FILM INTEGRITY ACT OF 1987

HEARING

BEFORE THE

SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES, AND THE ADMINISTRATION OF JUSTICE

OF THE

COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES

ONE HUNDREDTH CONGRESS

SECOND SESSION

ON

H.R. 2400

FILM INTEGRITY ACT OF 1987

JUNE 21, 1988

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FILM INTEGRITY ACT OF 1987

TUESDAY, JUNE 21, 1988

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES,
AND THE ADMINISTRATION OF JUSTICE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 10 a.m., in room 2237, Rayburn House Office Building, Hon. Robert W. Kastenmeier (chairman of the subcommittee) presiding.

Present: Representatives Kastenmeier, Synar, Schroeder, Berman, Bryant, Cardin, Moorhead, Hyde, Lungren, and Coble.

Staff present: Michael J. Remington, chief counsel; Virginia E. Sloan, counsel; David W. Beier, counsel; Joseph V. Wolfe, associate counsel; and Judith W. Krivit, clerk.

Mr. KASTENMEIER. The committee will come to order.

Mr. MOORHEAD. Mr. Chairman, I ask unanimous consent that the subcommittee permit the meeting to be covered in whole or in part by television broadcast, video broadcast and/or still photography, pursuant to Rule 5 of the Committee Rules.

This really doesn't say whether it can be covered black and white or whether the black can be colored later on. We will have to decide that later.

Mr. KASTENMEIER. Without objection, the request is agreed to.

Today is the second day of the subcommittee's hearings on artists' rights. Two weeks ago, we heard testimony about the issue of the rights of visual artists, and today we turn our attention to the integrity of films.

The subcommittee has been considering this complex and important issue in other contexts as well. Last fall and winter, we held extensive hearings on the Berne Convention, where the issue of moral rights was a key question. These hearings are being held because the subcommittee declined to treat this particular subject in the Berne bill, but at the same time we had suggested or proposed to the proponents of the provision that in fact we would consider this issue in separate hearings, and these hearings are a response to that.

We actually have a number of proposals before us today, and we will ask the witnesses to address all of them.

First of all, we have H.R. 2400, the Film Integrity Act of 1987, introduced originally by our colleague Richard Gephardt, of Missouri.

Secondly, we have an informal proposal by the Director's Guild to impose a moratorium on colorized films.

And we also have an amendment that was recently approved by the House Appropriations Committee, which I think, it is generally conceded, would appropriately belong in this committee as a matter of jurisdiction, but nonetheless was passed as an amendment to the Interior appropriations bill and is pending before the Rules Committee. This would require the labeling of altered films and a national commission to designate certain films as culturally, historically or aesthetically significant.

All of these proposals raise numerous constitutional and statutory questions. They are serious questions that deserve serious review. That is the purpose of this hearing and of the inquiry currently being conducted by the Copyright Office at my request and at the request of my colleague, the gentleman from California, Mr. Moorhead.

[A copy of H.R. 2400 follows:]

I

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 colorization, 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.".

Mr. KASTENMEIER. I believe that the motion picture industry is getting the message that lovers of great films are concerned about alterations in those films and want something done about it. It has always been my desire to have the various interested parties find a solution without necessarily involving the Congress. In this case, I am still hopeful that that will occur. I suspect, however, that the legislative proposal has to be considered as a serious answer.

There is no one who is a more ardent fan of motion pictures than I. I suspect that many, if not all, members of this subcommittee also would consider themselves fans. We also, however, have a responsibility to the copyright and trademark laws, which this subcommittee has overseen since its inception. And, if those laws are to be amended, we must ensure that they are amended in ways that ensure the integrity of this body of law that we have so carefully constructed over the years, and of the Constitution, which must be a guiding principle behind our laws. We must consider matters of equity in terms of both those who would seek to protect the integrity of creators' works as well as those who have property rights to copyright and seek to exercise those rights.

So I am anxious to hear from all of our witnesses about how we can proceed on these important proposals in that spirit.

[The statement of Mr. Kastenmeier follows:]

OPENING STATEMENT

OF

THE HONORABLE ROBERT W. KASTENMEIER

JUNE 21, 1988

TODAY IS THE SECOND DAY OF THE SUBCOMMITTEE'S HEARINGS ON ARTISTS' RIGHTS. TWO WEEKS AGO, WE HEARD TESTIMONY ABOUT THE ISSUE OF THE RIGHTS OF VISUAL ARTISTS, AND TODAY WE TURN OUR ATTENTION TO THE INTEGRITY OF FILMS.

THIS SUBCOMMITTEE HAS BEEN CONSIDERING THIS COMPLEX AND IMPORTANT ISSUE IN OTHER CONTEXTS AS WELL. LAST FALL AND WINTER, WE HELD EXTENSIVE HEARINGS ON THE BERNE CONVENTION, WHERE THE ISSUE OF MORAL RIGHTS WAS A KEY QUESTION. THESE HEARINGS ARE BEING HELD BECAUSE THE SUBCOMMITTEE DELETED THE MORAL RIGHTS PROVISION IN THE BERNE BILL, BUT PROMISED THE PROPONENTS OF THAT PROVISION THAT WE WOULD CONTINUE OUR CONSIDERATION IN SEPARATE HEARINGS.

WE HAVE A NUMBER OF PROPOSALS BEFORE US TODAY, AND ASK OUR WITNESSES TO ADDRESS ALL OF THEM. FIRST, WE HAVE H.R. 2400, THE "FILM INTEGRITY ACT OF 1987." SECOND, WE HAVE AN INFORMAL PROPOSAL BY THE DIRECTOR'S GUILD TO IMPOSE A MORATORIUM ON COLORIZED FILMS. THIRD, WE HAVE AN AMENDMENT THAT WAS RECENTLY APPROVED BY THE HOUSE APPROPRIATIONS COMMITTEE. IT ENCOMPASSES ANOTHER INFORMAL PROPOSAL BY THE DIRECTOR'S GUILD, TO REQUIRE LABELING OF ALTERED FILMS, AND A NATIONAL COMMISSION TO DESIGNATE CERTAIN FILMS AS CULTURALLY, HISTORICALLY, OR AESTHETICALLY SIGNIFICANT.

ALL OF THESE PROPOSALS RAISE NUMEROUS CONSTITUTIONAL AND STATUTORY QUESTIONS. THEY ARE SERIOUS QUESTIONS THAT DESERVE SERIOUS STUDY. THAT IS THE PURPOSE OF THIS HEARING, AND OF THE INQUIRY CURRENTLY BEING CONDUCTED BY THE COPYRIGHT OFFICE AT MY REQUEST, AND THAT OF MY COLLEAGUE, CARLOS MOORHEAD.

I BELIEVE THAT THE MOTION PICTURE INDUSTRY IS GETTING THE MESSAGE THAT LOVERS OF GREAT FILMS ARE CONCERNED ABOUT ALTERATIONS IN THOSE FILMS, AND THAT THEY WANT SOMETHING DONE ABOUT IT. IT IS ALWAYS MY DESIRE TO HAVE THE VARIOUS INTERESTED PARTIES FIND A SOLUTION WITHOUT NECESSARILY INVOLVING THE CONGRESS. IN THIS CASE, I AM STILL HOPEFUL THAT THAT WILL OCCUR. IN THE MEANTIME, HOWEVER, THIS SUBCOMMITTEE WILL CONTINUE TO CONSIDER THE LEGISLATIVE PROPOSALS BEFORE US.

THERE IS NO ONE WHO IS A MORE ARDENT FAN OF MOTION PICTURES THAN I AM. I SUSPECT THAT MANY, IF NOT ALL OF THE MEMBERS OF THIS SUBCOMMITTEE, ARE ALSO GREAT FANS. WE ARE ALSO, HOWEVER, FANS OF THE COPYRIGHT AND TRADEMARK LAWS, WHICH THIS SUBCOMMITTEE HAS OVERSEEN SINCE ITS INCEPTION. IF THOSE LAWS ARE TO BE AMENDED, WE MUST ENSURE THAT THEY ARE AMENDED IN WAYS THAT ENSURE THE INTEGRITY OF THE BODY OF LAW WE HAVE SO CAREFULLY CONSTRUCTED OVER THE YEARS, AND OF THE CONSTITUTION, WHICH MUST BE A GUIDING PRINCIPLE BEHIND ALL OUR LAWS.

I AM EAGER TO HEAR FROM ALL OF OUR WITNESSES ABOUT HOW WE CAN PROCEED ON THESE IMPORTANT PROPOSALS IN THAT SPIRIT.

Mr. KASTENMEIER. I would like to yield to the gentleman from California.

Mr. MOORHEAD. Well, thank you, Mr. Chairman. The subject that we are dealing with this morning is one that is of considerable concern to members of this subcommittee. Unfortunately, this morning we have a number of mark-ups in other committees, and I have one on a bill that I am very concerned with myself that begins about the same time as this hearing. So, if you see a shortage of people from time to time here, it is because of so many other things going on and not a question of interest, of which there is a great deal.

As I mentioned at the outset of our first hearing the other day on the issue of artists' right, it was not very long ago that we were grappling with these same issues in the context of implementing legislation providing for U.S. adherence to the Berne Convention. While there are some who dispute the tack we took, I think we made the correct decision in the context of the Berne legislation to leave the countries' moral rights law unchanged and allow it to continue to evolve. In my opinion it is very important that we not encumber the Berne legislation and have it go down the drain and not be passed into law.

During our hearings on Berne legislation we quickly learned that the issue of moral rights was a very delicate and complicated subject. In recognition of this fact, I joined with you, Mr. Chairman, in sending letters to Ralph Oman, the Register of Copyrights, and Don Quigg, the Commissioner of Patents and Trademarks, requesting that they study the relevant provisions of the Copyright Act, and the Lanham Act, as they relate to the practices of colorization, panning and scanning, and time compression. I am sure their respective studies will be very helpful to us as we explore these issues.

The bill before us today, H.R. 2400, would establish moral rights for the principal director and principal screenwriter of a motion picture. In addressing legislation of this kind, I am concerned that we do not interfere too heavily in the marketplace, thereby creating uncertainty and perhaps spawning years of litigation.

Having said that, Mr. Chairman, I look forward to the testimony of the witnesses and commend you for actively pursuing this very important issue.

[The statement of Mr. Moorhead follows:]

OPENING STATEMENT OF THE HONORABLE CARLOS J. MOORHEAD
REGARDING H.R. 2400 "FILM INTEGRITY ACT OF 1987"

Thank you Mr. Chairman. As I mentioned at the outset of our first hearing the other day on the issue of artists rights, it was not very long ago that we were grappling with these same issues in the context of implementing legislation providing for U.S. adherence to the Berne Convention. While there are some who dispute the tact we took, I think we made the correct decision in the context of the Berne legislation, to leave this country's moral rights law unchanged and allow it to continue to evolve.

During our hearings on the Berne legislation we quickly learned that the issue of moral rights is a very delicate and complicated subject. In recognition of this fact, I joined with you Mr. Chairman in sending letters to Ralph Oman, the Register of Copyrights and Don Quigg, the Commissioner of Patents and Trademarks, requesting that they study the relevant provisions of the Copyright Act and the Lanham Act as they relate to the practices of colorization, panning and scanning, and time compression. I am sure their respective studies will be very helpful to us as we explore these issues.

The bill before us today, H.R. 2400 would establish moral rights for the principal director and principal screenwriter of a motion picture. In addressing legislation of this kind, it is my concern that we do not interfere too heavily in the marketplace, thereby creating uncertainty and perhaps spawning years of litigation. Having said that, Mr. Chairman, I look forward to the testimony of the witnesses and commend you for actively pursuing this important issue.

Mr. KASTENMEIER. I thank my colleague.

Our first witness today is the Register of Copyrights of the United States, Mr. Ralph Oman. Mr. Oman has testified many times before this committee and has always provided us with excellent advice and guidance, and I certainly look forward to his testimony today.

And joining him is his colleague at the Copyright Office, Ms. Dorothy Schrader.

Mr. Oman.

TESTIMONY OF RALPH OMAN, REGISTER OF COPYRIGHTS, ACCOMPANIED BY DOROTHY SCHRADER, GENERAL COUNSEL, COPYRIGHT OFFICE

Mr. OMAN. Mr. Chairman, members of the subcommittee, thank you very much. It is always a pleasure to come and testify before your subcommittee.

Several other people have worked on this issue in the Copyright Office, and I will consult with them if you have any written questions.

I have submitted a written statement covering three subjects: first, a national droit de suite; second, enhanced moral rights for fine artists, both in H.R. 3221, introduced by Representative Markey; and, third, the Film Integrity Act of 1987, H.R. 2400, introduced by Representative Gephardt.

Your subcommittee has already held hearings, as you mentioned, on H.R. 3221 on June 9, and I have submitted an extensive written statement, which discusses the Markey bill. I will not comment further on it. Of course, I will be pleased to respond to any questions on any of the points raised in the statement.

Instead, I would like to focus on the many related issues raised by the buzzword of "colorization," whether or not to protect motion pictures from alterations which many see as mutilating and injurious to the integrity of the artists who make the films. Critics argue that these alterations—colorization, panning and scanning, dubbing in a foreign language, time compression—these diminish public awareness of the artistry of films.

Your hearing couldn't be better timed. We need a strong, steady hand on the tiller. A few weeks ago we focused our attention on Representative Gephardt's bill. Formally and informally, a lot of other ideas started getting thrown into the pot: the moratorium on copyright registration for colorized film; a moratorium on copyright protection for such films; a court-stripping effort, to deny the courts jurisdiction to try infringement suits involving colorized film.

A few months ago you asked the Copyright Office and the Patent and Trademark Office to look into the problem of material alterations of films, and to report to you early next year.

Last week, Representative Mrazek escalated debate up a notch or two when he attached an amendment to the Interior appropriations bill that would create a new Government agency—a national film commission—to watchdog material alterations of films, an approach sharply different from Representative Gephardt's bill.

I know you have all had many visits from many sincere people who worry about our cultural heritage. Some of those visitors have even drifted over to the Copyright Office. Some of them seem to misunderstand our decision on colorization, and I would like to explain that decision at some point down the road. We will be submitting our final regulation on that point in the near future.

Up to now we have had to sort out a host of proposals of varying merit and practicability, all untested by careful impartial examination. So today, you will focus on the issues. You will start the search for a sensible approach to possible legislation, and you will begin assessing the equities, which are not exactly cut and dried.

Our statement details the serious reservations we have about H.R. 2400. The bill poses problems of constitutional dimension, as you mentioned, concerning the "limited times" provision of Article I, section 8 of the Constitution, and the danger in resurrecting proprietary controls over works in the public domain.

The bill imposes potential criminal liability for violation of the vague test of material alteration of a film. The bill never really sorts out the complex relationship of the artistic author's new rights with the economic rights enjoyed by authors under the Copyright Act of 1976.

And last, the bill leaves unresolved a number of very practical uncertainties about how the new right would be exercised. I lay out these concerns in my written statement.

What I would like to concentrate on today is the Mrazek amendment. Before getting into details I want to make the obvious point about process, one that you have already made, Mr. Chairman. Whatever title or characterization all the bills and ideas may have, they are all fundamentally about copyright or fundamentally affect the rights of authors and copyright owners, and it is this subcommittee that must subject them to careful scrutiny. No other forum has the accumulated experience in crafting balanced legislation.

In copyright, you must reconcile art and industry within the framework of free market, free speech and the public interest, and the price you pay for hasty action is often high. Some of the ideas being considered need careful weighing against the letter of the First Amendment, so this subcommittee has a vital role to play.

I think, too, it is worth recalling that this subcommittee and the Library of Congress, which includes the Copyright Office, have tried over the years to be sensitive to the needs of people who make films and the needs to preserve intact and unaltered our Nation's rich film heritage. And you, Mr. Chairman, and the Library have done so long before the Directors and Screenwriters Guilds started knocking on your door. Let me mention some examples.

The 1976 Copyright Act preserves and strengthens the copyright registration and deposit systems that have built the extraordinary national film collection at the Library of Congress. For exactly the same reasons, you have maintained that system of registration and deposit in your Berne implementing legislation.

And your subcommittee's report language in the 1976 revision bill about the applicability of fair use to the preservation of older motion pictures is of immense importance and relevance to the problem at hand. The importance of preserving our entire audiovisual heritage is also reflected in your 1976 decision to create in the

Library of Congress the American Television and Radio Archives (ATRA).

Finally, it is worth recalling that the Copyright Office in its Proposed Notice of Rulemaking respecting registration of colorized films thought it necessary and proper to require the deposit for our national archives of the underlying black and white film upon which the colorizers base their derivative claim to copyright.

Having said all this, Mr. Chairman, I would like now to turn to the Mrazek amendment. First, moving away from a statutory moral right as proposed in the Gephardt version, the Mrazek amendment moves toward a form of labeling which tells the public that what they are seeing or what they are about to see is materially altered, and explains how it has been altered and then allows creative people involved with the making of the film to disassociate themselves from this altered version. This labeling approach is a much better starting point, at least at this time, than the completely new exclusive right that has been proposed.

Of course, if you go for a labeling approach, a larger issue arises, and that is: Why not extend this requirement to all works, at least in relation to derivative works? Last week, in the House Appropriations Committee, there was a lot of talk about the potential alteration of an original movie like The Grapes of Wrath. But the movie, directed by John Ford, starring Henry Fonda, is not really the original work. John Steinbeck's novel is the original work. How did Steinbeck feel about the movie version of his book? And why not create a labeling system that allows him to object if he doesn't like the resulting movie created from the original novel? I do not take a position on this larger question, but I simply raise it.

Second, an approach that applies a labeling requirement to all materially altered films would avoid one of the most troubling features of the Mrazek amendment, and that is, having the Government in the person of a national film commission decide which films deserve such benefits and which do not.

Justice Holmes once remarked that judges should not be put in the position of having to be art critics, and a Law Review article once questioned whether or not the Register of Copyrights ought to be an art critic in connection with the registration of the works in the Copyright Office. I think the answer is a resounding "no" on both counts, and that goes for any other Government official, even those who are members of the Society of Film Critics.

The Mrazek amendment compounds the problem of discriminating between films for purposes of labeling by authorizing the Commission to grant, in effect, a seal of cultural significance to particular films which can be used in commercial exploitation of the work. Virtually every major theatrical film might seek such approval, maybe even before theatrical release, arguing social, historical or aesthetic merit on one basis or another, because it might be a useful promotional device. That is not what this debate is all about.

The Mrazek amendment also assumes that the directors and screenwriters are the only artists harmed by material alterations of films. True, material alterations affect the contribution of directors and screenwriters, but they very often have a profound impact on the work of cinematographers, editors, art directors, and even the performers, to name just a few.

If a labeling requirement is to work as Representative Mrazek proposes, you have got to give serious consideration to expanding the right of objection to other creative interests.

As to Mr. Mrazek's proposal for a national film commission, consistent with my objections to discriminating among films for purposes of commercial or promotional labeling, I don't see much of a role for such a commission. If you deal with the substance, form, and acceptable placement of a labeling requirement in a statute, you really don't need a Government agency to carry out any special functions in this regard. The money you save on the commission could be spent on film preservation at the Library of Congress.

Still, in another context, there may be a role for a national film commission. A national focus on the importance of film preservation—and here I mean theatrical films, television, independent art films—can be of great use and the commission would help focus on it.

Even there you should hear from others long involved in preserving the national film heritage, organizations like the American Film Institute, the Library of Congress, the National Archives, other museums and film archives, and the Academy of Motion Picture Arts and Sciences. These people are not here today.

As I mentioned, the National Film Collection at the Library of Congress tries to collect and preserve archival quality prints or master negative materials of all theatrical films, and it is one of the easiest, least intrusive and most sensible ways to protect our film heritage. In this collection, the film archive and the public domain unite to serve the public interest and save the originals for new generations of admirers.

So what should you do, Mr. Chairman? First, you should avoid hasty legislation. Mass colorization of the classic repertoire is not imminent, despite Mr. Turner's nose-tweaking about colorizing "Citizen Kane." Many other forms of material alteration have been with us for a long time, and we can grit our teeth a bit longer over what television does to films.

At your request we have launched a serious study, and the Patent and Trademark Office is looking specifically at the Lanham Act. As you know, Mr. Chairman, notice of our study was published in the Federal Register on May 25, and we will hold a public hearing on September 8. So we are moving along.

For our part, I and my staff have been in contact with Congressman Mrazek, and I look forward to working with him to make sure our study considers his concerns and his perspectives. I urge all of those who have worked with and against him these past few weeks to help in the preparation of our study.

Second, Mr. Chairman, I urge another round of hearings, maybe after you receive the Copyright Office and Patent and Trademark Office studies. At those hearings you could hear First Amendment specialists and other commercial actors in the film marketplace, particularly broadcasters, cablecasters and pay TV service providers. People naturally look to this subcommittee for leadership, and now is the time to put together a bill that builds on the Mrazek amendment.

Third, I would not rule out the possibility that we may find an underlying common interest in this matter among the film produc-

ers, distributors, broadcasters and colorizers on the one hand, a. ', on the other, the creative contributors to the film. A broadly based, voluntary agreement setting down commercially stabilizing rules of behavior should not be excluded simply because we can't imagine the text of one right now.

The directors and screenwriters are looking for limitations on what can be done to their work in the context of commercial exploitation. The producers, distributors and other users want both commercial flexibility and predictable, stable rules. This is a situation where a voluntary code, particularly for colorization, may be achievable. You might want to explore this with other witnesses. For our part, Mr. Chairman, we are prepared to help.

That concludes my testimony, and I would be pleased to answer any questions.

Mr. KASTENMEIER. Thank you, Mr. Oman, for that presentation. And without objection, of course, your 41-page statement will be accepted and made a part of the record.

[The statement of Mr. Oman follows:]

STATEMENT OF RALPH OMAN
on H.R. 3221 and H.R. 2400
June 21, 1988

H.R. 3221, the Visual Artists Rights Act of 1987, would grant visual artists new federal rights under the Copyright Act which are known in civil law countries as "moral rights" and the resale royalty right, or "droit de suite." For visual artworks, it would establish for the first time a federal right in the nature of moral rights. H.R. 3221 would in addition create federal rights for works of fine art, which are defined as pictorial, graphic, or sculptural works of "recognized stature."

Traditionally, the United States copyright law has not given additional rights to a work based on its quality. The proposed distinction based on aesthetics has preservation and national cultural interests as the raison d'etre; it may be in the national interest to treat works of greater aesthetic merit with greater respect. In copyright law, however, the marketplace has traditionally controlled the benefits accorded works of differing quality.

H.R. 3221 assigns the Copyright Office two registration functions. I would ask that the legislative history make clear I have the authority to charge a reasonable fee for the registration services. Congress might wish to sever the moral rights from resale royalty provisions of H.R. 3221. The Office has no principled objection to the concept of resale royalty rights, but many issues need to be considered before legislating on this subject.

H.R. 2400 would in essence create a federal moral right on behalf of the principal director and principal screenwriter of a motion picture. Material alterations could be made in a motion picture only with the written consent of these artistic authors.

The Copyright Office cannot at this time support legislation that would create new moral rights in original works of authorship, pending completion of the study on colorization requested by the House Subcommittee on Courts, Civil Liberties, and the Administration of Justice.

When the Office decided that certain colorized films may satisfy the originality standards of the Copyright Act, the Office also proposed to require deposit of the black and white film. If this proposal is adopted, those black and white films will be made part of the collections of the Library of Congress and preserved for posterity.

Statement of Ralph Oman
Register of Copyrights

Before the Subcommittee on Courts, Civil Liberties
and the Administration of Justice
House Committee on the Judiciary
100th Congress, Second Session
June 21, 1988

Mr. Chairman and members of the Subcommittee I am Ralph Oman, Register of Copyrights in the Library of Congress. Thank you for the opportunity to appear and present the views of the Copyright Office regarding H.R. 3221, the Visual Artists Rights Act of 1987, introduced by Representative Markey, and H.R. 2400, the Film Integrity Act of 1987, introduced by Representative Gephardt.

H.R. 3221 would grant visual artists new federal rights under the Copyright Act: 1) a right to claim or disclaim authorship, and prevent distortion, mutilation, and other alterations of their works, and 2) a right to receive royalties when their works are resold. The first, known in civil law countries as the moral right, or "droit moral," has been granted to authors in various forms in several foreign countries, and to a limited extent under various legal theories in the United States. The second, known as resale royalty rights, or "droit de suite," is not recognized in federal law, but is recognized by the state of California and by several foreign countries. On behalf of the men and women who paint, sculpt and draw, this legislative proposal symbolizes a new direction for federal copyright law.

H.R. 2400 would in essence create a federal moral right on behalf of the principal director and principal screenwriter of a motion picture. Material alterations could be made in a motion picture only with the written consent of these artistic authors.

These bills come at a time when United States adherence to the Berne Convention for the Protection of Literary and Artistic Works appears imminent. The House has already passed an implementation bill, H.R. 4262, by a vote of 420-0, and a Senate bill, S. 1301, will soon be ready for a vote. Both the Senate and the House Berne implementation bills take the minimalist approach to moral rights -- i.e. that the United States need not adopt specific moral rights legislation to adhere to Berne. The Copyright Office supports the minimalist approach. Moreover, this Subcommittee has asked the Copyright Office to conduct a study relating to colorization, time compression, and panning and scanning of films and it would be premature to comment fully on these issues now.

I. VISUAL ARTISTS RIGHTS BILL

A. Background of Visual Artists Rights Legislation

Visual artworks present special challenges in copyright law because of the nature of their creation and dissemination. In many cases, they are neither mass produced nor mass distributed; a work may exist only in a single copy. After the sale of that unique work, the first sale doctrine of the copyright law prevents artists from sharing directly in the increased resale value of their works. In many cases, the lack of opportunity for visual artists to share directly in the future value of their works sets them apart from authors of musical works, dramas, and choreography.

Increased legal protection for visual artists has its own external impetus. The steadily increasing value of art in the marketplace has been exemplified recently by the history-making sales prices of fine art.

H.R. 3221 has been carefully crafted with an eye to the sensitivities of the marketplace and the interests of the artistic community. It responds to our desire to preserve the artistic achievements of American artists, as well as the need of creators to have a continuing relationship with their creations. There is also pending before the Senate a companion bill, S. 1619, introduced by Senator Kennedy last year. Hearings were held before the Senate Subcommittee on Patents, Copyrights and Trademarks in December at which I and a number of industry representatives testified.

B. Basic Principles of H.R. 3221

1. The Concept of Ownership. H.R. 3221 is the result of a number of refinements. For visual artworks, it would make a sharp distinction between the artist's copyright and the transferee owner's copyright, establishing for the first time an artist's federal right of personality. In contrast to economic rights, these personal rights do not transfer with an assignment or sale of copyright ownership. H.R. 3221 would give visual artists two new kinds of personal rights: moral rights and resale royalty rights. They are expected to remain with the artist for his or her lifetime, and, upon the author's death, to pass to the estate of the artist.

Although the artist may assign royalty collection to an agent, the bill specifies that the artist may not waive his or her resale royalties. It does not expressly state whether the author may assign or waive his or her moral rights, although nonassignability or nonwaivability

seems implied by the language that the artist shall have the right during his or her lifetime even where someone else holds the copyright. If the moral rights can be assigned or waived, it is unclear under what circumstances a court would enforce either.

2. Aesthetic Considerations. H.R. 3221 creates special federal rights for works of fine art, which are defined as pictorial, graphic, or sculptural works of "recognized stature." The bill allows "recognized stature" to be established by expert opinions from artists, historians, curators, and others knowledgeable in the field of fine art. Traditionally, the copyright law has not given additional rights to a work based on its perceived quality. Under present copyright law, the author of a Pulitzer Prize winning work has no more substantive rights than the author of a child's doggerel. The proposed distinction based on aesthetics has preservation and national cultural interests as the raison d'etre; it may be in the national interest to treat works of greater aesthetic merit with greater respect. In copyright law, however, the marketplace has traditionally controlled the benefits accorded works of differing quality. Congress has so far been unwilling to let judges act as arbiters of aesthetic quality.

