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Dan Renberg

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The Money of Color: Film Colorization and the 100th Congress

by DAN RENBERG*

The new technology in the service of the artist is wonderful, but in the service of people who are not the originators of the film, it is a weapon.¹

Woody Allen on film colorization

Introduction

During the late 1980's, numerous time-honored black-and-white films were altered through the process of colorization.² Proponents of film colorization argue that the addition of color to black-and-white films revitalizes public interest in them.³ In contrast, some motion picture industry professionals assert that the colorization process "mutilates" a filmmaker's work.⁴ Meanwhile, classic film buffs are still recovering from the shock of seeing the national television debut in November 1988 of the colorized version of Casablanca, one of America's most highly-revered films.⁵


². According to Roger Mayer, President of Turner Broadcasting Company (which owns the MGM film library), pictures that have been colored or are about to be colored include: It's a Wonderful Life, 42nd Street, Arsenic and Old Lace, Key Largo, Maltese Falcon, The Philadelphia Story, and Yankee Doodle Dandy. Film Integrity Act, 1987: Hearings on H.R. 2400 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Judiciary Comm., 100th Cong., 2d Sess. (1988) [hereinafter House Hearing] (written statement of Roger Mayer submitted in opposition to the Film Integrity Act at 5).

³. See, e.g., Senate Hearing, supra note 1, at 69 (statement of Roger Mayer).

⁴. See id. at 24 (statement of Woody Allen).

⁵. Mathews, Colorization: Beginning to See Possibilities, As Time Goes By, L.A. Times, Nov. 9, 1988, at 1, col. 5.
Since 1987, the United States Congress has kept a watchful eye on the film colorization issue by holding several committee hearings. At these hearings some members of the motion picture industry recommended that Congress ban film colorization unless the consent of directors and screenwriters has been obtained. Other industry representatives, such as owners of black-and-white films, have urged Congress to protect their right to alter films in order to meet the perceived demand for colorized pictures.

Congress responded to the conflicting industry concerns by enacting the National Film Preservation Act of 1988, which established a National Film Preservation Board to select “culturally, historically, or esthetically significant” films for inclusion in a national registry. The Act also mandated labeling of any film selected by the Board that is “materially altered,” including those that are colorized. While some critics of colorization hailed this legislation as a victory for truth-in-advertising and a first step towards American moral rights legislation, the creation of a national film registry and a labeling requirement for a select group of films does little to appease those who strongly oppose colorization without the author’s consent.

Recent events indicate that the controversy over colorization is far from over. In November 1988, a French appeals court provided colorization opponents a respite from recent defeats by forbidding a French television station from broadcasting Ted Turner’s colorized version of John Huston’s classic

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6. See infra notes 82-88 and accompanying text.
7. See infra notes 89-91 and accompanying text.
10. Id. at § 178j(a)(5).
film *Asphalt Jungle.* The French court acknowledged Turner's commercial rights to the film, but found that Huston's artistic rights required that the film be broadcast only in its original black-and-white form.

In an unrelated development, Turner dropped plans to colorize Orson Welles' black-and-white masterpiece *Citizen Kane.* According to press reports, Welles had signed a contract with the producers of the film that could be construed to prohibit such alterations without his or his estate's consent. Turner Entertainment Company announced that it would instead restore a black-and-white print of the film for better television viewing.

This Article examines the response of the 100th Congress to the controversy over film colorization and explores the legal and legislative history behind the National Film Preservation Act of 1988. Part I explains the process of colorizing black-and-white motion pictures and the economic incentives behind it. Part II examines whether individuals who colorize films should enjoy copyright protection and suggests that the Copyright Office's 1987 decision to register most colorized versions as derivative works was correct.

Part III summarizes the conflicting arguments advanced by members of the motion picture industry and analyzes a bill introduced by Representative Richard Gephardt (D-Miss.) that sought to ban all material alterations made without the au-

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13. Huston was vocally opposed to film colorization. *See Senate Hearing, supra* note 1, at 47 (statement of John Huston). The late filmmaker's son and daughter sought to block the airing of the colorized version of the film. They claimed that their father's artistic rights in maintaining the film's integrity superseded the rights of Ted Turner, who owns the legal copyright to the film. *See L.A. Times,* Nov. 25, 1988, at 2, col. 1. *See also* Feliciano, *Judge Bars Airing of Colorized Film,* Wash. Post, June 24, 1988, at C10, col. 3 (lower French court holds in favor of Huston estate and bars France's Channel 5 from showing film).


16. 52 Fed. Reg. 23,443 (1987) (to be codified at 37 C.F.R. § 202). The federal Copyright Act defines a derivative work as "a work based upon one or more pre-existing works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a 'derivative work.'" 17 U.S.C. § 101 (1982).
The legislative history and the provisions of the recently-enacted National Film Preservation Act of 1988 are also examined. Part IV suggests that the 100th Congress did not adequately address the concerns voiced by opponents of film colorization such as the Directors Guild. In addition, it offers a forecast of how the 101st Congress may handle further requests by colorization opponents for legislation that would protect the integrity of black-and-white films and their creators.

I

The Money of Color

Film colorization is a complex process that involves both people and computers. First, the black-and-white film is transferred to videotape. A computer is then directed to scan the first frame of a scene and separate it into 525,000 “pixels,” each of which represents an equal portion of the picture. Using state of the art technology, a human colorist, with the help of a computer sensing device, next establishes what original colors are represented by the blacks, whites, and grays on the tape. Once the “pure” or original colors are determined, the colorist selects those colors from the computer’s palette. Those signals are then used to color the pixels. Unless instructed otherwise, the computer completes the process by repeating that color every time it encounters the same signal throughout the rest of the scene.

Extensive research precedes the colorization process. For example, to ensure the accuracy of the colors chosen for Casablanca, American Film relied upon several books written about the filming of the picture, as well as wardrobe notes...
from the set. Before colorizing Miracle on 34th Street, researchers examined color photographs from the 1940s found in the Macy's Department store archives, in order to make the store's depiction realistic.

Trained film observers disagree as to the degree of success achieved by colorists. Describing the move towards colorization as "The Charge of the Light Brigade," Washington Post critic Tom Shales wrote that "coloring actually improves [a film] . . . spruces it up . . . ." An opponent of colorization, Vincent Canby, film critic for the New York Times, has expressed the opposite view:

Anyone who has seen colorized films must be struck by the curious laws that govern their physical universe. All skies are the same color of blue, all grass is the same color of green. Lips are usually the same dried-blood color and everyone appears to wear the same shade of Max Factor pancake make-up, which often glows as if radioactive. The red, white, and blue flags in the colorized version of "Yankee Doodle Dandy" come out orange, gray, and grayish-blue. Eyes are brown buttons and business suits come in two styles, basic grayish-blue and basic grayish-brown.

