?

I think it is an important point, but the figures that are floating around are sort of strange. And Mr. FitzSimons made a point here, I think in this question. It is hard to read this morning's paper and understand what recoupment means if a $300 million film has not yet recouped.

So, I just think there is a lot of confusion that I have now about this notion that two-thirds of our movies lose money and what that means. Are we talking in the court case sense of the term of net profits or are we talking in some other sense? I do not totally understand that area yet. I do not know if that is relevant except insofar as the economic argument is an important argument against our trying to legislate in this more ephemeral area of moral rights.

Mr. NOLAN. Excuse me, if I might just comment on the Paramount case. That was a contractual case.

Mr. BERMAN. Right.

Mr. NOLAN. The issue was profits as defined by that contract, not as we may say whether you earned more money than you had to spend.

Mr. BERMAN. You are not using the contractual definition of profits when you talk about movies making or losing money.

Mr. NOLAN. That is correct, right.

Mr. BERMAN. Are the T shirts included or not?

Mr. NOLAN. They are included.

Mr. MAYER. They are included. And the number that you mentioned is the position of a motion picture when it comes out a theatrical release. In other words, the numbers we are saying is, it only gets back a certain amount in theatrical release on an average, so that we need these supplementary markets to, in fact, have net profits.

Mr. BERMAN. One of the things that the industry has argued is, there is a collective bargaining process. I have not had a chance to read Mr. Counter's testimony. I do not know if he spoke to this issue. Could you take a moment to describe what the present collective bargaining status is with respect to giving directors and any other of the creative forces a role in this post-production process.

And second, how does the collective bargaining process, even assuming that is the appropriate place to let it go, how does that deal with films made prior to the entering into of the collective bargaining process?

I mean, who is going to bargain for the films of the directors who are no longer directing and the screenwriters who are no longer writing and where their products are already out and on the market?

Mr. NOLAN. It is an interesting question, because well, first of all, let me explain what currently is in the Directors Guild agreement. It requires us to call up the director, say, "We want to find an agreeable time for you to sit down with us so that we can transfer the film to tape, so that we can exploit it in the video media."

And the director has every right to sit down and does, in fact, as I mentioned in about 75 percent of the cases. We also, even though we do not have a requirement, many times call in the cinematographer, who is a very important element in this whole collaborative process.

In terms of prior works created prior to 1987, when the new provision in the DGA agreement became effective, we do call in those directors as well, again, for the practical reason that we care about our films and we have a relatively small pool of people from which to choose as directors. And we want to make sure that they are pleased with the way we are handling these things.

Mr. MAYER. May I interrupt you for a second, Peter? Those prior agreements do have creative rights bargaining in them, and there are clauses in those agreements as well, although they might not cover everything that is going on today.

Mr. BERMAN. Well, it would be a hell of a negotiator for one of the guilds or for the cinematographers who in 1949 dealt with colorization.

Mr. MAYER. No. No, I am not saying that one did.

Mr. NOLAN. But going back that far is an interesting point because a 1949 director may not be alive and who do you go to? Do you go to the person's children who have nothing to do with the motion picture industry?

Mr. BERMAN. I mean, I think that is a very fair point and I think there are so many complications in how you legislate this. Although I still would love to know whether you think there is a role—is there any role for the author, whoever that is and however we might settle that issue, to deal with gross damage to his reputation or serious damage to his reputation from a gross alteration, a major alteration of his creation? Is there any role there for rectification?

Mr. NOLAN. Well, first of all, I think the present law provides them with a remedy at least on the paternity rights side of things to excise his or her name from the credits, and possibly——

Mr. BERMAN. How would he do that?

Mr. NOLAN. Bring an action in court.

Mr. BERMAN. How would he do that?

Mr. NOLAN. Under 43(A) of the Lanham Act, and there is case law to that effect involving a motion picture and a director.

Mr. BERMAN. He could prevent say the subsequent distribution through——

Mr. NOLAN. With his name on it.

Mr. BERMAN. With his name on it. OK. What about——

Mr. NOLAN. And there is case law under 43(A) of the Lanham Act, again involving two plaintiffs. One case was brought by the Monty Python group, where they were able to stop distribution on network television, because their works were so substantially changed.

Mr. BERMAN. My final point, Mr. Chairman, I know we have other panels and it would be interesting to go on. There are a number of issues we could explore, but my final point is just continuing along the line of the chairman's questions with respect to the fact that the studios have, at times, negotiated contracts with directors that give them some form of, "creative control," that nothing can be done unless they approve of it being done in the post-production phase.

So, we are not talking here in absolute terms. Somewhere the studios are making a balance that says, the economic benefits of getting that director exceed the potential detriments of investing in that director's creative control.

I mean, in other words, we are not talking here an absolute right of ownership here that——

Mr. NOLAN. Of course not. We are in the collaborate process of making motion pictures. Mr. FitzSimons is part of that. I, hopefully, am part of that. Mr. Mayer is part of it. There is normal friction between collaborative partners in these efforts, but I guess the question I have is, should a court impose its decision on how best that process should unfold?

Mr. BERMAN. And my final question, because I did want to ask Mr. FitzSimons, I have to say I do not understand what legislation you want. On the one hand, you do not like what has been proposed by the directors. I guess we are referring here to the old Gephardt bill where the directors and their heirs and the screenwriters and/or their heirs would have final control over material alterations, because career producers are not included.

You do not want a veto power because you think that is not workable in a collaborative process, but you feel there is a compelling need for legislation. And what would that legislation——

Mr. FITZSIMONS. I think the legislation should spell out the relationship between the economic rights of the copyright holder and the moral right of the creative contributor, because that is the area that is causing all of this confusion and discussion.

Mr. BERMAN. Give me an example? What rights should we spell out?

Mr. FITZSIMONS. To what extent moral rights would have to be compromised to the advantage of the copyright owner and to what extent copyright owners' rights might have to be compromised for the benefit of the moral rights. In other words, it is to find a balance between these two conflicting elements.

Mr. BERMAN. And I guess in the case of the producers, you have a problem because you do not have collective bargaining rights.

Mr. FITZSIMONS. That is correct.

Mr. BERMAN. Normally, why is that not called bargaining?

Mr. FITZSIMONS. But it is not, because the bargaining process is not there.

Mr. BERMAN. Well, the producer does have the right, individually, to bargain in terms of the contract.

Mr. FITZSIMONS. It would depend completely on the producer's individual clout. Not all producers have the same clout.

Mr. BERMAN. You want to help this guy from Muskogee who is coming in to—all right, Mr. Chairman, thank you.

Mr. KASTENMEIER. With respect to the point that was made earlier about the recoupment of profits from films making a profit within a year after the first run theatrical release, I think the only point was that one cannot assume that a first run theatrical release alone will make a film profitable. Indeed, in most cases, it will not.

The studios are, therefore, dependent upon the release of these films in other forms of presentation that may require alteration. But the way films become profitable is through immediate release to premium cable television, to first run network television, to videocassettes, to airlines, and then later on, to independent television stations, to foreign sales or foreign distribution. There is just an enormous number of presumably profitable outlets that ultimately will redeem the film, though it may take some years.

One almost has to look 10 years down the line to see how good that film is. And even then, as Mr. Mayer suggests, it can still form part of a film library if all the rights have not been sold, which you might be able to redeem even at the end of the useful life of that film in terms of all these other distributions.

So one can hope that most of these films will show a profit and would expect that to be the case. It is said that cable television has such an enormous appetite for films because of competition with other companies that display these films and because they run so many hours a day that even some of the poorer films have a second life because they need the films to fill up their schedules.

I say that because I do not think we should assume that our motion picture industry does not have enormous economic potential for making profits and for redemption of the very considerable investments put into it.

Mr. NOLAN. Absolutely.

Mr. KASTENMEIER. I want to thank the witnesses in our opening panel this morning, Mr. Nolan, Mr. Mayer and Mr. FitzSimons, for their contributions. We are very grateful to all three of you.

Mr. NOLAN. Thank you, Mr. Chairman.

Mr. MAYER. Thank you, Mr. Chairman.

Mr. KASTENMEIER. Our next panel will consist of William Fraker, a distinguished cinematographer who is testifying for the American Society of Cinematographers and the American Society of Film Editors and Frank W. Stanley, president emeritus, International Photographers Guild. Mr. Fraker, would you care to go first?

STATEMENT OF WILLIAM FRAKER, CINEMATOGRAPHER

Mr. FRAKER. Yes, I would, thank you. Mr. Chairman and members of the subcommittee——

Mr. KASTENMEIER. In fact, one thing you might do for us is to identify your other colleagues who I have not introduced here who are with you on the panel.

Mr. FRAKER. All right. On my right, seated, is our counsel, Mr. David W. Fleming, and the vice president of the American Society of Cinematographers, Jack Cooperman, ASC.

Mr. Chairman and members of the subcommittee, I am William Fraker, a member and former president of the American Society of Cinematographers, speaking on behalf of that organization.

I want to express our thanks to you for the opportunity to appear here today and to share with you the views of our members regarding the issue of moral rights.

The ASC is an honorary society of film makers, the oldest of its kind in Hollywood, which is celebrating its 71st anniversary this year. We are neither a union or a guild. Its membership is by invitation only and it is composed of leading directors of photography in the United States and abroad. A sampling of some of their more well-known achievements have been included for the record.

Let me share with you, for a moment, the role of cinematography in the creation of a motion picture. The cinematographer, also known as the camera man as well as the director of photography, is both a creative artist and a master craftsman.

As an artist, he creates on film his vision of the subject matter by employing light, color, perspective, space and motion. As a craftsman, he selects the film's various lenses, the movements of the camera and its angles and perspective. He helps to establish the moods and emotions of the viewer. He directs how the camera sees the action. He paints with lights and shadows.

The beauty of a film, to a large degree, is attributable to the tastes and imagination of the cinematographer. In the words of the late Cecil B. DeMille, "For his patience and singleness of purpose in a most arduous work, he is eminently deserving of that which is justly said of few men: He is a true artist."

As far as cinematographers as artists are concerned, any change in the color, the light, the perspective or contents of the photography of a motion picture should be considered a material alteration. Electronic colorization of a black and white film is material alteration and, as such, is unacceptable.

As Stanley Cortez of the ASC so eloquently put it, "After all, when a motion picture which was originally photographed in black and white is then colorized, it is not the actor's acting which is changed, not the writer's writing, not the composer's music, not the editor's editing or the director's directing; no, it is the cameraman's photography which is totally altered from what was an expressive work of integrally refined light and shadow to a totally different form completely foreign to the cinematographer's vision of the story."

I know that perhaps some young people in America today scorn the impressionistic beauty of the classic black and white film, the master achievement of Hollywood's golden era. Because some people do not appreciate the black and white picture does not mean all should be robbed of the joy of seeing a classic in its original beauty and splendor.

Each of us must have the right to feel an undescribable thrill of seeing classics uncut, uninterrupted, the truth and the whole truth as we, the cinematographers, created it. Let us state emphatically that whatever position on moral rights that Congress should adopt,

cinematographers must be accorded rights equal to those of the directors and the writers.

As cocreators and coauthors, cinematographers deserve no less. Panning and scanning of a wide screen film is also material alteration and that, too, is unacceptable. When motion pictures are shown on television or transferred to tape or laser disk, they should be presented in their original full screen format so that no part of the image is cut off or trimmed.

If a special circumstance demands that a compositional alteration be made, then the director and the cinematographer must be involved in the supervision of the process. We feel that moral rights, by law, should not be subject to subsequent waiver by anyone. Any agreement purporting to surrender such rights should be deemed in violation of public policy and, therefore, void and unenforceable.

The motion picture is an art form indigenous to America. Films have captured the imagination and attention of the world. They are an integral part of the family of visual arts. And we, as cocreators of the motion picture, must and should be accorded the moral rights protection we have espoused here today. Mr. Chairman, thank you for allowing us to present our views, the views of the American Society of Cinematographers. The ASC is, indeed, grateful.

Mr. KASTENMEIER. Thank you very much, Mr. Fraker.

[The prepared statement of Mr. Fraker follows:]

Oral Statement
American Society of Cinematographers
Before the Subcommittee on Courts, Intellectual Property
and the Administration of Justice
of the House Judiciary Committee
United States House of Representatives
January 9, 1990
The School of Law
University of California Los Angeles

Mr. Chairman and Members of the Subcommittee, I'm William Fraker, a member and former president of the American Society of Cinematography, speaking on behalf of that organization. I want to express our thanks to you for the opportunity to appear here today to share with you the views of our members regarding the issue of Moral Rights.

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"No. It is the cameraman's photography which is totally altered -- from what was an expressive work of intricately

refined light and shadow to a totally different form, completely foreign to the cinematographer's vision of the story.

"I know that perhaps some young people in America today scorn the impressionistic beauty of the classic black and white film -- the master achievement of Hollywood's Golden Era. But because *some* people do not appreciate the black and white picture does not mean *all* should be robbed of the joy of seeing a classic in its original beauty and splendor.

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Mr. Chairman, thank you for allowing us to present the views of the American Society of Cinematographers. The ASC is indeed grateful.

A Partial List of Some of the More Prominent Motion Pictures Photographed by A.S.C. Members

The following compilation represents a sample of some of the classic feature motion pictures photographed by A.S.C. members during recent years. Except in four instances, the list does not include any silent pictures (of which there were thousands) nor does it include any motion pictures made specifically for television exhibition. The list represents less than 1% of the features shot by A.S.C. members over the last 70 years.

A single asterisk (*) appearing before a cinematographer's name indicates his nomination for the Academy Award for that feature picture. The appearance of two asterisks (**) signifies the Oscar was awarded him for his photography of that picture. Those films listed in boldface and underlined are films chosen as of September, 1989 by the Librarian of the Library of Congress for inclusion in the National Film Registry.

Feature Motion Picture	Year Photographed	Cinematographer
Abe Lincoln in Illinois	1940	*James Wong Howe, A.S.C.
The African Queen	1951	Jack Cardiff, A.S.C.
The Agony and the Ecstasy	1965	*Leon Shamroy, A.S.C.
Airport	1970	*Ernest Laszlo, A.S.C.
The Alamo	1960	*William Clothier, A.S.C.
All About Eve	1950	*Milton Krasner, A.S.C.
All My Sons	1948	Russell Metty, A.S.C.
All the Kings Men	1949	Burnett Guffey, A.S.C.
An Affair to Remember	1957	*Milton Krasner, A.S.C.
An American in Paris	1951	**Alfred Gilks, A.S.C.
Anatomy of a Murder	1959	*Sam Leavitt, A.S.C.
Anna and the King of Siam	1946	**Arthur Miller, A.S.C.
Anthony Adverse	1936	**Gaetano Gaudio, A.S.C.
The Apartment	1960	*Joseph LaShelle, A.S.C.
Apocalypse Now	1979	**Vittorio Storaro, A.S.C.
Around the World in Eighty Days	1956	**Lionel Lindon, A.S.C.
Arsenic and Old Lace	1944	Sol Polito, A.S.C. Joseph Walker, A.S.C.
The Asphalt Jungle	1950	*Harold Rosson, A.S.C.
Auntie Mame	1958	*Harry Stradling, A.S.C.
The Bad and the Beautiful	1952	**Robert Surtees, A.S.C.
The Bad Seed	1956	*Harold Rosson, A.S.C.
Battle Cry	1954	Sid Hickox, A.S.C.
Battleground	1949	**Paul Vogel, A.S.C.
The Barefoot Contessa	1954	Jack Cardiff, A.S.C.
Ben Hur	1959	**Robert Surtees, A.S.C.
The Best Years of Our Lives	1946	Gregg Toland, A.S.C.
The Big Country	1958	Frank Planer, A.S.C.
The Big Heat	1953	Charles Lang, A.S.C.

The Big Sleep	1946	Sid Hickox, A.S.C.
Birdman of Alcatraz	1962	*Burnett Guffey, A.S.C.
The Birds	1963	*Robert Burks, A.S.C. *Ub Iwerks, A.S.C.
The Bishop's Wife	1947	Gregg Toland, A.S.C.
Blackboard Jungle	1955	*Russell Harlin, A.S.C.
The Black Swan	1942	**Leon Shamroy, A.S.C.
Blood and Sand	1941	**Ray Rennahan, A.S.C. **Ernest Palmer, A.S.C.
The Blue Lagoon	1980	*Nestor Almendros, A.S.C.
Bonnie and Clyde	1967	**Burnett Guffey, A.S.C.
Born Yesterday	1950	Joseph Walker, A.S.C.
Bound For Glory	1976	**Haskell Wexler, A.S.C.
Breakfast at Tiffany's	1961	Frank Planer, A.S.C.
Brian's Song	1971	Joe Biroc, A.S.C.
Bridges at Toko - Ri	1954	Loyal Griggs, A.S.C.
Brigadoon	1954	Joseph Ruttenberg, A.S.C.
Broadcast News	1987	*Michael Ballhaus, A.S.C.
The Buccaneer	1938	*Victor Milner, A.S.C.
The Buccaneer	1958	Loyal Griggs, A.S.C.
Bus Stop	1957	Milton Krasner, A.S.C.
Butch Cassidy and the Sundance Kid	1969	**Conrad Hall, A.S.C.
Butterfield 8	1960	*Joseph Ruttenberg, A.S.C.
The Caine Mutiny	1954	Frank Planer, A.S.C.
Call Me Madame	1953	Leon Shamroy, A.S.C.
Call Northside 777	1948	Joe MacDonald, A.S.C.
Camelot	1967	*Richard Kline, A.S.C.
Can-Can	1960	William Daniels, A.S.C.
The Candidate	1972	Victor Kemper, A.S.C.
Captain from Castille	1947	Arthur Arling, A.S.C. Charles Clarke, A.S.C.
Captains Courageous	1937	Harold Rosson, A.S.C.
The Carpetbaggers	1964	Joe MacDonald, A.S.C.
Casablanca	1942	*Arthur Edison, A.S.C.
Cat on a Hot Tin Roof	1958	*William Daniels, A.S.C.
Charade	1963	Charles Lang, A.S.C.
Chinatown	1974	*John Alonzo, A.S.C.
Cimarron	1930	*Edward Cronjager, A.S.C.
Citizen Kane	1941	*Gregg Toland, A.S.C.
Cleopatra	1934	**Victor Milner, A.S.C.
Cleopatra	1963	**Leon Shamroy, A.S.C.
Close Encounters of the Third Kind	1977	**Vilmos Zsigmond, A.S.C.
Coal Miner's Daughter	1980	*Ralf D. Bode, A.S.C.
The Color Purple	1985	*Allen Daviau, A.S.C.
Come Back Little Sheba	1952	James Wong Howe, A.S.C.
A Connecticut Yankee	1949	Ray Rennahan, A.S.C.
The Corn is Green	1945	Sol Polito, A.S.C.
The Crowd	1928	Henry Sharp, A.S.C.
Cyrano De Bergerac	1950	Frank Planer, A.S.C.

Dark Passage	1947	Sid Hickox, A.S.C.
Day of the Locust	1975	*Conrad Hall, A.S.C.
Days of Heaven	1978	**Nestor Almendros, A.S.C.
Days of Wine and Roses	1962	Philip Lathrop, A.S.C.
Death of a Salesman	1951	*Frank Planer, A.S.C.
Decision Before Dawn	1951	Frank Planer, A.S.C.
The Deer Hunter	1978	*Vilmos Zsigmond, A.S.C.
The Defiant Ones	1957	**Sam Leavitt, A.S.C.
Desire Under the Elms	1958	*Daniel Fapp, A.S.C.
Destry Rides Again	1939	Hal Mohr, A.S.C.
Dial M for Murder	1954	Robert Burks, A.S.C.
Diary of Anne Frank	1959	**William C. Mellor, A.S.C.
Double Indemnity	1944	*John Seitz, A.S.C.
Dr. Jekyll and Mr. Hyde	1931	*Karl Struss, A.S.C.
Dr. Jekyll and Mr. Hyde	1941	*Joseph Ruttenberg, A.S.C.
Duel in the Sun	1946	Lee Garmes, A.S.C. Hal Rosson, A.S.C. Ray Rennahan, A.S.C.
Earthquake	1974	*Philip Lathrop, A.S.C.
East of Eden	1955	Ted McCord, A.S.C.
Easter Parade	1948	Harry Stradling, A.S.C.
The Egyptian	1954	*Leon Shamroy, A.S.C.
Elizabeth and Essex	1939	*Howard Greene, A.S.C.
Empire of the Sun	1987	*Allen Daviau, A.S.C.
The Empire Strikes Back	1980	Richard Edlund, A.S.C.
E.T.	1982	*Allen Daviau, A.S.C.
Executive Suite	1954	*George Folsey, A.S.C.
Exodus	1960	*Sam Leavitt, A.S.C.
The Exorcist	1973	*Owen Roizman, A.S.C.
Fanny and Alexander	1983	**Sven Nykvist, A.S.C.
A Farewell to Arms	1933	**Charles B. Lang, Jr. A.S.C.
Flashdance	1983	*Don Peterman, A.S.C.
Flower Drum Song	1961	*Russell Metty, A.S.C.
For Me and My Gal	1942	William Daniels, A.S.C.
For Whom the Bell Tolls	19[illegible]	*Ray Rennahan, A.S.C.
Forever Amber	19[illegible]	Leon Shamroy, A.S.C.
The Formula	1980	*James Crabe, A.S.C.
The Fountainhead	19[illegible]	Robert Burks, A.S.C.
The Four Seasons	19[illegible]	Victor Kemper, A.S.C.
The French Connection	19[illegible]	*Owen Roizman, A.S.C.
From Here to Eternity	1953	**Burnett Guffey, A.S.C.
Funny Girl	1968	*Harry Stradling, A.S.C.
Funny Lady	1974	*James Wong Howe, A.S.C.
Gaslight	1944	*Joseph Ruttenberg, A.S.C.
The General	1927	Dev Jennings, A.S.C. Arthur Miller, A.S.C.
Gentlemen's Agreement	1947	**Joseph Ruttenberg, A.S.C.
Gigi	1958	Robert Burks, A.S.C.
The Glass Menagerie	1950	

The Glen Miller Story	1954	William Daniels, A.S.C.
Going My Way	1944	*Lionel Lindon, A.S.C. *Ray Rennahan, A.S.C.
Gone with the Wind	1939	**Ernest Haller, A.S.C. **Ray Rennahan, A.S.C.
The Good Earth	1936	**Karl Freund, A.S.C.
The Graduate	1967	*Robert Surtees, A.S.C.
The Grapes of Wrath	1940	Gregg Toland, A.S.C.
The Great Dictator	1940	Carl Struss, A.S.C.
The Great Gatsby	1949	John Seitz, A.S.C.
The Great Waltz	1938	Joseph Ruttenberg, A.S.C.
The Greatest Show on Earth	1952	Peverell Marley, A.S.C.
The Greatest Story Ever Told	1965	*Loyal Griggs, A.S.C.
Green Dolphin Street	1947	*George Folsey, A.S.C.
Gunfight at the O.K. Corral	1957	Charles Lang, A.S.C.
Guys and Dolls	1955	*Harry Stradling, A.S.C.
Gypsy	1962	Harry Stradling, A.S.C.
Harvey	1950	William Daniels, A.S.C.
A Hat Full of Rain	1957	Joe MacDonald, A.S.C.
Hawaii	1966	*Russell Harlan, A.S.C. *Linwood Dunn, A.S.C.
Heaven Can Wait	1943	*Edward Cronjager, A.S.C.
Heaven Can Wait	1978	*William Fraker, A.S.C.
Hello Dolly	1969	*Harry Stradling, A.S.C.
High Noon	1952	Floyd D. Crosby, A.S.C.
The Hindenburg	1975	*Robert Surtees, A.S.C.
Hombre	1967	James Wong Howe, A.S.C.
Hondo	1953	Robert Burks, A.S.C.
How Green was My Valley	1941	**Arthur Miller, A.S.C.
How the West was Won	1962	*William Daniels, A.S.C. *Milton Krasner, A.S.C. *Charles Lang, Jr., A.S.C. *Joseph LaShelle, A.S.C.
How to Marry a Millionaire	1953	Joe MacDonald, A.S.C.
HUD	1963	**James Wong Howe, A.S.C.
I'll Be Seeing You	1944	Gaetano Gaudio, A.S.C.
Inherit the Wind	1959	*Ernest Laszlo, A.S.C.
Inside Daisy Clover	1965	Charles Lang, A.S.C.
Intermezzo	1939	Gregg Toland, A.S.C.
Intolerance	1916	G.W. Bitzer, A.S.C., (Honorary)
It Happened One Night	1934	Joseph Walker, A.S.C.
It's A Wonderful Life	1946	Joe Biroc, A.S.C. Joseph Walker, A.S.C.
Jaws	1976	Wilmer Butler, A.S.C.
Jezebel	1938	*Ernest Haller, A.S.C.
Joan of Ark	1948	**Winton Hoch, A.S.C.
Johnnie Belinda	1947	*Ted McCord, A.S.C.

Judgment at Nuremberg	1961	*Ernest Laszlo, A.S.C.
Julius Caesar	1953	*Joseph Ruttenberg, A.S.C.
Keeper of the Flame	1942	William Daniels, A.S.C.
Key Largo	1948	Carl Freund, A.S.C.
Keys of the Kingdom	1945	*Arthur Miller, A.S.C.
The King and I	1956	*Leon Shamroy, A.S.C.
King Kong	1933	Linwood Dunn, A.S.C.
King Kong	1976	*Richard Kline, A.S.C.
King Solomon's Mines	1950	**Robert Surtees, A.S.C.
Kismet	1943	*Charles Rosher, A.S.C.
Kismet	1955	Joseph Ruttenberg, A.S.C.
Kramer v. Kramer	1979	*Nestor Almendros, A.S.C.
Lassie Come Home	1943	*Leonard Smith, A.S.C.
The Last Emperor	1987	**Vittorio Storaro, A.S.C.
Laura	1944	**Joseph LaShelle, A.S.C.
The Learning Tree	1969	Burnett Guffey, A.S.C.
Leave Her to Heaven	1945	**Leon Shamroy, A.S.C.
Les Miserables	1935	*Gregg Toland, A.S.C.
A Letter to Three Wives	1948	Arthur Miller, A.S.C.
Lilies of the Field	1963	*Ernest Haller, A.S.C.
Limelight	1952	Carl Struss, A.S.C.
The Little Foxes	1941	Gregg Toland, A.S.C.
Little Women	1949	*Robert Plank, A.S.C.
Logan's Run	1976	*Ernest Laszlo, A.S.C.
Long Day's Journey into Night	1962	Borris Kaufman, A.S.C.
Lost Horizons	1937	Joseph Walker, A.S.C.
The Lost Weekend	1945	*John Seitz, A.S.C.
Love is a Many Splendored Thing	1955	*Leon Shamroy, A.S.C.
Madame Curie	1943	*Joseph Ruttenberg, A.S.C.
The Magnificent Ambersons	1942	*Stanley Cortez, A.S.C.
The Magnificent Seven	1960	Charles Lang, A.S.C.
The Maltese Falcon	1941	Arthur Edeson, A.S.C.
A Man Called Peter	1955	*Harold Lipstein, A.S.C.
The Man From Laramie	1955	Charles Lang, A.S.C.
The Man Who Came To Dinner	1941	Gaetano Gaudio, A.S.C.
The Manchurian Candidate	1962	Lionel Lindon, A.S.C.
Marjorie Morningstar	1958	Harry Stradling, A.S.C.
Marty	1955	*Joseph LaShelle, A.S.C.
Mary Poppins	1964	*Edward Colman, A.S.C.
Matewan	1987	*Haskell Wexler, A.S.C.
Meet Me in St. Louis	1943	*George Folsey, A.S.C.
Midsummer Night's Dream	1935	**Hal Mohr, A.S.C.
Mildred Pierce	1945	*Ernest Haller, A.S.C.
Miracle on 34th Street	1947	Charles Clarke, A.S.C.
Mister Blandings Builds His Dreamhouse	1948	James Wong Howe, A.S.C.
Mister Roberts	1955	Winton Hoch, A.S.C.
Mister Smith Goes to Washington	1939	Joseph Walker, A.S.C.

Misty	1961	Lee Garmes, A.S.C.
Modern Times	1936	Rollie Totheroe, A.S.C.
Mrs. Miniver	1942	**Joseph Ruttenberg, A.S.C.
Munity on the Bounty	1962	*Robert Surtees, A.S.C.
Murphy's Romance	1985	*William A. Fraker, A.S.C.
The Music Man	1962	Robert Burks, A.S.C.
My Darling Clementine	1946	Joe MacDonald, A.S.C.
My Fair Lady	1964	**Harry Stradling, A.S.C.
My Friend Flicka	1956	Carl Struss, A.S.C.
The Naked City	1948	**William Daniels, A.S.C.
National Velvet	1944	*Leonard Smith, A.S.C.
The Natural	1984	*Caleb Deschanel, A.S.C.
Network	1976	*Owen Roizman, A.S.C.
Night and Day	1946	Peverell Marley, A.S.C.
Ninotchka	1939	William Daniels, A.S.C.
North by Northwest	1959	Robert Burks, A.S.C.
Northwest Passage	1940	*Sydney Wagner, A.S.C. *William V. Skall, A.S.C.
Now Voyager	1942	Sol Polito, A.S.C.
Of Human Bondage	1946	Peverell Marley, A.S.C.
Oklahoma	1955	*Robert Surtees, A.S.C.
The Old Man and the Sea	1958	*James Wong Howe, A.S.C.
On the Waterfront	1954	**Borris Kaufman, A.S.C.
One Flew Over the Cuckoo's Nest	1975	*Haskell Wexler, A.S.C.
Paint Your Wagon	1969	William Fraker, A.S.C.
The Pajama Game	1957	Harry Stradling, A.S.C.
Pal Joey	1957	Harold Lipstein, A.S.C.
The Paradine Case	1947	Lee Garmes, A.S.C.
Pat and Mike	1952	William Daniels, A.S.C.
Patton	1970	*Fred J. Koenekamp, A.S.C.
Peggy Sue Got Married	1986	*Jordan Cronenweth, A.S.C.
Phantom Of The Opera	1943	**Hal Mohr, A.S.C.
Philadelphia Story	1940	Joseph Ruttenberg, A.S.C.
Picnic	1955	James Wong Howe, A.S.C.
The Picture of Dorian Gray	1945	**Harry Stradling, A.S.C.
A Place in the Sun	1950	**William C. Mellor, A.S.C.
Places in the Heart	1986	Nestor Almendros, A.S.C.
Poltergeist	1982	Richard Edlund, A.S.C.
Porky and Bess	1959	*Leon Shamroy, A.S.C.
The Postman Always Rings Twice	1946	Sydney Wagner, A.S.C.
Pride and Prejudice	1940	Carl Freund, A.S.C.
The Pride and the Passion	1957	Frank Planer, A.S.C.
Psycho	1960	*John Russell, A.S.C.
The Quiet Man	1952	**Winton Hoch, A.S.C.
Quo Vadis	1951	*Robert Surtees, A.S.C.

Raiders of the Lost Ark	1981	Richard Edlund, A.S.C.
The Rainmaker	1956	Charles Lang, A.S.C.
Raintree County	1957	Robert Surtees, A.S.C.
Random Harvest	1942	Joseph Ruttenberg, A.S.C.
The Razor's Edge	1946	Arthur Miller, A.S.C.
Rear Window	1954	*Robert Burks, A.S.C.
Rebecca	1940	**George Barnes, A.S.C.
Rebel Without a Cause	1955	Ernest Haller, A.S.C.
Red River	1948	Russell Harlin, A.S.C.
Reds	1981	**Vittorio Storaro, A.S.C.
The Right Stuff	1983	*Caleb Deschanel, A.S.C.
Rio Bravo	1959	Russell Harlin, A.S.C.
The River	1984	*Vilmos Zsigmond, A.S.C.
The Robe	1953	*Leon Shamroy, A.S.C.
Roman Holiday	1953	*Frank Planer, A.S.C.
The Rose Tattoo	1955	**James Wong Howe, A.S.C.
Rosemary's Baby	1968	William Fraker, A.S.C.
Ruby Gentry	1952	Russell Harlin, A.S.C.
Sabrina	1954	*Charles Lang, A.S.C.
Same Time Next Year	1978	*Robert Surtees, A.S.C.
Samson and Delilah	1950	*George Barnes, A.S.C.
The Sand Pebbles	1966	*Joe MacDonald, A.S.C.
The Searcher's	1956	Winton Hoch, A.S.C.
The Secret Life of Walter Mitty	1947	Lee Garmes, A.S.C.
Separate Tables	1958	*Charles Lang, A.S.C.
Sergeant York	1941	*Sol Polito, A.S.C.
Seven Brides for Seven Brothers	1954	*George Folsey, A.S.C.
Shane	1953	**Loyal Griggs, A.S.C.
She Wore a Yellow Ribbon	1949	**Winton Hoch, A.S.C.
Ship of Fools	1965	**Ernest Laszlo, A.S.C.
Show Boat	1951	*Charles Rosher, A.S.C.
Since You Went Away	1943	*Stanley Cortez, A.S.C.
Singing in the Rain	1953	Harold Rosson, A.S.C.
Snow White and the Seven Dwarfs	1937	Ray Rennahan, A.S.C.
The Snows of Kilimanjaro	1952	*Leon Shamroy, A.S.C.
So Proudly We Hail	1943	*Charles Lang, A.S.C.
Some Like it Hot	1959	*Charles Lang, A.S.C.
Somebody Up There Likes Me	1956	**Joseph Ruttenberg, A.S.C.
The Song of Bernadette	1943	**Arthur Miller, A.S.C.
Sophie's Choice	1985	*Nestor Almendros, A.S.C.
Sound of Music	1965	*Ted McCord, A.S.C.
South Pacific	1958	*Leon Shamroy, A.S.C.
Spartacus	1960	**Russell Metty, A.S.C.
Spellbound	1945	*George Barnes, A.S.C.
The Spirit of St. Louis	1957	Robert Burks, A.S.C. Peverell Marley, A.S.C.
Splendor in the Grass	1961	Borris Kaufman, A.S.C.
A Star is Born	1976	*Robert Surtees, A.S.C.
Star Trek IV	1986	*Don Peterman, A.S.C.
Star Wars	1977	*Richard Edlund, A.S.C.
State Fair	1945	Leon Shamroy, A.S.C.
The Sting	1973	*Robert Surtees, A.S.C.

A Streetcar Named Desire	1951	*Harry Stradling, A.S.C.
Summer of '42	1971	*Robert Surtees, A.S.C.
The Sundowners	1950	Winton Hoch, A.S.C.
Sunrise	1927	**Karl Struss, A.S.C. **Charles Rosher, A.S.C.
Sunrise at Campo Bello	1960	Russell Harlin, A.S.C.
Sunset Boulevard	1950	*John Seitz, A.S.C.
Tabacco Road	1941	Arthur Miller, A.S.C.
The Ten Commandments	1956	*Peverell Marley, A.S.C. *Loyal Griggs, A.S.C.
Ten North Frederick	1958	Joe MacDonald, A.S.C.
Tequila Sunrise	1988	*Conrad L. Hall, A.S.C.
That's Entertainment	1974	Ernest Laszlo, A.S.C. Russell Metty, A.S.C.
The Jass Singer	1927	Hal Mohr, A.S.C.
The Way We Were	1973	*Harry Stradling, Jr., A.S.C.
Thirty Seconds Over Tokyo	1944	*Robert Surtees, A.S.C.
This is the Army	1943	Sol Polito, A.S.C.
Thoroughly Modern Millie	1967	Russell Metty, A.S.C.
Thousands Cheer	1943	*George Folsey, A.S.C.
Three Coins in the Fountain	1954	**Milton Krasner, A.S.C.
To Catch a Thief	1955	**Robert Burks, A.S.C.
To Kill a Mockingbird	1962	*Russell Harlin, A.S.C.
Tootsie	1982	*Owen Roizman, A.S.C.
The Towering Inferno	1974	**Joe Biroc, A.S.C. **Fred Koenekamp A.S.C.
The Treasure of Sierra Madre	1948	Ted McCord, A.S.C.
A Tree Grows in Brooklyn	1945	Leon Shamroy, A.S.C.
True Grit	1969	Lucien Vallard, A.S.C.
Twelve Angry Men	1957	Borris Kaufman, A.S.C.
Twelve O'Clock High	1949	Leon Shamroy, A.S.C.
Two Years Before the Mast	1946	Ernest Laszlo, A.S.C.
The Unbearable Lightness of Being	1988	*Sven Nykvist, A.S.C.
The Unsinkable Molly Brown	1964	*Daniel Fapp, A.S.C.
Union Pacific	1939	*Farciot Edwards, A.S.C.
Vertigo	1958	Robert Burks, A.S.C.
Wargames	1983	*William A. Fraker, A.S.C.
Watch on the Rhine	1943	Hal Mohr, A.S.C.
Waterloo Bridge	1940	*Joseph Ruttenberg, A.S.C.
Western Union	1941	Edward Cronjager, A.S.C.
West Side Story	1961	**Daniel Fapp, A.S.C.
What Ever Happened to Baby Jane?	1962	*Ernest Haller, A.S.C.
White Christmas	1954	Loyal Griggs, A.S.C.
The White Cliffs of Dover	1943	*George Folsey, A.S.C.
Who Framed Roger Rabbit	1988	*Dean Cundey, A.S.C.

Who Shot Liberty Valance	1961	William Clothier, A.S.C.
Who's Afraid of Virginia Woolf	1966	**Haskell Wexler, A.S.C.
The Wild One	1953	Hal Mohr, A.S.C.
Wilson	1944	**Leon Shamroy, A.S.C.
Winchester 73	1950	William Daniels, A.S.C.
Witness for the Prosecution	1957	Russell Harlin, A.S.C.
The Wizard of Oz	1939	Harold Rosson, A.S.C.
Written on the Wind	1956	Russell Metty, A.S.C.
Wuthering Heights	1939	**Gregg Toland, A.S.C.
Yankee Doodle Dandy	1942	James Wong Howe, A.S.C.
The Yearling	1946	**Arthur Arling, A.S.C. **Charles Rosher, A.S.C. **Leonard Smith, A.S.C.
The Young Philadelphians	1959	*Harry Stradling, A.S.C.
Zelig	1983	*Gordon Willis, A.S.C.

Mr. KASTENMEIER. Now we would like to call on Mr. Stanley.

STATEMENT OF FRANK W. STANLEY, PRESIDENT EMERITUS INTERNATIONAL PHOTOGRAPHERS GUILD

Mr. STANLEY. Thank you, Mr. Chairman. I am delighted to be before you and this committee. On my left side is a gentleman from the staff of our union, Bruce Doering.

My name is Frank Stanley. I have 40 years experience in the motion picture and television industry and as a cinematographer, I have directed the photography on more than 40 feature films and dozens of movies for television. I am a member of the Academy of Motion Picture Arts and Sciences and I have served on its board of governors.

I speak to you today as the president emeritus of the International Photographers Guild, the largest and most influential photographers' organization in the world. Although I am pleased to testify before the committee, I must say that the guild's 2,600 members are mad as hell. We are mad because a present U.S. law is a one-sided patchwork that gives us lip service to moral rights while it encourages producers to pan and scan, colorize, indiscriminately edit and otherwise materially alter motion pictures without having to even consult any of the film's three principal creative artists, namely the director, the writer and the cinematographer.

We are mad because the cinematographer is the author of the photographic image that appears on screen. And yet we see these images being defaced, omitted and tarnished on a regular basis. The cinematographer brings to life the writer's script and the director's vision. In directing the photography, he or she utilizes light, shadow, space, the tones of black and white or color to delineate moods and define the emotions which audiences ultimately embrace.

Is my honor and reputation protected when the most beautifully lit and poignant scenes in "Breezy" or in "Ten" are edited out of the television version? Is Gordon Willis' brilliant photography, Francis Ford Coppola's direction or screen play protected when the local TV station version deletes Robert DeNiro's entire performance from "Godfather I or II?"

We are also mad because, as American citizens, we see that the lack of moral rights threatens to destroy our film heritage. If American law remains unchanged, future generations may actually never know that "Casablanca" or "Miracle on 34th Street" was originally filmed in black and white or that in its theatrical release, Milos Forman's production of "Hair" contained nine additional musical numbers.

It is also worth noting that under present copyright law multinational and foreign corporations such as Sony, are now considered to be the, "authors" of such classics as "From Here to Eternity" or the "Battle of the Coral Sea and King Rat."

To reverse this ominous trend, it is imperative that Congress address this imbalance of power. Clearly the insertion of disclaimers or labels do not protect the rights of film artists or the right of the American public to its film history. On the contrary, the small cost of labeling does not deter film producers from defacing films. At

most, it merely informs the public that certain films had somehow been tampered with or damaged.

Similarly, labeling, by itself, reduces the role of the artist to that of a eunuch who allows himself to be castrated so long as he can complain about the regrettable condition after the fact. Indeed, without other protections, labeling could legitimize the piecemeal dismantling of an indigenous art form.

To protect the art of the director, cinematographer and screenwriter and to prevent the destruction of our national film heritage, copyright law must be amended to provide these creators with legal standing to object to the material alteration of their films. Copyright law must empower a panel of expert neutral arbitrators to decide whether material alteration has damaged the creative identity or reputation of the artist.

The Guild believes this kind of arbitration procedure is consistent with the Berne Treaty in that it permits the aggrieved artist to object to defacements or alterations. At the same time, arbitration is a much quicker and more efficient form of dispute resolution than that of the court system. As a consequence, it would not unfairly hamper or delay the producer's efforts to exploit and develop secondary markets.

Therefore, the Guild believes arbitration offers a fair way of resolving artistic issues of this great moment. Clearly, what is needed is a congressional legislation which would permit creative artists to object to the heretofore untrammeled power of producers to truncate, tarnish and disfigure works of art that comprise a valuable part of America's culture. Thank you for your time and continuing interest in this momentous venture.

Mr. KASTENMEIER. Thank you, Mr. Stanley.

[The prepared statement of Mr. Stanley follows:]

Summary of the Statment of
FRANK W. STANLEY (President Emeritus)
INTERNATIONAL PHOTOGRAPHERS GUILD
Before the Subcommittee on Courts, Intellectual Property
and the Administration of Justice
of the Committee on the Judiciary
United States House of Representatives
January 9, 1990

The International Photographers Guild is the largest photographers union in the world. For more than sixty years the Guild has not only fought for the artistic rights of cinematographers but has been their exclusive bargaining representative in negotiations with Hollywood producers. Our members have won more Oscars, Emmys, Clios and other international awards than members of any other photographers organization.

The Guild believes copyright law should be amended to include the concept of moral rights as defined by the Berne Treaty. Present U.S. law is a one-sided patchwork that gives lip service to moral rights while it allows producers to pan and scan, colorize and otherwise materially alter motion pictures without having to consult any of a film's three principal creators/authors, namely, the director, writer and cinematographer.

The cinematographer is one of three principal creative artists because film is a visual medium and motion picture photography is the literature of light. In directing the photography the cinematographer utilizes light, shadow, tonality and color to delineate moods and define the emotions which audiences ultimately embrace.

To protect the art of the director, screenwriter and cinematographer and to prevent the defacement of our national film heritage, copyright law must be amended to give these creators legal standing to object to the material alteration of films. Copyright law must also empower a panel of expert, neutral arbitrators to decide whether material alteration has damaged the creative identity or reputation of the artists.

In addition, the insertion of disclaimers or labels at the beginning and end of altered films would not protect the rights of film artists or the American public's right to their film heritage. On the contrary, labelling without the protections would legitimize the piecemeal dismantling of an indigenous art form.

Furthermore, moral rights is an issue that affects the future of American art, and as such, demands Congressional legislation; it should not be relegated to collective bargaining between one guild and one set of producers. Nor should it be determined by the whims of new studio heads, many of whom represent foreign capital.

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San Francisco Labor Council
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Southern Nevada
Central Labor Council

STATEMENT OF FRANK W. STANLEY

Mr. Chairman, Members of the Sub-Committee:

The International Photographers Guild writes to defend the moral rights of cinematographers and to support the position articulated by the Directors and Writers Guilds.

Our Guild is well qualified for this task because it is not only the largest photographers union in the world, representing over 2,600 members, but also because for more than sixty years it has been fighting for the artistic rights of cinematographers, as well as representing their interests as the exclusive collective bargaining representative with the Alliance of Motion Picture and Television Producers and the major Hollywood independents. The Guild counts among its members almost all the 170 members of the American Society of Cinematographers. Our members' achievements are legendary; they have won more Oscars, Emmys and Clios than members of any other photographers organization in the world (Please see accompanying list of Guild members who are Academy Award winners and nominees).

Based on this experience, the Guild believes copyright law should be amended to include the concept of moral rights as defined by the Berne Treaty. Present U.S. law is a one-sided patchwork that gives lip service to moral rights while it allows producers to pan and scan, colorize, and otherwise materially alter motion pictures without having to consult any of a film's three principal creators/authors, namely, the director, writer and cinematographer.

We say the cinematographer is one of filmmaking's three principal creative artists because film is a visual medium and motion picture photography is the literature of light. The cinematographer brings to life the writer's script and the director's vision; in directing the photography he/she utilizes light, shadow, tonality, space and color to delineate moods and define the emotions which audiences ultimately embrace. Just as a literary author

transforms his ideas into a novel, so the cinematographer uses his visual artistic and technical knowledge to transform the director's inner thoughts into a photographic image.

As Guild member Laszlo Kovacs has said; "Everything is filtered through [the cinematographer's] heart, brain, eyes, taste and choices. That's how the audience is going to see the story....The form and final shape of that film is going through [his] eye."

Like an impressionist painter, the cinematographer paints with light, and in doing so, puts his imprimatur on a motion picture. As Guild member and Academy Award winner Vilmos Zsigmond points out, the cinematographer uses light to imitate and yet transcend reality. "The best lighting is when the audience feels it's real. When you compare it to nature, sometimes it's better than nature. There are many times a performer's face can be kept in the dark and the audience wouldn't really mind. But some other times it would be boring. So you make it a half silhouette. These are decisions only a cinematographer can make. The other people on the set might not even see!"

Because the cinematographer's creativity plays such a central role in filmmaking, legendary director Frank Capra has recently written, "It takes many talents to make a film, each contributing their share. But if one were forced to make a film with only the talents absolutely necessary, one could do away with all but two: the cameraman and the director. That team is the backbone of all filmmaking and has been since the days of [cinematographer Billy] Bitzer and [Director D.W.] Griffith. If they still had a camera, some film and a few chemicals, that team could make a film if they were the last people on earth."

Copyright Law Must Recognize Moral Rights

To protect the art of the director, cinematographer and screenwriter, and to prevent the defacement of our national film heritage, copyright law must be amended to provide these creators with legal standing to object to the material alteration of their films. In addition, copyright law must empower a panel of expert neutral arbitrators to decide whether material alteration has damaged the creative identity or reputation of the artist. The above arbitration procedure, we believe, is consistent with the Berne Treaty in that it permits the aggrieved artist to object to defacements or alterations. At the same time, arbitration is a much quicker and more efficient form of dispute resolution than that of the court system. As a consequence, it would not unfairly hamper or delay the producer's efforts to exploit and develop secondary markets. Therefore, the Guild believes such an arbitration procedure offers an equitable way of resolving artistic issues of great moment.

However, the Guild resolutely opposes two other purported solutions to the issue of moral rights. First, the mere insertion of

disclaimers or labels at the beginning and end of altered films would not protect the rights of film artists or the right of the American public to their film heritage. On the contrary, the small cost of labelling would not deter film producers from defacing films; at best, it would merely inform the public that certain films had somehow been tampered with or damaged. Similarly, labelling by itself would reduce the role of the artist to that of a eunuch who allows himself to be castrated so long as he can complain about his regrettable condition after the fact. In short, without other protections, labelling would legitimize the piecemeal dismantling of an indigenous art form.

Second, moral rights issues cannot and should not be resolved through collective bargaining. Whether or not film artists should be protected by the Berne Treaty is an issue that affects the future of American art and, as such, demands a solution nationwide in scope; it should not be relegated to collective bargaining between one guild and one set of producers. Moreover, the outcome of collective bargaining is most often determined by the respective economic power of labor and management, not to mention the employer's changing agenda; surely American film history should not be determined by the whims of new studio heads, many of whom represent foreign capital. Furthermore, not all films are produced under collective bargaining agreements; needless to say, this fact should not preclude film artists from exercising their moral rights.

Clearly, what is needed is Congressional legislation which would permit creative artists to object to the heretofore untrammeled power of the producers to truncate, tarnish and disfigure timeless works of art, works that comprise an invaluable part of America's culture.

ACADEMY AWARD NOMINATIONS AND WINNERS

CINEMATOGRAPHY

1927/28 First Year

DEVIL DANCER, United Artists. George Barnes.
DRUMS OF LOVE, United Artists. Karl Struss.
MAGIC FLAME, United Artists. George Barnes.
MY BEST GIRL, Pickford, UA. Charles Rosher.
SADIE THOMPSON, United Artists. George Barnes.
*SUNRISE, Fox. Charles Rosher and Karl Struss.
THE TEMPEST, United Artists. Charles Rosher.

1928/29 Second Year

THE DIVINE LADY, First National. John Seitz.
FOUR DEVILS, FOX. Ernest Palmer.
IN OLD ARIZONA, Fox. Arthur Edeson.
OUR DANCING DAUGHTERS, Metro-Goldwyn-Mayer. George Barnes.
STREET ANGEL, Fox. Ernest Palmer.
*WHITE SHADOWS IN THE SOUTH SEAS, Metro-Goldwyn-Mayer.
Clyde De Vinna.

1929/30 Third Year

ALL QUIET ON THE WESTERN FRONT, Universal. Arthur Edeson.
ANNA CHRISTIE, Metro-Goldwyn-Mayer. William Daniels.
HELL'S ANGELS, United Artists. Gaetano Gaudio and Harry Perry.
THE LOVE PARADE, Paramount. Victor Milner.
*WITH BYRD AT THE SOUTH POLE, Paramount. Joseph T. Rucker and
Willard Van Der Veer.

1930/31 Fourth Year

CIMARRON, RKO Radio. Edward Cronjager.
MOROCCO, Paramount. Lee Garmes.
THE RIGHT TO LOVE, Paramount. Charles Lang.
SVENGALI, Warners-First National. Barney "Chick" McGill.
*TABU, Paramount. Floyd Crosby.

1931/32 Fifth Year

ARROWSMITH, Goldwyn, UA. Ray June.
DR. JEKYLL AND MR. HYDE, Paramount. Karl Struss.
*SHANGHAI EXPRESS, Paramount. Lee Garmes.

*Denotes winner

Award Nominations and Winners
CINEMATOGRAPHY

1932/33 Sixth Year

*A FAREWELL TO ARMS, Paramount. Charles Bryant Lang, Jr.
REUNION IN VIENNA, Metro-Goldwyn-Mayer. George J. Folsey, Jr.
SIGN OF THE CROSS, Paramount. Karl Struss.

1934 Seventh Year

THE AFFAIRS OF CELLINI, 20th Century, UA. Charles Rosher.
*CLEOPATRA, Paramount. Victor Milner.
OPERATOR 13, Metro-Goldwyn-Mayer. George Folsey.

1935 Eighth Year

BARBARY COAST, Goldwyn, UA. Ray June.
THE CRUSADES, Paramount. Victor Milner.
LES MISERABLES, 20th Century, UA. Gregg Toland.
*A MIDSUMMER NIGHT'S DREAM, Warner Bros. Hal Mohr.

1936 Ninth Year

*ANTHONY ADVERSE, Warner Bros. Gaetano Gaudio.
THE GENERAL DIED AT DAWN, Paramount. Victor Milner.
THE GORGEOUS HUSSY, Metro-Goldwyn-Mayer. George Folsey.

1937 Tenth Year

DEAD END, Goldwyn, UA. Gregg Toland.
*THE GOOD EARTH, Metro-Goldwyn-Mayer. Karl Freund.
WINGS OVER HONOLULU, Universal. Joseph Valentine.

1938 Eleventh Year

ALGIERS, Wanger, UA. James Wong Howe.
ARMY GIRL, Republic. Ernest Miller and Harry Wild.
THE BUCCANEER, Paramount. Victor Milner.
*THE GREAT WALTZ, Metro-Goldwyn-Mayer. Joseph Ruttenberg.
JEZEBEL, Warner Bros. Ernest Haller.
MAD ABOUT MUSIC, Universal. Joseph Valentine.
MERRILY WE LIVE, Roach, M-G-M. Norbert Brodine.
SUEZ, 20th Century-Fox. Peverell Marley.
VIVACIOUS LADY, RKO Radio. Robert de Grasse.
YOU CAN'T TAKE IT WITH YOU, Columbia. Joseph Walker.
THE YOUNG IN HEART, Selznick, UA. Leon Shamroy.

*Denotes winner

1939 Twelfth Year

(Black-and-White)
STAGECOACH, Wanger, UA. Bert Glennon.
*WUTHERING HEIGHTS, Goldwyn, UA. Gregg Toland.

(Color)
*GONE WITH THE WIND, Selznick, M-G-M. Ernest Haller and Ray Rennahan.
THE PRIVATE LIVES OF ELIZABETH AND ESSEX, Warner Bros. Sol Polito and W. Howard Greene.

1940 Thirteenth Year

(Black-and-White)
ABE LINCOLN IN ILLINOIS, RKO Radio. James Wong Howe.
ALL THIS, AND HEAVEN TOO, Warner Bros. Ernest Haller.
ARISE, MY LOVE, Paramount. Charles B. Lang, Jr.
BOOM TOWN, Metro-Goldwyn-Mayer. Harold Rosson.
FOREIGN CORRESPONDENT, Wanger, UA. Rudolph Mate.
THE LETTER, Warner Bros. Gaetano Gaudio.
THE LONG VOYAGE HOME, Argosy-Wanger, UA. Gregg Toland.
*REBECCA, Selznick, UA. George Barnes.
SPRING PARADE, Universal. Joseph Valentine.
WATERLOO BRIDGE, Metro-Goldwyn-Mayer. Joseph Ruttenberg.

(Color)
BITTER SWEET, Metro-Goldwyn-Mayer. Oliver T. Marsh and Allen Davey.
THE BLUE BIRD, 20th Century-Fox. Arthur Miller and Ray Rennahan.
DOWN ARGENTINE WAY, 20th Century-Fox. Leon Shamroy and Ray Rennahan.
NORTH WEST MOUNTED POLICE, Paramount. Victor Milner and W. Howard Greene.
NORTHWEST PASSAGE, Metro-Goldwyn-Mayer. Sidney Wagner and William V. Skall.
*THIEF OF BAGDAD, Korda, UA (British). George Perinal.

1941 Fourteenth Year

(Black-and-White)
THE CHOCOLATE SOLDIER, Metro-Goldwyn-Mayer. Karl Freund.
CITIZEN KANE, Mercury, RKO Radio. Gregg Toland.
DR. JEKYLL AND MR. HYDE, Metro-Goldwyn-Mayer. Joseph Ruttenberg.
HERE COMES MR. JORDAN, Columbia. Joseph Walker.
HOLD BACK THE DAWN, Paramount. Leo Tover.
*HOW GREEN WAS MY VALLEY, 20th Century-Fox. Arthur Miller.
SERGEANT YORK, Warner Bros. Sol Polito.
SUN VALLEY SERENADE, 20th Century-Fox. Edward Cronjager.
SUNDOWN, Wanger, UA. Charles Lang.
THAT HAMILTON WOMAN, Korda, UA. Rudolph Mate.

*Denotes winner

Award Nominations and Winners
CINEMATOGRAPHY

1941 Fourteenth Year (Continued)

(Color)
ALOMA OF THE SOUTH SEAS, Paramount. Wilfred M. Cline, Karl Struss and William Snyder.
BILLY THE KID, Metro-Goldwyn-Mayer. William V. Skall and Leonard Smith.
*BLOOD AND SAND, 20th Century-Fox. Ernest Palmer and Ray Rennahan.
BLOSSOMS IN THE DUST, Metro-Goldwyn-Mayer. Karl Freund and W. Howard Greene.
DIVE BOMBER, Warner Bros. Bert Glennon.
LOUISIANA PURCHASE, Paramount. Harry Hallenberger and Ray Rennahan.

1942 Fifteenth Year

(Black-and-White)
KINGS ROW, Warner Bros. James Wong Howe.
THE MAGNIFICENT AMBERSONS, Mercury, RKO Radio. Stanley Cortez.
*MRS. MINIVER, Metro-Goldwyn-Mayer. Joseph Ruttenberg.
MOONTIDE, 20th Century-Fox. Charles Clarke.
THE PIED PIPER, 20th Century-Fox. Edward Cronjager.
THE PRIDE OF THE YANKEES, Goldwyn, RKO Radio. Rudolph Mate.
TAKE A LETTER, DARLING, Paramount. John Mescall.
THE TALK OF THE TOWN Columbia. Ted Tetzlaff.
TEN GENTLEMEN FROM WEST POINT, 20th Century-Fox. Leon Shamroy.
THIS ABOVE ALL, 20th Century-Fox. Arthur Miller.

(Color)
ARABIAN NIGHTS, Wanger, Universal. Milton Krasner, William V. Skall and W. Howard Greene.
*THE BLACK SWAN, 20th Century-Fox. Leon Shamroy.
CAPTAINS OF THE CLOUDS, Warner Bros. Sol Polito.
JUNGLE BOOK, Korda, UA. W. Howard Greene.
REAP THE WILD WIND, Paramount. Victor Milner and William V. Skall.
TO THE SHORES OF TRIPOLI, 20th Century-Fox. Edward Cronjager and William V. Skall.

1943 Sixteenth Year

(Black-and-White)
AIR FORCE, Warner Bros. James Wong Howe, Elmer Dyer and Charles Marshall.
CASABLANCA, Warner Bros. Arthur Edeson.
CORVETTE K-225, Universal. Tony Gaudio.
FIVE GRAVES TO CAIRO, Paramount. John Seitz.
THE HUMAN COMEDY, Metro-Goldwyn-Mayer. Harry Stradling.

*Denotes winner

1943 Sixteenth Year (Continued)

(Black-and-White - continued)
MADAME CURIE, Metro-Goldwyn-Mayer. Joseph Ruttenberg.
THE NORTH STAR, Goldwyn, RKO Radio. James Wong Howe.
SAHARA, Columbia. Rudolph Mate.
SO PROUDLY WE HAIL, Paramount. Charles Lang.
*THE SONG OF BERNADETTE, 20th Century-Fox. Arthur Miller.

(Color)
FOR WHOM THE BELL TOLLS, Paramount. Ray Rennahan.
HEAVEN CAN WAIT, 20th Century-Fox. Edward Cronjager.
HELLO, FRISCO, HELLO, 20th Century-Fox. Charles G. Clarke and Allen Davey.
LASSIE COME HOME, Metro-Goldwyn-Mayer. Leonard Smith.
*PHANTOM OF THE OPERA, Universal. Hal Mohr and W. Howard Greene.
THOUSANDS CHEER, Metro-Goldwyn-Mayer. George Folsey.