3. Scope of Application. Despite the limitations of two of the special rights to works of fine art, the bill gives limited moral rights to all pictorial, graphic, and sculptural ("PGS") works other than works made for hire. Congress should consider whether the bill should apply to the entire "PGS" category, as it now is interpreted in the copyright law, including works of applied art, toys, games, and the like, or whether even

the limited moral rights should apply to the much smaller category of works of fine art such as paintings, drawings, and sculpture. Exclusion of works made for hire limits the number of "PGS" works eligible for moral rights protection.

C. Federal Rights Conferred

H.R. 3221 would give a work of fine art four new federal rights, two of which apply also to all pictorial, graphic, and sculptural works, not just works of fine art. Three of the rights are an offshoot of the moral right, and the last is the droit de suite.

1. Right of Paternity. Under the Markey bill, works of fine art that are publicly displayed have both positive and negative paternity rights. An author of a work of fine art may require that his or her name be placed on any such work, or require that the name be removed from a work that has been distorted, mutilated or otherwise altered. This right to have the author's name removed does not exist for visual artworks that are not works of fine art.

The ordinary remedies of the copyright law apply: injunctive relief, actual and statutory damages or an award of the infringer's profits, and attorneys' fees.

2. Right of Integrity. The bill gives the author of any publicly displayed visual artwork an integrity right, irrespective of the quality of the work. The author can assert copyright infringement if his or her work is substantially or significantly distorted, mutilated, or otherwise altered, provided that the changes are the result of intentional or grossly negligent conduct.

3. Right Against Destruction. In addition to the right against distortion, mutilation, or other alteration, the bill confers upon authors of works of fine art a right to recover monetary damages for the destruction of a work, when such action is intentional or the result of gross negligence. This extraordinary right would be awarded exclusively to works of fine art in recognition of the national interest in preserving their unique contribution to our culture.

Under certain circumstances, the moral rights granted under the bill are unenforceable, as for example, when the owner of a building wishes to remove a work of art from the structure in which it is incorporated. Where the work cannot be removed from the building without distortion, mutilation, or other alteration, the author's moral rights continue only if they were 1) reserved in a written document signed by both the author and the owner of the building, and 2) recorded in the state's real property records before the work of fine art is installed. If these conditions are met, present and future owners of the building are bound. Otherwise, moral rights are considered waived and the building owner can proceed with the intended action.

Where a work of fine art can be removed from a building without substantial harm, the author's moral rights continue unless the building's owner notifies the author or diligently attempts to notify the author without success. The author has ninety days after receiving notice to remove the work or to pay for such removal, thereby taking title to it.

Where the author is dead, the owner of the building would have to notify the author's heir, legatee, or personal representative in writing of the opportunity to remove the artwork in appropriate cases. As a significant number of works installed in or on buildings may be considered works

of fine art just by reason of their selection as decoration, this right will impose new obligations on building owners. Thus, there will be custodial obligations with respect to protecting the work from defacement as well as an obligation to maintain information about the author, in case notification is necessary.

4. Right to Resale Royalties. The author's right to royalties on resale of his or her works applies to all pictorial, graphic, and sculptural works that resell above a certain price and appreciation level. The resale royalty is payable only on artworks resold for a gross price of $1,000 or more and 150 percent or more of the seller's original purchase price. The seller pays 7 percent of the increase in value over his or her original cost. No aesthetic standard is imposed on the author's right to royalties when the work of art is sold.

In order to qualify for a resale royalty, the author must register in the Copyright Office as an author before the resale occurs. Additionally, when a work on which royalties are payable is sold, the seller must register the transaction in the Copyright Office. The seller's penalty for failure to register the transaction is equal to treble the royalties owed. The bill directs the Register of Copyrights to issue procedures for both new registration requirements.

D. Elimination of the Copyright Notice

The bill would also eliminate the notice of copyright requirement in the case of pictorial, graphic, and sculptural works. Both the House and Senate Berne adherence bills eliminate the notice of copyright as a requirement for securing copyright with respect to all works. If Berne implementation legislation is ultimately passed, H.R. 3221's exemption from the notice requirement will become unnecessary.

E. Exclusions

The criminal penalties do not apply to the author's moral and resale royalty rights. The rights are supplementary to the economic rights of copyright, which the author may also hold. It is appropriate that only civil penalties apply to these additional personal rights.

Consistent also with personal rights, the rights created by the bill do not apply to works made for hire. Thus, neither employees nor employers of works made for hire may claim benefits under this bill.

F. Comments on the Registration Provisions

H.R. 3221 assigns the Copyright Office two registration functions. First, in order to be eligible for resale royalties an artist must register with the Copyright Office. Second, all transfers of artistic works subject to a resale royalty must be registered with the Copyright Office. The specifics of the registration procedures are to be determined by Copyright Office regulations, and no explicit fee is designated for providing these services.

Section 708 of title 17 specifically designates the fees for most services of the Copyright Office. Services not specifically designated, however, may fall within catch-all subsection (a)(11) providing fees "for any other special services requiring a substantial amount of time or expense, such fees as the Register of Copyrights may fix on the basis of the cost of providing the service." The Copyright Office believes this provision could be invoked to allow the Copyright Office to charge for the cost of providing the registration services proposed in H.R. 3221. Budgetary considerations would preclude the Office from offering the services for free. The applicability of section 708(a)(11) authorizing the charging of a reasonable fee should be made clear in the legislative history.

An artist registering for resale royalty eligibility may designate a collecting society as his or her representative. Conceivably, this provision could foster the establishment of organizations similar to the existing music performing rights societies.

The registration system for transactions requiring a resale royalty is distinguishable from other registration systems maintained by the Copyright Office in that the party registering the transaction receives no benefit from making a registration. The existing registration systems generally create public records of copyright ownership rights, or the right to a compulsory license. Registration of visual artwork transactions, on the other hand, documents the obligation of the seller to pay the artist a resale royalty. The high degree of voluntary compliance applicable to existing registration systems maintained by the Copyright Office may not be achieved with respect to registrations of fine art transactions.

The penalty for nonregistration of visual artwork transactions is the possibility of a suit by the artist or collecting society, which would subject the seller "to a penalty equal to treble the amount of the royalty owed." Clearly, enforcement falls almost entirely on the artist or his or her representative. Commentators on the California Resale Royalties Act report that the primary weakness of that Act is the inability or unwillingness of artists to sue to enforce their rights. 1/ That Act does not have a central registration system like H.R. 3221; the central registry should facilitate suits by artists.

The seller is responsible for making the resale royalty payment directly to the artist, presumably by locating the address of the registered artist, or the designated representative, in the records of the Copyright Office. The Copyright Office has no direct role in the payment scheme.

H.R. 3221 is unclear as to what happens if there is a break down in the system. What happens if the address of the registered artist is not current? What standards of diligence are imposed on the seller to locate the artist? May the seller deduct expenses incurred in locating an artist whose address is not current in the Copyright Office?

Noncompliance with the royalty resale provisions allows the artist to seek two distinct remedies. Nonpayment of royalties is designated as a "copyright infringement" and presumably all the remedies specified in Chapter 5 of title 17 would be available to the artist. Most significant of these remedies would be actual damages (likely the amount of the royalties owed), statutory damages, and attorneys' fees. Nonregistra-

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1. J. McInerney, "California Resale Royalties Act, Private Sector Enforcement," 19 U. of San. Fran. L. Rev. 1 (1984).

tion of transactions is also designated as a "copyright infringement," but H.R. 3221 specifies a penalty of "treble the amount of the royalty owed." The nature and relationship between these two remedies is unclear. For nonregistration of transactions, is "treble the amount of the royalty owed" intended as the sole remedy, or is it additional to other Chapter 5 remedies? Are the penalties for nonpayment and nonregistration cumulative, allowing an artist to receive treble royalties for nonregistration, plus statutory damages and attorneys' fees for nonpayment?

G. State Laws Protecting the Personal Rights of Artists

Three states have laws protecting the personal rights of artists in a fashion similar to H.R. 3221: California, New York, and Massachusetts. Of these three, only California provides for a resale royalty. H.R. 3221 is silent as to whether enactment would preempt these state laws. Unless it is amended, section 301 of title 17 would seemingly preempt these laws. A brief discussion of the three state statutes follows:

1. California

California was the first state to enact legislation granting rights similar to those in H.R. 3221. The California Resale Royalties Act compensates visual artists for the appreciated value of their work upon sale. 2/ The California Art Preservation Act protects the integrity of an artist's work, and establishes a right of attribution. 3/

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2. Cal. Civ. Code §986 (West Supp. 1984).

3. Cal. Civ. Code §987 (West Supp. 1984).

The Resale Royalty Act was passed in 1977 after publicity cast attention upon a few lucrative resales of works by contemporary artists. 4/ The Act was controversial, and was quickly challenged by an art dealer as being preempted by the 1909 federal Copyright Act. The Ninth Circuit rejected this contention in Morseburg v. Balyon. 5/ In 1982, the Act was amended to deal with the perceived enforceability shortcomings of the original legislation.

Under the California law, resale royalties apply only to transactions occurring in California, or to transactions where the seller is a resident of California. All transactions must be for more than $1,000 and the gross sales price must be greater than the original purchase price. For transactions subject to the royalty, the royalty is 5 percent of the gross selling price. 6/

The greatest shortcoming of the California law has been enforceability. The lack of a central registration system has been attributed as a major source of the problem. One commentator summed up the situation in the following words: 7/

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4. In the mid-1970's, Robert Rauchenberg's painting Thaw was auctioned for $85,000. Reportedly it had been purchased about fifteen years earlier for $960. The Whitney Museum reportedly paid $1,000,000 for Jasper John's Three Flags, while the artist earned only $900 from its original sale.

5. 621 F.2d 972 (9th Cir.), cert. denied, 449 U.S. 983 (1980). The preemption issue has not been litigated with respect to the 1976 Copyright Act. In light of section 301 of title 17, a preemption argument based on the current copyright law would likely be stronger.

6. Under H.R. 3221 and S. 1619, appreciated value serves as the basis for determining the royalty rather than gross selling price.

7. McInerney, "California Resale Royalties Act: Private Sector Enforcement," 19 U. of San. Fran. L. Rev. 1, 3 (1984).

> Despite the (1982) amendments, the Act is perhaps the State's most neglected and underused law. Many of those who could benefit are ignorant of the Act; others who are aware of the Act feel impotent to enforce it. Those whom the Act seeks to regulate do not comply with its provisions. The monitoring necessary for individual enforcement is an impossible bureaucratic nightmare attempted by no one. Apparent lack of effective means to collectively enforce the Act has made it virtually irrelevant. As a result, visual artists continue to be exploited and remain uncompensated for their residual interests in resold artwork.

The California Art Preservation Act seeks to preserve works of fine art and protect the personality of the artist. The Act prohibits the intentional "defacement, mutilation, alteration, or destruction of a work of fine art." Where the alleged mutilation was associated with an effort to conserve a work of fine art, evidence of gross negligence is required. Additionally, the artist has a right of attribution, and "for just and valid reason," the right to "disclaim authorship of his or her work of fine art." The rights of attribution and integrity may be waived by written contract. Owners of buildings who wish to remove a work of fine art capable of removal without mutilation, are subject to liability under the Act unless they attempt to notify the artist of their intention, and provide the artist with an opportunity to remove the work.

2. New York

In 1984, New York passed its New York Artists' Authorship Rights Act. 8/ The statute prohibits the display of an "altered, defaced, mutilated, or modified form" of a work of fine art which damages the artist's reputation. There is no explicit prohibition against destroying a work, although destruction in the context of damaging an artist's reputation might fall within the Act. The artist additionally has a right of attribution, and the right to disclaim authorship for good cause. Conservation does not constitute alteration, defacement, mutilation, or modification unless the conservation is done negligently.

3. Massachusetts

Passed in 1984, the Massachusetts statute prohibits "the intentional commission of any physical defacement, mutilation, alteration, or destruction of a work of fine art." 9/ The artist retains a right of attribution, and the right to disclaim authorship "for just and valid reason." If a work of fine art cannot be removed from a building without substantial alteration, the prohibitions of the Act are suspended unless a written obligation signed by the owner of the building has been recorded. If the work is capable of being removed without mutilation, then the prohibitions of the Act apply unless the owner notifies the artist and provides the artist with an opportunity for removal.

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8. N.Y. Arts & Cultural Affairs Law §14.03 (McKinneys 1987).

9. Mass. Gen. Law Chap. 231 §86S (West 1987).

H. European Concepts of Droit de Suite

Droit de suite, within the framework of continental European jurisprudence, is generally justified on the ground that the author/creator has the fundamental right to participate and share in every commercial exploitation of his intellectual creations.

Writers and composers, through the system of royalty payments, participate continuously during the term of copyright protection in the commercial exploitation of their creative works. Artists, on the other hand, do not generally enjoy the same prerogatives because of practical and legal constraints. An original work of art is an intellectual creation embodied in a tangible object. Since the value of such a work is measured in terms of its uniqueness, it is not susceptible to the ordinary modes of copyright exploitation (reproduction, performance, etc.). Its exploitation, nonetheless, occurs with every sale (resale) for a monetary consideration. Droit de suite -- the right to follow proceeds generated from such sales or resales -- is a system established in relatively few countries to allow the artist to share in the continued exploitation of his or her work of art.

The concept of droit de suite 10/ has developed somewhat

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10. The term droit de suite comes from French real property law. Under article 2279 of the Civil Code, a taker of personalty cuts off all rights of the true owner, for "in the matter of personalty, possession equals title." The only exception is in the instance where the holder is a thief or finder and the owner vindicates his rights in three years. Rights to realty are, however, more sacred, and an owner or a creditor may pursue the realty in the hands of a taker, even a bona fide one. Creditors may not do the same to personalty, for the chattel mortgage, as such, does not exist in French law. This right to pursue or follow the property (realty) is called, literally enough, the "follow-up right" (droit de suite). Rita E. Hauser, "The French Droit de Suite: The Problem of Protection for the Underprivileged Artist Under the Copyright Law," 11 ASCAP Copyright Law Symposium, 1, 5, n. 14 (1962).

ambiguously and equivocally on the European continent. It is generally inspired both by sentiments of equity and philanthropy.

Several theories have evolved within the scope of European jurisprudence, attempting to explain or justify the existence and juridical nature of the droit de suite. It has been described as a levy or tax, based on philanthropic considerations, to promote social welfare of artists and their heirs. Others have explained it as based on the inherent "latent value" of artworks. According to this theory the artist is deemed to have, at the moment of creation of an original work of art because of his or her labor, the right to share subsequently in an overt increase in the sale price. A failure to share in the added value would give rise to an unjust enrichment on behalf of a noncreative purchaser. Some have justified the resale royalty on a principle of contract law that permits and justifies the modification of a sales contract by a court when hardship results from circumstances unforeseen at the time of the making of the first sales contract.

The foregoing theories were advanced primarily because the first European laws of droit de suite were outside the framework of the copyright law. In the omnibus revision of the French copyright law in 1957, droit de suite became an integral part of the French Copyright Act. This now is also true of Belgium, West Germany, Czechoslovakia, Hungary and Yugoslavia.

Droit de suite is generally applicable to works of fine art. In Europe it does not generally apply to reproductions, architectural works and works of applied art. A limited consensus has evolved on the propriety of a special reward to the artist/creator. Disagreements, however, continue as to the best methods for granting this reward.

Ever since 1920, France has employed a simple approach whereby the authors of "graphic and plastic works" (whose price is more than 10,000 francs) receive a royalty (currently 3%) on the gross sale price of the works sold "either by auction or by merchant." For political and practical enforcement reasons, the law has not in fact been applied to sales by merchants. A similar approach is used in the German Copyright Act of 1965. The price received on a resale of an original work of art for 100 DM or more, with an "art dealer or an auctioneer" as purchaser, vendor or agent, is subject to a five percent royalty. This right is inalienable and unwaivable. The law, however, does not apply to architectural works and works of applied art. The right expires after ten years.

The Italian regime of droit de suite is based on the "value plus" principle which, without discrimination between public and private sales, grants the artist the right to participate in the profits of the owner/vendor. The "capital gain" royalty, which was first recognized in Italy by the 1941 Copyright Act, is substantially in effect to the present day. The law however has been applied retroactively to works of art sold by an artist before its effective date. The Italian law basically provides that the creators of works of art in the form of paintings, sculpture, drawings and prints shall be entitled to (1) a percentage of the amount by which the price of the first public sale of original copies of such works exceeds the price of first alienation or transfer of the physical object, and (2) a percentage of the capital gain that the original copies of their works ultimately acquire in successive public sales. The law also provides that an increase in value shall be presumed, and prescribes an elaborate system of percentages applicable to public and private sales. The percentages established for the public sales are applicable only if the

selling price is in excess of 1000 lire (4000 lire for private sales) for drawings and prints; 5000 lire (30,000 lire for private sales) for paintings; and 10,000 (40,000 lire for private sales) for sculpture. In practice, this legislative design has proven to be difficult to apply and enforcement has been lax.

In France and Germany, the droit de suite regimes have worked with fair success, but the general consensus seems to be that there are some serious problems in enforcing droit de suite.

I. General Comments on H.R. 3221

Traditionally, the United States copyright law has not given additional rights to a work based on its quality. The proposed distinction based on aesthetics has preservation and national cultural interests as the raison d'etre; it may be in the national interest to treat works of greater aesthetic merit with greater respect. But the copyright law has traditionally relied on the marketplace to control the rewards earned by artists.

We must be very careful in reordering relationships in the art world -- especially between the artists and the gallery owners. We should not look on works of art as we would a box of cornflakes in the supermarket. A gallery owner may have a very personal relationship with an artist, and we should not burst in with major reforms without full exploration of the ramifications. H.R. 3221 attempts to tred lightly in this delicate area, but the Copyright Office would like to hear from other experts before making a final judgment.

The Copyright Office has no principled objection to the concept of resale royalty rights, but we do have some questions. Are artists in the Federal Republic of Germany better off with the droit de suite than are artists in the United States? In California, artists strongly supported the droit de suite law, while gallery owners thought it would harm them. What actually happened? Would a uniform federal resale royalty act solve any problems with the California experience? Would a national resale royalty right, on the other hand make the United States a less attractive place for international art markets? Would Montreal or Bermuda replace New York as the premier art sale venue? Would a worldwide solution to the problem under the auspices of the World Intellectual Property Organization be the best solution?

II. THE FILM INTEGRITY ACT OF 1987

A. Background

Between 1985 and 1986, the Copyright Office received from several parties copyright registration materials for the colorized versions of ten motion pictures and one television program. The works were submitted for registration as derivative works. Because of the unusual nature of the claimed authorship and to obtain information about the process of creating the colorized versions from persons other than the claimants, on September 15, 1986, the Copyright Office published a Notice of Inquiry asking for comments concerning the copyrightability of the colorized audiovisual works. 51 Fed. Reg. 32665 (Sept. 15, 1986).

The Copyright Office Inquiry sparked public debate on many issues surrounding the colorization of black and white films. Controversy focused on two main issues: the copyrightability of colorized films and moral rights in the underlying black and white films.

Experts are divided on the issue of the copyrightability (as derivative works) of colorized films. This issue 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. This issue was initially resolved by the Copyright Office's registration decision and can only be finally resolved by the federal courts. The Office's registration decision is discussed in detail in Part III below.

While the Copyright Office was studying the registration issue, another controversy raged in Hollywood, on Capitol Hill, and in the media, concerning the moral and aesthetic issue of whether it is just or fair materially to alter films, which constitute an important part of our national heritage, regardless of the film's public domain status. The parties that colorize black and white films clear the rights in the underlying work before they colorize, where that work is still under copyright and owned by another. That is, they obtain from the owner of the film's copyright a license to make a derivative work of the film. A license is not necessary where the colorizers own the copyright themselves, or where the copyright in the film has expired. Opponents of colorization argue that regardless of whether the economic rights that comprise the copyright in a black and white film are cleared, there are or should be

independent moral rights inherent in works of art that prevent the colorization of black and white films unless the film's principal director, principal screenwriter, and/or other parties who contributed authorship to the work, consent to such alteration of their work.

On May 12, 1987, the Subcommittee on Technology and the Law of the Senate Committee on the Judiciary held a hearing to "explore how 'colorization' affects copyright, trademark and contract law, artistic integrity and the preservation of a major part of our national cultural heritage." 11/ At the hearing, representatives of the Directors Guild of America and the Screen Actors Guild urged the Subcommittee to pass legislation that would prevent the alteration of a completed motion picture by such methods as time compression (to free up film minutes for commercial messages), panning and scanning to alter screen ratios, film cutting, and the addition of computer generated color. They argued that copyright owners in film have a "custodial responsibility to pass on the works they hold for the next generation, unchanged and undistorted," 12/ and that without appropriate legislation, the nation may lose its invaluable cultural heritage.

The day after the Senate hearing, Congressman Gephardt introduced in the House of Representatives H.R. 2400, the Film Integrity Act of 1987 13/ on behalf of himself and Congressmen Levin, Lehman, MacKay and

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11. Colorization Hearing Before the Subcomm. on Technology and the Law of the Senate Comm. on the Judiciary, 100th Cong., 1st Sess. (May 12, 1987) (statement of Senator Patrick Leahy).

12. Id. (statement of Elliot Silverstein on behalf of the Directors Guild of America) at 10-11.

13. 133 Cong. Rec. E 1922, H 3555 (May 13, 1987).

Glickman. In his floor statement, Congressman Gephardt explained the purpose of the bill:

> This legislation reflects my deep concern over the potential impact of techniques like colorization on America's film treasury. Film is a uniquely American art form: we brought it to life, we made it talk, we used it to address our deepest social concerns. Classic feature films are a vital part of America's living heritage. They have become one of the most potent voices through which one generation speaks to the next... The choices of how a film is created and developed are very personal; these decisions should not be second guessed by entrepreneurs in search of a quick buck...
>
> [The legislation] restrain[s] film editors and computer technicians who would distort the original intent of our films. It holds those who would tamper with our American heritage to a higher standard than a mere dollar sign. 14/

In order to meet the concerns of opponents of colorization, H.R. 2400 would for the first time in American history introduce a moral right of integrity in the United States copyright law. Moral rights traditionally have been considered to be legal rights that are included in the bundle of rights that comprise a copyright under the laws of most European countries. They are considered to be personal rights that are different from the economic and proprietary aspects of copyright.

Article 6 bis of the Berne Convention sets forth some obligation for members to recognize two of the traditional moral rights: the paternity right and the right at issue in the colorization controversy -- the integrity right. The integrity right is a right against distortion of

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14. Id. at E 1922.

a work. The author's possession of this right generally means that an author, even if he or she has conveyed or licensed "all rights" to the work, retains the power to prevent, or at least object to, the distortion of the work by the transferee or licensee.

B. Provisions of H.R. 2400

H.R. 2400 would amend the Copyright Act of 1976, Title 17 United States Code, to include a new section 119 limiting the exclusive rights of the owners of a copyright in a motion picture. Under proposed section 119(a), the owner of a copyright in a published motion picture would not be able materially to alter the work without the written consent of the "artistic authors" of the work. The provision specifies that colorization constitutes a material alteration. The bill's definitional section clarifies that a motion picture's artistic authors are the principal director and principal screenwriter of the work.

Proposed section 119(b) provides for the transferability of an artistic author's right to consent to material alteration, both during the lifetime of the artistic author or upon his or her incapacitation or death. It also designates a successor to whom the right of consent would pass in the case of an artistic author who is dead or incapacitated on the effective date of the new provisions. Finally, proposed section 119(b) requires that, in any case, only a qualified artistic author may exercise the right of consent.

The bill's proposed section 119(c) provides that an artistic author's right to consent to material alteration in a motion picture would not expire when the copyright in that work expires.

Section 119(d)(1) provides that the artistic authors of a motion picture would be considered to be the "legal or beneficial owners of an exclusive right under a copyright" with respect to a motion picture that has been materially altered, and that the copyright remedies set forth in chapter 5 of the Copyright Act would apply against the party that altered the work. Section 119(d)(2) would add an additional remedy for material alteration without consent: the derivative work created by the alteration would not be eligible for copyright protection.

Finally, proposed section 119(e) gives the Register of Copyrights the authority to establish by regulation procedures for directors and screenwriters of motion pictures to be formally designated as the artistic authors of the motion pictures they create.

C. Copyright Office Views on H.R. 2400

1. Concerns regarding the timeliness of the proposed legislation.

The Copyright Office cannot at this time support legislation that would create new moral rights in original works of authorship. The Office has recently taken the position that the United States law provides, through a variety of noncopyright state statutes, judicial decisions interpreting state common law, and perhaps the federal trademark law, adequate protection of the moral rights of authors for the United States to accede to the Berne Convention. Because the Copyright Office believes that United States adherence to the Berne Convention is highly desirable and of the utmost importance, and because the moral rights issue is perhaps the most controversial issue related to Berne adherence, further consideration of moral rights legislation should be postponed until after Berne implementing legislation has been enacted into law.

Considering the provisions of H.R. 2400 independently of the issue of Berne adherence, the Copyright Office must oppose the bill on technical grounds. The bill fails to establish a well-defined moral right of integrity, it may run afoul of the copyright clause in the United States Constitution, and its provisions regarding ownership, transfer, and other aspects of the right created are incomplete and raise interpretive questions. The following discussion will describe in greater detail these technical infirmities.

2. Concerns regarding the scope of the right created by proposed section 119(a).

Proposed section 119(a) would create on behalf of the "artistic authors" of a motion picture, defined as "the principal director and principal screenwriter of the work," a right to control whether any party may make a "material alteration" of the motion picture once it has been published. This right is essentially different from what is traditionally understood as a moral right of integrity, and suffers from both overbreadth and underbreadth.

The right is overbroad because it prohibits any unauthorized "material alteration." This prohibition, which is undefined in the bill, encompasses a far broader range of potential alterations to a motion picture than does the harm protected against under the Berne Convention's traditional moral right of integrity. Article 6 bis of the Berne Convention prohibits any "distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to [the author's] honor or reputation." H.R. 2400 prohibits any material alteration of a film, regardless of whether it has a negative consequence for the artistic integrity of the work.

The overly broad prohibition would surely raise marketing problems regarding the distribution of a motion picture in the United States and abroad. Traditionally, United States copyright law has afforded the copyright owner of a motion picture the following right regarding alteration of the work: the right of authorizing the cutting or editing of the film for theatrical exhibition, broadcast exhibition, airline use, home video distribution, and preparation of noncommercial educational study materials; the right of authorizing the addition of subtitles, dubbing, or the addition of music for foreign distribution; and, the right of authorizing an adaptation of the work (the creation of a derivative work in another medium), a remake of the work, or a historic reconstruction of the work (i.e., to add footage or other material which the screenwriter or director arguably might have wanted in their version as published but which was exercised by the producer prior to first release). However, H.R. 2400 would require all these alterations of the motion picture, no matter how well intentioned and well done, to be cleared with the artistic authors of the work in addition to the copyright owners.

In addition to this interference with the ordinary marketing and distribution of motion pictues, the "material alteration" prohibition would interfere with, or perhaps eliminate completely, the exclusive right of the copyright owner of a motion picture to prepare certain derivative works -- such as novelizations -- based on the copyrighted work. A more narrowly drafted definition of the right of the artistic authors of a motion picture that focuses on material alterations that mutilate, distort, or otherwise prejudice the integrity of the artistic authors would avoid this problem and would delineate the economic rights of copyright owners from the moral rights of the artistic authors.

On the other hand, proposed section 119(a) is arguably under-inclusive by traditional moral rights standards for other reasons. First, the legislation only offers a moral right of integrity on behalf of the principal director and principal screenwriter of a particular work. It does not address the concerns of others involved in the creative process, such as the actors, cinematographers, screenplay authors other than the principal writer, soundtrack composers, and set designers.

The scope of the right created by section 119(a) is also affected by the fact that the bill does not address the requirements for and the effect given the consent of the artistic author. The bill is not clear as to whether the artistic author's consent may be acquired before or only after publication of the motion picture. A further question is whether consent given to one party, such as the producer of the motion picture, may be relied upon by a party who subsequently purchases or licenses the copyright in the motion picture from that party.

3. Concerns regarding Congress' authority to create a perpetual right of consent to material alteration pursuant to the copyright clause of the United States Constitution.