Money is a major incentive for undertaking the expensive, labor-intensive colorization process. According to Roger Mayer, Turner Broadcasting Company's president, "the huge expenditures were and are made with the expectation that the investment will be returned . . . . Obviously color enhancement is one way in which further commercial viability can be achieved." Colorized films can generate tremendous revenues for both their owners and the firms performing the colorization. Turner Broadcasting Company, which owns the MGM film library, controls over 3,600 movies, 2,500 of which

23. Mathews, supra note 5, at 1.
24. Note, supra note 18, at 504 n.57.
26. Id. (statement of Vincent Canby at 2).
27. Id. (statement of Roger Mayer at 4). Another proponent of film colorization told a Senate committee that "[t]here has never been a reason for the studios to spend money to preserve films. But now because of colorization, people now have a reason to restore their films." Senate Hearing, supra note 1, at 79 (statement of Rob Word, Senior Vice President, Hal Roach Studios).
28. According to the New York Times, computerized coloring has become a multimillion dollar business, with two California companies and two Toronto companies that market color technology charging up to $400,000 to colorize a black-and-white film. Yarrow, Action But No Consensus on Film Coloring, N.Y. Times, July 11, 1988, at C13, col. 3. Therefore, it is not surprising to learn that one firm, American Film,
command little, if any, attention in their original black-and-white form. In recent years, Turner Broadcasting has spent more than $30,000,000 preserving these films, many of which would otherwise have been lost.

Recent statistics indicate that Turner Broadcasting’s revenue raising efforts have been successful. During the past two decades, the black-and-white Miracle on 34th Street generated approximately $30,000 a year in revenues for the MGM library. However, in the two years following colorization, the film generated $350,000. The television ratings for broadcasts of altered classics provide additional support for Mayer’s assumption. For example, Yankee Doodle Dandy attracted about five million home viewers nationally when it was first televised in color. Only three-and-one-half million viewers watched it when it was shown in black-and-white the previous year.

The higher audience ratings enable broadcasters such as Turner Broadcasting to charge more for advertising. Furthermore, videocassette sales of colorized versions of classic films generate substantial profits for their owners. As the next section suggests, the desire to ensure the continuation of these economic benefits has led proponents of colorization technology to seek copyright protection for the colorized versions of black-and-white films.

II
Copyright Protection for Colorized Motion Pictures

The protection of an author’s economic benefits is a major component of American copyright law. Based on the copy-

has $55 million worth of backlogged assignments, including approximately 30 films annually for Turner Broadcasting. Mathews, supra note 5, at 1.

29. House Hearing, supra note 2 (statement of Roger Mayer at 1).

30. Id. at 3.


32. While little doubt exists that an initial boost in audience totals will occur for the premiere of a colorized version, it is not necessarily a long-term phenomenon. Miracle on 34th Street reached between 4.3 million and 8 million homes nationwide when the original version was shown during the 1980’s. In 1985, the color premiere attracted 13.4 million homes, but dropped back down to 8.7 million homes per year in 1987. Id.

right clause of the United States Constitution, the 1976 Copyright Act encourages authors to "invest their time and money in making original contributions by promising them property rights in the resulting works." A major premise of the 1976 Copyright Act is that an author will have little incentive to create additional works without the assurance of copyright protection of his work. Thus, in much the same manner as patents promote advances in science, copyrights serve the public interest by increasing the choices available in the literary and artistic marketplace.

Copyright protection has significant financial consequences in the area of film colorization. Colorists and copyright holders can expect to generate substantial revenues from both television syndication and home videocassette sales of colorized versions of black-and-white films. Thus, owners of interests in colorized films seek protection of their films as derivative works, which would protect the material added by the colorizer but would not extend to the underlying, pre-existing film.

The Register of Copyrights, Ralph Oman, addressed this issue in his testimony before a House panel in 1988:

[T]he issue of copyrightability (as derivative works) of colorized films is economically very important to the colorization companies, because if they cannot obtain derivative work copyright protection for their colorized films, their films can be freely copied and their investment in the colorization process will not be secure.

34. "The Congress shall have the power to ... promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. CONST. art. I, § 8, cl. 8.
36. Senate Hearing, supra note 1, at 92 (statement of Professor Paul Goldstein, Stanford University).
37. "The reason we're doing it is monetary .... People don't like black and white. They do like color, and when we color it, they buy it." Bennetts, Colorizing Film Classics: A Boon or a Bane?, N.Y. Times, Aug. 5, 1986, at A1, col. 5 (quoting Wilson Markle, president of Colorization, Inc.).
38. "[T]he purpose of copyright is not to reward authors as an end in itself, but rather to encourage authors to produce those works that consumers want." Senate Hearing, supra note 1, at 92 (statement of Professor Goldstein).
40. House Hearing, supra note 2 (statement of Ralph Oman at 20). See also Note, supra note 18, at 509 ("Recognizing the copyrightability of colorization would increase the rewards that colorists, and copyright proprietors of original films, could expect from their efforts.").
Advocates of the derivative colorized films, such as Ted Turner, often control the black-and-white original versions. Most commentators agree that authors of derivative works generally deserve protection. However, some have noted that if colorized films are copyrighted as derivative works, there is a potential threat that "the copyright proprietors of these new versions may choose to keep the original films out of circulation, and thus out of competition."41

A. Colorized Films as Derivative Works: The "Distinguishable Variation" Test

In June 1987, the Copyright Office of the Library of Congress rendered a landmark decision to register some colorized films as derivative works.42 Registration as a derivative work is allowed if a work is wholly or substantially based on a pre-existing work, satisfies the originality requirement, and is not in any way infringing.43

The originality requirement is the most controversial aspect of the colorization debate because the 1976 Copyright Act left the term "original" undefined. The relevant House Report simply explained that the standard of originality should be inferred from that established by the courts under the Copyright Act of 1909.44 Critics of the process argue that computer-enhanced colorizing lacks originality because it is "a technical process that does not have sufficient human authorship to merit copyright protection."45 Colorized film advocates assert

41. Note, supra note 18, at 509.
43. 52 Fed. Reg. at 23,443-44 (citing 17 U.S.C. § 103(b) (1982)).
44. H.R. REP. No. 1476, 94th Cong., 2d Sess. 51, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS 5659, 5664. According to Professor Nimmer, courts that interpreted the 1909 Act "uniformly inferred the requirement [of originality] from the fact that copyright protection may only be claimed by 'authors,' or their successors in interest. . . . [I]t follows that a work is not the product of an author unless the work is original." 1 M. Nimmer, supra note 11, at 2-6.
45. 52 Fed. Reg. at 23,445 (emphasis in original).
that the color selections made in altering a motion picture are made by individual human technicians and that the use of computer assistance in this endeavor is not inconsistent with courts' interpretation of "authorship."\textsuperscript{46}

One standard of originality that has developed since the passage of the 1909 Copyright Act is the "distinguishable variation" test.\textsuperscript{47} The test's origin is generally ascribed to Judge Frank's opinion in \textit{Alfred Bell & Co. v. Catalda Fine Arts, Inc.}\textsuperscript{48} Judge Frank applied the "distinguishable variation" test liberally to find that the plaintiff's copies of famous artworks were copyrightable:

All that is needed to satisfy both the Constitution and the [Copyright Act of 1909] is that the "author" contributed something more than a "merely trivial" variation, something recognizably "his own." . . . No matter how poor artistically the author's addition, it is enough if it be his own.\textsuperscript{49}

In \textit{Alva Studios, Inc. v. Winninger},\textsuperscript{50} the court applied an even more liberal definition of originality and held that a miniature reproduction of a Rodin sculpture was copyrightable. The distinguishable variation "resulted from [the plaintiff's] skill and originality in producing an accurate scale reproduction of the original."\textsuperscript{51} The \textit{Alfred Bell} and \textit{Alva Studios} decisions, however, suggest that a colorized film satisfies the distinguishable variation test because of the skill and expert judgment employed in researching and selecting the colors and operating the computers required to alter the black-and-white film.\textsuperscript{52} The addition of color to a black-and-white film is no more than a "merely trivial" variation.