1944 Seventeenth Year

(Black-and-White)
DOUBLE INDEMNITY, Paramount. John Seitz.
DRAGON SEED, Metro-Goldwyn-Mayer. Sidney Wagner.
GASLIGHT, Metro-Goldwyn-Mayer. Joseph Ruttenberg.
GOING MY WAY, Paramount. Lionel Lindon.
*LAURA, 20th Century-Fox. Joseph LaShelle.
LIFEBOAT, 20th Century-Fox. Glen MacWilliams.
SINCE YOU WENT AWAY, Selznick, UA. Stanley Cortez and Lee Garmes.
THIRTY SECONDS OVER TOKYO, Metro-Goldwyn-Mayer. Robert Surtees and Harold Rosson.
THE UNINVITED, Paramount. Charles Lang.
THE WHITE CLIFFS OF DOVER, Metro-Goldwyn-Mayer. George Folsey.

(Color)
COVER GIRL, Columbia. Rudy Mate and Allen M. Davey.
HOME IN INDIANA, 20th Century-Fox. Edward Cronjager.
KISMET, Metro-Goldwyn-Mayer. Charles Rosher.
LADY IN THE DARK, Paramount. Ray Rennahan.
MEET ME IN ST. LOUIS, Metro-Goldwyn-Mayer. George Folsey.
*WILSON, 20th Century-Fox. Leon Shamroy.

1945 Eighteenth Year

(Black-and-White)
THE KEYS OF THE KINGDOM, 20th Century-Fox. Arthur Miller.
THE LOST WEEKEND, Paramount. John F. Seitz.
MILDRED PIERCE, Warner Bros. Ernest Haller.
*THE PICTURE OF DORIAN GRAY, Metro-Goldwyn-Mayer. Harry Stradling.
SPELLBOUND, Selznick, UA. George Barnes.

*Denotes winner

Award Nominations and Winners
CINEMATOGRAPHY

1945 Eighteenth Year (Continued)

(Color)
ANCHORS AWEIGH, Metro-Goldwyn-Mayer. Robert Planck and Charles Boyle.
*LEAVE HER TO HEAVEN, 20th Century-Fox. Leon Shamroy.
NATIONAL VELVET, Metro-Goldwyn-Mayer. Leonard Smith.
A SONG TO REMEMBER, Columbia. Tony Gaudio and Allen M. Davey.
THE SPANISH MAIN, RKO Radio. George Barnes.

1946 Nineteenth Year

(Black-and-White)
*ANNA AND THE KING OF SIAM, 20th Century-Fox. Arthur Miller.
THE GREEN YEARS, Metro-Goldwyn-Mayer. George Folsey.

(Color)
THE JOLSON STORY, Columbia. Joseph Walker.
*THE YEARLING, Metro-Goldwyn-Mayer. Charles Rosher, Leonard Smith and Arthur Arling.

1947 Twentieth Year

(Black-and-White)
THE GHOST AND MRS. MUIR, 20th Century-Fox. Charles Lang, Jr.
*GREAT EXPECTATIONS, Rank-Cineguild, U-I (British). Guy Green.
GREEN DOLPHIN STREET, Metro-Goldwyn-Mayer. George Folsey.

(Color)
*BLACK NARCISSUS, Rank-Archers, U-I (British). Jack Cardiff.
LIFE WITH FATHER, Warner Bros. Peverell Marley and William V. Skall.
MOTHER WORE TIGHTS, 20th Century-Fox. Harry Jackson.

1948 Twenty-first Year

(Black-and-White)
A FOREIGN AFFAIR, Paramount. Charles B. Lang, Jr.
I REMEMBER MAMA, RKO Radio. Nicholas Musuraca.
JOHNNY BELINDA, Warner Bros. Ted McCord.
*THE NAKED CITY, Hellinger, U-I. William Daniels.
PORTRAIT OF JENNIE, The Selznick Studio. Joseph August.

(Color)
GREEN GRASS OF WYOMING, 20th Century-Fox. Charles G. Clarke.
*JOAN OF ARC, Sierra Pictures, RKO Radio. Joseph Valentine, William V. Skall and Winton Hoch.
THE LOVES OF CARMEN, Beckworth Corporation, Columbia. William Snyder.
THE THREE MUSKETEERS, Metro-Goldwyn-Mayer. Robert Planck.

*Denotes winner

1949 Twenty-second Year

(Black-and-White)
*BATTLEGROUND, Metro-Goldwyn-Mayer. Paul C. Vogel.
CHAMPION, Screen Plays Corp., UA. Frank Planer.
COME TO THE STABLE, 20th Century-Fox. Joseph LaShelle.
THE HEIRESS, Paramount. Leo Tover.
PRINCE OF FOXES, 20th Century-Fox. Leon Shamroy.

(Color)
THE BARKLEYS OF BROADWAY, Metro-Goldwyn-Mayer. Harry Stradling.
JOLSON SINGS AGAIN, Columbia. William Snyder.
LITTLE WOMEN, Metro-Goldwyn-Mayer. Robert Planck and Charles Schoenbaum.
SAND, 20th Century-Fox. Charles G. Clarke.
*SHE WORE A YELLOW RIBBON, Argosy, RKO Radio. Winton Hoch.

1950 Twenty-third Year

(Black-and-White)
ALL ABOUT EVE, 20th Century-Fox. Milton Krasner.
THE ASPHALT JUNGLE, Metro-Goldwyn-Mayer. Harold Rosson.
THE FURIES, Wallis, Paramount. Victor Milner.
SUNSET BOULEVARD, Paramount. John F. Seitz.
*THE THIRD MAN, Selznick-London Films, SRO (British). Robert Krasker.

(Color)
ANNIE GET YOUR GUN, Metro-Goldwyn-Mayer. Charles Rosher.
BROKEN ARROW, 20th Century-Fox. Ernest Palmer.
THE FLAME AND THE ARROW, Norma-F.R., Warner Bros. Ernest Haller.
*KING SOLOMON'S MINES, Metro-Goldwyn-Mayer. Robert Surtees.
SAMSON AND DELILAH, DeMille, Paramount. George Barnes.

1951 Twenty-fourth Year

(Black-and-White)
DEATH OF A SALESMAN, Kramer, Columbia. Frank Planer.
THE FROGMEN, 20th Century-Fox. Norbert Brodine.
*A PLACE IN THE SUN, Paramount. William C. Mellor.
STRANGERS ON A TRAIN, Warner Bros. Robert Burks.
A STREETCAR NAMED DESIRE, Charles K. Feldman Group Prods., Warner Bros Harry Stradling.

(Color)
*AN AMERICAN IN PARIS, Metro-Goldwyn-Mayer. Alfred Gilks; Ballet photographed by John Alton.
DAVID AND BATHSHEBA, 20th Century-Fox. Leon Shamroy.
QUO VADIS, Metro-Goldwyn-Mayer. Robert Surtees and William V. Skall.
SHOW BOAT, Metro-Goldwyn-Mayer. Charles Rosher.
WHEN WORLDS COLLIDE, Paramount. John F. Seitz and W. Howard Greene.

*Denotes winner

Award Nominations and Winners
CINEMATOGRAPHY

1952 Twenty-fifth Year

(Black-and-White)
*THE BAD AND THE BEAUTIFUL, Metro-Goldwyn-Mayer. Robert Surtees.
THE BIG SKY, Winchester, RKO Radio. Russell Harlan.
MY COUSIN RACHEL, 20th Century-Fox. Joseph LaShelle.
NAVAJO, Bartlett-Foster, Lippert. Virgil E. Miller.
SUDDEN FEAR, Joseph Kaufman, RKO Radio. Charles B. Lang, Jr.

(Color)
HANS CHRISTIAN ANDERSEN, Goldwyn, RKO Radio. Harry Stradling.
IVANHOE, Metro-Goldwyn-Mayer. F. A. Young.
MILLION DOLLAR MERMAID, Metro-Goldwyn-Mayer. George J. Folsey.
*THE QUIET MAN, Argosy, Republic. Winton C. Hoch and Archie Stout.
THE SNOWS OF KILIMANJARO, 20th Century-Fox. Leon Shamroy.

1953 Twenty-sixth Year

(Black-and-White)
THE FOUR POSTER, Kramer, Columbia. Hal Mohr.
*FROM HERE TO ETERNITY, Columbia. Burnett Guffey.
JULIUS CAESAR, Metro-Goldwyn-Mayer. Joseph Ruttenberg.
MARTIN LUTHER, Louis de Rochemont Associates. Joseph C. Brun.
ROMAN HOLIDAY, Paramount. Frank Planer and Henry Alekan.

(Color)
ALL THE BROTHERS WERE VALIANT, Metro-Goldwyn-Mayer. George Folsey.
BENEATH THE TWELVE-MILE REEF, 20th Century-Fox. Edward Cronjager.
LILI, Metro-Goldwyn-Mayer. Robert Planck.
THE ROBE, 20th Century-Fox. Leon Shamroy.
*SHANE, Paramount. Loyal Griggs.

1954 Twenty-seventh Year

(Black-and-White)
THE COUNTRY GIRL, Perlberg-Seaton, Paramount. John F. Warren.
EXECUTIVE SUITE, Metro-Goldwyn-Mayer. George Folsey.
*ON THE WATERFRONT, Horizon-American Corp., Columbia. Boris Kaufman.
ROGUE COP, Metro-Goldwyn-Mayer. John Seitz.
SABRINA, Paramount. Charles Lang, Jr.

(Color)
THE EGYPTIAN, 20th Century-Fox. Leon Shamroy.
REAR WINDOW, Patron Inc., Paramount. Robert Burks.
SEVEN BRIDES FOR SEVEN BROTHERS, Metro-Goldwyn-Mayer. George Folsey.
THE SILVER CHALICE, A Victor Saville Prod., Warner Bros. William V. Skall.
*THREE COINS IN THE FOUNTAIN, 20th Century-Fox. Milton Krasner.

*Denotes winner

Award Nominations and Winners
CINEMATOGRAPHY

1955 Twenty-eighth Year

(Black-and-White)
BLACKBOARD JUNGLE, Metro-Goldwyn-Mayer. Russell Harlan.
I'LL CRY TOMORROW, Metro-Goldwyn-Mayer. Arthur E. Arling.
MARTY, Hecht and Lancaster's Steven Prods., UA. Joseph LaShelle.
QUEEN BEE, Columbia. Charles Lang.
*THE ROSE TATTOO, Hal Wallis, Paramount. James Wong Howe.

(Color)
GUYS AND DOLLS, Samuel Goldwyn Prods., Inc., M-G-M. Harry Stradling.
LOVE IS A MANY-SPLENDORED THING, 20th Century-Fox. Leon Shamroy.
A MAN CALLED PETER, 20th Century-Fox. Harold Lipstein.
OKLAHOMA!, Rodgers & Hammerstein Pictures, Inc., Magna Theatre Corp.
Robert Surtees.
*TO CATCH A THIEF, Paramount. Robert Burks.

1956 Twenty-ninth Year

(Black-and-White)
BABY DOLL, A Newtown Prod., Warner Bros. Boris Kaufman.
THE BAD SEED, Warner Bros. Hal Rosson.
THE HARDER THEY FALL, Columbia. Burnett Guffey.
*SOMEBODY UP THERE LIKES ME, Metro-Goldwyn-Mayer. Joseph Ruttenberg.
STAGECOACH TO FURY, Regal Films, Inc. Prod., 20th Century-Fox.
Walter Strenge.

(Color)
*AROUND THE WORLD IN 80 DAYS, The Michael Todd Co., Inc., UA.
Lionel Lindon.
THE EDDY DUCHIN STORY, Columbia. Harry Stradling.
THE KING AND I, 20th Century-Fox. Leon Shamroy.
THE TEN COMMANDMENTS, Motion Picture Assoc., Paramount. Loyal Griggs.
WAR AND PEACE, A Ponti-De Laurentiis Prod., Paramount (Italo-American).
Jack Cardiff.

1957 Thirtieth Year

NOTE: Rules changed this year to One Award for Cinematography instead of separate Awards for Black-and-White and Color.

AN AFFAIR TO REMEMBER, Jerry Wald Prods., Inc., 20th Century-Fox.
Milton Krasner.
*THE BRIDGE ON THE RIVER KWAI, A Horizon Picture, Columbia.
Jack Hildyard.
FUNNY FACE, Paramount. Ray June.
PEYTON PLACE, Jerry Wald Prods., Inc., 20th Century-Fox.
William Mellor.
SAYONARA, William Goetz Prod., Warner Bros. Ellsworth Fredericks.

*Denotes winner

Award Nominations and Winners
CINEMATOGRAPHY

1958 Thirty-first Year

NOTE: Rules changed this year to Two Awards for Cinematography: One for Black-and-White and one for Color.

(Black-and-White)
*THE DEFIANT ONES, Stanley Kramer, UA. Sam Leavitt.
DESIRE UNDER THE ELMS, Don Hartman, Paramount. Daniel L. Fapp.
I WANT TO LIVE!, Figaro, Inc., UA. Lionel Lindon.
SEPARATE TABLES, Clifton Prods., Inc., UA. Charles Lang, Jr.
THE YOUNG LIONS, 20th Century-Fox. Joe MacDonald.

(Color)
AUNTIE MAME, Warner Bros. Harry Stradling, Sr.
CAT ON A HOT TIN ROOF, Avon Prods., Inc., M-G-M. William Daniels.
*GIGI, Arthur Freed Prods., Inc., M-G-M. Joseph Ruttenberg.
THE OLD MAN AND THE SEA, Leland Hayward, Warner Bros. James Wong Howe.
SOUTH PACIFIC, South Pacific Enterprises, Inc., Magna Theatre Corp. Leon Shamroy.

1959 Thirty-second Year

(Black-and-White)
ANATOMY OF A MURDER, Otto Preminger, Columbia. Sam Leavitt.
CAREER, Hal Wallis Prods., Paramount. Joseph LaShelle.
*THE DIARY OF ANNE FRANK, 20th Century-Fox. William C. Mellor.
SOME LIKE IT HOT, Ashton Prods. & The Mirisch Co., UA. Charles Lang, Jr.
THE YOUNG PHILADELPHIANS, Warner Bros. Harry Stradling, Sr.

(Color)
*BEN-HUR, Metro-Goldwyn-Mayer. Robert L. Surtees.
THE BIG FISHERMAN, Rowland V. Lee Prods., Buena Vista Film Dist. Co., Inc. Lee Garmes.
THE FIVE PENNIES, Dena Prod., Paramount. Daniel L. Fapp.
THE NUN'S STORY, Warner Bros. Franz Planer.
PORGY AND BESS, Samuel Goldwyn Prods., Columbia. Leon Shamroy.

1960 Thirty-third Year

(Black-and-White)
THE APARTMENT, The Mirisch Co., UA. Joseph LaShelle.
THE FACTS OF LIFE, Panama & Frank Prod., UA. Charles B. Lang, Jr.
INHERIT THE WIND, Stanley Kramer Prod., UA. Ernest Laszlo.
PSYCHO, Alfred J. Hitchcock Prods., Paramount. John L. Russell.
*SONS AND LOVERS, Company of Artists, Inc., 20th Century-Fox. Freddie Francis.

1962 Thirty-third Year (Continued)

(Color)
THE ALAMO, Batjac Prod., UA. William H. Clothier.
BUTTERFIELD 8, Afton-Linebrook Prod., M-G-M. Joseph Ruttenberg and Charles Harten.
EXODUS, Carlyle-Alpina S. A. Prod., UA. Sam Leavitt.
PEPE, G. S.-Posa Films International Prod., Columbia. Joe MacDonald.
*SPARTACUS, Bryna Prods., Inc., U-I. Russell Metty.

1961 Thirty-fourth Year

(Black-and-White)
THE ABSENT MINDED PROFESSOR, Walt Disney Prods., Buena Vista Distribution Co., Inc. Edward Colman.
THE CHILDREN'S HOUR, Mirisch-Worldwide Prod., UA. Franz F. Planer.
*THE HUSTLER, Robert Rossen Prod., 20th Century-Fox. Eugen Shuftan.
JUDGMENT AT NUREMBERG, Stanley Kramer Prod., UA. Ernest Laszlo.
ONE, TWO, THREE, Mirisch Company, Inc. in association with Pyramid Prods., A. G., UA. Daniel L. Fapp.

(Color)
FANNY, Mansfield Prod., Warner Bros. Jack Cardiff.
FLOWER DRUM SONG, Universal-International-Ross Hunter Prod. in association with Joseph Fields, U-I. Russell Metty.
A MAJORITY OF ONE, Warner Bros. Harry Stradling, Sr.
ONE-EYED JACKS, Pennebaker Prod., Paramount. Charles Lang, Jr.
*WEST SIDE STORY, Mirisch Pictures, Inc. and B and P Enterprises Inc., UA. Daniel L. Fapp.

1962 Thirty-fifth Year

(Black-and-White)
BIRD MAN OF ALCATRAZ, Harold Hecht Prod., UA. Burnett Guffey.
*THE LONGEST DAY, Darryl F. Zanuck Prods., 20th Century-Fox. Jean Bourgoin and Walter Wottitz.
TO KILL A MOCKINGBIRD, Universal-International-Pakula-Mulligan-Brentwood Prod., U-I. Russell Harlan.
TWO FOR THE SEESAW, Mirisch-Argyle-Talbot Prod. in association with Seven Arts Prods., UA. Ted McCord.
WHAT EVER HAPPENED TO BABY JANE?, Seven Arts-Associates & Aldrich Co. Prod., Warner Bros. Ernest Haller.

(Color)
GYPSY, Warner Bros. Harry Stradling, Sr.
HATARI!, Malabar Prods., Paramount. Russell Harlan.
*LAWRENCE OF ARABIA, Horizon Pictures (G.B.), Ltd.-Sam Spiegel-David Lean Prod., Columbia. Fred A. Young.
MUTINY ON THE BOUNTY, Arcola Prod., M-G-M. Robert L. Surtees.
THE WONDERFUL WORLD OF THE BROTHERS GRIMM, Metro-Goldwyn-Mayer & Cinerama. Paul C. Vogel.

*Denotes winner

Award Nominations and Winners
CINEMATOGRAPHY

1963 Thirty-sixth Year

(Black-and-White)
THE BALCONY, Walter Reade-Sterling-Allen-Hodgdon Prod., Walter Reade-Sterling-Continental Dist. George Folsey.
THE CARETAKERS, Hall Bartlett Prod., UA. Lucien Ballard.
*HUD, Salem-Dover Prod., Paramount. James Wong Howe.
LILIES OF THE FIELD, Rainbow Prod., UA. Ernest Haller.
LOVE WITH THE PROPER STRANGER, Boardwalk-Rona Prod., Paramount. Milton Krasner.

(Color)
THE CARDINAL, Gamma Prod., Columbia. Leon Shamroy.
*CLEOPATRA, 20th Century-Fox Ltd.-MCL Films S.A.-WALWA Films S.A. Prod., 20th Century-Fox. Leon Shamroy.
HOW THE WEST WAS WON, Metro-Goldwyn-Mayer & Cinerama. William H. Daniels, Milton Krasner, Charles Lang, Jr. and Joseph LaShelle.
IRMA LA DOUCE, Mirisch-Phalanx Prod., UA. Joseph LaShelle.
IT'S A MAD, MAD, MAD, MAD WORLD, Casey Prod., UA. Ernest Laszlo.

1964 Thirty-seventh Year

(Black-and-White)
THE AMERICANIZATION OF EMILY, Martin Ransohoff Prod., M-G-M. Philip H. Lathrop.
FATE IS THE HUNTER, Arcola Pictures Prod., 20th Century-Fox. Milton Krasner.
HUSH...HUSH, SWEET CHARLOTTE, Associates & Aldrich Prod., 20th Century-Fox. Joseph Biroc.
THE NIGHT OF THE IGUANA, Seven Arts Prod., M-G-M. Gabriel Figueroa.
*ZORBA THE GREEK, Rochley, Ltd. Prod., International Classics. Walter Lassally.

(Color)
BECKET, Hal Wallis Prod., Paramount. Geoffrey Unsworth.
CHEYENNE AUTUMN, John Ford-Bernard Smith Prod., Warner Bros. William H. Clothier.
MARY POPPINS, Walt Disney Prods. Edward Colman.
*MY FAIR LADY, Warner Bros. Harry Stradling.
THE UNSINKABLE MOLLY BROWN, Marten Prod., M-G-M. Daniel L. Fapp.

*Denotes winner

1965 Thirty-eighth Year

(Black-and-White)
IN HARM'S WAY, Sigma Prods., Paramount. Loyal Griggs.
KING RAT, Coleytown Prod., Columbia. Burnett Guffey.
MORITURI, Arcola-Colony Prod., 20th Century-Fox. Conrad Hall.
A PATCH OF BLUE, Pandro S. Berman-Guy Green Prod., M-G-M.
Robert Burks.
*SHIP OF FOOLS. Columbia. Ernest Laszlo.

(Color)
THE AGONY AND THE ECSTASY, International Classics Prod.,
20th Century-Fox. Leon Shamroy.
*DOCTOR ZHIVAGO, Sostar S.A.-Metro-Goldwyn-Mayer British Studios,
Ltd. Prod., M-G-M. Freddie Young.
THE GREAT RACE, Patricia-Jalem-Reynard Prod., Warner Bros.
Russell Harlan.
THE GREATEST STORY EVER TOLD, George Stevens Prod., United Artists.
William C. Mellor and Loyal Griggs.
THE SOUND OF MUSIC, Argyle Enterprises Prod., 20th Century-Fox.
Ted McCord.

1966 Thirty-ninth Year

(Black-and-White)
THE FORTUNE COOKIE, Phalanx-Jalem-Mirisch Corp. of Delaware Prod., U.A.
Joseph LaShelle.
GEORGY GIRL, Everglades Prods., Ltd., Columbia. Ken Higgins.
IS PARIS BURNING?, Transcontinental Films-Marianne Prod., Paramount.
Marcel Grignon.
SECONDS, The Seconds Company, Paramount. James Wong Howe.
*WHO'S AFRAID OF VIRGINIA WOOLF?, Chenault Prod., Warner Bros.
Haskell Wexler.

(Color)
FANTASTIC VOYAGE, 20th Century-Fox. Ernest Laszlo.
HAWAII, Mirisch Corp. of Delaware Prod., U.A. Russell Harlan.
*A MAN FOR ALL SEASONS, Highland Films, Ltd. Prod., Columbia.
Ted Moore.
THE PROFESSIONALS, Pax Enterprises Prod., Columbia. Conrad Hall.
THE SAND PEBBLES, Argyle-Solar Prod., 20th Century-Fox.
Joseph MacDonald.

*Denotes winner

Award Nominations and Winners
CINEMATOGRAPHY

1967 Fortieth Year

NOTE: Rules changed this year to one Award for Cinematography instead of separate Awards for Black-and-White and Color.

*BONNIE AND CLYDE, Tatira-Hiller Prod., Warner Bros.-Seven Arts. Burnett Guffey.
CAMELOT, Warner Bros.-Seven Arts. Richard H. Kline.
DOCTOR DOLITTLE, Apjac Prods., 20th Century-Fox. Robert Surtees.
THE GRADUATE, Mike Michols-Lawrence Turman Prod., Embassy. Robert Surtees.
IN COLD BLOOD, Pax Enterprises Prod., Columbia. Conrad Hall.

1968 Forty-first Year

*The Franco Zeffirelli production of ROMEO & JULIET, B.H.E. Film-Verona Prod.-Dino De Laurentiis Cinematografica Prod., Paramount. Pasqualino De Santis.
FUNNY GIRL, Rastar Prods., Columbia. Harry Stradling.
ICE STATION ZEBRA, Filmways Prod., Metro-Goldwyn-Mayer. Daniel L. Fapp.
OLIVER!, Romulus Films, Columbia. Oswald Morris.
STAR!, Robert Wise Prod., 20th Century-Fox. Ernest Laszlo.

1969 Forty-second Year

ANNE OF THE THOUSAND DAYS, Hal B. Wallis-Universal Pictures, Ltd. Prod., Universal. Arthur Ibbetson.
BOB & CAROL & TED & ALICE, Frankovich Prods., Columbia. Charles B. Lang.
*BUTCH CASSIDY AND THE SUNDANCE KID, George Roy Hill-Paul Monash Prod., 20th Century-Fox. Conrad Hall.
HELLO, DOLLY!, Chenault Prods., 20th Century-Fox. Harry Stradling.
MAROONED, Frankovich-Sturges Prod., Columbia., Daniel Fapp.

1970 Forty-third Year

AIRPORT, Ross Hunter-Universal Prod., Universal. Ernest Laszlo.
PATTON, 20th Century-Fox. Fred Koenekamp.
*RYAN'S DAUGHTER, Faraway Prods., Metro-Goldwyn-Mayer. Freddie Young.
TORA! TORA! TORA!, 20th Century-Fox. Charles F. Wheeler, Osami Furuya, Sinsaku Himeda and Masamichi Satoh.
WOMEN IN LOVE, Larry Kramer-Martin Rosen Prod., United Artists. Billy Williams.

*Denotes winner

1971 Forty-fourth Year

*FIDDLER ON THE ROOF, Mirisch-Cartier Prods., UA.
Oswald Morris.
THE FRENCH CONNECTION, A Philip D'Antoni Prod. in association with Schine-Moore Prods., 20th Century-Fox.
Owen Roizman.
THE LAST PICTURE SHOW, BBS Prods., Columbia.
Robert Surtees.
NICHOLAS AND ALEXANDRA, A Horizon Pictures Prod., Columbia.
Freddie Young.
SUMMER OF '42, A Robert Mulligan-Richard Alan Roth Prod., Warner Bros
Robert Surtees.

1972 Forty-fifth Year

BUTTERFLIES ARE FREE, Frankovich Productions, Columbia.
Charles B. Lang.
*CABARET, An ABC Pictures Production, Allied Artists.
Geoffrey Unsworth.
THE POSEIDON ADVENTURE, An Irwin Allen Production, 20th Century-Fox.
Harold E. Stine.
"1776", A Jack L. Warner Production, Columbia.
Harry Stradling, Jr.
TRAVELS WITH MY AUNT, Robert Fryer Productions, Metro-Goldwyn-Mayer.
Douglas Slocombe.

1973 Forty-sixth Year

*CRIES AND WHISPERS, A Svenska Filminstitutet-Cinematograph AB Prod., New World Pictures.
Sven Nykvist.
THE EXORCIST, Hoya Prods., Warner Bros.
Owen Roizman.
JONATHAN LIVINGSTON SEAGULL, A JLS Limited Partnership Prod., Paramount.
Jack Couffer.
THE STING, A Universal-Bill/Phillips-George Roy Hill Film Prod., Zanuck/Brown Presentation, Universal.
Robert Surtees.
THE WAY WE WERE, Rastar Prods., Columbia.
Harry Stradling, Jr.

*Denotes winner

Award Nominations and Winners
CINEMATOGRAPHY

1974 Forty-seventh Year

CHINATOWN, A Robert Evans Prod., Paramount.
John A. Alonzo.
EARTHQUAKE, A Universal-Mark Robson-Filmakers Group Prod., Universal.
Philip Lathrop.
LENNY, A Marvin Worth Prod., United Artists.
Bruce Surtees.
MURDER ON THE ORIENT EXPRESS, A G.W. Films, Ltd. Prod., Paramount.
Geoffrey Unsworth.
*THE TOWERING INFERNO, An Irwin Allen Prod., 20th Century-Fox/Warner Bros.
Fred Koenekamp and Joseph Biroc.

1975 Forty-eighth Year

*BARRY LYNDON, A Hawk Films, Ltd. Production, Warner Bros.
John Alcott.
THE DAY OF THE LOCUST, A Jerome Hellman Production, Paramount.
Conrad Hall.
FUNNY LADY, A Rastar Pictures Production, Columbia.
James Wong Howe.
THE HINDENBURG, A Robert Wise-Filmakers Group-Universal Production, Universal.
Robert Surtees.
ONE FLEW OVER THE CUCKOO'S NEST, A Fantasy Films Production, United Artists.
Haskell Wexler and Bill Butler.

1976 Forty-ninth Year

*BOUND FOR GLORY, The Bound For Glory Company Production, United Artists.
Haskell Wexler.
KING KONG, A Dino De Laurentiis Production, Paramount.
Richard H. Kline
LOGAN'S RUN, A Saul David Production, Metro-Goldwyn-Mayer.
Ernest Laszlo.
NETWORK, A Howard Gottfried/Paddy Chayefsky Production, Metro-Goldwyn-Mayer/United Artists.
Owen Roizman.
A STAR IS BORN, A Barwood/Jon Peters Production, First Artists Presentation, Warner Bros.
Robert Surtees.

* Denotes winner

1977 Fiftieth Year

*CLOSE ENCOUNTERS OF THE THIRD KIND, A Julia Phillips/Michael Phillips-Steven Spielberg Film Production, Columbia.
Vilmos Zsigmond.
ISLANDS IN THE STREAM, A Peter Bart/Max Palevsky Production, Paramount.
Fred J. Koenekamp.
JULIA, A Twentieth Century-Fox Production, Twentieth Century-Fox.
Douglas Slocombe.
LOOKING FOR MR. GOODBAR, A Freddie Fields Production, Paramount.
William A. Fraker.
THE TURNING POINT, Hera Productions, Twentieth Century-Fox.
Robert Surtees.

1978 Fifty-first Year

*DAYS OF HEAVEN, An OP Production, Paramount.
Nestor Almendros.
THE DEER HUNTER, An EMI Films/Michael Cimino Film Production, Universal.
Vilmos Zsigmond.
HEAVEN CAN WAIT, Dogwood Productions, Paramount.
William A. Fraker.
SAME TIME, NEXT YEAR, A Walter Mirisch-Robert Mulligan Production, Mirisch Corporation/Universal Pictures Presentation, Universal.
Robert Surtees.
THE WIZ, A Motown/Universal Pictures Production, Universal.
Oswald Morris.

1979 Fifty-second Year

ALL THAT JAZZ, A Columbia/Twentieth Century-Fox Production, Twentieth Century-Fox.
Giuseppe Rotunno.
*APOCALYPSE NOW, An Omni Zoetrope Production, United Artists.
Vittorio Storaro.
THE BLACK HOLE, Walt Disney Productions, Buena Vista Distribution Co.
Frank Phillips.
KRAMER VS. KRAMER, Stanley Jaffe Productions, Columbia.
Nestor Almendros.
1941, An A-Team/Steven Spielberg Film Production, Universal-Columbia Presentation, Universal.
William A. Fraker.

*Denotes winner

Award Nominations and Winners
CINEMATOGRAPHY

1980 Fifty-third Year

THE BLUE LAGOON, A Columbia Pictures Production, Columbia.
Nestor Almendros.
COAL MINER'S DAUGHTER, A Bernard Schwartz-Universal Pictures Production, Universal.
Ralf D. Bode.
THE FORMULA, A Metro-Goldwyn-Mayer Production, Metro-Goldwyn-Mayer.
James Crabe.
RAGING BULL, A Robert Chartoff-Irwin Winkler Production, United Artists.
Michael Chapman.
*TESS, A Renn-Burrill Co-production with the participation of the Societe Francaise de Production (S.F.P.), Columbia.
Geoffrey Unsworth and Ghislain Cloquet.

1981 Fifty-fourth Year

EXCALIBUR, An Orion Pictures Production, Orion.
Alex Thomson.
ON GOLDEN POND, An ITC Films/IPC Films Production, Universal.
Billy Williams.
RAGTIME, A Ragtime Production, Paramount.
Miroslav Ondricek.
RAIDERS OF THE LOST ARK, A Lucasfilm Production, Paramount.
Douglas Slocombe.
*REDS, A J.R.S. Production, Paramount.
Vittorio Storaro.

1982 Fifty-fifth Year

DAS BOOT, A Bavaria Atelier GmbH Production, Columbia/PSO.
Jost Vacano.
E.T. THE EXTRA-TERRESTRIAL, A Universal Pictures Production, Universal.
Allen Daviau.
*GANDHI, An Indo-British Films Production, Columbia.
Billy Williams and Ronnie Taylor.
SOPHIE'S CHOICE, An ITC Entertainment Presentation of a Pakula-Barish Production, Universal/A.F.D.
Nestor Almendros.
TOOTSIE, A Mirage/Punch Production, Columbia.
Owen Roizman.

*Denotes Winner

1983 Fifty-sixth Year

* FANNY & ALEXANDER, a Cinematograph AB for the Swedish Film Institute/the Swedish Television SVT 1, Sweden/Gaumont, France/Personafilm and Tobis Filmkunst, BRD Production, Embassy.
Sven Nykvist.
FLASHDANCE, a Polygram Pictures Production, Paramount.
Don Peterman.
THE RIGHT STUFF, a Robert Chartoff-Irwin Winkler Production, the Ladd Company through Warner Bros.
Caleb Deschanel.
WARGAMES, a United Artists Presentation of a Leonard Goldberg Production, MGM/UA.
William A. Fraker.
ZELIG, a Jack Rollins and Charles H. Joffe Production, Orion/Warner Bros.
Gordon Willis.

1984 Fifty-seventh Year

AMADEUS, a Saul Zaentz Company Production, Orion.
Miroslav Ondricek.
* THE KILLING FIELDS, an Enigma Production, Warner Bros.
Chris Menges.
THE NATURAL, a Tri-Star Pictures Production, Tri-Star.
Caleb Deschanel.
A PASSAGE TO INDIA, a G.W. Films Limited Production, Columbia.
Ernest Day.
THE RIVER, a Universal Pictures Production, Universal.
Vilmos Zsigmond.

1985 Fifty-eighth Year

THE COLOR PURPLE, a Warner Bros. Production, Warner Bros.
Allen Daviau.
MURPHY'S ROMANCE, a Fogwood Films Production, Columbia.
William A. Fraker.
* OUT OF AFRICA, a Universal Pictures Limited Production, Universal.
David Watkin.
RAN, a Greenwich Film/Nippon Herald Films/Herald Ace Production, Orion Classics.
Takao Saito, Masaharu Ueda and Asakazu Nakai.
WITNESS, an Edward S. Feldman Production, Paramount.
John Seale.

* Denotes Winner

Award Nominations and Winners
CINEMATOGRAPHY

1986 Fifty-ninth Year

* THE MISSION, a Warner Bros./Goldcrest and Kingsmere Production, Warner Bros.
Chris Menges.
PEGGY SUE GOT MARRIED, a Rastar Production, Tri-Star.
Jordan Cronenweth.
PLATOON, a Hemdale Film Production, Orion.
Robert Richardson.
A ROOM WITH A VIEW, a Merchant Ivory Production for Goldcrest and Cinecom, Cinecom Pictures.
Tony Pierce-Roberts.
STAR TREK IV: THE VOYAGE HOME, a Harve Bennett Production, Paramount.
Don Peterman.

1987 Sixtieth Year

BROADCAST NEWS, a 20th Century Fox Production, 20th Century Fox.
Michael Ballhaus.
* THE LAST EMPEROR, a Hemdale Film Production, Columbia.
Vittorio Storaro.
HOPE AND GLORY, a Davros Production Services Ltd. Production, Columbia.
Philippe Rousselot.
MATEWAN, a Red Dog Films Production, Cinecom Pictures.
Haskell Wexler.
EMPIRE OF THE SUN, a Warner Bros. Production, Warner Bros.
Allen Daviau.

1988 Sixty-first Year

* MISSISSIPPI BURNING, a Frederick Zollo Production, Orion.
Peter Biziou.
RAIN MAIN, a Guber-Peters Company Production, United Artists.
John Seale.
TEQUILA SUNRISE, a Mount Company Production, Warner Bros.
Conrad L. Hall.
THE UNBEARABLE LIGHTNESS OF BEING, a Saul Zaentz Company Production, Orion.
Sven Nykvist.
WHO FRAMED ROGER RABBIT, an Amblin Entertainment and Touchstone Pictures Production, Buena Vista.
Dean Cundey.

* Denotes Winner

Mr. KASTENMEIER. I take it Mr. Cooper also agrees with you, Mr. Fraker?

Mr. FRAKER. Yes, Mr. Cooperman, yes.

Mr. KASTENMEIER. Cooperman. Thank you, sir.

Mr. Stanley, you speak with a considerable amount of conviction and almost outrage. Is this newly found outrage or have you, over the years, felt as a cinematographer that——

Mr. STANLEY. I would say over the years you accumulate these things. You know, the numerous times I have invited a neighbor's attention to watch a film that is coming on television that I had performed and find out that it has been truncated or cut apart. In fact, some of the ideal parts that you are looking forward to no longer exist, this makes my insides feel scurvy-stricken.

Mr. KASTENMEIER. You represent an organization, a union of 2,600 members. Have you not tried to deal with this in collective bargaining over the years? I assume your other members feel as you do about this, at least many of them.

Mr. STANLEY. Collective bargaining is really a difficult thing. I mean, you have to say that first. And there are so many other issues that come into this thing. This is a thing we are trying to deal with in the most effective manner we hope to deal with it. I mean, bringing it to your attention is one of the most obvious ones.

Mr. KASTENMEIER. Sure, I appreciate that.

Mr. STANLEY. Because when you argue with moral issues in a collective bargaining agreement, it is the first thing that somebody wants to violate on the basis of bringing up the money.

Mr. KASTENMEIER. Well, would it be fair to say that while the matter may have been raised in collective bargaining, it has never been raised successfully?

Mr. STANLEY. Yes, that is true.

Mr. KASTENMEIER. How would you describe your organization as distinguished from the ASC? What is the difference? They have said they are not a union and they are not a guild. I am not sure what they are. What do you consider the ASC?

Mr. STANLEY. Well, they go back a long time, very much the way we did. I would say they started out primarily as an elitist organization. They were the little group that sort of felt that they distinguished themselves as being better than most. And I do not want to get into an argument with them on this, but essentially the guild represents 2,600 people in all facets of the motion picture and television industry, including 99 percent of ASC's 175 members.

Clearly, it is not necessary for a cameraperson to be a member of the ASC to know that the producers are destroying his or her art.

Mr. KASTENMEIER. Well, the fact is, you are a union and you represent not only those very special people in cinematography, but also represent the operators, assistants, still photographers and a lot of other people. Are most ASC members also members of your union?

Mr. STANLEY. Yes.

Mr. KASTENMEIER. They probably are.

Mr. STANLEY. Yes, I am a member of the ASC.

Mr. KASTENMEIER. You are a member of the ASC?

Mr. STANLEY. Yes. And most everybody in the ASC is a member of the union.

Mr. KASTENMEIER. Mr. Fraker, you may want to comment, too. The reason I ask is, so that there is a common understanding. We know what you are not. We do not know precisely what the ASC is. I gather it is an organization that, as you said, is neither a union nor a guild precisely, which recognizes those cinematographers who have achieved something and who have a special reputation in the film industry; is that right?

Mr. FRAKER. That is partially true, Mr. Chairman. It is actually a fraternal organization, honorary organization and it is comprised of directors of photography. But that is all, that is members of the organization, just directors of photography.

It is not really elitist. It was formed to find a common ground, to get together to discuss what the problems would be that everybody faced, because we all do not face the same problems at the same time. You may be doing a water picture. We may be doing a mountain picture. Somebody else may be doing a desert picture. And we want to say, "Well, what happened and how can we help each other?"

The ASC actually came into being, I think, around 1919 and it took on the auspices of a union during the strike here in Hollywood in 1933. That is where the 1933 came in. And people started to move into the ASC. And at that time, the ASC took in members who were not directors of photography at that time first camera men.

And then once the union came in and was organized, then the ASC went back to its original formation of an honorary fraternal organization.

Mr. KASTENMEIER. How do you qualify new members in your organization?

Mr. FRAKER. Well, they are invited in.

Mr. KASTENMEIER. They are.

Mr. FRAKER. They are invited in and they are interviewed by a membership committee. And their credits and all of that is viewed by a membership committee and it is voted on by the Board.

Mr. FLEMING. Mr. Chairman, Mr. Cooperman is the membership chairman. Maybe he can add to the qualifications.

Mr. KASTENMEIER. Well, I think the explanation is sufficient. In the past, we have looked at this particular question mostly through the eyes of the directors, and to some extent, the screenwriters. And we are learning that there are other people, other creative forces in filmmaking that also have an interest. What about the professional producers and the editors? Would they, in your view, qualify as having a similar interest to your own, in terms of a film, a creative interest, Mr. Fraker?

Mr. FRAKER. I do not believe so. And the reason I say that is, because the responsibilities are different. And I think it has to be determined by the responsibility that you are handed when you take on a project. I mean, if you stop and think about what you see on the screen, it is photographed, and the lights and shadows. Whether you put light on your face when she comes in the door or put her in silhouette changes the mood of that whole shot.

That is the responsibility that you have as a camera man or a creator. And those discussions are worked out with the director mostly. And those decisions are made by just maybe one person,

the cinematographer and/or in collaboration with the director and maybe only the director.

Mr. KASTENMEIER. In a discussion of colorization, I remember seeing an interview of Lawrence Olivier, 4 or 5 years ago, I guess. The interviewer was attributing to him great genius in terms of the cinematographic treatment of the material, whether it was "Macbeth" or "Hamlet," I have forgotten. It was done in black and white. He described the shadows and the grays and how marvelous that film was, and what a genius it was for him to envision that in black and white.

And he went through all this and finally Lawrence Olivier just said, "Well, you know, I really wanted it done in technicolor, but I could not come to terms with it." It was that simple.

Mr. FRAKER. That is probably true, but that is an actor's viewpoint, see. That comes from an actor.

Mr. KASTENMEIER. I am wondering then, who you see as the creators of a film. You say the producers are not really that involved. The editors perform a function, but perhaps not a creative function. Do you include cinematographers, screenwriters and directors? Is that who you think ought to be at the table, so to speak?

Mr. FRAKER. Mr. Chairman, to put it in simple, simple words, I think that once the screen play has been accepted and you give it to a man to make an interpretation of that screen play, and then put into collaboration with another person so they can put it on the screen, I think right there and then, it begins to define what the responsibilities are, and who really are perpetrators of that creative element.

And I think it is very, very simple. I know that when I go on a set, I do not want anybody else to tell me how to approach this whole problem and what the solution to the problem will be because I am the responsible party for that solution. And when we sit there in the dailies and people scream and holler and say it stinks, I am the one that stinks. So, I accept that responsibility.

Mr. KASTENMEIER. Mr. Fraker, this goes to a point that was discussed with the preceding panel, in terms of current practice for you and your colleagues. Are you, today, being asked in terms of cinematography, to frame your scenes with the perspective in mind of reducing those films to VCR and for other media uses? And therefore not to get too much action on the far edges of the wide screen because they are going to have to be either panned or scanned or cut one way or the other?

Mr. FRAKER. Well, it creates a major problem. Yes, is the answer to that. And I will tell you how it is done.

Mr. KASTENMEIER. That would be your responsibility, would it not?

Mr. FRAKER. Yes, exactly, and I will tell you how it is done. And you have different problems. When you shoot on the studio set, you have one problem. When you go out on a natural location you have another problem. We are being told all the time to protect for television, protect for television. While we frame for a 185 mat for the theaters, at the same time, we do not see top and bottom. We protect on the original piece of negatives so that they can later make a transfer to television, so they do not have to pan and scan as much.

That creates problems because sometimes you have a wide angle lens which you need more top and bottom and the top, you have to put a light there because the scene is only eight feet because you are in a practical location. And you say, "Well, I got to protect for television; I cannot use that light." Well, that light may be the only light that is really the source for the whole scene. And so, yes, you do, you absolutely do compromise and you are asked to compromise, sometimes directly and sometimes indirectly.

Mr. KASTENMEIER. Now, of course, we are talking mostly about post-release modifications or alterations of film. But in terms of editing, I take it, it is the producer and director and the film editor who get together and cut the film prior to release. Are you consulted normally in that context or are those the three people who make that decision, the producer, director——

Mr. FRAKER. Yes, except for what Jack brings up for the timing of the final print for the colorization in a sense, I have to use that word, to get the tones right and the color right and so forth for the timing. But, you know, it is a misnomer. The producers actually, and I have to say this, you can say that you want to be there for the timing of the film at the lab to make the colors rights, but there is no way that they are going to pay you for it, number one.

You are on your own time. And people who take pride in their work will show up. I do. I fly from New York to come to Hollywood on a Sunday to time that film so that we can protect ourselves. And a lot of camera men do. You cannot go in and negotiate that in a contract. If that is in, that is the first thing that is stricken out.

It is just written out and automatically you have an agent who deals for you. And I say, "What about timing and so forth. That is out, that is out, that is out." You know, those things, they talk about it, but it does not happen.

Mr. KASTENMEIER. Let me ask just one last question of you, Mr. Stanley. Specifically, in terms of post-release modification of films, as a professional, what are you offended most by? What process? Is it colorization or is it the editing or what is it that you have seen that really has offended you?

Mr. STANLEY. There are so many things, it would be hard to say. I would say on one film, it could be one particular thing. One of the things, I think, that seems most obvious to me is pan and scan. I mean, I remember doing a picture entitled "Hawaii." And we had three actors on the stage that we had set for it and photographed. And I remember seeing it on television and they had lost one actor entirely. I mean, so it was not my film. It was just the way they were going to fit it in there.

So a lot of times these things are done arbitrarily and I understand that, I mean, at the time I am doing it, but I cannot feel happy about it.

Mr. KASTENMEIER. Are either of you, Mr. Fraker or Mr. Stanley, are you aware of new technologies that are likely to cause problems in the future with respect to the modification of films as you have produced them? Are you aware of some emerging technologies? Can you identify any of those that we have not really seen affecting films much yet but might down the road 3 or 5, 10 years?

Mr. FRAKER. I think that problem is going to inherit from the start. I feel that you have a format of 133 for television, approximately 133 for television and we are shooting film for 185 for theatrical release. I think it is inherent that you have that problem no matter what happens.

I think they either expand the television set or else fix the screens in the theater. The only reason we went to 185 years and years ago was because we had what we called the invention or the come of cinemascope, which later moved into panavision, which is a 255 dimension, long and narrow and 185 is what they decided to call a wide screen so they could advertise it. And we came with that format.

Most of the shows that you shoot with do not shoot hard mat 185 which means that in the negative you put a slide in where the negative contacts the gate. And you eliminate the top and bottom of that piece of negative. That is hard mat 185 or hard mat 166, whatever as the frame you are going to use.

What they normally do is you shoot normal academy and you frame all the other things out of those things, so later on when you make transfers to television, which is 133, the square aspect ratio, then there is not the problem of going to scanning. What only comes out, not morally, it comes out with a dollar situation. It just costs x amount of dollars to do that, more money to do that.

Mr. KASTENMEIER. I was just at the Electronics Industry Association meeting in Las Vegas and I asked some of those people why they could not—because monitors are largely used for films—change the ratio. Or at least make some available for people who might have films as released for theatrical production, so they could show them more or less in the original form on their monitors.

But I gather there is no way.

Mr. FRAKER. No, you know, use a different aspect ratio and ground glass in the camera for when you shoot television shows for television directly as opposed to shooting theatrical motion picture release films. They are different formats. So there is an incompatibility that is always going to be there. And I think that is one of the solutions, number one.

And number two, the moral rights, I cannot get involved with dollars and moral rights. Dollars has its own place. And I think they should be looked at, but I do not think that should be a really determined factor at all what has to do with moral rights, personally. I feel that very strongly and moral rights, being an American, that is a moral right.

Mr. KASTENMEIER. Have you spoken of moral rights, let us say, earlier than 1987, 1988? I say that because I do not remember people discussing that as something that they had, at least not in those terms——

Mr. FRAKER. Now, when you say, excuse me——

Mr. KASTENMEIER [continuing]. In terms of creative.

Mr. FRAKER. Yes, when you say "spoken," no, discussed, yes. Yes, we have always talked about it. We have always talked about panning and scanning. We have always talked about it, because I show a lot of pictures in panavision and anamorphic lenses where you have the wide screens, and then transferred to television which we

had no say so. The producer did not ask us to come down and me make a TV transfer for "Paint Your Wagon." No, they did not. It was done. It was done.

I was not asked to come down or informed about it or anything like that. The next thing I know it is out on video. We discussed it and we screamed and hollered but amongst ourselves. We had no place to go. Now we have someplace to go. That makes it great. That makes it marvelous, that somebody will listen to us, somebody who has the power to change this or help us. That is what we need, we need help now.

Mr. KASTENMEIER. Thank you, Mr. Fraker.

Mr. STANLEY. I would like to add one more thing to that, that is, yes, there was discussion. I mean, I was familiar to listening to that kind of a discussion years back. In fact, there was a very, very notable director who expressed it within my sight, Mr. George Stevens. In fact, he was real upset because of the fact that a network had arbitrarily taken a scene, a picture that he had shot, and loaded it up with television commercials, and had, in the process, destroyed the continuity of the film.

Mr. BERMAN. Loaded it up with what?

Mr. STANLEY. Commercials.

Mr. BERMAN. Or commercials.

Mr. STANLEY. TV commercials. And so let us say I was aware of that and privy to that for years, in fact, so much so that when I traveled to European locations on films, I usually went to the local theaters or wherever to watch how things occurred. And I was amazed at watching, when I was in Spain, to do "Camelot," we went to the theater and saw that the theaters in Spain gave you all the commercials. In fact, they did the commercials in the theater and gave you all the commercials right in the beginning.

And once they were over with, they were done with. So whatever film you saw, you saw it untouched. And we thought how wonderful that would be. Wouldn't it be great to come back here with that?

Mr. KASTENMEIER. Mr. Synar.

Mr. SYNAR. Thank you, Mr. Chairman. Mr. Fraker, let me see if I have it correct now. At the table, you want the director, the producer and the cinematographer. Anybody else whose right should be protected? Who should be at the table?

Mr. FRAKER. At the table, I think the director and the cinematographer.

Mr. SYNAR. Not the producer?

Mr. FRAKER. No.

Mr. SYNAR. All right. Now, is it possible to weigh percentagewise the creative contribution of the director versus the cinematographer? In other words, if you two are sitting at the table, should we give the director a 60-percent vote and the cinematographer a 40-percent vote? Should it be 50/50? Should it be 70/30?

Mr. FRAKER. Well, I think it should be 50/50 because it is different responsibilities.

Mr. SYNAR. All right, now do you think it is possible to weigh the creative contribution of $1 million actress versus a cinematographer?

Mr. FRAKER. Definitely. I think the cinematographer is above the million dollar actor.

Mr. SYNAR. In other words——

Mr. STANLEY. He made $1 million because of the cinematographer.

Mr. FRAKER. That is right.

Mr. SYNAR. So a big name actor and their participation in the film does not enhance its ability to be a success more than a cinematographer's contribution.

Mr. FRAKER. No, no, no, let me say that the name you see up on the screen in the marquis is the actor. You see that first.

Mr. SYNAR. So they do have a tremendous creative contribution to it, do they not?

Mr. FRAKER. No, not creative, but they do make a contribution to the film and let us say it is economic, and maybe creative, too. There are a lot of good actors who think, who work and do it well. I am not putting down actors. What I am saying is that, the producers have to have something to sell and they sell the actor and once in awhile a director slips in and once in awhile a cinematographer slips in, James Howe, Greg Tillman. These people are very, very important.

Mr. SYNAR. I think, Mr. Fraker, you can just see from the first two panels, and we got two more this afternoon, we have opened a Pandora's box. I am not sure there is anybody who is involved in this industry that does not believe that their contribution is vital to the final product, whether it be economic or creative. And I think we, in Congress, and I think some of the questions that Mr. Berman has asked are very on point, which is really, I am asking who should be at the table?

And then Mr. Berman is following up with the second pitch which is, what is it that we should protect against? And very honestly, I am not sure we have any unanimity within the industry, within the individual groups. I mean, we've got people here who are different than the previous panel. And even more importantly, I am not sure you all have defined in your testimony this morning, either one of you, what it is you are trying to protect, I mean, what things you consider—changes significant enough to trigger what you have described as a 50/50 participation in a creative judgment.

Mr. FRAKER. Do you not feel that we have to, number one, define authorship? Do you not feel that we have to find out what we want to consider is moral rights?

Mr. SYNAR. Well, what about the person who writes the book? Do you think that they should be protected all the way through the process?

Mr. FRAKER. I think in motion pictures, that the director and cinematographer should be the two principal people involved.

Mr. SYNAR. So it does not matter what the author of the book—intended of the book. They should not be protected.

Mr. FRAKER. I have seen people buy books, pull in screenwriters, change those screenwriters to other screenwriters, to more screenwriters and finally do the picture. I cannot take the position and say "Protect the author." I am talking about motion pictures.

Mr. SYNAR. Well, that is the original product, is it not, that generated the entire scheme that finally moved it to a movie?

Mr. FRAKER. Yes.

Mr. SYNAR. Without the author, there would not have ever been a movie.

Mr. FRAKER. You can look at it that way. I do not look at it that way, see. I think that——

Mr. SYNAR. What about the screenwriter? You did not put the screenwriter down there at the table. So, it is just you and the director. A screenwriter is not protected?

Mr. FRAKER. No.

Mr. SYNAR. Even though it is their words, it is their flow.

Mr. FRAKER. You give it to another man to interpret that material. You give it to the director. He takes it and interprets it and discusses with the cinematographer and says, "All right, let us put it on the screen."

Mr. SYNAR. Well, let me take it to another step.

Mr. FRAKER. I am not trying to put down the screenwriter. Do not misunderstand me, or any of these people.

Mr. SYNAR. You did "Paint Your Wagon."

Mr. FRAKER. Yes.

Mr. SYNAR. OK. How many photographers did you have on staff when you did that?

Mr. FRAKER. Photographers?

Mr. SYNAR. Yes.

Mr. FRAKER. One. I was the only cinematographer.

Mr. SYNAR. You did every shot? I mean, there were not any assistants or anything?

Mr. FRAKER. Oh, I had camera operators and assistants.

Mr. SYNAR. How many camera operators?

Mr. FRAKER. Sometimes we had eight cameras. Sometimes we had one.

Mr. SYNAR. All right, now do you feel capable of protecting all the rights of all those operators?

Mr. FRAKER. Sure. That is my responsibility.

Mr. SYNAR. All right, who protects the rights of the screenwriter?

Mr. FRAKER. I have no answer for that.

Mr. SYNAR. Well, then why should they not be at the table so that they are protected?

Mr. FRAKER. I have no answer for that. I am concerned about the cinematographers——

Mr. SYNAR. No, I understand but——

Mr. FRAKER [continuing]. And fighting that, and I am not going to say—I do not put my work in anybody else's hands to interpret. I do it myself.

Mr. SYNAR. But the point is, and I agree with you, and I think you are doing a great job here in defending your thing. But the actors would say they do not want to put their work in your hands. They do not want to put their work in a director's hands.

Mr. FRAKER. Yes, but they do.

Mr. SYNAR. The screenwriter would say, "I do not want to put my work in the hands of the director." And the author of the book says, "I do not want to put my work in the hands of the screenwriter." So, I mean, this table is getting bigger and bigger and we need to know whose rights are being protected and whether or not you

do delegate your—I mean, I am not trying to be confrontational, but I am trying to figure out who is at this table.

Mr. FRAKER. Yeah, I understand. I understand and I think those are all good points and terrific points, but what I am concerned with, I know what I do. And I know what it takes to put that on the screen. And that is what I want to protect. See, it is as simple as that. It has nothing else to do with anybody. I am talking about me now.

Mr. SYNAR. All right, let us go to the second point which maybe Mr. Berman will explore.

Mr. STANLEY. Can I add one point to my friend also?

Mr. SYNAR. Sure.

Mr. STANLEY. From my point of view, there are three people involved. There is a director who directs it. There is a screenwriter who writes it. And there is a cinematographer who photographs it. Those are the three that I must insist upon. And I had better help my friend in this area because he is straying from this fundamental point.

Mr. FRAKER. Absolutely.

Mr. STANLEY. And the entire film industry is just rife with this. In fact, there are all kinds of things. If you want to say there are people in this who are the salt of the earth as far as being the original——

Mr. SYNAR. Yeah, and none of the people have provided the funds so all of you could work together should be involved.

Mr. Stanley. No, we reward them in a great many ways.

Mr. SYNAR. They make the profit. OK, thank you, Mr. Chairman.

Mr. KASTENMEIER. Let me ask one more question I had. I only do this because it is a facet of what Mr. Synar was asking.

We were looking at this issue about a year and a half, or 2 years ago, and it appeared that the directors had taken the initiative here. And along with them were a number of very prominent actors. And we asked the actors, Jimmy Stewart and others, "Well, this right is not going to be vested in you as an actor; it is going to be vested presumably in the directors." And they said, "Well, fine. That is all right. We trust the directors," apparently rather than the studios.

Now, I guess my question is, if it came to the point, and I only ask this theoretically you understand, that we would vest this sort of right in the directors, and not the cinematographers or maybe not even the screenwriters, would you accept that resolution as advancing your cause in a sense? Do you have more confidence in directors than you do in the studio, in other words?

What I am trying to do is suggest some of the Hobson's choices here. How would you respond to that, Mr. Fraker?

Mr. FRAKER. I would say, no.

Mr. KASTENMEIER. No.

Mr. FRAKER. Yeah, I would say definitely not, because I know where my responsibility is. And I know, when you take the so-called $20 million pictures that the major studios cannot seem to come under that budget because of the overheads, if you take that—I have done picture for $60,000. I have done them for $40 million. And I have taken that responsibility to put an image up on that screen.

Now, that is a responsibility and I accept that responsibility, OK, fine. I do not want somebody else to speak for me. I want to speak for myself when it comes to tampering with that piece of material. When I say, "Well, we do not need that to be yellow because I put a yellow filter on it; we want it to be blue. And we do not care about this and we want to trim this," and so forth, no, no, no, gentlemen, do not do that to me.

Mr. KASTENMEIER. Would you agree, Mr. Stanley?

Mr. STANLEY. I must tell you, although I feel very strongly for my friend, if directors had moral rights it would be far better than it is right now. I am delighted we have this audience here that we can appeal to on this point. And my feeling is, well, if I go to work with somebody—my feeling is I go with the director. I have to go with the director. He is the most important focus of my being able to create these things that I am going to photograph.

And therefore, if you are going to tell me that he is going to be the only one that is going to achieve all this, I have to say, well, it would be far better than it is right now. It is not perfect and I would not like the idea of being excluded, but far better the director than leaving it in the exclusive control of the producers.

Mr. KASTENMEIER. Thank you.

Mr. FRAKER. Let me go on, just one more point on this. I have said at production meetings before the pictures have started, I said, "Gentlemen, let me put it on the table right now. I work for the director. I do not work for the producer. I do not work for the star. I do not work for anybody. He is the man." Yes, Frank is absolutely right.

I am not trying to take anything away from him, but I do not want him to take it away from me either.

Mr. KASTENMEIER. I understand. Thank you. Mr. Berman.

Mr. BERMAN. You work for him, but you do not want to delegate that decision to him.

Mr. FRAKER. Well, it is not a matter of delegating that decision. Anything that we do together, we do together, I mean the decisions that are made.

Mr. BERMAN. Well, you work with him then?