Congress' authority to enact copyright legislation is derived from the copyright clause in Article I, clause 8, section 8 of the United States Constitution, which authorizes Congress to "promote the progress of science and the useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." The phrase "for limited times" creates a limitation upon Congressional power to enact legislation that secures for authors any exclusive rights in their works. Thus, while the period of copyright-like protection is discretionary with Congress within broad limits, 15/ a

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15. See Pennock & Sellers v. Dialogue, 27 U.S. (2 Pet.) 1, 16 (1829).

federal statute enacted under the Copyright clause that purports to grant a moral right of integrity for certain works in perpetuity would be clearly unconstitutional. 16/ Although such a right is not, strictly speaking, an economic right, it is a right with considerable economic consequences in the society at large and with direct consequences to the public's right to use works whose copyright terms have expired. Thus, the bill should attempt to impose an outer time limit on the duration of the right of consent of the artistic authors and their successors and transferees.

4. Concerns regarding the ownership and transfer provisions.

H.R. 2400 raises a number of questions regarding the ownership and transfer of the right established in proposed section 119(a). First, the bill does not clarify whether the artistic authors' right to consent to material alterations is to be enjoyed jointly and, if so, how that is to be accomplished. For example, if the principal director gives consent to a particular alteration but the principal screenwriter does not consent, can the alteration be made? Can each consent only with respect to an alteration that pertains to his or her work?

Second, the bill is unclear with respect to whom the artistic authors may transfer their right, and under what circumstances such a transfer may occur. Proposed section 119(b) specifies three transfer situations: 1) both artistic authors assign their right of consent during their lifetime to a third party who is a "qualified artistic author;" 2) one artistic author dies or becomes incapacitated and his or her right is transferred to another qualified artistic author; 3) the right of an artistic author who is dead on the effective date of the bill passes the

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16. See, e.g., Marx v. United States, 96 F.2d 204, 206 (9th Cir. 1938); Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975); 1 Nimmer on Copyright, §1.05, 1-34 (1987).

right to his or her heirs identified in section 203(a)(2) of the Copyright Act or, if there is no such successor to his or her heir under law; and such person assigns the right to a third party who is a qualified artistic author. These provisions regarding the transfer of the right of consent are replete with ambiguities.

The specific intent underlying the requirement for transfer to a "qualified artistic author" is unclear because the term is not defined in H.R. 2400. Clearly the term must refer to another principal director or principal screenwriter of some work. But H.R. 2400 is unclear as to what would qualify such an individual to be an assignee of an artistic author's right of consent. Furthermore, the policy of requiring such an assignee to be a director or screenwriter seems unwise. The policy consideration behind the requirement is to assure that the assignee is an individual who would be able to guard the integrity of the artistic author's work and reputation. Such an enforcement task might also be reasonably fulfilled by a professional association, a film scholar, an art historian or museum staff, a film critic, or some other expert individual or organization.

With respect to the bill's provision for the first transfer situation, proposed section 119(b) leaves unclear whether the two living artistic authors of a motion picture must assign their right of control jointly to only one qualified artistic author, or whether each may choose individually whether to transfer the right and to whom.

The bill's provision for the second transfer situation seems to indicate that an artistic author may bequeath to another qualified artistic author his or her right of consent. However, the provision is not clearly drafted and raises a question as to the result when an artistic author dies or becomes incapacitated after the effective date of the bill without

having accomplished a transfer of his or her right of consent by will or other testamentary document. Presumably a similar reference to the successor designated in section 203(a)(2) of the Copyright Act as is used with respect to the provision for an artistic author who is dead on the effective date of the bill could be added to the provision for the second situation to clear up this ambiguity.

The third transfer situation leaves no doubt as to whom the right of control of an artistic author who is dead or incapacitated passes on the effective date of the bill. However, the provision permits, but does not require the successor of a deceased or incapacitated artistic author to assign the right to another qualified artistic author. Since the bill permits only qualified artistic authors to exercise the right of consent, the right could be dormant in the hands of a successor who chooses not to assign the right. This result would seem to disrupt the bill's attempted scheme of having a perpetual chain of qualified artistic authors available to exercise the right of consent pertaining to every motion picture covered by the legislation.

A third point with respect to ownership of rights is that the bill has a somewhat awkward structure: the artistic authors are deemed owners of copyright in materially altered films by means of a standing to sue provision in the infringement chapter, even though they are not specifically granted any exclusive rights by amendment of section 106 of the Act. This seems to have the anomalous result that, where a public domain motion picture is colorized, for example, the artistic authors would be deemed owners of copyright in the very material alterations to which

they object. In short, if artistic authors are to be granted moral rights in the federal copyright law, it would seem more appropriate either to amend section 106 or add a new rights section, before sections 107-118 that set forth limitations on rights.

5. Miscellaneous concerns regarding the operation of the provisions of proposed section 119.

Proposed section 119(d) would apply the traditional remedies for copyright infringement specified in Chapter 5 of the Copyright Act as the remedies for acts of unauthorized material alteration. This wholesale approach to remedies creates some logical inconsistencies in the law that courts might find difficult to apply. For instance, applying section 504 of the Copyright Act, an artistic owner would be entitled to recover his or her actual damages suffered as a result of the violation of the right of control as well as any profits of the violator that are attributed to the act. The bill gives no guidance as to how actual damages and profits might be determined with respect to a particular act of unconsented material alteration. With respect to criminal remedies, application of section 506 would make criminal an act of willful unconsented material alteration of a motion picture for purposes of commercial advantage or private financial gain. Given the overbreadth of the concept of "material alteration," rendering such acts criminal raises constitutional due process concerns. Even if the provision is constitutionally permissible, there remains a policy question as to whether potential criminal liability would inhibit any sort of alteration of a film regardless whether it is impermissible under the material alteration provision. Such a chilling effect on expression might raise First Amendment problems.

Proposed section 119(e) authorizes the Register of Copyrights to establish procedures for directors and screenwriters to be formally designated as the artistic authors of films. It would seem such procedures would be unnecessary since the bill provides that the status of being an artistic author arises when the existence of the work in a certain form is achieved. The bill does not give any relevance to formal designation of an artistic author with respect to the author's ability to exercise his or her right of control or to gain a remedy for the violation of that right. If section 119(e) was intended to facilitate the identity of artistic authors by potential users of a motion picture, registration and recordation provisions would better achieve that end.

H.R. 2400 also raises a number of questions concerning the interplay between the right of consent to material alteration and the formalities found in the Copyright Act. For example, must a copyright claim in a film be registered with the Copyright Office for an artistic author of the film to bring a suit for violation of his or her right to consent, or to claim statutory damages under chapter 5 of the Copyright Act? Should assignments or other transfers of the right of control be recorded with the Copyright Office to facilitate identification of the rightsholders to a particular motion picture by potential users?

Finally, H.R. 2400 raises serious questions of retroactivity. Proposed sections 119(a) and (b) seem to indicate the bill attempts to create a right of consent not only in motion pictures created after its effective date, but also in all existing motion pictures that have been or will be published, regardless whether they are under copyright protection or are in the public domain. Retroactive protection raises serious questions about the effect of contracts concluded prior to enactment

whereby a copyright owner, but not an artistic author, approved the material alteration of a published motion picture. Also what is the impact on contracts entered into by owners of copies of motion pictures in the public domain with entities engaged to prepare derivative works based on those copies.

D. Moral Rights Studies and the Berne Convention

On May 10, 1988, the United States House of Representatives passed by a vote of 420 to 0 H.R. 4262, a bill to amend the Copyright Act to permit United States adherence to the Berne Convention. The bill would neither add a moral rights provision to the law nor freeze or preempt current moral rights law. In their floor statements, Chairman Kastenmeier and Representatives Moorhead, Berman, and Coble discussed the need legislatively to readdress the United States moral rights responsibilities outside the context of Berne adherence, particularly with respect to the film industry. To assist the Subcommittee on Courts, Civil Liberties, and the Administration of Justice in such a reexamination, Chairman Kastenmeier and Representative Moorhead requested that the Register of Copyrights and the Commissioner of Patents and Trademarks prepare studies of the relevant provisions of the Copyright Act and the Lanham Act as they relate to the use of colorization, panning and scanning, and time compression of preexisting motion pictures. The Copyright Office published a notice in the Federal Register requesting information relevant to this study on May 25 1988. 53 Fed. Reg. 18937. A hearing will be held at the Copyright Office on September 8, 1988.

The Copyright Office supports the Subcommittee's intention of revisiting the important issue of moral rights after the United States has joined the Berne Union. The Office cannot support any one approach to moral rights legislation concerning the alteration of motion pictures until after the completion of our study on that topic.

III. THE COPYRIGHT OFFICE'S COLORIZATION DECISION

A. Background.

In August, 1986, as a result of receipt of claims to copyright to register colorized versions of black and white motion pictures, the Office issued a Notice of Inquiry requesting public comment to assist it in developing its registration practices regarding colorization. Ordinarily, the Office considers claims to copyright on a case-by-case basis. Occasionally, public comment is solicited regarding new registration issues that are particularly complex. We solicited public comment on colorized versions of motion pictures as a class because we wanted to investigate the degree to which the creation of colorized audiovisual works are effected by computer assistance and to receive comment about the nature of the creative judgment, if any, involved in the colorizing process. The Office specifically declined to receive comment about the aesthetic value of colorization since aesthetic judgments are not generally relevant to registration decisions.

Under an existing regulation, "mere variations of coloring" are not subject to copyright. 37 C.F.R. 202.1(a). However, the courts have held that while color per se is uncopyrightable, some arrangements or combinations of colors may warrant copyright protection. 17/ This accords

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17. Nimmer On Copyright §2.14 (1985); Pantone, Inc. v. A.I. Friedman,

with the general rule that derivative works [18] may be subject to copyright if the new material constitutes an original work of authorship.

To be copyrightable, a derivative work must embody new and original creative authorship that makes the resulting work more than a trivial variation of the original. Copyrightability turns on whether a work contains the necessary quantum of original creativity. Because colorized motion pictures presented new questions concerning the registrability of claims to copyright, the Office sought views of the public with respect to these claims.

We specifically requested comment regarding 1) the steps in the colorization process that involve creative human authorship; 2) the authors of any copyrightable elements in a colorized film; 3) the method of and factors influencing color selection; and 4) any other cinematographic contribution utilized in coloring.

At the same time, the Copyright Office was aware that among the public, there were sharply held differences of opinion on the aesthetic consequences of colorizing previously published black and white films. The Office pointed out that although we followed with interest the public and industry debate about whether colorizing resulted in mutilating the artistry of creators of motion pictures, these issues could not form any part of the Office's inquiry regarding registrability. We also raised the question whether colorization practices might unduly extend the term of

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Inc., 294 F.Supp. 545 (S.D.N.Y. 1986).

18. A "derivative work" is a work based upon one or more preexisting 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. It must consist of editorial revisions, annotations, elaborations, or other modifications, which, as a whole, represent an original work of authorship. 17 U.S.C. 101.

copyright in preexisting works whether the original copyright remained in force or had expired, without any countervailing benefit to the public, such as access to the original black and white film. We requested information on this question from those with knowledge of motion picture industry practices.

B. The Colorization Decision.

After considering the comment letters received in response to our notice, it remained clear that the raging public debate centered on artistic integrity and not on copyrightability. An overwhelming majority of the commentators opposed the registrability of colorized motion pictures on aesthetic grounds. Consequently, many of the comments we received on registration might have been of more value to you in your consideration of legislation than they were to us. The issue has finally come to the right forum, and this new legislative proposal addresses the artistic integrity issue squarely. The Office does not have the authority to base registration decisions on aesthetic grounds, but instead has to decide the issue of registrability under the Copyright Act.

On June 22, 1987, we did so, concluding that within the class of colorized versions of black and white motion pictures, certain colorizations may be copyrightable. Those versions that reveal a certain minimum amount of creative human authorship are eligible for registration as derivative works.

It is important to note that the Office decision was a narrow one based on representations that the typical colorized film is the result of the selection of as many as 4,000-odd colors drawing from an available palette of 16 million colors. In examining such works for registration, we

will apply five criteria, including whether the color selections were made by a human being from an extensive inventory and whether the overall appearance of the film revealed that the range and extent of colors added were more than a trivial variation.

In addition, on June 24, 1987, we published a proposed rule on deposit of colorized films in connection with registration. In order to enhance the examiner's ability to apply the registration criteria and also to enrich the collections of the Library of Congress, we proposed deposit of both a colorized version and a black and white print of the motion picture.

Some members of the public objected to the Office's decision to register claims in colorized versions. Most who commented, however, agreed with the Office's decision, but felt that we exceeded our authority in requiring deposit of the black and white print. No final regulation has yet been promulgated. The Office, in proposing the deposit of the black and white print, asserted the authority to require this deposit under the general and specific rulemaking authority granted to it in the Copyright Act. In section 408(c) of the Copyright Act Congress vests the Register with authority to specify by regulation the "nature of the copies or phonorecords to be deposited in the various classes." An independent deposit requirement, section 407, has as its main purpose the acquisition of copies for the Library of Congress. By law the Register establishes regulations under which both deposit interests can be satisfied upon registration.

Copyright deposits are a principal base upon which the Library of Congress builds its collections of books, periodicals, music, maps, prints, photographs, and motion pictures. In many of these areas, copyright deposits form the greatest part of the Library's acquisitions.

The Library is particularly interested in acquiring motion pictures through copyright, because individual unit costs and methods of distribution make them less widely available for purchase than other types of publications, for example, books. In a related area, Congress has authorized the Librarian to establish an American Television and Radio Archives to preserve a permanent record of the television and radio programs which are the heritage of the people of the United States and to provide access to such programs to historians and scholars. When prescribing deposit for registration of motion pictures, the Copyright Office must take these same archival reasons into consideration. Since many of the older black and white films were never registered or otherwise deposited with the Library, the acquisition of the black and white films represents a potential major benefit to the national film collection of the Library and assists the preservation goals established by Congress in creating the Archives.

Pending final regulations governing deposit, no registration has yet been made under the colorization registration decision. If the Office does require deposit of the black and white print to facilitate examination of claims in colorized films, those black and white films will be made part of the collections of the Library of Congress and preserved for posterity.

C. Moratorium Proposal

Even though the Copyright Office has no authority to base registration decisions on aesthetic values, some opponents of colorization have floated the idea of a moratorium on implementation of the Office's decision to register certain colorized films. The idea of a moratorium is apparently based on a belief that the issue of computer-aided creation of

potentially copyrightable works was a policy decision Congress had not made and should review. The Copyright Office's issuance of certificates of registration for computer-colorized motion pictures and other audiovisual works, it is argued, would preempt Congress' opportunity to do so.

In the view of the Copyright Office, a moratorium is unnecessary and ill-advised. In the 1976 Copyright Act Congress deliberately created a flexible subject matter structure so that it would not have to micromanage each new technological advance. The central concept of originality was deliberately left undefined by Congress in the 1976 Act. Congress expressly stated in the legislative reports that it was satisfied with the interpretation of the concept given by the courts and wished to leave that task to the courts. The Copyright Office does not have its own definition of originality but rather applies the courts' interpretation of it in making registration decisions. Since some computer-colorized motion pictures meet the originality standard, the Copyright Office is required by section 410 of the Act to accept application for and issue certificates of registration for computer-colorized motion pictures and other audiovisual works as a class, while rejecting individual audiovisual works that fail to meet the originality standard (or otherwise fail to meet the legal requirements for registration). If the Office refused to accept claims to copyright that were sufficient under the Act, it would be acting contrary to its statutory mandate and would be subject to suit under the Administrative Procedure Act (and attorneys fees). Additionally, if a putative copyright owner of a colorized motion picture sought registration but was refused for any reason, he or she could still bring an infringement suit under section 411(a) of the Act.

Therefore, a moratorium would be effective only through amendments to the Copyright Act itself, including provisions denying the courts jurisdiction to hear infringement suits over computer-colorized motion pictures.

The rationale for such a moratorium -- that Congress entertains doubts about the propriety of copyright for works created with the aid of computers -- would have widespread application in other fields, such as the information industry, where very valuable and expensive expert systems are being developed and marketed; the music industry, where computers have become an integral part of both pop and avant garde classical music; and, even the graphic arts.

Since copyright vests upon creation, any moratorium must face the issue of how to deal with motion pictures and other audiovisual works colorized before the moratorium could go into effect, as well as those that may be colorized after any moratorium were to go into effect. Additionally, a decision would have to be made whether copyright for colorized motion pictures created after a moratorium went into effect would be denied or merely delayed in enforceability until after Congress made a determination about the basic question of any copyright for such works.

At a minimum, Congress would have to amend sections 501-503 of the Copyright Act (which specify who may sue for infringement and prescribe certain remedies, e.g., injunctions), and 28 U.S.C. 1338 (which grants federal courts original jurisdiction over copyright cases) and possibly 28 U.S.C. 1331 (which grants federal courts original jurisdiction over all civil actions which arise "under the Constitution, laws, or treaties of the United States").

In conclusion, Mr. Chairman, you recently asked that the Copyright Office study colorization and other technologies used to alter and create audiovisual works and to report back to the Subcommittee its findings. Our investigative work on this study is already under way. As noted, on May 25, 1988, we published a notice inviting public testimony at a hearing on September 8, 1988. The issue has caught the public interest to an extent unequaled by any other recent copyright dile ma. Judging from information inquiries to the Copyright Office, every other law review article written this year will deal with colorization. In two opportunities for public comment on registration, it has been clear that the moral rights issue is the omnipresent and all-engaging one. It deserves a fair and thorough hearing.

The Copyright Office stands ready to assist your Subcommittee, Mr. Chairman, in any further inquiries you may have. I will be pleased to answer any questions.

Mr. KASTENMEIER. You have summarized your views plus I think given some additional views on the Mrazek amendment.

I trust that the fact that that amendment is pending before the Rules Committee will not render irrelevant what we are undertaking today and what your office is undertaking. I suspect—I do not know but it would be my surmise that the amendment probably will not survive, at least in its present form, but I could be mistaken.

Let me ask you just briefly, and I say very briefly—about the Visual Artists Rights Act, which is not really a question for the other witnesses before us today, but you have given testimony on that. There are two aspects, as you correctly point out, to that bill. One is a right granted to the original artist, encompassing the rights of paternity and integrity. The second is a royalty provision.

You suggested, and indeed we contemplated, that they might be separated because either could survive separately. What is your judgment about the two separated parts? Which do you think—do you have greater trouble with the so-called moral right, the right to prevent the mutilation of a work? Or with the resale royalty provision?

Mr. OMAN. Well, we thought, in the Copyright Office, that the Berne implementing legislation addresses the issue of moral rights. The Berne bills conclude that in fact there is a level of moral rights already existing in this country that do protect the rights of fine artists.

The second half of the bill, the resale royalty or droit de suite aspect of it, raises some technical problems in our mind and raises questions that we felt hadn't been answered. So it is not one section of the bill that we favor and one we oppose. We have problems with both aspects of the bill. But we would encourage further study of both issues in the fullness of time.

Let me ask Ms. Schrader to make an additional comment on the Markey bill.

Ms. SCHRADER. I think we especially recommend additional study of the droit de suite or resale royalty proposal. This has been legislated in a relative handful of countries. Some countries have receded from such legislation, and in most countries where it exists there has been a lot of criticism of the system. It is not that there really is a consensus on this type of legislation.

In the United States, of course, we have a State—California—which has enacted a type of droit de suite provision, and one hears sometimes that as a result art sales have moved from California to other locations. So one of the major problems with the bill is whether it really achieves its objective of helping artists and rewarding them for their creativity or whether, in effect, people just go elsewhere to sell their artwork.

Mr. KASTENMEIER. You know, ironically, if you attended that particular hearing, even though the concept of a royalty is much simpler and indeed much less fundamental, it has lots of problems in it. The two panels, the pro and the con, were divided about the royalty. On the other hand, neither panel quarreled with the notion that an artist ought to have the right to prevent the mutilation of his or her work.

Both panels seemed to be more interested in that issue, even though it is probably much more far reaching ultimately, at least conceptually, than a 7½ percent royalty which could be statutorily fixed and for which there is some State law or precedent. I merely make that observation. But it did occur to us that the two ideas were separable and one could be considered and not necessarily the other.

Let us turn to the issue before us, and that is whether or not there ought to be a statutory initiative that goes in the direction of recognizing the film director and film writer's original creative effort in a film which has been released, and which would prevent certain specified alterations. There are two specified alterations. One is colorization and the other is "an other" alteration of the film, which could include editing, time compression, scanning and panning, and all the other technical treatments of film that may be brand-new in terms of technology or may be as old as the cutting room floor as far as we know.

You are going to undertake a hearing in September. I quarrel not at all with that. I am glad you are. My concern is whether the matter is presented to the Congress with such urgency that we may need to respond to the initiatives that are taking place even before then or confess that we are unable to deal with the issue prior to adjournment of this Congress. That happens to be a practical question which I will not lay on you because you are doing and promise to do that which has been asked of you.

In connection with the proposals, what, if any, statutory or constitutional problems do you see? Are there any—do you see any First Amendment problems with these proposals, or do you see any inconsistencies with the copyright law which, of course, has limited terms and some of these may or may not have limited terms in their application?

Mr. OMAN. Let me focus, first of all, on Mr. Gephardt's bill. There are some large policy concerns. We fear that the bill at the same time is both overbroad and underbroad, if there is such a word. In many ways, it goes further than Article 6 bis of the Berne Convention in prohibiting any material alteration of a film without the consent of the artistic authors.

As you know, Mr. Chairman, under 6 bis of Berne the only material alterations that are prevented are those that adversely affect the integrity or the honor of the artist. This goes much further than that. The 6 bis standard as applied in European countries varies from very high standards to lesser standards.

On the other side, the Gephardt bill does less than what 6 bis might do by limiting artistic authors to only the screenwriter and the director. This is a severe limitation.

As you mentioned, Mr. Chairman——

Mr. KASTENMEIER. On that point, one of the problems is how can you ever resolve that if you search for the artistic creator, other than as the proponents propose to resolve it by granting the right to the screen director and writer, conceding that many other artistic contributions go into a film? Indeed, the producer himself or herself may make a contribution to the film which is extremely important. How can it ever be resolved as to whose integrity is at stake? Who shall say that the film is in a sense "my" product in

terms of creativity? How can we ever get over that point, excepting by arbitrarily designating the director and writer? Is there any other means to determine who shall have a creative interest in the film?

Mr. OMAN. Well, if you are talking about preventing the alteration it is one thing, Mr. Chairman. If you are talking about registering objection to it having been done, that is another. I think if you are going to give the very great power of preventing the alteration you would want a very short list of those who were directly responsible for the artistic creation. If you are talking about a labeling requirement, I would think you could have a long list. It could be as long as the credits list, getting down to the grips and the other technical people who work on the film. You could allow them to register their approval or disapproval of their contribution based on their contribution to making the film.

Mr. KASTENMEIER. Now granted it is a little early, perhaps, for you to judge this, because you are having a hearing and all that. But basically, you don't have a problem with labeling; that is, having a disclaimer: "This film was edited for television;" "This film is colorized, the original version was not;" et cetera? You do not have a problem with that, do you?

Mr. OMAN. No. As a matter of fact, we feel that has tremendous potential as a solution to the problem, in terms of meeting the legitimate concerns of very serious artists and accommodating the commercial realities that have made the U.S. film industry the booming industry that it is.

Mr. KASTENMEIER. I think all of us have been intrigued with the notion of nominating certain films as great American classics for purposes of our heritage and so forth, and other films need not be so recognized. But, if we are to act on that legally, write a statute based on that, we may run into difficulties. And you are suggesting, rather than do that, we should generically deal with all films. Rather than just labeling classics, label all films, just as we do with GP, R and X, perhaps. Even making a distinction by the Government in the GP area or the G area, the X area, that would create serious problems if the Government required it.

Mr. OMAN. It is the voluntary system that the motion picture industry has imposed on itself. It is very different than having a Government agency in the guise of a national film commission make these distinctions. I would not want to be the chairman of the film commission who has to go down to the White House and tell the President that "Bedtime for Bonzo" did not make the list.

Mr. KASTENMEIER. You do not have a problem with labeling but you do have a problem with the Government requiring labeling, is that what you are saying?

Mr. OMAN. Well, you can make the general requirement for all films without distinguishing between——

Mr. KASTENMEIER. I see.

Mr. OMAN [continuing]. The classics and the run-of-the-mill films.

Mr. KASTENMEIER. Let me yield the time to my colleague. The gentleman from North Carolina, Mr. Coble?

Mr. COBLE. Mr. Chairman, I have no questions.

Mr. KASTENMEIER. The gentleman from Texas, Mr. Bryant.

Mr. BRYANT. Mr. Oman, I am curious about the difference between registration and copyright. You made a decision, apparently, that the colorized films can be registered. And I want to ask you if that decision means that colorized films are copyrightable or simply that they are entitled to be registered?

Mr. OMAN. Well, the authors are entitled to attempt registration. We don't promise that we will register them. They have to meet the standards established by the courts for registration. There has to be certain minimal standards of original human authorship. If the motion picture that is submitted had a wash of sepia tones, it might not qualify for registration. If it is an elaborate process where the colors are subtly shaded, chosen from a palette of 20,000 colors, the odds are that there probably would be sufficient human authorship for us to register that work.

It is the courts, however, that make the ultimate decision as to whether or not that work is entitled to copyright protection. We will register, but it is the courts that determine whether or not the work is in the end finally copyrightable.

Mr. BRYANT. Well, how does that work? Does somebody have to disagree with your decision and then sue you and take it to court?

Mr. OMAN. No. It is generally someone in the private sector who sues someone else in the private sector in court, and the court has to decide between those two parties whether or not there is an infringement, and that would call into question the copyrightability of the colorized motion picture.

Mr. BRYANT. Do you make the decision to provide the registration?

Mr. OMAN. We do make an initial decision, but it is merely advisory to the court. They give deference to our judgment, but it is in no way binding on the court. They have disagreed with us in the past and I suspect that they will disagree with us in the future.

Mr. BRYANT. How many have you already registered?

Mr. OMAN. We have not registered any. We were waiting for the process to be completed with the new regulation that we have proposed and we have received comment on. We are about to promulgate it in final form sometime in the next couple of weeks.

Mr. BRYANT. And how many applications for registration are pending now?

Mr. OMAN. Let me ask Ms. Schrader for the most recent count.

Ms. SCHRADER. I don't really have it with me. I would say that it is in the order of 25 to 30. But I think we would have to get back to you on the record with an exact count.

Mr. BRYANT. OK. Thank you very much.

Mr. KASTENMEIER. Do I understand that you have not yet made a decision on registration of colorized films?

Mr. OMAN. We have proposal deposit regulations. And the way the system works, that proposal is published in the Federal Register, and people are encouraged to comment. We have received those comments, and we are studying those comments. We are about to assimilate those comments into the final regulation and promulgate the final deposit regulation.

Mr. KASTENMEIER. I would like to yield to the gentleman from California, Mr. Berman.

Mr. BERMAN. Thank you, Mr. Chairman.

Mr. Oman, a film produced and copyrighted in, say, 1933, when would that go into the public domain, approximately?

Mr. OMAN. Seventy-five years later. If you want the exact date, we can figure it.

Mr. BERMAN. Seventy-five years even for a film produced and copyrighted this year? How many years before that goes into the public domain?

Ms. SCHRADER. Seventy-five.

Mr. BERMAN. I thought the 1976 law changed the terms.

Ms. SCHRADER. If I may explain further. Seventy-five years would be the maximum for published works. The law in effect before 1978 did require renewal registration for you to enjoy the full term of protection. So it is possible and, in fact, it has happened that some films have lost copyright 28 years after publication for failure to renew for the second term. That apparently is what happened to "It's A Wonderful Life," for example.

Mr. BERMAN. But the second term is 28 years?

Ms. SCHRADER. The second term originally was 28 years, but when you changed the law in 1978 you added a 19-year period to give a total of 47 years for the second term, and therefore, a total of 75 years for both terms, to put those works roughly on the same basis as the new law works.

Mr. BERMAN. So works that were renewed in effect have now the same treatment as new works?