Similar support for the registration of colorized films as de-


\textsuperscript{47} Alfred Bell & Co. v. Catalda Fine Arts, Inc., 191 F.2d 99, 102 (2d Cir. 1951).

\textsuperscript{48} \textit{Id.} In \textit{Alfred Bell}, the plaintiff had copyrighted eight mezzotints that were copies of artworks in the public domain. The defendant had photographed the plaintiff's works and counterclaimed that the mezzotints were not sufficiently original to be copyrightable. Note that the "distinguishable variation" test was first derived in Gerlach-Barklow v. Morris & Bendien, Inc., 23 F.2d 159 (2d Cir. 1927).

\textsuperscript{49} Alfred Bell, 191 F.2d at 102-03. See also Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 250 (1902) ("[A] very modest grade of art has in it something irreducible, which is one man's alone. That something he may copyright unless there is a restriction in the words of the act.").

\textsuperscript{50} 177 F. Supp. 265 (S.D.N.Y. 1959).

\textsuperscript{51} \textit{Id.} at 267.

\textsuperscript{52} See \textit{supra} text accompanying notes 18-24. See also Note, \textit{supra} note 18, at 513-14 (applying the distinguishable variation test to colorized motion pictures).
Derivative works comes from the recent Fourth Circuit decision of *M. Kramer Manufacturing Co. v. Andrews.*\(^{53}\) The plaintiff in *Kramer* sought to copyright as a derivative work a video poker game that closely resembled an earlier version, except for the additional element of a flashing card.\(^{54}\) The court scrutinized the new material added to the underlying work by the plaintiff,\(^{55}\) and concluded that the additional video images were not "trivial," but were "strikingly different and plainly discernible to the most casual observer."\(^{56}\) Consequently, the court determined that the plaintiff's work met the test of originality required for derivative works under the Copyright Act.\(^{57}\) Since the addition of color to a black-and-white film classic is certainly discernible, it should qualify as a copyrightable variation under the *Kramer* interpretation of the *Alfred Bell* test.\(^{58}\)

Some courts have used a stricter interpretation of the originality requirement. This has resulted in a more stringent application of the distinguishable variation test. In *L. Batlin & Son, Inc. v. Snyder,* the defendant obtained copyright registration for a plastic copy of a metal "Uncle Sam" bank with minor changes in size and detail.\(^{59}\) The plaintiff, Batlin, arranged to import and market his plastic bank, but the U.S. Customs Service refused to allow his products into the country based on the defendant's copyright registration. Batlin then sought to have the defendant's copyright declared void. The Second Circuit, sitting en banc, held that the defendant's copyright registration was invalid.\(^{60}\)

Elaborating upon the *Alfred Bell* and *Alva Studios* tests for originality, the *Batlin* court stated that the issuance of a valid copyright depended upon the showing of a "substantial varia-

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53. 783 F.2d 421 (4th Cir. 1986).
54. Id. at 425-26.
55. Id. at 437. The court examined the new material as a precondition to determining the merit of the plaintiff's infringement claim.
56. Id. at 440.
57. Id.
58. The *Kramer* Court invoked *Bell* as the "classic precedent for determining originality" in copyright law. Id. at 437.
59. 536 F.2d 486, 488-89 (2d Cir. 1976), *cert. denied,* 429 U.S. 857 (1976). The metal "Uncle Sam" bank had long been in the public domain. 536 F.2d at 487.
60. 536 F.2d at 488. In so holding, the court affirmed the district court's holding in favor of the plaintiff, Batlin. Id. at 487-88.
tion" in the derivative work. The Second Circuit justified its higher standard of originality by asserting that "to extend copyrightability to minuscule variations would simply put a weapon for harassment in the hands of mischievous copiers intent on appropriating and monopolizing public domain work." The standard established in *Batlin* has been cited with approval in several decisions.

Following the Second Circuit’s lead, the Seventh Circuit raised the standard of originality even higher in *Gracen v. Bradford Exchange*. After viewing *The Wizard of Oz* and several still photographs, the plaintiff, Gracen, created a painting of Judy Garland portraying the character of Dorothy and entered it in the defendant’s competition. Gracen’s painting won the competition and was selected for reproduction in the defendant’s series of collectors’ plates. When the two parties could not agree on a contract, the defendant hired another artist who created similar paintings. Gracen copyrighted her painting and sued for infringement. The court subsequently invalidated Gracen’s copyright and dismissed the infringement claim. Writing for the court, Judge Posner relied upon the *Batlin* interpretation of the distinguishable variation test in holding that the plaintiff’s artwork did not merit copyright protection as a derivative work. The judge distinguished between the artistic originality inherent in the painting and the “legal concept of originality in the Copyright Act.”

*Gracen* highlights the legal difficulties that can occur when more than one party creates a derivative work based on the same underlying work. It can be very difficult for the trier

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61. Id. at 491. See generally 1 M. Nimmer, supra note 11, at 3-10 to 3-13 (discussing the *Batlin* test and the sufficiency of various changes in a work).
62. 536 F.2d at 492. See also Greenstone, supra note 42, at 15 (discussing the *Batlin* requirement of substantial variation).
63. See, e.g., Sherry Mfg. Co. v. Towel King of Fla., Inc., 753 F.2d 1565, 1568 (11th Cir. 1985) (changes in the design of a beach towel were not sufficiently substantial to merit copyright protection); Eden Toys v. Florelee Undergarment Co., 697 F.2d 27, 34 (2d Cir. 1982) (plaintiff’s sketches were derivative works under the substantial variation test).
64. 698 F.2d 300 (7th Cir. 1983).
65. Id. at 301.
66. Id. at 305.
67. Id.
68. Id. at 304.
69. The owner of copyright in original works of authorship possesses the exclusive right to authorize derivative works. 17 U.S.C. § 106(2) (1982). MGM, owner of the copyright to the film *The Wizard of Oz*, granted such a license to Bradford in
of fact to determine whether or not the second derivative work was prepared by viewing the first derivative work or the underlying work. Therefore, it is especially important to clearly define initially what is required for a derivative work to receive copyright protection. Addressing this issue, Posner concluded that Gracen's work was not "substantially different" from the underlying works (in this case the movie and photographs). He explained:

"The purpose of the term [original] in copyright law is not to guide aesthetic judgments but to assure a sufficiently gross difference between the underlying and the derivative work to avoid entangling subsequent artists depicting the underlying work in copyright problems."

B. The Registration Decision

The Copyright Office's decision in 1987 to allow registration of colorized films requires the establishment of an appropriate judicial standard for determining a derivative work. There is public disagreement about whether a colorized film meets the Batlin test for authorship in derivative works, which distinguishes between human contributions that require sustained "artistic skill and effort," which are copyrightable, and those that exhibit only "physical skill" or technical competence, which are not copyrightable. Opponents of colorization have argued that altered films fail to meet the Batlin test. Proponents of copyright for colorized films maintain that the court improperly raised the standard of originality in

1976. 698 F.2d at 301. The Bradford court held that Gracen's right to create her painting derived from Bradford. Id. at 303. A motion picture may itself be a derivative work. Rights in the underlying work reside in the owner of that work. Russell v. Price, 612 F.2d 1123, 1128 (9th Cir. 1979) (copyright owner of play Pygmalion may enjoin exhibition of film Pygmalion produced under license when copyright in film has expired). A derivative copyright protects only new material contained in the derivative work, not matter derived from the underlying work. Id. (citing 1 M. Nimmer, supra note 11, at 3-16). See also G. Ricordi & Co. v. Paramount Pictures, Inc., 189 F.2d 469 (2d Cir. 1951).