Mr. FRAKER. Yes.

Mr. BERMAN. All right, let us take this movie Hawaii you mentioned, where you went over to a neighbor's house and watched the movie with him. And it was your movie and all of a sudden there was this scene, they lopped off one actor completely.

Let us assume for a second that, given the state of technology at that time, this movie was made a while ago.

Mr. STANLEY. Yes.

Mr. BERMAN. That they could not get it on the darn television without cutting off that actor. Let us assume that for a second. Are you happier—well, that is the wrong way to put it. Is it better, from the public's point of view, we are not sort of a panel of article 20 jurisdictional dispute arbitrators for the AFL-CIO——

Mr. STANLEY. Yeah, I understand.

Mr. BERMAN [continuing]. Deciding between the plasterers and the drywall carpenters here. Is it better that x millions of people saw that movie and saw your work, not in its true form, but in some form who never would have seen it in its initial release? Is

there something to that notion of a public interest in promoting the amount of access to that film?

Mr. STANLEY. What a thing to ask. You know, if a had a couple of shots, I would probably go along with you, but I honestly cannot say it now.

Mr. BERMAN. Well, with lunch coming up——

Mr. STANLEY. The thing is, if the thing—let me explain this.

Mr. BERMAN. I am just throwing this out.

Mr. STANLEY. Let me explain something to you. As a Congressman, if you brought forth something that you worked your tail off, that you consider is one of the finest points of your work, for example, in a piece of work, and somebody took your name out of it, how would you feel?

Mr. SYNAR. It happens everyday.

Mr. BERMAN. Well, you raise a very interesting point, because that is one of the problems, I think, that the representatives and the leaders of the creative community have in talking about this issue to Congress. Our staffs, I mean, there is no God-given moral right to the words our staffs craft in our name for our ownership, our exploitation, our use without any attribution whatsoever.

We do do a lot of that and as Mike said, we also steal each other's ideas with basic impunity. But still this point about weighing the extent to which the technology did not allow, at that particular time, the kind of adaptation to television that would have showed that scene in the way that you filmed it.

And then the second question is, what if I came back to you as the owner of the film and said, "Look, you got this legislation. I need you to sign off." I assume that is what you are asking for, a right to sign off before they lop that guy off. "I cannot do it any other way. I want to show this film, but I will give you a check for $10,000. Let me lop this guy off and show this film on television."

I know that the world of economics never tramples in the area of moral rights, but is this something that could sway? Would you still need two shots to give your consent if you could get some money?

Mr. STANLEY. You are getting into an area, we are being very, very frivolous.

Mr. BERMAN. No, I am not. I am not. I am wondering.

Mr. STANLEY. Ten thousand dollars is not frivolous, but——

Mr. BERMAN. No, no, no, this point of, should the legislation we craft allow the parties who would presumably have some kind of creative control to be bought out of their creative control?

Mr. STANLEY. You see, I feel, this is an expression of my own, that you are going to get into this kind of a problem. You have to allow or bring about an arbitration procedure. You have to empower an expert panel of arbitrators—those who know the art of filmmaking and all its aspects.

Mr. BERMAN. I understand what you are saying then. You want some third party, the production company on one hand, they own the copyright. They want to exploit this thing as much as possible. They want to make as much money as possible about it. Maybe the artistic questions involved are going to become subordinate to making the money.

Especially if there is no money involved, maybe the artistic concerns are going to become paramount to the creators. Maybe some third party process is involved in deciding what is an acceptable material alteration, rather than giving you control.

Mr. STANLEY. Yeah, you are getting closer to it, because you see, the thing that is the most depressing is that the production company, as the owner of the copyright, has absolute power over the fate of a motion picture. What's worse, is that their sole interest is in making more money. This is how terrible it has gotten. No wonder we're worried that filmmaking, as we know it, is being destroyed—at present, no one besides the studio is even consulted.

My feeling is, come up with a panel, come up with some people who I would respect to make a decision on this.

Mr. FLEMING. Congressman Berman, as counsel for the ASC, our position is that moral rights, however they might be defined by Congress, should never be bargained away. It should be against public policy. And, therefore, any contract to bargain them away, should be void. That is our position.

Mr. BERMAN. So that there is no basis for waiving this right for——

Mr. FLEMING. Absolutely, absolutely.

Mr. BERMAN [continuing]. Pecuniary consideration.

Mr. FLEMING. Whatever moral rights Congress defines.

Mr. DOERING. Congressman Berman, the Guild concurs in that position. We really see the central issue in this is the right of the author to object as per the Berne Treaty. And we suggest that arbitration is a way of enabling the artist to exercise his rights. And at the same time we believe it is a form of, as we said in our statement, dispute resolution that is more efficient than the court system. And it would enable these kind of decisions to be made by a panel of expert artists who would be deciding the questions based on moral rights and determining whether harm has been done to one's reputation and honor.

Mr. BERMAN. But the right to trigger an arbitration is different than the right to object and, therefore, prevent. So, which is it? Is it a veto or is it a right to trigger a third party dispute resolution mechanism? ASD thinks it is right to make a binding objection.

Mr. FLEMING. Well, we have gone on record saying, "No, we do not believe in veto power." There has to be a way around it. That has been our position.

Mr. BERMAN. That is different than——

Mr. FLEMING. There has to be around it, whether a third party——

Mr. BERMAN. Whether it be arbitration, whether it be anything, there has to be some way around it.

Mr. FLEMING [continuing]. Negotiations. Who has the final say, because in tne end, again that is a problem.

Mr. BERMAN. Well, is a right to consultation enough, if we legislated that. Where you have not been able to bargain that provision, legislating a minimum level of consultation by the copyright owner with the relevant guilds or people, individuals involved, is that an enhancement?

Mr. FLEMING. We think that is a big step.

Mr. FRAKER. It is a major step forward, because at least you have a right to——

Mr. FLEMING. We do not have that today.

Mr. BERMAN. The directors do, but you do not.

Mr. DOERING. Right, and we would concur with what you are saying, Congressman Berman, in the sense, yes, consultation is critical. And it would seem to us, that out of that consultation may come something that, you know, would lead to a binding decision by a neutral body.

Mr. BERMAN. Thank you, Mr. Chairman.

Mr. SYNAR. Can I just ask one question.

Mr. KASTENMEIER. The gentleman from Oklahoma.

Mr. SYNAR. Since it was your point that it is not a money or monetary decision, it is more of a reputation and honor decision that you are trying to object to or protect, I mean, I am not any expert, again as I said in my opening statement. I hope that gave me great room and latitude here today.

I do not think that there is an actor or actress that we could bring up here today that would not say that is what they want, that objective power, because their honor and reputation is that which is on the film. So, I mean, when I asked the panel earlier whether or not the actor and actress should be there, there was no interest in letting them be there but yet, the right that you are trying to protect, I think would be the major argument every actor and actress that would come up here would make the same argument.

Mr. DOERING. I think the answer to your question is that could well be, but as has been stated previously, the actors are quite confident and appear to be satisfied with putting that particular issue in the hands of the directors. And I do not see any actors here at this point. I cannot speak for them, but I think that we are trying to deal with, at least as the ASC people have said, from our standpoint of who are the key creative authors and I do not believe, you know, that this has been articulated from the actor's point of view, at least before your committee.

Mr. KASTENMEIER. I think we should also state that panning and scanning and colorization do not directly involve the actors as much as they involve cinematography.

Mr. BERMAN. Except for that guy who got lopped off.

Mr. KASTENMEIER. Well, the cutting room floor.

Mr. SYNAR. I think that they would argue that. I think that the actors that we have visited with in Washington are very—Jimmy Stewart is very offended the by way he looks in color in "A Wonderful Life." He thinks the whole tenor of his performance is changed by that act. But the point is that he would like that same ability to object.

In other words, I do not want to speak for him. Actors in general have never had, who have been in my office in the privacy of my quarters, given me any assurance that they feel confident that their rights are protected by anybody who has testified so far or will testify today.

Mr. STANLEY. I cannot deny him, but I cannot speak for him on the basis of—I am here really to talk about cinematographers, about the——

Mr. SYNAR. I am not asking you to take on their position. I am just——

Mr. FRAKER. You know, in the past, in the past, there have been a lot of actors who have had cinematographers under contract for that very reason, to protect their so-called rights.

Mr. SYNAR. So do politicians.

Mr. FRAKER. And also, you know, a lot of camera men are chosen because they can photograph one person better than the other. You know, it is all part of it. Actors are marvelous. Actors are actors.

Mr. KASTENMEIER. If there are no further questions, that concludes the hearing this morning. We thank this panel, Mr. Fraker and Mr. Stanley and their colleagues who are here, for contributing as much as they have on this panel. It has been very informative.

The committee will stand in recess until about 1:45. We will try to get started by 1:45 if we can, for the afternoon session, at which time we will hear from the third panel.

[Whereupon, at 12:15 p.m., the subcommittee recessed, to reconvene at 1:55 p.m., the same day.]

AFTERNOON SESSION

Mr. KASTENMEIER. The meeting will come to order. Before we start with our third panel, it is my understanding that a member of the International Photographers Guild or a representative, would like to make a very brief clarification of the testimony given earlier. Yes, sir.

Mr. DOERING. Thank you, Congressman Kastenmeier. Yes, I would like to say that, without taking away any of the emphasis concerning the importance of cinematographers, a principal author of feature films, it seems clear that we have to face the question that was raised near the end of the last session. And that is, if the director were the only author of a motion picture as per legislation, it is our opinion that cinematographers would be far better off than they are now.

Conversely, it seems to me it would be a real tragedy to have the concept of moral rights jettisoned because of the fear of opening Pandora's box. And I think it is important to state that for the record.

Mr. KASTENMEIER. We appreciate your statement. Of course, that deals with a hypothetical in any event. We all understand that, but thank you.

Our third panel consists of Joe Dante on behalf of the Directors Guild of America and Phil Alden Robinson for the Writers Guild of America. Mr. Dante has directed many well-known films, including "Gremlins." Mr. Robinson has written the screenplay for the recent hit "Field of Dreams."

So, welcome, gentlemen. You may proceed as you wish. I suppose Mr. Dante would go first.

STATEMENT OF JOE DANTE, ON BEHALF OF THE DIRECTORS GUILD OF AMERICA

Mr. DANTE. Yes, I would also like to introduce Elliott Silverstein——

Mr. KASTENMEIER. Who is very well-known to this subcommittee. He has appeared before it.

Mr. DANTE. The chairman of the Creative Rights Committee for the past 25 years.

Mr. KASTENMEIER. We are delighted to greet him.

Mr. DANTE. My name is Joe Dante and I am here representing the Directors Guild of America. Phil and I, together, are here to destroy the motion picture business today and deprive ourselves of future employment as you have heard from others.

In 1978, the DGA, sitting at the collective bargaining table, complained about the defacement of films by indiscriminate editing, particularly in syndication markets. Our view was that the studio should be as concerned about their product as Campbells Soup would be concerned about the sales of their soup adulterated by somebody who was selling it.

The chief executives of the studios agreed that it was a problem and that it was wrong to cut these films; but, said that it was too big a problem to police. We agreed and said that we would go to Congress. And that is what we did. We felt that there ought to be a law. And unfortunately the grievances that brought us to Congress 3 years ago have not abated significantly.

Movies continue to be presented in mutilated versions, panned and scanned, colorized, time compressed, my particular least personal favorite, and substantially reedited. I have, in fact, a 120-minute film that ABC network is currently in the throes of finding a way to cut 23 minutes out of, apparently, because they feel that it would be better if it was on in a 2-hour time slot instead of a 2½-hour time slot.

Nothing really has happened legislatively on either the State or Federal level to retard defacement of films. And if anything, it is on the rise.

The debate about moral rights that surrounded the Berne Treaty was very gratifying to us, but we do disagree with the minimalist view which says that existing State laws, the Lanham Act, et cetera, combine to give us low level moral rights, whatever that means. The problem is, there simply is no law to protect the moral rights of film artists, nothing that gives directors and writers the standing to appear in court as required by Berne, and object to the defacement of their work.

Therefore, we do not feel that the reforms made to the copyright law to enable Berne adherence are complete. We hope to convince Congress that the reforming process must continue despite the rather large political opposition that is arrayed against us.

Many of these corporations, in fact, would have you believe that the granting of moral rights will somehow bring down the motion picture business around our ears. This is a business that took in, I believe, $5 billion plus in the past year. And it seems to us that, since the corporate parties are reaping the financial rewards from Berne, they ought to be required to pay their share.

We do have the National Film Preservation Act, of course. And the Directors Guild is proud to be a member of the governing board. And we are very happy that films are finally being recognized as an art form, worthy of protection, which was not the case previously. And a small amount of consumer protection is achieved

by labeling, at least alerting the public to the fact that a film has been altered. But, of course, this does not really do much for the people whose films have been altered.

And a lot has been said today about the issue of authorship, who a film is by. The idea of a corporation being the author has, oddly, led us to a situation where the Sony Corp. is now the "author" of the "Bridge on the River Kwai."

It is worth noting that in Japan when "The Last Emperor" played, there was a lot of unflattering footage in the film relating to the rape of Nanking, which was edited out initially until there were protests about it. If the Sony Corp. felt uncomfortable with certain historical and cultural aspects of some of the American films of the 1940's, particularly during the war years, they could suppress a film. They could, if they wished to destroy the negatives of a particular film because they are now, by dint of ownership, the "authors" of that film.

I couldn't help but notice a slight air of acrimony to some of the testimony here today about who really deserves to have their moral rights represented. I think it is best to remember that the reason that we are all here today, certainly the reason that the DGA began this crusade was, that we were tired of seeing movies being destroyed. And the whole concept of moral rights has been our avenue to try to find a way in which this goal could be achieved.

We have contended that the principal director and screenwriter are the artistic authors of the film. And I think we have done it accurately. It takes a lot of people to make a film. And since I began in very low budget films, where you do everything yourself, and you learn to be the sound man and you learn to be the art director and you learn what everybody does, and I was an editor for a long time, I am aware that you cannot make a movie without these people. And nobody is contesting it, saying that the screenwriter and director can just go off on their own and make a movie and come out and hand it to you and, "Here it is."

However, as many talented people as have to be arrayed to make a picture, somebody has to tell them what to do. You cannot just put them all alone in a room and then go away and come back, and expect that they will have done anything. Everybody needs some guidance. And if the screen play is the blueprint, then the director is responsible for the construction. If the screen play is the concerto, the director is the conductor. There are probably other bromides I could come up with, but you get the idea.

The contributors to the movie, however important they are, are really in the service of a central plan or vision of the work. And somebody has to have that.

Now, the cinematographers came to you today and described themselves as the authors of the image. And I do not dispute that. The director seldom is the cinematographer. On occasion he is, but most often you need a cinematographer to do the job. But if the cinematographer is the author of the image, then the director and the screenwriter are the author of the work that encompasses that image.

And should Congress decide that cinematographers ought to be able to assert their moral rights, we certainly would have no objec-

tion to that or maybe certain other people who we feel might be part of the team.

But the fact is that, practically, this has to be reduced to a workable number of people. We cannot have 27 people all coming in and saying that they are the author of the work. Being on the outside of the motion picture business, it is probably not as apparent as it is to us how the system works and who is involved with the film the longest and who makes the decisions.

And it seems to me that the people involved in the film, including the actors, have entrusted themselves into the care of the director. Even the screenwriter has to do that. And in the end, the director is the one who is held responsible for the movie. If the movie is not good, the director is blamed. If the movie is good, the director gets credit.

We must not get lost in a maze of divisiveness in trying to decide who really deserves to be represented when the real task is to find the most efficacious way of protecting the work itself.

The issue of arbitration has come up which, frankly, was new to me before this testimony and which strikes me as promising. The idea is to avoid the flood of litigation with which litigants and injured parties are supposedly going to inundate our courts. Before the fact of the alteration the parties could be consulted. The artistic authors and the copyright owners who want to make the alteration could then go to a third party, an arbitrator, who could help them try to work it out. There are areas of compromise that can be often are reached involving issues such as these.

It seems like this might be a safety valve that would answer the problem of litigation.

On a personal note, I would just like to say that I became involved with this struggle 3 years ago because I value film and what it has meant to me.

[The prepared statement of Mr. Dante follows:]

Prepared Statement of Joe Dante, of Behalf of the Directors Guild of America

Mr. Chairman, we are pleased to have the opportunity once again to testify before the subcommittee regarding motion pictures and moral rights. The debate continues, but there has been no legislative action that retards or deters the continuing defacement of motion pictures. Neither on the federal nor state level have there been any steps taken towards the moral rights of film artists. Movies continue to be colorized, and they are shown in versions subjected to panning-and-scanning, lexiconning, and very substantial editing. In short, Mr. Chairman, there has been no relief for the grievances that brought us to Congress three years ago.

We will confine our remarks to a few areas this morning -- the aftermath of adherence to Berne, the National Film Preservation Act, the question of authorship, the collateral question of novelists' rights in films, and some discussion on arbitration. We are indebted to the Chairman and the subcommittee for facilitating the continuing debate on artists rights in motion pictures. Some of our positions have changed as the debate has evolved and enlarged, and these changes are discussed in our testimony.

We continue to believe that motion pictures are a significant part of the country's cultural heritage, and that as an American-born art form they have enriched our country and world with a whole new artistic experience. It is also true that motion pictures make money, as they are supposed to do for those companies that figure

in their financing. But commercial success doesn't mean that motion pictures are not an art form, nor, in our view, less worthy of respect than an architecturally-important building or an historically-important neighborhood. It does mean that the partners in motion picture making, the creative and financing sides, see the issue of moral rights in a very different fashion. The financiers of motion pictures create enormous political difficulties in dealing with this question because of their contention that moral rights would cripple the American motion picture business. This fantasy and others put forward by our opponents are propaganda designed to instill fear in Congress. What is truly sad in all of this is the shortsightedness. What is good for motion pictures is what enhances respect for the art form itself and for the people who participate in this work.

The dismal record of the companies in preserving film is an indication of this lack of concern and respect. The opposition to moral rights is another.

Moral Rights and the Berne Treaty

We participated in last year's debate on the Berne Treaty and its implementing legislation. Again, we were pleased to have had that opportunity. We were the beneficiaries in that sense, Mr. Chairman, of your notion that the issue of moral rights simply had to be discussed in the context of Berne adherence. It was your initial bill that incorporated the language of article 6(bis), and

initiated the passionate debate about moral rights preceding passage of the implementing legislation.

The "minimalist" view is that various state statutes, the Lanham Act, contracts, etc., all combine to provide a low-level of moral rights protection. This is a very dubious proposition for any artist in any art form, but it is emphatically not the case in motion pictures where the low level is beneath reach. State statutes systematically exclude motion pictures from protective status, the Lanham Act leads on to consumer's rights through labeling, and contracts in the motion picture business more and more routinely include boilerplate denying moral rights to creative participants for all time. Moral rights provide the legal tools for creators to protect their work from alterations that undermine their honor or reputation. There are no moral rights for filmmakers in the United States, and no arcane legal theories can alter that simple fact.

There is no law to protect the moral rights of film directors and screenwriters -- none! No lawyer or legislator can point to one which gives directors and screenwriters the standing to appear in court as required by Berne to object to defacement of their work. There are no "minimal" rights, if that is not in fact an oxymoron, no rights of any kind for us despite our adherence to Berne. So we consider the reforms made to copyright law to enable Berne

adherence to be incomplete, and our goal is to convince Congress that the reforming process needs to continue.

Whatever illusions we may have had about the difficulty of our advocacy efforts have disappeared. When the implementing legislation passed the House, you summed matters up, Mr. Chairman, when you said it was "politically unfeasible" to pass moral rights as part of adhering to Berne.

Because of the enormous political opposition by wealthy and powerful corporations, the U.S. skirted around the issue of moral rights when we joined Berne. Corporate parties that reap financial rewards from U.S. Berne membership should be required to pay the price of admission, a theme not unfamiliar to those who have cried foul over motion picture piracy. Now that Berne membership has been achieved, perhaps we can convince Congress to upgrade our stature as befits the leading copyright nation by implementing explicit moral rights.

The National Film Preservation Act

The 100th Congress did take some regard for the importance of motion pictures as a part of our cultural patrimony by passing the National Film Preservation Act. This very modest measure gives special status to 25 films a year, films judged to be historically and culturally significant. We supported the measure, and, as many of the other witnesses before you today, the Directors Guild serves

as a member of the governing board which nominates films for inclusion on the National Registry.

This is a significant measure on two counts: (1) Movies are designated by statute as an art form worthy of protection; and (2) labels applied to the films give a very modest level of consumer protection to film viewers. The act is significant in and of itself, but it is not, and has no pretense to being, a step on the road to artists rights. Generating interest in and enthusiasm for classic motion pictures is worthwhile; helping the Library of Congress to shore up its collection of archival prints is important; and labeling a few classic films as to the nature of their alterations is useful. But none of these worthwhile goals advance moral rights protection for motion pictures.

Administratively, the Library of Congress is to be commended for carrying out the provisions of the legislation in a smooth and professional manner. Our one critique relates to the non-participation of the producers' representatives in the nominating process. The crucial responsibility of members of the board is to recommend films to the Librarian of Congress for inclusion on the National Registry. If these industry representatives can't or won't fulfill their statutory responsibility, they ought to excuse themselves from the board.

Authorship

As the debate on moral rights in motion pictures has progressed, it has become apparent that the issue of "authorship" is perhaps the most important one, and certainly a perplexing one to Members of Congress. Is the studio the author? Or the bank? Can a corporation be an author? Are the director and screenwriter the principal artistic authors? If there are moral rights, shouldn't they be asserted by a number of the creative contributors to motion pictures?

The concept of authorship in regard to moral rights requires coming to terms with a notion novel to U.S. law: that the copyright holder may not be the "author" for moral rights purposes. In the case of motion pictures, this is invariably the case. (While this is a novel concept to U.S. law, it is not a novel concept in many legal systems. Moreover, the U.S. routinely embraces moral rights when it annually reaffirms the U.N.'s Universal Declaration of Human Rights.)

In the 100th Congress, Majority Leader Richard Gephardt introduced H.R. 2400 which included the concept of "artistic" author, creating a tidy distinction between those with an artistic interest and those whose interest is economic.

An interesting and sharp light gets thrown on the question of authorship with Sony's recent purchase of Columbia Pictures. Under

current American law we are now faced with the following absurd situation: a Japanese corporation is now the "author" of The Bridge on the River Kwai, The Battle of the Coral Sea, King Rat, From Here to Eternity and The Last Emperor. Sony can release these films so cut or changed that their meaning, cultural and historical impact is completely reversed thereby offending both the moral and patriotic rights of the true creators of the films. This is to say nothing of Sony's absolute right under current law to destroy the negatives in order to deny the future any opportunity to view the films. Does this sound far-fetched? The subcommittee should know that the Japanese initially excised from the exhibition of The Last Emperor, in Japan, all footage relating to the rape of Nanking. Clearly an attempt to distort history.

Clearly, a corporation is not an artistic participant in movie-making; it's the financier, the marketer, the distributor. It's executives move on with an astonishing regularity -- why should they care about the cultural or artistic significance of film. We have made this point previously, but the Sony purchase of Columbia sharpens the distinction.

We have contended that the principal director and principal screenwriter are the primary "artistic authors." The screenwriter provides the blueprint, and the director is responsible for the construction of the entire project, from the first to the last. Because of the scope of their responsibility, these two creative

participants ought to be considered authors in a creative sense. We do not deny or diminish the extraordinary contributions of other creative participants, but they are in the service of a central vision of the work. Just as you, Mr. Chairman, and your colleagues have assistants who play key roles in advising on policy, discussing ideas, and suggesting legislative tactics. But you are the Representative. You determine the philosophy of your office. You are the author of your bills. No one else.

Our concern is the protection of motion pictures, not self-aggrandizing for directors, for financial or any other purpose. The subcommittee will remember our testimony to eliminate financial reward to directors or screenwriters should there be moral rights and should they choose to waive these rights. Cinematographers and cameramen are testifying before you today. Should Congress decide that cinematographers ought to be able to assert moral rights we would have no objection to that.

Too much energy in this debate has been drained off over the extraneous and totally false notion that directors and screenwriters are trying to advance their own interests at the expense of other creative participants in moving-making. An endless list of creative participants asserting moral rights would make the possibility of waivability virtually meaningless. But if a few additions to the list of those who can assert rights would

move the debate off center, then the Directors Guild would not object.

The Novel Into a Movie

In this same vein, subcommittee members here and in the copyright subcommittee on the Senate side have claimed that directors trammel on the moral rights of novelists whose work is transmuted into film. How can directors make a claim, it is asked, to moral rights when there might be a violation of the spirit of those rights held by novelists.

We have answered this is two ways: (1) Novelists have a choice as to whether or not to sell their work to the movies; and (2) novels and motion picture are two totally different art forms, governed by different aesthetic principals, and very difficult to compare and analyze in terms of damage to honor and reputation.

But it is this analysis that is crucial. Moral rights as provided in a number of Berne countries and as outlined in the treaty do not prevent a syndicator from editing or lexiconning or panning-and-scanning a motion picture. Moral rights do not prevent defacement, they give the victim the right to cry out. They provide that the director may object, and if the director can prove in court damage to honor and reputation, he or she can find relief.

Let us move this off center a bit, and let novelists have moral rights in the motion pictures for which their novels form the basis. But let the standard remain consistent: injury to honor and reputation. It is insufficient whether the novelist likes or dislikes the movie based on his or her work; insufficient as to whether he or she feels a character is not developed fully enough; or certain nuances not captured in an important scene. Moral rights are a defense for "personness" -- a personal, driving vision, a product of the mind. It is in the broad sense a defense of this highly personal freedom of expression which has been governed by aesthetic principles. A novel that is an anti-war diatribe that becomes a glorification of war in the movie version is a moral rights violation, but simply liking or disliking a movie version of a novel does not constitute such a violation.

The Berne Treaty understands that art forms are difficult to compare and for that reason makes substantial allowance in terms of moral rights when works in one medium are adapted into another. In a financial sense, it is difficult to conceive that a screen adaptation of a novel hurts the novelists' successive works in the marketplace. Screen adaptations stimulate interest in a novelist's work. How many soft-cover editions proudly declare the work has been or is soon to be made into a major motion picture!

Arbitration

One of the prominent arguments against moral rights is the contention that the granting of these rights will invite a flood of litigation. Court dockets will be crowded with the capricious claims of directors and screenwriters that their honor or reputation has been damaged through the exhibition of work in an altered form.

We have argued in turn that the number of moral rights cases in countries where these rights exist is extremely small. Even if the United States as a society is more litigious than those in Europe, there still ought to be a modest increment of moral cases in countries where these rights are part of domestic law. We have also contended, and we still contend, that there would be a strong self-policing aspect to moral rights complaints. The director or screenwriter bringing a frivolous suit is not likely to be courted by the studios for future employment.

Much of this debate is necessarily speculative. It is claimed the courts will be jammed up with suits; Hollywood, rolling in grosses but always teetering on the edge of bankruptcy, will fall into the financial abyss; the putative hard times of European film industries can be traced directly to moral rights. Nonsense! Nevertheless, one of these speculative calamities, the jamming of court dockets, might be avoided if an artists' rights statute in the motion picture field included an arbitration procedure.

We believe an arbitration procedure to resolve moral rights disputes has merit. First, it would offer the opportunity for concerns to be heard in a formal, but expedited fashion. Second, it would permit persons with backgrounds sensitive to the film arts to decide whether an action to be taken is harmful to an author's reputation.

We think any arbitration process would have these key elements: (1) the arbitrator (preferably one person chosen by the parties, but alternatively three persons, one each chosen by the parties and a third chosen by their representatives) would be an expert in the field of motion picture arts; (2) the parties would be allowed to make a short written presentation (up to 20 pages) and would be allowed an oral hearing upon request; (3) the hearing could be arranged on as little as five days written notice; and (4) a decision on the merits would be issued as promptly as necessary to meet the exigencies of the situation. The decision would resolve one critical issue; namely, whether the action proposed to be taken constituted harm to the reputation and honor of the artistic authors. This is the issue to be resolved by the arbitrator. We believe any arbitration system should be conducted under federal auspices, though the degree of federal involvement might be quite small.

Summary

The issue of artists' rights is troublesome in the sense of the passions it stirs and the intensity of the political forces it brings into play. It is an issue with a legitimate claim on the attention of this subcommittee because the issue concerns itself with creative persons and their work products, which is the work of copyright law. Out of a sense of fairness, Mr. Chairman, you included a moral rights provision in your original Berne bill, and your openness to this issue and the openness of the subcommittee has now brought you to Los Angeles. We thank you and the subcommittee for your continuing interest in this matter, and we hope in the months ahead we will move beyond the debating stage, to set in place a legal foundation to protect the great film heritage of our country, and to protect the moral rights of American motion directors and screenwriters and those from other countries who exhibit their work here.

Mr. SYNAR. So, you were not a career director at the time.

Mr. DANTE. Well, I had directed a couple of movies, but I would like to say that, if you would like to be the producer from Muskogee, or whatever, Phil and I would be only too happy to write and direct the picture, because it can only be an improvement in many areas.

I was lucky enough to assist the late John Huston in videotaping a statement that he made around the time that Mr. Turner was colorizing "The Maltese Falcon." And it was shown to legislators in Washington, during which Huston said, "Save the past for the future. Every future needs a past upon which to build itself and define itself. Preserve the way we saw ourselves. The truth is what is at issue here, historical truth. That truth is being cynically distorted for future generations by those to whom truth means nothing."

I wish I could have said that. Now, just before I conclude, actually Mr. Silverstein, who is in a better position to discuss the collective bargaining issue has a little something to say.

Mr. SILVERSTEIN. Mr. Chairman, Mr. Nolan, I believe this morning made a statement regarding the progress of labor negotiations in the area of moral rights. And I have asked permission to address you to set the record straight; that as of the moment, there are no negotiations taking place on the issue of moral rights with the Producers Association.

There are negotiations on other matters. They have asked the Directors Guild to talk with them about moral rights and we have said, "Of course, we will talk with you. We will talk with anybody. We will talk with committees of Congress. We will talk with educational groups." We will talk with the Producers Association in the hope of educating them and illuminating the issues and the anguish and destruction that lies behind it. And perhaps something useful may come out of this. We do not know.

But the request has been to hold these conversations in what is called the continuing creative rights committee. That is a committee, a joint committee which meets by contract, twice a year to discuss creative rights issues, that is issues involving the rights of directors during the making of the film and prior to its release, that is prior to the point at which we say the moral rights should be triggered.

This continuing dialog on these issues is intended to prevent the pot from boiling over and reaching a point of great emotion at the time of formal negotiations. The request has been to discuss these moral rights in this continuing committee after the current negotiations are over. So, I do not know, I think Mr. Nolan may have been misinformed or is uninformed on the issue.

Mr. KASTENMEIER. And could you tell us when that might be? Can you speculate as to when they——

Mr. SILVERSTEIN. No, I cannot say anything about that at the moment, sir. I can only say that the so-called continuing creative rights committee meets supposedly twice a year and is informal in nature, would not consist—should there be a disagreement of some kind about something, it is not a negotiating panel. It is an exchange of information.

It is, in effect, say, "What is troubling you this week?" "Oh, what is troubling us is this." "Oh, I see, OK. Well, if we want to do something about it, we will." And then perhaps something productive could come out of that, but at the moment, there are no negotiations on moral rights taking place.

Mr. KASTENMEIER. Thank you. Mr. Robinson.

STATEMENT OF PHIL ALDEN ROBINSON, SCREENWRITER, ON BEHALF OF THE WRITERS GUILD OF AMERICA

Mr. ROBINSON. Thank you, Mr. Chairman. First of all, sir, I have some good news for you. I will be your first 5 minute speaker of the day at the conclusion of which I would like, with your permission, to take a minute to comment very briefly on some things that were said this morning that I found mindboggling, but we will get to those later.

Like Joe, I am a director, but first and foremost, I am a screenwriter. Before they let you become a screenwriter in Hollywood, you first have to demonstrate a certain amount of ability and a profound willingness to undergo humiliation and abuse. It is analogous, I am told, to being a member of the minority party in a legislature, but I do not know if that is true.

Mr. SYNAR. That is fine, you got three majority people. We do not know.

Mr. ROBINSON. OK, minority counsel then. Nobody knows better than we do what it is like to have our work changed beyond recognition. Everybody changes screenplays. It is the national sport of Hollywood. Why then do screenwriters complain when a copyright owner changes a finished film?

The reason is that we draw a distinction between the process and the product of that process. The process, film making is collaborative. We accept that. Nobody knows that better than we do. But the product of that process, the movie, deserves more. When it is finished, it should stay finished.

And I would like to just take a minute to tell you about a screenwriter's view of the process to help you, perhaps, better understand our very strong feelings about the product. When we begin to write a motion picture, life, as we know it, stops. We work pretty much around the clock for weeks and weeks, month after month, draft after draft.

And when we are finally completely done, we rewrite for weeks and weeks, and months and months. After about 10 or 12 drafts, we put a title page on it that has the date and it says, "First draft." We think it is pretty good. We show it to a friend who tells us it stinks. We know he is right, so we go back and we do about six or eight more drafts. We put a new title page on it, new date. It still says, "First draft."

After a few more of those, we finally get up the nerve to turn one in to the studio. Now, we get to enjoy the helpful suggestions of studio executives who may or may not have any idea what we are trying to do. So, we do five or six more drafts to try to incorporate changes that they have suggested.

We slap a new title page on that says, "Second draft." We are moving up now. We are really progressing. Now, the suggestions

come, not just from studio executives, but from their assistants, their secretaries, their friends, their mothers, their friends' mothers, their children. Actually, the children give very good notes, I have found.

And after a long time, if we are really, really lucky, and they want to make a film, we then get suggestions and changes from a director, who may have a completely different vision of what the movie is going to be, present company excepted, of course, from actors who feel that their characters would not say this or would not do that.

We find that scenes we labored over until they were just right, cannot be filmed or they are changed completely during production or they are cut out entirely during editing. And we endure all this for one reason. It is not the money, and God knows it is certainly not the glamour. It is for that slim wisp of a hope that at the end of all the pain and angst and politicking and tap dancing and accommodating and changes and 7-day weeks and 16-hour days and sleepless nights, that at the end of all that, a movie gets made, a movie that somehow miraculously, after all this, reflects that original vision that you had long ago, sitting by yourself with a blank piece of paper.

And maybe all over America, all over the world, people will sit in dark rooms and watch something that once existed only in your imagination. And they will be moved or entertained or enlightened or somehow touched by it. And this movie that you imagined that is the product of so many people working so hard for so long, this movie that against all odds, somehow turned out pretty good, this movie that bears your name, will outlive you.

You will have succeeded in leaving something behind with the power to reach people, something that says, "I was here and I tried, and this is what I did when I was here."

Mr. Chairman, to accomplish that is an extraordinarily moving thing. To have even a chance of accomplishing that is the prime reason we create. But to go through all that and then to have somebody who did not put any of his sweat and tears and passion, much less a big chunk of his life into it, turn around and say, "Hey, pal, I own this and I think it would be better if we painted it green or cut off the ending or put in some rock music, or slapped in some nudity or lopped off the beginning," for someone to do that is the ultimate degradation, discouragement, insult, crime.

It is a moral crime, not just against the creators, but against the people for whom that work was intended because they will not get to see it the way it was meant to be seen. So, instead of being moved by an artist who put part of his life into this, they will be ripped off by a merchant who gave it maybe 5 minutes of thought.

Sir, artists are perhaps more aware than most how very fortunate we are to live in a country that recognizes and guarantees freedom of expression. But we are also perhaps slightly more aware than most of this ultimate truth, that freedom of expression is valueless if the product of that expression can be changed without the permission of the author. And we request your help in defending that expression. Thank you.

[The prepared statement of Mr. Robinson follows:]

Prepared Statement of Phil Alden Robinson, Screenwriter, on Behalf of the Writers Guild of America

It has been suggested that it's hypocritical for a screenwriter to complain about a copyright owner changing a finished movie. After all, our screenplays get changed all the time by directors, actors, producers, friends of the grip, and second cousins of the wardrobe assistant. We are witnesses, even participants in this. So how can we complain that someone colorizes a film or chops it up? The reason is that we draw a distinction between the process and the product of that process. The process - filmmaking - is collaborative. We know that better than anyone. But the product - the movie - should be inviolable.

When we begin to write a motion picture, life stops. We write for months and months, draft after draft, ant then when we're finally done . . . we re-write for months and months; changing, questioning, doubting, discovering, experimenting, honing, throwing things out and putting them back. After about 10 or 12 drafts, we put a title page on it that says First Draft. We think it's pretty good. We show it to a friend who tells us it stinks. We know he's right. So we do 6 or 8 more drafts and put a new title page on it. It still says First Draft. After a few more of those we finally get up the nerve to turn one in to the studio. They read it. Pretty soon, we get to enjoy the helpful suggestions of studio executives who may or may not have a clue what we're trying to do . . . so we do 5 or 6 more drafts, slap on a title page that says "Second Draft" and turn it in. Now the suggestions come not just from studio executives, but from their assistants, their friends, their mothers, their friends' mothers, and their children. Actually, the children give pretty good notes.

After a very long time, if we're really, really lucky, we then get notes from a director who may have a completely different vision of the movie . . . from actors who may feel their character wouldn't say this or do that . . . we find that scenes we labored over for months cannot be filmed, or are completely changed during production, or are cut out entirely during editing . . . and yet we endure all this. We endure it for one reason - it's not the money, and it's certainly not the glamor: it's for that slim wisp of a hope that at the end of all the pain and angst and self-doubt and pride-swallowing and politicking and fighting and accommodating and tap-dancing and seven day weeks and 14 hour days and sleepless nights -- that at the end of all - after years of all that - a MOVIE is made; a movie that somehow miraculously reflects that original vision you had long, long ago sitting by yourself with the blank piece of paper. And maybe all over America and all over the world people will sit in dark rooms and watch something that once existed only in your head. And they'll be moved, or entertained, or enlightened, or touched . . . and a part of it will stay with them and become a piece of their memories, a piece of their life. And this movie that you imagined, and that is the product of so many people working so hard for so long, this movie that against

all odds turned out pretty good, this movie that bears your name - - will outlive you. You will have succeeded in leaving something behind with the power to touch people. Something that says I was here. And I tried. And this is what I did when I was here.

Mr. Chairman, to accomplish that is an extraordinary thing. To have even a chance of accomplishing that is the prime reason we create. But to go through all that and then to know that someday, somewhere, someone who did not invest his sweat and dreams and a big chunk of his life in this movie can say "Hey Pal, I own this and I think it'd be better if we paint it green - or cut off the beginning - or put some rock music in there - or cut in some nudity - or put on a new ending" - to know that that can happen is the ultimate insult, degradation, discouragement, crime. It is a moral crime. Not just a crime against the creators, but also against the people for whom the work was made. For they will not see the work as it was intended to be seen by the people who made it. And instead of being moved by an artist who gave part of his life to this . . . they will be ripped-off by a merchant who thought about it for all of five minutes.

Mr. Chairman, artists are perhaps more aware than most how very fortunate we are to live in a country that recognizes and guarantees freedom of expression. We are also, perhaps, slightly more aware than most of this ultimate truth: that freedom of expression - that most basic and important of freedoms - is worthless if the product of that expression can be changed without the consent or participation of the author.

We ask your help in protecting that freedom.

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Mr. KASTENMEIER. Thank you, Mr. Robinson. You did that in 5 minutes.

Mr. ROBINSON. Thank you. But it is uncommon, sir, in Hollywood, for the numbers to add up right, so I am proud of that. May I take 1 more minute just to address a few things that were said this morning?

Mr. KASTENMEIER. I knew that was coming.

Mr. ROBINSON. Thank you, sir. I got the impression from some of the speakers on the first panel that they think that writers and directors are trying to somehow limit the commercial exploitation of movies. We are not doing that. We want our movies disseminated in every medium possible.

All we want is, to insure that in whatever form that movie is shown, it is in the correct version, it is the same version that the copyright owner originally approved. When we are working on a film, the copyright owner has every right, and they exercise it, to make all the changes they want. We are not questioning that.

What we are saying is that, when the movie is finished, when the studio or the copyright owner says, "OK, that is it; lock it and release it," that that is the version that should be protected for the next generation and in any medium that it is shown in.

We were also told that the studios are very cooperative. "We always let the director, we always encourage a director to come in when the film is transferred to videotape." I have directed two motion pictures. On the first one, I found out about the video transfer when I saw it in a store, and they did a very bad job and made it look bad.

On the second film, "Field of Dreams," I had to call consistently to say, "When are you transferring it?" "We will get back to you." I finally got a date and I said, "I am going to come." They said, "Well, you do not have to come." I said, "No, I am going to be there." "Well, you do not have to be there the whole time." I said, "No, I want to be there the whole time."

"Well, you are not going to bring the cameraman, are you?" They actively tried to discourage me from being there. And I went there and I did not waste any of their time. I did not cost them any money, and I think we have a better video transfer of that film because of it. But they certainly do not encourage directors to come.

Mr. Mayer said that there is sufficient protection for artists. Mr. Nolan also said, "The system works pretty well." Well, clearly we would not be here if there were sufficient protection for artists and for our work, and clearly the system has not worked very well. The creative community is up in arms about changes to their work.

Mr. Fitzsimons said that, had color film been available in the early days, we would not be talking about colorizing. Well, this is simply not true. Color film was available in the 1930's and people made black and white films in the 1940's and the 1950's as an artistic choice. And they did that intentionally. They had the option of shooting in color. They chose to do it in black and white, and now some of those films are being colorized. And we think that that is wrong.

As for the question of the author, there is no question that the producer contributes to a film, that the cinematographer contributes to a film, or that the cinematographer's work is affected by

some of these changes. But there is a difference between who contributes and who is the principal author. There is a difference between who is affected by changes and who is the principal author of the films.

It is the Writers Guild's position that the word author means writer. And we are happy to extend that definition to directors, given the nature of this medium. But we think that the writer and the director are the principal authors of the film and that we are sufficient to protect the moral rights of the work.

Finally, just as a point of reference, when somebody talked about, "How would you like it when your legislation gets changed?" And Mr. Synar, very correctly, pointed out that it happens all the time. I was a political science major and I finally get to use something I learned in college. When you are writing a piece of legislation, many hands are involved, obviously. But once it is passed, it is law. And the President cannot change that law just because he wants to. He has to come back to you to say, "Please write a new law."

Mr. KASTENMEIER. We wish that were true. We wish that were true.

Mr. ROBINSON. I am sure you could argue, sir, but we would be on the same side in that argument.

Mr. SYNAR. That is why political science will get you nothing after the education.

Mr. ROBINSON. That has been my experience, sir. Thank you very much.

Mr. KASTENMEIER. I am glad for your additional comments, because I think you left the impression—you described the process and then the finished product as though the finished product should not be altered, period.

Realistically, given many things, such as aspect ratios and editing for television, we have known for some time that the theatrical release ultimately will probably be altered in some sense to fit that medium. So I gather your point is that the creators, namely the director and the screenwriter, not only ought to be consulted, but should as a matter of right be consulted about the post-release alterations in any form.

Mr. ROBINSON. Absolutely. I will give you a very quick example. "Field of Dreams" was a PG–13 film and 9 of the 10 airlines that purchased it, showed it as is. One of the airlines said, "We have some language changes we would like you to make, very minor language changes, we want you to take out a few words." And a few of these were things that I agreed to.

We are not being obstinate here. We are saying that we understand that sometimes changes will be made. We want to make them. We had already covered those words in our post-production. We had recorded duplicate versions that would be acceptable for network television, for instance.

There were a few changes we talked them out of, but there was one on which they would not listen to us. It is a scene in which the actress, Amy Madigan says to another person in a heated discussion at a PTA meeting: "At least I am not a book-burner, you Nazi cow." And American Airlines said, "You cannot say Nazi cow on American Airlines."

And so the studio proceeded to reedit the scene in such a way that the scene made no sense at all. And when I found out about that, I said, "No, no, no, surely they will listen to reason; Nazi cow is not a terrible thing to say." American would not even explain it. We could not figure out, do they have like Nazi passengers that they do not want to offend? Do they have cows that they do not want to offend? I did not understand it.

So, finally the compromise we reached was, "OK, just bleep the word Nazi. Do not recut the scene, just take out the word Nazi on the soundtrack." So, now she says, "You," no sound, "cow." And it sounds like she is saying something much worse than Nazi. To show you how ridiculous this is, in the very next scene, she says to her husband, played by Kevin Costner, "Isn't that great; I called her a Nazi cow." They did not object to that.

The ultimate irony is that this scene is about censorship. This is a scene at a PTA meeting when she gets up to say, "We should not be banning books. It is not in the American tradition." That is the scene that American Airlines wanted to censor. And that is the kind of moronia that we are dealing with out there, that we can help them with.

Mr. SYNAR. As a rancher, I am personally offended by all of this.

Mr. KASTENMEIER. Thank you. Mr. Dante, you did mention the Film Preservation Act. I do not recall this to embarrass Mr. Silverstein, whom I highly regard, but I remember, in fact it is in our folders, the Directors Guild of America press release of June 24, 1988. It says, "U.S. House of Representatives Committee on Rules will vote on the National Film Preservation Act of 1988 tomorrow, Thursday, June 23, 1988. The bill, if approved and signed into law, would grant full copyright protection to principal directors and screenwriters and their heirs of designated films and would make it unlawful to colorize or materially alter such motion pictures without changing the title of those works."

That was released by the Directors Guild of America. I do not know if you are familiar with that, but you do not think now, after reflection, that it quite achieves all of those ends, do you?

Mr. DANTE. Well, it obviously does not achieve all those ends.

Mr. KASTENMEIER. No, as a matter of fact, that is why we are here. But I think we must be clear that that is not what that bill achieves. It does require, in some modest way, that certain films be labeled and it does require the designation of 25 major American films.

The law does not really preserve anything.

Mr. DANTE. I believe that the objections of some of our opponents were one of the reasons that that bill was watered down.

Mr. KASTENMEIER. Well, at the time that it went to the Rules Committee it already had been watered down.

Mr. DANTE. Well, I think that Mr. Valenti had a great deal to do with that.

Mr. KASTENMEIER. He did not put out this news release.

Mr. DANTE. No, he did not.

Mr. KASTENMEIER. And the act was not changed, at least not substantially changed at that particular time, before the Rules Committee acted. Well, I just say that I think expectations and views of what we achieve or hope to achieve legislatively are sometimes——

Mr. DANTE. Well, we are still very happy to have it.

Mr. KASTENMEIER. Are you?

Mr. DANTE. Oh, yes, absolutely. The mere fact that motion pictures are protected in anyway, is a tremendous step forward. I think that those of us who have been on the front of this battle for a long time, were disappointed that it was not a stronger bill. But I do not think there is anyway that we could say that it was a step backward. It is definitely a step forward.

Mr. KASTENMEIER. Well, no, it was not a step backward, but I think it fell so far short of your expectations that——

Mr. DANTE. No, you must realize that we are used to having nothing. This is something. Something is always better than nothing.

Mr. KASTENMEIER. I yield to my colleague.

Mr. SYNAR. Thank you, Mr. Chairman. Mr. Dante, who was the producer of the Gremlins? Who produced the film?

Mr. DANTE. Well, we had several. We had the real producer, whose name is Mike Finnell, who worked with me from day one, everyday on the picture. And we had the executive producers. We had Steven Spielberg, whose idea the picture was and who found the script. And we had——

Mr. SYNAR. Did Mr. Spielberg and Mr. Lucas, I think was also involved in it.

Mr. DANTE. No, not on that one.

Mr. SYNAR. Mr. Spielberg, did he protect your moral rights? In other words, did he give you final editing of Gremlins?

Mr. DANTE. As a matter of fact, no.

Mr. SYNAR. All right, so he had final rights as producer.

Mr. DANTE. He had final cut on that picture.

Mr. SYNAR. All right, so he was in charge of your moral rights, was he not?

Mr. DANTE. Yes, I suppose you could say that.

Mr. SYNAR. OK, now he was in charge of editing and if the film——

Mr. DANTE. No, I would not go so far as to say that. Now, the way it works, and this is——

Mr. SYNAR. I am just trying to get the contractual relationship here. Now, if that film is to go on to TV or some other form, Mr. Spielberg, not you, will have the determination——

Mr. DANTE. No, that is, as a matter of fact, not true. The picture has already been on network television. I was the one who was consulted, not Mr. Spielberg. I was offered the option of cutting 15 minutes out of the picture or having it lexiconned, sped up to fit in a 2-hour time slot.

Mr. SYNAR. Now, was that done through contract or Steven Spielberg just allowed you to do that?

Mr. DANTE. I believe it was done in that case in contract, by a contract, by my contract.

Mr. SYNAR. So, you put that in your contract with Mr. Spielberg.

Mr. DANTE. Yes.

Mr. SYNAR. Now, during the Senate testimony earlier--Mr. Berman. Mike, can I interrupt?

Mr. SYNAR. Sure.

Mr. BERMAN. Put what in your contract?

Mr. DANTE. The fact that, when the film went to network television, I was to be consulted, the phrase, consulted. What that really means is, "We are going to tell you what we are going to do and, if you have some suggestions, we will glad to hear them, but we are going to decide what we are going to do with your film." I mean, that is consultation.

Mr. SYNAR. Explain that to me again. What were your rights?

Mr. DANTE. My right was to be told what they were going to do, what their plans were and to be consulted about the way the picture was going to be cut.

Mr. SYNAR. Did you have veto power?

Mr. DANTE. Oh, absolutely not, no.

Mr. SYNAR. OK, so he retained his——

Mr. DANTE. Who?

Mr. SYNAR. Spielberg.

Mr. DANTE. No, nobody had veto power. When a film is sold to network, the studio owns the film. The studio sells the film.

Mr. SYNAR. But who had more rights, you or him with respect to negotiating with the network?

Mr. DANTE. Well, neither of us had the moral rights in the sense that the moral right is the right to object. I did not have a right to object. I had a right to be consulted.

Mr. SYNAR. The reason I am asking is, that Steven Spielberg has been in all of our offices and I think he makes a very persuasive case that he, among a few, having been producer, director, et cetera, in the whole integrated market, can give us a pretty objective feeling of where everything is. And he comes down on your side clearly on the issue on moral rights.

And yet we find it interesting, or at least I find it interesting that in his negotiations with directors where he is the executive producer, that he retains those rights for himself.

Mr. DANTE. Well, he retains the final cut rights in the production of the motion picture. That is our working relationship. When we show the film to the studio, I say, "I do not want to cut this," he backs me up or not. That is his position.

But once the film is completed, his moral rights stop. I mean, he does not have a right to tell them not to sell it.

Mr. SYNAR. Now, is your main concern the preservation of the original film?

Mr. DANTE. That was initially my main concern when I got involved with this. I——

Mr. SYNAR. All right, so would that be satisfactory if we were to guarantee that at least one copy of the original film was intact?

Mr. DANTE. Like where, in some vault somewhere.

Mr. SYNAR. I mean, that it was protected.

Mr. DANTE. The nature of motion pictures is that it is a public art.

Mr. SYNAR. Right.

Mr. DANTE. A movie does not exist at all, except in your memory. I mean, it may be in a can somewhere, but as you are watching it, it is a piece of time. Once the film is over, all you have is your impression of it.

Mr. SYNAR. But if the original impression that you made is preserved——

Mr. DANTE. I am very pleased that it is preserved. But my problem is not that the films are being saved in a vault somewhere. My problem is that the way that they are being presented to the American public is false. And that what I made is not what is being shown.

Mr. SYNAR. What is the difference between Mona Lisa, if I go to where it is being shown, and see the actual Mona Lisa, and that in an art book. It is obviously not being shown.

Mr. DANTE. There is probably no difference as long as it is reproduced correctly. But my point is that these films are not being reproduced correctly. Every film that you see is a copy. It is a tape or it is off a dupe negative. I mean, it is not the original negative. Nobody runs the original negative for one thing. It is all orange. You cannot see it. So you make prints. And the prints are like prints of paintings. They have to be exhibited in a way that is concomitant with the way that they were made.

Mr. SYNAR. All right, define for me, if you could, how you would define materially altered?

Mr. DANTE. Alteration of the material.

Mr. SYNAR. Give me some examples of what it is and what it is not——

Mr. DANTE. Well, for instance, I will give you an example.

Mr. SYNAR [continuing]. That affects the integrity of the film.

Mr. DANTE. I will give you an example. When Alfred Hitchcock died, he believed that he had made Rear Window and that he had finished the picture and that it was completed. When the picture was shown by MCA in television syndication, they decided that the could not speed it up because they did not have a music track. So they had to add a dream sequence to the picture, a 3-minute dream sequence, that Alfred Hitchcock did not direct, which went right in the middle of the picture in a crucial moment that it did not belong.

And to my mind, this is no longer the picture that Alfred Hitchcock made, but it is being advertised as Alfred Hitchcock's "Rear Window." This is one of innumerable examples that I could give you of pictures being reshot, reedited, relooped, reeverything, purely at the whim of the person who owns the pictures, so that they can make a couple of extra bucks, not that I dispute their ability to make money.

I feel that when Mr. Turner bought the MGM library, he bought a trust and his trust is that he is now the custodian of those films. And those films are a tremendously wide group of pictures that go back to the early 1930's, that are in toto, a picture of the way we have been for the past 50 years.

I do not think that his purchase of those films gives him the right to distort that history. And that is one of the reasons that I guess——

Mr. SYNAR. But if the history is protected by an original copy——

Mr. DANTE. An original copy is not being shown. The public is not meeting the original copy.

Mr. SYNAR. But it is available. Sometimes they will show it.

Mr. DANTE. Well, if a scholar or a film student would like to journey to Washington to see the print——

Mr. SYNAR. Let me——

Mr. DANTE [continuing]. That is fine. I think that is wonderful.

Mr. SYNAR. Let me pursue that, because I have asked Ted that same question. And I mean, it is an interesting debate. I mean, obviously, when you buy $1 billion library, which is what he bought, and he colorizes a number of the films, what he is basically doing is enhancing the value from a billion to a billion three. And that is exactly what he was doing.

He made it a more expensive library by doing it. So, I asked him once, I said, "Ted, why did you do it?" He said, "Well, I could give you the monetary reason, that it gave me $300 million more, and you might do that. I could give you the fact that I just wanted to make everybody mad in Hollywood. That is what my game in town is." He said, "Do you know why I did it, because young people will not watch black and white film, and I wanted to get a bigger distribution of these films. They just will not watch it."

And I thought that was a very insightful—I mean, how do you respond to that?

Mr. DANTE. Well, I remember his answer to that being that, "I think they look better in color," was the answer.

Mr. SYNAR. Well, I am just talking about a personal conversation here.

Mr. DANTE. Well, the fact is that if they will not watch black and white, why are half the rock videos being made in black and white? Why is Roy Orbison's tape of his last performance with Bruce Springsteen, photographed in black and white? I mean, I do not buy this. Maybe Mr. Turner does, but I do not happen to think that it is true.

Mr. SYNAR. OK, let me go to you, Mr. Robinson, if I could. You stated in your second remarks that you made about principal author. Now, obviously, sometimes a screenwriter takes a screen play from another medium, a novel or a play or something else. How is that person's rights protected?

Mr. ROBINSON. When you adapt a novel into a screen play, which I did on "Field of Dreams," the first thing you have to realize is that you do not do this unless you like the book. It is too hard and it takes too much time to work on something you do not like. So, you go into it hopefully, with the attitude of, "I am doing this because I want to honor this material."

There are cases when novelists have complained about the movies that have been made from their novels, just as there are many cases of screenwriters who have complained. We do not want to get into discussions about what happens before the film is released, the relationship between the people who are making the film.

What we are saying is that, after the film is finished—whether or not that film reflects the screen play the way the screenwriter intended it to be—once that film is finished, it should stay finished. On "Field of Dreams," I sent Bill Kinsella, who is the author of "Shoeless Joe," the novel it was based on, a long letter when I started to write, about, "Gee, I am going to change this and I have to change this and here is why I am changing this."

And he sent me back a postcard that said, "Dear Phil, do whatever you have to make it a movie. Love, Bill." I believe that Joe has——

Mr. DANTE. Yes, interestingly, Margaret Mitchell wrote to David Selznick when he asked if she would be involved in the making of "Gone with the Wind," and she said, "I wrote the book and that is all. My connection with the motion picture ended when I signed the contract selling you the film rights. I sold them to you lock, stock and barrel. From that day forward, they have been yours to do with as you please."

Mr. SYNAR. But you do understand, I can give you a case in point of a number of times where someone sold their rights, obviously, to get it moved into a screen play or in a movie and then when they looked at the screen play, way before the final product was made, they objected to it. And yet it was still made and, "the principal author," in this case the novelist's rights were not protected. You will agree with that, in their own mind.

Mr. ROBINSON. I would say, in their own mind, they are the principal author of a novel. They are not the principal author of a movie.

Mr. SYNAR. All right, now sometimes, you know, even with your genius, you have to have a number of screenwriters that help.

Mr. ROBINSON. Absolutely.

Mr. SYNAR. How do you determine who the principal author is on that and how do you protect all the other ones who have contributed?

Mr. ROBINSON. Sir, the Writers Guild of America won the right to determine credits a long time ago. And there is a very elaborate arcane, sometimes questionable, but always final solution which is a Writers Guild arbitration. And that determines who gets the credit on the screen and that determines who gets residuals, who gets bonuses based on credits. And in this case——

Mr. SYNAR. I am from Muskogee, OK. I got you a screen play. And since I am not a career producer or career screenwriter, I come to you and give it to you because you are a career one. And you and I work together. And then it is a final product.

And then they come back later and want to make some changes, what you call material changes. It was my original idea. I used you and you and I were in partnership. How am I protected?

Mr. ROBINSON. Sir, under any screenwriting contract, it says the studio is the author of the screen play. This is for purposes of copyright obviously. If you and I cowrote together, we would have an agreement together that we share screen play credit. If you wrote a screen play, sold it to a studio, signing a contract that said the studio can do what it wants with it, and then I was hired to write it, it would go to an arbitration to see, did you make enough contributions to it to get credit or did I make enough contributions to get credit.

Mr. SYNAR. How do you give that weight?

Mr. ROBINSON. I do not understand the question.

Mr. SYNAR. Do you contract that weight, the proportion of the vote?

Mr. ROBINSON. In other words, if we both got shared credit?

Mr. SYNAR. My final question is this, you know, we have had about three panels now, and every panel has a different group of people at the table who are making this decision. Let us say it is just you and the director——

Mr. ROBINSON. OK.

Mr. SYNAR [continuing]. OK, which this panel is arguing. It is just you two.

Mr. ROBINSON. Right.

Mr. SYNAR. Let us say it is a 50/50, not 50/50, what happens if you all cannot agree, you finally just literally cannot agree?

Mr. ROBINSON. Sir, personally, I think that if I write a movie and it gets shown on television, for instance, and to compress it for time they cut out a scene, and the director may or may not object to that scene being cut out, but I do because, in my belief, when people see that movie, they are going to say, "Gee, the story-telling is not very good." They will say, "Well, it is well-directed, it is well-acted, but God, this guy just does not know how to write a screen play. He does not set things up properly. He does not move a character along properly."