Ms. SCHRADER. Yes.

Mr. BERMAN. And the tentative decision to register colorized works is based on this principle of originality?

Mr. OMAN. Sufficient human authorship. Original human authorship.

Mr. BERMAN. Over and above the original work?

Mr. OMAN. Yes. Which is the court-established standard for giving separate copyright protection to a derivative work.

Mr. BERMAN. I see. It is a test of whether it is a derivative work then. Is that the key to it?

Mr. OMAN. Well, that is what we are talking about in this particular instance. The same standards apply for the original work also. There has to be sufficient original human authorship to qualify for the original copyright protection.

Mr. BERMAN. But it sounded like you were saying earlier that if the colorization is good we call it—we give it——

Mr. OMAN. That would constitute a new work that will be entitled to another 75-year term of protection.

Mr. BERMAN. But if the colorization is—I forget your phrase, if it is a quick and sloppy job, we don't call it a new work?

Mr. OMAN. If they just use three colors—the sky is blue, the earth is brown, and the people are pink or whatever color—there would be some question as to whether or not there was sufficient human authorship there in choosing colors and making artistic decisions, and that would be a work that would be questionable in terms of whether or not we would register. I would say it probably would be questionable as to whether or not the court would protect the copyright of such a work, or challenge it.

Mr. BERMAN. And it is the notion that you could have the same original work and have different people colorize it, and each one,

each different colorization would have the potential for having a new registration, a new copyright?

Mr. OMAN. Exactly.

Mr. BERMAN. Thank you, Mr. Chairman.

Mr. KASTENMEIER. Would that also apply to other alterations, editing and so forth, of these films? You are suggesting that all of them, then, could be registered by the modification of these films, is that right?

Mr. OMAN. If the modifications constitute sufficient human authorship. I can imagine a situation where a film is so radically edited that it would constitute a new work, and that would be entitled to another term of protection. It couldn't be just a rearrangement of a scene or two; it would have to be a major artistic contribution.

Mr. BERMAN. Mr. Chairman.

Mr. KASTENMEIER. Of course that would not affect the time of expiration or the term or necessarily the ownership of the original work?

Mr. OMAN. No, certainly not.

Mr. KASTENMEIER. Obviously. But these alterations that we are considering, technical alterations in films, and they may be time compression or anything else, could alter the film so that you would register it as a new work.

Mr. OMAN. Let me ask Ms. Schrader to comment further on that.

Mr. KASTENMEIER. It may be, you know, I question that.

Ms. SCHRADER. We certainly haven't made any such decision, not even tentatively in that respect, and we have not been registering claims to copyright in films edited for television, even though that practice has existed for 30 to 40 years.

As Mr. Oman said, it is conceivable that a work could be edited to such an extent that you might have a new work, but it is not something that would be registered readily. It would have to be a special case for the editing to be justifiable. And, as I say, we have not done that to date. Nor do we have, as far as I am aware, any claims pending that would seek registration on the basis of time compression, editing, and so forth.

The question really is would it be similar to the abridgment of a book? I mean, it has been possible for more than a century to get protection for certain abridgments of a literary work. The extent that you can make an analogy to film has not really been settled.

Mr. BERMAN. Mr. Chairman.

Mr. KASTENMEIER. I think in response to Mr. Bryant you suggested that a person could get into court on this, but to do that, you used infringement as a basis for precipitating a court action. There may be other parties in interest who would not be able to avail themselves of an infringement claim or get into an infringement suit. Could they test—could these directors test these colorization registries in court without being involved in an infringement claim?

Mr. OMAN. There are ways of suing the Copyright Office. There would be an opportunity, if we refused to register a colorized work, for a colorizer to sue me and try to get the courts to direct me to register the work under the Administrative Procedure Act. We

have not talked about whether that could work in the reverse, but let me ask Ms. Schrader to comment on that.

Ms. SCHRADER. The problem with the reverse situation is the question of whether we have denied the directors any right, that is, whether they had any right that could be presented to us and we have acted adversely against them. I think it would be a very difficult case for them to maintain under the Administrative Procedure Act, if we have decided to register a colorized film on the basis of the original authorship in the colorization.

There may be other ways, but perhaps they are not easy cases to maintain. We have heard just this week that a lawsuit may be beginning in France going into the question of the legality of colorization under French law. I don't know the details of the suit, but it is conceivable that someone might bring a case, say, in a country that is a member of the Berne Convention. An author might test the limits of Article 6 bis.

Mr. KASTENMEIER. One other question before the gentleman from North Carolina.

There are, you just said, two colorization processes: the domestic process and, I think, the Canadian process. If one has sought to register a film colorized the former process, would a film colorized by the latter process also have standing to be registered, if it is very similar, but not quite the same?

Mr. OMAN. Certainly, if both versions were made with the authority of the copyright owner, where the works are not in the public domain, and if they met the standards that we require for original works of authorship, we would register both. If one was a mere variation of the first, a few of the colors changed, that would put it in a different light. But these are the decisions that our examiners make every day in dealing with derivative works. We would do the same for both versions of the colorized motion picture.

Mr. KASTENMEIER. Thank you. I would like to yield to the gentleman from North Carolina.

Mr. COBLE. Thank you, Mr. Chairman. I was going to do this subsequently, but I am not sure where we will be.

Mr. Oman and Ms. Schrader, let me bounce this off of you. It appears that an assertion has been made that by granting copyright protection for computer colorization that you may have exceeded authority by altering the constitutionally mandated limitation on duration. I would like your response to that.

Mr. OMAN. On duration of the term of copyright or on the requirement that there be——

Mr. COBLE. I am sorry. Congressionally mandated, I think I said constitutional.

Mr. OMAN. The Copyright Office is required by law to examine claims to copyright. We feel that to do so in the area of colorized motion pictures is no different than all of the other works that we examine. We do require that there be human authorship. If the example that was given to us was not computer-assisted authorship, but it was work done mechanically by a computer, we would have to look at it differently than we would if it were a merely computer-assisted colorization.

Ms. Schrader has studied this issue in some depth. Let me ask her to further elaborate on the question.

Ms. SCHRADER. Our decision was that as a class colorized films might be subject to registration. We haven't yet decided that any one of them would be registered. But obviously, on the basis of the argument that was made to us in our proceeding, we reached the conclusion that some colorized films probably would involve sufficient original human authorship to justify registration. A telling argument that was made was that the decisions regarding the particular hues and tones and shades of colors are made from a possible palette of 16 million and that about 4,000 choices are made in a typical 90-minute colorized film. That kind of selection—the number of choices from the possibilities that are available—would constitute original authorship in terms of the copyright law.

And, as Mr. Oman said earlier in response to other questions, it is the standard that has been developed over the years by the courts. In the 1976 Act, the subcommittee looked at the question of whether originality should be defined in the statute. You decided not to define it in the statute, and instead to rely on the precedents that had been developed over decades by the courts. The 1976 House report makes clear that there was no change in the concept of originality as developed by the courts over the years.

So what the Copyright Office has done is apply that concept of originality to the arguments that were made by the colorizers in our proceeding and decide that as a class we could not say that all colorized films are unoriginal. Some of them would seem to be original.

Now, of course, we don't grant the copyright. If, in fact, there is original authorship in a work, the copyright exists from creation of the work under the current Act. We do not grant rights. We register claims and make a public record of those claims and then ultimately, again as Mr. Oman has said, the courts decide whether there is a valid copyright. That usually is decided either in the context of an infringement action where the Copyright Office is not a party, or a declaratory judgment action might be the other possibility.

Mr. COBLE. Thank you. Let me ask you an additional question concerning H.R. 2400, which includes a provision that allows objection to films that have been materially altered to continue in perpetuity. I would like your response to that provision. What do you think?

Mr. OMAN. That does raise very serious constitutional questions I think. The Constitution, in Article I, section 8, is very explicit on that point. The grant of copyright protection should be limited and not open-ended. I think this is one of the issues that would have to be dealt with if the Gephardt bill is going to be processed any further.

Mr. COBLE. Thank you. Thank you, Mr. Chairman.

Mr. KASTENMEIER. Before I yield to Mr. Berman—it is quite possible that the computer program for colorization, assuming it is, you know, really a computer operation, that it can be registered as a copyright and also that the product of the program quite separately may be registered in your office. You make no distinction, is that correct?

Mr. OMAN. Well, they would be two separate and distinct works. The computer program would be registered as a computer program and the product, the art, the final result of the computer-assisted artwork would be registered if there were sufficient authorship involved.

Mr. KASTENMEIER. I would like to yield to the gentleman from California.

Mr. BERMAN. Thank you, Mr. Chairman. Just one last question.

You seem to be endorsing the idea of a labeling requirement. Congress mandating the labeling of, I don't know whether you just meant colorization or you meant any material alteration. I am wondering if you include in that the notion of either the colorization or another alteration without the consent of the director or the screenwriter. In other words, communicating as part of the label that aspect of the alteration.

Mr. OMAN. We have not formally endorsed any of the proposals. What I have tried to suggest is that, if Congress feels that fairness requires some congressional intervention, the most promising avenue to pursue would be one of labeling. Certainly, from our perspective, a voluntary agreement would be the best of all possible worlds. But, labeling does show promise in terms of registering the complaints of the artistic creators of the film in a place where the public can be aware of them and make their purchase or viewing decisions based on that disclaimer.

But on the other aspect of your question let me ask Ms. Schrader to comment.

Ms. SCHRADER. Sorry. I have lost——

Mr. BERMAN. Well, I mean, just to label that this film has been colorized is not telling us a lot. I guess you are learning that it was originally a black and white film. Were you including in this notion of an acceptable response to the concerns of the creative community the labeling of the lack of approval of the director or the screenwriter, assuming those are the appropriate people?

Ms. SCHRADER. I think we are saying that this is a possibility. We think it is an idea worth exploring. We are not really endorsing the proposal at this point, but certainly that might be one aspect of a labeling system, so that the creative people would have an opportunity to signify their disapproval.

Mr. BERMAN. Thank you.

Mr. KASTENMEIER. Actually, I think there are at least three levels of types of labeling here that may be considered. One relates the technical issue. "This film has been altered by colorization" or something like that. The second one is a disclaimer from any of the creative community that may be authorized to disclaim. And third would be the requirement that the title be changed. That is a form of labeling. To be sure, a drastic one, I am sure, as far as the copyright owner is concerned, but it is nonetheless one of the proposals.

Would you place that in the same category as other labeling possibilities?

Mr. OMAN. Changing the title?

Mr. KASTENMEIER. Yes.

Mr. OMAN. Well, in the real world I wonder what practical impact that would have. What more notice would it put people on than keeping the original title with the other disclaimers attached?

I understand from talking to someone before your hearing started that there are people out there who are renting video cassettes. And are they going to tell customers when they come in and ask for "Yankee Doodle Dandy" that we don't have "Yankee Doodle Dandy" but we have "The Life and Times of George M. Cohan." It is more form without substance I think, and I am not sure it achieves the purpose in protecting the original work. It will be talked about in its original title whether or not we require that the title be changed because that is how it is generally recognized.

Mr. KASTENMEIER. Well, I wouldn't want to press the matter further at this point, but it does appear to me that there are at least three levels of "labeling" which would have different impacts in terms of the film and the two communities affected.

If there are no further questions, I want to thank you again, you, Mr. Oman, and Ms. Schrader, for your contributions this morning. Obviously, we hope you will pursue the inquiry that you have embarked upon, and we will doubtless need to call on you in the near future again for help on this and other issues.

Mr. OMAN. Thank you, Mr. Chairman. We are at your service.

Mr. KASTENMEIER. Now, I would like to introduce and call forward our first panel. It consists of a well-known motion picture director, Arthur Hiller; the distinguished film critic of The New York Times, Vincent Canby; and the dean of the Cardozo Law School, Monroe Price, who has studied the issue of artists' rights extensively over the years. If the three of you will come forward.

We are most happy to have you here. I don't know that there is any particular order. Perhaps we will call on Mr. Hiller first.

TESTIMONY OF ARTHUR HILLER, FILM DIRECTOR, ON BEHALF OF THE DIRECTORS GUILD OF AMERICA; VINCENT CANBY, FILM CRITIC, THE NEW YORK TIMES; AND MONROE PRICE, DEAN, CARDOZO LAW SCHOOL

Mr. HILLER. Mr. Chairman, and members of the committee.

In the United States you have the right to purchase a painting by David Hockney, by Rauschenberg, by Roy Lichtenstein.

In the United States, you have the right to take a knife and cut that Rauschenberg painting into four pieces, and sell four so-called Rauschenberg paintings—or paint in another character on the Hockney to "make it more appealing" in your terms.

In the United States, you have the right to desecrate or mutilate the artistic expression and intent of the artist.

In the United States, you have the right to purchase a motion picture, whether it be "Citizen Kane" or Ninja Vixens or any others.

In the United States, you can edit that film down to a 30-minute snappy version (as they did on the airplanes), or to fit into a time slot. You can pan and scan the film to fit a smaller frame as you see fit, you can computer color it, you can technically slow it down or technically speed it up to fit a time schedule. You can digitally change the film.

In the United States, you have the right to desecrate or mutilate those films to change them from the artists' desired intent.

A cut version of "Citizen Kane" is not Orson Welles' "Citizen Kane." A colored version of "Casablanca" is not Michael Curitz' "Casablanca."

Why is it in our country over the past few years that "money" is the reason for so many decisions, for so many laws? It seems as if all rights are tied to money, whether they be property or artistic rights.

Will there ever come a time when laws and decisions are made for moral reasons, when there can be rights other than money rights? By the way, we are not looking for a royalty or a payment for changes. We're looking for no changes except by the artist.

Shouldn't the author of a book, the composer of a symphony, the maker of a film, shouldn't these artists have a right to not have their creative work changed, defaced , mutilated?

The recent Berne debate resulted in a conclusion by this committee, and by Mr. Oman this morning, that there was sufficient American law to cover these moral right cases. Other than registration of copyright for museums and archives. Where is that law? What is that law?

George Stevens went to the Federal Court about the slashing of "A Place in the Sun," and the Federal Court said there is no legal moral right. John Huston's lawyers told him to forget it, there are no laws to help.

It's time for a change now in this country. I feel it falls to you and to us now, in 1988, to rewaken that sense of respect for our painters, our film-makers, our composers, for all our creative artists, and to try to rekindle in all the Congress a perception of the Congress' responsibility as the guardians of a national cultural heritage. Please don't let parts of it be destroyed.

Now, obviously, one way is with legislation. The Motion Picture Integrity Act of 1987, introduced by Congressman Gephardt is a moral rights bill and provides the necessary protections. Its intention is to preserve the work of art, to have it remain intact and unchanged, to preserve the aesthetics of the artist's vision by which he or she communicates to the audience today and the audiences of tomorrow. It prevents the material alteration of a motion picture unless the principal director and screenwriter (or their artistic heirs) both agree to such an alteration.

The bill is a modest and restrained approach that balances the interests of the copyright holders with the interests of the creative artists and the larger societal interest of protecting our country's social heritage.

In Europe, there is already a distinction between economic rights and moral rights. 1. The moral rights include the right of the artist to control the aesthetic fate of his or her work. 2. The economic rights include the right to disseminate that work. To buy it, to sell it, to make profit.

In Canada, they have just this month passed a law that includes tougher penalties for piracy of films and of records. The moral right is designed to prevent unauthorized tampering with the works of the artists.

We seem to be letting the computers freely take over. Do we really want computers to be the artists of the future? Computers can already provide you with a painting, with a musical piece and

in terms of films, the computer techniques are on the brink of adding voices to silent films or computer changing the musical score, or computer adding new shots to a scene in an old film, or a newer one, or computer adding new scenes to the movie or new actors to a scene.

Am I being extreme?

Am I being ridiculous?

Well let me tell you of some of the computer technology that will be with us in a year or so. The computer will be able to recreate people it has on film. Yes, that is what I said—the computer will be able to recreate Humphrey Bogart and give him different lines to say in the scene—or it can create a whole new scene with all new characters so the picture will appeal more to young folks.

Or what about replacing Humphrey Bogart in the entire Maltese Falcon film with Sly Stallone, who is seen as more popular with the audiences today. That's right, they can computer-create Sly Stallone and his inflection and replace Humphrey Bogart in any of his films—or replace John Wayne in any of his films—or John Wayne can replace Sly Stallone in today's films.

And it can happen to you. Let us say you were on Nightline. With Ted Koppel and ABC decides to run the program again on Saturday afternoon, and there you are again. Your face, your words, your inflections—except the network felt they could attract more of the young audience by changing your voice to Peewee Herman's! Your face is the same, the words are the same—just your voice and its inflections have changed to Peewee Herman's. Would you say, "That's OK, its the words that count."

It is these kinds of violations of the creative community that has our anger and our hurt aroused.

What's more, it shortchanges the audience. The original interpretation of the artist is what they should see and feel, not an interpretation of the interpretation. And that is also true for the audiences of the future. They deserve to hear or see it as the creative artist intended and as it defines the culture of our society today.

Thank you.

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

[The statement of Mr. Hiller follows:]

Summary Statement of Arthur Hiller

H.R.2400, "The Film Integrity Act of 1987" addresses the issue of the defacement of motion pictures through various methods of alteration, particularly the destructive process of colorization.

A "moral rights" bill for motion pictures, H.R.2400 would prevent material alteration of a motion picture unless the principal director and screenwriter (or their artistic heirs) both agree to the changes. This right of objection could be voiced only after the movie is released in its final form and violation of the consent provision would result in the loss of copyright to the copyright holder.

The Directors Guild of America believes H.R.2400 is a restrained approach that balances the interests of the copyright holder against the larger societal interest of protecting our country's film heritage.

The DGA suggests only one change in H.R.2400 as currently drafted. We have previously testified that the director's and screenwriter's right of consent to alteration of their film ought to be alienable. We ask now, in harmony with a developing British model, that this right should be considered inalienable but waivable.

Aside from H.R.2400, certain other initiatives would bring limited protection to insure the integrity of motion pictures. Congressmen Foley, Yates and Mrazek have sponsored the creation of a national film commission which would establish a registry of historically and aesthetically important films. Films named to the registry would be affixed with a seal designating their importance and should the films be materially altered, the nature of the change would be clearly advertised on the film in the form of a label.

The DGA supports this truth-in-advertising approach as a step in the right direction, but it is distinctly not a moral rights approach and falls short of providing the kind of protection to motion pictures that we believe is ultimately necessary to protect our nation's film heritage.

In a related matter, the DGA believes that no copyright registration should be issued by the Copyright Office of the Library of Congress for computer-colorized films until Congress has developed public policy on the issue. The Copyright Office has now initiated its own review of the entire question of computer authorship and it seems entirely sensible that its initial ruling be held in abeyance until these hearings and Congressional deliberations on the subject are complete.

DIRECTORS GUILD OF AMERICA

Statement of

Arthur Hiller

of the Directors Guild of America

Before the

Subcommittee on Courts, Civil Liberties

and the Administration of Justice

of the House Judiciary Committee

June 21, 1988

DIRECTORS GUILD OF AMERICA, 7950 SUNSET BLVD., LOS ANGELES, CA 90046
NATIONAL OFFICE TELEX NUMBER 181498

Mr. Chairman:

We are very pleased to have the opportunity to testify this morning in favor of H. R. 2400, the "Film Integrity Act of 1987," introduced in May of last year by Representative Richard Gephardt. This bill responds to an outcry from film directors, screenwriters, critics, actors, film scholars and all segments of the creative and scholarly film community, in reaction to the defacement of motion pictures through various methods of material alteration, particularly the destructive process of colorization.

The urgency that we felt a year ago is still with us. With every passing day, more and more of the storehouse of our priceless American film heritage is being mutilated beyond recognition from its original artistic vision. Now one of our greatest classics, CASABLANCA, is nearly half-way through the ignominy of being colorized and will be broadcast next fall. Ted Turner has said he wants next to colorize CITIZEN KANE just to make people mad, though I am sanitizing Turner's language.

The Gephardt bill is a "moral rights" bill for motion pictures. It would prevent the material alteration of a motion picture such as CASABLANCA, unless the principle director and screenwriter (or their artistic heirs) both agreed to such alteration. Bowing to the practicalities of how movies are made and financed, the bill provides that this right of objection would be available only after the movie had been "published." Violation of the consent provision

would result in the loss of copyright to the copyright holder.

We believe the bill's approach is a direct and clear response to the technological assaults on motion pictures which threaten our country's film heritage. We also believe the legislation is a modest and restrained approach that balances the interest of copyright holders against the larger societal interest of protecting our country's culture. This kind of protection is not an alien concept. We protect our parklands; and we protect great architectural works, together with historic buildings and neighborhoods.

The initial development of legislation to protect historic and architecturally significant buildings was also protracted and controversial because it was viewed as limiting the property rights of individual owners. Now, however, this legislation is accepted as an important milestone in protecting our country's architectural heritage. Indeed, rather than damaging real estate interests, Congress has gone so far as to provide tax incentives to encourage the rehabilitation of historic property.

Many of the same objections first raised to the historic preservation of buildings have surfaced again during debate on the Berne Treaty. The copyright industries have opposed moral rights as a damaging infringement on their ownership rights and the way they dispose of their property.

We believe both the House and Senate committees have made a wrong decision in approving Berne implementing legislation without explicit moral rights protection; and we adamantly believe that U.S. law, in any of its parts or permutations, is clearly insufficient to satisfy the language of Article 6bis. The copyright industries have prevailed on the Berne legislation, and the due rights of artists have been shunted aside.

But we also believe there is some unease on the part of a number of Members of Congress about the neglect of moral rights. This is the unfinished business of the Berne implementing legislation and today is the second in a series of hearings on specific moral rights legislation pending before this Committee. In addition, Chairman Kastenmeier and Congressman Morehead have initiated a full-scale inquiry by the Copyright Office into the effects of technological developments on the copyright aspects of motion pictures. These are all welcome steps. We hope that these ongoing hearings, together with the inquiry by the Copyright Office, will lead this Committee to adopt full moral rights protection for motion pictures and all other forms of artistic expression.

We reject the notion that if explicit moral rights protection were spelled out in federal statutes it would mean an economic upheaval for the country's copyright industries.

(Motion picture producers religiously proclaim the demise of the film industry in every negotiating session even as profits rise and business expands.) We reject the notion alluded to in this Committee's report on the Berne legislation that moral rights has caused the decline of French cinema. We reject the notion that the adoption of moral rights would trigger massive litigation on the part of the country's artists. We reject the idea that moral rights are unworkable. If this were the case, there ought to be some indication of it in European countries where moral rights are in force. We believe federal legislation, such as the Gephardt bill, would serve the long-term economic interests of the motion picture business. As in the case of historic properties, increasing the country's regard for motion pictures as an artistic medium can only lead to economic benefits. And, as a matter of justice, the Gephardt bill only elevates the position of the director and screenwriter, the principle artistic authors, into that of the legal guardians of the art form.

Mr. Chairman, we would suggest one change in the Gephardt bill as currently drafted. The right of consent in the bill is triggered after the motion picture is "published." In testimony before this Committee, we have explicitly said that this right ought to be alienable. Principle directors and screenwriters may agree to

alterations in their films. We have also testified that Congress should cap the amount of compensation that a director or screenwriter could receive for giving this permission at $1.

We would now ask, in harmony with a developing British model, that this right of consent be considered inalienable but waivable. Unlike the British model, we would wish to see the right waivable only after "publication." Whether the right is alienable or waivable the practical effect is the same, but such a change would bring the bill much more in harmony with the notion of moral rights as personal rights that cannot be bought or sold. And as personal rights, they cannot belong to a corporation.

Aside from the Gephardt legislation, certain other initiatives would bring some limited protection to insure the integrity of motion pictures. A collateral effort is now underway in the House Appropriations Committee, sponsored by Congressmen Foley, Yates, and Mrazek. Under this approach, a historic film commission would be established with the power to create a registry of historically and aesthetically important films. Films named to the register would be affixed with a seal designating their importance. Should films on the register be shown in a materially-altered way, the nature of that alteration would be clearly advertised on the film in the form of a label. Additionally, a computer-

colorized film on the registry could no longer use the original title in its marketing, promotion, or distribution.

This approach offers two advantages: (1) For the first time, the government would recognize motion pictures as an art form; and (2) the viewing public would be informed that certain classic motion pictures are being presented in an altered form. This approach is clearly a step in the right direction and the Directors Guild supports it.

This truth-in-advertising approach would fairly inform an audience that what they are about to see had been changed from what was originally shown in movie theaters and, presumably, is not what the audience expects to see. Since colorization is such a drastic alteration, it also seems fair to strike the original title from the colorized edition.

There would be no prohibition to showing movies listed on the registry in an altered version; there would be no prohibition on what we directors regard as the iniquitous practice of colorization. What would be required is a certain degree of truthfulness in advertising.

We believe this national registry concept is a step in the right direction, and we shall work hard for its passage. However, it is distinctly not a moral rights approach to motion picture protection, and it falls short of providing the kind of protection, called for in the Gephardt bill, that we believe is necessary. The essence of the moral

right of integrity is the safeguarding of the work in the form in which it was originally conceived. Labeling achieves something for audiences but much less for the film artist and the artistic product itself. And, of course, the labeling remedy proposed in the Yates-Mrazek measure would only apply to those few films designated for the registry.

In another but related matter, we believe that no copyright registration should be issued by the Copyright Office of the Library of Congress for computer-altered or colorized films until Congress has stated public policy on the issue.

The Copyright Office is not a rule-making agency like the FCC or SEC; rather, it is a ministerial arm of Congress. Therefore, its June 1987 decision to register colorized films was incorrect and initiated prematurely.

The issue of colorization has brought into focus the phenomenal potential of computers to alter art works. It is important that Congress deal with the issue in a consistent, even-handed fashion. As acknowledged by the National Commission on New Technology Uses of Copyrighted Works ("CONTU"), "the dynamics of computer science promise changes in the creation and use of authors' writings that cannot be predicted with any certainty. . . .The Copyright Office in the course of its regular activities, should report to Congress if the impact of computers is found to raise

questions of copyright law or policy requiring legislative attention." Final Report of CONTU, July 31, 1978, at 46. [Emphasis supplied.]

By granting films already in the public domain the potential for seventy-five more years of copyright protection by virtue of computer-colorization, the Copyright Office has rendered a very material change in the law. The Congressionally-mandated limitation on duration has been altered. As in the case of the proper requirements for copyright protection to computer-assisted work, Congress, not the Copyright Office, should make public policy in this critical area.

With respect to decision on copyright registration, the Copyright Office can only follow the statutory requirements of the Act. It is not a policy or rulemaking authority. The June 1987 ruling was a policy decision, not simply a ministerial act. It exceeded the Copyright Office's authority and should be reversed. Congress should then initiate special deliberations on the role of computers in meeting the statutory test for authorship. But Congress' review should take place on a "level playing field" of consideration. Unless the 1987 order is reversed, the colorizers will continue to act in reliance upon the Office's decision and in all likelihood, prejudice the equitable outcome of the Congress' review.

Indeed, the Copyright Office has now initiated its own review of the entire question of computer authorship, with hearings to begin in September of this year. It seems entirely sensible that its initial ruling should be held in abeyance until these hearings and Congressional deliberation on the subject are complete.

In conclusion, I wish to thank the chairman and members of this Committee for continuing to explore the subject of moral rights and for the opportunity to testify before you today.

Mr. KASTENMEIER. Now we would like to call on Mr. Canby.

Mr. Canby.

Mr. CANBY. Mr. Chairman, members of the subcommittee, I would like to add my support for the Gephardt bill as I understand, to protect the moral rights of film-makers. In the past years, hundreds of films made between 1910 and the 1930s have been allowed to disintegrate because the nitrate stock on which they were printed was perishable. Those films have either crumbled into dust or gone up in smoke.

Now, as a result of the wholesale tinting of black and white films, a process known as colorization, thousands of additional films will vanish, at least in the form in which they were originally made. The computerized tinting of movies is not being done piecemeal on a station-by-station basis, the way films are mostly edited for television. It is being done by people who have somehow acquired ownership of the films and who, theoretically anyway, could even destroy those films if they saw fit.