70. 698 F.2d at 305. Posner also asserted in dicta that the pre-Batlin Second Circuit cases that applied a more liberal distinguishable variation test should be considered superseded. Id.


72. The Copyright Office published a Notice of Inquiry to solicit public comments preceding the registration decision. Id. at 23,443-44.

73. Id. at 23,443, 23,445.
Gracen to "require a sufficiently gross difference in works," and that such films meet the tests of originality in Batlin.

The Copyright Office concluded that "certain colorized versions of black and white motion pictures are eligible for copyright registration as derivative works." Calling its decision a "close, narrow one," the Copyright Office based its conclusions "on the allegations that the typical colorized film is the result of the selection of as many as 4000 colors, drawn from a palette of 16 million colors."

The Copyright Office devised the following criteria to determine whether the coloring of a particular black-and-white film meets the required standard of originality:

1. Numerous color selections must be made by human beings from an extensive color inventory.
2. The range and extent of colors added to the black-and-white work must represent more than a trivial variation.
3. The overall appearance of the motion picture must be modified; registration will not be made for the coloring of a few frames or the enhancement of color in a previously colored film.
4. Removal of color from a motion picture or other work will not justify registration.
5. The existing regulatory prohibition on copyright registration based on mere variations of color is confirmed.

These criteria can be met rather easily by colorized films, making it likely that all future colorized versions would be

74. See supra text accompanying notes 64-70 for a discussion of Gracen.
75. 52 Fed. Reg. at 23,445. In their written comments, Color Systems Technology and Turner Broadcasting Company argued that "it is totally inconsistent to claim that colorization is such a substantial change that it distorts and mutilates while claiming at the same time that it is no more than a 'trivial' variation on the underlying black and white film." Baumgarten, supra note 46, at 6.
76. 52 Fed. Reg. at 23,446. Since the June 1987 decision to register certain colorized films, the Copyright Office has sought further information concerning how colorization technologies affect the creation and uses of motion pictures and television programming. At the request of the House Subcommittee on Courts, Civil Liberties, and the Administration of Justice, the Copyright Office studied the nature and impact of the colorization process and the perceived need for future legislative action to solve the problems raised by this new technology. Request for Information; Notice of Hearing, New Technology and Audiovisual Works, 53 Fed. Reg. 18,937, 18,937-38 (1988). The Patent and Trademark Office initiated a similar inquiry at the request of the House panel. Notice of Inquiry; Motion Pictures, Alteration; New Technologies, 53 Fed. Reg. 28,048 (1988). Subcommittee Chairman Robert Kas tenmeier received the two reports on March 15, 1989. See infra notes 175-77 and accompanying text.
77. 52 Fed. Reg. at 23,446.
suitable for registration as derivative works. Furthermore, a film that meets the requirements laid out by the Copyright Office would likely satisfy most courts that consider derivative work cases; the substantial research that precedes the choice of the colors together with the numerous color possibilities available to the technicians appear to fulfill the Batlin requirement of "true artistic skill." In addition, the variety of colors increases the likelihood that the resulting alterations will be more than trivial in effect. Most colorized films should also meet the Seventh Circuit standard established in Gracen.

Encouraged by the copyright protection afforded by the 1987 registration decision, Ted Turner and other film owners continued to colorize black-and-white films. Opponents of colorization, such as the Directors Guild, having failed to prevent copyright protection through the public comment process, took their case to Capitol Hill.

III
The 100th Congress and Film Colorization

Opponents of colorization sought federal intervention at public hearings and private lunches with members of the 100th Congress. When the congressional session ended, opponents' efforts had resulted in the passage of the first-ever legislation dealing with the colorization issue—the National Film Preservation Act of 1988. Nevertheless, the victory was somewhat hollow because the law's provisions fail to adequately resolve many of the key issues that concern critics of colorization.

A. The Leahy Hearing: Opening Salvos Fired

In May 1987, the Senate Subcommittee on Technology and the Law heard testimony concerning the legal issues raised by film colorization. Representatives of the parties involved—

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78. Batlin & Son, Inc. v. Snyder, 536 F.2d 491 (2d Cir. 1976).
80. Representative Bob Mrazek (D-N.Y.) was a prime sponsor of the National Film Preservation Act of 1988 and hosted a half-dozen lunches and dinners for members to meet Hollywood legends, such as Jimmy Stewart, and discuss the colorization issue. Easton, supra note 31, at 1.
81. National Film Preservation Act, supra note 8.
82. See Senate Hearing, supra note 1.
film directors, actors, film owners, and colorizers—provided Congress with a first-hand look at the controversy.

Among the more vocal opponents of colorization was Elliot Silverstein, an officer of the Directors Guild of America. Silverstein warned that colorization "represents the mutilation of history," and asserted that film owners should acknowledge a "moral component in their ownership right—a custodial responsibility to pass on the works they hold to the next generation, unchanged and undistorted." He suggested that Congress would be acting in the public interest if it drafted guidelines to restrain film owners from altering their properties.

Support for this recommendation came from film directors Woody Allen and Sydney Pollack, who expressed the sentiments of filmmakers whose works have been altered. Pollack likened the colorizing of a film without the director's consent to robbing him of his identity. Allen, after labeling colorizers' morality "atrocious," explained that he did not oppose all colorization, but that he believed that "if the director is not alive and his work has been historically established in black and white, it should remain true to its origin." Actress Ginger Rogers completed the panel of witnesses representing industry talent and gave a moving account of her disturbance at seeing herself in a colorized film.

Three witnesses testifying on behalf of colorization interests countered the request for congressional intervention made by the Hollywood contingent. Buddy Young, the president of Color Systems Technology, told the Subcommittee that "sneers about 'computer coloring by number' are entirely unmerited" because professionally-trained artists make all creative decisions. The president of Turner Entertainment,

83. Id. at 11-12.
84. Id. at 12.
85. Id. at 15, 24. Similar sentiments were expressed by the National Society of Film Critics, which petitioned Ted Turner in late 1986 to halt the colorization of black-and-white films because it is a "barbarism and a betrayal not only of the filmmakers' intentions but of the very notion of film as an art form." Id. at 49.
86. Id. at 17.
87. Id. at 24.
88. "Our appearance and expressions are the tools we use to create a character on the screen. It is a subtle and sensitive art that is completely obliterated by computer coloring. . . . [T]he nuances that go into a great performance . . . are sacrificed under a smear of pink and orange frosting." Id. at 39.
89. Id. at 58.
Roger Mayer, stated that the higher television audience rating for altered versions of black-and-white classics provided hard evidence of the public demand for colorization. To further illustrate the demand for colorized films, Rob Word, vice president of Hal Roach Studios, told the Subcommittee that over the Christmas season, approximately 11,000 black-and-white videocassettes of *It's A Wonderful Life* were sold, compared with over 60,000 of the colorized version.

**B. Moral Rights and U.S. Entry Into the Berne Convention**

Colorization opponents also sought protection for classic black-and-white films under the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention). For several years, Congress had considered the century-old Berne Convention to be the most important international copyright treaty in the world. Proponents of American entry into the Berne Convention argued that membership would enhance the United States' position in the global marketplace by reducing the impact of international copyright piracy. This would be achieved through the Berne Convention's requirement that member nations guarantee authors copyright protection for the duration of the life of the author plus fifty years, along with rights of translation, reproduction, public performance, broadcasting, adaptation, and arrangement.