That damages my reputation. And I believe that I should have the right to object to that. And the question that——

Mr. SYNAR. And that you should have precedence over the director.

Mr. ROBINSON. If it damages me and not him, absolutely, sir.

Mr. SYNAR. Well, we are back to reputation and image. That argument can be made for actors. That argument can be made for cinematographers. That argument could be made for——

Mr. ROBINSON. Sir, but they are not the principal authors.

Mr. SYNAR. Right.

Mr. ROBINSON. There are many who would agree with the earlier assessment. But, I think that we are the right people to say, "We are going to protect this work and we will protect the work of the people that we hired and whom we directed.

Mr. SYNAR. Thank you, Mr. Chairman.

Mr. KASTENMEIER. The gentleman from California.

Mr. BERMAN. There is a well-known former Senator, who got depositories and suppositories mixed up. In a debate on the Senate floor, he said, "Nevada will not be the home of a nuclear suppository."

Mr. ROBINSON. Which, of course, he was wrong.

Mr. BERMAN. When you had the script for "Field of Dreams," my guess is that was an unusual enough movie that no one was quite willing to put together the money to hire a prominent star, I mean all of the work that it took and all of that coin to get a "Field" going, all the costs involved in that motion picture, I mean, this was sort of an unusual movie.

What studio did that?

Mr. ROBINSON. Universal.

Mr. BERMAN. Universal. Did they have a commitment from American Airlines to show that movie on the airplane or had they sold the rights to that movie before that movie was made?

Mr. ROBINSON. My understanding——

Mr. BERMAN. Let us put it before it was finally finished, that point of time that you are talking about that it goes into movie studios or theaters?

Mr. ROBINSON. My understanding is, no, but I could be wrong. I am not privy to those negotiations, but my belief is that, after the film was released, the airlines came in and bid for it.

Mr. BERMAN. All right. Do you think they sold any rights?

Mr. ROBINSON. They presold some foreign rights before they made the film.

Mr. BERMAN. Dubbed or subtitles?

Mr. ROBINSON. It has been shown overseas in both versions.

Mr. BERMAN. Well, your answer sort of ruins my hypothetical.

Mr. ROBINSON. I am sorry.

Mr. BERMAN. But the logic of it is there, an unusual film. You are trying to put together the money. You want to know there is going to be some market. You want to go out and sell it. You are willing to take a chance on this and so they have gone out and they have peddled the film to American Airlines. And now some jerk at American Airlines, who is in charge of—I mean, that is an interesting job, to work for an airline and be able to look at all these films and play around with them all you want, but some jerk says, "I am going to cut out that line."

Under the Guild's suggestion, you should be able to say, "You cannot show that movie on American Airlines unless we consent to this. And you have the burden of convincing us to grant our consent."

Mr. ROBINSON. Well, in fact, what we are asking for, we are saying, "You can do whatever you want to but we retain the right to object to it, if you change it in a way that"——

Mr. BERMAN. Here is my problem, this word objection.

Mr. ROBINSON. Yes, sir.

Mr. BERMAN. Consultation, I understand. And I understand your version of consultation which is, "Come on in; tell us what you think. If we like what you say, we may do it, but we are going to decide and all the cards are in our hand." That is what consultation is. It is better to have it than not.

I am sure when you went in on the second video, the transfer to videocassette, you made some suggestions that they decided made sense and took them.

Mr. ROBINSON. Right.

Mr. BERMAN. But now registering your right to object, what does that mean? Is that, you can block it from being shown in that form?

Mr. ROBINSON. To me, the right to object is the right to effectively object. It is not to have freedom of speech, to say, "Wait I object." And they say, "Thank you, goodbye."

Mr. BERMAN. Right. I assume so.

Mr. ROBINSON. Right. And my limited understanding of the Berne Convention is that moral rights includes the right to object. It seems to me that we need some way to redress our grievances. Right now, we do not have one other than the individual clout of the director or the writer. When they cut up my film or when they change it in a way that I feel damages me, where can I go? Who do I talk to under the present system?

Mr. BERMAN. And does that reflect your view, as well? In other words, the original Gephardt bill did not simply give you a place to go. It said, "Nothing happens unless you or if you have died, your heirs, say it is OK, an alteration cannot take place otherwise," as I read that bill.

What I am hearing today from different people is something different. I am not sure what it is. Maybe it is arbitration. Maybe it is some third party dispute resolution, but it does not sound like it is the right to veto. Is that a fair assumption?

Mr. DANTE. I think what we are trying to do is we are trying to be responsible. We certainly do not want to interfere with the rights of the copyright owner to make money from the films. We want the films to be shown. We want them to be seen. We would like to have a say in the way that those pictures are presented which we currently do not have.

If we feel that an arbitration system would enable us to come to terms, then I think that would be a wonderful idea. I mean, we are not so doctrinaire that we do not want the films to be seen, we want them all to be locked in a vault and nobody can see them unless they run them exactly the way that they were made. That is not exactly what we are saying.

What we are saying is that films have been treated like third class art in this country for a long time. Finally, people are coming to their senses and they are seeing that there is some enormous importance in the things that have come before us, not just the things that we are going to make in the future.

And I know that there was discussion of new technologies briefly as if all we had to do is wait and somehow these new technologies are going to solve our problems for us. I wish that was the case. I do not believe it is true even involving the screen ratios. When high definition television comes in and everybody says, "Well, good the screen is wider; now we do not have to worry about panning and scanning," no one has dealt with the fact that all the pictures made before 1953 and all television shows are square and not wide. And are we going to cut the top and the bottom off of every single one of those movies?

These kind of problems, I think, are solvable, but we need to discuss them. We need to finally talk about actually doing something.

Mr. ROBINSON. Also, Congressman, I would point out that we make changes all the time to accommodate the commercial needs of the copyright owner.

Mr. DANTE. And censorship, we absolutely always make censorship changes.

Mr. ROBINSON. For instance, when a film is sold to network television, you shoot some scenes two ways, using the offending word or not. And in post-production, you rerecord a different version so that it does not say a word that cannot be shown on network. We do that all the time.

We are not trying to say, it has to be our way or nothing at all. We want to be able to contribute to this process but we want to do it in such a way that does not damage the works as they were substantially intended to be seen. That is all, we are trying to be very reasonable.

Mr. BERMAN. It is not easy to conceive of a way in which Congress can give some kind of balance that does not give the whimsical, irrational person the chance to destroy a valuable piece of property by not letting it get marketed and at the same time, prevent the kind of gross alterations of a creator's work that people are——

Mr. DANTE. I think you will find that whimsical irrational people tend to not get hired to do these things. That more of us are responsible than it may appear from the tabloids.

Mr. SYNAR. I am glad that two Californians are having this conversations.

Mr. BERMAN. The home of whimsical and irrational people. I think when Mr. Synar was asking about Spielberg and you, what is happening is that the opponents of what you are trying to do, legislatively, are making some points saying, since Mr. Spielberg has been an advocate of this position, when he is the executive producer of a movie, when he is putting together a movie, he does not contractually give to the director that which he is saying that Congress should legislate for the director.

Mr. DANTE. Well, let me speak to that. When I did the film that we discussed with Mr. Spielberg, I was the young kid who did B pictures. I did werewolf movies. I mean, there is a certain amount of responsibility that Mr. Spielberg obviously owes the studio. If I am his choice to direct the film, it is in his interest to be able to say to the studio, "Now, listen, do not worry, I will be responsible for this person."

Now, in the subsequent films we have done, we have shared final cut, because there is no particular reason for him to worry anymore about it. In the film making process, his responsibility has, I think, less to do with any kind of moral rights than it does with simple expedience of the fact that he has to say, "OK, I am responsible for this person, if I want to hire him and he does not have the kind of credits that you are used to."

Mr. BERMAN. Sure, I understand that, but you are now talking post-production. And as I understand it, when Mr. Spielberg directs a movie, he contractually keeps certain control of post-production alterations that he effectively can block through the exercise of the contract. But he does not contract that to the directors whom he hires to direct his films.

Mr. DANTE. Well, it is not his position to contract that to the directors that he hires. It is for the directors themselves, to try to contract that.

Mr. ROBINSON. Also that is not moral rights, sir. There is a difference between final cut and what we are talking about. Final cut is——

Mr. BERMAN. No, but I am talking post-production.

Mr. ROBINSON. Right.

Mr. BERMAN. As I understand it, we know a situation. We know that when Warren Beatty did "Reds," he won a case that said he had a contractual right to control how that would be shown on television, to block it from being shown on television if he did not give his approval.

Mr. DANTE. Right, and he did, I believe.

Mr. BERMAN. He certainly did. Now, the viewers of free television did not get to see "Reds," but he made that decision. You know, I saw it, so the hell with the world. No, I mean——

Mr. DANTE. It is available on tape.

Mr. BERMAN. On what?

Mr. DANTE. It is available on tape.

Mr. BERMAN. It is on tape and it has been on cable and anyway. He got that by contract.

Mr. DANTE. Right.

Mr. BERMAN. And he was the director.

Mr. DANTE. He is one of the very few people who can get that by contract, as is Mr. Spielberg, one of the very few, which he gets by dint of his success at the box office.

Mr. BERMAN. No, I understand all that. All I want to do is get to the point that if this was such a fundamental artistic right, why are the people who are coming to Washington who have that special clout to be able to get it by contract not giving it to directors when they are acting as producers?

Mr. DANTE. Because he cannot give it. It is not in his power to give it. He is merely the producer. He is not the studio. The film is still owned by the studio. It is not owned by him.

Mr. BERMAN. So he——

Mr. DANTE. When I work for Warner Brothers, I work for Warner Brothers, whether he is coproducing the movie or not.

Mr. SYNAR. Mr. Dante, what he is trying to say very simply is, is that the same rights that he wants as directors do not appear to be given when he is hiring those same people.

Mr. DANTE. He is not in a position to grant those rights.

Mr. BERMAN. Well, if he has clout, he can exercise that clout.

Mr. DANTE. You mean, what you are saying is that, in order to be consistent in his position, he should go to the studio when he hires a young director and say, "Well, give this guy final cut or we will not make the picture." Is that what you are saying?

Mr. BERMAN. That is what they are saying.

Mr. SYNAR. "Give him the same rights that I demand when I am making movies."

Mr. DANTE. That is an apples and oranges argument. I do not see how that has anything to do with what we are talking about.

Mr. BERMAN. All right, I mean, I do not want to spend a long time on it.

Mr. ROBINSON. I will tell you why I think it is apples and oranges is that, there is a fundamental difference between final cut and moral rights. Mr. Spielberg retains final cut when he is a director as some very successful directors have. When he is a producer, he may not give final cut to a director working for him.

But moral rights is referring to what happens to the film after it is cut.

Mr. BERMAN. That is what I am talking about, too.

Mr. ROBINSON. That is what we are talking about, OK. It is not in Mr. Spielberg's purview to say to a director that he hires, "You can control what happens to this when it is sold to the network television."

Mr. DANTE. Absolutely.

Mr. ROBINSON. He does not have that right.

Mr. DANTE. He does not have that power.

Mr. ROBINSON. The studio or the copyright owner has that. That is what we are talking about.

Mr. BERMAN. Well, but as director, he has that——

Mr. DANTE. When he directs his own films, it is in his deal but he cannot make that deal for someone else.

Mr. BERMAN. Because he makes it in his deal.

Mr. DANTE. But he cannot make it for someone else, just because he is involved with the film. It is his directorial power that these people are buying.

Mr. BERMAN. OK.

Mr. DANTE. And when he is producing a movie, he is not the director and it is not quite as good a deal for the studio.

Mr. BERMAN. I do not want to belabor this. I mean, it is getting very individual here. I think, the point that is being made here by opponents is, all the people are coming to Washington telling us to legislate this, do not give this. And you are saying they do not have the power to give it. And I say, well, if they really care they could say, "I am not going to be the executive producer of this movie unless you give the director the post-production control." But we can go back and forth on that.

Mr. DANTE. Well, I have to tell you my own experience is that I have actually had post-production control on every picture I have done for him. And I do not know that it was contractual. I think he just gives it to you. I have been very lucky in that regard.

Mr. BERMAN. Well, then it is in his power to give it.

Mr. DANTE. I think it is a moot point. I think that the studio gives it or takes it away at their whim.

Mr. BERMAN. When Mr. Mayer testified, he was talking about colorization. And he was saying——

Mr. DANTE. He also said that film was an art form. I was very pleased to hear that.

Mr. BERMAN. Right, right, well, he has some credits for having respected that in the course of his career, as I understand it. But he was saying essentially, "Every one of the films we have colorized, we now distribute to video dealers, the black and white version as well as the colorized version."

Essentially, he was saying, it is getting out there. He even said at one point, "It seems like the customers are renting or buying the black and white prints more than the colorized prints." Although at another point, he was saying, "People like colorized more than black and white." So, I am not quite sure what he meant.

Is it your understanding that there is essentially nothing—is there anything being done to inhibit the availability of black and white original prints at this particular point?

Mr. DANTE. Well, that is an interesting question. I actually have a contract here which is a contract that was entered into by MCA with a company called Quintex, which has agreed to colorize the products for MCA. And interestingly in this contract, the provision for the agreement is that MCA agrees to suspend all worldwide black and white distribution of these programs during the term of the agreement, which would lead me to think that there is no way that these programs are going to be available in black and white during the run of the colorized version.

Mr. BERMAN. That does create that inference.

Mr. DANTE. Well, I think this is part of the deal. The Quintex Co. is apparently paying for all of the colorization itself for a percentage of the profits. And they feel that in order to maximize their profits, they do not want to be competing with the black and white versions of the shows.

Mr. BERMAN. So, not everybody then is doing what Turner is doing.

Mr. DANTE. Well, no. We are very pleased that Mr. Mayer and Mr. Turner have spent a lot of money on, you know, keeping their film library up, which I think is merely good business. But I do not think that we can really just depend with their whim, as to whether or not they decide that it is a good idea to have these black and white films out.

I mean, they could decide that the marketplace, for some reason, is not responding enough, you know. In television, it only takes a percentage of people not watching your show to get a show canceled. And it is not inconceivable that they could say, "Well, you know, everybody who wanted one of these has got it and let us just not make it available anymore." I really hate to seat them the power of deciding who gets to see an original black and white version.

Mr. BERMAN. I saw an example of panning and scanning in Washington that undoubtedly the Directors Guild was showing of "The Graduate" when it was shown on television. I have never been accused of being a man of culture and taste, but even I could tell this was ridiculous.

You were getting dizzy going back and forth in a very important scene with Anne Bancroft and Dustin Hoffman, a scene where you would want to see the room and both of them and their relationship and you could not do it.

We are now hearing that the technology has improved dramatically, that films are being made in a different fashion. Panning and scanning techniques are better. They can block off the camera so that they are thinking about television when they are making these movies and that this is no longer a serious issue.

What is your view of that?

Mr. DANTE. Well, that it is a serious issue. For one thing, it would be a serious issue even if all movies from now on were only made in 133 because of all the movies that have already been made in the wide screen formats. I believe it is a serious issue.

If somebody makes a film, and it is this wide, and on TV you are only seeing this wide, you have only seen half the film. The technique, the technology has improved to a point where you can be very deceptive and you can almost make a film look like there are not supposed to be people standing over here. The old technique was worse, because they did not have the ability to do a smooth pan.

Now, they have an ability to do a smooth pan but it is still a giant compromise. I mean, unless the person who has made the film has decided, "OK, we are going to make the picture in wide screen but let us keep everybody in the middle of the frame and we will save ourselves a lot of money later, because we will not have

to do all this planning and scanning," the fact is it is cheaper for the studios to letterbox than it is to pan and scan.

It is very costly and time consuming.

Mr. BERMAN. They claim the public does not like that.

Mr. DANTE. Well, I do not understand then how the Criterion Laser Disk Co. could be in business because that seems to be all they sell is letterboxed versions of pictures. I think that there is more use of letterbox on commercials today. They are using letterbox on MTV all the time. And I think it is gaining in acceptance.

I think it is a matter of educating the public somewhat about what it means and the fact that you are not getting less, you are getting more. But, I certainly do not think it is a controversy that is going to go away. And as I said, when high definition comes in, there is going to be the question of panning and scanning this way, up and down to fit pictures into a wider format.

I hate panning and scanning, but my personal nightmare is lexiconning, which is a process by which the film can be speeded up or slowed down to fit in a prearranged time period on television.

In the old days, if a film did not run long enough, some enterprising station manager with some imagination would show a cartoon or a "Three Stooges" short at the end and fill out the time. Now, since imagination seems to be in short supply, it has become incredibly common practice, more common than you would believe, to stretch out the film artificially with this machine that literally prints every third frame twice. So, that as people walk past the camera, they stop for a moment. And you can imagine, it makes the camera work look terrible.

There is also a way of speeding up the film so that it can fit in a smaller—in a shorter time period. And they say, "Oh, we are helping you; you do not have to cut it now." Unfortunately, this is, to me, a worse alternative than cutting, because it destroys every single effort at timing and pacing that you have put in a film—William Wyler used to do many, many, many takes to get exactly the right performance and exactly the right timing, not to mention Chaplin and comedians like the Marx Brothers who would take their films out on road, on stage, to time precisely where the laughs would fall.

People work very hard on films and care about what they do. And then to turn on the TV and see everybody moving jerkily across the screen at twice the speed, just so they can cram in more commercials, is insidious, even more so because most people are not aware that it is being done.

Mr. BERMAN. My final question is maybe more of a reaction than a question. In response to Mr. Synar's question, in talking about book authors, I thought you were a little cavalier there. I mean, the guy is the author of the book and not the movie, but it is clear that "Bonfire of the Vanities" is going to start out as a movie that a company is going to be willing to spend a lot of money on without regard to how the screen play is like the book because it has that title and it is Tom Wolfe's or Tom Clancy in——

Mr. ROBINSON. "Hunt for Red October."

Mr. BERMAN [continuing]. Right, "Hunt for Red October" and many other such movies. And so, I mean, what about his honor and his reputation if the thing is distorted tremendously?

Now, there is one answer that, I guess, does not apply in your case and that is people can always say, "Well, I like the book a lot better than the movie." But, well, I guess you could say, "I liked it in the theater much better than I liked it on television." But, to what extent does your analysis break down when you take the position that the book author should have nothing more than what he can get by contract, whereas, screenwriters should.

Mr. ROBINSON. I think that my analysis is based on my experience, which is that a novel is fundamentally different from a movie. And that when you make a movie out of a novel, you are creating a new work.

There are certain things that books do much better than movies ever could, interior dialog inside a character's head and certain kinds of jumping back and forth in time, and multiple layers of meaning. They can do that really well and the smart screenwriter is not going to try to even do that stuff when he writes "Fade in, scene one."

There are certain things that a movie can do as well as, if not better than a book. And the job of the screenwriter, when he is adapting a book is to say, "OK, I love this book, but we are now making a movie. Now, what is the heart of this book? What is it that I want to put into the movie?" And you try to find the spine or the one core idea or the one central notion that you want to make a movie out of and you make a movie out of that not out of the book.

Mr. BERMAN. And you do not think that that is what American Airlines was trying to do with "Field of Dreams?"

Mr. ROBINSON. I guess not, no, sir.

Mr. BERMAN. Thank you. I have no further questions.

Mr. DANTE. I would like to just submit to you, I am not going to read it, a brief on motion picture adaptations by George Bluestone, an expert on turning novels into film. It deals with the reasons why, in his view, a motion picture and a film are completely different entities with different agendas completely. And I think if you read this, it will illustrate some of the stuff that Phil was saying.

And I would also like you to see the contract, the Quintex contract.

Mr. KASTENMEIER. Without objection, we would be pleased to receive those for the record.

Mr. DANTE. Thank you.

Mr. KASTENMEIER. Thank you.

[The documents follow:]

George Bluestone
90 Babcock Street
Brookline, MA 02146

BRIEF ON THE AUTONOMY OF MOTION PICTURE ADAPTATIONS OF LITERARY FICTIONS

The general argument of my Novels Into Film (Johns Hopkins Press, 1957) is that filmmakers do not replicate fictional sources of motion pictures but rather use them as raw materials for the creation of unique entities. A key passage from the Preface reads:

> We discover...in film versions of the novel an inevitable abandonment of "novelistic" elements. This abandonment is so severe that, in a strict sense, the new creation has little resemblance to the original. With the abandonment of language as its sole and primary element, the film necessarily leaves behind those characteristic contents of thought which only language can approximate: tropes, dreams, memories, conceptual consciousness. In their stead, the film supplies endless spatial variations, photographic images of physical reality, and the principles of montage and editing. All these differences derive from the contrast between the novel as a conceptual and discursive form, the film as a perceptual and presentational form. In these terms, the filmmaker merely treats the novel as raw material and ultimately creates his own unique structure. That is why a comparative study which begins by finding resemblances between novel and film ends by loudly proclaiming their differences. (pp. viii-ix)

The book goes on to develop a detailed case for this argument which, through more than a hundred citations by later critics and scholars, successfully changed the terms of discourse on this subject. The case is made in the book's first chapter:

> Such statements as: "The film is true to the spirit of the book"; "It's incredible how they butchered the novel"; "It cuts out key passages, but it's still a good film"; "Thank God they changed the ending"--these and similar statements are predicated on certain assumptions which blur the mutational process. These standard expletives and judgments assume, among other

> things, a separable content which may be detached and reproduced, as the snapshot reproduces the kitten; that incidents and characters in fiction are interchangeable with incidents and characters in the film; that the novel is a norm and the film deviates at its peril; that deviations are permissible for vaguely defined reasons -- exigencies of length or of visualization, perhaps -- but that the extentof the deviation will vary directly with the "respect" one has for the original; that taking liberties does not necessarily impair the quality of the film, whatever one may think of the novel, but that such liberties are somehow a trick which must be concealed from the public. (p.5)

And again

> What is common to all these assumptions is the lack of awareness that mutations are probable the moment one goes from a given set of fluid, but relatively homogenous, conventions to another; that changes are inevitable the moment one abandons the linguistic for the visual medium. Finally it is insufficiently recognized that the end products of novel and film represent different aesthetic genera, as different from each other as ballet is from architecture. (pp. 5-6)

> The film becomes a different thing in the same sense that an historical painting becomes different thing from the historical event which it illustrates. It is fruitless to say that film A is worse thatn novel B as it is to pronounce Wright's Johnson's Wax Building better or worse than Tchaikovsky's Swan Lake. In the last analysis, each is autonomous, and each is characterized by unique and specific properties. (p. 6)

The study, subtitled "The Metamorphosis of Fiction Into Cinema," goes on to substantiate the case by meticulous attention to six well known examples: John Ford's The Informer (from Liam O'Flaherty), William Wyler's Wuthering Heights (from Emily Bronte), Robert Z. Leonard's Pride and Prejudice (from Jane Austen), John Ford's Grapes of Wrath (from John Steinbeck), William Wellman's The Ox-Bow

Incident (from Walter Van Tilburg Clark) and Vincent Minnelli's Madame Bovary (from Gustave Flaubert).

The main contours of this perspective have been confirmed through additional work I have done since the book came out. See example "Elmer Gantry: Adaptation or Evasion?" Film Quarterly (Spring, 1961); "The Fire and the Future: Truffaut's Farenheit 451, "Film Quarterly (Summer, 1967); "Barry Lyndon: The Book, The Film, "Sphinx #9, No. 1 (February, 1979) and "Filming the Novel: The Hemingway Case," forthcoming chapter in A Moving Picture Feast: Hemingway and Film, ed. Charles Oliver (Praeger, 1989).

A number of scholars and critics have widened, deepened and modified the assumptions of Novels Into Films, but the essential insights have remained intact. Among the more durable: The Classic American Novel and the Movies, ed. Gerald Peary and Roger Shatzkin (New York Ungar, 1977); The American Novel and the Movies, ed. Andrew Horton and Joan Magretta (New York: Ungar, 1981); Joy Gould Boyum, Double Exposure: Fiction Into Film (New York: New American Library, 1985).

The following from Horton and Margretta is typical of the direction taken in recent years by comparative studies:

> Anyone with the most rudimentary literary training should be struck by the perverse backwardness of the adaptation-as-betrayal approach: The study of adaptation

> is clearly a form of source study and thus should trace the genesis (not the destruction) of works deemed worthy of close examination in and of themselves. Knowing how Fellini has reshaped Petronius in Fellini Satyricon helps us understand his art, just as knowing how Shakespeare used Plutarch helps us appreciate Anthony and Cleopatra.

Even today the method can be applied to films as diverse as Lawrence Kasdan's The Accidental Tourist (based on Anne Tyler), James Ivory's Room With a View (based on E.M. Forster), and Leonard Nimoy's The Good Mother shows that Leonard Nimoy's fidelity to Sue Miller's model, the failure to improvise, translate, invent, killed much of the book's inner fire. The tradition continues.

These are, of course, aesthetic questions, but they tend to reinforce the moral and legal positions arising from debates over the rights of motion picture artists. However, it is my opinion that the motion picture is an autonomous entity distinct from the fiction on which it is modeled, and that the filmmakers are the authors of that entity, i.e. the motion picture adaptation.

In asserting a right in a motion picture after the entity is completed, filmmakers have a vested interest in retaining control over the technological alterations such as colorization, panning and scanning, lexiconning, letterboxing, additions and deletions. I note that such discussions of rights, moral and legal, rarely extend to deviations from the fictional model. In such cases the filmmakers rather than the novelists become the injured parties. Novels Into Film is an instance where an aesthetic argument reinforces a moral and juridical right.

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File No.: 12195/____

November 27, 1989

Elliott Williams
General Counsel
Directors Guild of America, Inc.
7920 Sunset Boulevard
Los Angeles, California 90046

NOV 28 1989

Re: Colorization (MCA-Qintex Contracts)

Dear Elliott:

Enclosed as per our conversation are copies of the MCA-Qintex contracts limiting the use and distribution of MCA owned black and white television shows after their purchase for colorization by Qintex.

As you will note from paragraph 6, page 9 ("McHale's Navy"), paragraph 5, page 13 ("The Munsters") and Paragraph 6, page 15 ("Leave It To Beaver") MCA has agreed:

> "During the term, MCA shall suspend the worldwide black and white television (all forms) distribution of 'McHale's Navy' ('The Munsters') ('Leave It To Beaver') and HRS shall have no distribution rights in any black and white episodes of 'McHale's Navy' ('The Munsters') ('Leave It To Beaver')."

So much for let the public decide.

Before these documents are used or subjected to further distribution, I request that I be consulted.

Best regards,

TAYLOR, ROTH, BUSH & GEFFNER
A Law Corporation

JAY D. ROTH

JDR:cb
Enclosure

cc: Glenn Gumpel (w/enc.)
cc: Larry Chernikoff (w/enc.)

(Dictated/not read)

dga will4.cb
haseu #399/afl-cio

TO: Keenan Wolens, Simon Aaron and Jay D. Roth
(Executive Committee)

FROM: Thomsen Young

DATE: November 17, 1989

RE: Qintex Entertainment, Inc.

ENCLOSED PLEASE FIND: A copy of the Memorandum Agreement

(x) FOR YOUR INFORMATION

( ) PLEASE REVIEW AND TELEPHONE ME AS SOON AS POSSIBLE

( ) IN ACCORDANCE WITH YOUR REQUEST

( ) PLEASE READ AND ADVISE ME HOW TO REPLY

( ) PLEASE SIGN AND RETURN TO ME

( ) PLEASE ACKNOWLEDGE RECEIPT

( ) PLEASE REVIEW AND COMMENT

( ) PLEASE FILE AND RETURN CONFORMED COPY

( ) PLEASE HANDLE

(x) FOR YOUR FILES

July 10, as of June 30, 1987

Hal Roach Studios, Inc.
345 North Maple Drive
Beverly Hills, California 90210

ATTN: Messrs. Hal Gaba, Robin French, David Evans and Mort Marcus

Gentlemen:

This memorandum agreement ("agreement") sets forth our understanding relative to Hal Roach Studios' ("HRS") or its nominee's or subsidiary's financing of additional new episodes of "The New Leave It To Beaver", your subdistribution rights to that series, and your options to colorize and subdistribute colorized episodes of the series "McHale's Navy", "The Munsters", and the original "Leave It To Beaver" and to subdistribute black and white episodes of the original "Leave It To Beaver".

I. THE NEW LEAVE IT TO BEAVER

A) PRODUCTION FINANCING:

1) HRS shall deposit into MCA INC. general account number 910607500 at the Universal City branch office of the Bank of America ("Bank of America Account") $11,070,000 as follows:

a) $3,500,000 no later than July 2, 1987 from HRS' general funds available in the United States. ("First Principal Amount");

b) $2,000,000 no later than five (5) business days after the execution of this agreement ("Second Principal Amount"). It is acknowledged that such funds will be transferred from a bank account outside the United States on behalf of HRS from funds controlled by HRS' affiliate/parent Qintex America Limited ("Qintex"). Within one (1) day of the execution of this agreement, HRS will cause an officer of Qintex to confirm to MCA that instructions for this payment have been sent to its bank and will concurrently furnish a copy of said instructions to MCA's office in Australia, telex number AA 25687, attention, Pal

Cleary, and to MCA INC. in Universal City, attention Richard Baker, telefax number (818) 777-6431;

c) $5,570,000 no later than January 2, 1988 ("Third Principal Amount"). HRS will cause Qintex to execute and deliver to MCA a standard form guarantee for said payment within five (5) business days of the execution of this agreement in a manner substantially in the form attached hereto as Exhibit "A".

2) [Intentionally Deleted]

3) With respect to the First Principal Amount, Second Principal Amount and Third Principal Amount, MCA shall have the right to withdraw $410,000 upon completion of each episode of "The New Leave It To Beaver", and upon delivery to HRS of a certificate of completion of each episode so completed. MCA agrees to pay to HRS, within ten (10) business days after the end of each calendar quarter, interest on the First Principal Amount, Second Principal Amount and, after deposited in MCA's account, the Third Principal Amount unused balances based on the United States three (3)-month Treasury Bill Rate, simple interest, in effect at the beginning of each calendar quarter.

4) MCA will produce 27 new episodes for the 1987-1988 television season. These programs are under initial license by MCA exclusively to WTBS for two double runs during the 1987-1988 television season, after which MCA will make the program available to HRS for syndication commencing September 15, 1988.

5) HRS shall have the option to order a minimum of an additional twenty (20) episodes ("additional twenty episodes") on or before March 1, 1988, it being understood that HRS shall deposit the full production funds on or before the date which MCA shall subsequently notify HRS that it needs such funds to prepare to resume production. The funded amount for the additional twenty (20) episodes shall

be $8,610,000 if the option is exercised by December 31, 1987, and $9,430,000 if the option is exercised thereafter, but only until March 1, 1988. MCA shall have the right, but not the obligation, to license these additional twenty (20) episodes exclusively to WTBS on an up to two (2) double-run basis for the 1988-89 television season, prior to their availability to HRS. MCA will not license these additional twenty (20) episodes to any other licensee without HRS' prior written approval.

6) If HRS desires additional episodes beyond the additional twenty (20) episodes, the parties shall negotiate in good faith as to the terms and conditions under which additional episodes would be produced, delivered and distributed.

B) DISTRIBUTION AGREEMENT:

1) MCA grants HRS a term of distribution for exclusive worldwide television (including free, basic cable and pay television and subject to existing foreign licenses, including with Canada, existing as of this date) commencing September 15, 1988. MCA shall furnish HRS with a list of MCA's existing foreign, including Canada, licenses within ten (10) business days of the execution of this agreement. MCA warrants and represents that its existing foreign, including Canada, licensees are not extensive. The term shall last until the later of:

a) eight (8) years; or

b) nine (9) years, if the option pursuant to paragraph I A) 5) is exercised; or

c) until HRS has recouped on an accounts receivable basis $700,000 gross per episode (plus residuals) to be determined as of the last accounting statement due prior to the end of the term. If applicable, the term shall be extended for cycles of four (4) years.

2) MCA shall make available to HRS 85 English language half hours, prior to the

commencement of the term. Should HRS elect to order the additional twenty (20) episodes, MCA shall make available those episodes no later than September 15, 1989.

3) It is agreed that MCA shall be responsible for payment of all participations triggered by HRS' distribution of the series at the time such participation payments are triggered in all media. It is further agreed that HRS shall advance MCA for all residuals triggered by HRS' distribution of the series, at such time such residuals are triggered from all television licensing. HRS' advances for payment of residuals are recoupable from gross sales. Within a reasonable time after execution of this agreement, MCA shall provide HRS with all information on a per-episode per-run basis necessary to compute residual costs.

4) New York City Television Market - HRS shall have thirty (30) days from the date of execution of this agreement to successfully license the series in the New York City market. Otherwise, MCA shall license the series back from HRS for $41,000 per episode for the initial television syndication cycle, payable in thirty (30) equal consecutive monthly installments commencing the first of the month following availability. In such event, the series will be exhibited during the term on WWOR-TV, Secaucus, New Jersey on terms (except for license fee and payout) no less favorable to MCA than those licensed to any other station in the United States, but in no event on terms less favorable than six (6) runs over four (4) years.

5) HRS' gross receipts from the exploitation of the series shall be apportioned and distributed as follows:

First: HRS shall recoup all residuals payments advanced.

Second: From all gross receipts, HRS shall deduct distribution fees as follows:

a) US and Canada:

i) Network television (ABC, CBS, NBC,

FBC, PBS, CBC, CTV or such other broadcast entity which comes into being after the execution of this agreement which the parties mutually agree upon): 15%;

ii) Syndicated television: 35% (includes WTBS if license is non-exclusive);

iii) Basic cable: 25% (includes WTBS if license is exclusive);

iv) Pay television:

A) Satellite delivered: 20%

B) Stand alone: 35%

b) Elsewhere: 40%

Third: HRS shall deduct its normal and customary distribution expenses, not to exceed 9% of gross excluding dubbing costs for foreign release. HRS shall document such expenses in writing to MCA as part of its normal accounting requirements as specified below.

Fourth: HRS shall remit to MCA, subject further to HRS' recoupment of production advances, distribution guarantees plus interest calculated quarterly at prime at HRS' principal bank in the United States, on the balance of revenue generated from its exploitation of the series. In addition to production advances and residuals, HRS shall guarantee MCA a minimum distribution payment of $23,780,000 payable as follows:

8.25% @ WTB on 6/30/87

a) $5,945,000 is payable to MCA on or before 10/1/89 pursuant to the conditions of paragraph 13.A hereunder, and

b) $5,945,000 is payable to MCA on or before 10/1/90, and

c) $5,945,000 is payable to MCA on or before 10/1/91, and

d) $5,945,000 is payable to MCA on or before 10/1/92, OR

e) As earned, whichever occurs earlier.

6) Notwithstanding anything hereinabove to the contrary, with respect to advertising or license fee revenue attributable to the 1987-88 WTBS telecasts of "The New Leave It To Beaver" episodes on a once/week basis (or in the case of other additional episodes that HRS orders beyond 85 for later telecast seasons), if MCA continues to sell the advertising time, MCA will credit against the production guarantee (periodically throughout the season) one half the net advertising receipts after deducting a 10% sales fee and the residuals for three reruns. If WTBS pays MCA a fixed license fee, MCA will first deduct residuals out of the gross and thereafter credit HRS with one-half the remaining license fee. If HRS wants to sell the time, HRS can do so subject to any prior existing advertising commitments and subject to HRS obtaining gross revenues which after deduction of its distribution fee equal the last fixed bona fide license fee offered by WTBS. If HRS or its designee sells the advertising time, HRS will credit against its recoupment of the production guarantee, one-half of receipts and remit the other half to MCA (periodically throughout the season). HRS would be entitled to a 10% fee (inclusive of all sales commissions except advertising agency commissions), and would reimburse MCA for the residuals as such become due regardless of gross. HRS will provide written notice to MCA of HRS' decision within ten (10) days of the execution of this agreement. Notwithstanding anything to the contrary written above, with respect to a reasonable number of episodes produced prior to or during the 1986-87 television season, MCA shall have the right to license the exhibition of such episodes to WTBS on no more than a twice a week basis during the 1987-88 television season without further obligation to HRS.

7) [Intentionally Deleted]

II. McHALE'S NAVY

1) MCA grants HRS an option, exercisable in writing no later than December 31, 1988, to colorize 138 half-hour episodes of "McHale's Navy", and distribute same on an exclusive basis on free, basic cable and pay television throughout the world for a five-year term commencing January 1, 1991, or earlier in markets not then licensed by MCA at the time colorized versions are available [for these markets, the restriction pertaining to MCA set forth in Paragraph II 6) below shall not apply until January 1, 1991] and ending midnight December 31, 1995. In exercising this option, HRS guarantees MCA a minimum of $50,000 per episode or a minimum of $6,900,000 pursuant to the conditions of paragraph 13.B hereunder.

2) MCA shall not limit the number of runs HRS can license for "McHale's Navy".

3) It is agreed that MCA shall be responsible for payment of all participations triggered by HRS' distribution of the series at the time such participation payments are triggered in all media. It is further agreed that HRS shall advance MCA for all residuals triggered by HRS' distribution of the series, at such time such residuals are triggered from all television licensing. HRS' advances for payment of residuals are recoupable from gross sales. Within ninety (90) days after execution of this agreement, MCA shall provide HRS with all information on a per-episode per-run basis necessary to compute residual costs.

4) HRS will colorize "McHale's Navy" at its own cost, and will advance costs related to that colorization.

HRS' colorization shall be fully colorized and of the "state of the art" highest quality available. MCA shall be consulted and have one-time prior approval of the color of continuing elements. MCA shall have ongoing consultation rights at the site of colorization in connection with color quality. At the end of the term, all rights granted herein to the colorized

episodes shall revert to MCA, but HRS shall be entitled to 10% of adjusted gross receipts on any subsequent distribution of HRS-colorized episodes. Adjusted gross receipts shall be defined to include gross receipts less all residual payments, third party participations and direct distribution expenses, all of which deductions shall not exceed 15% of the gross receipts triggered by MCA's distribution of the colorized episodes.

5) HRS' gross receipts from the exploitation of "McHale's Navy" shall be apportioned as follows:

First: HRS shall recoup all residuals payments advanced.

Second: From all gross receipts, HRS shall deduct distribution fees as follows:

a) US and Canada:

i) Network television (ABC, CBS, NBC, FBC, PBS, CBC, CTV): 15%;

ii) Syndicated television: 35% (includes WTBS if license is non-exclusive);

iii) Basic cable: 25% (includes WTBS if license is exclusive);

iv) Pay television:

A) Satellite delivered: 20%;

B) Stand alone: 35%

b) Elsewhere: 40%

Third: HRS shall deduct its normal and customary distribution expenses, not to exceed 9% of gross excluding dubbing costs for foreign release. HRS shall document such expenses in writing to MCA as part of its normal accounting requirements as specified below.

Fourth: HRS shall remit to MCA subject first to HRS' recoupment of colorization

expenses (not to exceed $2,500 per minute of film colorized, or less if HRS' costs should fall), distribution guarantees and residuals calculated quarterly at HRS' principal bank in the United States, the balance of revenues generated from its exploitation of the series.

6) During the term, MCA shall suspend the worldwide black and white television (all forms) distribution of "McHale's Navy" and HRS shall have no distribution rights in any black and white episodes of "McHale's Navy".

7) In addition, MCA shall credit against HRS' minimum guarantee, ten percent of MCA's and its affiliated companies' wholesale receipts from any worldwide home video exploitation of the colorized "McHale's Navy" during the term.

8) HRS shall remit to MCA the guaranteed minimum as follows:

a) $1,725,000 is payable to MCA at the earlier of one year after the commencement of the term or January 1, 1992, and

b) $1,725,000 is payable to MCA at the earlier of twenty-four months following the commencement of the term, or January 1, 1993, and

c) $1,725,000 is payable to MCA at the earlier of thirty-six months following the commencement of the term, or January 1, 1994, and

d) $1,725,000 is payable to MCA at the earlier of forty-eight months following the commencement of the term or January 1, 1995, OR

e) as earned, whichever is earlier.

9) No rights are hereby granted to the produced-in-color motion pictures McHale's Navy (1964) and McHale's Navy Joins the Air Force (1965). Further, MCA shall have the unrestricted right to produce (or have produced) and distribute (or have

distributed) at any time the following new productions deriving from the original "McHale's Navy" series: theatrical feature films, 90-minute or longer made for television motion pictures in one or more parts not to exceed four (4) separate productions per year (during the term), and animated productions of any length.

With respect to series deriving from the original "McHale's Navy", MCA shall not produce during the term any such series except as follows:

a) For network television, as previously defined, on a once a week basis, for exhibition commencing no earlier than September 1990;

b) For basic cable at any time during the term on condition that:

i) HRS has previously licensed the series in colorized form to the same basic cable network; or

ii) HRS gives MCA written approval; or

iii) January 1, 1993;

c) For first-run syndication, MCA shall not offer any production of first-run syndicated programming until January 1, 1993.

Concurrent with the television exhibitions permitted pursuant to subparagraphs a), b) and c) above, MCA shall have all Canadian and foreign television distribution rights on such new series.

Notwithstanding anything to the contrary, MCA shall not advertise, publicize or in any way publicly announce the availability of the first-run, basic cable, or off network new series for syndication until January 1, 1993.

10) Notwithstanding HRS' option that might be occasioned under paragraph II-1) above, for the purposes of a test, MCA agrees to split the costs, on a 50/50 basis with HRS, of

the pilot colorization of a single episode, to be designated by MCA, of the original "McHale's Navy". If HRS does not, pursuant to paragraph II-1) above, exercise its option to colorize old "McHale's Navy" episodes, then MCA shall reimburse HRS its investment in the colorization of that pilot episode and HRS shall have no further rights to such episode. If HRS exercises its colorizing option, then the pilot episode would be considered one of the colorized episodes and HRS and MCA would make the appropriate financial adjustments in guarantees and recoupments as if the pilot had not been made. It is further understood that the cost of such colorization for one episode shall be at HRS' actual cost, not to exceed $2,000 per minute, or less if HRS' costs should fall. Further, HRS' colorization shall be fully colorized and of the "state of the art" highest quality available. MCA shall be consulted and have one-time prior approval of the color of continuing elements. MCA shall have ongoing consultation rights at the site of colorization in connection with color quality.

III. THE MUNSTERS

1) Provided that by June 30, 1988, MCA has not committed to produce (or have produced) episodes of the "New Munsters" (or another appropriate title), for exploitation in any media in the United States, then MCA shall grant HRS an option, exercisable in writing no later than May 31, 1989, to colorize all 70 half-hour episodes of "The Munsters", and distribute same on an exclusive basis on free, basic cable and pay television throughout the world for a five-year term commencing June 1, 1991, or earlier in markets not then under license by MCA at the time colorized versions are available (for these markets, the restriction pertaining to MCA set forth in paragraph III-5) below shall not apply until June 1, 1991) and ending midnight May 31, 1996. If the "New Munsters" series is produced but not renewed for a second season by June 1, 1989, then HRS shall reinstate its option to colorize and distribute "The Munsters"

as provided above and the HRS option date shall be 90 days after MCA gives written notice to HRS that production on "New Munsters" is not continuing but in no event earlier than May 31, 1989. In exercising this option, HRS guarantees MCA a minimum of $75,000 per episode or $5,250,000 pursuant to the conditions of paragraph 13.C hereunder. If MCA produces and sells a "New Munsters" series, for the first year of production MCA shall not use the word "color" or any derivative thereof in the title of the "New Munstors." Anything to the contrary notwithstanding, MCA may use the word "color" and/or any derivatives thereof in advertising and/or promotion of the "New Munsters".

2) MCA shall not limit the number of runs HRS can license for "The Munsters".

3) It is agreed that MCA shall be responsible for payment of all participations triggered by HRS' distribution of the series at the time such participation payments are triggered in all media. It is further agreed that HRS shall advance MCA for all residuals triggered by HRS' distribution of the series, at such time such residuals are triggered from all television licensing. HRS' advances for payment of residuals are recoupable from gross sales. By August 31, 1988, MCA shall provide HRS with all information on a per-run per-episode basis necessary to compute residual costs unless MCA has commenced production of the "New Munsters" series prior to August 31, 1988, in which event MCA shall furnish such information by August 31, 1989 if the "New Munsters" series has not been renewed for a second season.

4) HRS will colorize "The Munsters" at its own cost, and will advance all costs related to that colorization. HRS' colorization shall be fully colorized and of the "state of the art" highest quality available. MCA shall be consulted and have one-time prior approval of the color of continuing elements. MCA shall have ongoing consultation rights at the site of

colorization in connection with color quality. At the end of the term, all rights granted herein to the colorized episodes shall revert to MCA, with HRS entitled to 10% of adjusted gross receipts on any subsequent distribution of HRS-colorized episodes. Adjusted gross receipts shall be defined to include gross receipts less all residual payments, third party participations and direct distribution expenses, all of which deductions shall not exceed 15% of the gross receipts triggered by MCA's subdistribution of the colorized episodes.

5) During the term, MCA shall suspend the worldwide black and white television (all forms) distribution of "The Munsters" and HRS shall have no distribution rights in any black and white episodes of "The Munsters".

6) HRS' gross receipts from the exploitation of "The Munsters" shall be apportioned as in the case of "McHale's Navy", (paragraph II-5 above). HRS shall remit to MCA the guaranteed minimum for "The Munsters" as follows:

a) $1,312,500 is payable to MCA at the earlier of one year after the commencement of the term or June 1, 1992, and

b) $1,312,500 is payable to MCA at the earlier of twenty-four months following the commencement of the term or June 1, 1993, and

c) $1,312,500 is payable to MCA at the earlier of thirty-six months following the commencement of the term or June 1, 1994, and

d) $1,312,500 is payable to MCA at the earlier of forty-eight months following commencement of the term or June 1, 1995, OR

e) as earned, whichever is earliest.

7) No rights are hereby granted to the produced-in-color motion picture Munster

Go Home (1966) or the world premiere movie The Munster's Revenge (1981).

3) Notwithstanding HRS' option that might be occasioned under paragraph III-1) above, for the purposes of a test, MCA agrees to split the costs, on a 50/50 basis with HRS, of the pilot colorization of a single episode, to be designated by MCA, of the original "The Munsters". If HRS does not, pursuant to paragraph III-1) above, exercise its option to colorize old "The Munsters" episodes, then MCA shall reimburse HRS its investment in the colorization of that pilot episode and HRS shall have no further rights to such episode. If HRS exercises its colorizing option, then the pilot episode would be considered one of the colorized episodes and HRS and MCA would make the appropriate financial adjustments in guarantees and recoupments as if the pilot had not been made. It is further understood that the cost of such colorization for one episode shall be at HRS' actual cost, not to exceed $2,000 per minute, or less if HRS' costs should fall. Further, HRS' colorization shall be fully colorized and of the "state of the art" highest quality available. MCA shall be consulted and have one-time prior approval of the color of continuing elements. MCA shall have ongoing consultation rights at the site of colorization in connection with color quality.

IV. ORIGINAL "LEAVE IT TO BEAVER"

1) MCA grants HRS an option exercisable in writing no later than September 30, 1990 to colorize no fewer than 130 and up to all of the 234 episodes of the original "Leave It To Beaver" series, and to distribute the colorized episodes and any remaining black and white episodes not so colorized on an exclusive basis on free, basic cable and pay television throughout the world for a five-year term commencing September 1, 1992. Notwithstanding the foregoing, HRS agrees not to distribute any episode in black and white form once it has been colorized.

2) In exercising this option, HRS guarantees MCA a minimum of $85,000 per episode or $19,890,000 for all episodes, pursuant to the conditions of paragraph 13.D hereunder, whether or not colorized and whether or not the black and white episodes are actually distributed by HRS.

3) MCA shall not limit the number of runs HRS can license for the original "Leave It To Beaver".

4) It is agreed that MCA shall be responsible for payment of all participations triggered by HRS' distribution of the series at the time such participation payments are triggered in all media. It is further agreed that HRS shall advance MCA for all residuals triggered by HRS' distribution of the series, at such time such residuals are triggered from all television licensing. HRS' advances for payment of residuals are recoupable from gross sales. By August 31, 1989, MCA shall provide HRS with all information on a per-episode per-run basis in order to compute residual costs.

5) HRS will colorize the original "Leave It To Beaver" at its own cost, and will advance costs related to that colorization. HRS' colorization shall be fully colorized and of the "state of the art" highest quality available. MCA shall be consulted and have one-time prior approval of the color of continuing elements. MCA shall have ongoing consultation rights at the site of colorization in connection with color quality. At the end of the term, all rights granted herein to the colorized episodes shall revert to MCA, but HRS shall be entitled to 10% of adjusted gross receipts on any subsequent distribution of HRS-colorized episodes. Adjusted gross receipts shall be defined to include gross receipts less all residual payments, third party participations and direct distribution expenses, all of which deductions shall not exceed 15% of the gross receipts triggered by MCA's distribution of the colorized episodes.

6) During the term, MCA shall suspend the worldwide black and white television (all

forms) distribution of the original "Leave It To Beaver".

7) HRS' gross receipts from the exploitation of the original "Leave It To Beaver" shall be apportioned as in the case of "McHale's Navy" (paragraph II-5 above).

8) HRS shall remit to MCA the guaranteed minimum for the original "Leave It To Beaver" as follows:

   a) $4,972,500 payable to MCA September 1, 1993; and

   b) $4,972,500 payable to MCA September 1, 1994; and

   c) $4,972,500 payable to MCA September 1, 1995; and

   d) $4,972,500 payable to MCA September 1, 1996; OR

   e) as earned, whichever is earlier.

9) MCA agrees not to create or authorize to create a colorized version of this series from the date of this agreement until August 31, 1992, using the colorization technology of any party other than HRS.

10) Notwithstanding HRS' option that might be occasioned under paragraph IV-1) above, for the purposes of a test, MCA agrees to split the costs, on a 50/50 basis with HRS, of the pilot colorization of a single episode, to be designated by MCA, of the original "Leave It To Beaver". If HRS does not, pursuant to paragraph IV-1) above, exercise its option to colorize original "Leave It To Beaver" episodes, then MCA shall reimburse HRS its investment in the colorization of that pilot episode and HRS shall have no further rights to such episode. If HRS exercises its colorizing option, then the pilot episode would be considered one of the colorized episodes and HRS and MCA would make the appropriate financial adjustments in guarantees and recoupments as if the pilot had not been made. It is further understood that the

cost of such colorization for one episode shall be at HRS' actual cost, not to exceed $2,000 per minute, or less if HRS' costs should fall. Further, HRS' colorization shall be fully colorized and of the "state of the art" highest quality available. MCA shall be consulted and have one-time prior approval of the color of continuing elements. MCA shall have ongoing consultation rights at the site of colorization in connection with color quality.

V. CROSS COLLATERALIZATION AND RECOUPMENT

1) For the purposes of recoupment of HRS' guarantees to MCA for production and distribution of "The New Leave It To Beaver", HRS shall be entitled to cross collateralize against its total guarantee of $34,850,000 (or $43,460,000 or $44,280,000 as occasioned in paragraph I-A-5 above), plus residuals for up to eight runs licensed by HRS per episode:

a) Amounts due MCA in excess of the minimum guarantees from the distribution of the colorized "McHale's Navy" series if HRS' option is exercised, and/or;

b) If MCA makes "The Munsters" available, and HRS' option is then exercised, amounts due MCA in excess of the minimum guarantee from the distribution of the colorized "The Munsters" series, and/or;

c) Amounts due MCA in excess of the minimum guarantees from the distribution of the colorized original "Leave It To Beaver" series if HRS' option is exercised as provided above.

2) a) Amounts received by HRS from WTBS licensing under I B) 6) and amounts received by MCA pursuant to II 7) above shall be credited toward HRS' recoupment total per paragraphs I B) 1) ~~k~~) and V 1) a) b) and c). Amounts received by HRS or MCA pursuant to paragraph 21 shall also be credited toward HRS' recoupment total per paragraphs I) B) 1) ~~k~~) and V) 1) a) b) and c).

b) Amounts received by HRS from MCA pursuant to HRS 10% participation in MCA's receipts from MCA's distribution of colorized versions of "McHale's Navy", or original "The Munsters" or original "Leave It To Beaver", after the HRS distribution term expires for such colorized series, shall be credited toward HRS' recoupment total per paragraphs I B) 1) c) and V 1) a) b) and c).

VI. As additional consideration under this agreement, HRS hereby grants to MCA warrants to purchase up to one (1) million shares of HRS common stock at a strike price of $12 per share exercisable by written notice to Corporate Secretary commencing ten (10) days after the execution of this agreement. Such warrants shall expire by the following dates if not exercised by MCA prior thereto.

a) 250,000 shares 10/1/89;

b) 250,000 shares 10/1/90;

c) 250,000 shares 10/1/91;

d) 250,000 shares 10/1/92.

The parties shall exercise all documents necessary to affect the purposes of this paragraph VI.

VII. HRS DISTRIBUTION LOGO

HRS may insert at its own cost not subject to recoupment, its own distribution logo to submasters of episodes of all series subdistributed under this agreement, provided that such logo appears after:

a) all end credits,

b) the copyright notice for each episode as determined by MCA/Universal, and

c) the MCA/Universal or Revue logo already there in place.

VIII. In the event that this agreement is signed by a subsidiary or other nominee of HRS, HRS agrees to sign such additional documentation, concurrently with the execution of this agreement, that it shall guarantee and remain responsible for all such obligations covered by this agreement.

IX. All rights not specifically granted herein are reserved by MCA.

X. ADDITIONAL PROVISIONS: The provisions attached hereto are hereby made a part of this agreement.

Until a formal contract is executed between the parties hereto, this memorandum agreement shall govern these agreements and shall be binding on both parties.

AGREED TO:

R

Laurence Kahlenberg SVP

HAL ROACH STUDIOS, INC. OR ITS NOMINEE OR SUBSIDIARY

July 10, 1987

DATE

Ned Nalle

MCA TELEVISION LIMITED

10 July '87

DATE

ADDITIONAL PROVISIONS

1. OWNERSHIP OF MATERIAL:

The Episodes: HRS is a licensee hereunder, and as between the parties, all right, title and interest in and to the original and colorized episodes (hereinafter "episodes") shall be and remain vested in MCA or an affiliated company, subject to the rights licensed by MCA to HRS hereunder. HRS agrees that it shall not, while this agreement remains in effect and at any time thereafter, dispute or contest directly or indirectly, or do or cause to be done any act, which impairs MCA's rights or title in the episodes, or the validity of the copyrights or trademarks therein. MCA or an affiliated company is the copyright proprietor of the episodes in their original black and white versions. Any colorization of the black and white episodes shall be performed by HRS or its affiliates as a work made for hire, and the copyright in and to such colorized versions of the episodes shall be in the name of MCA or an affiliated company. MCA will on a timely basis advise HRS of proper copyright notice to be affixed on each episode. All right, title and interest in and to all duplicates and the contents thereof, including the copyright therein, shall at all times be and remain with MCA until the contents thereof are erased or destroyed. MCA will on a timely basis register in the United States Copyright Office the copyright for all colorized versions of the episodes.

2. Materials:

(a) With respect to the "New Leave It To Beaver" series, MCA shall cause to be delivered to HRS, at MCA's expense, no later than 45 days prior to the commencement of the term, at such location in the Los Angeles area as HRS shall designate:

1) 1" C format videotape;
2) Separate international music effect and dialogue track;
3) Music cue sheets;
4) Continuity scripts;
("New Leave It To Beaver Materials").

No later than the end of the term, HRS shall return the "New Leave It To Beaver Materials"

to MCA. During the term, MCA shall produce at HRS' request any additional materials that HRS may need for the purposes hereunder, and HRS shall pay the actual production costs of said materials.

(b) With respect to colorizing "McHale's Navy", "The Munsters" or the original "Leave It To Beaver", in the event that HRS exercises any or all of its options as provided for hereunder, at HRS' request, MCA shall produce and deliver a new 1" C format videotape of each episode from the best existing fine grain master. MCA shall consult with HRS prior to producing the 1" C format videotapes, which shall be produced pursuant to specifications to be provided by HRS, and if HRS chooses, such production shall be in the presence of a representative of HRS or Colorization Inc. at the site of the production of said videotapes as designated by MCA. HRS agrees to pay MCA up to $500 per episode for its actual costs of producing such videotapes. Such costs shall be recoupable as a distribution expense. MCA warrants and represents that "McHale's Navy", "The Munsters" and the original "Leave It To Beaver" were produced originally on 35mm film. Within a reasonable time after the execution of this agreement and without additional cost to MCA, MCA will provide HRS with access to the fine grain masters for inspection by a representative of HRS or Colorization Inc. to determine the quality and present condition of said fine grain masters for preparation for colorization. In the event that a substantial number of fine grain masters for any given series are of insufficient quality to be used for colorization, the parties shall discuss in good faith how the costs for producing new fine grain masters will be apportioned.

3. With regard to copies of the episodes furnished to HRS' licensees pursuant to license agreements, HRS shall impose such conditions and requirements to control said copies as are standard in the free television, pay and basic cable television industries as more specifically set forth in paragraph 19. Shipping charges from MCA to HRS or its designee shall be borne by MCA. Shipping charges from HRS to MCA shall be borne by HRS.

4. Warranty of Rights: MCA warrants and represents that subject to music performing rights covered by

paragraph 5 below, it has secured or will have secured all rights, licenses, permissions and grants of whatsoever nature necessary for its performance of the terms of this agreement, and that there are no prior contractual agreements which might interfere with the exercise of the rights granted hereunder, and MCA will not enter into any arrangements during the life of this agreement which might so interfere.

5. With regard to music performing rights, MCA warrants that performing rights in the music contained in said films are: (a) controlled by BMI, ASCAP or SESAC, or any other performing rights society having jurisdiction, or (b) in the public domain or, (c) controlled by MCA to the extent necessary to permit HRS' licensees' telecast and MCA agrees to indemnify HRS and its licensees against liability or expenses arising out of the performance of such MCA controlled music. If music in category (a) is included in the episodes, MCA will advise HRS of the title, composer and publisher and HRS shall require its licensees to procure and pay for a license to perform such music. Music furnished to HRS for promotional purposes may be used solely on television to promote the episodes for which the music was originally recorded.

6. Governing Law: This agreement shall be governed by and construed in accordance with the laws of the State of California applicable to agreements made and to be performed within that State.

7. Incidental to all other rights granted hereunder, HRS shall have the right to advertise and promote the series licensed hereunder from the date of this agreement to the end of the term with the exception of "The Munsters," which right shall not begin until HRS has exercised its option, and with the further exception of the original "Leave It To Beaver", which right shall not commence until after September 15, 1988. MCA agrees to permit HRS access to all advertising and promotional materials ("advertising materials") related to exhibition of the episodes, including foreign language soundtrack rights to such episodes in MCA's possession or to which MCA has access. In the case of the aforesaid advertising and promotional materials, MCA shall have the right, in its judgment, to furnish copies thereof, and shall not be required to furnish to HRS possession of any such materials or elements if MCA only has one copy of same.