I would like to emphasize that black and white films should not be regarded as if they were disadvantaged color films, which through some terrible accident of fate had been denied the glories of color. It is true that many old black and white films would have been made in color if color had then been available. The point, however, is that they were not made in color; and, if they had, they would not be the same films we are now trying to protect.

Black and white films are made according to their own aesthetics. Some films can be done in color photography that can't be done in black and white. Black and white films offer opportunities to the film-maker not available in color. Black and white films are neither better nor worse than color films. they are simply different.

Movies are an art form, which is not to say that all movies are works of art. Most are not. However, all movies—great, good, bad, and indifferent—speak to us from their own time and place, and as they do this they say different things to each succeeding generation. Whether film-makers know it or not, they are also historians. Thus colorization revises our vision of the past. It is the same thing as rewriting our history books to conform with contemporary fashion, which in this case is contemporary greed.

I would also like to emphasize that any act relating to the moral rights of the film-makers, that is, the directors and the writers, will only be effective if all films are protected, those that at this moment we think to be junk as well as those we acknowledge to be classics. Every generation has its own standard. It should not be up to us to label as instantly disposable any film that a later generation might find to be a treasure.

Promoters of colorization like to say that by tinting black and white films they are introducing many people to movies they would not otherwise have seen. To the extent that such people are seeing movies they haven't seen before, this is true. However, they are not seeing the original films. They are seeing one pale variation.

The most damaging aspect of colorization is the likelihood that, if colorization becomes an accepted practice, the original black and white prints will cease to exist for all intents and purposes. The colorizers deny this. They say that because they need the black and

white prints from which to make colorized copies they will guard and preserve those black and white prints forever.

However, it seems possible that the availability of tinted versions of our classic films will mean that ultimately our access to the originals, even on videocassettes, will be denied. Why should a businessman who has poured hundreds of thousands of dollars into the tinting of old movies go out of their way to put the original versions on the market. They would be competing with themselves.

The black and white prints and black and white videocassettes will continue to exist, but under lock and key in the vaults of the colorizers. A large part of our artistic and social history will have disappeared as completely as if the films had been put into a sack and dropped into the ocean.

If Congress does not act, I am afraid that a large portion of our film heritage will vanish. Either that or it will be so distorted that future generations will have no idea how most movies looked in the first half of this century and no comprehension of how they enriched our imaginations.

Thank you.

Mr. KASTENMEIER. Thank you, Mr. Canby.

[The statement of Mr. Canby follows:]

**Summary of the Statement of Vincent Canby
Before the House Subcommittee on Courts
and Administration of Justice,
House Judiciary Committee**

June 21, 1988

As a film critic, I urge the approval of the Gephardt bill to protect the moral rights of film makers.

Colorization will cause thousands of films to vanish, at least from their original form, and when they do, a large part of our artistic and social history will have disappeared. Movies -- great, good, bad and indifferent -- are art forms. They speak to us from their own time and place and, as they do this, they say different things to each succeeding generation. When black and white movies are subjected to a tinting process, the art form is mutilated and corrupted and history is rewritten.

Black and white films are made according to their own esthetics and should not be regarded as if they were disadvantaged color films. Great directors have sought or still seek emotional and intellectual responses through the use of black and white that disappear when, after the fact, someone comes along and arbitrarily dabs the original movie with pale little blobs of pink and blue and lavender.

Promoters of colorization like to say that they are introducing many people to movies they would not otherwise have seen and television ratings are higher. People are seeing more movies, but they are not seeing the original films. The world as seen in a colorized movie is a lesser one than the worlds seen in a black and white film or a film shot in color. It looks small and cheap. It's a place of limited imagination and comic strip reality.

If colorization becomes an accepted practice, the original black and white prints stand to disappear. The demise of the 16 mm print market provides historical precedent. Movie producers, who once looked to the 16 mm market as a major source of income, cannot compete with the video cassette market and can no longer afford to spend money required to make the prints. Video cassette distributors do not have the time, patience or money to seek out the copyright holders for comparatively obscure foreign films, once the staple of 16 mm distribution.

In much the same way, it seems possible that the availability of tinted versions of our classic films will limit our access to the originals. Why should businessmen who have poured hundreds of thousands of dollars into the tinting of old movies, go out of their way to put the original versions on the market? They would be competing with themselves.

The black and white prints and cassettes will exist, but under lock and key in the vaults of the colorizers. Future generations will have no idea how most movies looked in the first half of this century and no comprehension of how they enriched our imaginations.

STATEMENT OF VINCENT CANBY

Before the House Subcommittee on Courts and Administration of Justice, House Judiciary Committee

June 21, 1988

I am here as a film critic to add my approval of the Gephardt bill, intended, as I understand it, to protect the moral rights of film makers.

In the last 50 years, hundreds of films made between 1910 and the 1930s have been allowed to disintegrate because the nitrate stock on which they were printed was so perishable. Those films have either crumbled into dust or gone up in smoke. Now, as a result of the wholesale tinting of black-and-white films, a process popularly known as "colorization," thousands of additional films will vanish, at least in the form in which they were originally made.

This tinting of movies is not the only indignity suffered by films, but it is certainly the most dangerous one. Before now, theatrical feature films have been chopped into segments, drastically edited and sometimes even expanded to fill television time-slots. In such cases one could usually assume that the original films continued to exist somewhere in the versions in which they were shown in theaters.

The computerized tinting of movies is something else. It is not being done piece-meal, on a station-by-station basis. It is being done by people who have somehow acquired ownership of the films and who, theoretically anyway, could even do away with the films if they saw fit.

This tinting is the mutilation of an art form and it will, I am convinced, lead eventually to the effective disappearance of the original films. It is immoral and, over the long haul, it is probably self-defeating economically.

To begin, I'd like to emphasize that black-and-white films should not be regarded as if they were disadvantaged color films, which, through some terrible accident of fate, had been denied the glories of color. It's true that many old black-and-white films would have been made in color if color had then been available. The point, however, is that they were not made in color and, if they had, they would not be the same films we are now trying to protect.

Black-and-white films are made according to their own esthetics. Some things can be done in color photography that cannot be done in

black-and-white. Black-and-white offers opportunities to the film maker not available in color. Because of this, we respond to black-and-white films in one way, and to color films in another. Black-and-white films are neither better nor worse than color. They are a different aspect of the cinema art and, as such, they must be preserved.

The colorization processes that now exist are a joke. Colorized films do not suddenly become color films. They become tinted films that look as wan and sickly as old-fashioned, hand-tinted picture-postcards. They destroy the nature of the original work and substitute something that reflects only the wizardry of today's computer-technology.

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.

The world as seen in a colorized movie is a lesser one than the worlds seen in a black-and-white film or a film shot in color. It looks small and cheap. It's a place of limited imagination and comic-strip reality.

I must point out here that my objections to colorization would remain even if the processes themselves were far better.

Cinema is an art form, which is not to say that all movies are works of art. Most are not. However, all movies--great, good, bad and indifferent--speak to us from their own time and place and, as they do this, they say different things to each succeeding generation.

Many films that, in their own day, were regarded simply as pop entertainment are now regarded as classics. I think of the early Marx Brothers movies, John Huston's "Maltese Falcon," Howard Hawks's "Twentieth Century," Michael Curtiz's "Casablanca," Alfred Hitchcock's "Thirty-Nine Steps." I happen to believe that "Buck Privates," the early Abbott and Costello comedy, is a classic, though there are probably few critics who would agree with me.

I would hate to see a colorized version of "Buck Privates." Part of the film's comedy comes from the stark look of the black-and-white world inhabited by the consistently optimistic Bud Abbott and Lou Costello. Because they refuse to recognize the utter bleakness of that world, there now appears to be a gallantry in their humor not initially recognized.

When black-and-white movies are subjected to a tinting process, art is being corrupted and history rewritten. Nobody looking at the

colorized "Maltese Falcon" can have any true idea of the effect of the black-and-white version. The tints trivialize the film that Huston made.

Great directors--from D.W. Griffith, Eric von Stroheim and John Huston through Francois Truffaut, Woody Allen and Martin Scorsese--have sought or still seek emotional and intellectual responses through the use of black-and-white that disappear when, after the fact, someone comes along and arbitrarily dabs the original movie with pale little blobs of pink and blue and lavender.

Whether film makers know it or not, they are also historians. Thus colorization revises our vision of the past. It's the same thing as rewriting our history books to conform with contemporary fashion, which, in this case, is contemporary greed.

I would also like to emphasize that any act relating to the moral rights of film makers--that is, the directors and the writers--will only be effective if all films are protected, those that at this moment we think to be junk as well as those we acknowledge to be classics. Every generation has its own standards. It should not be up to us to label as instantly disposable any film that a later generation might find to be a treasure.

Promoters of colorization like to say that by tinting black-and-white films they are introducing many people to movies they would not otherwise have seen. To the extent that such people are seeing movies they haven't seen before, this is true. However, they are not seeing the original films. They are seeing variations that depart so far from the originals that I doubt that any new film students are created.

The promoters like to point out that colorized films are now receiving higher television ratings than black-and-white films. Such ratings are beside the point of the bill that's being considered here. I'm sure the ratings would also go up if the computer technicians should discover a way to remove the actors' clothes, in, of course, good taste. The ratings for a nude "Gone with the Wind" would probably go through the roof, but I doubt that many people would argue that a nude "Gone with the Wind" had much to do with the original "Gone with the Wind."

There's another aspect to colorization that I find potentially even more damaging to film preservation. That is, the likelihood that, if colorization becomes an accepted practice, the original black-and-white prints stand to disappear for all intents and purposes. The colorizers deny this. They say that because they need the black-and-white prints from which to make colorized copies, they will guard and preserve those black-and-white prints forever.

I suspect that the actuality will be somewhat different.

Consider what has happened to the distribution of 16-millimeter versions of 35-millimeter theatrical films with the advent of the video

cassette. There once was a time when the only practical way of seeing old movies, other than stumbling over them on television, was in 16-millimeter. The distribution of 16-millimeter prints to campus film societies and other private groups was big business.

Now more and more people, those who once depended on 16-millimeter outlets, are watching their movies on video cassettes. The 16-millimeter market has shrunk to such an extent that many distributors can no longer afford to spend the money required to make 16-millimeter versions. Also, they are not replacing worn-out 16-millimeter prints with new ones.

Movie producers, who once looked to the 16-millimeter market as a major source of income, now bypass 16-millimeter entirely, going directly from 35-millimeter theatrical release into the video cassette market.

As a result, there no longer is any way to see many classic films on a movie screen, except in in museums and other archives. In addition, as the 16-millimeter market has declined, a number of classic foreign films are disappearing from this country, probably forever. Video cassette distributors do not have the time, patience or money to seek out the copyright holders for comparatively obscure foreign films, once the staple of 16-millimeter distribution.

Though the video cassette recorder has become an essential teaching tool as well as a wonderful household toy, it has destroyed the 16-millimeter market, including our chance to see classic movies in a good approximation of their original splendor.

In much the same way, it seems possible that the availability of tinted versions of our classic films will mean that, ultimately, our access to the originals, even on video cassettes, will be denied. Why should businessmen, who have poured hundreds of thousands of dollars into the tinting old movies, go out of their way to put the original versions on the market? They would be competing with themselves.

The black-and-white prints and black-and-white video cassettes will continue to exist, but under lock-and-key in the vaults of the colorizers. A large part of our artistic and social history will have disappeared, as completely as if the films had been put into a sack and dropped into the sea.

If Congress does not act, I'm afraid that a large portion of our film heritage will vanish. Either that, or it will be so distorted that future generations will have no idea how most movies looked in the first half of this century, and no comprehension of how they enriched our imaginations.

Thank you.

Mr. KASTENMEIER. Just one comment. I think there is absolute agreement, sort of a universal agreement that we ought to do more in terms of preservation of films and ensuring that films in their original condition are maintained. The archival interest in films that the Register of Copyright made quite a point of supporting.

In any event, we ought to perhaps be able to achieve something in that regard, quite apart from what we otherwise do with the somewhat more difficult question of moral rights of movie directors and others.

Mr. KASTENMEIER. I would like to now call on Dean Monroe Price.

Mr. PRICE. Thank you very much, Congressman—Mr. Chairman and members of the committee.

I think that it is significant that this set of hearings is the first in a post-Berne world. With the guidance of the chairman, this Nation is about to enter a new era because of its adherence to an international order that is different from the one that we have been in before.

Although in the past we have been proud to say this is a Nation that did not have moral rights as they existed in Europe. Now we are not taking that position. We have through some careful and very delicate statesmanship said that there is a minimalist approach to Berne, which I felt was a great and creative approach, but I don't think that a minimalist approach is a nihilist approach. Berne certainly doesn't say there is no moral right.

And I appreciated the statement of Congressman Howard Berman, on the floor, that "I am troubled that we may not be intellectually honest when we conclude that we can join Berne by deeming U.S. laws to be in compliance but assuming none of the responsibilities under the Convention to enhance the rights of authors."

Whether the post-Berne world is a better world or not, it is a world that we are entering, and I think the question for this committee in these sets of hearings is what should moral rights be like in the United States? What makes our set of moral rights different from those of other countries? How do they evolve? What is different in our background and in particular sectors of the industry that lead to different resolutions of this issue?

I would say that in a way our moral rights, because of our peculiar history, is linked in a way to consumers rights to artistic integrity as well as the rights of the creator, the director or the screenwriter in this case. And that leads me to think that a policy of mandatory labeling of films to disclose whether they are works that are different from the originally issued film in significant ways is the correct one. Moral rights arise from the concern for the consumer and the consumer's interest in artistic integrity. This is not something which we are just doing for the author and the creator, but for the society at large, or the community at large.

I also think that given the importance of the right of paternity under Article 6 bis there ought to be the right of a director or a screenwriter to have his or her name removed from a film if it is modified. And this leads me to suggest that the remedy should be provided not only for films of the greatest artistic significance but should exist for all films. This also touches on some of the points

that the Register raised about picking and choosing among films. To the extent we are dealing with a disclosure question, consumer interest in artistic integrity as well as the creator's interest in artistic integrity, it should be all films and not just the greatest American classic that are appropriately labeled.

Any colorized or otherwise significantly changed film should be appropriately labeled whether or not the director consents to the colorization. And I believe that a labeling requirement should apply to films already in existence, and there is nothing ex post facto about a requirement that forces information about a current metamorphosis.

Another way of achieving the appropriate goal is the American version the droit public payant under French law, and this goes to something which the chairman just raised about preservation of film. One could conceive of establishing a special royalty requirement on a colorized version to be placed in the fund for the restoration of the American film heritage.

And I would suggest that such a royalty on films which are in the public domain would be particularly appropriate. That is to say, that although we think of the public domain as something that can be used without payment, colorization might be the basis for imposing a particular tax. In my statement I call this a moral rights' version of the "tax to pollute" concept in environmental law or "Robin Hood meets Casablanca."

Producers who wish to exploit the treasure of black and white films by altering them would have to give back a compulsory license so that the asset base of culturally significant American films remains a vital one.

Now much of the focus today is on colorization, but it is my view that worse fates lie ahead in terms of the technological ability to transform films and raise serious questions about possible violations of moral rights and the deception of the consumer. In that sense, I think that if a national film commission is created it ought to have the kind of duty that the Register now has, to think about and recommend to this committee and other committees other forms of material alteration that seem to be on the horizon and appropriate remedies that ought to be taken. The national film commission with respect to film would be something like CONTU with respect to copyright in general.

As Congressman Berman said concerning actors' rights: "I remain open to the prospect that there may be a legislative approach in the spirit of Article 6 bis which will not kill the goose that lays the golden egg." I think labeling is the right way to accomplish this result. There is a difference between golden eggs and goldplated ones and providing for proper recognition of that difference is appropriate.

Thank you.

Mr. KASTENMEIER. Thank you, Dean Price.

[The statement of Dean Price follows:]

**Summary of the Statement of Monroe E. Price
Before the House Subcommittee on Courts
and Administration of Justice,
House Judiciary Committee**

June 21, 1988

To the extent the moral right of artists is tied to their relationship to consumers, I favor a policy of mandatory labeling of films to disclose whether they are works that are different from the originally issued film in significant ways. Colorization is one such significant alteration, but not the only one.

I do not believe these remedies should be provided only for films of the greatest artistic significance, but should exist for all films. Any colorized or otherwise significantly changed film should be appropriately labeled whether or not the director consents to the colorization. I believe that a labeling requirement should apply to films already in existence.

Much more difficult is what should occur, beyond disclosure, for a group of motion pictures that may warrant greater protection, i.e. films which, in the terms of the Mrazek bill, are "culturally, historically, or aesthetically significant." The idea here, a valuable one, I believe, is that a society can take extraordinary steps to protect its most valuable treasures.

The question is the degree of protection against distortion that government should impose. One possibility is to have a narrow category of protected films and, as to those, prohibit colorization or other forms of distortion whether or not the artistic author of the film consents. Congress could also act affirmatively to strengthen the availability of untouched originals of culturally, historically or aesthetically significant works without impeding the production of colorized works. For example, federal law could provide that as a condition of registering colorized derivative works, the highest possible quality of the original would have to be restored and made available through deposit with the Register of Copyrights. It is also possible to require that in exchange for colorization, the producer must relinquish the original black and white from which the derivative work is made to the public domain at an earlier date. A third way of achieving this goal is an American version analogous to the droit public payant under French law, in which a royalty on the colorized version is placed in a fund for the restoration of the American film heritage.

If a National Film Commission is established, its responsibilities ought to have a study and reporting component, much like those of CONTU. I would give the Commission two additional responsibilities; I would provide them with an affirmative interest in assisting in building a library of excellent negatives of the most important films of the American motion picture heritage. And I would charge them with reporting to Congress, periodically, on aspects of technological manipulation of film which might meet the standard of distortion or mutilation and which raise possible moral rights questions. The Commission, without taking overt action, could also provide guidance to the industry, and could help Congress and state legislatures concerned about these questions raised by technologies that lie ahead.

Mr. Chairman, members of the Subcommittee. My name is Monroe E. Price. I am dean of the Benjamin N. Cardozo School of Law at Yeshiva University. I am a copyright professor by osmosis, having had the pleasure of serving for fifteen years with the late Professor Melville Nimmer on the faculty at UCLA. Indeed, my very first scholarly project at UCLA was working on an international effort, coordinated by Professor Nimmer, seeking to compare the approach of various European countries with the United States in the area of copyright and what was awkwardly called "neighboring rights," including moral rights.

Accession to Berne ushers in a new era in terms of thinking about the moral rights of authors. Heretofore, those few scholars who wrote about moral rights had virtually nothing in American law to serve as a hook for analysis. They were like Brandeis and Warren, trying to create a new right, but not so successfully.

In the world after Berne, these issues are not so insular, so bizarre, so remote from the skeleton of intellectual property. We shall be part of a convention which appears to encourage moral rights for artists.

The legislative record concerning accession to Berne is ingenious in its treatment of the pre-existing structure of moral rights in the United States. Under the inventive "minimalist" approach, moral rights are said to be where they were prior to Berne and they are said to be sufficient for compliance.

After Berne, however even under the minimalist approach, it is hard to say that there is no moral right. The minimalist approach is not the nihilist approach. I particularly appreciated the statement of Congressman Howard Berman that "I am troubled, however, that we may not be intellectually honest when we conclude that we can join Berne by deeming U.S. laws to be in compliance, but assuming none of the responsibilities under the Convention to enhance the rights of authors."

My own feeling is that courts, interpreting law, or engaged in the growth of the common law, will treat Berne and Article 6bis as an artifact of the legal culture that must be recognized and respected.

Thus, my view of the world after Berne is slightly different from those who simply state American law in its present form complies with Article 6bis. This new event, this new involvement with the Berne order means at least the following: our pre-existing law is coupled with a commitment to treat that law as evolving. Moral rights are now worthy of examination and possibly of redefinition. Moral rights are now part of the agenda for discussion.

Our national position is no longer that moral rights do not exist. It is rather that there is a body of moral rights law, partly in the common law, partly in state law, partly in federal legislation. The task is not to deny those rights, but rather to articulate them, to fashion what moral rights ought to mean in the American context.

Here, I think the felicitous epigram of Ralph Sharp Brown is useful. "We are masters of our fate," he has written, quoting the concluding section of Berne's Article 6bis namely that "Means of redress for safeguarding the rights granted by this article shall be governed by the legislation of the country where protection is claimed."

In a sense, this hearing is an example of the changed context in which we think about law. Whether these hearings result in new legislation, they mark a recognition of an international order, to which the United States will be a party, in which rights of integrity, of honor and reputation, rights to assert a moral claim against the derogation or mutilation of an author's work can be made. The idea of rights other than economic rights is a subject for keener inspection.

Whether this is a better world remains to be seen. But it is a world we have entered.

Given that as background, I should like to turn to the legislative proposals now being considered that speak to the rights of directors and screenwriters with respect to colorization and other activities that can be said to alter, distort, mutilate or derogate from the integrity of a film or the reputation of its author.

Rather than speak to technical aspects of each bill, let me suggest some principles:

To the extent the moral right of artists is tied to their relationship to consumers, I favor a policy of mandatory labeling of films to disclose whether they are works that are different from the originally issued film in significant ways. Colorization is one such significant alteration, but not the only one. I believe moral rights evolution in this country will come from concern for the consumer more than concern for the creator. This is a reflection on our fundamental values, but it is something we should recognize. That impetus, however, will shape the way rights evolve. And given the importance of the right of paternity, I also favor the right of a director or

screenwriter to have his or her name removed from a film if it is modified.

I do not believe these remedies should be provided only for films of the greatest artistic significance, but should exist for all films. For example, to the extent it is the consumer's right to an artistic product of integrity that is involved, the requirement of labeling should not depend on a waiver by the director. Any colorized or otherwise significantly changed film should be appropriately labeled whether or not the director consents to the colorization. I believe that a labeling requirement should apply to films already in existence. There is nothing ex post facto about a requirement that forces information about a current metamorphosis.

Much more difficult is what should occur, beyond disclosure, for a group of motion pictures that may warrant greater protection, i.e. films which, in the terms of the Mrazek bill, are "culturally, historically, or esthetically significant." The idea here, a valuable one, I believe, is that a society can take extraordinary steps to protect its most valuable treasures. We know this process well in all our cities where there are struggles, through landmark preservation laws, to distinguish those structures that ought not be altered and preclude their owners from acting inconsistently with the public interest. From the perspective of a semiotician, a building, and its visual and cultural relationship to the community, is little different from the relationship between a film and the community. Both are forms of visual speech.

The question is the degree of protection against distortion that government should impose. One possibility is to have a narrow category of protected films and, as to those, prohibit colorization or other forms of distortion whether or not the artistic author of the film consents. Congress could also act affirmatively to strengthen the availability of untouched originals of culturally, historically or esthetically significant works without impeding the production of other colorized works. It is also possible to require that in exchange for colorization, the producer must relinquish the original black and white from which the derivative work is made to the public domain at an earlier date.

A third way of achieving this goal is an American version analogous to the droit public payant under French law, in which a royalty on the colorized version is placed in a fund for the restoration of the American film heritage.

This would be a copyright or moral rights version of the "tax to pollute" concept in environmental law or Robin Hood Meets Casablanca. Producers who wish to exploit the treasure of black and white films by altering them would have to give back a compulsory license so that the asset base--culturally significant American films--remains a vital one.

Much of the focus today is on colorization. It is my view that worse fates lie ahead in terms of the technological ability to transform films and raise serious questions about possible violations of moral rights and deception of consumers. If a National Film Commission is established, its responsibilities ought to have a study and reporting component, much like those of CONTU.

We are still at an early date in our understanding of the proper relationship between our sense of responsibility in a Berne context and the changing technology in the use and abuse of motion pictures. I would soften the powers of a National Film Commission. I would give the Commission two additional responsibilities: I would provide them with an affirmative interest in assisting in building a library of excellent negatives of the most important films of the American motion picture heritage. And I would charge them with reporting to Congress, periodically, on aspects of technological manipulation of film which might meet the standard of distortion or mutilation and which raise possible moral rights questions.

For it is clear, already, that the issues are more complex than colorization or dubbing. Technologies ahead could yield concerns that raise moral rights questions. The Commission, without taking overt action, could provide guidance to the industry, and could help Congress and state legislatures concerned about these questions.

In some ways, I would suggest a bill broader and narrower than the Mrazek bill. I would suggest that the labeling remedy be virtually universal, not just for films that are on the registry. As to films which are on the registry, I would provide the Commission with additional authority to take remedial steps, though not necessarily the ones listed in the bill. I prefer an approach that affirmatively works to strengthen the reservoir of American films while interfering as little as possible with the economic growth of the industry.

There are some less intrusive, and perhaps less valuable approaches. For example, one notion is to have evolution of moral rights to continue to develop at the state

level. The House has already indicated that accession to Berne does not preempt state law in the moral rights area. There is some beauty in thinking that a useful way for moral rights to evolve in this way. At some point, if state laws advance to a point that requires federal preemption and definition of moral rights law, that is time enough for federal action. Perhaps that is the inevitable way for this body of law to develop.

Another form of intervention would be to enact, at the federal level, a presumption of nonwaiver of moral rights if such rights are not explicitly waived in a contract. In this case of directors, it would, in lieu of the Gephardt bill, make rights waivable but only if they are expressly waived. Professor Brown seems to favor "lodging the bundle [of rights] initially with the creative person, and leaving their transfer to the initiative of the buyer." His conclusion is that "something is to be said for tipping the balance initially toward the creator."

As Congressman Berman stated at the time of the House vote on Berne, respecting "directors' rights," I remain open to the prospect that there may be a legislative approach in the spirit of Article 6bis which will not kill the goose that lays the golden egg. Maybe the way to do this is to recognize that there is a difference between golden eggs and gold-plated ones and providing for proper recognition of the difference.

Mr. KASTENMEIER. I must state that in my view the United States would not be adhering to Berne if, in fact, we explicitly put a moral rights provision in the adherence legislation. I hope you understand that.

Mr. PRICE. I do understand.

Mr. KASTENMEIER. I think some of your ideas are quite good in terms of suggesting ways in which we could achieve something here. Some of the ideas are novel and I think very helpful.

I guess one of the troubling aspects—I am going to address this to Mr. Canby—is to what extent we are now confronting new technology. You and I in the years past, 30 to 40 years ago, in films used to see that the director would sometimes lose some of his film on the cutting room floor. Sometimes it was even the story line itself. And so we had a generation that grew up understanding that films were altered and that sometimes directors paid terrible artistic prices in the process.

Now it may be that things are better with the Directors' Guild and the ability to participate in the final product, by at least the better known directors who are able to achieve a somewhat better fate, perhaps. But historically, we had always understood that films sometimes were substantially altered and that maybe the best scenes were left on the cutting room floor.

And so we have to ask what is new today? Is it merely the new technology that deals with films in particular ways that were not possible before? It isn't the editing process, I take it.

Mr. CANBY. Well, I think the fact that films have always been a collaborative effort and that we know that many films supposedly have been ruined by sticky-fingered editors or producers acting as editors doesn't really have much bearing on what we are talking about here, which is the protection of films that we know to be finished.

Now there are always—and from where I sit I see five or six a year—versions, new versions which are touted to be the original versions of films being released. I just got a notice the other day that Colonel Blimp, which came out in 1943 in a 2-hour version in black and white, an English film, is going to be reissued now in a nearly 3-hour version in technicolor. Now what is the original version? I haven't seen either one, but the original version in terms of American audiences would have been that 2-hour black and white version. Now we are going to get a 3-hour one in the original 3-color technicolor.

These are problems that I really don't think have a bearing on what we are talking about here, which is the preservation of the films that we have. And the only way that we can do that is go on the assumption that the least films had the endorsement of the director and the writer and those are the works that we are trying to keep from being further tampered with.

But since films are a collaborative thing right from the start, there are many people involved, though I think we have to assume for our own work here that the director and the writer are the principal people responsible. There was a time in—actually at the time that most of the films we are talking about, black and white films, were made when the producer was a very different—well he served a very different function than he does today. You had very

strong producers who put together films, people like Selznick, who were really the auteurs of their films, the authors of those films.