Before the United States could ratify the treaty and join this international body, Congress had to amend the federal copyright law to comply with the Berne Convention standards. During consideration of the enabling legislation, some film-makers lobbied Congress for the inclusion of a provision explicitly recognizing the moral rights of American artists—rights that are granted by other Berne Convention signato-

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90. Mayer cited *Maltese Falcon* as an example of a film that benefited from colorization, testifying that since it was colored, the number of people who had seen it over a six month period was five times the number of those who had watched the black-and-white version over the previous decade. *Id.* at 68.

91. *Id.* at 77 (statement of Rob Word, Vice President, Hal Roach Studios). To counter Ginger Rogers' testimony about actors' attitudes towards colorization, Word stated that Cary Grant so enjoyed seeing the new version of his film *Topper* that he wrote to the firm that colorized it. *Id.* at 79.

92. *See* S. REP. NO. 352, 100th Cong., 2d Sess. 5-6 (1988).

93. *Id.* at 2. *See also* 134 CONG. REC. H3083 (daily ed. May 10, 1988) (statement of Representative Berman); *id.* at H3084 (statement of Representative Hyde).

The artists believed that such a provision would protect their films against colorization and other alterations.

Their effort proved unsuccessful. When Congress finally approved the Berne Convention Implementation Act of 1988, it did not include a moral rights provision. The floor manager of the bill in the House, Representative Robert Kastenmeier (D-Wis.), attributed the absence of moral rights protection to the controversy surrounding the issue, citing "the political reality that legislation with a moral rights provision simply would not pass." He further contended that artists are adequately protected by current laws, "including the Lanham Act and laws relating to defamation, privacy, publicity, and unfair competition."

Disappointed by its failure to receive statutory protection from colorization and other material alterations, the Directors...


96. In contrast to an expansion of the rights of authors, the legislation explicitly preserved the status quo with respect to those rights "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 Oct. 31, 1988, Pub. L. No. 100-568, 1988 U.S. CODE CONG. & ADMIN. NEWS (102 Stat.) 2853, 2854.

97. 134 CONG. REC. H3083 (daily ed. May 10, 1988) (statement of Representative Robert Kastenmeier, floor manager in the House). See also Schwartz, supra note 8, at 139 ("Except for the creative artists involved . . . the legislative strategy of all of the other parties was to keep the issue of moral rights, or at least the inclusion thereof, separate from the enabling legislation . . . in order to ensure that the controversy would not prevent the United States from joining Berne.").

98. 134 CONG. REC. H3083 (daily ed. May 10, 1988). Some commentators have suggested similarly that there are "back doors" to the assertion of moral rights under current law that obviate the need to enact explicit moral rights legislation. See Greenstone, supra note 42, at 19-20 ("Use of the Lanham Act is a back door to the assertion of moral rights. The cases speak to the violation of artists' rights even where an artist may have parted with those rights; the right to edit, colorize, or insert commercials ends where alterations deface or mutilate the work."). But see Krigsman, Section 43(a) of the Lanham Act as a Defender of Artists' Moral Rights, 73 TRADEMARK REP. 251, 270-72 (1983) (Lanham Act provides only limited protections for authors and artists); see also Gilliam v. American Broadcasting Cos., Inc., 538 F.2d 14 (2d Cir. 1976) (extensive unauthorized editing by ABC of the Monty Python television shows constituted "mutilations," which, accompanied by the author's name, amounted to misrepresentations in violation of section 43(a) of the Lanham Act); see generally Note, supra note 11, at 968-69 (artists must rely on Copyright Act, Lanham Act to assert any type of moral rights); Note, supra note 18, at 525-26 ("Filmmakers who do not own the copyrights to their creations can only rely upon theories of law, which have been used indirectly to protect the moral rights of artists.").
Guild called the absence of a moral rights provision a "travesty" and vowed to continue its fight.\(^{99}\)

C. The Film Integrity Act of 1987

During the lengthy debate over incorporating a moral rights provision into the Berne Convention enabling legislation, the Subcommittee on Courts, Intellectual Property, and the Administration of Justice announced that it would hold hearings in June 1988 on the Film Integrity Act,\(^{100}\) which provided moral rights protection for film artists.\(^{101}\) Calling colorization a threat to America's best films,\(^{102}\) the Film Integrity Act would have amended the 1976 Copyright Act to give "the principal director and screenwriter of a film the right of consent for any material alteration of their work."\(^{103}\) The Directors Guild endorsed the legislation as a "modest and restrained approach that balances the interest of the copyright holders against the larger societal interest of protecting our country's culture."\(^{104}\) The Guild also suggested that such federal legislation would serve the long-term economic interests of the film industry, because it would increase "the country's regard for motion pictures as an artistic medium."\(^{105}\)

The flaws in the drafting of the Film Integrity Act were apparent both to representatives of the Copyright Office and to the film owners and producers testifying before the congres-
The Register of Copyrights, Ralph Oman, maintained that the Film Integrity Act failed to establish a "well-defined moral right of integrity" because it prohibited any unauthorized material alteration. Oman feared that the Act would raise marketing problems regarding the distribution of all films for television and videocassette, and would likely interfere with the preparation of non-film derivative works such as novelizations. Furthermore, the Act's perpetual moral rights provision potentially conflicted with the copyright clause of the Constitution because it did not protect the authors solely "for limited times." Finally, the sections of the Act dealing with ownership and transfer were incomplete, raising a question as to what would occur if the director wanted to alter the film, but the screenwriter refused.

The Motion Picture Association of America (MPAA) opposed the definition of "artistic authors" contained in the Film Integrity Act. The MPAA's representative criticized the legislation because it required only the consent of the "principal director" and "principal screenwriter" for any alterations. He insisted that Congress should not bestow such power upon only two "artistic authors," because films are essentially a collaborative effort dependent on "a legion of artists," such as producers, directors, screenwriters, special effects artisans, actors, cinematographers, musicians, composers, lyricists, set designers, makeup artists, and others. The MPAA advocated that Congress leave alteration decisions entirely to the marketplace, "to be worked out by producers, directors, and screenwriters in their individual employment contracts and

106. See House Hearing, supra note 2.
107. Id. (statement of Ralph Oman at 25). Oman also suggested that American law provides adequate moral rights protection "through a variety of noncopyright state statutes, judicial decisions interpreting state common law, and perhaps the federal trademark law." Id. at 24.
108. Id. at 26.
110. House Hearing, supra note 2 (statement of Ralph Oman at 28).
111. Id. (statement of David Brown, MPAA representative at 4).
112. Id. According to Roger Mayer of Turner Broadcasting, the concept of sole authorship contained in the Gephardt bill neglected the influential role of the motion picture studios in producing the black-and-white classics, stating that such films are the "children of the old movie moguls and their staff producers." Therefore, Mayer asserted that control over the pictures belongs to the "true" spiritual heirs of the moguls and producers: the copyright holders. Id. (statement of Roger Mayer at 6).
guild agreements."

Following the hearing, the Subcommittee took no further action on the Film Integrity Act. Given the reasonable concerns voiced by the opponents of the legislation, the Act's demise was neither surprising nor untimely; another legislative initiative with the similar goal of regulating film colorization, the National Film Preservation Act of 1988, had emerged.