8. MCA, on behalf of itself and HRS, shall undertake the collection of the Copyright Royalty Tribunal ("CRT") funds derived from HRS' exploitation of the distribution rights granted to HRS by MCA. MCA shall provide HRS with copies of all CRT reports pertaining to the distribution rights granted to HRS herein within thirty (30) days after receipt of same. Such royalties collected by MCA shall be paid to HRS, and HRS agrees that such royalty revenues shall be included as part of the gross receipts derived from HRS' exploitation of the episodes and shall be applied toward HRS' recoupment of monies advanced to MCA hereunder.

9. [Intentionally Deleted]

10. HRS and MCA shall account to each other on an annual basis for successive one-year periods (using July 1st to June 30th as the reporting year). Statements and any payments due thereon shall be due and issued within ninety (90) days after the end of each accounting period.

11. Audit: Both parties hereto shall keep records relating to the episodes on a generally recognized accounting basis, and shall make such records available to the other party for audit and/or inspection once per annum, at a time to be mutually agreed to by both parties. Both parties' obligation to maintain such records shall not extend beyond thirty-six (36) months from the end of each accounting period.

12. Nondisclosure: Both parties hereto agree that the terms and conditions of this agreement contained herein are confidential and shall not be disclosed to any third party without the prior written approval, not to be unreasonably withheld, of the other party except as required by law. The parties hereto contemplate that each of them may release a press announcement covering this agreement. The parties hereto agree to secure the approval of the other party not to be unreasonably withheld, prior to the release of any such announcement.

13.A In order to collateralize and secure the timely payment of the initial installment, in the sum of $5,945,000, due to MCA hereunder, pursuant to Paragraph I B) 5) Fourth a) hereof, HRS hereby grants to MCA a present, future and continuing lien upon, and security interest in, the license agreements, sublicense agreements, contract rights,

accounts receivable, deposit accounts, and all cash and non-cash proceeds thereof, now or hereafter arising from or relating to HRS' distribution or exploitation of the episodes of "The New Leave It To Beaver" described in paragraph I hereof ("'The New Leave It To Beaver' Collateral"); provided, however, that the security interest granted hereby shall be limited to the extent of the first $5,945,000 of "The New Leave It To Beaver" Collateral. Upon receipt by HRS of any of said Collateral, or proceeds thereof, HRS shall deposit such monies into a segregated, interest-bearing custodial account, to be denominated "The MCA Custodial Account #1," and maintained at a national banking institution acceptable to MCA. Said Custodial Account #1 shall be segregated and maintained separate and apart from any other monies or accounts maintained by HRS. The security interest granted to MCA hereunder shall attach in and to said Custodial Account #1 with the same force and effect as the security interest of MCA in and to said Collateral and HRS hereby grants to MCA a lien upon, and security interest in, the Custodial Account #1. Upon receipt by MCA of the initial installment, in the sum of $5,945,000 due to MCA hereunder pursuant to Paragraph I B) 5) Fourth a) hereof, the security interest granted hereby shall terminate and MCA shall execute and deliver to HRS such UCC Termination statements and other documentation, including the letters of joint instruction described in Paragraph 15 as Exhibit "B", as may be necessary to terminate said security interest.

.3 In order to collateralize and secure the timely payment of the total minimum guarantee in the sum of $6,900,000, due to MCA hereunder, pursuant to Paragraph II 8) hereof, HRS hereby grants to MCA a present, future and continuing lien upon, and security interest in, the license agreements, sublicense agreements, contract rights, accounts receivable, deposit accounts, and all cash and non-cash proceeds thereof, now or hereafter arising from or relating to HRS' distribution or exploitation of the episodes of "McHale's Navy" described in paragraph II hereof ("'McHale's Navy' Collateral"); provided, however, that the security interest granted hereby shall be limited to the extent of such $6,900,000 minimum guarantee. Upon receipt by HRS of any of the "McHale's Navy" Collateral, or proceeds thereof, HRS shall deposit such monies into a segregated, interest-bearing

custodial account, to be denominated "The MCA Custodial Account #2," and maintained at a national banking institution acceptable to MCA. Said Custodial Account #2 shall be segregated and maintained separate and apart from any other monies or accounts maintained by HRS. The security interest granted to MCA hereunder shall attach in and to said Custodial Account #2 with the same force and effect as the security interest of MCA in and to the "McHale's Navy Collateral" and HRS hereby grants to MCA a lien upon, and security interest in, the Custodial Account #2. Upon receipt by MCA of the total minimum guarantee of $6,900,000 due to MCA hereunder pursuant to Paragraph II 8) hereof, the security interest granted hereby shall terminate and MCA shall execute and deliver to HRS such UCC Termination statements and other documentation, including the letters of joint instruction described in Paragraph 15 as Exhibit "B", as may be necessary to terminate said security interest.

.C In order to collateralize and secure the timely payment of the total minimum guarantee in the sum of $5,250,000, due to MCA hereunder, pursuant to Paragraph III 6) hereof, HRS hereby grants to MCA a present, future and continuing lien upon, and security interest in, the license agreements, sublicense agreements, contract rights, accounts receivable, deposit accounts, and all cash and non-cash proceeds thereof, now or hereafter arising from or relating to HRS' distribution or exploitation of the episodes of "The Munsters" described in paragraph III hereof ("'The Munsters' Collateral"); provided, however, that the security interest granted hereby shall be limited to the extent of such $5,250,000 minimum guarantee. Upon receipt by HRS of any of the "The Munsters" Collateral, or proceeds thereof, HRS shall deposit such monies into a segregated, interest-bearing custodial account, to be denominated "The MCA Custodial Account #3," and maintained at a national banking institution acceptable to MCA. Said Custodial Account #3 shall be segregated and maintained separate and apart from any other monies or accounts maintained by HRS. The security interest granted to MCA hereunder shall attach in and to said Custodial Account #3 with the same force and effect as the security interest of MCA in and to "The Munsters" Collateral and HRS hereby grants to MCA a lien upon, and security interest in, the Custodial Account #3. Upon receipt by MCA of the total minimum guarantee of $5,250,000 due to MCA

hereunder pursuant to Paragraph III 6) hereof, the security interest granted hereby shall terminate and MCA shall execute and deliver to HRS such UCC Termination statements and other documentation, including the letters of joint instruction described in Paragraph 15 as Exhibit "B", as may be necessary to terminate said security interest.

.D In order to collateralize and secure the timely payment of the total minimum guarantee in the sum of $19,890,000, due to MCA hereunder, pursuant to Paragraph IV 8) hereof, HRS hereby grants to MCA a present, future and continuing lien upon, and security interest in, the license agreements, sublicense agreements, contract rights, accounts receivable, deposit accounts, and all cash and non-cash proceeds thereof, now or hereafter arising from or relating to HRS' distribution or exploitation of the episodes of the original "Leave It To Beaver" described in paragraph IV hereof ("the original 'Leave It To Beaver' Collateral"); provided, however, that the security interest granted hereby shall be limited to the extent of such $19,890,000 minimum guarantee. Upon receipt by HRS of any of the original "Leave It To Beaver" Collateral, or proceeds thereof, HRS shall deposit such monies into a segregated, interest-bearing custodial account, to be denominated "The MCA Custodial Account #4", and maintained at a national banking institution acceptable to MCA. Said Custodial Account #4 shall be segregated and maintained separate and apart from any other monies or accounts maintained by HRS. The security interest granted to MCA hereunder shall attach in and to said Custodial Account #4 with the same force and effect as the security interest of MCA in and to the original "Leave It To Beaver" Collateral and HRS hereby grants to MCA a lien upon, and security interest in, the Custodial Account #4. Upon receipt by MCA of the total minimum guarantee of $19,890,000 due to MCA hereunder pursuant to paragraph IV 8) hereof, the security interest granted hereby shall terminate and MCA shall execute and deliver to HRS such UCC Termination statements and other documentation, including the letters of joint instruction described in paragraph 15 as Exhibit "B", as may be necessary to terminate said security interest.

14. [Intentionally Deleted]

15. HRS shall execute such documentation and take all action as MCA may, from time to time, require in

order to assist MCA in protecting, perfecting and realizing upon all of MCA's liens and security interests, including without limitation, executing and delivering to MCA a letter of joint instructions, in the form of Exhibit "B" hereof, addressed to HRS' licensees and sublicensees in respect of MCA's security interest in the individual Collateral separately described in paragraphs 13.A, 13.B, 13.C and 13.D above. MCA shall hold such letters of joint instructions, in trust, and shall not transmit nor deliver such letters to any licensee or sublicensee of HRS unless and until HRS shall be in default of the obligation to pay MCA those amounts due pursuant to paragraphs I B) 5) Fourth a), II 8), III 6) and IV 8) hereof, whereupon MCA may, in MCA's discretion, deliver same to the appropriate licensees or sublicensees of HRS. HRS shall insert the following language in all license agreements which are subject to paragraph 13: "Notice is hereby given that HRS has assigned and pledged to MCA Television Ltd. ("MCA"), as security for certain obligations of HRS to MCA, all rights under, pursuant and appurtenant to this agreement. Unless and until further notice is received by you in the form of a letter signed jointly by HRS and MCA with respect to the interest of MCA in this agreement, such interest and rights of MCA shall not affect your rights, obligations or other conduct hereunder."

16. Default: The following shall be events of default hereunder: HRS (i) breaches any material provision hereof; (ii) fails timely to pay any monies due MCA hereunder; or (iii) breaches any other provisions hereof. In the event HRS breaches under (i) or (iii) above, HRS shall have thirty (30) days after written notice from MCA to cure such breach(es). In the event HRS breaches under (ii) above, HRS shall have fifteen (15) days after receipt of written notice from MCA to cure such breach(es). Should HRS fail to cure any breach pursuant to (i) or (iii) above (other than a monetary breach) within said thirty (30) day cure period, but HRS is able to demonstrate to MCA's reasonable satisfaction that in spite of all efforts expended by HRS to cure the breach, HRS requires additional time to cure, and HRS continues to exercise its good faith best efforts to cure, MCA may at its sole discretion extend the cure period beyond thirty (30) days by an amount of time to be determined by MCA, it being understood that MCA shall exercise good faith in making such determination.

Upon any uncured default set forth in the preceding grammatical paragraph, MCA may, at its election: (a) terminate this agreement, and/or (b) declare the balance of the minimum guarantee monies and applicable residuals owed MCA hereunder immediately due and payable, and/or (c) if MCA elects to terminate this agreement, HRS' sublicenses shall automatically attorn directly to MCA pursuant to the provisions of the sublicense agreements between HRS and its sublicensees, as specified in Paragraph 15 hereinabove, and MCA shall have the right to enforce, or otherwise realize upon, the security interest set forth in Paragraph 13 hereinabove, and shall have all other rights and remedies available at law or in equity and all such rights and remedies contained herein shall be cumulative, and none of them shall be in limitation of any of MCA's other rights or remedies. A waiver by MCA of any of its rights or remedies in any one instance shall not be deemed or construed to be a waiver of such right or remedy for the future, or any subsequent breach thereof.

17. This agreement has been entered into as a result of arms-length negotiations and vigorous negotiations between HRS and MCA and shall not be construed for or against either party irrespective of which party drafted all or any portions of the agreement.

18. Severability: Any invalid provision(s) hereof shall be severed, and be of no force or effect, and the remaining provisions shall continue in full force and effect, as if the invalid provision(s) had never been contained herein.

19. In its licensing agreement, HRS shall, among other things, obligate its licensees as follows:

a) To prepare usage reports as may be required by Guild agreements, which usage reports HRS shall deliver to MCA upon MCA's request and upon HRS' receipt thereof;

b) Prohibit the copying or duplication of any prints or tapes furnished to licensee hereunder;

c) Limit its licensees' promotional and advertising activities to those consistent with contractual and Guild obligations supplied by MCA; and

d) That all materials furnished to licensees shall be returned at the end of the license or

erased or destroyed with the appropriate licensees' certificate of destruction or erasure.

20. With respect to all materials, advertising materials and any other materials (collectively "items") which MCA furnishes to HRS pursuant to this agreement, HRS shall return such items in the same condition, reasonable wear and tear excepted, within a reasonable time after HRS no longer needs such items in order to perform the rights granted to HRS herein but in no event after the end of HRS' term with respect to each such item.

21. MCA reserves the right to license short excerpts ("clips"), not to exceed two minutes in length, of "The New Leave It To Beaver", and provided that HRS exercises the applicable option with respect to "The New Munsters", black and white "McHale's Navy", black and white "The Munsters", and black and white original "Leave It To Beaver" for exhibition for limited use as part of a different program in any area or media but agrees that such clips shall not be utilized as any regular or substantial part of any strips or series of programs. Notwithstanding anything to the contrary written above, MCA shall have the unequivocal right to include excerpts from the original "Leave It To Beaver" in "The New Leave It To Beaver" episodes at its own cost and without fees. The parties shall take a 35% distribution fee with respect to clips from each series, the remainder being credited to the gross receipts with respect to each series. HRS shall have the right during its respective terms to license short excerpts, not to exceed two minutes in length, of the colorized versions, if HRS exercises its options thereto, of McHale's Navy", "The Munsters", and original "Leave It To Beaver" for exhibition for limited use as part of a different program in any area or media but agrees that such clips shall not be utilized as any regular or substantial part of any strips or series of programs. Any sums received by HRS from such clip licenses shall be considered part of HRS' gross receipts from the exploitation of each series. The party engaging in the clip licensing shall be responsible for the payment of all participations, third party payments, residuals and reuse fees, if any, triggered as a result of its license of such clips. Anything to the contrary notwithstanding, MCA shall have the right to use clips from the series for its own institutional promotional purposes or to promote the series.

22. Execution of Documents: If at any time any party hereto shall deem or be advised that any further assignments, licenses, assurances in law or other acts or instruments, including lawful oaths, are necessary or desirable to vest in it the rights provided for herein, the parties hereto agree to do all acts and execute all documents as may reasonably be necessary or proper for that purpose or otherwise to carry out the intentions of this agreement.

23. Notices: All notices shall be sent to HRS at 345 N. Maple Drive, Beverly Hills, California 90210, attention Executive Vice President in Charge of Syndication with a copy to Business Affairs and Legal Department. All notices to MCA shall be sent to MCA Home Entertainment at 70 Universal City Plaza, Universal City, California 91608, attention Business Affairs Department.

24. Indemnification:

A. HRS's Indemnification: HRS shall indemnify and hold harmless MCA, MCA INC., its and their respective subsidiary and affiliated companies, their respective shareholders, directors, officers, employees, licensees, agents, successors and assigns and each of the foregoing, against and from any and all claims, demands, causes of action, judgments, liabilities, losses, costs and expenses (including, without limitation, reasonable attorneys' fees) that may arise out of or result from (i) the breach of any of HRS's warranties and representations contained herein; (ii) the breach by HRS of any of the other provisions in this agreement; or (iii) the negligent or intentionally tortious or malicious acts, errors or omissions of HRS, its officers, directors, employees, agents or licensees. MCA will promptly give HRS notice of any claim or action which is or may be covered by the preceding sentence and which comes to MCA's attention, and MCA will promptly deliver or cause to be delivered to HRS photocopies of any and all letters, proceedings, complaints and other documents in MCA's possession relating to any such claim or action. HRS at HRS's expense shall conduct the defense of any such claim or action on MCA's behalf by counsel of HRS's own choosing, in which event, each of the indemnitees referred to in the first sentence of this Paragraph A against which or whom such claim shall have been made or such action shall have been brought shall have the right to participate, by such indemnitees' counsel and at such indemnitees' expense, in the

defense of such claim or action, and HRS will cause its counsel to cooperate fully with such indemnitees and its counsel in the defense of such claim or action. There shall be no settlement of any claim without the reasonable formal written consent of the indemnitor.

B. MCA's Indemnification: MCA shall indemnify and hold harmless HRS, and its respective subsidiary and affiliated companies, and their respective shareholders, directors, officers, employees, licensees, agents, successors and assigns and each of the foregoing, against and from any and all claims, demands, causes of action, judgments, liabilities, losses, costs and expenses (including, without limitation, reasonable attorneys' fees) that may arise out of or result from (i) the breach of any of MCA's warranties and representations contained herein; (ii) the breach by MCA of any of the other provisions in this Agreement; or (iii) the negligent, or intentionally tortious or malicious acts, errors or omissions of HRS, its officers, directors, employees, agents or licensees. HRS will promptly give MCA notice of any claim or action which is or may be covered by the preceding sentence and which comes to HRS's attention, and HRS will promptly deliver or cause to be delivered to MCA photocopies of any and all letters, proceedings, complaints and other documents in HRS's possession relating to any such claim or action. MCA at MCA's expense shall conduct the defense of any such claim or action on HRS's behalf by counsel of MCA's own choosing, in which event, each of the indemnitees referred to in the first sentence of this Paragraph 24B against which or whom such claim shall have been brought shall have the right to participate, by such indemnitees' counsel and at such indemnitees' expense, in the defense of such claim or action and MCA will cause its counsel to cooperate fully with such indemnitees and its counsel in the defense of such claim or action. There shall be no settlement of any claim without the reasonable formal written consent of the indemnitor.

C. Neither the receipt, inspection nor retention by either party of any copy of any document or documents delivered pursuant to this Agreement, nor any act of either party, nor any omission by either party to exercise any right of either party, nor the expiration or termination of this Agreement, nor the election by either party or any of the other indemnitees referred to in Paragraphs 24A or B

above to participate in or conduct the defense of any claim or action referred to in Paragraphs 24A or B above, shall impair, modify or discharge any of either parties' warranties and representations herein contained or any of either party's obligations under Paragraphs 24A or B above.

Deal8
SEB:ls 7.01.87 (1)

EXHIBIT "A"

GUARANTEE

The undersigned Qintex America Limited is an affiliate of Hal Roach Studios, Inc. ("HRS"). In consideration of the execution by MCA Television Limited ("MCA") of the agreement with HRS dated July 10, 1987 as of June 30, 1987 (hereinafter the "Basic Agreement") and the benefits expected to be derived by the undersigned as a result of its ownership of the stock of HRS, the undersigned hereby unconditionally guarantees to MCA, MCA's successors and assigns, the full and prompt payment by HRS of $5,570,000 due to MCA on January 2, 1988 and of all costs of collection (including without limitation attorney's fees) incurred by MCA in collecting such sum together with interest on said sum to the extent any portion thereof is unpaid on the date it is due until paid in full. The undersigned will be bound by any and all amendments to, or modifications of, the Basic Agreement which may be made with knowledge of, notice to, or approval by, the undersigned. The undersigned waives any and all rights, remedies and defenses of a guarantor and agrees to be liable to MCA as if the undersigned were jointly and severely liable for all of the guaranteed obligations of HRS. Furthermore, the undersigned waives any defenses, rights, or remedies which are personal to HRS, and also waives any defenses, rights, or remedies of HRS which are based upon lack of corporate power or authority or based upon bankruptcy, insolvency, or other debtor proceedings pertaining to HRS. If and to the extent that Qintex does not fully pay all sums owing to MCA under this Guarantee on demand the unpaid portion thereof until paid in full, shall bear interest. Interest provided for in the preceding sentence and interest provided in the second sentence of this Guarantee shall be at the prime or reference rate announced from time to time by Bank of America and shall be adjusted whenever there is a change in the prime or reference rate as so announced by Bank of America, but in no event shall such rate exceed the maximum rate permitted by applicable law. If there is litigation between the undersigned and MCA arising out of or connected with this Guarantee, the prevailing party shall be entitled, in addition to such other relief as may be appropriate, to recover from the non-prevailing party the prevailing party's attorney's fees and court costs. This Guarantee is binding upon, and inures to the benefit of, the successors and assigns of the respective parties.

QINTEX AMERICA LIMITED

BY_____

July _____, 1987

MCA TELEVISION LIMITED
100 UNIVERSAL CITY PLAZA, UNIVERSAL CITY, CALIFORNIA 91608. TELEX: 67-7053. CABLE: MUSICOR

Direct Dial Number

818-777-1643

June 23, 1988

VIA FAX

Hal Roach Studios, Inc.
345 North Maple Drive
Beverly Hills, CA 90210

Attention: Len Kalcheim

Re: Amendment to July 10, as of June 30, 1987 Agreement/"The New Leave it to Beaver"

Gentlemen:

Reference is hereby made to the July 10, as of June 30, 1987 Agreement between MCA Television Limited and Hal Roach Studios, Inc. regarding among other things the television syndication rights to the above-captioned television series. In accordance with John Lloyd's telephone conversation with Ned Nalle on June 20, 1988 and Blair Westlake's telephone conversation with Len Kalcheim on June 23, 1988, the agreement shall be modified as follows:

1. Paragraph I(A)(4) shall be amended by changing the date appearing in the last line of such paragraph from "September 15, 1988" to "June 28, 1988".

2. Paragraph I(B)(1), the sixth line, shall be amended by changing the "September 15, 1988" date to "June 28, 1988".

3. Paragraph I(B)(1)(a) shall be amended to read as follows: "eight (8) years and seventy nine (79) days; or"

4. Paragraph I(B)(1)(b) shall be amended to read as follows: "nine (9) years and seventy nine (79) days, if the option pursuant to Paragraph I(A)(5) is exercised; or"

All other terms and conditions of the July 10, as of June 30, 1987 Agreement shall be and remain as they are, and this letter shall modify this Agreement only so far as

specified herein.

Please acknowledge your understanding and agreement of the foregoing by signing, or having an authorized representative of Hal Roach Studios, Inc. sign in the space provided below.

Very truly yours,

BLAIR M. WESTLAKE
On behalf of
MCA TELEVISION LIMITED

AGREED TO AND ACCEPTED
Hal Roach Studios, Inc.

By: _____

Title: _____

Date: 6/24/88

BMW/ljb
cc: John Lloyd, Ned Nalle

AMENDMENT AGREEMENT

This Amendment Agreement dated of June 30, 1988 by and between MCA Television Limited ("MCA"), 100 Universal City Plaza, Universal City, CA 91608 and Hal Roach Studios, Inc. ("HRS"), 345 North Maple Drive, Beverly Hills, CA 90210.

Reference is hereby made to the Agreement dated July 10, as of June 30, 1987, as amended by agreements dated September 25, 1987, November 18, 1987, January 4, 1988 and June 23, 1988 (hereinafter collectively referred to as the "Agreement"), regarding among other things the television syndication rights to the television series known as "The New Leave It To Beaver" and "McHale's Navy". The parties hereto agree to amend the Agreement as follows:

1. Paragraph I(A)(5) is hereby deleted entirely from the Agreement and in its place shall be substituted the following:

"MCA hereby agrees to produce twenty (20) new episodes of the television series known as "The New Leave It To Beaver" for the 1988-89 television season (hereinafter collectively referred to as the "Twenty Episodes"). The Twenty Episodes shall be under initial license by MCA to SuperStation TBS (formerly known as "WTBS") for up to two (2) double runs during the 1988-89 television season, after which MCA will make such episodes available to HRS for syndication commencing September 15, 1989. MCA will not license the Twenty Episodes to any other licensee without HRS' prior written approval. MCA's commitment to produce and deliver the Twenty Episodes to HRS, and HRS' agreement to license from MCA such Twenty Episodes, shall be subject to the following:

1.1 Nineteen (19) of the Twenty Episodes shall be newly produced episodes.

1.2 One (1) of the Twenty Episodes shall be the previously produced black and white original "Leave it to Beaver" pilot entitled "It's a Small World", containing new wrap-around footage produced in 1987, with appearance by the current cast introducing such pilot. The pilot is not one of the 234 episodes of the original "Leave It To Beaver", and is not one of the 85 episodes that have been previously produced by MCA for initial exhibition on SuperStation TBS.

1.3 Intentionally Deleted.

1.4 PRODUCTION FINANCING FOR TWENTY EPISODES

$7,400.00

HRS shall be obligated to pay MCA for each one of the Twenty Episodes, subject to Paragraphs 1.3 hereof, the sum of Three Hundred Seventy Thousand ($370,000.00) U.S. Dollars, together with interest (see Paragraph 1.5 hereinbelow) (hereinafter the "Twenty Episodes Production Guarantee") on or before June 29, 1997. HRS may fulfill payment of some or all of the Twenty Episodes Production Guarantee as follows:

1.4.1 HRS shall assign its right to receive payment from WWOR to MCA (i.e. One Hundred Forty Three Thousand Five Hundred Dollars ($143,500.00) per month payable over a period of thirty (30) months commencing October 1, 1989) for the 85 Episodes of "The New Leave It To Beaver" licensed to HRS pursuant to the Agreement, and the Twenty Episodes that are the subject of this Amendment Agreement. Provided MCA, its parent company, or affiliates thereof alone or in combination, continue to own a controlling interest in WWOR, in the event WWOR fails to make the aforesaid payments, such failure shall not be deemed a breach by HRS, and should such a failure to make payment by WWOR occur for reasons other than a material breach by HRS, HRS' obligations to pay MCA the Twenty Episode Production Guarantee shall be reduced by an amount equal to the sum WWOR fails to pay. In order to effectuate the foregoing, HRS agrees to prepare and execute all necessary documentation, including, but not limited to amendments to any existing agreements, and UCC-1 Forms for filing in at least the states of California, New York and New Jersey.

1.4.2 HRS agrees that MCA may credit against the Twenty Episode Production Guarantee (periodically throughout the season) the portion of the revenue from net advertising receipts set forth in Paragraph I(B)(6) of the Agreement, derived from the episodes of "The New Leave It To Beaver" which would otherwise have been paid to HRS by MCA from exhibition on SuperStation TBS during the 1987-88 television season.

1.4.3 By HRS preparing and submitting to MCA a monthly statement on the receipts from licensing the Twenty Episodes, until such time HRS has fully paid the Twenty Episode Production Guarantee. Such statement and payment for one hundred percent (100%) of receipts attributable to the Twenty Episodes shall be delivered to MCA on or before the 15th day of each month for the immediately preceding month. HRS shall immediately upon receipt deposit one hundred percent (100%) of receipts attributable to the Twenty Episodes in a segregated bank account, in accordance with Paragraph 13 of the Agreement, and from such bank account immediately draw receipts attributable to the Twenty Episodes and deposit same in another segregated bank account and shall leave such receipts on deposit in such segregated bank account until such time payment is made to MCA pursuant to this Paragraph. HRS' right to the distribution fee pursuant to Paragraph I(B)(5) Third of the Agreement shall be deferred until such time as HRS has fully paid the Twenty Episode Production Guarantee, after which HRS shall immediately recoup such deferred sums out of future receipts. HRS shall instruct the banking institution selected for such segregated account to mail to MCA a duplicate copy of the statement prepared each month by such banking institution that is sent to HRS, and such bank statement shall be sent to the attention of Jerry Clark, Vice President, Finance, MCA Television Group, 100 Universal City Plaza, Building 502/2, Universal City, CA 91608. HRS' failure to make timely reporting and payment on more than two (2) consecutive occasions or a total of three (3) occasions irrespective of whether they are consecutive, shall be deemed a material breach of the Agreement and this Amendment Agreement.

1.4.4 Paragraph (I)(B)(7) and the words "intentionally deleted" shall be deleted therefrom, and in its place shall be substituted the

following: "To the extent that HRS is entitled to participate pursuant to existing agreements between HRS, or one of its affiliate companies, and MCA, or one of its affiliate companies, in proceeds derived from the theatrical motion pictures entitled "The Groundstar Conspiracy" and "The Life of Riley", HRS hereby assigns the revenue from such participation to MCA effective the date of this Amendment Agreement. MCA shall not be obligated to pay to HRS any participation monies HRS might otherwise be entitled to receive pursuant to agreements to which HRS is a party, but MCA shall instead apply such monies to the Twenty Episode Production Guarantee HRS is obligated to pay MCA. Notwithstanding the preceding sentence, MCA or its affiliate shall not be relieved of its obligation to render accounting statements to HRS during the aforesaid assignment period. At such time the Twenty Episode Production Guarantee described in Paragraph 1.4 hereinabove has been fully paid to MCA by HRS in accordance with said Paragraph, MCA, or its affiliate company, shall resume sending payments, if any, to HRS in connection with HRS' participation in the proceeds, if any, from the aforesaid theatrical motion pictures."

1.4.5 HRS shall cause its affiliate company, Qintex Australia, to execute and deliver to MCA a Guarantee for the repayment of the Twenty Episode Production Guarantee, in the same form as that found in Exhibit "A" attached hereto and made a part hereof, within ten (10) business days following the execution of this Amendment Agreement.

1.5 Any interest to be paid by HRS to MCA on monies due MCA hereunder shall be based on the United States 3-Month Treasury Bill Rate (or such other similar instrument which may replace the 3-Month Treasury Bill) in effect at the beginning of each calendar quarter, and shall be compounded quarterly. Interest on the per-episode Twenty Episode Production Guarantee shall begin to accrue as of completion of each respective episode (in the case of "It's a Small World", interest shall begin to accrue upon the date the episode is made available to HRS), and shall continue until principal and interest have been fully repaid.

1.6 Except for contracts executed as of the date hereof, the payment terms HRS negotiates with its various licensees for the syndication rights to the Twenty Episodes shall be the same as the payment terms each such licensee agrees or has agreed to make in connection with the first eighty-five (85) episodes of "The New Leave It To Beaver" previously licensed to HRS by MCA.

1.7 MCA shall secure SuperStation TBS' agreement not to exhibit the Twenty Episodes of "The New Leave It To Beaver" 12:00 a.m. (E.T.) Monday through 11:59 p.m. (E.T.) Friday (unless such requirement is waived by HRS); exhibition of the episodes shall be limited to Saturdays and Sundays.

1.8 HRS obtaining a release or waiver from the Gaylord Broadcasting Group from a prior existing commitment for exclusivity rights to "The New Leave It To Beaver" in the television markets in which Gaylord owns televisio stations.

1.9 HRS agrees that MCA shall be entitled to one hundred percent (100%) of the net advertising receipts set forth in Paragraph I(B)(6) of the

Agreement, derived from the episodes of "The New Leave It To Beaver" including the portion which would otherwise have been paid to HRS by MCA from exhibition on SuperStation TBS during the 1988-89 television season.

2. **DISTRIBUTION AGREEMENT FOR TWENTY EPISODES:** The terms of Paragraph I(B) of the Agreement shall govern the distribution of the Twenty Episodes, except such Paragraph shall be modified with respect to the Twenty Episodes only, as follows:

2.1 Notwithstanding anything to the contrary contained in Paragraph I(B), the license term for the Twenty Episodes shall commence September 15, 1989 and continue until the later of September 14, 1997 or as described in Paragraph I(B)(1)(c);

2.2 Paragraph I(B)(5)Fourth shall not apply, and for the distribution of the Twenty Episodes HRS shall remit to MCA, subject further to HRS' recoupment of the Twenty Episode Production Guarantee, all of HRS' receipts derived from exploitation of the Twenty Episodes after deducting the amounts set forth in subsection 5 (First and Third) of Paragraph I(B) of the Agreement. The amounts attributable to Subsection 5 Second of Paragraph I(B) of the Agreement shall be deferred until the Twenty Episode Production Guarantee has been paid, after which HRS shall immediately recoup such deferred sums out of future receipts.

2.3 Paragraph I(B)(6) shall be read in accordance with the changes set forth in Paragraph 1.4.2 hereinabove, however, MCA shall undertake the advertising sales for the Twenty Episodes for the 1988-89 television season just as MCA has done on the 27 Episodes produced for the 1987-88 television season.

2.4 The results from distribution of the eighty five (85) episodes and the Twenty Episodes, for purposes of reporting to MCA, shall not be cross-collateralized. If all 105 episodes are licensed under a single agreement (versus a separate license for the first 85 episodes and a separate license for the Twenty Episodes) the revenue for the Twenty Episodes shall be allocated fairly and the minimum allocation to the Twenty Episodes shall be at least equal to the pro-rata allocation for the 85 episodes. For reporting purposes the 85 episodes and the Twenty Episodes shall be treated separately.

3. **ADDITIONAL "THE NEW LEAVE IT TO BEAVER" EPISODES NOT YET EXHIBITED:** The following Paragraph shall become Paragraph I(A)(7) of the Agreement: "Seven (7) of the Twenty-Seven (27) episodes of "The New Leave It To Beaver" series for the 1987-88 television season that MCA has produced pursuant to Paragraph I(A)(4) of the Agreement, as amended on June 23, 1988, have not yet been exhibited on SuperStation TBS. The seven (7) episodes will be exhibited some time between September 1, 1988 and December 31, 1988. MCA will deliver such seven (7) episodes to HRS on or before September 1, 1988. HRS agrees not to deliver the episodes to its licensees earlier than January 1, 1989. The working titles of the seven (7) episodes are as follows: "The Great Debate",

"Cursed Again", "Hook, Line & Sinker", "Inside Eddie Haskell", "Family Scrapbook II", and "Gosh, Wally"."

4. The following Paragraph shall be added to the Agreement and become Paragraph I(B)(8): "MCA shall undertake the design, creation and production of a new main title (i.e. opening credits) for the Twenty Episodes, and the cost of same shall be paid by MCA from the Twenty Episode Production Guarantee receipts. The design and content of such main title shall be solely at MCA's discretion. Such new main title shall only appear on the Twenty Episodes. In the event HRS, at some future time, elects to have MCA replace such new main title with the main title used on the episodes produced prior to the 1988-89 television season, the cost for such replacement shall be borne solely by HRS and shall be deemed a recoupable distribution expense. MCA warrants and represents that such new main title sequence will not appear on any of the previously produced episodes of "The New Leave It To Beaver" or "Still the Beaver" without the prior written approval of HRS".

5. Paragraph VI of the Agreement shall become Paragraph VI(A), and the Agreement shall be amended to include the following Paragraph VI(B): "HRS, with the consent of its parent company, hereby grants to MCA warrants to purchase up to five hundred thousand (500,000) shares of HRI Group, Inc. at a strike price of Eight Dollars ($8.00) per share exercisable by written notice to HRI's Corporate Secretary at any time prior to the expiration dates set forth hereinbelow.

(a) 125,000 shares on or before October 1, 1990;

(b) 125,000 shares on or before October 1, 1991;

(c) 125,000 shares on or before October 1, 1992;

(d) 125,000 shares on or before October 1, 1993.

The parties hereto shall exercise all documents necessary to effect the purposes of this Paragraph VI(B).

7. Paragraph 16 "Default" of the Agreement shall become Paragraph 16(A), and the Agreement shall be amended to include the following Paragraph 16(B):

"16(B) Force Majeure: If either party hereto shall be impeded, delayed or prevented from the performance of any of its obligations hereunder on account of or by reason of any cause reasonably beyond its control, including without limitation, strikes, walk-outs, lock-outs, boycott or other labor disturbances; acts of God; acts of civil or military authorities or of public enemy; fires, floods, earthquakes, explosion or other acts of the elements or accidents; mental, physical or other disability of named talent ("named talent" means all performers receiving on-screen credit); epidemics o quarantine restrictions; or wars or riots (collectively, "force majeure"), such party's obligations hereunder with respect to any required performance which is so impeded or prevented and the running time hereunder shall be

suspended until such event of force majeure ceases, and such suspension shall not be deemed a breach of this Agreement. In the event of a force majeure occurrence, the party impeded, delayed or prevented from performance hereunder due to same shall give written notice to the other party within ten (10) business days following the occurrence of the force majeure. However, such parties inadvertent failure to give said notice shall not be deemed a breach of the Agreement."

8. Intentionally Deleted.

9. McHALE'S NAVY

9.1 HRS is hereby exercising its option pursuant to Paragraph II(l) and the commencement of the license term shall be June 30, 1988 and continue through December 31, 1995, and MCA's agreement to license "McHale's Navy" to HRS, on terms differing from those in the Agreement, shall be subject to all of the conditions set forth in Paragraphs 1.1 through 1.7 hereinabove, first occurring, unless MCA waives any one of such conditions.

9.2 The following Paragraph shall become Paragraph II(ll): "In connection with Paragraph II(I) hereinabove, MCA's affiliate company WWOR TV, Channel 9 of Secaucus, New Jersey (herein "WWOR") will sublicense from HRS all 138 half-hour episodes of "McHale's Navy", to be colorized by HRS, entitling WWOR to not less than six (6) runs of each episode for a term of four (4) years. If HRS delivers to WWOR no later than September 1, 1989 sixty five (65) colorized "McHale's Navy" episodes (of the total 138 episodes), and provided HRS has advised WWOR no later than June 15, 1989 that HRS will be delivering by such date the number of episodes required herein, WWOR will pay to HRS a license fee of Twenty Five Thousand Dollars ($25,000.00) per episode payable in accordance with Paragraph 9.3 hereinbelow. In the event HRS delivers not less than forty (40) colorized episodes of series on or before September 1, 1989, and not less than twenty-five (25) additional colorized episodes of series on or before October 20, 1989, WWOR shall remain obligated to pay a per episode license fee of Twenty Five Thousand Dollars ($25,000.00) payable in accordance with Paragraph 9.3 hereinbelow. Notwithstanding the preceding two sentences, in the event WWOR does not elect to repeat any of the aforesaid sixty five (65) episodes in 1989 after their initial run, HRS shall use its best efforts to deliver to WWOR a sufficient quantity of additional colorized episodes at least two (2) weeks prior to the date on which WWOR requires such additional colorized episodes. In any event, HRS shall commence delivering the balance of the seventy three (73) episodes not delivered by September 1, 1989 (and October 20, 1989 as the case may be), on or before January 2, 1990 and such delivery shall be quantities of colorized episodes and at intervals sufficient for WWOR to continue exhibiting episodes of the series without repeating previously exhibited episodes, and in time sufficient to permit WWOR to include descriptions of the episodes in various television listing publications. In the event HRS is able to deliver additional episodes beyond the initial sixty five (65) due September 1, 1989 (or forty (40) on September 1, 1989 and twenty-five (25) on October 20, 1989), but prior to January 2, 1990 permitting WWOR the ability to exhibit episodes of the series continuously without repeating episodes through December 31, 1989, then the

obligation of HRS to deliver episodes commencing January 2, 1990, shall be delayed one (1) weekday for each additional episode beyond sixty five (65) HRS has delivered in accordance with this sentence. If WWOR programs the exhibition of same for the Fall 1989 season, WWOR agrees to exhibit the series (unless HRS waives such requirement) for a minimum of one exhibition during any one of the following time periods: (a) 4:00 p.m. to 8:00 p.m. on a strip basis Monday through Friday (E.T.), or (b) 11:00 p.m. to 12:00 p.m. on a strip basis Monday through Friday (E.T.), or (c) 5:00 p.m. to 8:00 p.m. (E.T.) Saturday on a once-a-week basis, or (d) 5:00 p.m. to 7:00 p.m. (E.T.) Sunday on a once-a-week basis, through the November, 1989 Nielsen rating's period. If WWOR elects to strip the series (as in (a) or (b) above), WWOR may exhibit the series at any other time of the week on a strip or other basis. On the other hand, if WWOR elects to exhibit on a once-a-week basis that is either on Saturday or Sunday, or both days, WWOR shall not strip the series Monday through Friday unless during time periods (a) or (b), but WWOR may also exhibit the series on a once-a-week basis outside the time periods described in (a), (b), (c) or (d). If HRS delivers to WWOR no later than September 1, 1989 and October 20, 1989 the aforesaid 65 episodes, but WWOR does not elect to exhibit same until sometime in 1990, the $25,000 license fee per episode shall still apply, but WWOR shall not be obligated to exhibit the series during the aforesaid (a) (b) (c) or (d) time periods. If HRS fails to deliver to WWOR by September 1, 1989, and October 20, 1989, the aforesaid 65 episodes, WWOR shall only be obligated to pay a license fee of Twenty Thousand Dollars ($20,000.00) per episode and shall be under no obligation to exhibit the series during any particular time periods. WWOR agrees to advise HRS no later than August 15, 1989 whether the McHale's Navy series will be programmed on a strip or once-a-week basis during the 1989-90 television season.

9.3 The following Paragraph shall become Paragraph II(12): The terms and conditions of a television syndication license agreement to be negotiated by WWOR and HRS hereunder shall be no less favorable than the terms and conditions, except for the aforesaid license fee and payout (either $115,000.00 per month for 30 months commencing October 1, 1989 if all 65 episodes are delivered by September 1, 1989; $115,000.00 per month for 30 months commencing November 1, 1989 if all 65 episodes are delivered by October 20, 1989; or $92,000.00 per month for 30 months commencing the first day of the month following the first exhibition of the series, but in no event later than October 1, 1990, whichever may be applicable pursuant to Paragraph 9.2 hereinabove), than those granted by HRS to its most favored customer in connection with the sublicensing of television syndication rights to "McHale's Navy". WWOR's obligation to pay the applicable license fee pursuant to the parenthetical clause in the preceding sentence is subject to HRS fulfilling its delivery obligations of the colorized episodes of the "McHale's Navy" series pursuant to the terms of this Paragraph 9.

9.4 The following Paragraph shall become Paragraph II(13): HRS' obligation to deliver 138 colorized episodes of the series shall be subject to the availability of physical materials for all of the episodes permitting colorization. In the event one or more episodes cannot be colorized as a result of technical problems with the physical materials furnished by MCA hereunder, the number of episodes and the corresponding per-month payment mad

by WWOR to HRS shall be adjusted downward accordingly, and likewise all other obligations of either party to the other as set forth herein and in the Agreement shall be adjusted accordingly.

All other terms and conditions of the Agreement shall be and remain as they are, and this letter shall modify the Agreement only so far as specified herein. In the event of an inconsistency between this Amendment Agreement and the Agreement, this Amendment Agreement shall prevail.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the date first written above.

HAL ROACH STUDIOS, INC.	MCA TELEVISION LIMITED
By _____	By _____
Title	Title
June 30, 1988	June 30, 1988

Mr. KASTENMEIER. I just have one last question. I just want to be clear, but I think my colleagues have covered most of the areas quite well. That is, how do you see the role of certain others? We talked a little bit at the outset about cinematographers, for example. What is your view about that?

We had, of course, a witness this morning representing certain producers, not all producers, but certain professional producers.

Mr. DANTE. Career producers is the phrase.

Mr. KASTENMEIER. Career producers. Is it your view that they do not make a core contribution to the film that could be considered to warrant giving them a similar right?

Mr. DANTE. That is not strictly my view, but I would say that it varies to such a tremendously great degree from film to film and producer to producer, that to make a blanket statement and say that producers always are key creative elements in the production of a film, I just do not—I could not get behind that myself and I have worked with a number of producers.

Mr. KASTENMEIER. I think that is the problem though.

Mr. DANTE. Well, I did a film with seven producers once, and you have to——

Mr. KASTENMEIER. And then there are some producers who have worked with seven directors on——

Mr. DANTE. Well, that usually does not result in a very good film. When you have seven producers, one of them produces and the others, they sort of act like producers and I do not think that what the majority of them do is as creative or certainly as seat of the pants difficult as what the writer and the director do.

So, although I certainly think the producer is a part of the creative process, I would not be able to say that I thought that the producer had, frankly, even as much to do with the finished film as the cinematographer.

Mr. KASTENMEIER. Well, I cannot really contrast my own position on this, other than to concede that, to the outsider, it may appear that in some films the producer, the executive producer, is the person who, in some films, plays such a key role, who actually puts the film together at the outset, before a director is even hired. Throughout the film the producer may play a very substantial role in the direction of that film, to the very end.

Then there are other cases, where the producer is more or less, his role is quite different, more concerned with making sure that——

Mr. DANTE. People show up on time.

Mr. KASTENMEIER [continuing]. The business aspect of the film under production is handled properly and so forth.

That is why I am unclear as to whether there is a definite answer to the question of whether a producer has a similar core responsibility for the creative aspect of the film in some cases.

Mr. DANTE. I think we could all point to films that we felt were producer oriented, "Gone with the Wind" and certainly "Snow White and the Seven Dwarfs." But I think that, in general, the responsibility really of actually doing the work and actually making the film, and I think this is really a key point, that the job of making the film really falls from a day-to-day, hour-to-hour, month-to-month basis on the director who is working from a screen

play written by the writer, who may well have taken hours and weeks or months or, you know, however long to write the script.

But, in the end, once that script is in his hand, it really is up to the director to make the film. And I cannot think of any films that do not have directors. There is always a director, even if he fell asleep, there is a director.

Mr. ROBINSON. I would also just add to that, sir, that the producer whom you first describe, who is a very creative controlling influence, I am sure has had the good sense to hire a director who would be the proper repository for the moral rights of the film. I do not think that he is going to pick somebody who is going to trash the film or allow it to be not treated well, if he is, in fact, given the right to look after that.

One of the problems we have is that we have executive producers. We have producers. We have associate producers, executive in charge of production.

Mr. DANTE. And we have friends of various people.

Mr. KASTENMEIER. Well, I understand that. And you know, everybody knows that it is very hard for the theater goer sometimes——

Mr. ROBINSON. To know who did what.

Mr. KASTENMEIER. Yes, because you see up there, Lorimar Films by so and so productions, by X, Y, and Z, apparently distributed by yet another company and so forth. And then the directors and maybe others, codirectors or whatever may also appear. And the result is you cannot really understand, from the outside, the roles that these people play.

Mr. ROBINSON. Right, even from the inside it is sometimes hard. There are movies on which the unit production manager is, in fact, the line producer of the movie. And so, I think if we are going to be setting industry guidelines for who is the principal author of the film on an industry-wide level on a practical level, clearly it is the director and the writer.

There are cases when a producer, Walt Disney, for instance, on "Snow White," is the prime creative force, but I think today on an industrywide level, it is the director and the writer.

Mr. KASTENMEIER. The gentleman from California.

Mr. BERMAN. You gentlemen are authors and not attorneys, and for that I congratulate you. But, there is this issue of dealing with movies already made, already panned and scanned. The copyright office says that is an unconstitutional taking to try now and restrict that film, that that in a sense, has constitutional problems if we attempted to legislate restraints on the ability to show movies that were already materially altered and are out there.

Mr. DANTE. Well, they can be unaltered. I mean, one of the great things about the——

Mr. BERMAN. Well, I mean, they were voluntarily altered.

Mr. DANTE. One of the great things about the fact that all of these negatives have been preserved and one of the things we were discussing before, that all of this effort has gone into preserving the original versions of the work, means that all you have to do is to go back to that original work and do a new transfer for videos, since that is really basically what we are talking about, which is really——

Mr. BERMAN. But you do not want Congress saying, "Nothing can ever be shown that has been panned and scanned," do you? I mean, somewhere we have to set up a process to decide when and how, but you do not want—I mean, that is a very dangerous precedent.

Mr. ROBINSON. Sir, I am not a lawyer. I do not know about precedence, but I think, I personally would never want to see anything that has been panned and scanned.

Mr. BERMAN. Right, but now should Congress say that—Mr. Robinson. I think the death penalty is not strong enough for pan and scan.

Mr. BERMAN. I know this is an important issue, but——

Mr. DANTE. I just do not believe that it is that difficult to go back to the original materials and make a new version. These people do not mind spending a fortune to make crummy versions that completely destroy the film. All we are talking about is going back and making a version that is actually true to the movie.

Mr. BERMAN. My point is that they are, at least the copyright office has raised a constitutional question with our effort to try to regulate in this area.

Mr. DANTE. Well, the copyright office also declared that a colorized movie is a derivative work. And I am not sure that that was the decision of a lifetime.

Mr. ROBINSON. You know, I think that this objection that you raise, as well as others, and that our friends on the other side have raised, are all valid questions. What if this, what if that? I think that it is easy to overemphasize the problems, because there is, today, no incentive for them to help come up with solutions.

Mr. BERMAN. That is true.

Mr. ROBINSON. If the force of law were behind moral rights, these are very bright, creative, skillful, problem-solving people and I am sure that they would very quickly come up with some solutions and we would be very happy to sit down with them in a spirit of cooperation.

Mr. DANTE. We would assist them in any manner whatsoever.

Mr. BERMAN. You can pick apart anything that you were to propose.

Mr. ROBINSON. Right.

Mr. BERMAN. I mean, that is right.

Mr. ROBINSON. Right.

Mr. BERMAN. You have to propose, and whatever you propose, somebody can pick apart.

Mr. DANTE. I mean, we know that we are on very difficult ground. The fact that we have gotten as far as we have is a source of great happiness to us. The fact that we are able to actually sit here and make our feelings known is wonderful. I just think that the urge to clutter the debate with all sorts of side issues tends to obscure somewhat, the fact that——

Mr. BERMAN. The Constitution.

Mr. DANTE. No, no, no, no, not the Constitution. That is a main issue, not a side issue. It obscures the fact that, when you people go home, or if you go to your hotel, and you turn on your television, chances are much greater than 50/50 that you will see something that has been tampered with in some way, that the film will either

be cut, panned and scanned, colorized or lexiconned. To me, that is an unacceptable way for our country to be at this point.

I mean, we should show more respect for the work of artists. And that is really why we are here.

Mr. KASTENMEIER. If there are no further questions, we would like to thank our panel, Mr. Joe Dante and Mr. Phil Alden Robinson, for representing their particular guilds. And also it is good to have Elliot Silverstein back at the witness table again. Thank you very much for your appearance today.

Mr. ROBINSON. Thank you, sir.

Mr. DANTE. Thank you, sir.

Mr. KASTENMEIER. We now will hear from our last panel, Louis Fogelman, who is a board member of the Video Software Dealers Association, and his presentation will be on behalf of the Video Software Dealers Association. Also, Mr. Charles E. Sherman, senior vice president for television for the National Association of Broadcasters on behalf of both NAB and the Association of Independent Television Stations.

Gentlemen, you are both welcome. Who would like to proceed first?

STATEMENT OF LOUIS FOGELMAN, BOARD MEMBER, VIDEO SOFTWARE DEALERS ASSOCIATION, ON BEHALF OF THE VIDEO SOFTWARE DEALERS ASSOCIATION

Mr. FOGELMAN. Mr. Chairman, my name is Louis Fogelman and I am the president and CEO of Show Industries, which operates the Music Plus Stores throughout California, mainly in the greater Los Angeles area. I have been a video retailer for the past decade.

It is a pleasure to appear before this committee representing my company and the Video Software Dealer Association, of which I have been a board member for the past 6 years. VSDA is the national trade association of home video distributors and retailers and represents about 20,000 of the roughly 30,000 retail home video stores across the country.

My focus today is the creation of videocassettes and the related technological adjustments, such as panning and scanning, the principal technique used to adapt films to standard TV screens.

VSDA's main concern is that the subcommittee not view the issue too narrowly, as merely a battle between the screenwriters and directors, on the one hand, and studios on the other. It is crucial that you keep in mind the public interests ultimately to be served. They include the concerns of thousands of small businesses, who provide motion pictures and videocassette form to the public and, even more importantly, the preference of our customers—millions of Americans who look to home video for affordable family entertainment. Claims by others that they represent the public interest should be scrutinized carefully.

It is not clear precisely how any particular legislative scheme would create "artist's moral rights" in the motion picture industry. But the inevitable results of such schemes would be to increase the leverage that directors and screenwriters possess in their bargaining with motion picture studios. That added leverage would result from an "artist's moral right" to veto any exhibition of his work in

a form that he claimed would harm the "artistic integrity" of the work.

Such a proposal is unwarranted and unwise. Video dealers and their consumers would be harmed, in several ways:

First, writers or directors could insist that their films be letter-boxed, rather than panned and scanned. So-called letter-boxing is a technique used in order to present a film on square TV screens, but within a viewing area of approximately the same height to width ratio as a theater screen. The entire picture is compressed into a smaller rectangle with black bands filling in the void that results at the top and the bottom of the screen. It is the experience of our member dealers that, with few exceptions, the public finds "letter-boxing" a distracting and annoying interference with the enjoyment of the film. After four decades of television viewing, they are accustomed to a fully filled screen, not one cut off at the top and the bottom.

In addition, letter-boxing substantially diminishes picture resolution on the TV because the picture is squashed into a smaller space. Details are obscured. Most of our customers find the smaller and poorly detailed letter-boxed picture is far less satisfactory. This customer dissatisfaction with the letter-boxing has been the general experience of the dealers in our area.

Number two, writers and directors could prevent conversion of films to videocassette in any format. Directors or writers could claim that both letter-boxing and panning and scanning processes unacceptably adulterate the "artistic integrity" of their films. Their veto power would totally deny home video access to a number of important films.

Thirdly, writers and directors who are not opposed in principal to panning and scanning would nevertheless use the economic leverage of their "moral rights" to increase their compensation, in exchange for permitting their films to be processed for the videocassette format. We, the retailers, would have to absorb that increased cost or pass it on to our customers.

Though some directors have claimed that they would never use any "moral rights" for financial bargaining, their new leverage would inevitably affect the outcome of commercial negotiations.

Four, "moral rights" could lead to very substantial delays in the release date of videocassettes. This is the likely outcome for many films. In part, that is because the process would be so unwieldy. You have heard today what a Pandora's box this area involves. It will be difficult to limit the number of persons involved. The delay caused by extended negotiations to obtain artistic approval of home video versions could significantly reduce the market demand for those videocassettes.

Number five, in addition to harming our businesses and our customers directly by restricting or delaying access to particular films, a new "moral rights" scheme also would be harmful in the aggregate by reducing the total number of motion pictures which studios and other investors are able to underwrite. As the problem noted above reduces the post-theater markets for films, studios will be forced to produce fewer films overall.

In addition, I would like to comment on the labeling proposals. Some approaches envision a labeling scheme. Under such labeling

requirements, videocassettes would have to disclose that changes had been made without the approval of key participants in the creation of the original work. At first blush, this less drastic approach might seem to be a modest, reasonable option. But here again, VSDA urges you not to focus solely on relationships between the studios and their screenwriters and directors. You should carefully review and keep in mind the realities of retailing, and the significant burden such a scheme would place our members and their customers.

Who would be responsible: For determining that such disclaimers were included; for reviewing the adequacy of disclaimers; or for determining whenever a disclosure was required in the first place? Placing any of those responsibilities on the dealer would be extremely unfair. Video dealers would be innocent bystanders who should not be penalized with regard to disputes about which they have no direct knowledge and over which they have no control.

We also would not agree with the implication that such a disclaimer might give our customers, namely, that they would find that the videocassette version was of significantly inferior quality, or not enjoyable.

In conclusion, let me make two general observations. First, as you know, the motto of the home video industry has long been "freedom of choice" for America's consumers, freedom to rent or purchase the films they wish to see. If consumers object to the format producers choose for videocassettes, they will let us know loud and clear and we will tell the film production industry. But the fact is that most of our customers do not enjoy letter-boxed films on their TV screens, which are so much smaller than those in the movie theaters.

We have seen claims that very large wall TV screens and HD TV will soon be available and will allegedly diminish this problem, both because of their size and because they will more closely approximate the shape of theater screens. We urge the subcommittee to remember that it will be many years before such luxury becomes a reality for the average American family trying to find affordable entertainment on a tight budget. There are still millions of television screens in American homes that are of modest size. Letter-boxing is a particularly annoying distraction and distortion of picture resolution for such smaller sets.

Second, the existing American system for distributing films through theaters, home videocassettes, television and cable broadcast has been an unparalleled success in making these films widely accessible to the public. It is the envy of the world. Given the many other pressing matters before the committee and the maze of issues which legislative "moral rights" entails, we urge you to follow the old adage, "If it ain't broke, don't fix it." This system is not broken. New legislation is not needed.

Mr. KASTENMEIER. Thank you, Mr. Fogelman.

[The prepared statement of Mr. Fogelman follows:]

Statement of

Louis Fogelman, on Behalf of
The Video Software Dealers Association

At the Copyright Moral Rights Hearing

Before the
Subcommittee on Courts, Intellectual Property and
the Administration of Justice
of the House Judiciary Committee

on
Copyright Moral Rights in Films

January 9, 1990

Thank you, Mr. Chairman. I am Louis Fogelman of Los Angeles, President of Video Place in California. I am a member of the National Board of Directors of the Video Software Dealers Association, or "VSDA." VSDA is the national trade association of home video distributors and retailers, and represents about 20,000 of the roughly 30,000 retail home video stores across the country.

I welcome this opportunity to present the position of VSDA on the issue of so-called "moral rights" in regard to the motion picture industry, particularly the processing of films for viewing on television screens in such formats as prerecorded videocassettes, broadcasts and cable. The phrase, "moral rights," is the standard reference in European legal doctrine to an artist's right to protect the integrity and reputation of his work.

Our basic point is that Congress should consider the full range of public interests involved in this complex issue. Congress should not narrowly, and artificially, view the matter as merely a dispute between producers and directors. In fact, Mr. Chairman, we strongly agree with your comment last March, when the Copyright Office Report was released, that proponents of legislation not only have the burden of proving that such a change was justified, but also must show that any legislation is consistent with the interests of the film distribution system and the viewing public.

I will not dwell on the specific issue of colorization -- which VSDA addressed extensively during deliberations on the Interior Appropriation bill in the last Congress -- except to reiterate that most VSDA members support the right of the customers to see colorized versions of older films. This will also create the opportunity for new generations of viewers to enjoy great film classics they might otherwise pass by.

Our focus today is the creation of videocassettes and related technological adjustments, such as panning and scanning. As other witnesses have detailed, panning and scanning is the principal technique used to adapt films shown on theatre screens so they also can be enjoyed on standard TV screens. Congressional establishment of new moral rights with regard to such mechanical processes would raise a number of difficult threshold issues.

First, the Copyright Office report, "Technological Alterations to Motion Pictures," itself notes that any effort to retroactively create such rights regarding pictures already made would raise very serious questions of constitutionality -- and fundamental fairness. It would be changing the law after the players in the motion picture industry had committed resources to making a film on the basis of the copyright rules of the game operative at that time.

Second, there is the fundamental question of why Congress should intervene at all in the intricate web of labor management negotiations, rights of consultation and collective bargaining agreements that have been painstakingly developed between the motion picture studios and the writers and directors. That complex relationship is unique to the United States; it precludes simplistic comparisons to "moral rights" regimes in other countries.

These issues will be explored by other witnesses. VSDA's main concern is that the Subcommittee not view the issue too narrowly, as merely a battle between screenwriters and directors, on the one hand, and studios, on the other. It is crucial that you keep in mind the public interests ultimately to be served. They include the concerns of thousands of small businesses, who provide motion pictures in videocassette form to the public and, even more importantly, the preferences of our customers -- millions of Americans, who look to home video for affordable family entertainment. Claims by others that they represent the "public interest" should be scrutinized carefully.

The proponents of moral rights legislation implicitly assume, incorrectly, that altering the film so that it may be viewed in the most enjoyable form on television screens necessarily lessens the "artistic quality" of the film. That proposition confuses two very distinct concepts: "artistic value," on the one hand; and the directors' personal preference as to how they would like the film to be viewed on television size screens.

In the first place, there are a great many artistic contributors to the film. If the director and the screenwriter prefer to see the film on television in a letterboxed fashion, while all the leading actors prefer to see it in a panned or scanned version, who is to say which version is of "higher artistic quality" for purposes of viewing on television? In any event, artistic quality or value is inherently subjective. Certainly, many esteemed art critics and fine arts scholars often rate particular art works as being of lesser artistic quality than would the creating artist himself. Who is correct?