Mr. Hiller I think can talk about this much more accurately than I can, but I think that what has happened and what does happen in the making of films to make them good, bad or failures isn't really the point of what we are doing, or talking about at this hearing.

Mr. KASTENMEIER. One of the things that also troubles me, my own taste notwithstanding, is, if the opponents are able to demonstrate to us, let us say, that in a poll of 10,000 viewers of films either in theaters or certainly in television, 2 out of 3 would say they would prefer colorized versions to the original black and white versions, should the fact that 2 out of 3—I don't know this, but I think that those who oppose this would propose to demonstrate something like this: That 2 out of 3 people prefer colorized versions. Should that enter into our consideration of this question at all?

Mr. HILLER. I think that that is taken from wrong—nobody has ever set up a true study that says that. I mean, that comes mostly from asking people do you prefer color films or black and white films.

Mr. KASTENMEIER. Yes.

Mr. HILLER. The two times that a station—that I am aware of, that a station has run the same movie, the same film, one night in black and white, one night the colorized version, the black and white version in each case got the most people.

Mr. KASTENMEIER. Really?

Mr. HILLER. Yes.

Mr. KASTENMEIER. I didn't know that.

Mr. HILLER. Yes.

Mr. KASTENMEIER. Well, I am giving you a hypothetical. I don't know that that is the case.

Mr. HILLER. No. I think you would have to do a real study. But is that the point?

Mr. CANBY. Yes, is that the point? I don't think it is.

Mr. KASTENMEIER. That was my question.

Mr. CANBY. Yes.

Mr. KASTENMEIER. Should that be something taken into consideration?

Mr. CANBY. I should hope not. Because if somebody came along and can take one of Mr. Hiller's ideas of what can happen with computers, came along with a computer that could remove all of the actor's clothing, and you showed "Gone With The Wind," a nude "Gone With The Wind," you would probably have huge ratings at least once, but it wouldn't mean much as far as the art of the film is concerned.

Mr. HILLER. It is a point also that I was making in terms of the paintings at the beginning. That if you take a Rauschenberg and cut it into four pieces, that is not really four Rauschenberg's, even though a lot of people may say, "Oh good. That gives more of us a chance to hang a Rauschenberg."

Mr. KASTENMEIER. This is somewhat different, though.

Mr. HYDE. Would the gentleman yield?

Mr. KASTENMEIER. Yes. I yield to the gentleman from Illinois.

Mr. HYDE. What if you make four copies of that same Rauschenberg, and the original you hang there with the baby spotlight and even a flower arrangement. But then you take the copies and you cut those. You have preserved the heritage, the original. It is there in all its glory. But you have commercialized some of the copies and, while it is certainly not aesthetically pretty, you haven't really damaged the work of art. And why can't you do that with movies?

Mr. HILLER. OK. But the difference is that you are dealing with a painting, where the only way you can see a painting, let us say the Mona Lisa, is you must go to Paris, you must go to the museum, the Louvre, and see the painting. Motion pictures appear all over the country, all over the world. It is not like you have to make a big trip to see them.

Mr. KASTENMEIER. Another question I asked before because I know it is difficult. I asked it of the Register. And that is, how can we be so sanguine that a "principal" director and screenwriter exclusively shall have this sort of moral right to determine what happens and, as I understand it, their heirs or assigns; therefore, theoretically, let us say the children or the grandchildren of a director shall have more to say than has John Steinbeck, who is not a screenwriter but may have sold his rights to the producer, who hires a screenwriter to rewrite the story for film purposes. Steinbeck has no rights in that but the grandchild, perhaps, of a director has a right. Do you see that as necessary——

Mr. HILLER. No. You are dealing with two different things. Steinbeck wrote a novel. Steinbeck——

Mr. KASTENMEIER. No, I know that it is a derivative work. It is not the same.

Mr. HILLER. Not derivative. It is something—it is a different work. When that book was sold to the movies it was with the understanding that a movie would be made. And we, as directors, have no objection, let us say, if somebody wants to make a musical Grapes of Wrath. That again would be a different entity. And make it in color, fine. But not to take the original work that was made in black and white.

Mr. KASTENMEIER. Well, it would be entitled to a copyright but I can't say it is not a derivative work. I think it probably is.

Mr. HILLER. Which is derivative? I am sorry.

Mr. KASTENMEIER. Derives from the original.

Mr. HILLER. If it derives from the original, they may—I don't know who has the right. But depending on the rights, what I am saying is that it becomes a different entity. If it is a different entity, then it is OK.

Mr. KASTENMEIER. Indeed, you know, one can ask should the heirs of those writers have anything to say about making musicals out of——

Mr. HILLER. Yes.

Mr. KASTENMEIER. Which has been very successfully done, I might say.

Mr. HILLER. You have to go back to the original writer to get those rights; yes.

Mr. KASTENMEIER. But I could imagine Victor Hugo might be offended by a musical of his very serious work, which is probably a

much greater alteration than, you know, colorization would be, as a matter of fact.

Mr. HILLER. You are saying he would not have like Les Miserables and—sorry. I am mixing up my——

Mr. KASTENMEIER. Well, I think one can argue about that. But I guess my question really is can we be sanguine about nominating the principal director and the screenwriter exclusively, and their heirs, for this purpose?

Mr. PRICE. Well, I think that there is a problem always in determining who is the custodian of moral right. In the visual category, you can talk about the collector or the dealer or the artist. In this context, you can name a number of people. And I think that it is always a problem for the Congress to decide which among many alternatives to employ, and it is the same old problem of saying, God, there are so many problems out there. How do we pick one or the other? That is a different from the heirship issue, which I think is another substantial issue.

Mr. HILLER. The reason the writer and the director were selected was the writer provides the basis from which—the floor plan from which the rest of us work on our film, and the director was selected because, by the nature of the way films are made, the director is the only one who has the entire picture in his or her head. The director is the only one—it is like the hub of a wheel, and the spokes go out and touch every other aspect.

Now, just by the nature of the way films are made. I am not saying that a producer may not be a better person or, you know, creatively better, or any other person. But that is why it is narrowed to those two people.

Mr. PRICE. You could let the banker do it. Bankers are probably the most significant participant.

Mr. KASTENMEIER. I would like to yield to my colleague from California, Mr. Lungren.

Mr. LUNGREN. Thank you, Mr. Chairman.

I think one of the things in dealing with this that we all ought to recognize is that this is an important issue. But having said that, I will tell you I have not had a single constituent come up and say that this is something that Congress ought to be dealing with. In fact, I have had some constituents come up and say this is something we ought not to be dealing with. That the industry ought to be able to take care of that themselves.

But having said that, I would like to ask——

Mr. HILLER. But I am sure that that is true for novels that authors have written, for paintings that hang in the museum. Your constituents can say, Hey——

Mr. LUNGREN. No, I understand. The reason I am telling you that is——

Mr. HILLER. We are supposed to protect our heritage.

Mr. LUNGREN [continuing]. No, I understand that. I am just saying you ought to recognize the political reality in which you are dealing here.

Mr. Hiller, I would like to ask you a couple of questions, though. One is, it is an old phrase but I happen to think it makes sense—beauty is in the eye of the beholder. Many times I have read critics of works of art, including films, who have gotten some sense, some

beauty, some insight out of a work of art that if you went and talked to the producer or the director or the painter or the writer, they didn't consciously have in mind but they see it there.

If that be true, I still don't understand why it is such a desecration, as long as you don't destroy the original, to allow colorization. Let us say, for my children's generation who have for whatever reason—you may disagree with it, but they have grown up with color being part of film, and you probably can entice them to see a black and white one. One of the greatest films I ever saw I still believe is On The Waterfront. I tell my kids how great it is. It comes on the TV. I watch it. They get turned off.

Mr. HILLER. Isn't that a shame?

Mr. LUNGREN. Yes. But my point is this.

Mr. HILLER. Isn't that a shame. That is the point we are making.

Mr. LUNGREN. My point is this. Perhaps if I could get them to watch it in a colorized version, which would not nearly be as good, I would grant you that, that would intrigue them so they would want to go see the original. In art, we in some ways may not be allowing, or not drawing some generations to see the originals because we are going to prohibit colorization of some of the classics.

Am I totally wrong on that, or do you think there is some merit in that?

Mr. HILLER. Well, my feeling on that is, if you see the—let us say you keep the black and white and you show the colored version, that becomes psychologically in everybody's mind the version and the black and white doesn't exist even though it is somewhere away.

Also, how can they go see a black and white when it is preserved in a vault somewhere. They are not going to be able to go in and see it.

It is just—and you are taking somebody's work and you are changing it. Were you here when I—I don't think you were—when I said——

Mr. LUNGREN. I came in a little late. But let me go back to one thing.

Mr. HILLER. If you were on Ted Koppel—did you hear when I mentioned that?

Mr. LUNGREN. No, I didn't hear that.

Mr. HILLER. Let us say you were on Ted Koppel.

Mr. LUNGREN. All right.

Mr. HILLER. And they repeated the broadcast on Saturday afternoon.

Mr. LUNGREN. Right.

Mr. HILLER. And there you were, it was your face and your words and your inflections, but to get the younger people to watch it they changed your voice to Peewee Herman. How would you feel about that?

Mr. LUNGREN. Well, that has never happened to me. My local newspaper had a picture of Bryant Gumbel and called it me.

[Laughter.]

Mr. LUNGREN. They also did it with a former colleague who had just been sent to prison and they put my name on his picture, which didn't help in my district. That is my local paper.

No, but my concern is that are we going too far in this in saying that because we think the beauty is in the original art——

Mr. HILLER. Not necessarily the beauty, just that it is a piece of art.

Mr. LUNGREN. OK, the integrity of the piece of art.

Mr. HILLER. Yes, integrity. Right.

Mr. LUNGREN. My point is how do you destroy the integrity if you preserve the original and then have an expurgated version of it or a colorized version of it.

Mr. HILLER. Because what I am saying is that is not Orson Welles' "Citizen Kane."

Mr. LUNGREN. No, I understand. But you said a moment ago, psychologically people will want to watch the one rather than the other. I mean, I can understand your point precisely if art were merely for the creator. For instance, if the artist created it and kept it for himself or herself and no one had the right to violate it. But the artist in making the creation and then making it public creates a risk, a risk of being laughed at, a risk of being denied artistic merit in the judgment of others, and if you paint a painting and someone else buys it, the risk of even that person doing something to it.

Mr. HILLER. I think that is terrible. I have said at the beginning——

Mr. LUNGREN. I do, too.

Mr. HILLER. I think that that should not be allowed. I am speaking moral rights for all artists, for all creative artists.

Mr. LUNGREN. Well, I understand that, but the artist does sell it. The artist creates a work that is art, but it is also commercial. Otherwise, you wouldn't have it out there and you wouldn't be making money on it. And there is a certain compromise the artist makes in deciding that he or she is going to make a living.

Mr. HILLER. We are saying, though, that that can be bought by somebody, sold by somebody, make all the money they want, but the creative artist doesn't have to get any money from that. But, if it is a desecrated work, that's something different.

I mean, I am trying to think. Suppose the Mona—I think somebody did paint a moustache on the Mona Lisa once, didn't they?

Mr. LUNGREN. I don't know.

Mr. HILLER. All right, it was a good copy and painted on. But suppose the Louvre, they hung that and said this is a copy—this is the Mona Lisa with Moustache by so and so, and they put the Mona Lisa down in the vault. You know, it is just not the way to do it. Leave up the original Mona Lisa.

Mr. LUNGREN. So the fact that you would preserve the original and allow alterations to it after someone else has—alterations to copies after someone else has purchased the ownership interest in it just does not solve the problem?

Mr. HILLER. I am not sure I followed that.

Mr. LUNGREN. Well, what you are saying is you must maintain the original, at least as long as the producer—I mean, the director and the writer want to maintain it or their heirs?

Mr. HILLER. That is correct. The original, whatever went out to the public, that version, yes.

Mr. LUNGREN. I see. It is an interesting and intriguing thing. I just wonder if at some point in time—and I don't mean to disparage you at all, but is there a certain elitism here? Are we suggesting that people don't have the right to take a look at colorization or other types of technological manifestations which change the piece of art, maybe making it compatible to some others who wouldn't get a chance to look at it and derive some beauty from it?

Mr. HILLER. So you would be happy now with Mr. Canby's version of "Gone With The Wind" and taking the clothes off, technically? Technically taking the clothes off the people and have them wandering around that way? Because it certainly would intrigue a certain amount of the audience. You would get a good audience for that.

Mr. LUNGREN. We are obviously looking at it from different perspectives. I am looking at it from the perspective I guess of what I call the consumer, the viewer; the one who is appreciating the art who might draw something different out of it and then be drawn into the original.

I guess we may be going around in circles. I am just trying to find out what your baseline is, and I guess your baseline is once the director and the writer have determined what it is——

Mr. HILLER. No. Once that film has, with all the input of all of the people has reached the point, not where it is testing, not where it is trying, but where it is now out to the public in a release form, then we say that is what we want to preserve.

Mr. LUNGREN. But the director——

Mr. HILLER. And writer.

Mr. LUNGREN [continuing]. And the writer in collaboration could change that subsequently.

Mr. HILLER. They could change the coloring or something subsequently; yes.

Mr. KASTENMEIER. The gentlewoman from Colorado.

Mrs. SCHROEDER. Thank you, Mr. Chairman.

I wanted to ask a few questions about the commission. I must say the film commission troubles me in that we have a group of people saying they are going to determine what is culturally, historically and aesthetically significant. That bothers me a lot. But I am not quite sure what this group thinks of it.

As I listen to each you—Mr. Hiller, I think you said you saw that as a collateral effort to the Gephardt bill.

Mr. HILLER. No, I didn't.

Mrs. SCHROEDER. OK. I thought I saw that in your testimony.

Mr. HILLER. Sorry. Yes. I had misunderstood the word. Yes.

Mrs. SCHROEDER. You say you saw it as collateral.

Mr. HILLER. I saw it as one step. If you say to me, do I love that? No, I don't love it. I love what I am saying here, which is something that looks after everything.

But sometimes you have to be grateful when one step is taken, and I think that is what that bill does. It gives us at least one step.

Mrs. SCHROEDER. So you would not be happy with one bill rather than the other; is that correct?

Mr. HILLER. Yes. I want—yes, the Gephardt bill by far.

Mrs. SCHROEDER. Is what you want?

Mr. HILLER. Sure. I want them both.

Mrs. SCHROEDER. But if you couldn't get that you would be happy with the commission as a beginning?

Mr. HILLER. As one step.

Mrs. SCHROEDER. Well, let me ask a film critic. What do you think? Can we put together a commission that can decide this for America?

Mr. CANBY. I haven't read that bill. I have read the Gephardt bill and that seems to me the bill that I can support right now, or would support. The basis of my feeling about what is happening with colorization and any attempt to protect black and white films is basically that all films should be protected. All films without any regard to their quality. I think any fooling around with artistic judgment is dangerous.

Mrs. SCHROEDER. So you probably would not go for a commission even though you——

Mr. CANBY. Well, as I said, I haven't read the bill. So possibly if I read it I would feel differently.

Mrs. SCHROEDER. Mr. Price, I don't think you have really gotten into this directors and screenwriters vis-a-vis other people. Who do you think makes this decision? I think that is one of the things that I hear on this panel, is that we are very troubled about who really—whose film is this?

Mr. PRICE. When I was looking at the Gephardt bill and the film commission and thinking of the three of us here, this seems to me a very good question, because the way we break down on those points is very telling.

As I read the film commission bill, it permits the colorization of any film. It doesn't prohibit colorization at all, it is only a labeling bill and an original title bill. I would fault it because it does provide selectivity. I would rather see mandatory labeling across the board, but I think the film commission approach is acceptable.

As I read Mr. Canby's testimony, he would not like the film commission because it permits colorization. And I am not even sure about his view of the Gephardt bill because it, too, permits colorization with the director's permission. You might say that as to certain films—a narrow group, maybe a hundred films—there ought to be a collective determination that they cannot be colorized whether or not the director agrees with it.

When we think about landmarking buildings, we landmark them whether or not the architect thinks that it is a good idea to landmark them. The moral right in that sense says there is a community interest in seeing that Grand Central Station remain Grand Central Station, and even if everyone who has been a part of the process says no, let us build a McDonald's there, you can't do it. So I think that in some ways as to some kinds of rights we don't want to make a community decision that that should be preserved and not leave it up to anybody.

What I think the moral rights doctrine does, and I think it is a 19th century evolution, is to delegate that right to a particular person. I would say the director. I have some trouble with having it be two persons rather than one. I think it complicates the issue a great deal. And I think the director is a good surrogate for saying—and this goes back to Congressman Lungren's question—the decision as to how it should be finished has been made and that

same collaborative team could make decisions about its modifications. So the producer has the right to do it but he has got to go back to the director to make the modification as was done with the original thing. Heirship poses particular kinds of problems.

Mrs. SCHROEDER. But, as a lawyer, isn't there a way to get out of this? I mean, aren't we just talking about how many angels stands on the head a pin? Because if that director, if we decide to give the director the right, the director has still got to get the money to make a picture. And whoever gives him the money, don't they make them waive their right? I mean, would they ever get money again?

Mr. PRICE. That is a question which, as I understand it, isn't answered in H.R. 2400 by saying you cannot waive it at the moment of the initial transaction to make the picture, that only after the picture has been released can the director consent.

It seems to me the question ought to be what the waivability aspect of it is. That is a different issue from whether the director consents. But, as I understand it from counsel for the directors, the intention here is to have the bill require consent at a later date.

Mrs. SCHROEDER. Because my guess is there is more lawyers in this country per person than anywhere else. My guess is they will figure out a way, representing the people who put the money up. And so my question then is, are we really doing anything meaningful if your goal is to protect the films?

Let me ask another question, too. We will hear in testimony and we hear in our offices that all of these films are available in black and white and it is just that people don't check them out. You keep saying, Mr. Hiller, that they are locked in a vault somewhere. But people are saying they are out, they just——

Mr. HILLER. There are some of them available in black and white, and they do a good business, too. There are lots appear on television.

Mrs. SCHROEDER. Will this affect shortening them for like airlines and things?

Mr. HILLER. Yes. That is terrible.

Mrs. SCHROEDER. So this is the whole ball of wax?

Mr. HILLER. Yes.

Mrs. SCHROEDER. But then, again, won't the people——

Mr. HILLER. It deals with every kind of mutilation of the film whether it be panning and scanning, picking one to fit——

Mrs. SCHROEDER. But how are you ever going to get money again to make a movie? I mean, do you really think that they will put that kind of money up if you can hold them on whether or not they can sell it to airlines or whether or not they can put it on television or whether or not they can colorize it?

Mr. HILLER. No. We are not asking for the world. We realize—we are not out to break any laws. We realize there are certain subject matters that aren't good for kids. We realize those things, and we go along with the editing for television for those reasons, because it is reaching out to a young market and we understand what they are doing.

The same is true on the airlines. There are often young people aboard, so they usually are working with that version. So we are not—yes, in the perfect life we would rather that didn't happen.

We would rather television didn't have commercials, of course. But we have been living with it for many years because we realize that is the way it is.

Mrs. SCHROEDER. Thank you, Mr. Chairman.

Mr. PRICE. If I can say, in 119(a) as I read it there is a right of consent that has to be exercised once the work has been published, so that is the later point. The question of whether it can be waived is handled in (b) which says it can be assigned but only to a third party who is a qualified artistic author.

Does this mean that the magic of lawyerdom can come up with an answer? Probably. I am sure that they can. But there was an effort I believe to make it more difficult.

Mr. KASTENMEIER. The chair will state that there is a vote on. I would like to yield to the gentleman from Illinois, Mr. Hyde, next. We will go as far as we can.

I would like to say to the panel, the members that we have after this panel—we are almost done with this panel. We have another panel and I strongly urge members here to return for the last panel of the day.

The gentleman from Illinois, Mr. Hyde.

Mr. HYDE. Just a brief word about shortening the film for airline flying. The alternative I guess would be to keep circling until they finish the film——

[Laughter.]

Mr. HYDE [continuing]. Which could have an adverse economic impact on——

Mr. PRICE. Actually, Mr. Hiller made a film about that called The Out-Of-Towners.

Mr. HYDE. In addition, sometimes shortening the film for airline viewing is a good idea, in my humble opinion, because you can show an otherwise marvelous film like E.T. without the gratuitous scene with the parents smoking marijuana. The same is true with many other films that have the obligatory gratuitous sex scene, which has no relevance to the story and makes it unsuitable to kids who, fortunately, get to ride on airplanes once in a while.

Mr. HILLER. We do do that. That is what I say. We are agreeable and we do it.

Mr. HYDE. Oh. Well, good. I thought that was being objected to as altering artistic integrity.

Mr. HILLER. No. I said that we do not want to hurt the moral standards and we do not want to break any laws, and that is why we edit for television and why we edit for airplanes.

Mr. HYDE. Now, in looking at the Gephardt bill, I find one of the sections says, "During their lifetime the artistic authors of a motion picture may assign the right of consent only to a third party who is a qualified artistic author."

Now in trying to find out what is a qualified artistic author, I see the definition says, "shall be the principal director and principal screenwriter of the work." I hesitate to think if there are two people, the principal director or principal—I guess you have to be both the way this bill is drafted. But then Mr. Gephardt has his own understanding of the language.

But that would mean, if I had produced "The Maltese Falcon" or "Citizen Kane," I could assign that to Cheech and Chong because

they are qualified artistic authors. They have made a film I am sure and they have written several of them. No? Yes?

Mr. HILLER. Well, you could but then there would be a lawsuit because that is not what it says. Because what it says is that the heirs of, let us say, if the writer and director have passed away, then the heirs have the right along with an artist of the same caliber at the same level.

Mr. HYDE. It really doesn't say that. Have you read the bill, sir?

Mr. HILLER. Yes.

Mr. HYDE. You have?

Mr. HILLER. I may not have read it well.

But, you know, everything isn't—I am sure you are aware of this more than I am. That when you first write out a bill it is not perfect.

Mr. HYDE. Oh sure.

Mr. HILLER. That there are little changes that have to be made.

Mr. HYDE. I am just saying there are lots of problems with this. Getting language and confining the permissible class of human beings to whom you can transfer—that is, qualified artistic authors—presents enormous difficulties because there are lots of those who may or may not be sensitive enough to deal with your work of art the way you would want it dealt with.

Mr. HILLER. That is right.

Mr. HYDE. But that is just one little problem.

Mr. HILLER. No, but it is easy to say it is easier to have Mr. Woody Allen than Cheech and Chong, you know. You know, I can make the extremes too, and you have to reach some way of finding which is the right people.

Mr. HYDE. OK. We have to run to vote. I just want to ask you a question. When you sell a picture, what are you selling? In other words, someone wants you to make a movie, and they've got to go raise $15 million.

Mr. HILLER. Right.

Mr. HYDE. And they raise the money, and they promise certain things to these people putting their money in. Then you make the movie, and it is 2 hours and 38 minutes and they can't use it, they need a 2-hour movie because they have got to show it three times to get the popcorn sales in.

Mr. HILLER. Right.

Mr. HYDE. All, beneath the dignity of this great movie, but nonetheless the economics that made it possible for you to make the movie include that consideration.

Mr. HILLER. I can tell you that in 99.44 percent cases they would get the reduced version.

Mr. HYDE. The 2-hour movie.

Mr. HILLER. Sure. Every once in a while they are going to hit somebody who says, no, I am not going to do it. But that has nothing to do, really, with this bill. Because we are talking about after it goes out to the public.

Mr. HYDE. Well, OK. All right. We had better go vote.

Mr. HILLER. No. You raise a good problem, though, but it doesn't fit into here because, as I say, we are talking about from the time the picture is released.

Mr. HYDE. They might have to re-release it if nobody is taking it because they are only getting two showings a day instead of three.

Mr. HILLER. Possible.

Mr. HYDE. All right. Thank you.

Mr. KASTENMEIER. The chair will state that—we will ask the indulgence of the witnesses, Mr. Hiller, Mr. Canby, and Dean Price, to remain because at least two of our members do have some questions of you. If you will be good enough to do that, then following that we will have one more panel.

The vote being now conducted on the house floor, we stand in recess for 10 minutes.

[Recess.]

Mr. KASTENMEIER. The committee will please come to order.

When the committee recessed we were hearing from our first panel, involving Mr. Hiller, Mr. Canby, and Dean Price. I would now like to call on the gentleman from California, Mr. Berman.

Mr. BERMAN. Thank you very much, Mr. Chairman. I did note that they did one of those computer moves on Nightline a few weeks ago and they turned Ted Koppel into Dan Rather.

[Laughter.]

Mr. BERMAN. I have gone over a few of these issues I would almost say ad nauseam with representatives of directors and screenwriters in my office, but I think it is important to get some of this on the record with respect to the Gephardt bill.

The first question is why don't you deal with this issue in the collective bargaining process? The screenwriters are in a very bitter strike right now. To the extent we are dealing with some fundamental assault on the artistic integrity of the product of directors and screenwriters, why doesn't this get elevated to the kind of an issue that says before we enter into a collective bargaining contract this time around we want the kinds of contractual protections that some directors get as individuals right now.

As I understand it, for some directors making movies now there are very comprehensive contract provisions that constrain the copyright owner from doing all kinds of things, be it colorization, be it panning and scanning—all kinds of different things, without that director's consent. Why not take this from an individual bargaining thing which only benefits the most powerful within the guilds to a guild issue and bargain?

You are speaking about 3 or 4 out of 4,000 or 5,000. That is why I am saying, why not transfer it to a collective bargaining process?

Mr. HILLER. Who can get that into the—because we feel that we are talking really for creative artists in general. We are talking for the painters, for the composers.

Mr. BERMAN. Markey has a bill that deals with that for the visual arts and, in fact, that was the subject of a hearing last week, or 2 weeks ago. Here we are talking about films.

Mr. HILLER. I don't know if any of these issues have been brought up in collective bargaining, but I would presume that we would not get a very favorable response from the Motion Picture Association. Mr. Valenti can perhaps answer that.

Mr. BERMAN. I can assume that without question, just given their reaction to this legislative proposal. But that is the thing about collective bargaining. Ultimately it includes the right not to

perform services if the other side is being recalcitrant, and ultimately there is some battle here that it gets settled in.

Mr. HILLER. But what we are talking about is a social issue, and that is the preservation of an art form. And that talks about our society as it is today and the society of the future, and I think that is beyond collective bargaining.

Mr. BERMAN. I have had a lot of discussions and, as a matter of fact, there are some other arguments as to whether or not this is a mandatory bargainable issue, and some other aspects of labor law interface with that particular question.

But going to a different question, the scope of the material alterations--well, let me put it differently. What constitutes a material alteration? Does cutting for commercials? Does this proposal need to be fleshed out in greater detail to tell us, the world, the copyright owners, what you are talking about and what you are not talking about?

Mr. HILLER. I suspect so. Now I am not a legislator and I am not as you know, a copyright lawyer, so I don't know. But I would think that it needs further definitions as to what each area is.

Mr. BERMAN. Is cutting for commercials, not editing in the sense of shortening it, but simply determining that the copyright owner wants to market this on television, is that a material alteration in your mind?

Mr. HILLER. No.

Mr. BERMAN. Is dubbing this in a foreign language so that the film can show abroad, is that a material alteration?

Mr. HILLER. No.

Mr. BERMAN. All right. Colorization obviously is.

Mr. HILLER. Yes.

Mr. BERMAN. The bill, it is fair to say, is silent on what is and what isn't?

Mr. HILLER. The dubbing issue might well be also a mutilation, and I think our feeling would be run it in the initial language and put subtitles on it.

Mr. BERMAN. Putting subtitles on the film is not a material alteration?

Mr. HILLER. Would not be, yes. There are many things in life that you don't like to do but that you do. I mean, yes, I would much prefer that everybody understood the picture in the way it was done. But you have to face the fact that you are in a foreign country and that some change has to be made. You have to face the fact that television is a commercial medium and some changes have to be made.

Mr. BERMAN. The third question, or issue I would like to raise is the extent to which, if this bill were to pass in the form it is now, consent by the director, the screenwriters, the assignees, could be obtained by the payment of additional money. To what extent have we done anything more than enhance the economic clout of a director and screenwriter vis-a-vis the producer, but without any guaranteed protection of artistic integrity?