D. The National Film Preservation Act of 1988

In May 1988, Representative Bob Mrazek (D-N.Y.) circulated a draft bill that later evolved into the National Film Preservation Act of 1988. The Act established the National Film Preservation Board and the National Film Registry. The original version of the Act would have amended federal copyright law to give the principal director or principal screenwriter the exclusive right to prevent the public performance, distribution, leasing, or sale of a "materially altered" motion picture. Additionally, the Act would have required that any colorized film use a different title than the original black-and-white version.

At an early stage, Representative Mrazek succeeded in enlisting the support of Representative Sidney Yates (D-Ill.), chairman of the Subcommittee on the Interior of the House Appropriations Committee. On June 8, 1988, when the Subcommittee was considering the Interior Department appropriations bill for the 1989 fiscal year, Chairman Yates offered an unprinted amendment concerning film colorization. Although the provisions of the Mrazek-Yates amendment were not memorialized in written form, the Subcommittee agreed to the amendment in its recommendations to the full Appropriations Committee.

When the Subcommittee's conclusions appeared in printed form a few days later, colorization proponents were caught off guard by the contents of the Mrazek-Yates amendment,

113. Id. (statement of Roger Mayer at 6).
114. Schwartz, supra note 8, at 141.
115. Id. at 142. A new § 119 would have been created. Id.
116. Id.
117. Id.
118. Id.
119. Id. at 143.
which was entitled the “National Film Preservation Act of 1988.” The amendment’s provisions included an authorization of $500,000 for a National Film Commission within the National Foundation on the Arts and Humanities. The commission would be required to designate up to twenty-five culturally, historically, or esthetically significant films per year for inclusion in a National Film Registry. The commission would also determine whether such films had been materially altered, as by colorization, and would make it unlawful for colorized versions of protected black-and-white films to be distributed under the original film’s title. Moreover, the amendment mandated labeling altered films so viewers would be aware that they were not watching the original version.

Originally, the Mrazek-Yates bill created and empowered a free-standing commission through an amendment to the copyright laws—an amendment which would ordinarily fall under the purview of the House Judiciary Committee. However, its sponsors revised the proposal by placing the commission under the auspices of the Secretary of the Interior. By attaching the amendment to the Interior Department appropriations bill (H.R. 4867), Mrazek and Yates were able to avoid the jurisdiction of the Judiciary Committee, which was not expected to approve such legislation.

120. Id. at 143 n.16 (citing H.R. COMM. ON APPROPRIATIONS 73-82 (Comm. Print 1988) (making appropriations for the Department of the Interior for fiscal year 1989)).

121. See generally Robb, Nat’l Pic Commission Proposed, DAILY VARIETY, June 18, 1988, at 16, col. 5 (discussing Mrazek-Yates amendment); Easton, supra note 31, at 1 (registered films could not be colorized without changing their titles and informing viewers); Eller, Artistic Protection Scores First Major Victory on Capitol Hill, THE HOLLYWOOD REPORTER, June 10, 1988, at 49 (“If a film was originally released in black-and-white and subsequently colorized, it is also unlawful to release the film under its original title.”).


123. H.R. 4867, 100th Cong., 2d Sess. (1988). The Directors Guild sought to move the amendment through the Appropriations Committee rather than the Judiciary Committee because it feared losing in the Judiciary Committee to opponents within the motion picture and publishing industries that opposed moral rights legislation. Schwartz, supra note 8, at 143-44. See also Yarrow, supra note 28, at C13, col. 3 (quoting Representative Yates on his bill: “It does not deal with colorization, except through labeling, because I didn’t think we should get into something that deals with copyright and is a subject for the Judiciary Committee.”).

This legislative route was also attractive because, as chairman of the relevant subcommittee, Representative Yates could likely muster sufficient support on the full Appropriations Committee to ensure the passage of the proposal.
The full Appropriations Committee did not consider H.R. 4867 until after both sides had attempted to influence the panel. Director Frank Capra wrote an emotional appeal to members of the committee in which he anguished over the colorization of *It's A Wonderful Life* and asked that Congress protect film classics from "the irresponsible assaults of greedy marketeers."124 Meanwhile, the Reagan Administration informed Committee Chairman Jamie Whitten (D-Miss.) that it opposed the creation of a National Film Commission because "no hearings have been held on this agency, there is no known compelling need for it, and the resources are clearly only a small beginning for what could well become a massive and intrusive new Federal regulatory agency."125

The measure encountered little resistance during its consideration by the full Appropriations Committee on June 16, 1988. The Mzarek-Yates amendment faced only one hurdle: a motion by Representative Vic Fazio (D-Cal.) to strike the provisions regulating the colorization of black-and-white films.126 Representative Fazio argued that the provisions did not belong on an appropriations bill, because they constituted legislation.127 He further observed that the Judiciary Committee had agreed to hold hearings on the issue and that the Copyright Office was conducting a study of the impact of colorization on the motion picture industry, commissioned by the Kas- tenmeier Judiciary Subcommittee in February 1988.128

Despite Chairman Whitten's agreement that the Judiciary Committee was the proper forum for the consideration of

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Also lobbying members to approve the Mrazek-Yates amendment was Jimmy Stewart, star of the Capra film, who appeared at a June 15th press conference and attended the Appropriations Committee markup session on the following day. Schwartz, supra note 8, at 144-45; Davis, House Panel Rebuffs Challenge to Offshore Oil-Leasing Plan, CONG. QUARTERLY, June 18, 1988, at 1693.


126. Davis, supra note 124, at 1693; Schwartz, supra note 8, at 144.

127. Davis, supra note 124, at 1693. In order to ensure orderly consideration of all legislative proposals by the appropriate legislative committees, clause two of House Rule XXI prohibits unauthorized legislative provisions in appropriations bills. The Rules Committee may, however, issue a waiver allowing substantive legislation attached to an appropriations bill to be considered on the House floor.

128. Schwartz, supra note 8, at 144. See supra note 76 for a description of the Copyright Office study.
amendments to the Copyright Act, the Appropriations Committee rejected the Fazio motion to strike the provisions by a 25 to 20 show of hands. On June 20, 1988, the Committee approved the Mrazek-Yates amendment as it had emerged from the Subcommittee, and reported the provisions favorably as part of the $9.7 billion appropriations bill for the Department of the Interior.

While the full House prepared to take up consideration of the Mrazek-Yates amendment, parties with an interest in the colorization controversy publicly reacted to the legislation. At this time, the Film Integrity Act of 1987, which included a moral rights provision, had not yet been rejected. At the Subcommittee hearing on the Film Integrity Act, the Register of Copyrights stated his preference for a labeling scheme over the creation of a statutory moral right.

One representative of the Directors Guild endorsed the labeling proposal as a truth-in-advertising approach, but noted that it fell short of the moral rights protection called for in the Film Integrity Act. The Directors Guild representative stated that "labeling achieves something for audiences but much less for the film artist and the artistic product itself," and reminded Congress that the labeling remedy proposed in the Mrazek-Yates measure would only apply to those few films designated for the registry.

Turner Broadcasting Company initially complained that the

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129. Schwartz, supra note 8, at 145. Schwartz attributes Mrazek's success in part to the Congressman's prediction in remarks to the committee that the legislation would not receive the necessary approval of the Rules Committee allowing its consideration by the full House. Mrazek argued that in light of the measure's apparently imminent demise committee members should approve his amendment and "show Jimmy Stewart and the American people that they care about American movies." Id.