The same analysis holds in the case of a film director, on the one hand, and the film critics who often disagree with the directors' view of the film's artistic qualities. In short, beauty is indeed in the eye of the beholder. Therefore, it also is difficult to separate the concept of the "public interest" from the question of how to afford the public the greatest access to films, in the format that they most enjoy viewing. How else could one better define the public interest? Unless it is anchored concretely to consumer preference, the abstract notion of "greater public interest" is too vague and elusive. It only serves to highlight the dangers of the Congress' trying to judge which art forms, and methods of dissemination, best advance the "public interest."

Veto Over Technology

It is not clear precisely how any particular legislative scheme would create "artist's moral rights" in the motion picture industry. But the inevitable result of such schemes would be to increase the leverage that directors and screenwriters possess in their bargaining with motion picture studios. The added leverage would result from an "artist's moral right" to veto any exhibition of his work in a form that he claimed would harm the "artistic integrity" of the work.

Such a proposal is unwarranted and unwise. Video dealers and their customers would be harmed, in several ways:

(1) Writers or directors could insist that their films be letter-boxed, rather than panned and scanned. So-called "letter-boxing" is the technique used in order to present a film on square TV screens, but within a viewing area of approximately the same height-to-width ratio as a theatre screen. The entire picture is compressed into a smaller rectangle, with black bands filling in the void that results at the top and bottom of the screen. It is the experience of our member dealers that, with few exceptions, the public finds "letter-boxing" a distracting and annoying interference with their enjoyment of the film. After four decades of television viewing, they are accustomed to a fully filled screen, not one cut off at the top and bottom.

In addition, letter-boxing substantially diminishes picture resolution on the TV because the picture is squashed into a smaller space. Details are obscured. Most of our customers find the smaller and poorly detailed letter-boxed picture far less satisfactory. This customer dissatisfaction with the letter-boxing has been the general experience of the dealers in our area.

(2) Writers and directors could prevent conversion of films to videocassette in any format. Directors or writers could claim that both letter-boxing and panning and scanning processes unacceptably adulterate the "artistic integrity" of their films. Their veto power would totally deny home video access to a number of important films.

(3) Writers and directors not opposed in principle to panning and scanning would nevertheless use the economic leverage of their "moral rights" to increase their compensation, in exchange for permitting their films to be processed for the videocassette format. The studios would pass on that increased cost of production in the form of higher prices charged to distributors and, in turn, video retailers. We-- the retailers -- would have to absorb that increased cost (although our margin of profit is far smaller than those of screenwriters and directors) or pass it on to our customers.

Though some directors have claimed they would never use any new "moral rights" for financial bargaining, their new leverage would inevitably affect the outcome of commercial negotiations.

Unfortunately, since this initial hearing was held prior to the directors' circulating any specific legislative proposals for comment by other interested parties, it is difficult to comment in detail on this vaguely outlined concept. We assume that

there will be an opportunity to do so if any proposal were introduced in the form of actual legislation in the future. For now, I would only note that even if a director's veto over particular formats for post-theatre markets was "inalienable," and could not be bartered away, this would not necessarily be the end of economic bargaining leverage. The director could still bargain, as part of his or her contract, not to exercise that inalienable right.

In other words, the question assumes that a veto right which cannot be bartered away also "could not be used as a bargaining chip." This is incorrect, as the next sentence of the question itself points out. If the director has the ability "to waive" the exercise of the right, then he could negotiate such a waiver in advance as part of the initial contract for directing the movie. The waiver presumably would be in return for a substantially greater fee than he would otherwise have been able to negotiate. In short, this proposal still could enable the directors to use the right as a bargaining chip in their economic negotiations with film producers.

(4) "Moral rights" could lead to very substantial delays in the release date of videocassettes. That is the likely outcome for many films. Almost five years passed before "E.T." was released on video because of such negotiations; not every film has the remarkable longevity of that picture. For many films, the delay caused by extended negotiations to obtain artistic approval of home video versions could significantly reduce the market demand for those videocassettes. We know from experience that more recently publicized films tend to displace consumer interest in older films, making them more difficult to market.

This threat of uncertainty and delay is particularly dangerous because of the veritable Pandora's Box opened by any scheme for moral rights in the motion picture industry. The Copyright Office report emphasizes that, if Congress considers a moral rights regime, there is no principled basis on which the status of a film "creator" or "artist" could be limited merely to screenwriters and directors. Many other participants in the creative process could claim eligibility, from studio executives and actors to choreographers, musical composers, and the author of an original underlying work adapted for the screen, to name but a few. All would have a substantial claim to participate. Consider, for example, a large, elaborate musical film based on a Broadway play or book; negotiations over the application of technological processes would become an unmanageable mob, rather than the simple scheme portrayed by "moral rights" proponents.

(5) In addition to harming our businesses and our customers directly by restricting or delaying access to particular films, a new "moral rights" scheme also would be harmful in the aggregate by reducing the total number of motion pictures which studios and other investors are able to underwrite. Your subcommittee is quite familiar with the fact that a number of very successful movies produce sufficient revenues from theatre runs and other markets, including home video, to help sustain the production of many other, less successful, films. As the problems noted above reduce the post-theatre markets for films, studios will be forced to produce fewer films overall. That, in turn, will mean less inventory for our members to offer, and fewer films for the public to rent.

Labeling Proposals

Although much of the preliminary discussion has focused on the concept of a veto power granted to the holder of "moral rights," some approaches envision a labeling scheme. Under such labeling requirements, videocassettes would have to disclose that changes had been made without the approval of key participants in the creation of the original work. At first blush, this less drastic approach might seem to be a modest, reasonable option. But here again, VSDA urges you not to focus solely on relationships between the studios and their screenwriters and directors. You should carefully review and keep in mind the realities of retailing, and the significant burdens such a scheme could place on our members and their customers. VSDA would object to such disclaimers on a number of grounds. First, the cumulative effect of various disclaimers, notices and warnings required to accompany films on videocassette, whether on the package or as an insert in the tape itself, at some point becomes burdensome to the viewer, and decreases the enjoyability of this form of home entertainment.

Second, it is not clear who would be responsible: for determining that such disclaimers were included; for reviewing the adequacy of disclaimers; or for determining whether a disclosure was required. Each of those questions would have to be answered, in light of the degree to which the film had ben altered, and in light of the statutory language that had been enacted. Placing any of those responsibilities on the dealer, of course, would be extremely unfair and unreasonably burdensome. Video dealers would not be in a position to know the nature of any changes made or how they would relate to some official standard of alteration that might trigger prescribed disclosure or other alleged remedial action. Video dealers would be innocent bystanders who should not be penalized with regard to disputes about which they have no direct knowledge and over which they have no control.

Third, we would not agree with the implication that such a disclaimer might give our customers, namely, that they would find that the videocassette version was of significantly inferior quality, or not enjoyable.

Moreover, the Interior Appropriations bill consideration last year taught us an important lesson. In an effort to meet all of the problems raised by moral rights legislation, proposals that start out appealingly simple are likely to end up so complicated as to make Rube Goldberg weep with envy. The complexity of these proposed "solutions" can ultimately create more serious problems than those they were designed to remedy. For example, while you address the impact of new technologies on "public access" to the original version of audiovisual works, you must remember the question of what impact legislative proposals might have on the public's ability to see these works at all -- in any format -- because of the problems that legislation would create for video retailers. Some proposals would impose a duty on retailers to contact designated categories of artists involved in a film's creation and to make sure that, if they objected to the videocassette format, their objection was adequately reflected in a "warning label" for the public. Such schemes, could well impel retailers simply not to carry these films.

In fact, once we move beyond colorization and talk about technologies that apply to most films put into a video format, such as panning and scanning, you should ask yourselves whether the "public interest" really requires further

"disclosure." Americans have been seeing movies on television for decades, and home videos for many years. Is it really necessary to explain to them that when they see a film on a TV screen, it is not the same experience as seeing it on a large screen movie theatre? You should credit the American consumer with more intelligence than that.

In conclusion, let me make two general observations. First, as you know, the motto of the home video industry has long been "freedom of choice" for American consumers -- freedom to rent or purchase the films they wish to see, when they want to see them. We believe that a vigorous competitive marketplace is the best mechanism for determining which technologies best serve the public interest. If consumers object to the format producers choose for videocassette, they will let us know loud and clear, and we will tell the film production industry. But the fact is that most of our customers do not particularly enjoy letter-boxed films on their TV screens, which are so much smaller than those in movie theatres.

We have seen claims that very large wall TV screens and HDTV will soon be available and will allegedly diminish this problem, both because of their size and because they will more closely approximate the shape of theatre screens. We urge the Subcommittee to remember that it will be many years before such luxuries become a reality for the average American family trying to find affordable entertainment on a tight budget. Remember, too, that there are still millions of television screens being viewed in American homes that are smaller than the size TV some of you may have in your own house. Letter-boxing is a particularly annoying distraction and distortion of picture resolution for such smaller sets. Moreover, if anything, the prospect of much larger, and rectangular shaped HDTV screens sometime in the future suggests that much of this issue will eventually sort itself out, without the harmful and unjustified effects of Congressional intervention.

My final point is this. The existing American system for distributing films through theatres, home videocassettes, television and cable broadcasts has been an unparalleled success in making these films widely accessible to the public. It is the envy of the world. Normal labor management relations provide an ample arena for directors, screenwriters and other participants in movie making to work out their relationships and relative rights of "artistic control" with the studios. Especially in light of the many other pressing matters before the Judiciary Committee, and the maze of issues which legislating "moral rights" entails, we strongly recommend that you follow the old adage, "if it ain't broke, don't fix it." The system is not broken. New legislation is not needed.

Mr. FOGELMAN. In addition, Mr. Chairman, unfortunately I was unable to be here earlier because of some illness in my family and our counsel, Mr. Wides, would like to make a couple of points based on some earlier testimony.

Mr. KASTENMEIER. All right, Mr. Wides.

Mr. WIDES. Very briefly. I appreciate the opportunity.

Mr. KASTENMEIER. Very briefly, all right.

Mr. WIDES. When you and your fellow career professional Congressmen get back to Washington and decide what you may want to do, I would hope that you would look over the testimony I heard today, very carefully, because I think there is a danger when you have a number of hearings, to assume that there is definitely a problem on which Congress should act. And the question is how best to act?

And the general tenor of a lot of the conversation, including comments by some members of the subcommittee, was "How can we protect the moral rights" and then, "Let us figure out if we can do it in a way that is consistent with the other public interests." And we would submit that the question really is whether it is in the public interest to do anything. And that is really the question which should still be the starting point.

And the items that came up today that illustrate that include the fact that, on the one hand, we have heard that moral rights are inevitable rights, inalienable rights of man written in some platonic realm. On the other hand, everyone seems to be concerned that their own rights be protected but do not worry about the inalienable rights of anyone else because they are too messy.

Second, Mr. Robinson emphasized very heavily the difference between the final cut and moral rights. And yet, I think if you go back on the record you will find him saying that what their real concern is or what their position is, they do not care if they understand that the studios will have to make changes, but the final version, the final cut, which is the studio's decision, once locked up, should not be changed.

Well, that is a decision of the studios, not of the directors or the screenwriters. And if they are willing to have that position be locked up, then what is the difference if later on the same studio makes a different decision?

But the final point and the main one is the question of is the public interest? The Congress has a constitutional responsibility for the copyright system. Beyond that, in terms of creativity, it is a question of what will be in the public interest, what will elicit production of films? I do not know of any directors or writers who have indicated that they are going to stop writing or directing because they have seen one of their movies lexiconned or panned and scanned, and that the public is going to be denied the production of creative systems.

And if the final cut of a movie with the editing of large scenes on the cutting room floor is not such a terribly gross or major impact on the integrity of the artistic process, that that is something that should be handled by moral rights. I think you really have to put it in perspective and wonder whether the slight speeding up or panning and scanning in a way that is not remotely perceptible to the

public is either harming the public interest or gross damaging of their reputation.

Mr. KASTENMEIER. Thank you, Mr. Wides. We are, of course, quite aware that we represent the public interest. Thank you for reminding us. Next, we would like to hear from Mr. Charles E. Sherman on behalf of the National Association of Broadcasters. Mr. Sherman is a senior vice president for television. We are delighted to have him here.

STATEMENT OF CHARLES E. SHERMAN, SENIOR VICE PRESIDENT FOR TELEVISION, NATIONAL ASSOCIATION OF BROADCASTERS, ON BEHALF OF THE NAB AND THE ASSOCIATION OF INDEPENDENT TELEVISION STATIONS

Mr. SHERMAN. Thank you, Mr. Chairman. Prior to becoming the senior vice president for television for the National Association of Broadcasters, I worked in television stations for about 20 years, starting in Madison with WMTV and had some program responsibilities there and then continued to work for Forward Communications for the next 15 years and managed stations for them in Illinois and West Virginia.

And I would like to try to give you a perspective today on what a moral rights regime would mean to a local broadcaster and how it would impact our operations on a day by day basis. And in doing this, I am speaking not only today for the NAB, but also for INTV, the Independent Television Association.

And both of us submit that the marketplace is working today, if you simply judge by the public reaction, because if you look at the marketplace, 70 percent of all people today see their motion pictures through some form of television. Whether it is free, over the air television or whether it is cable, 70 percent of the audience is still watching motion pictures and seeing that picture for the first time on some form of television.

And as broadcasters, we are concerned really about two major aspects of this moral rights issue. The first is, what we could call editing for content and time. In some respects, we might find ourselves in conflict here between the Communications Act on one hand and the Copyright Act on the other. And it is something that obviously raises a great deal of concern for us.

The other issue that we would be concerned about is how moral rights would affect our business activities, business activities in two senses. Right now, we simply deal with one person when we purchase a film. We deal with the syndicator. The rights that are given to us under that syndication agreement are all-contained in that contract and so forth.

A moral rights regime could possibly make it necessary for us to deal with two, three, four, five, six people or maybe even more in arbitration and then you are not only talking here about the networks. You are talking about 1400 broadcast stations throughout the United States. You are talking about thousands of cable systems as well. So, the business arrangements and the exhibition arrangements are certainly changing in a dramatic way.

And then there is one other aspect which has not been hit on today and we, frankly, do not know how that would play out. And

that is the question of broadcasters as local producers. We produce local documentaries. We produce local public affairs. How will the moral rights regime affect us on a local level? That is another question I think that should be considered as well.

But let us take a look just very briefly, and I am sure these are points you are very familiar with, but just quickly to review; from our point of view, the concept of editing for time and content. First of all, as we well know if we listen very carefully to the cable debate these days, broadcasters have, unfortunately, only one stream of revenue. That stream of revenue is advertising.

And we have to be given the opportunity to be able to cut a product in order to be able to get our advertising in within sufficient time or otherwise, we are simply not going to have the money to be able to buy that film and to continue to provide our public service. So, the advertising issue and the cutting for that is obviously one that is very important to us. But we would also remind you that in cutting for those breaks, we also provide public service announcements which deal with a wide variety of community issues and station identification which is required under the Communications Act. We have to provide information in regard to weather emergencies and so forth. So there are a number of things that make it necessary for us to be able to cut content at various times.

Another requirement simply has to do with the competitive nature of broadcasting, the competitive nature of television, and that is cutting programs for existing time periods. It is something that goes back to the early years of radio and is now carried into television. We simply have a standard of generally starting programs on the hour and half hour. And if you are going to be competitive in this business, you have to be able to start right on time.

There are any numbers of studies that have been done, proof that is available that if you have overruns, that can be significant in nature, that they can seriously affect your rating, especially your news ratings. The only possible exception to that is the overruns of the NFL football games on Sunday, especially when they are on CBS, it is very helpful to "Sixty Minutes." But that is the only case where it generally tends to build a rating. In most other cases, overruns hurt the operation of a commercial station.

And then finally, there is the enigma of editing for content. You have broadcasters who represent communities throughout this country each with different standards. We are members of those communities and we are required on one hand by the Communications Act, to make sure that we provide that program in that local public interest. And so we have to be careful about content dealing with indecency, obscenity, in some cases, violence.

And what is something that could well be indecent content in one part of the country may not be in another part of the country. I mean, these are community standards which we have to be careful about. And we could well find ourselves, if there is a moral rights regime, in conflict with the Copyright Act on one hand, the Communications Act on the other. So, we feel that it is essential that we retain editorial control in terms of serving our local communities.

And finally, you have been talking here about formatting in terms of the simple technology of the television screen. You have

talked briefly about letter-boxing. We have also talked briefly about panning and scanning. So there has been enough said on that.

The only comment I would like to make on it, though, Mr. Chairman, and I am glad to see you were at the CES to see these new technologies and how they are developing, remember that most television receivers in the United States are 20 inches or less. Despite all the talk about the big screens, most television viewers, when they go to the store to buy a television set, buy a set that is 20 inches or less and that is in the overwhelming majority of all cases.

Even if you look at these sales figures today, you will see that the large projection screen sales are going down; they are not going up. So, that the marketplace is dictating at the present time, that most people watch television on small screens.

So basically, these are the concerns of the broadcasters as we look at this moral rights regime; which editing standards do we follow? Is our responsibility to the Copyright Act or the Communications Act? Do we letter-box? Do we pan and scan? And so these are the issues that we have and the concerns that we have. Thank you for your attention.

Mr. KASTENMEIER. Thank you very much, Mr. Sherman.

[The prepared statement of Mr. Sherman follows:]

PREPARED STATEMENT OF CHARLES E. SHERMAN, SENIOR VICE PRESIDENT FOR TELEVISION, NATIONAL ASSOCIATION OF BROADCASTERS, ON BEHALF OF NAB AND THE ASSOCIATION OF INDEPENDENT TELEVISION STATIONS

Thank you, Mr. Chairman. I am Chuck Sherman, Senior Vice President of Television for the National Association of Broadcasters (NAB). I am representing both the NAB and the Association of Independent TV Stations (INTV). I appreciate the opportunity to appear here today as your panel looks at the issue of "moral rights."

Let me make plain the position of NAB and INTV --- we do not believe that such a radical change in the copyright law is in the public interest. Broadcasters are required under the terms of their license to serve the public interest in their local communities. We provide local, national and international news, emergency information, entertainment and other programming. If you allow a small group of individuals to impose an "artistic veto" on broadcasters, you will be severely hampering our ability to carry out our public interest responsibilities.

We see the creation of moral rights law as directly in conflict with those responsibilities by restricting our ability to edit programs and maintain an orderly schedule for our local communities. We also see such moral rights as an unnecessary and costly "add-on" to the already expensive process of bringing programming to the American audience.

Let me explore these concerns in greater detail.

In 1988, Congress found the proper middle ground on this issue. When Congress ratified the Berne Convention, it pointed to existing federal and state law as satisfying our "moral rights" obligations under the Convention. The Congress recognized the fact that our copyright law provides incentives to produce and provide programming for the public. In fact, in Sony Corp. v. Universal City Studios, Inc.,[1] the United States Supreme Court reiterated that the public interest takes precedence over private motivations in copyright law. We have discovered nothing today which should direct Congress to disrupt this carefully-crafted balance.

Yet moral rights clearly do not exist for the benefit of the public, but rather for the author or, in this case, the film director. The Berne Convention itself spells out the primacy of the author:

> "Independently of the author's economic rights, and even after the transfer of 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." (emphasis added)[2]

This is an important point. We believe that the current copyright system works because it takes into account the incentives provided to those who produce copyrighted works, while it also promotes the flow of intellectual property to the public. Motion pictures made by American film companies set the world standard. Yet establishment of

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[1]464 U.S. 417, at 429, (1984).

[2]Berne Convention for the Protection of Literary and Artistic Works, September 9, 1886 (Paris Revision 1971) Art. 6 bis.

moral rights will simply result in an after-the-fact attempt by certain collaborators in the creation of a motion picture to secure an additional right or benefit which was not part of the original contract they entered into with the movie studio. Moral rights threaten to impede the flow of news, art, music and films to the public by creating a new set of non-economic rights which are foreign to our system of copyright.

This change in our system of copyright creates a great deal of uncertainty and a significant loss of predictability -- characteristics which are the hallmark of our economic system and which promote the dissemination of a variety of video works to the viewing public. Moral rights creates a series of "subjective rights" which would leave the parties involved in bringing video works to the public unsure as to how to proceed.

Such a radical change in the current method of bringing programming to the public should occur only where the current copyright system has significantly failed. That is clearly not the case. Our current system of copyright protections has worked quite well and could serve as a model for other countries.

Under a moral rights regime, the broadcaster runs the risk of losing his or her editorial discretion. It is the broadcaster who should decide how a motion picture should be presented to the local community. Not only is the broadcaster a member of that community, but his or her FCC license places the legal responsibility and liability on his or her shoulders to exercise proper editorial discretion. Failure to do so can result in forfeitures and could ultimately place the broadcast license in jeopardy.

As stated in the Senate hearings on this subject, the true issue is one of control. Who controls the work in its post-theater release? Our very firm conviction is that as it applies to broadcast television, the local television licensee is and should be vested with that control. By local practices, statutory responsibilities and common law, the local broadcaster bears the liability and therefore the "control" over editorial decisions made for the local audience. This system of bringing movies to the general public has served us all very well and there is little public policy justification for making a change now.

Mr. Chairman, the amount of control which a director or screenwriter enjoys in the post-production phase of a film or other work can and should be negotiated in the marketplace, and not determined by Congress. Those who seek such rights have already been compensated at the time of their work. To give these creative people additional rights beyond that original contract elevates their contribution in a collaborative work above other contributors to the same work.

There are additional concerns which moral rights would raise. As you know, Mr. Chairman, a number of customary editorial techniques are used in order to broadcast a theatrically-produced motion picture on television. Given that television is a mass medium which is broadcast free of charge to all, how those editing decisions are made are crucial.

Mr. Chairman, a moral rights amendment to the copyright law would impose an unnecessary and overly burdensome requirement on broadcasters. Broadcasters must retain

38-276 - 91 - 10

their full editorial discretion to fulfill their responsibilities as licensees.

Broadcasters need to be able to edit for content. As licensees under the Federal Communications Commission (FCC), television broadcasters are legally responsible for everything which they air. Broadcasters face sanctions if obscene or indecent material is aired. Licenses also must be able to edit other material, such as scenes which may be inappropriately violent for their audiences. Consider what would happen if moral rights holders denied broadcasters the ability to edit out such material.

Clearly, it also is essential that broadcasters be permitted to edit movies or other programs for commercial insertions. The only source of revenue which broadcasters have is the sale of air time to advertisers. Unless broadcasters can insert commercials at appropriate breaks in programs, there is serious doubt as to our ability to raise the revenue needed to buy rights to air movies to begin with. Let me add to those insertions other matter, such as public service announcements, station identifications and weather and news bulletins, all of which are functions which stations provide as licensees under the Communications Act of 1934.

Similarly, broadcast stations must operate under tight time schedules. Editing for time may require broadcasters to shorten films by removing footage or by using lexiconning techniques, such as time compression or expansion. Clearly, the ability to offer a wide range of programs at fixed intervals requires broadcasters to be able to start and end programs at precise times. This is particularly true for network stations, which are required

to mesh local programming schedules with the network's schedule.

There are other techniques which also have been raised concerning moral rights. Because of the disparity in aspect ratios between television screens and film for motion pictures, it is necessary to adjust the film to fit the smaller confines of the TV screen. There are two ways to do this: 1) letter-boxing and 2) panning and scanning.

Letter-boxing involves the placement of large black bands at the top and bottom of the TV picture in order to retain the film's natural aspect ratio. Thus, the picture must be shrunk in order to fit onto the television screen.

A more common approach is panning and scanning, where a complete picture is preserved by adjusting the widescreen image seen in the theater to the narrow image used in televisions.

For over 25 years, broadcasters have used panning and scanning as their primary technique to resolve this problem. I am unaware of any outcry or rejection of this process by the general public. Clearly, this is a matter best settled by consumers, in this case the viewers, and not the Congress. Do viewers prefer to watch a picture which is "less than a full screen's worth?" If so, that will become apparent and the marketplace will adjust.

Finally, there is the ongoing debate over colorization of motion pictures. As best we can determine, only a few stations make use of colorized movies. However, for

purposes of this debate, we see colorization as another technique which enables films to be more readily available and enjoyable by the public. Indeed, I think one can argue convincingly that such a technique may expose many of the popular films of the past to a wider audience of young people. Such films already are clearly labeled as colorized. If the public demands films in their original black-and-white rendition, I am confident that broadcasters, who depend upon fulfilling the desires of their local audiences, will provide films in that format. Again, the marketplace will be the best arbiter of this ongoing dispute.

Let me briefly touch on another impact of moral rights. Broadcasters already spend millions and millions of dollars each year to purchase the rights to various programs. In fact, it is estimated that of those who view a motion picture, only 10 percent actually see it in a theater, while 70 percent see it on broadcast television. Moral rights would force a television station licensee to not only purchase the current bundle of rights to air a particular program or film from the studio, but also to negotiate with other parties, such as screenwriters and directors, for the additional rights necessary to air the program.

In summary, Mr. Chairman, I am pleased to appear here today to testify on this issue. Both NAB and INTV strongly oppose any imposition of moral rights on our current copyright protections. Our present copyright system works in protecting the rights of creators, providing financial incentives to create, and encouraging the distribution of those works to the general public. Moral rights will not enhance that system, but instead will do that system great injury.

Mr. KASTENMEIER. As a matter of fact, you raise a number of issues, several that I had not really thought of before, that it is reasonable to assume would concern broadcasters.

Parenthetically, do broadcasters care what size screen their viewers view their programming on?

Mr. SHERMAN. It is how long they view, not on what size.

Mr. KASTENMEIER. So they really do not care whether it is a big screen or a small screen?

Mr. SHERMAN. Well, to the degree that we see the new developments in HD TV, and, in fact, probably the segment of the industry that has put more money into it, the American segment, that has put more money into it right now than any other, is the broadcasters. We are the ones who have put our money on the table to try to get the best HD TV system for this country through our Advanced Television Test Center.

Yes, we do care about transmission. We do care about quality, but there are so many factors that enter into a decision about what size screen a person will buy. It is not only economics. A lot of it has to do with what room it is going to be in? A lot of it has to do with simply the size of the living room. And I think, as we all well know, living rooms are not getting bigger. Living rooms are getting smaller. And so that television set which is a piece of furniture there, is going to probably be smaller as well until the time when it can finally be put on the wall.

So, yes, we are concerned about transmission. We are concerned about this, but basically, I guess, if you look at it on a practical everyday basis, our concern is making sure that, no matter what the set size, we get the best possible picture to the home.

Mr. KASTENMEIER. Do you ever foresee any variation in the aspect ratio on television? That is to say, is it going to be four to three or one point three, three or——

Mr. SHERMAN. Well, the three to four which is the present ratio, has been in effect now since 1941, just before we entered World War II. And no significant change can take place in that, Mr. Chairman. If we would do that, I think you would find a great deal of public unease, because it would immediately obsolete 160 million television receivers.

The format is definitely tied in with the present system of transmission. If and when, and I would say when more than if, the Federal Communications Commission finally acts, and we think it will probably be in about 1993, 1994, on a new HD TV standard, that will really provide the opportunity to change the aspect ratio at that particular time.

Mr. KASTENMEIER. Two other questions. One, you mention that for various reasons, independent television stations particularly need to exercise editorial control because of the community they are in and its mores and so forth. Is it a matter of practice that independent television stations reedit movies that they receive? How common is that?

Mr. SHERMAN. I think it frankly depends on the motion picture. It will depend on the time. I think this is a problem also and something that concerns not only independents but it affects affiliates as well. When I ran an ABC affiliated station on the weekends, I

heavily ran a lot of movies. So we were concerned about this as well.

And you try, as much as possible, not to have to edit for overall time. If you are running a 2-hour movie block at night, you try to make sure that that length movie will fit in there with an appropriate number of commercial breaks.

We would generally try to hold back the longer movies, for example, for a Saturday night, a Sunday night, when you could run it at the end of the night and therefore, you could have overruns and it would not hurt your schedule.

But I would say, in general, most of the editing that is done, is done simply for commercial insertion. It is not done for content, except, of course, with the newer movies. And a lot of times now, these movies that have been R rated, GP rated, coming out of Hollywood, are movies that have been already edited for television, movies that have had a different sound track put in.

But occasionally something slips by and so broadcasters are very careful to make sure that each movie is looked at before it goes out on the air, because occasionally, when it is not properly viewed ahead of time, I think, some of them have found themselves in embarrassing situations and people in the community calling up and saying, "Why did that particular word get through," and so forth.

Mr. KASTENMEIER. Is it not the normal practice for an independent broadcaster to know in advance what the running time is of a film released for television? If it is, we will say, 103 minutes running time, they know that is a 2-hour segment, they have 17 minutes of advertising or other station programming to put in there, and they accept it on that basis?

Mr. SHERMAN. Yes, they do. Sometimes though, you have no choice. Sometimes it is sold as part of—supposedly you have a choice because there is not supposed to be any blocked booking. But, I mean, from a very practical point of view, you tend to buy movie packages. And there will be movies in there of varying lengths. And so sometimes you will see 103, and you know that is going to be a very tight push for a 2-hour block. And you may schedule that at another time, or, indeed, you may reduce it in order to get your commercial load in within that 2-hour period.

Mr. KASTENMEIER. My last question goes back to a point you made that, to the extent that television, either locally or I suppose network, does its own production, I suppose we are talking about theatrical production, it would have directors and writers and the same principles for which the Directors Guild fights would apply to them, at least in theory?

Mr. SHERMAN. That is the question we are raising. We do not know.

Mr. KASTENMEIER. Well, I do not know either. Thank you. One last question. Mr. Fogelman, you indicate that letter-boxed films are not very popular. You do not get that many of them, do you? How many letter-box films do you get in cassette form for rental or sale?

Mr. FOGELMAN. We probably have a couple of handfuls right now. That is all that is available.

Mr. KASTENMEIER. Yes, really you do not get that many of them. But you do observe that they are unpopular?

Mr. FOGELMAN. Yes, and my experiences have shown me through our own stores and sales people, through other retailers that I have talked to and met with at board meetings and so forth, that the common theme from the consumer is that they do not like it when they have seen it.

Mr. KASTENMEIER. Whether through Turner or through other organizations, do you get these cassettes that are done in black and white and in color, where it is optional with the viewer? When a person comes in and rents, he or she can pick one or the other?

Mr. FOGELMAN. Yes, and in some cases, studios such as Turner, have the movies available both in black and white and in color. And in our case, we carry both versions.

Mr. KASTENMEIER. What observation do you have in terms of popularity among your customers?

Mr. FOGELMAN. I really a lot of times depends on the movie itself, but we do have enough popularity in both formats to warrant carrying both formats at the stores.

Mr. KASTENMEIER. The gentleman from Oklahoma.

Mr. SYNAR. Just a couple of brief question. Mr. Fogelman, you indicated in your testimony that when a movie has been out and then it is going to be released in videocassette, the longer the period of time between those two actions, the demand falls off.

Mr. FOGELMAN. That is correct.

Mr. SYNAR. Does your industry have any studies that can verify that?

Mr. FOGELMAN. Nothing that I am aware of off the top of my head. It is more of a marketing feel.

Mr. SYNAR. Well, is it because, very simply, that you are getting some of the residual effect of the advertising for the original movie?

Mr. FOGELMAN. To a great extent, that is correct.

Mr. SYNAR. So, if there is a delay because of congressional action or because of what some of the people are trying to do with moral rights, that would mean your industry would have to pay more for advertising to really gin up the enthusiasm again, right?

Mr. FOGELMAN. To that extent, they would make the consumer aware that the movie is available, yes, because you know——

Mr. SYNAR. So it is really a financial burden on you all.

Mr. FOGELMAN. I am not so sure if it is a financial burden on the retailer as it might be on the producer of the cassette itself.

Mr. SYNAR. Mr. Sherman, just one question, it is my understanding when you get a film from the copyright owner for a local TV station, they do not tell you where they would suggest commercials to be placed. That is a decision you can make or are there some films that suggest where commercial breaks should be made?

Mr. SHERMAN. Occasionally, you will find some suggestions, but in general, it is up to the local broadcaster.

Mr. SYNAR. OK, thank you, Mr. Chairman.

Mr. KASTENMEIER. The gentleman from California.

Mr. BERMAN. Thank you, Mr. Chairman. On the point you just made, the delay in time affecting the marketability, that certainly was not the experience with a film like ET.

Mr. FOGELMAN. No, I think that ET is the exception, though, and the longevity of the dynamics of that film and the popularity of that film is the exception versus the rule.

Mr. BERMAN. They did a lot of advertising for the video distribution as well.

Mr. FOGELMAN. You still have to advertise. You still have to make the consumer aware that the film is available regardless if it has been out on a recent basis or it has not been available for a long time. That is just part of the marketing nature of videocassette sales and rental.

Mr. BERMAN. Well, I mean, you have some very interesting and I think very useful and valuable anecdotal impressions from your own operations, from your colleagues' operations and things like this.

Mr. FOGELMAN. Sure.

Mr. BERMAN. Scientifically, I mean, if you were making an effort to establish a scientific market analysis of, what do you call it again?

Mr. FOGELMAN. The window?

Mr. BERMAN. Letterboxing or the time between the original distribution of the film and then the video tape, if they did advertising again for the video tape, you might have a different answer than if they do not do separate advertising. Are any films out in both letterboxing and in the panned and scanned format, and then people have a choice and seem to be choosing one over the other?

Mr. FOGELMAN. I believe that it is just one or the other. I do not believe they are both available.

Mr. BERMAN. So you are dealing with different films. I mean, it may be the film. In other words——

Mr. FOGELMAN. Well, for example, Lawrence of Arabia was available over the years on pan and scan. Just recently, it has been rebrought out on a letterbox type of basis.

Mr. BERMAN. How is it doing?

Mr. FOGELMAN. So, so. It is no big thing either way. I mean, there was a lot of hoopla and the whole thing about the——

Mr. BERMAN. I am just wondering to what extent you can draw a generalization about consumer preferences when you are dealing with different movies or a movie that has been out and circulated a lot in one format and then it is circulated in another format. I am not sure you can make evidentiary statement.

Mr. FOGELMAN. I guess the statements that I do make is just based on the experience and the feedback that I have been getting over the last couple of years based on this controversy.

Mr. BERMAN. Has there been an effort to make any market surveys of this by independent——

Mr. FOGELMAN. Not that I am aware of at this point.

Mr. BERMAN. On either side.

Mr. FOGELMAN. Right.

Mr. BERMAN. The labeling issue, cinematographers, they suggest a label on tapes or on television along the lines, "This video tape contains a motion picture which has been adjusted to conform to a video format and has been colorized," if that is appropriate, "without the participation of the original creators, including the director, the screenwriter or the director of photography." Apart from

the principle of labeling, is that such a big issue really? Is that really going to affect any aspect of your day to day business, or the acceptability of television programming, that kind of a label?

Mr. FOGELMAN. I guess one of the ways I can answer that, is that movies are watched over and over many times. A customer can come in and rent a movie and then in 2 weeks, come back and rent that movie again. Let us say that they watched a certain movie and it is one of their favorites and they really enjoyed it. And then they came back 3 months later to rent that movie again.

And now that movie has a disclaimer on it and maybe they think that, you know, they are getting cheated someway, that the movie is not going to be as enjoyable as it was before.

Mr. SYNAR. Do most people not fast forward ahead through the FBI warning and everything else?

Mr. FOGELMAN. That is not the part they are watching, that is correct.

Mr. SHERMAN. Mr. Berman, historically, the NAB has not been in favor of labeling.

Mr. BERMAN. Even though many of your programs label——

Mr. SHERMAN. That is up to the individual station.

Mr. BERMAN [continuing]. Edited for television.

Mr. SHERMAN. We have disagreements among our members on whether or not to label. There are some that feel it should be stated, "Edited for television." There are others who feel that under today's competitive environment in which we face so many competitors, that it puts them at a disadvantage.

We have also been taken to task and we have had a very expensive lawsuit brought against us at one point for labeling a whole block of time as family viewing time, and we lost that case out here, because it found us to be in violation of someone's constitutional rights.

Mr. BERMAN. You mean the family hour or the family programming?

Mr. SHERMAN. The family viewing hour, that is right. And so we are very nervous about labeling from an economic point of view, but also our members feel that that is something they should decide individually in their own competitive environment and that the marketplace really should decide that.

Mr. BERMAN. Thank you, Mr. Chairman.

Mr. KASTENMEIER. I thank both witnesses on behalf of the committee, Mr. Sherman and Mr. Fogelman, for their testimony here. This concludes the hearing today on the motion picture industry and moral rights. And we thank all the witnesses and others who have attended and helped us today, including the UCLA law school in whose moot courtroom we had this hearing today.

Thank you all very much. We stand adjourned.

[Whereupon, at 4:20 p.m., the subcommittee adjourned, to reconvene subject to the call of the Chair.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING

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

A REPORT OF
THE REGISTER OF COPYRIGHTS

MARCH 1989

UNITED STATES COPYRIGHT OFFICE
WASHINGTON, D. C.

EXECUTIVE SUMMARY

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

In deciding on the form of implementing legislation for Berne adherence, Congress adopted the "minimalist approach," under which only those changes absolutely required to join the Convention would be made to the Copyright Act. With respect to moral rights, after two years of hearings and consultations with foreign experts, Congress reached the conclusion that the totality of existing U.S. law -- federal, state statutory, and common law -- satisfied our obligations under the Convention to accord moral rights. [1]

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1. See Berne Convention Article 6bis.

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

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

In order to fulfill this mandate, Copyright Office staff visited two companies engaged in computer color encoding of motion pictures as well as a company that modifies theatrical motion pictures for viewing on television. The staff also interviewed representatives of motion picture companies, Turner Entertainment Company, the Directors Guild of America, and the

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

Screen Actors Guild of America. In response to a Request for Information, we received twenty comments from all industry interests, as well as from scholars, preservationists, and other interested parties. On September 8, 1988, we held a public hearing and received testimony from fourteen witnesses representing a broad spectrum of industry and the public.

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

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

Chapter 1: Introduction

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

Chapter 2: Copyright in the Motion Picture and Television Industries

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

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

This review serves as background for a discussion of the position of U.S. motion picture directors that, for purposes of preventing material alterations to their works, the principal director and principal screenwriter should be considered the "authors" of the motion picture. This position is based on a number of arguments; first, that the principal director is the single individual primarily responsible for the actual composition of the picture; second, that only the principal director and principal screenwriter are involved in "telling the yarn;" and, finally, due to the large number of individuals involved in creating a motion picture, it is impractical to grant rights to everyone; hence, since a line must be drawn somewhere, the principal director and principal screenwriter represent a logical place to draw that line.

We then give the response of academics and motion picture industry representatives to the directors' arguments. Testimony by a law professor

that motion picture scholarship has, in recent years, come to recognize the importance of the contributions of several groups of filmmaking professionals (e.g., cinematographers, art directors, and editors) is cited. Testimony from motion picture industry representatives challenging the directors' position is discussed. These representatives assert that for most of the "classic" motion pictures at issue, the studios are more properly regarded as the author. Testimony on the current important role of certain types of producers is also discussed.

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

Chapter 3: Post Exhibition Alterations to Motion Pictures

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

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

> Computer Color Encoding. This is a process by which black and white film prints are transferred to videotape and electronically encoded with color.
>
> Pannning and Scanning. This is a process by which motion pictures, composed for viewing ontheatre screens, are altered for viewing ontelevision screens.
>
> Letterboxing. This technique is an alternative to panning/ scanning and permits the original composition of a theatrical motion picture to be retained on television by reducing the size of the image. Letterboxing leaves dark bands at the top and bottom of the screen.
>
> Lexiconning. This technology involves the electronic time compression or expansion of a motion picture in order to fit the picture into broadcast time slots.

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

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

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

In this chapter, we discuss the nature of collective and individual bargaining in the motion picture industry. We note that the Directors Guild of America Basic Agreement contains a detailed set of minimum conditions for the preparation, production, post-production stages of motion pictures, and for post-theatrical release editing. Directors are given an absolute right to a "Director's Cut" -- the penultimate form in which the motion picture is released. Directors do not have, and for purposes of legislative reform,

have disavowed any desire to obtain the "Final Cut;" i.e., the right to determine the final form of the work as theatrically viewed.

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

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

Chapter 5: Moral Rights

This lengthy chapter begins with a review of the nature of moral rights, with special emphasis on the Berne Convention and U.S. case law. We review recent state and federal legislative efforts to grant moral rights to works of fine art, as well as the discussions on moral rights during hearings on U.S. adherence to the Berne Convention. We go into the

testimony of directors, producers, and computer color encoding companies in detail, as well as the remarks of various Members of Congress.

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

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

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

The producers' and "colorizers'" response to the directors' claim rests on the assertion that their activities are consistent with both the purposes of the Copyright Act and the rights they have fairly obtained through collective and individual bargaining. Additionally, they argue that

imposition of restrictions on alterations to existing motion pictures would violate the "takings" clause of the Fifth Amendment to the U.S. Constitution. The producers and colorizers reject the directors' attempt to invoke the public interest, arguing that the directors actually seek a right permitting them to insist that the original version be the only version distributed to the public. They note the public's preference for color television viewing, and they point to their preservation efforts in restoring and making available black and white versions of motion pictures along with the colorized version. They stress the critical economic need and benefit of distributing motion pictures in non-theatrical markets. The producers and colorizers deny that collective and individual bargaining are inadequate and that directors should have the final say over the form in which their works are distributed in post-theatrical markets.

We then analyze these various arguments, concluding as follows.

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

In analyzing the directors' assertion that a meritorious public purpose is served by protecting the integrity of their works, we note that in adhering to the Berne Convention, the United States has declared that its law satisfies the obligations of the Convention, one part of which is

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

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

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

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

contractual protection -- protection which the directors claim is inadequate for vindication of their rights.

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

Chapter 6: Preservation

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

Chapter 7: Conclusions

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

> (1) The Subcommittee should seriously consider a unified federal system of moral rights;
>
> (2) If a unified federal system of moral rights is adopted, state moral rights protection should be partially preempted. Preemption should apply to rights equivalent to those granted in the amended federal statute but not to nonequivalent rights;
>
> (3) If the Subcommittee prefers an industry-by-industry approach to moral rights, and chooses to zero in on the motion picture industry, the Subcommittee should carefully consider whether the existing web of collective and individual bargaining is adequate to protect directors' legitimate interests;
>
> (4) If the Subcommittee chooses to grant a higher level of moral rights in the motion picture industry than now exists, the Copyright Office could support this effort in principle. This legislation would accord rights only to works created on or after the effective date of the legislation and would be granted to authors of preexisting works used in motion pictures on or after the effective date, as well as to other creative participants in the motion picture (e.g., cinematographers, art directors, editors, and perhaps, actors and actresses).

THE TRADEMARK ACT OF 1946

AND

TECHNOLOGIES FOR ALTERATION OF MOTION PICTURES

Report to the Subcommittee on Courts, Intellectual Property and the Administration of Justice

Committee on the Judiciary

United States House of Representatives

March 15, 1989

Patent and Trademark Office
United States Department of Commerce

I. Introduction.

The Subcommittee on Courts, Intellectual Property and the Administration of Justice of the Committee on the Judiciary, U.S. House of Representatives, has requested that the U.S. Patent and Trademark Office and the U.S. Copyright Office examine the impact of new technologies for the alteration of existing motion pictures on consumers, artists, producers and distributors of motion pictures, and other affected parties. Examples of these technologies include colorization of black and white motion pictures, time compression and expansion, and panning and scanning. The Subcommittee asked the Copyright Office to conduct a broad-based inquiry concerning the nature, extent and effect of the new technologies on creators and users of audiovisual works; the Patent and Trademark Office was asked to study the specific, narrower question of the extent to which the Trademark Act of 1946 (Lanham Act), 15 U.S.C. 1051 et seq., and particularly section 43(a) of the Act, 15 U.S.C. 1125(a), may apply to use of the new technologies to alter existing motion pictures without the consent of the principal director and principal screenwriter who participated in their creation.

The U.S. Patent and Trademark Office published a Notice of Inquiry in the Federal Register on July 26, 1988 (53 FR 28048), soliciting written comments on the following two questions:

> (1) To what extent is it contemplated that the Lanham Act, and particularly section 43(a) of the Act, may be used to address potential

problems relating to the use of new technologies for the alteration of existing motion pictures, including but not limited to colorization, time compression, and panning and scanning?

(2) Should the Lanham Act be amended to provide more or different protection than is currently available? If so, what form should new legislation take? Who should be protected?

Written comments were received from the Directors' Guild of America; the U.S. Trademark Association; Color Systems Technology, Inc.; Turner Broadcasting System, Inc.; the National Broadcasting Company, Inc; the National Association of Broadcasters, Inc; the Public Advisory Committee for Trademark Affairs; the Patent Law Association of Chicago; Morality in Media, Inc.; and the Motion Picture Association of America, Inc. On November 11, 1988, film director Elliot Silverstein met with U.S. Patent and Trademark Office staff to discuss the inquiry and to advocate the position of the Directors' Guild of America.

II. Background.

The U.S. copyright law does not contain provisions expressly protecting "moral rights." Article 6bis of the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971), to which the United States adhered effective March 1, 1989, defines moral rights as the right of an author to claim authorship of the work ("right of paternity") and the right of the author to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the work, which would be prejudicial to the author's honor or reputation ("right of integrity"). Article 6bis provides that moral rights exist independently of the author's economic rights of exploitation under copyright, and that moral rights must be protected at least as long as economic rights.

In recent years, U.S. film directors have advocated legislation to provide moral rights protection under Federal law. The advent of new technologies for the alteration of existing motion pictures, like colorization, has become a focus for their efforts. The directors view themselves and principal screenwriters as film "authors" in the most atavistic sense, independent of whether they have retained a copyright or contractual interest in the economic exploitation of their works. In the directors' view, technological alteration of motion pictures by third parties without the consent of the "authors" is a violation of their

moral rights and an impairment of their creative freedom as filmmakers.

During the 100th Congress, the Directors' Guild of America (DGA) sought to gain protection against unauthorized alteration of existing motion pictures as part of legislation to amend the U.S. copyright law to implement the Berne Convention. To satisfy U.S. obligations under the Convention, the directors argued, Federal law must contain express moral rights protections. The Congress disagreed, however, taking the view that existing Federal, State and common law, including section 43(a) of the Lanham Act, are sufficient to satisfy U.S. obligations under Article 6bis of Berne. H.R. Rep. No. 100-609, 100th Cong., 2d Sess. 34, 38 (1988) (Berne House Report); see also "Final Report of the Ad Hoc Working Group on U.S. Adherence to the Berne Convention" (Ad Hoc Report), reprinted in 10 Colum.-VLA J.L. & Arts 513, 553-4 (1986). The Berne House Report states that "current law is sufficient to comply with Article 6bis and th[e] implementing legislation will have no effect, one way or the other, on current law." Berne House Report at 23. The legislation itself provides that U.S. adherence to Berne will not "expand or reduce any right of an author of a work, whether claimed under Federal, State or the common law -- (1) to claim authorship of the work; or (2) to object to any distortion, mutilation, or other modification of, or other derogatory action in relation to, the work, that would prejudice the author's honor or reputation." Berne Convention

Implementation Act of 1988, Pub. L. No. 100-568, section 3(b), 102 Stat. 2853 (1988).

The DGA supported other legislation during the 100th Congress that would have provided moral rights protection. H.R. 2400, the "Film Integrity Act of 1987," would have created a new section in the Copyright Act to prohibit "material alterations" of motion pictures without the permission of the director or principal screenwriter. The legislation was not enacted.

Two bills were introduced in the 100th Congress to create labeling requirements for materially altered motion pictures and to establish bodies to oversee film preservation. One proposal, H.R. 4897, would have amended section 43 of the Lanham Act to require "a clear and conspicuous disclosure" that a film had been materially altered and the fact that "any aggrieved party" had objected to the alteration; it would have also established a "National Film Preservation Commission" to encourage the restoration and preservation of films. The Congress adjourned without acting on the bill.

Another bill, H.R. 4867, contained a proposal for establishment within the Library of Congress of a "National Film Registry" for U.S. films of historic, cultural or aesthetic significance. The legislation was enacted as the "National Film Preservation Act of 1988" (NFPA), Pub. L. No. 100-446, 102 Stat. 1774 (1988), and is effective for three years. It provides that "materially altered"

versions of films entered on the Registry must be labeled as materially altered before they may be exhibited or distributed; the label must indicate that the alteration took place without the consent of the director and principal screenwriter. "Material alteration" is defined to include colorization of black and white films and "other fundamental post production changes in a version of a film for marketing purposes." The definition excludes "changes made in accordance with customary practices and standards," such as editing to remove obscene material for television broadcast. NFPA, section 11(5). The definition of "material alteration" is also intended to exclude panning and scanning. See 134 Cong. Rec. S 12010 (daily ed. Sept. 8, 1988) (statement of Senator DeConcini).

The Subcommittee has requested the Copyright Office and Patent and Trademark Office inquiries to assist Congress in determining whether further legislation is required to protect the moral rights of film artists, and to deal with "the many problems that technology and the marketplace have created for both the integrity of our national film heritage and the creative freedom of filmmakers." Letter from Hon. Robert W. Kastenmeier and Hon. Carlos Moorhead to Ralph Oman, Register of Copyrights, (Feb. 25, 1988).

III. Summary of Comments.

In order to give interested parties an opportunity to provide views on the subject of this report, on July 28, 1988, the Patent and Trademark Office published a notice of inquiry and request for comments in the Federal Register. 53 Fed. Reg. 28048 (July 28, 1988). Written comments were received from ten parties. These comments are summarized below, and are available at the Patent and Trademark Office for public inspection and copying.

A. Directors' Guild of America (DGA). The DGA believes that new technologies for alteration of motion pictures have diminished the quality of American film classics. The DGA notes the Congressional determination that section 43(a) provides moral rights protection within the meaning of Article 6bis of the Berne Convention, and approves of the flexibility with which courts have sought to protect creative artists under the section. The DGA argues, however, that effective labeling of technologically altered works may defeat the application of section 43(a), and that judicial evolution of protection is too slow. The DGA proposes that section 43(a) be amended to prevent those who alter motion pictures without consent from using the original title of the work and the names of the principal director and principal screenwriter. The proposed amendment states:

> In the case of a motion picture, any person who shall materially alter said motion picture after publication without the consent of the principal director and principal screenwriter or their heirs, which consent shall not be

> granted or withheld for compensation, and who shall cause such motion picture to enter into commerce with the original title of the film and the names of the principal director and principal screenwriter in the credits or advertising for the motion picture, shall be liable to a civil action by the principal director or principal screenwriter or their heirs.

Amendments of section 45, 15 U.S.C. 1127, would contain the following definitions:

> Material alteration of a motion picture shall mean any change a motion picture (sic) by virtue of such processes, including but not limited to colorization, panning and scanning, time compression and extensive editing for non-continuity acceptance purposes.
>
> Publication of a motion picture shall mean the theatrical release or the first paid exhibition of a film following previews, trial runs, and festivals, all of which provide input leading to the theatrical release version of the film.

Acknowledging that the collaborative nature of film production involves the creative services of many individuals, the DGA argues that only principal directors and screenwriters should have rights under the amendment to section 43(a). They are "universally recognized" as the film artists who participate in all stages of the work, according to the DGA, and "the other artists trust [them] to create the finest work possible."

The DGA proposes that statutory damages of $100,000, attorneys' fees, and punitive damages be available as remedies for violations of the amended section 43(a).

B. The United States Trademark Association (USTA). The USTA acknowledges the judicial application of section 43(a) to protect creative artists, but urges against amendment of the "versatile unfair competition provision" to create a remedy limited to single practices of a single industry. The USTA states that the Lanham Act is not the proper vehicle for providing moral rights protection to creators.

C. Color Systems Technology, Inc. (CST). CST is a company engaged in film colorization, and its comments are limited to that technology. It argues that section 43(a) does not apply to the conventional means of making, marketing and advertising colorized films, because no "false description or representation" is involved. CST claims that expansion of section 43(a) to apply to colorization would frustrate impermissibly the work for hire principles of the U.S. copyright law as applied to motion pictures; under these principles, producers commonly own all economic rights of exploitation.

D. Turner Broadcasting System, Inc. (TBS). TBS owns the copyrights in the "world's largest collection of vintage films," including the MGM library of 2200 features, the pre-1948 Warner Brothers library of 750 films, and the RKO library of 700 features. TBS states that section 43(a) does not prevent distribution of a work that retains its original form but "that a copyright holder has colorized without violating any

contractual rights of the artist." Noting that a 43(a) remedy is available for "gross distortions or mutilations" of creative works, TBS claims that colorization does not involve mutilation, false descriptions or representations, or harm to the reputations of film directors and screenwriters.

TBS points out that colorization does not affect the original, 35mm-film version of motion pictures. TBS has implemented labeling procedures to ensure that viewers know they are seeing colorized versions of black and white motion pictures. TBS claims that labeling precludes any likelihood of public confusion that might be actionable under section 43(a).

TBS states that section 43(a) should not be amended to protect directors against material alterations of motion pictures, since they may retain creative rights under copyright or by contract, and they may sue under existing section 43(a) if "garbling" or "mutilation" can be shown.

E. National Broadcasting Company (NBC). NBC notes that standard practice in the broadcasting industry involves editing of motion pictures (1) for insertion of advertising and other non-program material like station identification and public service comments, (2) to meet time segment requirements, (3) to accommodate the difference in size and proportion between traditional movie theater and television screens (usually by panning and scanning), and (4) to delete violent, sexually explicit, or obscene

materials from broadcast programming. NBC argues that such alterations of motion pictures should not come within the purview of section 43(a). NBC believes that the case-by-case judicial approach is most appropriate for protection of artists under the Lanham Act. Like USTA, NBC argues against amendment of the Lanham Act to create industry-specific applications of a general unfair competition statute.

NBC notes the labeling requirement for "materially altered" versions of historically-significant films selected for inclusion on the newly-established National Film Registry. NBC argues against legislation creating specific remedies for directors and screenwriters under section 43(a); it states that legislation amending 43(a) should go no further than to require that a similar label be applied to motion pictures altered by use of the new technologies. NBC agrees with CST that creation of a moral right remedy for film directors under the Lanham Act would upset the work for hire scheme under U.S. copyright law. Moreover, NBC notes that film-making is a collaborative venture, and doubts whether creative control of motion picture production should be imputed solely to directors and screenwriters for purposes of section 43(a).

F. National Association of Broadcasters (NAB). The NAB points out that the Copyright Office has determined that colorized motion pictures are protectible as derivative works, recognizing

the right of copyright holders in original black and white films "to exploit the pecuniary interest in derivative works made possible by new technologies." NAB agrees with other commenters that the Lanham Act should not be amended; it states that "[e]fforts to create third-party control over the exploitation of works either in the public domain or in which the copyright is held by someone other than those involved in the creative process, establishes a right not recognized in American jurisprudence."

G. Public Advisory Committee on Trademarks Affairs (Committee). Members of the Committee are divided as to whether section 43(a) would apply to new technologies for film alteration, but are willing to leave the question to the courts. They are unanimous, however, in their view that the Lanham Act should not be amended to provide specific rights to directors and screenwriters. They believe that the Copyright Act is the proper vehicle for addressing the concerns of creative artists who have suffered moral rights abuses. One member took the view that colorization has no effect on the integrity of the nation's film heritage as long as the original 35mm print of the motion picture remains available to the public.

H. Patent Law Association of Chicago (Association). The Association stated that it favors the application of section 43(a) to colorization, since the public is likely to confuse the

original with the colorized version of a motion picture. The Association did not address the other technologies.

I. Morality in Media, Inc. (MM). This group notes that section 43(a) has been held applicable to alteration of motion pictures. MM suggests adding a new paragraph (c) to section 43 of the Act to make clear that it does not proscribe editing done for television broadcast in compliance with Federal, State or local laws pertaining to obscene or indecent matter.

J. Motion Picture Association of America, Inc. (MPAA). MPAA states that the Lanham Act does not apply to "appropriate" uses of the the new technologies for alteration of motion pictures; in MPAA's view, colorization, time compression and expansion, and panning and scanning do not fall within section 43(a) because they do not tend to confuse viewers. The industry practice is to label colorized films as such, according to MPAA, which avoids the type of consumer confusion at which section 43(a) is directed. Citing a recent court decision limiting relief under section 43(a) to competitors (see Section VI, infra), the MPAA states that standing to sue under the statute should be limited to those who have suffered competitive injuries. Like CST and NBC, the MPAA argues that amending the Lanham Act to create remedies against film alteration would upset the work made for hire principles applicable to motion pictures under the Copyright Act.

IV. The New Technologies.

A. Colorization.

Colorization is the addition of a variety of selected colors to a videotape copy of a black-and-white motion picture or television production. It involves several steps.

Initially, a new print of the existing film is made and transferred to video tape. Film-to-tape transfer is effected on a "telecine machine." A reel of film is threaded through an apparatus that looks like a film projector, and onto a take-up reel. A cathode ray tube projects light through the passing film frames. The focal point of the light source moving across the film frame is called the "raster." The projected image is picked up by photoelectric cells that transform the photographic image into electronic information, which is then manipulated through computer-controlled electronics.

Next, the individual "shots" of the motion picture are identified and catalogued (a typical feature-length film has 800 to 1400 shots), and the overall "look and feel" of the picture is established by selecting flesh, hair, and eye tones of key characters. The "storyboard" is then created; it is a visual representation of key shots to ensure overall continuity of the colorization process. The individual shots are then colored, using a combination of human effort and computer technology. The

shots are grouped according to location and character, rather than according to their sequence in the original motion picture. Finally, the colored shots are recorded in their original order, and scene-to-scene color transitions are balanced in the finished product.

B. Time Compression and Expansion.

Unlike colorization, time compression and expansion is not, strictly speaking, a new technology. Time compression and expansion is an established process whereby motion picture images may be adapted to meet requirements of non-theatrical exhibition media, particularly broadcast and cable television, airline exhibition, and home video. Like colorization, it involves the transfer of motion picture images from film to tape.

Time compression or expansion is accomplished by changing the rate at which the film frame runs past the "raster" during the film-to-tape transfer process. Modern telecine equipment permits speed changes measured in hundredths of a frame per second, allowing precise changes in timing of the motion picture. Compression and expansion are accomplished so that no change is discernible to the viewer. Motion pictures can be compressed or expanded up to six or seven percent with no visible effect, but two or three percent changes are more common. Correction devices are used to avoid "jerking" or other defects in the video image.

If the speed change is greater than two percent, the sound track is adjusted by running the sound levels through an audio pitch changer that makes automatic adjustments when it is given the original film rate and the desired new rate (in frames per second).

C. Panning-and-Scanning.

Panning-and-scanning is a process whereby the "aspect ratio" in which motion pictures are photographed and exhibited theatrically, generally 1.85:1 (Academy standard) or 2.35:1 (CinemaScope), is adapted for viewing on television screens, which in the United States requires an aspect ratio of 1.33:1. Panning-and-scanning has been in use for several decades to adapt motion pictures for television viewing. Panning-and-scanning is also accomplished during the film-to-tape transfer process, using the telecine machine to select portions of each frame to fill the entire television screen.