Mr. HILLER. We have clearly stated that what we wish is that there would be a fee for the director or writer's permission of $1. That you cannot be paid any more than $1 for giving that permission.

Mr. BERMAN. So to change this proposal then to reflect that limit on waivability, on consideration. OK.

Mr. HILLER. Legislatively, you may have a better way of dealing with it. What we were trying to deal with was nobody making money out of that.

Mr. BERMAN. You talked before about the book and the motion picture, and you said they were different works. But here one of the ways you are dealing with black and white to color is to say you can't use the title. If they are different works, if the book author objects, how do you distinguish the ability to still call the movie Grapes of Wrath?

Mr. HILLER. The writer has given those rights, given or been paid for them—paid for those rights that the picture can be called The Grapes of Wrath.

Mr. BERMAN. And should we step in and legislate? I mean, that is what they will say to you. You have been paid to direct a film which we own. And you are saying we should come in and legislate a limit on that right of ownership.

Mr. HILLER. No. I am saying the ownership stays. That there are two levels. One is an artistic level and one is an economic level. I say that at the artistic level you make certain decisions, and at the economic level you make others. You follow the pattern of the droit moral in France or other European countries, and I think somewhat similar in England, and now in Canada, where the moral rights stay with the author of the film.

Mr. BERMAN. How would the labeling proposal that has been thrown out address that—the one that says that if you are going to make a material alteration you explicitly inform the public of that. If it is done without the consent of the key artistic creators, and let us assume for a second that that is the director and the screenwriter, that the absence of their consent is part of the label. How does that——

Mr. HILLER. That is not in the Gephardt bill, though.

Mr. BERMAN. No. No. There are a lot of things we have talked about here that aren't in the Gephardt bill.

Mr. HILLER. OK. See, my own feeling is, given my druthers I want it not to happen. I don't want the film to be changed or desecrated or mutilated or anything done to it. If the legislature sees fit not to give the creative artist that kind of a support but says we will give you this amount of support, then I would be happy. You know, I would embrace one step, so to speak.

Mr. BERMAN. Labeling is preferable to doing nothing, but not as good as vesting in a director the power to block the alteration.

Mr. HILLER. By far, yes.

Mr. KASTENMEIER. The gentleman from Maryland, Mr. Cardin.

Mr. CARDIN. Thank you, Mr. Chairman. I only have one or two questions.

I take it that the panel would prefer moral rights legislation for all artists, but if we cannot move in that direction, then you would agree to try to work by field, the Gephardt bill dealing with motion pictures. And we have talked about the labeling. I wonder if the other two panelists would comment on the labeling aspect.

If it is the wisdom of Congress not to move towards the Gephardt bill, which would require the consent of the writer or the director, how would labeling satisfy your concerns?

Mr. CANBY. Well, I have always found that little sign or card that comes on before a film on television saying "This film has been edited for television" more provocative than anything else. Because the next question is how? What has been cut out? How much has been cut out?

I think labeling is kind of ridiculous. It just says I have misbehaved and you come on and watch the movie. It doesn't tell you anything of substance. You can't look at that edited film and have any idea what has been removed. I find labeling sort of a pat on the back for doing what you want, to either cut or colorize or whatever.

Mr. CANBY. Of course, there are different forms of labeling. Labeling could specify precisely what was done in regards to whether it was colorization, editing.

Mr. HILLER. Yes, but if it doesn't tell you how much has been cut out, it is very difficult for somebody seeing that film for the first time to have any idea what has been removed. I saw not too long ago on one of independent stations in New York The Bank Dick. The time slot was about an hour and 10 minutes, and there must have been 20 minutes of commercials, which meant that that film that they showed us ran about 48 minutes.

Mr. CARDIN. Let me deal with the colorization issue. Would labeling work in regards to the concerns that you have on colorization?

Mr. HILLER. No.

Mr. CARDIN. Would you explain why?

Mr. HILLER. It would simply announce that you are seeing a film that has been colorized, which I suppose anybody who is interested in films would be able to pick up anyway. What else is it telling the viewer who just stumbles upon it, somebody who is not particularly interested in films? I don't know what it accomplishes.

Mr. CARDIN. One of the concerns that has been expressed to us by the artists is that the artist does not necessarily want to be identified with the change, the alteration.

Mr. HILLER. Right. But I don't know that colorizing says much to that effect. Does it? Does it say the director doesn't want to be associated with this film? It just tells you it is colorized.

Mr. CARDIN. It could. Again, the labeling could say that it is done without the consent of the director.

Mr. HILLER. Well, and it could go on to say that he doesn't like the color blues and greens in this particular—I mean, the explanation could go on forever. And I don't think it really accomplishes a great deal.

Mr. CARDIN. Mr. Price.

Mr. PRICE. Well, I think there are problems always in text and whether text means anything, whether it communicates anything. Films are now filled with words that are the results of wars over credits and who gets to where on the marquee and various things like that.

But I think that labeling here is a useful technique. And on the question of paternity, that is, the right of an author to be associated or disassociated with the work, I would rather see the right of a

director to have his or her name removed rather than some long explanation saying "I don't like this movie" or whatever. I think that's a simpler technique than the question of paternity, as it were, under the Berne Convention.

Mr. HILLER. And the title removed.

Mr. PRICE. On the title, the director would be—the bill, the Appropriations Committee bill, as I will refer to it, would say that the original title can't be used. It doesn't really indicate what that means. I think that there is a substantial question about what words are prohibited words or permitted words.

Mr. CARDIN. Let me just comment a little. Removal of a name, though, do you think that the viewing audience would really pick up the fact that a name is not included in the credits?

Mr. PRICE. Well, I think here we are really dealing with a very valuable right of personality. There was an earlier reference to cutting up a Rauschenberg. It seems to me one of the problems there is calling it a Rauschenberg. Putting up a quarter of a Rauschenberg and saying here is a piece of paper that has certain colors on it is an all right thing to do if it—it may be if it is not representing that it is a Rauschenberg painting. And if someone is taking a narrative and saying this is not by John Steinbeck and it is not whatever, or not saying it, then something may be accomplished by doing that, if the author is embarrassed or does not want his or her name associated with the work.

The right of paternity under Berne is the right to have your name associated with work that ought to be attributed to you and the right not to have work attributed to you that is misrepresented in its attribution. And I think that very valuable insight is something that is attempted to be captured here in that bill.

Mr. CARDIN. Thank you, Mr. Chairman.

Mr. KASTENMEIER. I thank my colleagues. Are there any other questions of the panel?

Let me just ask one question, Dean Price, on the last issue. Is there not a distinction to be made between works for hire and, let us say, Rauschenberg as an artist who does his own painting? That is to say, there is a different relationship between someone who does a creative effort in the context of a work for hire, in terms of controlling the work and, let us say, an original artist as in the case of an oil painter; is there not?

Mr. PRICE. Certainly I think that in implementing Berne, or implementing our new adherence, these are important questions that need to be addressed, the relationship between work for hire and moral rights. One could have a regime in which one thinks that the right of personality ought to exist whether it is a work for hire or not, and that could be different among sectors. You could say that a painter, even though he is painting under a commission, has the right to have his or her name associated with the work, no matter what the contract of commission said, and not have that apply to directors, or vice versa.

So I think the reason for going sector by sector is to say how would each sector that does work for hire interrelate with otherwise inalienable moral rights.

Mr. KASTENMEIER. Thank you.

Mr. LUNGREN. Mr. Chairman.

Mr. KASTENMEIER. Yes.

Mr. LUNGREN. Mr. Canby, if I could just ask you a question. And that is, if the options were nothing or required labeling in terms of alteration of a film, would you support—or would you think anything was offered by requiring labeling?

Mr. CANBY. Yes. I think it would point out something that had—you know, a bad deed that had been done. I don't know that it would illuminate much of the problem in the minds certainly of the viewers. I think I feel in practice it wouldn't do much to stop it, but I think it is a good idea. It couldn't hurt.

I feel the same way about the editing of films for TV. I don't know that it really accomplishes anything. It may tell some of the viewers that this film is not quite what it was originally. And such labeling does not hurt, but I would like to see something much more effective done.

Mr. LUNGREN. I understand that. But it does serve at least the purpose of notifying the viewer that this is not the original film.

Mr. CANBY. Right.

Mr. LUNGREN. Obviously, it doesn't tell them why and any other reason, but presumably, if it is on television, for instance, a commercial decision was made that the colorized version was what they thought they wanted to put their money up for, and the person who is viewing it is getting a chance to see that. There is no guarantee they would have gotten the chance to see the noncolorized version before. At least, if they are seeing that, they have been put on notice that there is an original, perhaps a "classic" that they may want to see. Without labeling there would be no intriguing aspect or no signal to them that, look, there is the real thing somewhere else, if that is how you view the artistic product.

Mr. CANBY. Well, that is true. I think what we are coming upon is a day when there are going to be so many channels available that a lot of these films will be shown in their original black and white version, if things are allowed to—if they are protected.

Mr. LUNGREN. Well, I still believe in the marketplace. And if that is true, we don't have to worry about any legislation whatsoever.

Mr. HILLER. But if there were no colored pictures, and if we spent our time putting on black and white films, we would introduce the young people to black and white films. I mean, how do you introduce your child to anything? You introduce them to it. And if you introduce them to black and white films, because there aren't the colored versions of it, they will learn about black and white.

Mr. LUNGREN. Well, I still have trouble seeing Little League kids using metal bats. But I give them a wooden bat and they look at me like I am crazy. I mean, the fact of the matter is you and I may wish they were using wooden bats, we think it is a purer form of baseball, and if they want to get to the majors they have to learn to use a wooden bat, but the fact of the matter is they all use metal bats today.

And I appreciate that I enjoy On The Waterfront. I enjoy High Noon. I enjoy films like that. But I can't get my kids to watch them.

Mr. HILLER. It is not even a question of enjoyment. It is a question of the right of the artist. You know, that is really what it goes to. I mean, you know, you have your feelings.

Mr. KASTENMEIER. If that is all the questions we have, we thank our three witnesses, Mr. Hiller, Mr. Canby, and Dean Price, for their contributions today. Thank you, gentlemen.

Mr. KASTENMEIER. Next, and the last panel, I would like to greet Mr. David Brown, the producer of many well-known and well-regarded films, and Mr. Roger Mayer, the President and Chief Executive Officer of Turner Entertainment Company, which, of course, has colorized a number of films. I am also pleased to greet Mr. Jon Baumgarten, who accompanies the panel and is a distinguished copyright practitioner has testified before this committee on a number of occasions.

I would like to first call on Mr. Brown.

Mr. MAYER. Mr. Chairman, I understand you allowed us to show a few minutes of colorized films. We would like to do that first, if possible.

Mr. KASTENMEIER. Is the panel in agreement with the showing? You indicated it is a 3-minute version?

Mr. MAYER. It is 3 minutes, yes. It is 3 minutes just of clips, just to give you an idea of what is going on.

Mr. KASTENMEIER. Without objection, we will watch the 3-minute film.

[Film clips shown.]

Mr. KASTENMEIER. Which of you desires to testify first? Mr. Brown.

TESTIMONY OF DAVID BROWN, FILM PRODUCER, ON BEHALF OF THE MOTION PICTURE ASSOCIATION OF AMERICA, INC., THE ALLIANCE OF MOTION PICTURE AND TELEVISION PRODUCERS, AND THE MANHATTAN PROJECT, LTD., AND ROGER L. MAYER, PRESIDENT AND CHIEF EXECUTIVE OFFICER, TURNER ENTERTAINMENT COMPANY, A SUBSIDUARY OF TURNER BROADCASTING SYSTEM, INC., ACCOMPANIED BY JON BAUMGARTEN, ESQ., PROSKAUER, ROSE, GOETZ & MENDELSOHN

Mr. BROWN. Mr. Chairman, distinguished colleagues, my name is David Brown. I am the proprietor of a company called the Manhattan Project, Ltd. I assure you it has nothing to do with the organization of that name during World War II, and I trust I won't have any bombs. I am an independent producer of films and television. My company is associated with Tri-Star Pictures, which is a major distributor. I am an experienced producer of motion pictures, having worked previously as executive vice president of both 20th Century Fox and Warner Brothers. In addition, from 1972 until earlier this year, Richard Zanuck, my partner, and I ran an independent production company, the Zanuck-Brown Company. Mr. Zanuck and I have film credits with which I am sure you are familiar. They include, "The Sting," "Jaws," "Cocoon," and "The Verdict," and many less well-known and less successful films.

I would like to correct a misconception. Nowhere in the deliberations on this matter has role of the producer been mentioned, not in legislation, not in panels, not in commissions, nowhere; and yet

producers created this great popular art form and business known as the motion picture industry. Films are the creation not only of the principal screenwriter and a director, but also, of producers—the men and women who backed directors and principal writers.

Now to familiarize yourself with the process of making a motion picture, whether it becomes a work of art or not. The producer normally, unless the director is also the producer, comes first and identifies the basic idea or property or book or play on which the film is to be based, and selects a writer to adapt the work. There are occasions, of course, when, as in the case of "Butch Cassidy and the Sundance Kid," the screenplay is in completed form and requires only a minimum of work by the same or a different writer at that point, or even before a director is selected.

To summarize, the producer usually comes first, and he then selects a writer. And then, if the script is OK, or sometimes before, he makes a list of directors and he goes after the directors.

I take exception to the idea that the principal screenwriter, who sometimes can never be identified because there are sometimes many writers on a film, and the director are the auteurs. A movie is not a symphony by Strauss. It is not a Monet. A motion picture, a popular art form, is not an elitist art form.

It is true that films in many foreign countries and, certain filmmakers in this country, Woody Allen among them, are truly amuteur. The director is responsible for everything in the movie. As for films in this country, I spend a fair amount of my time protecting the works of original artists from the meddling of directors and writers.

Many producers, Mr. Zanuck and I included, are not money men. We don't raise the money for the movie. Our backers are generally distributors. We are primarily active in the creation of films. We are authors of films, if you please, but not sole authors because we know—and I will go into this in a moment—how many people are involved in the making of films.

So I want to say again there are major misconceptions that I would like to try to refute and clarify. One is that writers and directors are sole creators of films. Not true.

Another misconception is that our film heritage is about to be destroyed. I respectfully suggest that is not the case. The fight is not about destroying classics. In a funny way it is a little about censorship. The film heritage exists. Every work of art or non-art has a life span. A popular novel sells for a year or two. A successful film is in theatrical distribution for 6 months and sometimes a year; then it goes into other modes of exhibition. Those works that the public and qualified critics identify as classics in the fullness of time become works of art. They are rarely in circulation at the time of such recognition.

They usually are in museums or archives, and we, through our educational system, are made aware of them. No Film Commission is going to satisfy me that they know what a work of art is. That will come in only the fullness of time.

Mozart, Beethoven, were all pilloried by critics. Their works and their artsmanship, so to speak, came much later.

A film, as I have said, is usually not a pure work. It is a collaboration and fusion of many talents and skills. As for being criticized

for desecrating classics, may I point out that "Carmen" has been made as "Carmen Jones," a jazz version. "Romeo and Juliet" has been made as "West Side Story." We never worry about classics in the public domain. I don't know how many versions there are of the Bible, but nobody is getting excited about them. But new versions are constantly issued.

So bills such as H.R. 2400, in my opinion, are based on the faulty premise that directors and screenwriter participants are the sole creative forces. The American motion picture is a fusion of producers, directors, screenwriters, special effects, actors, cinematographers, musicians, composers, lyricists, animators, and many others.

David O. Selznick, who provided Margaret Mitchell's "Gone With the Wind," had it adapted by perhaps 14 screenwriters, and engaged as many as four directors. They were all involved in the creation of the film version of "Gone With the Wind." Is it a classic? I think we all agree it will rank as a classic. Whose is going to make a decision about further alterations in "Gone With the Wind."

A film that Mr. Zanuck and I made, Jaws, would not have the same impact without the music of John Williams, his thumping "Jaws" theme. Robert Redford, was the prime force behind the filming of "All The President's Men." It was Mr. Redford who bought the book, who thought it could make a movie. He then hired a director named Alan Pakula. He hired William Goldman, and later Alvin Sargeant, to write the screenplay. Is Mr. Redford mentioned anywhere as an auteur? Not at all.

So I think it is presumptious for the directors and writers to ask Congress to accord them special status because they claim to have a monopoly on the creativity that goes into making a movie. I wish it were so. It would make our life a lot easier. Sometimes the Writers Guild of America, to whom we give the responsibility of allotting screen credit for writers, have to have boards and arbitrators to decide who did what, and sometimes it is someone who wrote only 15 percent of the screenplay who receives credit.

Alterations occur in a theater where a projection machine is badly lighted. A lazy projectionist who doesn't make the change alters the showing of a film. The television screen was never designed to show movies. We have an Italian actor speaking for Robert Redford or Paul Newman when the film is exhibited in Italy. That is an alteration, but a necessary one. It proves that a movie is not sculpture or poetry.

I believe that the issues addressed by H.R. 2400 are better left for resolution in the marketplace. I think producers and directors and screenwriters have dealt with these types of issues for years without Congress jumping in. They are doing so now. We presently have a strike, but we can't go to Big Daddy.

In negotiations, directors and screenwriters are represented by powerful unions. The Directors Guild of America agreement specifies the director's participation in creative phases of film-making. This is the result of long negotiations. Some individual directors have obtained the right to a final cut. Legislative action on these issues, are not appropriate.

I love movies. Most of the people I know who are in the movie business as producers, directors, writers and entrepreneurs are movie buffs. They love them. The idea that everybody is going to

take "Gone With the Wind" and present it in nude form is nonsense. All businessmen are not bad. All artists are not good.

The Guild agreements represent only the minimum protections afforded directors and screenwriters. So I think Congress should let the marketplace do what it must do and does do and does so well and so cruelly at times.

I will conclude with a comment about the Mrazek proposal. I don't think anyone in the motion picture and television industry would welcome a Federal Film Commission. I don't think anyone in our creative community, screenwriter, director or producer, would want the Federal Government to set up an agency to make creative decisions, even if they were represented on that agency.

I am aghast that producers and screenwriters are calling for the creation of a permanent federally funded commission to make decisions that could have a profound effect on our creative efforts. Our industry has prospered. It is one of our main sources of foreign income. We have grown over the years because we have been able to operate in a free marketplace.

We petition the Congress, respectfully, not to alter that fundamental fact. Thank you.

Mr. KASTENMEIER. Thank you, Mr. Brown.

[The statement of Mr. Brown follows:]

MOTION PICTURE ASSOCIATION
OF AMERICA, INC.
1600 EYE STREET, NORTHWEST
WASHINGTON, D.C. 20006
(202) 293-1966

June 21, 1988

Summary of Testimony of David Brown

The Motion Picture Association of America, the Alliance of Motion Picture and Television Producers, and Mr. Brown's own production company, The Manhattan Project Ltd., oppose legislation such as H.R. 2400, "The Film Integrity Act of 1987," that would impose so-called "moral rights" on the American motion picture and television program production industry.

We oppose federal "moral rights" legislation because:

1. Bills such as H.R. 2400 are based on the faulty premise that directors and screenwriters are the sole creative forces behind a film. Thus these proposals ignore the fundamental fact that filmmaking is a collaborative effort by a variety of creative artisans.

2. Under these proposals Congress, would grant directors and screenwriters enormous power to decide what the viewing public may or may not see see in their homes and in theaters. It would be a gross error to confer such authority on screenwriters and directors or anyone else. Such decisions are better left to the free marketplace.

3. Producers, directors, and screenwriters have dealt with these types of issues for years in guild and individual negotiations without Congress jumping in and taking sides. Congress should let these issues continue to be resolved through negotiation, not legislation.

4. Enactment of a federal "moral rights" statute would hamper the ability of the film industry to respond to consumer demand for new diverse programming, by giving non-copyright owners broad power to veto alterations deemed essential by the copyright owner for successful marketing. Ultimately, this would undermine a key goal of the Copyright Act: to promote public access to creative works.

5. Technological innovations that permit copyright owners to adapt motion pictures to changing markets -- from colorization to panning-and-scanning to time compression and time expansion -- tend to enhance public access to copyrighted works.

STATEMENT OF DAVID BROWN

ON BEHALF OF

THE MOTION PICTURE ASSOCIATION OF AMERICA, INC.

THE ALLIANCE OF MOTION PICTURE AND TELEVISION PRODUCERS

AND

THE MANHATTAN PROJECT LTD.

ON

H.R. 2400

"THE FILM INTEGRITY ACT OF 1987"

BEFORE THE HOUSE JUDICIARY SUBCOMMITTEE ON

COURTS, CIVIL LIBERTIES AND THE ADMINISTRATION OF JUSTICE

June 21, 1988

Mr. Chairman, my name is David Brown. I am head of The Manhattan Project Ltd., an independent producer of films and TV programs that is associated with Tri-Star Pictures.

I appear here today on behalf of my own company, as well as the members of the Motion Picture Association of America (MPAA)[1/] and the Alliance of Motion Picture and Television Producers (AMPTP)[2/].

I welcome the opportunity to share with this Subcommittee our views on so-called "moral rights" legislation pending before this Subcommittee, H.R. 2400, "The Film Integrity Act of 1987."

Mr. Chairman, I bring to this Subcommittee years of experience as a producer of motion pictures. I've spent much of my professional life in the motion picture business.

I served as Executive Vice President of both Twentieth Century Fox Film Corporation and Warner Bros., supervising all aspects of production on a worldwide basis.

In 1972 Richard Zanuck and I formed an independent production company, the Zanuck/Brown Co. Earlier this year I established my own production company, The Manhattan Project Ltd.

1/ The members of MPAA are: Columbia Pictures Entertainment; MGM/UA Communications Co.; Orion Pictures Corporation; Paramount Pictures Corporation; Twentieth Century Fox Film Corporation; Universal City Studios Inc.; The Walt Disney Company; and Warner Bros. Inc.

2/ The AMPTP represents a variety of producers of TV programs and motion pictures, such as: Aaron Spelling Productions; The Burbank Studios; Columbia Pictures Entertainment; 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.

During my career as a creative producer I have nurtured films through every phase of the production and distribution process. I have seen my own ideas and detailed concepts and those of other producers blossom into motion pictures. I have worked closely with other creative talents to transform these ideas and concepts into vibrant and successful entertainment. I have been part of the creative teams that produced such motion pictures as Jaws, The Sting, Cocoon, and The Verdict.

In addition to my experience in the film industry, I've had a long career as an author of both books and magazine articles.

I recite this capsule summary of my career for a specific purpose.

I think it will help the members of the Subcommittee to understand why I, as an experienced creative producer who knows the ins and outs of the U.S. film and TV business, am so strongly opposed to the imposition of federal "moral rights" legislation on my industry.

Mr. Chairman, I will begin with some brief comments on H.R. 2400. I will then turn my attention to our industry's concerns with "moral rights" proposals that differ from the specific language of "The Film Integrity Act of 1987."

Some of the Many Problems With H.R. 2400

Even just a quick look at H.R. 2400 explains why the motion picture and television production community is so alarmed by this bill. I will share with you just a few of our concerns.

First, the bill raises many troubling questions. It answers virtually none.

For example, what does the bill really cover?

H.R. 2400 is sometimes referred as an anti-colorization proposal. That would be troubling enough. But this bill goes far beyond that. It speaks of "material alterations, including colorization," but fails to define "material alterations."

Does this include alterations designed to preserve motion pictures that might otherwise cease to exist? Does this reach editing intended to make the film suitable for free TV -- the sole or primary access that millions of Americans have to motion pictures? Does it include editing films to accommodate the insertion of commercials that are essential for their broadcast on free TV? What about the film-to-tape transfer process that

every TV series and every movie shot on film must go through to be seen on the home screen?

Put another way, what types of changes does it not reach?

Here's another fundamental question. The bill empowers the "artistic authors," defined as the principal director and the principal screenwriter, to object to any such material alteration. But who decides who was the principal director and the principal screenwriter, particularly for the tens of thousands of films already produced? What happens if the principal director agrees with the proposed changes but the principal screenwriter objects?

And what do you do when, as is often the case, several screenwriters contribute to the script and one of the writers who only wrote, say, 15% of the final version, fills in the missing piece that makes the film work? Should that person be deemed the principal screenwriter?

Ultimately no amount of legislative tinkering can resolve these difficult questions, so numerous that we cannot even anticipate them all. The answers will only come from the federal courts, after years of time-consuming and expensive litigation that would inject uncertainty into the marketplace and that could deny films and TV programs to consumers. Is this the kind of dispute that should be tieing-up our judiciary and withholding entertainment from audiences?

Second, we are deeply concerned with the radical alteration H.R. 2400 would work on the Copyright Act.

The proposal stands the Copyright Act on its head by endowing non-copyright owners with rights generally reserved for copyright owners. It permits non-copyright owners to sue copyright owners who alter a movie without the written consent of the so-called "artistic authors."

The bill also takes the extraordinary step of denying copyright status to a motion picture that is altered without the consent of the "artistic author": "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." Thus, not only can the producer be sued as if he were a copyright infringer, he is also denied the ability to exploit his work!

Also worrisome is the fact that the right of consent afforded "artistic authors" outlives the life of the copyright in the underlying motion picture. This raises an intriguing constitutional question. Given the constitutionally-limited term of copyright, can Congress amend the Copyright Act to grant rights that exist in perpetuity? Even if Congress has such power, is it good public policy to use it here?

I could go on, Mr. Chairman, but I will not.

Obviously we vigorously oppose H.R. 2400. Our concerns, however, go well beyond the specific language of H.R. 2400. They transcend the important issue of whether copyright owners should be free to colorize black-and-white pictures. Our concerns reach any bill that would amend federal law to impose "moral rights" on our industry. Let me explain why this is so.

Filmmaking is the Collaborative Effort of a Variety of Creative Forces

As we understand it, the DGA's proposal would vest in the so-called "artistic authors" -- to wit, "the principal director" and "the principal screenwriter" -- the power to object to any "material alteration" in a motion picture. But their plan proceeds from a faulty premise. It assumes, wrongly and haughtily, that they are the sole creative forces behind a film. That is simply not true.

The American motion picture is a fusion of a variety of creative talents. It is a group collaboration. The worth and popularity of films depends on the skill of a legion of artists: the producers, directors, screenwriters, special effects artisans, actors, cinematographers, musicians, composers, lyricists, set designers, make-up artists, and others.

Would Chariots of Fire have beguiled audiences if Vangelis had not created such a memorable score? Would Jaws have been so riveting and tension-packed without John Williams' thumping shark theme? Would The Exorcist have terrified and captivated audiences without the extraordinary make-up created for the young child? Would Star Wars have won such global applause without its astonishing special effects?

The producer is no less a creative contributor than the director or screenwriter. Many of our most treasured motion pictures came to life because a producer had an idea and pursued it.

Because David O. Selznick thought that the book Gone With the Wind would make a great movie and worked obsessively to transfer that book to celluloid, an American film classic was born. And Walt Disney, were he with us today, would be surprised to learn that he was not the guiding creative force behind the motion picture classics from the studio that bears his name. Even George Lucas must concede that it is his vision and guidance as a producer that gives a "LucasFilm" production its distinctive character.

Mr. Chairman, directors and screenwriters are vital to the filmmaking process, but it is ludicrous to assert that they have a monopoly on creativity. How elitist for them to ask Congress to anoint them as the sole "artistic authors" in moviemaking! To claim authorship only for the principal director and the principal screenwriter is a contemptuous dismissal of the band of creative talents whose special and sometimes indispensable contributions are central to the existence of a movie.

"Artistic Authors" as "Censors"

But the directors and screenwriters don't stop there. They also want to reserve to themselves the power to decide what the viewing public will see in theaters and in their homes.

For example, these "artistic authors" want the power to decide whether or not the public will have access to a colorized version of a black-and-white motion picture. They want this power despite the fact that:

- it is the copyright owner who invests thousands or millions of dollars to produce or acquire a film, and many thousands or millions of dollars more to colorize, distribute and market it;

- the copyright owner often engages in painstaking efforts to secure, preserve, and reconstruct the best available print of the black-and-white film;

- the public might well prefer the colorized version (often creating renewed demand for a work where previously there was none); and

- if the public rejects the colorized version, it can view the original black-and-white version that remains available, absolutely unaltered. (Colorization is accomplished electronically, using a videotaped copy made from the original film).