131. Ralph Oman, Register of Copyrights, told the Kastenmeier subcommittee that he had "serious reservations" about the Mrazek-Yates plan for a National Film Commission because its power to regulate movie alterations made it "smack" of censorship. See Yarrow, Debate Heats Up on Coloring Films, N.Y. Times, June 22, 1988, at C26; Registrar of Copyrights Opposes Bill to Ban Film Colorizing, COMMS. DAILY, June 22, 1988, at 2.

132. The Subcommittee hearing was coincidentally scheduled on June 21, 1988, one day after the Appropriations Committee approved the National Film Commission amendment. See supra notes 106-13 and accompanying text.

133. Schwartz, supra note 8, at 146.

134. House Hearing, supra note 2 (statement of Arthur Hiller at 6-7).
Appropriations Committee had approved the Mrazek-Yates amendment "without any notice or comment, either from our side or from the public." Turner Broadcasting's president later said that his company would have no problem following the labeling requirement because it already labeled colorized films, but added that "taste and choice should not be legislated."

Just prior to the House debate on the Mrazek-Yates amendment, members from entertainment industry guilds and interested congressmen developed a compromise plan. Jack Valenti, president of the MPAA, opposed the proposed regulation of colorization and favored a compromise because he felt it was "desperately wrong for the Government to get involved in the motion-picture business." While he favored "full disclosure" of any alterations, Valenti recommended that the industry regulate itself, much like the motion picture ratings system. In an open letter to the film industry published in Daily Variety, Valenti wrote:

> It's better to resolve our differences within the circle of our industry than for us to become naggers and snarlers, so that eventually one party cries "havoc" and lets loose a government agency [the National Film Preservation Board] whose empowering is palpably wrong in the long run, though its objectives may seem to be so congenially suitable in the short, an illusion we have seen so many times before in history.

On June 21, 1988, before the colorization issue had been debated on the House floor, Valenti and other members of the Directors Guild attended a private meeting with several congressmen to negotiate a compromise. At the meeting, Valenti argued against the creation of a National Film Commission and objected to the provision requiring film owners to change the titles and label films that were altered or colorized. Representative Mrazek argued for the labeling provision, explaining that it was designed to provide a disin-

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137. Id.
138. Id.
139. Valenti, Nat'l Film Preservation Board is a Dangerous Chink in Showbiz' Armor, Daily Variety, July 20, 1988, at 10.
140. Significantly, no members of the House Judiciary Committee attended. Schwartz, supra note 8, at 146.
141. Id.
The compromise plan that emerged reflected the input of Valenti and members of Congress who were consulted by Representatives Yates and Mrazek. One notable difference between the Appropriations Committee’s version of the National Film Preservation Act and the compromise version was the exclusion of the provision requiring a change of title for altered and colorized films. Additionally, the Act no longer established a National Film Commission, but instead created a National Film Registry Advisory Board charged only with advising the Secretary as to which films should be included in the National Film Registry.

On June 29, 1988, after considerable political wrangling,
the House took up consideration of the Interior Department appropriations bill. Representative Yates introduced the newest compromise amendment—one that had been approved for debate by the Rules Committee the previous day. In expressing his support for the legislation, Yates compared the National Film Preservation Act of 1988 to laws preserving landmarks, battlefields, buildings, and brittle books. Representative Mrazek added that the bill was designed to inform future generations that colorized films “do not represent the original creative vision of directors like John Ford, John Huston, Fred Zinneman, and others” who made black-and-white films. The House approved this amendment to the Interior Department Appropriations bill by a unanimous voice vote and then passed the entire bill as amended by a vote of 361 to 45.

The Interior Department Appropriations bill approved by the Senate, however, differed from the bill passed by the House regarding the film preservation provisions. A confer-

by the Copyright Office. Id. at 149 (citing letter of June 27, 1988 to Representative Claude Pepper, Chairman, House Rules Committee). Additionally, private parties with a stake in the legislation sought to lobby the Rules Committee to support their positions. Among those actively opposing the measure at this point in the legislative process were Turner Broadcasting, the Coalition to Preserve the American Copyright Tradition (comprising primarily publishing companies), and representatives of the broadcasting, airline, and advertising industries. Id. at 150.

On June 28, Mrazek and Yates offered the Rules Committee a third draft of their amendment to the Interior Department appropriation bill. The text of the Yates proposal approved by the Rules Committee is contained in its report accompanying H.R. 4867. H.R. REP. NO. 737, 100th Cong., 2d Sess. 1-7 (1988). This time, they succeeded in obtaining the waiver, as the Committee made the amendment in order and reported out the resolution (H. Res. 485) required for the House to consider H.R. 4867. In a significant procedural move, the Rules Committee provided that this third version of the National Film Preservation Act could not be amended while the full House considered it. H. Res. 485, 100th Cong., 2d Sess., 134 CONG. REC. H4853 (daily ed. June 29, 1988). The House approved the rule by a 342 to 57 margin, allowing for consideration of H.R. 4867. Id. at H4856. In other words, only a motion to strike the entire amendment would be ruled in order during debate on its provisions.

147. Yates first stepped in after a colloquy with Representative Don Edwards (D-Cal.), who opposed the creation of a federal commission responsible for judging movies. 134 CONG. REC. H4855 (daily ed. June 29, 1988). Edwards had previously written the Rules Committee, stating his concern that provisions related to the film commission were potentially violative of the first amendment and “smack[ed] of censorship.” Schwartz, supra note 8, at 149.
149. Id.
150. Id.
151. One observer has suggested that proponents of the Mrazek-Yates amendment did not seek at the outset to attach a similar measure to the Senate appropria-
ence committee of House and Senate members sought to resolve this and other issues of disagreement. Some groups, such as the National Association of Broadcasters, still tried to persuade legislators not to accept any legislative provisions dealing with colorization or other alterations. The Librarian of Congress, Dr. James Billington, supported the Yates labeling proposal, but suggested that the film registry should be moved into the Library of Congress, which already housed the largest motion picture collection in the United States. The Reagan Administration continued to voice its opposition to the National Film Preservation Act of 1988, noting that studies of colorization issues had not concluded and stating its concern that the proposal would require the Patent and Trademark Office to enforce the labeling provisions.

After several backroom negotiating sessions between Yates, Mrazek and Senate conferees, an agreement was reached between House and Senate members of the conference committee. The final version of the National Film Preservation Act of 1988 contained the original House proposal to create a National Film Preservation Board empowered to nominate up to twenty-five films annually for a National Film Registry. There were, however, several significant changes from the Mrazek-Yates amendment that passed the House in June 1988. First, in a major concession, the House negotiators agreed to include a “sunset provision” which terminates all provisions of the Act after three years unless Congress, by an act of law,
reconstitutes it. 157 Second, the House members acceded to a request that jurisdiction over the National Film Preservation Board and the Film Registry shift from the Interior Department to the Library of Congress, which already contains the Copyright Office and a tremendous film collection. 158 Third, the authorization for the National Film Preservation Board was reduced from $500,000 to $250,000. 159

The final version also contains provisions for mandatory labeling, but only on materially altered versions of films selected for the Registry. 160 Among the remedies for violations of the labeling requirements are civil fines of up to $10,000 for a willful violation of the Act. 161 While colorized versions of films included in the Registry must be labeled retroactively, the law provides an exception for copies already purchased for home use. 162 The Act requires labels on colorized versions of protected black-and-white films, and sets forth the specific wording for the labels. 163

Although the Act passed both houses by large margins, 164 some controversy remained about the correct interpretation of some of its provisions. During the House debate on final passage of the legislation, efforts were made to establish a more stringent labeling requirement and a more restrictive definition of “material alterations.” Possibly to influence subsequent judicial construction of the statute, Representative Mrazek engaged Representative Yates, the floor manager, in a colloquy on these subjects.