To pan-and-scan a motion picture, a telecine operator sits before a bank of sophisticated electronic equipment during the film-to-tape transfer process. The operator views the image fed from the telecine machine onto a video monitor. The goal of the telecine operator is to pan-and-scan the movie in a way that will convey the action of the film without compromising its overall feel. To decide how the picture should be panned-and-scanned, the operator moves the "raster" across the film image, selecting portions of

each frame for transfer to video. The "raster" is like a camera that is moved around the film image to capture the parts of the image that the telecine operator believes will be most effective in the video version of the film. Increasingly sophisticated computer electronics permits the operator to make both linear and non-linear moves across the film image. Thus, he or she can vary the speed with which the "raster" pans across the image, and can raise and lower the image in virtually any direction. Moreover, a device called an "x-y zoom" permits the operator to zoom in on specific features of the film image for emphasis in the video version.

V. Section 43(a) of the Lanham Act: Legislative History and Early Application.

The Subcommittee has asked for an examination of the application of section 43(a) of the Lanham Act to address problems arising from use of the above-described technologies for alteration of motion pictures without the consent of the principal director and principal screenwriter. Section 43(a) provides:

> Any person who shall affix, apply, or annex, or use in connection with any goods or services, or any container or containers for goods, 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 or 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 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.

15 U.S.C. 1125(a).

The Trademark Act of 1946, popularly known as the Lanham Act, was enacted to correct several problems that had arisen under the prior Acts of 1905 and 1920. These included a lack of comprehensive trademark protection, conflicting case law, textual

ambiguities, and the lack of conformity of U.S. trademark law with international commitments. Section 43(a) did not attract much attention during debates, and its legislative history is sparse. However, the history of the development of the language that became section 43(a) and its historical setting reveal two clear Congressional objectives -- to create a uniform Federal law of unfair competition and to protect consumers against confusion.

In 1938, the Supreme Court had ruled in Erie Railroad Company v. Tompkins, 304 U.S. 64 (1938), that there is no Federal common law in the United States. This meant that protection from unfair competition, and safeguards against confusion of the buying public, were available only under State law or judicial decisions. The result was "a checkerboard of rights and a checkerboard of protection." Robert, "Commentary on the Lanham Trade-Mark Act," 15 U.S.C. 1051-1127, pp. 265, 285 (1948).

The drafters of the Lanham Act intended to remedy this lack of uniformity. The Act itself contains a clear statement of Congressional purpose in section 45, which states in relevant part that "[t]he intent of this chapter is to ... protect persons engaged in ... commerce against unfair competition; [and] to prevent fraud and deception ... by the use of reproductions, copies [and] counterfeits ...." 15 U.S.C. 1127. The Senate Report on the Lanham Act also provides guidance:

> The purpose ... is twofold. One is to protect the public so that it may be confident that ... it will get the product which it asks for

> and wants to get. Secondly, where the owner of a trademark has spent energy, time, and money in presenting to the public the product, he is protected in his investment from its misappropriation by pirates and cheats.

S. Rep. No. 1333, 79th Cong., 2d Sess. 3 (1946), reprinted in 1946 U.S. Code Cong. Serv. 1274.

Despite its potentially broad application, few cases were brought under section 43(a) in the early years following passage of the Lanham Act. In those few cases, moreover, courts declined to apply the provision to forms of unfair competition other than traditional cases of "passing off," i.e., the unauthorized use of the trademark of a competitor. See, e.g., Chamberlain v. Columbia Pictures Corporation, 186 F.2d 923 (9th Cir. 1951). The watershed decision came in L'Aiglon Apparel, Inc. v. Lana Lobell, Inc., 214 F.2d 649 (3d Cir. 1954). The plaintiff manufactured a dress that it advertised for sale at $17.95; the defendant sold inferior copies of plaintiff's product for $6.95, featuring a photograph of the plaintiff's dress in its advertisements. In rejecting defendant's claim that section 43(a) only codified the preexisting common law of unfair competition, the court concluded that Congress had created a new statutory claim for many forms of unfair competition. 214 F.2d at 651.

The real boom in section 43(a) cases began in the 1960s; since then, case law has expanded significantly both the types of conduct falling within the provision and the range of persons

with standing to sue. Section 43(a) now provides relief against infringement of unregistered trademarks, unfair competition arising from the copying of trade dress and certain configurations of goods, and false advertising claims related to the goods of another. See "USTA Trademark Review Commission Report and Recommendations on the United States Trademark System and the Lanham Act" (USTA Review Commission Report) at 96 (1987); see also Bauer, "A Federal Law of Unfair Competition: What Should Be the Reach of Section 43(a) of the Lanham Act?", 31 UCLA L. Rev. 671, 685-703 (1984).

The next section discusses cases where creative artists have sought remedies for false attribution or unconsented alteration of their works under both common-law unfair competition and section 43(a).

VI. Protection of Creative Artists Under Common-Law Unfair Competition and Section 43(a).

Creative artists are not strangers to the law of unfair competition. For many years, courts have used both common law and section 43(a) unfair competition theories to protect creative artists from violations of their moral rights arising from false attribution or unconsented alteration of their works.

It has been said that the law of unfair competition developed judicially to restrain people from "playing dirty tricks on each other." Hearings on H.R. 4744 Before the Subcommittee on Trademarks of the House Committee on Patents, 76th Cong., 1st Sess. 166 (1939). In International News Service v. Associated Press, 248 U.S. 215 (1918), the Supreme Court granted protection against unfair competition for misappropriation of products involving literary activity. Defendant International News Service (INS) obtained news reports from early news stories written by Associated Press (AP) members; INS sent the stories to its own members in other time zones to compete with AP members there. The Court noted that news stories are not copyrightable per se, but found that AP had a "quasi-property" right in its stories. 248 U.S. at 236. The Court enjoined INS from publishing the stories on the theory that it had "misappropriated" AP's uncopyrighted news product.

In Prouty v. National Broadcasting Co., 26 F. Supp. 265 (D. Mass. 1939), relief was granted against misappropriation of a

creative work based on common-law unfair competition. The plaintiff authored a novel called Stella Dallas, and defendant broadcast a series of skits characterized as "episodes in the life of ... Stella Dallas in the character portrayed in said novel under that name and title." 26 F.Supp. at 265. The plaintiff claimed that the defendant had misappropriated the title of her commercially-successful novel; she also alleged that the skits were of poor quality, jeopardizing her reputation. In enjoining the defendant's broadcast, the court stated:

> If it should appear ar that in these broadcasts the defendant had appropriated, without the plaintiff's consent, the plot and principal characters on the novel, and that the use being made of her literary production was such as to injure the reputation of the work and of the author, and to amount to a deception upon the public, it may well be that relief would be afforded by applying well-recognized principles of equity which have been developed in the field known as "unfair competition."

Id. at 266.

In Granz v. Harris, 198 F.2d 585 (2nd Cir. 1952), the Second Circuit protected a creator's moral right against false attribution by finding an implied contractual right against unfair competition. The plaintiff, famous record producer Norman Granz, contracted with the defendant to sell uncopyrighted master recordings of a series of jazz concerts. The contract provided that the credit line "Presented by Norman Granz" was to appear on recordings

released by defendant, and that liner notes authored by Granz would be included on the record jackets. The defendant released the records with approximately eight minutes of music deleted, but included the required attribution to Granz. The court found that while the contract permitted defendant to produce an abbreviated record from the master discs, an implied contractual limitation, the plaintiff's required credit line, precluded defendant from attributing the abbreviated version to Granz. By releasing a shorter version of the recording and indicating Granz as the source, the court held, the defendant had breached the contract.

The first reported case in which the direct application of section 43(a) to protect a creative artist was argued was Autry v. Republic Pictures, 213 F.2d 667 (9th Cir. 1954). There, the famous actor and singer Gene Autry tried to restrain the defendant motion picture company from editing motion pictures containing his performances for television broadcast. The court found that Autry had contracted away all ownership rights in his performances, and denied his motion for preliminary injunction without reaching the section 43(a) argument. The court suggested that cutting and editing for television could result in "emasculating the motion pictures so that they would no longer contain substantially the same motion and dynamic and dramatic qualities which it was the purpose of the artist's employment to produce," in violation of section 43(a). 213 F.2d at 669.

Nonetheless, the court found Autry's contractual surrender of rights dispositive.

Insofar as we are aware, section 43(a) was not raised again in a case brought by an artist for fourteen years. However, two intervening decisions involving film directors further developed general principles of unfair competition used to protect the moral rights of film directors. In Preminger v. Columbia Pictures Corporation, 267 N.Y.S.2d 594 (Sup.Ct.), aff'd, 269 N.Y.S.2d 913 (App.Div.), aff'd, 18 N.Y.2d 659, 273 N.Y.S.2d 80 (1966), noted director Otto Preminger attempted to prevent television distribution of his film "Anatomy of a Murder" under agreements between the defendant and more than one hundred television stations; the agreements permitted unlimited cutting and editing for advertising and time segment requirements. Preminger's contract had reserved a final cut right, but the court found this applied to theatrical release only. The court cited standard industry practice, of which Preminger was aware, that allowed editing for television. The court stated, however, that Preminger would be entitled to an injunction if the cutting amounted to "mutilation." The judgment was affirmed on appeal, with a dissent supporting Preminger's common-law right to have his work shown in an unmutilated fashion. 269 N.Y.S.2d at 918 (Rabin, J., dissenting).

Likewise, in Stevens v. National Broadcasting Company, 148 USPQ 755 (Cal. Super. Ct. 1966), director George Stevens sought to

enjoin NBC from cutting and editing his film "A Place in the Sun" for television. Unlike Preminger, there was no contract relationship between Stevens and NBC, but the court applied the tort of "false light" to protect Stevens "where the commercial interruptions would tend to mislead the public, or ... to ... emasculate or destroy the mood and effect of the creative work." 148 USPQ at 755. The court order permitted NBC to insert commercials, but prohibited their use in any way that would "adversely affect or emasculate the artistic or pictorial quality of the film, or destroy or distort materially or substantially the mood, the effect or the continuity of the film." Id. at 758.

Geisel v. Poynter Productions Inc., 283 F. Supp. 261 (S.D.N.Y. 1968), was the first case to hold squarely that section 43(a) serves as a remedy to creative artists for unfair competition arising from false attribution. Geisel involved marketing by the defendant of dolls bearing the well-known commercial name of the plaintiff, Dr. Seuss. In granting plaintiff a preliminary injunction, the court found that the defendants intentionally misrepresented to the public that Dr. Seuss created or authorized the dolls; these misrepresentations were held to be false designations of origin proscribed by section 43(a).

Significantly, the Geisel court set out principles for the broad application of section 43(a) that have served as guidelines for subsequent cases in which moral rights protection for creative

artists has been sought. By enacting section 43(a), the court stated, "Congress has fashioned a new Federal remedy against ... the use of a false designation of origin or any false description or representation," which should be "broadly construed." 283 F. Supp. at 266-7. The court declared that the phrase "false designation of origin" covers not only geographical origin, but "any representation with respect to the originator of a product." Id. The court stated that any false representation, whether express or implied, that a product was authorized or approved by a particular person, gives rise to a cause of action under section 43(a). Liability is not restricted to literally false descriptions and representations, the court added, but includes actions that "create a false impression." Id. The court stated that actual passing off is not necessary, and that a showing of the "likelihood of customer confusion as to the source of the goods" is sufficient. Id. The court declared that a plaintiff is not required, for the purposes of obtaining injunctive relief, to show that the alleged misrepresentation resulted in diversion of business or that customers are actually deceived; rather, the plaintiff must show only "that the false representations have a tendency to deceive." Id. at 268.

Geisel led to an increase in the number of cases where section 43(a) was invoked to protect artists from moral rights abuses arising from false attribution of their works. In Rich v. RCA Corporation, 390 F. Supp. 530 (S.D.N.Y. 1975), country singer

Charlie Rich was granted an injunction under section 43(a) prohibiting RCA from marketing an anthology of songs recorded by Rich ten to fourteen years earlier, packaged with a contemporary photograph of Rich on the jacket. The court found likely confusion of consumers as to the true contents of the package. Similarly, in Benson v. Paul Winley Record Sales Corporation, 452 F. Supp. 516 (S.D.N.Y. 1978), well-known guitarist George Benson brought an action under section 43(a) to enjoin distribution and sale of a recording advertised as "George Benson, Erotic Moods." The defendant had altered old recordings in which Benson appeared as a back-up artist to accentuate his guitar tracks; one selection was overdubbed with the sexually-suggestive moaning of a woman. The record jacket featured a modern picture of Benson. The court enjoined distribution and sale of the recording under section 43(a), stating that it was likely to confuse the public and harm Benson's reputation.

In Jaeger v. American International Pictures, Inc., 330 F. Supp. 274 (S.D.N.Y. 1971), the plaintiff film director claimed that the English version of his German film "Kamasutra - Perfection of Love" had been mutilated and garbled by defendant. The court denied defendant's motion to dismiss, finding that plaintiff might be able to prove unfair competition under section 43(a) "in the distribution to the public of a film that bears his name but at the same time severely garbles, distorts or mutilates his work." 330 F. Supp. at 278.

A high-water mark for protection under section 43(a) against material alteration of artistic works was Gilliam v. American Broadcasting Company, 538 F.2d 14 (2d Cir. 1976). The plaintiffs, members of the British comedy group Monty Python, concluded an agreement to write and perform for the British Broadcasting Corporation (BBC); the agreement required that the BBC consult with the writers before making any but minor script changes, and forbade altogether any alterations to recorded programs. Plaintiffs also granted the BBC the right to license television broadcasts of the recorded programs in overseas territories. The BBC licensed Time-Life Films to distribute Monty Python programs in the United States, and granted Time-Life the right to edit for insertion of commercials, censorship, and time segment requirements. ABC contracted with Time-Life to broadcast two ninety-minute specials, each consisting of three thirty-minute Monty Python programs.

Of ninety minutes of program material to be included in the first broadcast, ABC cut twenty-four minutes. After viewing the special, Monty Python tried to negotiate with ABC concerning editing of the second special. Failure of these negotiations resulted in Monty Python filing an action to enjoin the second broadcast and for damages based on common law copyright infringement and violation of section 43(a) of the Lanham Act. The trial court denied plaintiffs' motion for preliminary injunction due to likely financial harm to ABC, even though it

found that Monty Python had established an impairment of the integrity of their work and that the damage caused would be irreparable.

On appeal, the Second Circuit found that there was a substantial likelihood that Monty Python would succeed in proving infringement of their common law copyright in the program scripts, because the editing power granted from the BBC to Time-Life exceeded the editing power BBC had under its own arrangement with Monty Python. With regard to the claim under section 43(a) of the Lanham Act, the court noted that "American copyright law, as presently written, does not recognize moral rights ... , since the law seeks to vindicate the economic, rather than the personal, rights of authors." 538 F.2d at 24. Noting that "courts have long granted relief for misrepresentation of an artist's work by relying on theories outside the statutory law of copyright, such as ... unfair competition," the court saw the Lanham Act as a vehicle to "vindicate the author's personal right to prevent the presentation of his work to the public in a distorted form." Id.

In a widely quoted concurring opinion, Judge Gurfein agreed with the majority's conclusion regarding infringement of common-law copyright, but was uneasy about the Lanham Act claim. He stated: "[T]he Lanham Act is a trademark statute, not a copyright statute." 538 F.2d at 26. He went on to observe that the Act

"is not a substitute for droit moral which authors in Europe enjoy," and that it "does not deal with artistic integrity. It only goes to misdescription of origin and the like." Id. at 27. Judge Gurfein also argued that an appropriate label or legend indicating that plaintiffs had not approved the editing done by ABC would remove all doubt as to a violation of secton 43(a).

The Gilliam decision is important because it recognizes the applicability of section 43(a) of the Lanham Act to prevent falsely attributing a materially-altered artistic work to the creators of the original work.

Cases following Gilliam continued to grant relief to artists and authors under section 43(a), although no reported case has expanded Gilliam to prevent alteration of motion pictures beyond other than editing and cutting.

In Follett v. New American Library, Inc., 497 F. Supp. 304 (S.D.N.Y. 1980), plaintiff Ken Follett was hired by a British publishing house to edit and refashion the English translation of an original French work, which was released as "The Heist of the Century" with authorship attributed to "Rene Louis Maurice with Ken Follett." Subsequently, Follett published two bestsellers, "The Eye of the Needle" and "Triple." Arbor House acquired American rights to "The Heist of the Century," changed the title to "The Gentlemen of 16 July" and the authorship attribution to "Ken Follett with Rene Louis Maurice," and prepared to release

the work simultaneously with Follett's newest novel, "The Keys to Rebecca." Follett sued under section 43(a) to enjoin Arbor House from publishing the book and using a false and misleading authorship attribution. The court found that defendant had falsely attributed principal authorship of "Heist" to Follett, despite evidence of industry standards indicating that attribution among co-authors is within the publisher's discretion. Holding that the Lanham Act "is designed not only to vindicate 'the author's personal right to prevent the presentation of his work to the public in a distorted form' [quoting Gilliam], but also to protect the public and the artist from misrepresentations of the artist's contribution to a finished work," the court ordered Arbor House to give equal attribution to Rene Louis Maurice and Ken Follett. 497 F. Supp. at 313.

Section 43(a) was also applied in Smith v. Montoro, 648 F.2d 602 (9th Cir. 1981). There, the plaintiff actor had contracted to star in a film and receive star billing. The distributors removed his name from the credits and advertising and substituted that of another actor. Smith sued for damages under section 43(a). The district court dismissed Smith's claim, holding that the Lanham Act is limited to cases involving passing off one's goods as those of a competitor. The district court found that no competitive relationship existed between Smith and the distributor. The Ninth Circuit reversed, holding that plaintiff

had stated a claim for "reverse passing off", removing a name or trademark from the product of another and substituting a different name or mark. The Ninth Circuit concluded, as a matter of law, that Montoro's conduct was actionable under section 43(a) as a false designation of origin in connection with Smith's services as an actor.

Courts have divided recently over the question of whether parties in section 43(a) cases must be in competition with each other. In Halicki v. United Artists Communications, Inc., 812 F.2d 1213 (9th Cir. 1987), the Ninth Circuit dismissed an action by a motion picture producer against distributors and exhibitors of his film who had erroneously advertised the film as R-rated rather than PG-rated. The court held that "the statute is directed against unfair competition. To be actionable, conduct must not only be infair but must in some discernible way be competitive." 812 F.2d at 1214. Accordingly, the court held that the plaintiff had no standing to sue. The recent case of Allen v. Men's World Outlet, 679 F. Supp. 360 (S.D.N.Y. 1988), reached the opposite conclusion. There, actor and director Woody Allen sought an injunction under section 43(a) against defendant's use of an Allen look-alike in advertising matter. In granting the injunction, the court stated that "[t]here is no requirement under the [Lanham] Act that plaintiff and defendant actually be in competition." 679 F. Supp. at 368. It is enough, the court stated, that the defendant's audience be "the same

audience to which plaintiff's own commercial efforts are directed." Id.

VII. Amendment of Section 43(a) by the Trademark Revision Act of 1988.

The Trademark Revision Act of 1988 (TRA), Pub. L. No. 100-667, 102 Stat. 3925 (1988), becomes effective on November 16, 1989. The Act amends section 43(a) as follows:

> Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which --
>
> > (1) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or
> >
> > (2) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another's goods, services, or commercial activities,
>
> shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

TRA, section 112.

The main purpose in amending section 43(a) was to conform its language to expanding judicial interpretations that have made it, "in essence, a Federal law of unfair competition." See H.R. Rep. No. 100-1028, 100th Cong., 2d Sess. 14 (1988). Amendment was

also sought in four specific areas where courts had drawn different conclusions: (1) to provide that relief is available for false representations about anyone's goods or services, not merely those of a defendant (subject to First Amendment rights of free speech); (2) to clarify that the remedies for infringement of a Federally-registered mark are also available in section 43(a) actions; (3) to provide a cause of action for disparagement or tarnishment of a trademark; and (4) to prevent the dilution of famous trademarks. See USTA Review Commission Report, supra, at 96-113.

The disparagement or tarnishment and dilution proposals were not enacted. However, the TRA has codified case law holding that injunctions, damages and destruction of labels and similar materials are available as remedies in section 43(a) cases. TRA, sections 128(c), 129 and 130. Moreover, subject to First Amendment considerations, amended section 43(a) will now apply statutorily to misrepresentations about the goods, services or commercial activities of anyone, not only to false representations made by a defendant about its own goods, services or commercial activities.

VIII. Conclusions.

After consideration of the comments and our own review of the legislative history, cases and other authorities, we conclude that in certain circumstances section 43(a) may provide a right of action to prevent technological material alteration of existing motion pictures without the consent of persons who participated in the creation of those motion pictures, including principal directors and screenwriters. We do not believe, however, that section 43(a) should be amended to create a specific right for principal directors and principal screenwriters to prevent "material alterations" of motion pictures over which they exercised some artistic control. If more extended moral rights protection for creative artists is desired, it should not be sought under the Lanham Act.

A. Applicability of Section 43(a) to the New Technologies.

Section 43(a) of the Lanham Act generally prohibits false designations of origin and false descriptions or representations in connection with any goods or services used in commerce; it provides a right of action to persons who believe they are likely to be damaged by such false designations, descriptions, or representations. 15 U.S.C. 1125(a).

Since the Second Circuit's holding in Geisel, supra, section 43(a) has been applied as a means to protect creative artists

from violations of their moral rights of paternity and integrity. Of the cases discussed in section VI, supra, the paternity right was protected in Rich, Benson, and Follett. The integrity right was protected expressly only in Gilliam, although it was recognized in dicta in Autry and Jaeger (and in Granz, although no claim under section 43(a) was presented in that case).

No case has been reported wherein a principal director or screenwriter has alleged a violation of section 43(a) arising from colorization, time compression or expansion, or panning-and-scanning of a motion picture. In fact, no section 43(a) action involving moral rights claims arising from false attribution or alteration of a motion picture has been litigated since the Gilliam case in 1976. An apparent reason for this is that disputes involving potential moral rights violations in the motion picture industry are rarely settled in court. Unions representing artists in a variety of fields use contracts providing for dispute resolution by arbitration. The Minimum Basic Agreement of the Directors' Guild of America is a good example. The 1984 Agreement provides in relevant part:

> The following matters shall be subject to arbitration: ... all grievances, disputes or controversies over the interpretation or application of any Employee's personal services contract or deal memo with respect to ... (2) cutting rights, ... (4) creative rights provisions (including, without

> limitation, all consultation and/or approval rights of any kind relating to any motion picture).

DGA Basic Agreement (1984), Section 2-101.

Moreover, the Agreement limits directors' post-production control over the exploitation of a motion picture in a way that is common in the industry. Section 7-505 provides in relevant part: "The Director shall prepare the Director's Cut of the film for presentation to the individual Producer and to the person designated ... as having final cutting authority ... over the motion picture." Also, section 7-1500 states expressly that "[t]he Employers' [producer's] decision in all business and creative matters shall be final." Thus, while motion pictures may represent the artistic expression of film creators, in the real world of film production, moral rights are bargained for, retained, or waived by contract.

Notwithstanding industry practice, we believe it could be argued that section 43(a) might be available to restrain use of the new technologies for film alteration in certain, limited circumstances. First, a plaintiff would have to show that its original work was materially altered, i.e., that it was altered to an extent sufficient to create a substantially different work. Second, false attribution of the altered work to the plaintiff must be shown, and, further, that such attribution is likely to damage plaintiff's reputation and confuse the public as to the

origin of the work. The plaintiff may also have to show a discernible competitive relationship with the defendant. See Halicki and Allen, supra. Depending on the facts of the case, a label or legend disclaiming approval of the altered work by the creators of the original work might be a valid defense. See Judge Gurfein's concurring opinion in Gilliam, 538 F.2d at 27.

Moreover, the amendment to section 43(a) under the TRA has no apparent effect on its applicability to new technologies for the alteration of existing motion pictures. Plaintiffs would still have to show material alteration of their work, and the likelihood of the materially altered work being attributed to them, causing damage to their reputation and resulting in likely confusion of the public. Effective labeling or a disclaimer of attribution would still be a cognizable defense.

Ultimately, only the courts can determine whether technological alteration of a motion picture results in false attribution or material alteration sufficient to give rise to a claim under section 43(a), especially where the proponent of the claim contractually surrendered moral rights. Of the three technologies at issue here, however, we believe that only colorization might pass judicial muster as the type of alteration that could trigger application of the statute. Colorized motion pictures are clearly altered versions of original works, and the Copyright Office has determined that they are derivative works

for which copyright registrations may be sought. See "Copyright Registration for Colorized Versions of Black and White Motion Pictures; Final Rule," 53 Fed. Reg. 29887 (August 9, 1988). A credible claim of damage to the reputation of the creators of original black and white motion pictures might be made in situations where the colorized version is attributed to them. However, a label similar to that required under the new National Film Preservation Act for altered versions of historically significant films, stating that the film was altered without the consent of certain of its creators, or even simply a statement that the film is the colorized version of an original black and white motion picture, seems likely to defeat any claim based on section 43(a).

In contrast to colorization, time compression and expansion and panning-and-scanning are established industry practices for the adaptation of motion pictures to meet the requirements of non-theatrical exhibition media. Panning-and-scanning is necessary to permit exploitation of motion pictures through television broadcast, and is intended to be effected without changing the quality of the original version. Time compression and expansion, moreover, do not usually result in changes discernible to viewers. As such, it does not seem to us that use of these technologies to alter existing motion pictures could be viewed as the type of "garbling" (Jaeger) or "mutilation" (Gilliam) that has been held actionable under section 43(a).

B. Amendment of Section 43(a).

While we have concluded that section 43(a) may reach certain technological alterations of motion pictures without the consent of their creators, we recommend strongly against amendment of section 43(a) of the Lanham Act to create a specific right for film artists to prevent such alterations. We reach this conclusion for two reasons.

The first is that section 43(a) is functioning in the way that Congress intended -- as a broad, uniform Federal law of unfair competition. Section 43(a) was enacted in 1946 to harmonize conflicting standards of protection against unfair competition and consumer confusion under then-existing state and common law. Through judicial interpretation over its forty-three year history, section 43(a) has been applied to many types of conduct involving a wide variety of commercial activity. It now provides relief against, inter alia, infringement of unregistered trademarks, unfair competition arising from the copying of trade dress and certain configurations of goods, and false advertising claims related to the goods or services of another. See USTA Review Commission Report, supra, at 96. In some cases, as we have seen, it also provides relief against violations of the moral rights of creative artists.

The 100th Congress approved of the broad application of section 43(a) in two fundamental ways. First, it enacted the TRA, which

amended section 43(a) to conform its language to the expanded scope of protection applied by the courts, and to resolve certain issues, such as the availability of full statutory remedies and the nature of actionable conduct under the provision, where courts had drawn different conclusions. Notably, Congress resolved these issues in favor of broadening application of the statute, not narrowing it. Second, Congress placed section 43(a) within the body of U.S. law that provides the "equivalent" of moral rights for purposes of meeting U.S. obligations under Article 6bis of the Berne Convention. Berne House Report, supra, at 34, 38; Ad Hoc Report, supra, at 553-4.

These actions reveal the sense and intent of Congress that section 43(a) should reach a broad range of conduct involving unfair commercial practices, including cases where such conduct may intrude upon the personal rights of artists. In our view, the creation of a narrow, industry-specific application of the statute to protect the moral rights of certain film artists, or to impose a labeling requirement for altered films, or even to create an exemption for editing to delete obscene material, would be inconsistent with the Congressional intent that section 43(a) function as a broad-based Federal law of unfair competition.

The second reason that we do not favor amending section 43(a) is that it would frustrate the work made for hire doctrine applicable to motion pictures under U.S. copyright law and film

industry contractual practice. The motion picture is an archetypal example of the type of work to which the work made for hire principles of the Copyright Act are intended to apply. See section (2) of the definition of "work made for hire" in 17 U.S.C. 101; see also H.R. Rep. No. 90-83, 90th Cong., 1st Sess. 85-87 (1967). The motion picture is a highly collaborative work, involving the artistic services of many persons; to facilitate economic exploitation of motion pictures and make them available to the public, the work made for hire doctrine centralizes all copyright ownership in a single source, commonly the producer of the motion picture. As the "employer or other person for whom the work was prepared," 17 U.S.C. 201(b), the producer is considered the initial owner of all rights in the film, including the rights to distribute copies to the public and to make derivative works such as colorized versions. As noted above, standard contracts in the film industry accommodate this reality -- directors, screenwriters, film editors, cinematographers and others generally cede to the producer the right to all post production uses of their creative contributions, in exchange for which they receive agreed upon compensation.

We conclude that an amendment to section 43(a) to create specific moral rights for film creators would impair the functioning of this system. The Copyright Act accords ownership rights to a single entity, the producer. Even in Gilliam, the leading moral rights case under section 43(a), the plaintiffs were the

copyright holders. In our view, the creative contributors to a motion picture should not have the right, by invoking section 43(a) to an extent beyond its current reach, to prevent economic exploitation of altered works in relation to which they contractually surrendered artistic control.

We are sympathetic to the appeal of U.S. film directors and other creative artists for strong, explicit moral rights protection. We also note the Congressional sentiment, evidenced by the recently enacted National Film Preservation Act and by other moral rights proposals considered in recent years, in favor of granting such protection under Federal legislation.

Every country of which we are aware that has created moral rights by express legislation, including States party to the Berne Convention, has placed them under copyright. Even the United Kingdom, the first Berne member to satisfy moral rights obligations under the Convention by means of the common law, has dedicated an entire chapter of its new copyright, design and patent statute to moral rights. See U.K. Copyright, Designs and Patents Act 1988, Chapter IV, sections 77-89.

We recommend against use of section 43(a) of the Lanham Act as a vehicle for the creation of statutory, Federal moral rights. We have concluded that section 43(a) is functioning properly as a broad Federal law of unfair competition. If Congress seeks to provide more extensive moral rights protection for film

directors, screenwriters, and other artists than is currently available under the combination of Federal, State and common law that satisfies U.S. obligations under the Berne Convention, it should choose a vehicle other than section 43(a) of the Lanham Act.

FILM DISCLOSURE AND PRESERVATION ACT OF 1988

(Mr. KASTENMEIER asked and was given permission to address the House for 1 minute and to revise and extend his remarks.)

Mr. KASTENMEIER. Mr. Speaker, I am pleased to introduce the Film Disclosure and Preservation Act of 1988. The House Judiciary Subcommittee on Courts, Civil Liberties and the Administration of Justice, which I chair, has over the past several months given the issue of film integrity a great deal of detailed consideration. Beginning with the subcommittee's hearings and consultations on legislation to permit the United States to implement the Berne International Copyright Convention, the issue of artists' rights in general has been prominent and controversial.

H.R. 4262, which allows the United States to adhere to Berne, passed the House by a vote of 420-0 in the spring, but it passed without the artists' rights provision I had originally proposed. There was sufficient interest in the issue among the members of the subcommittee, however, that we agreed to hold separate hearings on the issue. In addition, at my request, and that of my colleague, CARLOS MOORHEAD, the ranking minority member of the subcommittee, the United States Copyright Office is currently conducting a detailed inquiry into the specific issue of film integrity, and into the effects of new technologies on this very important part of our national cultural heritage.

Yesterday, the Subcommittee on Courts, Civil Liberties and the Administration of Justice held a hearing on a variety of proposals to protect our film heritage. While it is important that we not rush to judgment, it seems that a consensus is developing to require that if a film has been materially altered, that fact should be disclosed to the consuming public. That is the purpose of my bill which I believe will promote discussion of the details of this disclosure requirement, and facilitate further consensus.

In particular, my bill would require that for every public exhibition of a materially altered film, including one that has been colorized, and for all promotional and rental activity relating to that film, there shall be a clear and conspicuous disclosure: First, that the film has been materially altered from the form in which the public first saw it; second, of the nature of the alteration; and third, of the fact of any objection by an aggrieved director, screenwriter, editor, or cinematographer, or by their designated representatives.

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

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

The term "material alteration" has been greatly debated, and is extremely difficult to define. Because debate on the issue of film integrity has focused to a large extent on colorization, that practice must be included in the definition of "material alteration." I welcome suggestions on whether the bill should specifically include other practices, or whether there should be exemptions to the term, for example, for business practices that are currently considered customary and reasonable. Editing for television might fall within such an exemption.

The bill does not set forth specific examples of disclosure that would satisfy its requirements. Instead, it seeks the cooperation of the various parties who have a stake in the disclosure, and in the creating and exhibiting of the film, in developing and agreeing upon appropriate disclosure standards. It is these parties, rather than the U.S. Congress, who know the intricacies of the art—and the business—of making and distributing a film, and they are the ones who know best what kind of disclosure makes sense. The bill limits those parties to representatives of the copyright owners, and of the guilds representing directors, screenwriters, cinematographers, and editors. I welcome comments about whether other parties should be included.

The bill permits the courts to consider the recommendations of these parties in determining whether the disclosure requirements have been violated.

The parties aggrieved by a failure to provide appropriate disclosure may sue, and may recover appropriate damages and costs, or obtain injunctive relief.

Some of the various proposals on film integrity have amended the copyright law. Some have amended the trademark law. My subcommittee has jurisdiction over both of these bodies of law, and has unique expertise in these areas. My preliminary determination is that it is wiser to amend section 43 of the Trademark Law (The Lanham Act), which prohibits false designations of origin and false descriptions.

Because it would be unfair to subject the parties to multiple disclosure requirements, the bill preempts the States from taking similar actions.

In addition to the disclosure requirements, the bill directs the National Film Preservation Commission to determine methods to encourage the restoration and preservation of films. Once again, it is important to encourage the concerned private parties themselves to restore and preserve films, rather than to rely on the U.S. Government. However, the Government's unique resources may be critical to this effort and governmental participation is in no way prohibited.

There may be other issues that the Commission should explore, and I am open to hearing about them.

The Commission's membership will be balanced. It will represent more than particular special interests, since it is composed of a wide variety of parties, representing all facets involved in the creation of films, and in distributing, broadcasting, and otherwise exploiting them. Consumers, archivists, academics, and appropriate governmental employees will also be represented. The chairpeople of the National Endowments of the Arts and of the Humanities will be members, as will be Librarian of Congress.

My bill permits the Congress to continue its consideration of the effect of new technology on film integrity. It may be an intermediate step, or it may be the last step. I believe that it would not be appropriate to do more until the Copyright Office has reported to us on the results of its study, and until my subcommittee can hold further hearings.

The issue of the integrity of our film heritage is important, and it is controversial. The Congress has been presented with many—often contradictory—proposals. We must be careful not to upset the careful balance we crafted in the 1976 Copyright Act. We must act in accordance with the system of trademark laws that has developed over the years. Above all, we must be guided by appropriate constitutional principles. I believe that my bill serves these essential interests well.

PERMISSION FOR SUBCOMMITTEE ON HUMAN RESOURCES AND INTERGOVERNMENTAL RELATIONS OF THE COMMITTEE ON GOVERNMENT OPERATIONS TO SIT TOMORROW DURING 5-MINUTE RULE

Mr. WEISS. Mr. Speaker, I ask unanimous consent that on tomorrow the Subcommittee on Human Resources and Intergovernmental Relations of the Committee on Government Operations be permitted to meet during the 5 minute rule.

Mr. Speaker, I have cleared this with the minority member.

I

100TH CONGRESS
2D SESSION

H. R. 4897

To amend the Act entitled "An Act to provide for the registration and protection of trade-marks used in commerce, to carry out the provisions of certain international conventions, and for other purposes", enacted July 5, 1946 (popularly known as the Lanham Act), to require certain disclosures relating to materially altered films and to establish a National Film Preservation Commission.

IN THE HOUSE OF REPRESENTATIVES

JUNE 22, 1988

Mr. KASTENMEIER (for himself, Mrs. SCHROEDER, Mr. BERMAN, Mr. CARDIN, and Mr. BRYANT) introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To amend the Act entitled "An Act to provide for the registration and protection of trade-marks used in commerce, to carry out the provisions of certain international conventions, and for other purposes", enacted July 5, 1946 (popularly known as the Lanham Act), to require certain disclosures relating to materially altered films and to establish a National Film Preservation Commission.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Film Disclosure and Preservation Act of 1988".

SEC. 2. AMENDMENT OF THE LANHAM ACT.

Section 43 of the Act entitled "An Act to provide for the registration and protection of trade-marks used in commerce, to carry out the provisions of certain international conventions, and for other purposes", enacted July 5, 1946 (60 Stat. 427; 15 U.S.C. 1051 et seq.), is amended by inserting at the end thereof the following new subsection:

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

"(i) That the film has been materially altered from the form in which it was first released to the public.

"(ii) The nature of that alteration.

"(iii) The fact of objection, if any, by any aggrieved party to any such alteration.

"(B) Any person who proposes to exploit a materially altered film in the manner set forth in subparagraph (A) must make a good faith effort to notify in writing and by registered mail and in a reasonable amount of time prior to such exploitation those individuals described in paragraph (3)(B). Such person shall send a copy of the notice by registered mail to the professional guilds referred to in paragraph (3)(B)(III).

Any individual so notified must indicate such individual's objection within a reasonable period of time after receipt of such notice.

"(2)(A) Any aggrieved party may obtain appropriate relief with respect to any violation of paragraph (1).

"(B)(i) In any action under subparagraph (A), the court may grant appropriate equitable relief, may award actual damages or, if the aggrieved party so elects, statutory damages not to exceed $100,000, and may allow the recovery of full costs, including attorney's fees, to the prevailing party. The court shall award punitive damages whenever any person required to give notice under paragraph (1)(B) fails to make a good faith effort to locate any individual as required by such subparagraph.

"(ii) In determining whether any violation of paragraph (1) has occurred, the court may take into account examples of disclosures and of reasonable periods of time as agreed upon by representatives of copyright owners and of appropriate professional guilds as described by section 10 of the Film Disclosure and Preservation Act of 1988.

"(C) No action shall be maintained under this subsection unless it is commenced within 1 year after the claim accrues.

"(3) As used in this subsection:

"(A) The term 'film' means a theatrical motion picture after its first publication.

"(B) The term 'aggrieved party' means—

"(I) the principal director, principal screenwriter, principal editor, or principal cinematographer of the film;

"(II) an agent designated by an individual described in subclause (I); and

"(III) in the event an individual listed in subclause (I) is deceased or otherwise unavailable and no agent has been designated, a representative of the appropriate professional guild who is authorized by that guild to represent such individual in any cause of action under this subsection.

law or statutes of any State respecting the material alteration of films are preempted.

"(4) Any disclosure requirements imposed under the common law or statutes of any State respecting the material alteration of films are preempted.".

SEC. 3. ESTABLISHMENT OF NATIONAL FILM PRESERVATION COMMISSION.

There is established a commission to be known as the National Film Preservation Commission (hereinafter in this Act referred to as the "Commission").

SEC. 4. DUTIES OF COMMISSION.

The Commission shall—

(1) determine methods to encourage the restoration and preservation of films, including the voluntary efforts of individuals involved in all facets of creating films, and of distributors, broadcasters, and other commercial interests that exploit such films or own copyright interests in them;

(2) annually report to the Congress with respect to the effectiveness of the disclosure requirements imposed under section 43(c) of the Lanham Act; and

(3) report to the Congress whether categories of audiovisual works other than films should be brought within the scope of such disclosure requirements.

SEC. 5. MEMBERSHIP.

(a) NUMBER AND APPOINTMENT.—The Commission shall be composed of:

(1) six individuals appointed by the President, by and with the advice and consent of the Senate, from among individuals involved in the creation of a film, distributors, broadcasters, and other individuals with commercial interests in the exploitation of such works (including copyright owners), consumers, archivists, academics, and employees of appropriate governmental agencies; one of whom the President shall designate as chairperson;

(2) the Librarian of Congress;

(3) the Chairperson of the National Endowment for the Arts; and

(4) the Chairperson of the National Endowment for the Humanities.

(b) TERMS.—(1) Except as provided in paragraphs (2) and (3), members appointed under subsection (a)(1) shall be appointed for terms of three years.

(2) Of the members first appointed under subsection (a)(1), two shall be appointed for terms of one year and two shall be appointed for terms of two years.

(3) Any member appointed to fill a vacancy occurring before the expiration of the term for which such member's predecessor was appointed shall be appointed only for the remainder of such term. A member may serve after the expiration of such member's term until such member's successor has taken office.

(c) VACANCY.—Any vacancy in the Commission shall not affect its powers but shall be filled in the same manner in which the original appointment was made, and subject to the limitation set forth in subsection (a) with respect to the original appointment.

(d) QUORUM.—Five members of the Commission shall constitute a quorum, but a lesser number may conduct hearings.

SEC. 6. COMPENSATION OF MEMBERS OF THE COMMISSION.

(a) BASIC PAY.—A member of the Commission who is a fulltime employee of the United States shall receive no additional compensation by reason of service on the Commission.

(b) PER DIEM.—Subject to amounts provided in advance in appropriations Acts, a member of the Commission from private life shall receive the daily equivalent of the annual rate of basic pay payable for level V of the Executive Schedule for each day (including traveltime) during which such member is engaged in the actual performance of duties vested in the Commission, plus reimbursement for travel, subsistence, and other necessary expenses incurred in the performance of such duties, in accordance with subchapter I of chapter 57 of title 5, United States Code.

SEC. 7. DIRECTOR AND STAFF.

(a) DIRECTOR.—The Commission shall have a Director who shall be appointed by the Commission and who shall be paid at a rate not to exceed the rate of basic pay payable for level IV of the Executive Schedule. The Director, subject to the direction of the Commission, shall supervise the activities of persons employed by the Commission and the preparation of the reports of the Commission and shall perform such other duties as may be assigned to the Director by the Commission.

(b) STAFF.—The Commission may appoint and fix the pay of such additional personnel as it considers appropriate.

(c) APPLICABILITY OF CERTAIN CIVIL SERVICE LAWS.—The staff of the Commission may be appointed without regard to the provisions of title 5, United States Code, governing appointments in the competitive service, and may be paid without regard to the provisions of chapter 51 and subchapter III of chapter 53 of such title relating to classification and General Schedule pay rates, except that no individual so appointed may receive pay in excess of the maximum annual rate of basic pay payable for GS–16 of the General Schedule.

(d) EXPERTS AND CONSULTANTS.—The Chairperson of the Commission may procure temporary and intermittent services under section 3109(b) of title 5, United States Code.

SEC. 8. GOVERNMENT AGENCY COOPERATION.

The Commission is authorized to request from any department, agency, or independent instrumentality of the Government any information and assistance it considers necessary to carry out its functions. Each such department, agency, and instrumentality is authorized to cooperate with the Commission and, to the extent permitted by law, to furnish such information and assistance to the Commission.

SEC. 9. ADMINISTRATIVE SERVICES.

The Administrator of General Services shall provide administrative services for the Commission on a reimbursable basis.

SEC. 10. MEETINGS RESPECTING DISCLOSURE REQUIREMENTS.

Nothing shall prevent representatives of copyright owners of films and of appropriate professional guilds representing directors, screenwriters, editors, and cinematographers of films from meeting for the sole purpose of developing and agreeing upon disclosure requirements and reasonable periods of time for purposes of complying with the requirements of section 43(c)(1) of the Lanham Act, if such joint activity is not in violation of the antitrust laws.

SEC. 11. EFFECTIVE DATE.

This Act shall take effect on the date of its enactment, except that the amendment made by section 2 shall take effect on the ninetieth day beginning after such date.

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100TH CONGRESS
1ST SESSION

H. R. 2400

To amend title 17 of the United States Code to provide artistic authors of motion pictures the exclusive right to prohibit the material alteration, including colorisation, of the motion pictures.

IN THE HOUSE OF REPRESENTATIVES

MAY 13, 1987

Mr. GEPHARDT (for himself, Mr. LEVIN of Michigan, Mr. LEHMAN of Florida, Mr. MACKAY, and Mr. GLICKMAN) introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To amend title 17 of the United States Code to provide artistic authors of motion pictures the exclusive right to prohibit the material alteration, including colorization, of the motion pictures.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Film Integrity Act of 1987".

SEC. 2. LIMITATION ON EXCLUSIVE RIGHTS: MOTION PICTURES.

Chapter 1 of title 17, United States Code, is amended by inserting at the end thereof the following new section:

"§ 119. Limitation on exclusive rights: motion pictures

"(a) Notwithstanding the provisions of section 106, in the case of a motion picture, once the work has been published, no material alteration, including colorization, of the work shall be permitted without the written consent of the artistic authors of such work.

"(b) During their lifetime, the artistic authors of a motion picture may assign the right of consent described in subsection (a) with respect to such motion picture only to a third party who is a qualified artistic author. In the event of incapacity or death of an artistic author, the right of consent may be transferred to another qualified artistic author. In the case of an artistic author who is dead or incapacitated on the effective date of this section, this right of consent passes to the successor identified in section 203(a)(2) of this title or, if there is no such successor, then to his or her heir under law. Such successor or heir may assign this right of consent only to a third party who is a qualified artistic author. In no event may a person who is not a qualified artistic author exercise this right of consent.

"(c) The right of consent described in subsection (a) with respect to a motion picture shall not expire when the copyright expires in such work pursuant to chapter 3 of this title.

"(d)(1) The provisions of chapter 5 of this title (relating to copyright infringement and remedies) shall apply to the material alteration, including colorization, of motion pictures and for purposes of such chapter the artistic authors of a motion picture (or their heirs or assigns) shall be deemed to be the legal or beneficial owners of an exclusive right under a copyright with respect to such motion picture.

"(2) If any material alteration, including colorization, of a motion picture occurs without the consent of the artistic authors of such work, then there shall be no copyright in such altered work.

"(e) The Register of Copyrights may establish, by regulation, procedures for directors and screenwriters of motion pictures to be formally designated as the artistic authors of such motion pictures.".

SEC. 3. DEFINITION.

Section 101 of chapter 1 of title 18, United States Code, is amended by insert after the defintion of "anonymous work" the following:

" 'Artistic authors' of a motion picture shall be the principal director and principal screenwriter of the work.".

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PRESERVING THE GENIUS OF THE SYSTEM

A CRITICAL EXAMINATION OF THE INTRODUCTION OF MORAL RIGHTS INTO UNITED STATES LAW

Jon Baumgarten

Robert Gorman

Christopher A. Meyer

September 11, 1989

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Table of Contents

PREFACE

> The American cinema is a classical art, but why not then admire in it what is most admirable, i.e., not only the talent of this or that filmmaker, but the genius of the system.
>
> -- Andre Bazin, 1957*

As indicated in its title, this paper is a critical assessment of a doctrine known as "moral rights" or "droit moral." This name often causes critics of the doctrine to disclaim immoral objectives. The writers had initially considered, instead, invoking a new label: "droit caprice," we thought (and in part still think), might aptly convey the troubling, deeply subjective core of the doctrine. But we concluded that the connotation of "caprice" was no more fair to the doctrine's proponents than the connotation of "morality" is to its critics.

So "moral rights" it remains. At bottom, however, neither disavowal nor semantic invention is necessary. The term "moral rights" simply but imprecisely distinguishes between the various economic and social interests of authors, proprietors, and the public in creation and use of a work, and the author's personal interest in the work as a

* Quoted in Schatz, The Genius of the System xiii & 8 (Pantheon Books 1988).

reflection of his or her spirit;* it does not relate to theologic, temporal, or legal notions of right or wrong.

The issue at hand, then, is whether it is objectively desirable to adopt a comprehensive moral rights regime in the United States. We conclude that it is not. The American information/entertainment community as a whole, no less than one of its branches -- Bazin's "cinema" -- is the product of a remarkable "system" consisting of unquestionably talented, energetic authors (a term we will use in its copyright sense to indicate all individual creators), but also of:

- Equally talented producers and publishers -- those engaged in anticipating public appetites and discerning professional and educational needs, coordinating the efforts of multiple authors, packaging diverse creative elements, and assuring wide distribution and public availability of the resulting works;
- Able business men and women making day-to-day judgments based on conventional business considerations and customary expectations;
- Courageous entrepreneurs and investors taking substantial economic and personal risks;
- A deliberately crafted copyright law that facilitates collaboration among authors and between art and commerce, and that encourages innovation, development and dissemination of creative works;
- Other legal principles that already protect the authors' reputational interests in those works; and

*Ricketson, The Berne Convention For The Protection of Literary and Artistic Works: 1886-1986 at 456 (1987).

- A fundamental commitment to the principles of contract and to the public availability of ideas, information and the products that embody them.

The "genius of the system" resides in the balance among its components; it proves itself in the renown and vitality of the American information/entertainment community and its works throughout the world. We believe that adoption of a comprehensive moral rights regime in the United States would mean substantial change in each component and among them -- change that is unnecessary and that would seriously disrupt this balance and impair its continued success.

I

INTRODUCTION AND SUMMARY: MORAL RIGHTS AS CHANGE

The national copyright laws of the industrial West, while generally sharing many attributes, may be divided generally into two types:

- Those, such as are found in the United States and the United Kingdom, that provide property rights grounded in principles of economic reward and incentive and established by legislation, and
- Those, such as are found in France, which afford both property or "economic" rights that are quite similar to copyright in the United States, and an additional regime of "moral rights" that flow by natural right from the reflection of the author's personality in his or her work.

The legal doctrine known as "moral rights" has long been a feature of European and Latin American copyright systems. Importantly, moral rights have generally been part of such systems since their inception. The practical evolution of moral rights abroad has thus been shaped over time by commercial considerations and other factors; and commerce and art have in turn accommodated the embedded legal standards. Adoption of moral rights protection has virtually never represented the sudden imposition of a new hierarchy of prerogatives, obligations, risks, decision points, assessments, and the like on a well-developed, functioning system of creativity, law, and business.

Yet the question of adopting a comprehensive moral rights regime in the United States necessarily requires consideration of just such an intrusion. One can expect impassioned debate on whether moral rights are a good or bad thing; but one must not fail to start with an understanding that domestic adoption of "droit moral" represents fundamental change. The moral rights doctrine would for the first time in the United States give the author or his heirs a continuing "aesthetic veto" over the presentation and distribution of a work, even after it and any copyright therein has been transferred to another or has expired, or after the author has long been dead, and potentially in contravention of voluntary agreements. It gives lawful stature to subjective purpose, whim, fancy, deliberation, and impulse alike, notwithstanding prior assurance, commitment, custom, investment, understanding, and reliance. It requires users and producers alike to guess at the aesthetic sensibilities of authors and their heirs (including complete strangers to any dealings between the parties) and how they might fare in the courtroom. It is, in sum, at variance with the purpose and principles of our copyright law, with domestic traditions and institutions of contract, property and judicial competence, and with entrepreneurial needs and basic business expectations and practice.

And it is in tension with essential values. Our intellectual property system is designed to encourage innovation and promote dissemination of creative works;[1] it complements the First Amendment.[2] The principles of droit moral are directed toward restraining distribution; they introduce a kind of umbilical inhibition on forms of experimentation, creativity, and public exposure of works (and the ideas they express) that, today, are entirely lawful and assured.

There is no need for such a transformation of legal principle, convention, national policy, and working marketplace. Existing United States law does not ignore the personal interests of literary and artistic creators. A variety of federal and state statutory and common law protects authors against particular non-consensual misuses or omissions of their names and egregious distortions of their works. This includes laws and decisions concerning copyright, unfair competition, trademark, defamation, privacy, publicity and contract.[3] This body of law has been

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[1] U.S. Constitution, Article I, Section 8, Clause 8.

[2] See, e.g., Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 550 (1985) (copyright the "engine of free expression") (O'Connor, J.).

[3] See generally, e.g., Final Report of the Ad Hoc Working Group on U.S. Adherence To The Berne Convention, reprinted in 10 Col.-VLA J.L. & Arts 35 (1986) (hereafter "Ad Hoc Comm. Rep.").

developed and elucidated in this country over decades. It has grown with particular care to reflect our national customs and values.[4] Courts have long ago become comfortable dealing with its principles and with adapting it to new technologies and markets. Creators and entrepreneurs alike are familiar with its contours and act accordingly. The current system provides meaningful security to the reputational interests of authors, but may not satisfy every felt offense to individual or artistic sensibility. That is scant cause for drastic legislative intervention.

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[4]See, e.g., 17 U.S.C. 107 (fair use defense to copyright infringement) (codifying prior case law); 15 U.S.C. 1125(a) (requirement of public confusion in federal unfair competition cases); Wainright Securities, Inc. v. Wall Street Transcript Corp., 558 F.2d 91 (2d Cir. 1977), cert. denied 434 U.S. 1014 (1978) (copyright fair use doctrine reflects First Amendment values); Winters v. New York, 333 U.S. 507 (1948) (First Amendment's application to both information and entertainment); New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (Constitutional limitations on defamation actions); Time, Inc. v. Hill, 385 U.S. 374 (1967) (Constitutional limitations on privacy actions); L.L. Bean, Inc. v. Drake Publishers, Inc., 811 F.2d 26 (1st Cir. 1987) (Constitutional limitation on unfair competition actions against literary and artistic satire); Frosch v. Grosset & Dunlap, Inc., 427 N.Y.S. 2d 828 (1st Dept. 1980) (Constitutional limitations on publicity claims; termination of privacy claims on death); General Mills, Inc. v. Henry Regnery Co., 421 F.Supp. 359 (N.D. Ill. 1976) (parody of plaintiff's book not likely to cause confusion); Rogers v. Grimaldi, 875 F.2d 994 (2d Cir. 1989) (higher standard for unfair competition relief in case of artistically relevant expression); Edison v. Viva International Ltd., 70 A.D. 2d 379 (1st Dept. 1979) (trade custom relevant to defense of mutilation claim).

It is the contention of this paper that changes in United States law designed to more systematically and expansively embrace the doctrine of moral rights would be profoundly ill-advised. They would likely be impracticable in application, undermine longstanding, working, contractual and business arrangements, and disrupt the carefully balanced system of rights, limitations, and beneficiaries that characterizes the copyright law. Industry adaptation, if possible, would take years and be accompanied by percolating litigation and claims, thoroughly unsettling past and future arrangements. In the interim, and quite possibly in the long term as well, they would inject substantial uncertainty and jeopardy into the United States' singularly successful copyright industries and threaten investment in, creation, and dissemination of divers works of information, education, and entertainment.

II

THE NATURE OF MORAL RIGHTS

The droit moral is based on the notion that the artist

"lives in his work."[5] Four rights are generally held to comprise moral rights: paternity, integrity, divulgation, and withdrawal. Not all nations that recognize moral rights observe all four; indeed, Article 6-bis of the Berne Convention refers only to the first two:

> 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, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.

The right of paternity gives the author of a work, even after the transfer or license of the copyright, the right to claim authorship thereof, to prevent the attribution of the work to another person, or to prevent the author's name from being used on works he or she did not create.[6]

United States law accords comparable protection in certain situations. Our courts have employed the laws of contract,[7] defamation,[8] the Lanham Act,[9] and the Copyright

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[5] Ricketson, The Berne Convention For The Protection of Literary and Artistic Works: 1886-1986 at 462 (1987) (herein "Ricketson").

[6] DaSilva, Droit Moral and the Amoral Copyright: A Comparison of Artists' Rights in France & the United States, 28 Bull. Copr. Soc'y 1, 26 (1980) (hereafter "DaSilva").

[7] Granz v. Harris, 198 F.2d 585 (2d Cir. 1952).

[8] Clevenger v. Baker, Voorhis & Co., 8 N.Y.2d 187, 168 N.E.2d 643, 203 N.Y.S.2d 812 (1960).

(continued...)

Act[10] to grant relief to authors.[11] But the wholesale incorporation of the right of paternity into United States law, so as to broadly embrace general circumstances or all forms of dissemination and use of all types of works would be impracticable and unwise.[12]

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[9](...continued)
[9]Dodd v. Ft. Smith Special School Dist. No. 100, 666 F.Supp. 1278 (W.D. Ark. 1987).

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

[11]Both chambers of Congress, the Executive branch, independent experts, and the World Intellectual Property Organization concluded that these forms of protection were in compliance with Article 6-bis of the Berne Convention. See S. Rep. No. 100-352, 100th Cong., 2d Sess. 9 (1988); H.R. Rep. No. 100-609, 100th Cong., 2d Sess. 37-38 (1988); Ad Hoc Comm. Rep., supra.

[12] It would be inappropriate, for example, to require broadcasters to announce the names of all composers, lyricists, and performers of broadcast music; to impose liability for the failure to mention the name of an architect at an opening ceremony or in attendant news coverage or for a magazine, newspaper or book publisher's failure to accord credit to the photographer of an image obtained from stock houses that commonly trade in anonymous works; to insist (absent agreement) upon identification of every contributor to collaborative or highly supervised tasks that are truly organizational or institutional creations; or to permit disavowal of contractual arrangements pertaining to pseudonyms (that may, in fact, be author-initiated; see Blau, Name As Mask: The Theory & Practice of Pseudonyms, N.Y. Times, Sept. 4, 1989 at 42 col. 1) or customary or negotiated terms of anonymity and of agreements governing derivative uses, post-production editing, and other consensual variations of an author's work. Yet the droit moral would support just these results. See Parts IV and V, below.

The right of integrity is a dramatic manifestation of the extent to which moral rights provide an aesthetic veto. It accords authors and their heirs the right -- with regard to neither the existence nor the ownership of copyright -- to prevent what they feel is a mutilation, distortion or alteration of the author's work. Here too, United States law affords protection to a creator when the distortion or alteration is in violation of contract, or constitutes a defamatory representation, or creates confusion or deception in the marketplace, or violates the author's copyright.[13] Moreover, statutes in several states forbid the mutilation or distortion of singular works of art.[14] As will be discussed below, however, the grant of a general, unbounded[15] right of integrity, whose violation might occur (or in any event where a colorable claim, risk or uncertainty might arise regardless of actual litigation or prosecution to judgment) whenever the individual sensibilities of an author could be offended, would likely be disastrous for many sectors of the copyright industries, and for the public.

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[13] E.g., Gilliam v. American Broadcasting Co., supra. See fn. 11.

[14] E.g., Cal. Civ. Code § 987; N.Y. Arts & Cult. Aff. Law §14.03.

[15] I.e., if extended beyond current law the integrity (and paternity) right would be free of important constraints purposefully imposed by courts and legislature. See fn. 4.

The right of "divulgation" accords to the author the right to determine when his work should be disseminated to the public.[16] It is essentially equivalent to the right of first publication long recognized in the United States. Prior to 1978 that right was a creature of state law; it is now part of the federal copyright law. It is also reinforced by our law of privacy and of equitable remedies in the field of contract. Certain European applications of the right would, if incorporated in the United States, conflict with some of our copyright and property rules,[17] but the divulgation right alone is essentially uncontroversial and there is no significant effort underway to modify present United States law on the subject.