Addressing the labeling of colorized films, Mrazek said that he understood that the conferees agreed that the label “should be displayed at the beginning and the end of the movie” with-

157. Id. at § 1781.
158. Id. at § 178a.
159. Id. at § 178k.
160. Id. at § 178c.
161. Id. at § 178e.
162. Id. at § 178c(c).
163. Id. at § 178c(d). The labels for the package and the panel card immediately preceding a colorized film must state: “This is a colorized version of a film originally marketed and distributed to the public in black and white. It has been altered without the participation of the principal director, screenwriter, and other creators of the original film.” Id.
Representative Fazio and Senator Dennis DeConcini made certain that their own interpretations of the conference agreement appeared in the Congressional Record. Fazio suggested that "Representative Mrazek's interpretation of those processes excluded from the definition of material alteration of a film is more restrictive than the interpretation many [members] thought was agreed to by the conferees." Fazio also took issue with Mrazek's discussion of the labeling requirement, noting that section four of the law required the label to appear "immediately preceding commencement of the film," and did not insist upon a similar label at the end.

Senator DeConcini also took exception to Mrazek's statement on the labeling requirement. DeConcini noted that there was "no such agreement by the conferees for such a requirement," and saw "no reason why the plain language of the statute on this point should not be controlling." He provided his own interpretation of "material alteration" which, though less restrictive than Mrazek's, still included colorization. The Senator did soften his remarks, however, by suggesting that misunderstandings about the intent and meaning of the Act's provisions stemmed from the "time pressures" faced by the conferees as they approached the congressional recess prior to the Republican Convention.

After the "re-interpretation" of these provisions was completed, Congress sent the Interior Department's appropriations bill to the White House for President Reagan's signature. It met with his approval and, on September 27, 1988, the National Film Preservation Act of 1988 became the first federal law aimed at both preserving motion pictures and regulating

165. Id. at H7246.
166. Id. at H7246-47 (statement of Representative Vic Fazio); id. at S12009-10 (statement of Senator DeConcini). Representative Jack Brooks, another active participant in the negotiations over the film colorization bill, agreed with the interpretation offered by Senator DeConcini and inserted his remarks in the Congressional Record on September 9, 1988. Id. at E2884.
167. Id. at H7247.
168. Id.
169. Id. at S12010.
170. Id. Senator DeConcini asserted that the conferees did not intend to include in the definition of "material alteration" the processes of panning and scanning, time compression, time expansion, and customary editing to meet time formats. Id.
171. Id.
IV
A Look Back, A Look Ahead

The efforts of the 100th Congress to address the issue of film colorization did little to assuage the concerns expressed by directors such as Frank Capra, Woody Allen, and other opponents of the process. While the National Film Preservation Board members have been named and will receive $250,000 for the Board's operating expenses in the 1989 fiscal year, film owners continue to enjoy nearly unlimited power to alter motion pictures. Though some in Congress might point with pride to the disclaimers of originality required by the National Film Preservation Act of 1988, it is imperative to remember that this restriction applies to no more than the twenty-five newly-registered films chosen each year and does not ban the colorization of any black-and-white classics. Congress did little more than appropriate funds for a national registry of films to be administered by the Librarian of Congress.

The only attempt to fully appease the Directors Guild was Richard Gephardt's fatally-flawed bill, the Film Integrity Act of 1987. Given the indefiniteness of its provisions and the possible constitutional conflicts it might have provoked, the Gephardt bill surely was not the right vehicle for artists to acquire statutory moral rights protections.

There was at least one bright spot for artists and filmmakers during the 100th Congress—the American entry into the Berne Convention. Even this momentous occasion did not compensate for Congress' refusal to amend the Copyright Act.

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173. The Board's 15 original members include Fay Kanin (Academy of Motion Picture Arts and Sciences), J. Nicholas Counter III (Alliance of Motion Picture and Television Producers), Gene F. Jankowski (American Film Institute), Franklin J. Schaffner (Directors Guild of America), Jack Valenti (MPAA), Edward O. Fritts (National Association of Broadcasters), David Kehr (National Society of Film Critics), William K. Everson (Department of Cinema Studies, New York University), Roddy McDowall (Screen Actors Guild of America), John Belton (Society of Cinema Studies), Ben Levin (University Film and Video Association), Howard Suber (Department of Theater, University of California, Los Angeles), and George Kirgo (Writers Guild of America).

of 1976 to include a moral rights provision. Although proponents of such legislation were assured that there will be future hearings on the subject, opponents could cite the passage of the Berne Convention Implementation Act of 1988 as grounds for devoting time to other, more pressing issues.

A look ahead at the balance of the 101st Congress suggests that the House will continue to examine issues related to film colorization. On March 15, 1989, Representative Kastenmeier received studies on colorization technology, which he had commissioned from the Copyright Office and the Patent and Trademark Office.\(^{175}\) The Copyright Office's primary conclusion was that Congress should create a uniform federal standard concerning the alteration of works created by filmmakers and visual artists such as painters and sculptors.\(^{176}\) It proposed that this change should be accomplished by an amendment to federal copyright law. At a press conference, Kastenmeier commented that this recommendation "will . . . be a disappointment to some in the film industry who seek to maintain the status quo. It will likely be welcomed by others who seek increased protection for artists."\(^{177}\) In contrast, the Patent Office concluded that an amendment to the trademark law was not necessary.\(^{178}\)

If Congress revisits the contentious issue of film colorization, it may encounter similar obstacles to those faced by Representatives Yates and Mrazek in 1988. There is no evidence of a decrease in the lobbying strength of Ted Turner and other proponents of colorization who stand to benefit financially from the alteration of black-and-white films. Furthermore, jurisdictional battles among committees could increase the difficulty of enacting legislation more restrictive than the National Film Preservation Act of 1988.

Colorization opponents' best approach might be an attempt to expand the labeling requirement in the National Film Preservation Act of 1988 to include all colorized films, not just those chosen for the Film Registry. This would resemble early versions of the Mrazek-Yates amendment, which re-

\(^{176}\) Id. at 4.
\(^{177}\) Id.
\(^{178}\) Id.
quired labels disclosing material alterations in any altered film.\textsuperscript{179} While such a requirement would not prohibit copyright holders from colorizing films, it would provide equal treatment for all people who were involved in creating black-and-white motion pictures.

**Conclusion**

This Article has sought to foster a better understanding of the legal and legislative history behind the passage of the National Film Preservation Act of 1988, the first statute addressing film colorization. While it is too early to judge the worth of the recently constituted National Film Preservation Board, colorization opponents will likely be dissatisfied with its limited powers. It would not be surprising if there were renewed efforts to obtain statutory protection for the creators of black-and-white films. Although such legislation might have great moral value, past experience suggests that colorization opponents will have to overcome one nearly insurmountable obstacle: the money of color.

\textsuperscript{179} At one point during consideration of the National Film Preservation Act of 1988, it appeared that colorization interests might abide by this proposal on their own in an effort to reduce the likelihood that Congress would pass more restrictive legislation. In a June 27, 1988, letter to members of the Rules Committee, Turner Broadcasting stated that it would label all color-converted videotapes voluntarily, including information “where applicable, that the original director or cinematographer did not participate in the color conversion.” Schwartz, supra note 8, at 149.