The right of withdrawal grants an author the right to withdraw from circulation works of which he or she no longer approves for any reason, in order that the work might be modified or completely suppressed; the author is generally expected to make appropriate compensation to the publisher for exercising the right. There is no movement to incorporate this right into United States law, and to do so would obviously raise serious constitutional and copyright

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[16]DaSilva at 20.

[17]Id. at 12-14, 20, 22.

problems.[18] In the marketplace of ideas -- the copyright marketplace -- an author is free to recant by writing new works, but not, at least in the United States today, by demanding that a publisher withdraw a work from the market. Although this right is commonly recognized abroad in theory, its existence, practicability and wisdom have been widely questioned and its application appears quite narrow.[19]

The pertinence of the withdrawal right should not, however, be too quickly dismissed. It is in principle a quite legitimate formulation of the droit moral and is an apt demonstration of that doctrine's nature and consequence. Its excision from the Berne Convention and diminution in practice are clear evidence that the very theory of moral rights is suspect in contemporary cultures marked by increasing reliance on collaborative effort, entrepreneurial investment and democratic values.[20]

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[18]See id. at 23-26; and Sarraute, Current Theory on the Moral Right of Authors and Artists Under French Law, 16 Am. J. Comp. L. 465, 476-78 (1968) (hereafter "Sarraute").

[19]See DaSilva at 25; Sarraute at 477.

[20]There is other evidence that important societal interests have diminished the ardor for moral rights in its doctrinal birthplaces. See, e.g., Ginsburg, Reforms and Innovations Regarding Authors' and Performers' Rights in France: Commentary on the Law of July 3, 1985, 10 Col.-VLA J. Law & The Arts 83, 89-90 (1985) (hereafter "Ginsburg") (limitation on moral rights in software under French law to accommodate the needs of employers, the fact of collaborative

(continued...)

III

THE INDUSTRY CONTEXT

The copyright industries of the United States have made our nation the world leader in the fields of music, film, television and radio, recordings, books, magazines, and computer software. These industries, while diverse, are nevertheless characterized by several shared features pertinent to the question of moral rights.

First, the allocation of creative and business control in the copyright industries has, for the most part, evolved through decades. This allocation is the product of an elaborate array of, variously, individually negotiated contracts, collective bargaining, agency representation, and industry customs and practices. In the film industry, for example, creative and technical contributors are represented by strong and sophisticated labor organizations, whose collective bargaining agreements are among the most elaborate in the United States. These agreements provide in detail for a wide range of employee rights with respect to such matters as credit in the promotion and exhibition of the film,

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[20](...continued)
development, and promotion of domestic industry); see also, Part V.

participation in artistic decisions, and compensation in connection with an ever-increasing number of "subsidiary uses," i.e., those that seek profits in markets as diverse as those for home videos and stuffed animals.

Second, the economics of the copyright industries can be characterized as often involving large investments and great risks. It is well known that a substantial majority of films, theatrical productions, recordings and books do not turn a profit. Investors in these industries can accept these risks only because of their ability to capitalize upon the rarer successes. These successes can often be achieved, and any sizeable investment justified regardless of degree of risk, only through the freedom that the producer or publisher has to adapt the work for a variety of media and purposes and to market it -- and subsidiary works -- in a manner designed to maximize revenues. In addition, an entrepreneur's ability to borrow monies for future endeavors against the collateral in a film or software catalog, for example, will be greatly reduced if lenders believe their security interests or commercial assessments may be impaired by persons not party to the loans.[21] This would happen if

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[21]The vice president of a major California bank has indicated to the writers that if moral rights could hinder or prevent motion picture copyright owners from freely seeking all potential markets for their films then his bank would be

(continued...)

an individual contributor -- owning no copyright rights -- could prevent a studio, software house or text publisher from fully marketing adapted versions of a film, program, or textbook series without that particular individual's consent.

Third, many of the works that are produced in these industries are intensively collaborative. A motion picture film, for example, is the product of the creative efforts of the producer, the director, the screenwriter, the actors, the cinematographer, the set and costume designers, special effects designers and other technical personnel, not to mention the authors of the underlying literary and musical material commonly incorporated into films. Magazines and newspapers are the product of the comingled efforts of publishers, news and feature writers, editors, artists and photographers. Book publishing, particularly of educational, professional and reference works, is also a highly collaborative undertaking involving a great many individual contributors -- often in varying disciplines or media -- to a single work, project, or cohesive series. Music and recordings are commonly the result of the blended talents of

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[21](...continued)
reluctant to lend production monies against such collateral because its value would be, essentially, impossible to calculate. See also, H.R. Rep. No. 100-609, 100th Cong., 2d Sess. at 37 (1988) (concerns of international film producers).

several composers, lyricists, performers, recording engineers, and producers. Greeting cards reflect the merged efforts of researchers, designers, writers, and illustrators. And successful software and improved product releases are frequently the work of multiple designers and cooperating or successive programmers. In order that these kinds of works can be created and disseminated (in some cases under severe time constraints), the law must unambiguously identify those having the power and responsibility to make binding creative and business decisions. To subject such persons to idiosyncratic, individual interventions at virtually any time and far into the future could destroy their ability to undertake works for which there is great or potential popular demand, because they would never -- in the near term or many years hence -- have the confidence they have today in their ability freely to market their product as they deem appropriate.

A final characteristic of these industries relevant to any consideration of moral rights is the vast proliferation of versions, media and channels in and through which creative works can be cast and disseminated to the public. Theatrical films are shown on broadcast and cable television, are marketed overseas (with dubbing or subtitles) and en route, are distributed to the public in the form of videotapes and

discs, and are frequently converted into book form. Recordings and music are transformed into music videos, sound tracks, and innumerable popular and instructional arrangements. Books are transformed into a wide variety of subsidiary media; trade books, for example, are routinely excerpted, abridged, and recorded on audiotape, while educational and news materials are increasingly converted into video form, computer software, and data bases. Textbooks, reference works, and computer programs are frequently revised to assure currency, meet institutional requirements, and provide enhanced features. Virtually all of these conversions require editing, translating, or some other form of adaptation in content or manner of presentation. These adaptation rights have long, under United States law, been exclusive to the owner of copyright. The right of the copyright owner to decide whether, when and how to make these adaptations is an essential element in attracting investment into the entertainment and publishing industries. And an absence of undue encumbrance on that right is critical to assure the broad dissemination of information and entertainment to all segments of the public.

IV

MORAL RIGHTS IN CONFLICT WITH UNITED STATES LAW AND POLICY

Were moral rights -- particularly the right of integrity -- to be incorporated into United States law, that would inevitably create deep conflicts with fundamental principles that have nourished the U.S. copyright community, the American public, and the worldwide audience for our entertainment, educational, and technological products. Even if courts, in attempting to resolve these conflicts, were ultimately to subordinate moral rights to property rights and standard practices in particular cases, the continuing uncertainties and potential of litigation would have a serious destabilizing impact upon the operations of the creative industries and thus, ultimately, upon the public, because the distribution of new or adapted works would be delayed or prevented.

These conflicts cannot readily be resolved by legislation. The principles endangered are too important and the conflicts too inherent in any moral rights regime: the

droit moral concedes primacy to the subjective purpose or whimsy of individuals; it cannot be effectively bounded by rules or standards that would lead to reasoned predictability. A legislature could try to "fine tune" a moral rights regime; it might -- and in certain respects (e.g., relation to contract) virtually must, if it proceeds -- limit the doctrine's reach by carving out exemptions or by limiting the exercise or duration of such rights and the class of beneficiaries thereof. But, at root, a legislature that is sensitive to these conflicts can likely only create a patchwork of concessions, exemptions, and limitations that would serve little purpose but to jeopardize a working -- thriving -- system. It is of course not inconsistent with the legislative role to compromise and adjust competing interests. But that delicate task, at its best, usually follows demonstrable need and entails preservation of admirable values and institutions. Invocation of and tinkering with a comprehensive moral rights doctrine does not fit either criterion.

In the portions of this paper that follow, we examine the principles with which an expansive moral rights doctrine conflicts: rules and traditions of copyright, contract, and property; the role of courts; and public interests.

A. The Conflict with Copyright

1. The Exclusive Rights. Copyright law now gives copyright owners several exclusive rights, including the right to reproduce the copyrighted work and the right to base derivative works upon it. If an author has transferred a copyright to another, the right to develop and use the work belongs exclusively to the transferee. Under current U.S. law the author, having been remunerated for the transfer, can neither freely license others to reproduce or adapt the work nor prevent others who are authorized from doing so.

Under a moral rights regime, however, the author retains the right, even after the transfer of copyright, to impede or prevent the preparation or use of derivative works, which of necessity contain "alterations" or "modifications," or the manner of presentation of the work itself.[22] Graphic artists or photographers could complain that someone to whom they had transferred or licensed their copyright without pertinent qualification had cropped their works in a fashion they considered unartful or juxtaposed them with text or other artwork they viewed as unworthy. A novelist, having transferred to another the exclusive right to convert his story into a motion picture film, could claim that the resulting film distorted his setting, characters or story

[22]See, e.g., Ginsburg at 90 n. 36.

line. A member of a school textbook or software development team or one of dozens of contributors to a reference work, notwithstanding employment or negotiated confirmation of rights in a publisher, might seek to restrain modification of the work to meet the needs of electronic distribution, topical currency, or institutional regulation.

These are not hypotheticals crafted to demonstrate extreme positions of moral rights advocates. They are, rather, drawn from litigations and commentary in countries having moral rights regimes.[23] A few examples of the difference between copyright commerce in the United States and in states having strong moral rights regimes may be inferred from the decisions encapsulated below and in Part V.

- In France it is clear that "[an author's] grant of rights to adapt a work does not prevent the author from asserting his moral right of integrity against authorized adaptations which the author finds objectionable."[24]

- The Canadian creator of a sculpture portraying geese in flight enjoined the owners of the sculpture (who owned the shopping center where it was displayed) from draping the geese with colored ribbon as part of a Christmas display. The court

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[23]If a national moral rights regime were adopted in the United States, it is not implausible to suspect that U.S. courts would look to such foreign decisions for guidance, particularly where the decisions were rendered by courts in Berne member states.

[24]Ginsburg at 90, n. 36 (emphasis in original).

credited the sculptor's objection to an offense to his honor and reputation as a result of the temporary seasonal ornamentation of his work.[25]

- A dispute that found its way into both United States and French courts clearly demonstrates the difference between the two systems, and shows the potential breadth of moral rights claims. The composer Dmitri Shostakovich protested not the alteration or distortion of the content of his music, but rather the use of one of his compositions -- which was, according to copyright analysis, in the public domain -- on the sound track of a motion picture film that he believed portrayed the Soviet Union in an uncomplimentary light. His claim that this constituted an illegal distortion of the integrity of his music was rejected in New York but sustained by a French court.[26] Putting aside for the moment other important problems in such "context" applications of the droit moral, it is difficult to determine how users (including authors) of works are to discern the feelings of predecessor creators about potential uses, short of seeking their consent (or that of their heirs) in each case -- an alternative that is impossible to reconcile with the principle of public domain or of copyright transfer and ownership.

- The well-known Paris department store, Galeries Lafayette, used, in its window decorations, certain reproductions of public domain paintings by the French artist Henri Rousseau, who had died more than sixty years before (so that the copyright had expired). The reproductions -- which did not bear Rousseau's name -- employed different colors from the originals and altered some images. The artist's granddaughter succeeded in having a court

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[25]Snow v. Eaton Centre, Ltd., 70 Can. Pat. Rptr. 2d 105 (Ont. High Ct. 1982).

[26]See references in Merryman at 1039. See also the temporarily successful claim of the artist DeChirico for the context in which his work was displayed at the Venice Biennale of 1950, with his youthful works allegedly being overemphasized. Merryman at 1032-33.

order the reproductions removed.[27] This result, of course, is totally at odds with the concept of the public domain as understood in the United States.

- When a producer decided, for artistic reasons, to delete a scene from an opera during a performance in France, the artist who had painted the stage sets convinced a court that his moral right was violated by the deletion. The court ordered that all future publications and advertising should state that the scenery in question was not being shown because of the excision of the scene from the opera.[28] In the United States, unless the artist had a contractual right to have all his sets used, the producer would violate none of the artist's rights by eliminating the scene; indeed, accession to the non-contractual demands of individual contributors to such a collaborative venture would be inimical.

- In Italy, motion picture directors may successfully claim that the televised showing of their films with commercial interruptions violates their right of integrity. Whether relief is to be granted depends on the court's aesthetic determination, on a case-by-case basis, regarding the nature of the film, the frequency and duration of the interruptions, and any possible resulting unfavorable opinion of the character of the work on the part of the viewing audience.[29]

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[27] Judgment of March 13, 1973, Trib. gr. inst., Paris; discussed in Merryman, The Refrigerator of Bernard Buffet, 27 Hastings L.J. 1023, 1030 (1976) (hereafter "Merryman"). Absent attribution, public confusion was not likely. Cf. fn. 13, supra.

[28] Leger v. Reunion des Theatres Lyriques Nationaux, [1955] Tribunal civil de la Seine, discussed in Merryman at 1029-30.

[29] Nimmer & Geller, International Copyright Law and Practice (1987) [Italy] at 62-63. This appears to be considerably less attentive to contractual arrangements, and to invite much more judicial assessment of aesthetics, than is the case in the United States. Cf., e.g., Preminger v. Columbia Pictures Corp., 49 Misc.2d 363 (Sup. Ct. N.Y. Co.), aff'd, 25 (continued...)

The foreign principles or results just recounted would generally not obtain under current law in the United States. Absent contractual restraints, freedom to reproduce and adapt public domain works, to adapt and present works under license or copyright ownership, and to use copies of works in a manner that does not infringe the copyright (where it is owned by another) are fundamental to copyright business today. Nor should it be otherwise. It would be untenable in this country if the proprietor of a retail establishment, or any other purchaser of a piece of sculpture, were liable for stringing holiday lights thereon, or placing a flower pot at its base. It would be equally untenable -- and of far graver public and economic consequence -- if the producers of a motion picture had to get post-production approval from the numerous participants in the film's creation in order to market, e.g., a videotape copy or authorize its exhibition with customary commercial insertions on free television, or if other copyright owners had to disregard their contractual rights and seek individual consent to make otherwise lawful adaptations of their works.

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[29](...continued)
A.D.2d 830 (1st Dept.), aff'd 18 N.Y.2d 659 (1966); but see Stevens v. National Broadcasting Co., 150 USPQ 572 (Ca. Super. Ct. 1966).

Quite apart from this doctrinal conflict with copyright, according the author a broad integrity right would have a devastating impact upon creative development. The right to prepare "derivative works" (software adaptations, musical arrangements, audio and video versions, anthologies, translations, enhancements, dramatizations, revised editions, condensed versions, and the like) is frequently the most valuable exclusive right the copyright owner has today. Authors and publishers will often see no profit until a book is adapted into audiotapes, condensed versions, computer software, foreign-language versions, or motion picture film. A copyrighted motion picture will often turn a profit only after it is adapted for television and cable transmissions, formatted for videocassette and videodisc sales, and dubbed or subtitled for foreign distribution. Software publishers can expect little consumer attraction to a product that cannot be readily enhanced to add features or eliminate problems.

Persons considering whether to invest in the creation of these works, anticipating impact on their later adaptation and distribution, will be discouraged if there is a substantial risk that an individual contributor may claim that the integrity of the contribution has not been preserved. If the copyright owner cannot freely adapt the

work, not only will copyright doctrine be profoundly undermined, but also public access to creative works and their adaptations will be jeopardized, and the availability of alternative forms of public distribution will be limited. This is particularly disturbing today, as new technologies make possible exciting new ways of communicating original works and adaptations, and resurrecting older treasures for new audiences.

2. Copyright Ownership. Granting broad moral rights to authors would also conflict with basic principles of United States copyright law that allocate ownership rights in jointly authored works and in works made for hire.

a. Joint Works

Under United States law, a joint owner possesses an undivided interest in the copyright, with the attendant freedom to independently license or otherwise market the work or transfer that right to a third party (subject in each instance only to a duty to account to the other co-owners). Under the prevailing rule in moral rights jurisdictions, every individual co-author retains the right to protest against the divulgation (i.e., first publication) or the adaptation of the work, even when the divulgation or adaptation is satisfactory to all of the other authors. The effect is to require unanimous agreement among all co-owners

before a completed work or adaptation can be presented to the public. As noted by the Copyright Office "[t]he [contrary] rule in the United States . . . facilitates the dissemination of works owned by two or more persons."[30] This is thus another example of how moral rights not only conflict with U.S. copyright doctrine but also impede the public's access to works.

b. Works Made For Hire

Moral rights jurisdictions also uniformly treat as the "author" of a work an employee who has prepared the work within the scope of his or her employment. The conflict with the United States doctrine of "work made for hire" is obvious. Our doctrine rests on an appreciation that, if copyright is to provide encouragement to write and publish, the incentives should be given to those with economic and creative control over the authorship process. In the employment context, that person is the employer, who assumes the risks of the enterprise and who compensates the employee for the latter's services.

Foreign copyright law, reflecting comparable economic realities, often creates the fiction that there is an imputed assignment of copyright from employee to employer. But

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[30]Copyright Law Revision, Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law 89 (1961).

because moral rights may be owned only by natural persons, employees are frequently given integrity and paternity rights that conflict with the property rights of their employers. Such an allocation (and contention) of rights is, of course, precisely the converse of that purposefully made[31] by United States law, which treats the employer as both the initial copyright owner and the author of works prepared by employees within the scope of their employment.

Granting employees moral rights -- such that they could claim a measure of control over the future uses to be made by an employer of works prepared in the course of employment -- would thus be altogether incompatible with both the governing United States law and the economic assumptions which have shaped it.

B. The Conflict with the Public Interest

A fundamental purpose of copyright is to further the public's interest in access to diverse sources of information and entertainment. This recognition takes three forms: the understanding that copyright's incentives will induce authors and entrepreneurs to create and distribute original works of authorship, the extent to which fair use permits certain uses of copyrighted works, and the free availability for any use

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[31] See H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 121 (1976) (rejection of limitations on ownership under work for hire doctrine).

of any work whose copyright has expired. The first needs little additional elaboration; as previously discussed, the uncertainties engendered by a strong moral rights regime could only serve as disincentives to investment, impair creation and distribution of new and adapted works, and limit the channels of public dissemination. The last two are considered here.

1. Fair Use. The fair use doctrine serves the public interest by permitting persons, without the consent of the copyright owner, to make certain reasonable uses -- typically for a socially constructive purpose, or for a "productive" one in the creation of a second work -- that do not significantly impair the economic interests of the owner. It thus amplifies the role of copyright in encouraging the creation and dissemination of works.

If the lofty purposes embraced within the fair use doctrine -- teaching, scholarship, news reporting, parody and critical commentary -- are regarded as sufficiently weighty as to justify incursion upon the economic rights of the copyright owner, they should also justify incursion upon the integrity right of the author. Indeed, many uses traditionally regarded as fair -- such as parody and critical commentary -- may be more likely to generate complaints from an author than from a third-party copyright owner, and so the

need to shelter such uses against integrity claims may be greater. The hospitality that our law has afforded to these uses, including, for example, the unauthorized substitution of satirical lyrics for those of the original composer[32] and the use of reasonable excerpts in reviews, news reports, and the like,[33] would surely be undermined were the original author permitted to protest against such uses as an assault, by reason of parody, objectionable "context," or content truncation, upon the integrity of his work. Yet such claims could well be embraced by moral rights doctrine.[34]

Even the right of paternity would in some instances burden reliance upon the fair use doctrine. The long-established right to make "incidental" uses of copyrighted works, i.e., the reproduction of small portions of others' works within a larger creative or reportorial

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[32]Berlin v. E.C. Publications, Inc., 329 F.2d 541 (2d Cir. 1964); Fisher v. Dees, 794 F.2d 432 (9th Cir. 1986).

[33]Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law 24 (1961).

[34]See, e.g., text at n. 25, supra; text and n. 48, infra. Representatives of U.S. educational groups have been sensitive to this possibility: "Every time we hear questions of right to recall, integrity, paternity, not only gives us concern of what could happen to our [fair use] rights, but it raises issues with respect to First Amendment rights as well." Hearings Before the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the House Judiciary Committee on H.R. 1623, at 700 (testimony of A. Steinhilber for Educators' Ad Hoc Committee on Copyright).

context, could be jeopardized if it were necessary for the user conspicuously to identify and credit the author(s) of the work incidentally utilized.

There appears no simple resolution to this conflict. It cannot be fully resolved simply by subjecting the exercise of moral rights to fair use analysis concerning the four factors in section 107 of the Copyright Act, because they are directed precisely to the economic aspect of copyright that moral rights analysis ignores. Conceivably, the addition of a fifth factor -- "the effect upon the subjective views or aesthetic feelings of the individual author, if any" -- might suffice, but its very terms are repugnant to the First Amendment values of fair use and make manifest the perils of accommodating fair use principles and moral rights.

2. Limited Duration of Copyright. Many foreign nations treat the right of integrity as surviving the death of the author, either for a fixed term of years, or forever. This is, of course, contrary to the prevailing doctrine of United States law to the effect that "personal" torts such as defamation and privacy are extinguished by the death of the injured party.

If a right of integrity were perpetual or in excess of the term of copyright, it would also conflict with the "limited times" restriction that the Constitution imposes

upon Congress's power to enact copyright legislation. Among the most fundamental of U.S. copyright principles is that at the expiration of a finite term of copyright a work becomes a part of the public domain. Thereafter it may be copied by anyone in part or in whole and used and adapted freely in all forms of expression. As the Supreme Court has stated, the limited grant of copyright "is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired."[35]

It should be obvious that the public domain would be gravely burdened if authors and their heirs were able to limit the public's access to works whose copyright has expired by invoking moral rights. (In certain foreign nations where moral rights are recognized, governments have established agencies that in effect censor new works derived from important public domain works to assure aesthetic orthodoxy, and place a formal government imprint on texts, translations or abridgments. This inconsistency with United States law is too stark to require elaboration.)

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[35]Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984).

C. The Conflict with Property Law

Incorporation of a right of integrity into United States law would also create tension with certain fundamental principles of property law.[36] For example, a person who purchases a sculpture today has the unquestionable right to place the work in any lawful setting; to turn over possession to another; to let it gather dust in a closet; to drape it with holiday lights; to permit it to deteriorate with the passing of time; or to refrain from any of these actions. Similarly, the owner of a structure generally has the right to add all manner of decoration or new structural elements, to remove such additions, or to tear the building down.

By invoking the right of integrity, however, an author could interfere with such freedom of choice. The author could, for example, insist:

- that he or she be given access to a work for purposes of preservation or restoration;
- that the owner of the work be directed to place it in such a location as to reduce exposure to the elements or to wear and tear;
- that a large outdoor sculpture not be dismantled;

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[36]For a critical assessment of two recent French court decisions, which pitted moral rights against contract and property law, see Francon & Ginsburg, Authors' Rights in France: The Moral Right of the Creator of a Commissioned Work to Compel the Commissioning Party to Complete the Work, 9 Colum. J.L. & Arts 381 (1985), especially at 384-85 (hereafter "Francon & Ginsburg").

- that a mural on a wall not be obliterated (or that the wall not be pulled down);
- that particular adornments or additions to owned structures and artworks be removed or prohibited.

The enforcement of such claims would not be surprising examples of moral rights theory, but would conflict with customary property and privacy interests of owners of structures and works of art in this country.[37]

D. The Conflict with Contract Law

Under the United States legal system, economic rights are usually created, defined and allocated by contract. Our copyright law, after creating certain rights and granting them to authors, expressly permits authors to transfer or license any or all of their exclusive rights. Contract law permits the making of enforceable agreements regarding copyright ownership, licensing, and adaptation of works,

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[37]See text and n. 24, supra; text and n. 46 and preceding ¶, infra. It is undoubtedly true that our legal system occasionally permits limits upon the free use of property by its owners, as seen in zoning, nuisance and landmark preservation laws. But it is at least questionable that the possession, placement and use of works of art create hazards to the public interest or claims of particular aesthetic stature sufficient to justify governmental intervention. Where would the line be drawn between those works deserving of such intervention and those not? Should there not be an obligation on the part of government to compensate the owner for the takings of property that would result when the right of integrity was invoked by the artist? Although state statutes according certain integrity rights to works of art have existed in several states for several years, there appear to have been few claims brought thereunder.

compensation, creative participation, credit, working conditions, and the like. The economics and the traditions of the various copyright industries have produced an array of contractual practices, some of them shaped by collective bargaining of strong and sophisticated unions. Even where contracts are individually bargained, a successful author will receive rights in a contract not available to authors who lack a proven track record. Granting to authors full rights of paternity and integrity would severely distort both the contractual arrangements long in place and the environment in which they are negotiated.

A publisher typically has legitimate interests in negotiating for substantial control over the editing and marketing of books. In educational publishing, for example, it is the publisher who often develops the concepts and themes for instructional materials, selects and supervises the work of contributing authors, assures coordination and continuity of instructional materials, and must accommodate the materials to a wide range of educational and community imperatives. It is essential that in this and similar situations the publisher exercise centralized editorial control, without fear of complaints by individual text writers and other creative contributors -- either immediately after concluding their work or far in the future -- that

their work has been improperly edited or modified. The appropriate vehicle for allocating the rights of authors and publishers is by contract; not by legislation.

The need for editorial control, free of an author's subjective veto, is evident in other works that are the product of many people's efforts, including magazines, software, motion pictures and television productions. All these works require that financial and editorial responsibility over the contributions of collaborators be centralized, and that the respective roles of editor/producer and creative contributor be regularized. Throughout the United States copyright industries, the tradition has been to do so through contract or consensual understanding, with provision being made as appropriate for compensation, for creative control, for credit, and the like.

There is no compelling justification to turn the world of copyright business upside down by overriding these longstanding relationships and predicates for predictability. To declare in a statute that individual contributors should have an indefeasible right to disavow contractual arrangements and grants, and to limit the editorial and marketing discretion of a publisher or film producer, would destroy the legal and economic underpinnings of the world's strongest copyright industries. Ordinarily, legislatures in

the United States do not grant to individuals a right that overrides free individual or collective bargaining, absent demonstrable evidence of abuse that has resulted in serious adverse social or economic consequences. No such demonstration has been made here.

F. The Conflict with the Judicial Role

A consistent theme in United States copyright jurisprudence has been that judges are ill-equipped to make rulings on matters of aesthetics. The most well-known and frequently cited source for that proposition is the opinion of Justice Holmes in Bleistein v. Donaldson Lithographing Co.,[38] which concluded that it was not for judges to engage in "aesthetic evaluations":

> It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits.

Yet it is inevitable -- and foreign experience confirms this conclusion -- that enforcement of moral rights would compel courts to make judgments about aesthetics and other highly subjective matters, for which our courts simply do not possess -- and should not be made to construct -- adequate

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[38]188 U.S. 239, 251-52 (1903). See also, e.g., Baltimore Orioles, Inc. v. Major League Baseball Players Assoc., 805 F.2d 663 (7th Cir. 1986); Knickerbocker Toy Co. v. Winterbrook Corp., 554 F.Supp. 1309 (D.N.H. 1982).

measuring rods. Moreover, the uncertainty about what standards courts would apply if they had the duty to make such rulings, together with the inherent unpredictability of any litigation, would significantly undermine planning and investment in the copyright industries. A court adjudicating a claim of violation of the integrity right would likely feel compelled to refer to the language of Article 6-bis of the Berne Convention in determining whether there has been "any distortion, mutilation or other modification, or other derogatory action in relation to" the plaintiff's work. Few cases are likely to raise such a simple questions of interpretation.

The line between legitimate uses and violations of the right of integrity would be exceedingly hard to draw. Among contemporary artists, the reproduction and chopping up of others' works -- without permission -- is hardly unknown, either in the "mainstream," where collagists, recording stars, and musicians cut and paste bits and pieces of others' photographs, paintings, musical compositions and sound recordings in the pursuit of art (and profits), or among the avant garde, where dicing and selling pieces of a Picasso is viewed as a profound artistic experience.[39] And in cases of

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[39]See, e.g., Morris, When Artists Use Photographs: Is It Fair Use, Legitimate Transformation, or Rip-Off? Art News

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copyright owner-authorized activity, such as licensed motion picture adaptations of novels, directors and other authors commonly exhibit little practical or doctrinal concern for the integrity rights of their predecessor creators.[40] The questions raised by the foregoing demonstrate the substantial inconsistencies in the positions of many moral rights advocates. Among other explanations,[41] the very individualistic nature of aesthetic judgment clearly is one.

Under a moral rights regime, the term "distortion" is quite subjective, and the term "modification" appears to be so vague as to be potentially limitless, including all forms of reproduction, adaptation, parody, and even selective quotation. (The phrase "other derogatory action in relation to" an author's work could be construed, and has been

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[39](...continued)
January, 1981 at 102; Kernan, The Great Debate Over Artists Rights, Washington Post May 22, 1988 at F1.

[40]Thus, the Register of Copyrights has noted: "Directors have argued that [novelists, short story writers, composers, and others whose existing works are later incorporated into motion pictures] should have to rely on contractual protections for material alterations to their works in motion pictures. This position is fundamentally at odds with the directors' argument that they should not have to rely on contractual protections in their dealings with producers." Technological Alterations To Motion Pictures (U.S. Copyright Office, March 1989).

[41]At least in some cases, moral rights appear to be urged in order to provide bargaining leverage against publishers and producers, rather than truly to protect all creators' reputations.

construed in other nations, to include negative criticism.) In sum, the typical formulation of the integrity right lends itself to such a broad construction as to raise serious issues of impairing fair use and free speech under the Copyright Act and the First Amendment.

A court ruling upon a moral right claim would also have to determine whether a work's alteration or modification were "prejudicial to the author's honor or reputation." A somewhat similar standard is, of course, used in defamation cases; but (putting aside whether there is any need for a national authors' defamation law) here there is a wealth of case law to assist the court in giving meaning to the standard, the requirement of falsity introduces an objective element, the claim terminates upon death, our courts have interposed protection for First Amendment interests -- and even then the standard remains somewhat elusive. It would likely be much worse in an unrestrained moral rights context. The questions whether changes in a work or its presentation:

- would be likely to be detected by an audience,
- would, if so detected, be attributed to the artist or author, and
- would thereby result in prejudice to the author's "honor" or reputation

seem both particularly important and difficult to answer.

The problem of unpredictable application of vague standards is compounded when the test of "prejudice" applied by the court is deemed to be a subjective one, to be applied through the eyes of the author.[42] Even a more "objective" standard to determine whether there has been a "distortion" that undermines the author's "honor and reputation" will not provide clear guidelines. An objective "reasonable person" standard, effective enough in evaluating claims of negligence, would be difficult to apply in the context of modifications of works of authorship. Artistic sensibilities, and the likely battle of expert witnesses, do not readily provide standards to which the public is normally expected to conform its behavior.

Other judicial standards, equally elusive, might be imported into a right of integrity were it to be incorporated in United States law. Some foreign nations having moral rights regimes nevertheless permit a licensee or copyright owner to make changes that are "necessary to" or "inherent in" adaptation to a different medium; to make changes that the author "could not in good faith refuse" to permit; or changes that do not constitute a "distortion" of the author's work. Foreign courts have also looked at the plaintiff's

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[42]See, e.g., Snow v. Eaton Centre, Ltd., 70 Can. Pat. Rptr.2d 105 (Ont. High Ct. 1982), discussed at text and n. 25, supra.

claim to see whether it would be a "misuse" or "abusive assertion" of moral rights, or a "vexatious" action based merely upon an artist's "hypersensitivity," or an "unreasonable refusal" to permit the defendant's use.

What do all of these terms and standards mean? How would United States courts apply them? Can they be reasonably anticipated in the rush to put together a newspaper or magazine issue comprising many contributions, or even in the more unhurried preparation of other works? Are these jury questions, or questions for the court? Are courts or judges equipped to distinguish an "inherent" or "necessary" modification from a "distortion," or a "vexatious misuse" from a good faith assertion? All of these tests require judicial determinations (and business assessments of those determinations) regarding aesthetics, artistic and literary adaptations in a host of media, questions of taste, and matters of human psychology. Judges since Holmes have come to understand that this is the path down which courts ought not be invited, let alone compelled, to go.

38-276 - 91 - 14

V.

THE FOREIGN EXPERIENCE

It has been suggested that the existence of successful copyright industries in countries having strong moral rights regimes "proves" that moral rights are substantially benign and that the conflicts discussed above should not deter consideration of a comprehensive moral rights law for the United States.

This part demonstrates that the application of moral rights law appears more random -- and hence unpredictable -- than benign and that devices used in foreign countries to moderate the extent to which moral rights can interrupt, delay, or prevent entrepreneurial endeavors simply cannot be reliably exported into the United States.

Initially, however, we would question the assertion that moral rights have been a harmless doctrine abroad. Since the great flaw in droit moral is its inhibition of creative works, it is difficult to prove its impact with clarity, to show what might have been. Yet it is entirely reasonable to assume that while droit moral may not in the short run stifle the activities of individual authors, the possibility of aesthetic veto over the initial and secondary marketing of

films, books and other publications, software and other works surely will impair the investment that gets those creative works to the public and, ultimately, the funds available to support their creation.[43] And there is at least some clear reason to question whether copyright industries flourish where moral rights are strong, at least to the extent that they might otherwise.[44] Moreover, when viewed from the perspective of U.S. custom, practice, law, and policy, many moral rights decisions of foreign courts and assertions of moral rights commentators are quite disturbing. See Parts IV and V.A.

To the extent that moral rights may not be disruptive abroad, the same conclusion would not follow its transplant to our shores. A comprehensive moral rights regime, if adopted in the United States, would have to be superimposed upon a carefully crafted, painstakingly balanced, and indisputably well functioning copyright law and creative system. Because moral rights would serve as a new

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[43]This was reportedly confirmed by the international film producers who expressed concerns over moral rights to a U.S. delegation. See n. 21, supra.

[44]The French Ministry of Culture, for example, recently announced its intention to subsidize directly the production of motion pictures in France in the amount of $30 million per year. And it is apparently acknowledged that the limitation of French moral rights in software is in part attributable to the objective of promoting that country's programming industry. See n. 20, supra.

limitation on copyright owners' rights, the current balance would be destroyed. As the Supreme Court has recently noted, much of the current copyright law consists of compromises between the views of contending parties to which these parties agreed.[45] Extraordinary new limitations, such as those created by moral rights, to which many parties strenuously object, should not be imposed on the current, successful system.

One of the safety valves that may make moral rights relatively benign abroad is the fact that the doctrine of stare decisis need not be observed in civil law nations. This permits French courts, for example, to apply moral rights (or not) to a particular set of facts as if no other (or even higher) court had considered the issue. This practice would, of course, be untenable in the United States, where the decisions of sister courts are rarely ignored and those of senior courts must virtually always be followed.

Likewise, the United States recognizes the fundamental importance of freedom of the press and the security of contract and property rights. Each of these powerful constitutional concerns could be implicated by the enforcement of a moral rights regime. If an author, after

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[45] Community for Creative Non-Violence v. Reid, 109 S.Ct. 2166, 2177, n. 16 (1989).

creating a manuscript and transferring or licensing the copyright therein, could prevent the publication at any time of a reasonably edited version to which he or she objected for content, format, or other subjective reason, the publisher's rights and public interests would have been severely constrained by any domestic measure, whatever the standards of other societies. Additionally, many of the devices that limit the vigor of moral rights in practice abroad are grounded in nuance, custom, informal understanding and the like, factors that have grown over time and cannot be suddenly imposed. See Part I. Too, these devices frequently involve no less ambiguity and uncertainty than would strict enforcement of moral rights.

A. Canvass of Foreign Decisions

A recounting of the situations in which moral rights have been enforced outside the United States reveals how inconsistent the doctrine, fully incorporated, would be with United States legal principles and business practices. To understand the impact of moral rights abroad, moreover, it must be emphasized that the doctrine is both asserted and judicially enforced with orthodoxy, on the one hand, and ignored in practice and elaborately conditioned through a variety of techniques, on the other. In civil law countries this apparent contradiction may not be particularly

troubling. In the United States, however, adoption of a moral rights regime would not necessarily be accompanied by the substantial flexibility that permits foreign systems to survive.

For businesses and entrepreneurs in the United States (indeed, for many authors themselves), one need not finely parse continental moral rights doctrine -- and the complex web of formal exceptions, informal accommodations and customary "winks" that make it perhaps less strictured in application than in appearance -- to apprehend that the adoption of a thoroughgoing moral rights regime in the United States would pose a substantial obstacle to the doing of copyright business. It is not necessary to wait for a string of judicial decisions to be rendered or for firms to diminish investment or suffer reversals for this to be said with some confidence: it is the uncertainty -- and the expense or avoidance that uncertainty engenders -- that makes the negative impact certain, yet difficult to prove with precision.

In addition to the examples set out in Part IV, the following cases demonstrate the broad reach of moral rights, as established by judicial decisions, commentary and statutes.

- A Dutch court granted relief to an artist whose mural, painted onto a building, was later

whitewashed over by the building owners. In another case, however, the Dutch court conceded that the tearing down of a building did not impair the integrity right of a muralist whose work had been painted on the walls. Taken together, these cases demonstrate as well the uncertainties endemic in moral rights regimes.

- In Switzerland and France, there is support for the proposition that additions made to a completed building can infringe the architect's rights of integrity.[46] A like result would be astonishing in the United States, where owners of real property have, subject to zoning and public safety requirements, virtually unlimited freedom to modify the appearance of the interior and exterior of their buildings.

- In performing a song in a cabaret in the Netherlands, a singer improvised upon the original text of certain lyrics. The singer's text was apparently "low brow" in humor and was found by a court to destroy the atmosphere of the song and lyrics as originally written. The court enjoined the future performance of the song with the altered lyrics.[47] The fair use doctrine of U.S. copyright law has often, but not always, provided the opposite results. In either case, U.S. analysis would be based more on economic and free expression concerns than on aesthetics.[48]

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[46]Nimmer & Geller, International Copyright Law and Practice (1987) [Switzerland] at 74 n.297 (hereafter "Nimmer & Geller [country]").

[47]Pres. Dist. Ct. Amsterdam, 21 Dec. 1978, discussed in Merryman at 1030-31.

[48]Compare Berlin v. E.C. Publications, Inc., 329 F.2d 541 (2d Cir. 1964) (parody use held fair); Fisher v. Dees, 794 F.2d 432 (9th Cir. 1986) (low-brow parody held fair use); and Elsmere Music, Inc. v. National Broadcasting Co., 482 F.Supp. 741 (S.D.N.Y. 1980) (same) with MCA v. Wilson, 677 F.2d 180 (2d Cir. 1981) (low-brow parody held infringing). See also General Mills, Inc. v. Henry Regnery Co., 421 F.Supp. 359 (N.D. Ill. 1976) ("Morey Amsterdam's Betty Crocker Crock Book

(continued...)

- The author of a children's book about to be published in the Netherlands succeeded in enjoining the publication of the book because the illustrations being used by the publisher as an adjunct to the author's text were held by a court to be sufficiently inferior as to prejudice the author's reputation and her value as an author of children's books.[49] Assuming that the publisher had contractual freedom to select and edit the illustrations, this result would generally not be supported under current U.S. law.

- An opera conductor ordered the alteration of certain stage directions in a production of a Wagnerian opera, claiming that the staging had created a scandal on opening night. A German court, upholding the stage director's claim that the modified stage directions offended the integrity of his work, enjoined the performance with the conductor's alterations.[50] The opera would thus apparently not be available to the public in the form chosen by the conductor, arguably to the public's ultimate detriment. It is hard to imagine the size of the class of individuals with the power, under a regime permitting such a decision, to demand concessions concerning the performance of a work as collaborative as an opera or motion picture. It is generally the law in the United States that a producer's or publisher's contractual right to make, market and perform a work is not subject to the post-production whims of one or more of the participants. To permit such interventions in the United States would likely greatly reduce the willingness of sponsors to fund free television broadcasts, for example, because the content of any

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[48](...continued)
for Drunks" not infringement of registered "Betty Crocker" trademark).

[49]Pres. Dist. Ct. Utrecht, 27 Nov. 1975, discussed in Nimmer & Geller, [Netherlands] at 45.

[50]Judgment of Aug. 14, 1975, LGE Frankfurt-on-Main, discussed in DaSilva at 31.

particular work might remain open to second-guessing long after contracts were signed.

- In Italy, an employer who approves and accepts works completed by an employee in the course of employment is not authorized to modify that work without the employee's consent, unless such modification is regarded as technically necessary to adapt the work to its intended use.[51] This is directly contrary to U.S. work-for-hire principles, as well as to custom, practice and investment objectives of domestic businesses, and to Congress' express determination not to modify those principles to restrict the scope of employers' rights.[52]

- In France, the statute expressly provides that the "existence or the execution of an employment agreement by the maker of a creative work shall not limit the maker's enjoyment of" moral and pecuniary rights; even journalists writing for publisher employers in the course of employment retain their moral rights in their writings.[53] If this were U.S. law, it would make the timely production of news and other current publications even more difficult than it is now.

- A number of European and Latin American nations override provisions of freely negotiated publishing agreements, limiting the publisher in the kinds of corrections and other editorial actions that it can make in a manuscript.[54] In Italy, the right of integrity imported into every author-publisher contract entitles the author, upon the payment of resulting expenses, to make any modifications in

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[51]Nimmer & Geller [Italy] at 40.

[52]See fn. 30, supra.

[53]Reeves, Bauer & Lieser, Retained Rights of Authors, Artists, and Composers Under French Law on Literary and Artistic Property, 14 J. Arts, Mgmt. & L. 7, 9 (1985) (hereafter "Reeves").

[54]Nimmer & Geller [Argentina] at 52, [Switzerland] at 74.

the work, and even to withdraw a published work from circulation "for serious moral reasons."[55]

- Under legal systems as diverse as those of Argentina and Poland, an author may bring an action for violation of the integrity right even against a transferee of copyright ownership, in the event the latter changes, supplements or abridges the work in a manner that "distorts" the work.[56] This contrast between allowable adaptation and proscribed distortion is a common feature of European legal systems. It is, however, not at all clear how one should distinguish between the permitted and the proscribed.

- In certain European nations, Italy among them, coauthors of a joint work must be unanimous in granting their consent before a work can be initially published, or modified or adapted to a new use. No single coauthor may make or grant the right to make such derivative works, as would be the case in the United States.[57] Should a dispute arise among coauthors, an Italian court may intervene and grant rights to publish or adapt, upon appropriate conditions, if a refusal by a joint author is "unjustified." Similarly, France grants moral rights to all partners in a collaborative work; if there is a dispute over their respective moral rights, the statute provides that the courts will arbitrate.[58] These principles are contrary to U.S. law and its underlying policy.[59]

- Several foreign nations protect the author's right of integrity even after the expiration of

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[55]Nimmer & Geller [Italy] at 48.

[56]Nimmer & Geller [Argentina] at 51-52, [Poland] at 31.

[57]Nimmer & Geller [Italy] at 64.

[58]Reeves at 9.

[59]See fn. 29 and accompanying text, supra.

copyright.[60] Moreover, in order to preserve the integrity of works that have fallen into the public domain, nations such as Argentina and Brazil have created governmental agencies which have the power to approve for publication translations and other versions of such works and to bar the publication of derivative works that are not governmentally authorized and authenticated.[61]

This discussion illustrates the manner in which the right of integrity has been enforced in a number of foreign nations. Briefer attention can be given to the right of paternity, which has apparently been invoked with far less frequency. Although assertion of that right has not operated as an aesthetic veto to the extent that the integrity right has, there are any number of contexts in which such assertion is impracticable or inappropriate.[62]

- An architect in Switzerland was given judicial relief because his name was not mentioned on the church building that was constructed according to his plans, nor in the inauguration ceremonies, nor in related newspaper articles.[63]

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[60]France, Ecuador, and other nations influenced by the French legal tradition, such as Senegal, Benin, Central African Republic. See Ricketson, The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986, 467 (1987) (hereafter "Ricketson").

[61]Nimmer & Geller [Argentina] at 53, [Brazil] at 80, where the editor urges that the governmental agency should be flexible in giving attention to the needs of the general public by allowing the adaptation of classic texts to prevailing cultural levels.

[62]See also fn. 12, supra.

[63]Nimmer & Geller [Switzerland] at 74.

- The copyright law of Brazil requires that any person "using an intellectual work by any means or process" must identify to the public the names of the authors and the performers. The names of song composers and lyricists must be mentioned in radio broadcasts and motion picture films, whether or not the work constitutes an integral theme or main part of the broadcast or film.[64] The contractual credit practices of the motion picture industry in the United States are very complex; thus one generally sees exhaustive credits at the end of a motion picture, but only reference to a few "stars" on posters or newspaper advertisements.

- Contrary to law, and to practice in some (but not all) cases, in the United States, in certain foreign nations, paternity rights exist even for employees producing what would be regarded in the United States as a work for hire. Thus, although an employer in Belgium can prevent an employee from signing his name to a work authored in the scope of employment, the employee may prevent the employer from signing <u>its</u> name to the work.

That these examples are not anomalies, but are well within the mainstream of moral rights doctrine may be inferred from a respected treatise on the Berne Convention, which opines that the following uses would interfere with an author's integrity rights: typographical mistakes; imperfections in art reproductions (including poor colors); paraphrases, abridgments or any other "rewriting" of a text (even when done by the current owner of copyright); the

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[64]Nimmer & Geller [Brazil] at 77-78. A broadcaster who fails to comply with the requirement must "disclose the identity of the author or performer . . . for three consecutive days, at the time of day at which the offense was committed." Copyright Act of 1973, Art. 126.

rearrangement of a musical work in a different style; a caricature of a work of art. The treatise continues:

> It will be noted that the above examples relate to changes that are made in the course of reproducing or adapting a work. It is equally possible that a work may be distorted, mutilated or otherwise modified in the course of its performance or communication to the public, through the particular interpretation that is given to it by the performers or in the way it is presented. Thus, a competent actor may readily transform a tragedy into farce, and vice versa, without changing a word of the written text, and a theatrical or cinematographic director may entirely change the significance of a dramatic or operatic work by altering the location, period or "atmosphere" of the piece. It is true that changes of these kinds invariably involve the application of considerable independent creativity on the part of the performers, directors or producers. Nonetheless, article 6-bis makes no distinction between this category of alterations and those made in the course of reproducing or adapting a work, and it is to be assumed that the paragraph applies equally to both.[65]

Moral rights have thus been extended in foreign nations to a wide array of creative works and authors, and provide an aesthetic veto over a wide array of reproductions, of editing, arrangements and other derivative works, and of performances and displays. They have been also used to stifle commentary, criticism, parody, and the creative contributions of others.

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[65]Ricketson at 468-69.

B. Limitations on Moral Rights Abroad

Although not every foreign court confronted with the fact situations recounted in the preceding section would necessarily come to the same decision, the fact remains that many might. These decisions are plausible where moral rights are strong; they are not aberrational applications of the rights of integrity and paternity. And, as previously discussed, most if not all of them sharply conflict with fundamental principles and practices of United States law and business.

To the extent that the doctrine of moral rights has not attained notoriety for impairing the vitality of the copyright industries abroad, it is not because the restraints imposed by the doctrine are readily assimilated by those industries. The restraints are sometimes ignored in practice or are diluted in ameliorative statutory provisions or judicial rulings. (As noted earlier, however, these factors cannot be relied upon to diminish the adverse impact of a comprehensive moral rights regime in the United States.)

1. The Paternity Right

The extent to which moral rights, if they are not to hobble a nation's copyright industries, must develop over time in conjunction with a copyright law and business practices may be seen in the statutes of many nations that

expressly provide that the right of paternity is to be accorded only when usual and customary to do so. Thus, Israel gives the author the right to be named in "the accepted manner and extent"; and Sweden, "to the extent and in the manner required by proper usage."[66] Japan permits the omission of the author's name when that accords with "fair practice"; an example is the playing of a song as background music in a hotel, where attribution is regarded as impracticable.[67]

Canada amended its copyright act in mid-1988, and in particular its preexisting sections on moral rights. Section 12.1(1) of the Canadian Act now gives the author in certain circumstances "the right, where reasonable in the circumstances, to be associated with the work as its author."

Other countries apply a de minimis doctrine to the paternity right. For example, a court in Brazil held that an architect was not entitled to be credited on postcard reproductions of public monuments he had created.[68]

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[66]Nimmer & Geller [Israel] at 14; Berne Convention Implementation Act of 1987: Hearings Before the Subcommittee on Cts., Civ. Liberties, and the Admin. of Just., 100th Cong., 1st and 2d Sess., 1169 (1987).

[67]Nimmer & Geller [Japan] at 40.

[68]Nimmer & Geller [Brazil] at 78.

Great Britain enacted a new copyright law in mid-1988, and included detailed and heavily circumscribed grants of the paternity and integrity rights. A partial list of works for which no right of paternity is provided includes: computer programs and computer-generated works, works made for hire, works being permissibly used by virtue of the fair use doctrine, any work "made for the purpose of reporting current events," a work prepared for publication in a periodical or an encyclopedia or other collective work, designs of useful articles and anonymous and pseudonymous works. Moreover, the new British statute provides that the author shall have no recourse when he or she has waived the paternity (or integrity) right in a signed writing, or has consented to the unattributed use, or is deemed to do so by estoppel or other contract principles. The paternity right is even subject to a provision that it is not infringed unless the author in advance has "asserted" that right in a signed writing.[69]

2. The Right of Integrity

The right of integrity, although sounding virtually absolute in the language of Article 6-bis of the Berne

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[69]Copyright, Designs and Patents Act, 1988, ch. 48, §§77-79, 88.

Convention,[70] has theoretically been circumscribed abroad both by statute and by custom. Given the court decisions recounted above and in Part IV, however, it seems fair to question how effective these purported limitations have actually been.

In foreign jurisdictions that recognize the right of integrity, the author is frequently required in principle to assert that right in a fair, good faith manner. France, for example, generally regarded as the most vigorous proponent of the integrity right (and of moral rights generally), has developed the doctrine of "misuse," and forbids the assertion of the integrity right in an "absolute" or "arbitrary" manner.[71] Other nations decline to enforce the integrity right when its assertion is thought to constitute an "abuse"[72]; or when its assertion is contrary to morality or not in good faith[73]; or when the author's claim is vexatious and based on no more than hypersensitivity[74]; or when the

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[70] "[T]he author shall have the right . . . to object to any distortion, mutilation or other modification, or other derogatory action in relation to the said work, which would be prejudicial to his honor or reputation." (Emphasis added.)

[71] Nimmer & Geller [France] at 82.

[72] Nimmer & Geller [Switzerland] at 75; [Belgium] at 27.

[73] Nimmer & Geller [Greece] at 28.

[74] Nimmer & Geller [Germany] at 86.

author cannot in good faith refuse to give his permission to the defendant's modifications.[75]

Many nations recognizing the right of integrity permit licensees to make alterations and modifications in an underlying work when that is necessary in light of the nature of the work and the purpose of the use[76]; while others permit adaptive changes in an underlying work when necessary to make use of it in a different medium but only so long as the "essence" is not distorted.[77] This right to make reasonable changes in the course of adaptation is among the most significant limitations upon the right of integrity. It has been said of French law:

> [T]he adaptor of a work is not held to the same strict standards as those who reproduce, exhibit or perform work. When a creative artist authorizes an adaptation of his work into a different medium, he must allow a certain latitude in view of the differences existing between the two media concerned. It is sufficient that the adaptation preserve the spirit, character and substance of the work.[78]

While it is difficult to square these alleged accommodations to commercial reality with the results in many

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[75] Id. at 87.

[76] Nimmer & Geller [Japan] at 41.

[77] Nimmer & Geller [Hungary] at 53, [Poland] at 31.

[78] Reeves at 20-21. See also, Kwall, Copyright and the Moral Right: Is an American Marriage Possible?, 38 Vand. L. Rev. 1, 13 (1985).

of the cases previously discussed, it is easy to foresee insurmountable problems even if such accommodations are to be grafted onto moral rights doctrine that is, in turn, to be grafted onto U.S. copyright law. The difficulty in applying terms such as "misuse," "arbitrary," and "abuse," particularly when they are transplanted onto a functioning legal system rather than sharing in its development since its inception, should not be underestimated. Their application in this country would appear to require uncertain and expensive case-by-case elucidation by tribunals unsuited and inappropriate to the task of divining aesthetic motivation.

The right of integrity has also been facially modified abroad with regard to particular uses (e.g., instruction)[79] and to collaborative works, such as encyclopedias and periodicals, where there is a need for common creative and editorial oversight.[80] Some nations expressly give wide discretion to the motion picture producer in incorporating, adapting, and editing the contributions of the various creative individuals who participate in the making of the

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[79]Nimmer & Geller [Japan] at 41.

[80]Nimmer & Geller [France] at 82.

film.[81] German law allows adaptation and editing rights of underlying literary works, absent "gross" distortion.[82]

Also, despite moral rights lore in many nations to the effect that the integrity right cannot be relinquished by contract, law and practice not uncommonly are to the contrary.[83]

VI

CONCLUSION: THE MORAL BEHIND MORAL RIGHTS ABROAD

The moral that may be derived from this examination of moral rights as they have developed abroad is that they are extremely ill-suited for importation into the United States. Their development is rooted in a continental view of authors and their creations that is fundamentally at odds with the purpose of the United States copyright system. Their enforcement has taken place in civil law systems that place less emphasis on the principles of public availability of

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[81]Nimmer & Geller [Italy] at 63-64, [Poland] at 31-32.

[82]Nimmer & Geller [Germany] at 91.

[83]See Plaisant at 162, Kwall at 13 n. 48, Reeves at 17. See also, Nimmer & Geller [Germany] at 90-91, [Greece] at 30, [Poland] at 32, [Switzerland] at 77.

expressive works and the security of contract in the information and entertainment world than does this country.

Even apart from that, however, it would be unwise to superimpose broad statements of foreign law onto the United States' system while ignoring both formal legal limitations and the wide range of informal industry adaptations and accommodations that have evolved around the moral rights doctrine abroad, but that could not readily be applied here.

Moral rights "on the books" have sometimes proven different from moral rights in practice -- but neither form is less disturbing for the difference. Authors at times simply have not asserted moral rights, or have treated them as informally negotiable. The lore that moral rights are not waivable or that they are perpetual is honored widely in the breach. The lack of any refined tradition of stare decisis in civil law countries makes it possible for courts to invoke moral rights in one case and reject them in another while being substantially indifferent to the inconsistency.[84]

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[84]The difficulty of transplanting this civil law doctrine into a common law country may be seen in the 1988 statute that imported some aspects of the rights of paternity and integrity into the copyright law of Great Britain. The statute is riddled with exceptions of all kinds, from customary usages to works for hire to fair use to computer software to waivability. It seems clear that this statute will afford to British authors rights of paternity and integrity that are not significantly different from those already granted in the United States.

In sum, to import moral rights without all of the limitations found in foreign law would be the worst kind of legal transplant, going well beyond any acceptable policy justification and severely disrupting industry practices. On the other hand, to import moral rights with all of the usual foreign limitations would likely be virtually impossible. Those limitations -- some codified, many not -- are the products of a lengthy evolutionary process in countries of differing practices, customs and traditions, and are frequently dependent upon aesthetic and subjective determinations that exceed the competence and proper function of judicial enforcement.

The United States' position of leadership in the international market for copyrighted works has been established under the present law's recognition of the economic rights of creators, the validity of contracts, and meaningful safeguards against reputational abuse. To impose a foreign regime on the present system, which would amount to an unnecessary, new and unpredictable package of limitations on copyright owners' rights, could have only a dulling effect on all of our copyright industries -- industries that feed not only the public's desire for information and entertainment, but the marketplace of ideas as well.

ADDENDUM

This study was undertaken by Proskauer Rose Goetz & Mendelsohn at the request of the following organizations:

American Greetings Corporation

American Newspaper Publishers Association

Association of American Publishers

Harcourt Brace Jovanovich

IBM

Magazine Publishers Association

Motion Picture Association of America

National Music Publishers' Association

Printing Industries of America

Recording Industry Association of America

Software Publishers' Association

Turner Broadcasting

Warner Communications

WEINTRAUB
ENTERTAINMENT GROUP, INC.

Barney Rosenzweig
Executive Vice President and
Chairman, Television Division

January 31, 1990

The Honorable Robert W. Kastenmeier
Chairman, House Sub-committee on Courts,
Intellectual Property, and the Administration of Justice
2137 Rayburn HOB
Washington, DC 20515

Dear Mr. Kastenmeier:

I am writing at the suggestion of Charles Fitzsimons, Executive Director of the Producer's Guild of America, concerning certain "moral rights" and the motion picture industry.

I am a television producer of some standing in my community and the man who conceived and personally supervised every aspect of 127 hours of the television series "Cagney & Lacey"; there were a hundred different writers involved in that process and dozens of directors. The constants (show-in and show-out, week after week and season after season) were the stars and myself. Sharon Gless, Tyne Daly and Barney Rosenzweig made that show. We got the awards and if anyone is going to be granted any moral rights on this or any other project I am thus involved with, it better not exclude the producer.

In the early days of Hollywood, no one questioned what producer David O. Selznick was to "Gone With The Wind", or Pandro Berman to all those Fred Astaire and Ginger Rodgers films, or Walt Disney to his early work, or Arthur Freed to the MGM musical. They were the producers... the storytellers. Today in television the producer is still that person: the show-runner.

Television is a producer's medium. Ask the people who make and stand behind their shows - from Aaron Spelling to Stephen Cannell, Stephen Bochco, Len Hill, Edgar Scherick or Phil de Guerre. The definition of who does what in television today is not that different from what it was generally in Hollywood before a few critics in France coined the term "auteur" and the Writer's Guild took the producers, their traditional nemises, to court - thus all but destroying the Producer's Guild and giving leave for the studios themselves to usurp the name producer. (Thus, the Motion Picture Producer's Association which is, in fact, an alliance of manufacturers not a union of creative producers per se).

11111 Santa Monica Blvd., 20th Floor Los Angeles, California 90025 213-312-1363 FAX 213-478-5170 TLX 170747

For purposes of any moral rights to be granted, please understand that the producer is the storyteller. He or she is the one who decides what tale should be told to an audience. The producer then goes about the business of putting all the elements together to make that happen. He or she may write it themselves and or direct it themselves, thus becoming a single or a double hyphenate. Conceivably, the producer could even star in the film, as Charlie Chaplin did, or as many of our more entrepreneurial actors do today, but the basic function -- that of deciding to tell a particular story to an audience -- is the producer's role.

They may be overlapped, they may even be the same individual, but a director is hired to command the crew, to "block" the action and to aid the actors. A writer is someone selected to turn an idea into a screenplay - a blueprint for the director and production team. The producer is the story teller - visualizing it first, then putting together and supervising all the creative elements for the financiers and ultimately the audience - shepherding it through its conclusion and release.

Hoping this is some clarification for your purposes, I am

Respectfully yours,

BARNEY ROSENZWEIG

BR/mjr

cc: Senator Alan Cranston
Representative Howard Berman
Representative Mike Synar
Representative Mel Levine

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