Mr. Chairman, I have no doubt that directors and screenwriters have strongly-held feelings about such issues as colorization. They are certainly entitled to bring their concerns to this Subcommittee. But it seems that the directors and screenwriters are asking Congress to legislatively grant them an awful lot of power. They want the sole authority to decide what people see. In fact, what they want smacks of censorship.

Rather than getting involved in such matters, Congress should leave such decisions where they belong: in the marketplace, to be worked out by producers, directors and screenwriters in their individual employment contracts and guild agreements.

Moral Rights Legislation and Existing Private Agreements Between Producers and Directors/Screenwriters

For decades, the private business relationships between producers and directors and screenwriters have been governed by comprehensive collective bargaining agreements and individual employment contracts that define the producer/director and producer/screenwriter relationship in excruciating detail. (The current Directors Guild of America (DGA) agreement is well over two hundred pages long, and the Writers Guild of America (WGA) agreement is even longer.)

However, if successful, DGA's push for federal "moral rights" would unnecessarily immerse the federal government in the marketplace and throw these established private business relationships out of whack. Such legislation would seriously disturb the existing balance between parties fully capable of looking after their own interests in the negotiating process.

Adoption of a "moral rights" law along the lines of the one advocated by the DGA would vest the directors and screenwriters -- non-copyright owners-- with tremendous control over the fate of motion pictures and TV shows that are produced at great expense by production companies.

Such federal intervention would be unfair. It would also be unnecessary.

In their collective bargaining agreements with producers, directors and screenwriters have gained myriad "moral rights"-type protections. These agreements are negotiated by the DGA and the WGA, two powerful unions that represent the collective strength of thousands of directors and screenwriters, respectively.

Because the directors are the major proponents of this misguided legislation, it makes sense to take a brief look at their guild and individual agreements.

Today directors have broad rights to have their names prominently displayed when a film is shown theatrically or on videodiscs and videocassettes, when their work is advertised; or when a record, tape or book identified with the film is licensed and distributed by the producer. Just take a look the next time you see a film, rent a prerecorded videocassette, or pick up your daily newspaper and turn to the movie listings. You'll see these rights in action.

These agreements go well beyond the important issue of director credit. For example, if a motion picture licensed for TV syndication in this country is to be edited, the director, if available, has the right to do the editing.

The DGA agreement also spells out in detail a director's right to be involved in myriad decisions relating to the production and release of a motion picture. As the Guild agreement states: "The Director's professional function is unique, and requires his or her participation in all creative phases of the filmmaking process, including but not limited to all creative aspects of sound and picture."

In fact, the directors and producers recently agreed to a new provision in the pending Guild agreement that gives the director the right to be consulted when the producer is considering whether the film should be colorized, time compressed, time expanded or panned-and-scanned. This demonstrates that the guild agreements are malleable. They are not fixed in granite. They do adapt with the times.

Keep in mind, the DGA agreement represents only the minimum protections afforded directors. Directors are free to negotiate greater protections in their individual contracts and can never be made to give up rights protected by the Guild agreement.

As is true elsewhere, the more established a director, the greater the leverage he or she has to expand upon the rights in the Guild agreement. Thus, established directors often successfully insist that their individual contracts with producers contain various rights that go beyond those in the Guild agreement. In some instances, these rights even include the "final cut" -- the ultimate determination of the version to be released.

Mr. Chairman, for more than forty years the producers and directors and screenwriters have conducted their business and settled their differences without Congress jumping in and taking sides. Congress should let this free-market mechanism continue to operate. It should let these issues continue to be resolved through negotiation, not legislation.

Moral Rights Legislation and Consumers

As you well know, Mr. Chairman, the Copyright Act is constructed to balance the interests of the owner of a copyrighted work and the users of that work. These interests reinforce one another.

If the copyright owner's ability to control his work is unnecessarily constrained, the incentive to create is reduced, and the public is denied access to the fruits of creativity. By permitting a non-copyright owner to interfere with the copyright owner's distribution of a work, and therefore the user's access to a work, "moral rights" legislation would throw this balance of interests out of kilter.

Today, the consumer has access to an ever-growing and diverse body of copyrighted films and television programming. These works are delivered to the consumer through an expanding range of transmission media -- from movie theaters and free broadcast television to basic and pay cable, pay-per-view, videocassettes, MMDS, satellite home earth stations, and so on. With every passing year, there seems to be another promising new means of delivery. Before long, direct broadcast satellites (DBS), delivering a variety of program choices directly to homes from satellite transmissions, may be commonplace. And in the not-too-distant future, high-definition television (HDTV), delivered through the various transmission media I have mentioned, will create new opportunities to meet consumer demand.

This abundance of viewing and delivery options is a clear indication that our copyright system is fulfilling one of the underlying purposes of the constitutional grant of copyright: to stimulate artistic endeavors in order to promote broad public access to creative works.

But we must remember that our industry's ability to provide consumers with diverse viewing options is dependent upon our being able to display films and video works through all these media. Such widespread performance is essential to the recoupment of the huge investments copyright owners make in their creations. Anything that diminishes the attractiveness of making such investments, or that increases the risks associated with such investments, threatens to reduce the flow of new copyrighted works.

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

This is a most troubling prospect in an industry such as the motion picture business which is a high-cost, high-risk enterprise. The cost of producing a feature film for an MPAA member company is now over $20 million, up 113% since 1980. Add to that the $9 million (on the average) that MPAA members spend in advertising and print costs.

Significantly, most MPAA member company films don't make money from their world-wide theatrical exhibition. Only through revenues from non-theatrical sources here and abroad, including the free TV, cable TV and home video markets, are MPAA members able to reduce their losses with respect to some films and recoup their production costs as to others. In any event, it is estimated that two-thirds of MPAA member company films never recoup their costs!

In order to improve the odds of financial success, the copyright owner must have the freedom to adapt his productions to the differing needs of various markets. But if legislation such as H.R. 2400 were to become law, it would call into question the right of the copyright owner to:

-- edit a motion picture for airing on free broadcast television to comport with standards and practices and to accommodate the inclusion of commercials;

-- dub or subtitle films to make them marketable both here and abroad;

-- adapt films to take advantage of new formats (e.g., S-VHS and laser disc) that improve the quality of home viewing enjoyment;

-- meet the many and varied requirements of foreign markets, each of which often imposes its own censorship laws;

-- adapt programming from one display medium to another (e.g., the initial transfer of a TV show from film to tape, or the transfer from one video standard -- e.g., NTSC video -- to another -- e.g., HDTV or the European PAL-SECAM transmission systems).

Moral Rights and Technological Change

Mr. Chairman, the many technological innovations that permit us to adapt film and motion picture works to changing markets -- from colorization to panning-and-scanning to time compression and time expansion -- should be looked upon as tools of value to society, not as tools of destruction.

Colorization permits films that would otherwise moulder in dark vaults to live again on the nation's television screens. It does so without in any way disturbing, maiming or contaminating the negative of the black-and-white film that remains pure, and in fact, is often restored and improved by the colorizer.

Panning-and-scanning permits an audience that elects not to see a motion picture in a theatre to enjoy that film at home, on television, videocassettes or discs.

Time expansion and compression facilitate the artful adaptation of odd-length motion pictures to the stricter time requirements of broadcast television and pre-recorded videocassettes.

Each and every one of these techniques tends to expand public access to copyrighted works, a fundamental goal of the Act.

In the months to come, the Copyright Office, pursuant to the mandate of this Subcommittee, will collect public submissions on the function and application of these and other technologies to film and video. I believe the record will conclusively demonstrate that permitting copyright owners to use these technologies without being subject to legislatively-sanctioned interference by non-copyright owners promotes the arts by promoting public access.

A "Compromise"

Mr. Chairman, during hearings on the Berne Copyright Convention, the directors announced to this Subcommittee and your Senate counterpart that they were offering a "compromise." They said that they would "only" ask for legislation that withheld the application of moral rights until the motion picture had its theatrical release, "after the employer/employee period is over and deadlines have been met. ... "

Don't be misled; that's no compromise.

First, it is simply wrong to assert that the employer/employee relationship ends with the theatrical release of a motion picture. As the directors know full well, residual payments don't end at that time; they haven't even begun yet. And many of the rights spelled out in the individual and guild agreements don't come into play until well after the film is released theatrically.

Second, as I've outlined above, many decisions crucial to the marketing of a film in the various ancillary markets aren't made until well after initial theatrical release.

Simply put, the directors' "compromise" gives us little comfort.

Conclusion

Congress in its wisdom has created a copyright system that promotes the democratic principle of broad public access to creative works. That principle is forwarded by a careful balancing of the rights of those who own copyrights and those who use them. To interfere with that balance by interposing an interest that is at best tangential (and at worst spurious) is to undercut the goals of copyright. That is both anti-creativity and anti-consumer. It is not in the public interest.

Mr. Chairman, today products of the American motion picture and television industry are coveted throughout the world. American films and television programs fill theater and TV screens in all parts of the globe. Our industry has achieved this enviable status in a free marketplace, in which creative artists work together to meld their collective talents in an entertaining and illuminating final product. I fear that if "moral rights" legislation is thrust upon our industry, if Congress tampers with a process that has proven so successful over decades, that this delicate balance among creative contributors may be lost, and with it the preeminent position of our film and TV industry. I implore this Subcommittee not to travel down that dark and dangerous path.

Mr. KASTENMEIER. Now we would like to call on Mr. Roger Mayer.

Mr. MAYER. Thank you, Mr. Chairman, members of the committee. My name is Roger Mayer, and I have been an executive in the motion picture and television industries for about 36 years. I am currently president and chief executive officer of the Turner Entertainment Company, a wholly-owned subsidiary of Turner Broadcasting. Prior to that, I was with MGM for 25 years, most notably as senior vice president of administration and president of the MGM Laboratory, and my main duties at MGM included overseeing the operations of the MGM studio and the MGM libraries of film which Turner later acquired.

Our great libraries, and we own three of them, contain many thousands of old black and white movies, which despite their intrinsic entertainment value do not command an audience today because today's audiences are conditioned to look at movies in color. They simply cannot be persuaded, cajoled or bullied into watching them in black and white, and we have tried.

By changing these old movies to color, we have revitalized interest and found an audience for them, and we can show that. We hope to familiarize this subcommittee with our position and with its merits.

Rumor has it that once a black and white movie is colored the original version is lost forever. Just not so. Not only do the black and whites remain, preserved and restored by us, in their original form, but they remain available. This is true of movies that had some life of their own before colorization such as The Maltese Falcon and it is true of those that have had little life of their own such as Captain Blood. Whatever life a black and white movie had before coloring remains after coloring, absolutely unaffected by the new version. This summer we will release on videocassette the fine old movies Father of the Bride and Adam's Rib. Both will be released in both color and in black and white. The public will then have its choice.

The public also has access to a whole world of film clubs, schools and museums where black and white films are perpetually available to film buffs, and I can assure Mr. Canby that anytime somebody wants a black and white print we have it available.

And, of course, the vast majority of TV sets have a knob that can be turned down to eliminate color if that is your desire. So those who color old movies present a choice, another version and not a substitute.

Nor is this really a contest between art and commerce. These movies were made as entertainments in commercial ventures by production companies who assumed all the risk. Those who helped make them took no financial risk and were paid, often handsomely. They did not return their salaries with an apology if the movie flopped.

It is crucial to point out that the broadest possible ownership rights were obtained from directors and others through collective bargaining and personal negotiation in exchange for those large salaries and sometimes profit participations and residuals. The owners, in return, received control of the methods and manner of

distribution, advertising and the use of the various media, such as TV, videocassettes, and now color conversions.

These owners not only have the clear legal right to color their old movies, but we think they also have a moral right. Despite propaganda to the contrary, these old movies were not the immaculately conceived children of the director. They were made in the heyday of the old studio system and are basically the children of the studio moguls and their staff producers who oversaw every aspect of each production. They chose the property, worked on the script with the writer or multiple writers, and assigned all others to the film, including the director, who was replaced midway through a production if his work was not satisfactory.

The spiritual heirs of these moguls and producers are today's copyright holders who want their pictures admired and enjoyed by as many people as possible.

When anti-colorists deny the right to color black and white pictures we feel they are calling for censorship. Although obscured in a cloud of sometimes hysterical rhetoric, at issue here are matters of taste and choice. Taste and choice should not be subjects for legislation.

Legislation directed toward colorization can only be based on the belief that the public lacks the wisdom and the sophistication to make a choice.

You can't appreciate Bizet's Carmen? Their elitist arguments, imply. Tough. I have banned the jazzed up version, Carmen Jones. There is currently a rock version of Carmen showing in Vienna.

You don't enjoy the King James version of the Bible. Unfortunate, but I am burning all versions written before or since including those you may find more palatable.

You don't want to watch a movie in the form that I consider proper and pure. Too bad. But no way will I let you see that movie in another form that you might enjoy or might not enjoy.

Certainly no one wants to slap yellow paint on the original Van Gogh Irises or to paint a moustache on the original Mona Lisa. That would be to destroy the one-of-a-kind works of art. When dealing with movies, however, you are dealing with multiple copies, mass distributed. You may color some copies, but multitudes of others exist. Always replaceable. Always available so long as the master or the negative remains untouched, and it must remain untouched or you cannot make additional copies.

History teems with examples of works that have been reinterpreted with no damage to the original. Moreover, we would all maintain that our lives would be immeasurably impoverished were it not for this rich and ancient heritage of artistic alteration and adaptations.

That these old movies remain preserved—and there has been some discussion of preservation here, so we would like to reassure you in that regard. That these old movies remain preserved in black and white is due mainly to the efforts of the owners of the great film libraries. For our library alone, we have spent more than $30 million of private money on preservation in recent years, and the reinvestment continues at the rate of a million dollars a year.

A major goal of this vast expenditure is historical preservation. But we have restored, without discrimination, without regard to current opinions of commercial value. Obviously, that which is commercially viable must be fully utilized in order to justify preservation expenditures; and, obviously, color enhancement is one way in which further commercial viability can be achieved and our investment returned.

The incentive to invest in motion pictures and the care for the great libraries would be chilled if some outsider could say, "You go ahead and spend the millions on preservation and we will decide how and if you can release the results."

In summation, we think coloring old movies is a matter of taste and choice which, in a democracy, nobody should want to legislate. There is an overwhelming precedent in all of the arts and throughout history, as well as in our own entertainment industry, for creating new versions out of old ana for reinterpreting existing works. Coloring black and white movies is but one small aspect of this cherished and culturally enriching tradition. I point out that if people do not like the colorized versions they will not watch them and they will not be successful, and we are willing to live with that.

Above all, coloring an old black and white movie in no way affects the existence, integrity and availability of the original version. By adding color to old movies, we have given new life to pleasant diversions which for the most part have languished unappreciated for decades, and we have delighted new millions with the kind of wholesome entertainment we would all want for our families.

Finally, we have submitted an analysis of the Mrazek amendment, and respectfully ask, Mr. Chairman, that those written comments be made a part of this record. Thank you, Mr. Chairman.

Mr. KASTENMEIER. Without objection, that will be done. We will be pleased to receive your written comments. Thank you, Mr. Mayer.

[The statement of Mr. Mayer follows:]

SUMMARY STATEMENT

ROGER L. MAYER, TURNER BROADCASTING SYSTEM, INC.

SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES, AND
THE ADMINISTRATION OF JUSTICE
HOUSE COMMITTEE ON THE JUDICIARY
JUNE 21, 1988

Over the past several years, Turner Broadcasting has spent $1.4 billion to acquire the MGM, RKO and pre-1950 Warner Bros. film libraries, including the colorization rights to the black-and-white portion of the libraries. More than 2,000 of the 3,400 theatrical films and half of the 1,000 hours of television programming are in black and white, accounting for perhaps one-third of the libraries' value.

Colorization rights are crucial to the worth of the black-and-white films and television shows, because colorization opens them up to the modern television and VCR audience, which is disinclined to watch black and white. In the last few months since their colorization, CAPTAIN BLOOD and THE SEA HAWK, two fine old Errol Flynn movies, have been seen by ten times as many people as in all the years since the close of their original theatrical exhibition. In fact, the colorization of a movie may actually increase the market for the black-and-white version.

Colorization does not affect the black-and-white original, which we carefully preserve; any argument that original works of art are "lost" is misinformed. In fact, Turner Broadcasting does actively market both colorized and black-and-white versions of the same films through cable, broadcast syndication and the videocassette market.

TBS spends several million dollars each year on the restoration and preservation of its films. For obvious reasons, the continued commercial viability of these films is a healthy inducement for those continuing preservation efforts. The additional revenues provided by colorization make a substantial contribution to this endeavor.

It is misleading to assert that the old movies in question were exclusively the director's vision, and thus the director has the right to control. In the vast majority of cases, movie-making was -- and is -- a largely collaborative effort. The old movies are more the "children" of the studio moguls than of the directors.

Colorization is only the latest step in a centuries-old human tradition of adaptation. Books have been adapted to plays, plays to stage musicals, and stage musicals to movies. Even Woody Allen has adopted this approach, as evidenced by his use of a Japanese film in "What's Up, Tiger Lily" a few years ago. Creative adaptation into new, alternative forms is an enriching aspect of our artistic culture.

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WRITTEN STATEMENT FOR SUBMISSION TO THE COMMITTEE ON THE JUDICIARY - SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES, AND THE ADMINISTRATION OF JUSTICE - U.S. HOUSE OF REPRESENTATIVES, JUNE 21, 1988

My name is Roger Mayer and I am President and Chief Executive Officer of the Turner Entertainment Company, a wholly owned subsidiary of Turner Broadcasting. I have been an executive in the motion picture and television industries for approximately 35 years at only two other companies: Columbia Pictures and MGM. I was at MGM for 25 years, most notably as Senior Vice President of Administration and as President of the MGM Laboratory. My main administrative duties included the administrative control of the MGM Studio and the MGM Library.

We are the owners of over 3,600 movies, 1,700 hours of TV programming, and 4,000 shorts and cartoons. More than 2,500 of the movies are in black and white and, except for a few classics, receive little or no exposure. By adding color, we have revitalized interest and found an audience for them. Our testimony today is intended to explain the reasons for this activity, and to familiarize the subcommittee with our view of the colorization process.

There seems to be a belief in some quarters that once a black and white movie is colored, the original version is destroyed or gets locked away, never to be seen again, a portion of our cultural heritage lost.

Not so.

Not only do the old black and whites remain, preserved and

restored by us, in their original form, but they remain available to anyone who wishes to see them--even more available perhaps once a color-enhanced version is released. There exist many thousands of old black and white movies which, despite their intrinsic entertainment value, do not command an audience today because today's audiences are conditioned to looking at movies in color and cannot be persuaded, cajoled, or bullied into watching them in black and white. This is a fact of life, and coloring's raison d'etre. Often after a movie has been colored, the demand or the black and white version remains slight. However, the excitement generated by the colored version sometimes stirs public interest in the original black and white--interest which was non-existent before. When interest leads to demand, that demand is filled. If video stores discern customer demand for the black and white version of any color enhanced movie, they have only to contact distributors who will be delighted to fill any such orders. Some few black-and-whites do have a life of their own. That life remains after coloring, absolutely unaffected by the new version. Black and white copies of "The Maltese Falcon," for example, can be found in video rental stores along with the colored copies. This summer we are releasing the wonderful old movies "Father of the Bride" and "Adam's Rib." Both movies will be released both in black and white and in colored videos, and the public will have a choice.

Then, too, there's still a whole world out there of movie houses, film clubs, schools, and museums where black and white

films or tapes are perpetually available to film buffs. And of course, as has frequently been noted, the vast majority of television sets have color knobs which can be turned down if a home viewer prefers black and white. In truth, those who color these old movies are presenting a choice: an alternative, another version, not a substitute.

That these old movies are preserved in black and white is due mostly to the efforts of those who own the great film libraries. For our library alone, more than $30,000,000 has been spent on preservation in recent years, and the reinvestment continues at the rate of several million dollars a year. A major goal of this vast expenditure is historical preservation. We have restored without discrimination: the bad and the good, the commercially worthless and the commercially viable. Everything preserved must be available for use in order to justify and motivate preservation expenditures. And obviously color enhancement is one way in which further commercial viability can be achieved. The huge expenditures were and are made with the expectation that the investment will be returned. If some outsider could tell the owners of the great film libraries, "You spend the millions on preservation and we will decide if and how you can release the results," that would have a chilling effect on the incentive to care for the great libraries and to invest in motion pictures.

Turner Broadcasting has invested over $1.4 billion dollars to acquire the largest film library in the world. A substantial portion of that library's value was calculated by taking into

account the increased revenues from distribution of colorized films. Retroactive legislation to prohibit colorization would thus be grossly unfair to our company.

Almost all the movies in question were made before color was actually or economically available. Ninety-nine percent of movies made today are made in color. Life is in color. There is little doubt that, had color been available and affordable, it would have been used. A few of the old black and white movies are true classics. Almost all are the kind of movies most of us devoutly wish were still made, the kind we particularly wish were available to our families. Take, for instance, three Errol Flynn adventures, "The Charge of the Light Brigade" and two based on Sabatini novels, "Captain Blood" and "The Sea Hawk." In the three months after they were colored, these movies were enjoyed by multi-millions of television viewers--probably ten times the number who saw them in all the decades of their prior syndication on television in their black and white versions. Famed critic Tom Shales wrote of "The Charge of the Light Brigade," "...no cinematic masterpiece...but a thrilling adventure spectacle...coloring actually improves it...a product of the Hollywood escape machine at full tilt, and coloring it spruces it up still further." "Captain Blood" and "The Sea Hawk," in my opinion, also do not qualify as masterpieces; but they are typical of most of the movies to be colored, rewarding entertainment for viewers of all ages.

As you know other companies are coloring their libraries. Listed on the following page are the pictures recently colored or about to be colored by Turner.

"42nd Street"
"A Christmas Carol"
"Across the Pacific"
"Action in the North Atlantic"
"Adam's Rib"
"Americanization of Emily"
"Arsenic and Old Lace"
"Asphalt Jungle"
"Bataan"
"Boomtown"
"Captain Blood"
"Carbine Williams"
"Casablanca"
"Charge of the Light Brigade"
"Command Decision"
"Dark Victory"
"David Copperfield"
"Destination Tokyo"
"Dr. Jekyll and Mr. Hyde"
"Father of the Bride"
"Fighting 69th"
"High Sierra"
"Key Largo"
"King Kong"
"Maltese Falcon"
"Prince and the Pauper"
"Roaring 20's"
"San Francisco"
"Sea Hawk"
"Sergeant York"
"The Bachelor and the Bobby Soxer"
"The Catered Affair"
"The Fastest Gun Alive"
"The Gazebo"
"The Hunchback of Notre Dame"
"The Philadelphia Story"
"The Postman Always Rings Twice"
"The Stratton Story"
"They Died with Their Boots On"
"They Drive by Night"
"They were Expendable"
"Thirty Seconds Over Tokyo"
"Westward the Women"
"White Heat"
"Yankee Doodle Dandy"

They richly deserve their resurrection.

This is not a contest between art and commerce. These old movies were put together by large companies as commercial ventures in order to entertain the public and thereby to make money for all concerned, and I mean all. While we can hope that the directors and others involved enjoyed their work and tried to create art, they did not donate their talents. They worked because they were getting paid--handsomely paid, as a rule. Moreover, they assumed no risk. They did not return their salaries with an apology when their movies flopped.

It seems universally acknowledged that the owners or licensees of the copyrights have the legal right to decide whether these old movies should be colored. The Directors Guild, however, has postulated that a "moral" right exists too, and this right belongs to the principal director and principal writer.

Here, we need to explode a minor myth: the contention that the old movies were exclusively the directors' vision, and thus the director has the right to control. There are a few exceptions but movie making--even today--is a hugely collaborative effort among many creators. Most of the black and white movies in question were made in the heyday of the studio system. Despite propaganda to the contrary, these old movies are not the immaculately conceived "children" of the directors. They are, for the most part, the "children" of the old movie moguls and their staff producers. Theirs was the "creative concept," and the financial responsibility. They chose the project, worked on the script with the writer, and then assigned all others jobs on the film, including the job of the director. As anyone familiar with the studio system knows, several writers or directors worked on many pictures, including such classics as "Gone With the Wind" and "The Wizard of Oz." The spiritual heirs of the moguls and producers, the true "parents" of these old films, are not the directors but the copyright holders--who want to show off their children proudly to as large an audience as possible. Nobody has more of a stake in preventing the destruction of these pictures than the copyright holders.

Not only do we contest the directors' claim to creative "parenthood," but we find it crucial to point out that the broadest possible ownership rights were obtained from directors, writers and other personnel, by collective and individual bargaining under employment agreements, for large salaries and sometimes profit percentages. The owners, in return, received control of the methods and manner of distribution, advertising, and use of the

various media (such as TV, airlines, videocassettes, and now color-converted versions).

Many fine movies are made today. However, when one looks at the appalling amount of trash--some of it dangerous, some merely vulgar or ugly, one has to wonder. The protesting directors do not raise an eyebrow at some of the sordid junk their colleagues are directing today, yet want, in effect, to "ban" a group of wholesome movies which once gathered dust but which are now being enjoyed by a large and appreciative audience. If one wants to make traditional family entertainment available, and we most certainly do, then we should and must color such movies as "The Charge of the Light Brigade," "Boomtown" and "David Copperfield." This effort is particularly crucial for prime-time, younger audiences, a market that is almost entirely closed to black and white films.

This brings me to another, and far more serious, quarrel with the anti-colorists: the concept that only one vision or version of a work may be allowed.

Absolutely not so.

Colorization is not the cinematic equivalent of painting a moustache on the "Mona Lisa." And not just because movie prints are mass-produced (not unique entities) nor because a movie is rarely created by a lone genius, nor because Da Vinci's work is a true masterpiece. The analogy fails utterly because to paint a moustache on the "Mona Lisa" would mean that it would no longer exist in its original form. The old black and white movies continue to exist, as we have demonstrated. It is worth mentioning, perhaps, that various artists have, indeed, painted a moustache on <u>copies</u> of the "Mona Lisa," among them Dali and Marcel

Duchamps. A mixed media piece by Duchamps includes a photographic copy of the "Mona Lisa" to which an impressive moustache has been added.

Frequently, as in the case of Duchamps, artists simply appropriate the work of others to incorporate into their own works. Woody Allen, for example, took a Japanese movie and satirized it for comic effect in "What's Up, Tiger Lily." I assume his employer owned the Japanese film so Allen felt he could do as he pleased--which indeed he could. Just as Allen's new use of the Japanese film did not affect the availability, or lack thereof, of the original, so the Duchamps adaptation in no way impinges on the integrity of the original "Mona Lisa" in the Louvre. The integrity and the existence of the old black and white movies are also not in jeopardy.

From time immemorial, in fact, and long before the advent of movies, creators and entrepeneurs alike have exercised the right, both moral and legal, to change the work of others and come up with new concepts. The public in turn has the right to accept the modified version or reject it.

History teems with examples of such changes. Moreover, we would all maintain that our lives would be immeasurably impoverished were it not for this rich and ancient heritage of artistic alterations and adaptations--of which coloring old black and white movies is just one other example.

Legislation directed toward colorization can only be based in the belief that the public lacks the wisdom and sophistication to be allowed a choice in this matter. We disagree. The reality is, times have changed. Audiences are different, the screen is

different, markets are different, demand is different. Each of us has something that is fondly remembered from another time. But nostalgia for the past, appealing though it can be, is not necessarily in the public interest. "You don't like Bizet in its original?" the elitist arguments imply, "Tough, but I've banned the jazzy 'Carmen Jones' version. You don't read long novels? Unfortunate, but I'm burning all the condensations. You don't want to look at a movie in the form that I consider proper and pure? Too bad, but no way will I let you see that movie in another form that you might enjoy." Let us allow no one to mandate what the public may see and be allowed to judge for itself.

A major objective for all of us who work in the motion picture industry and who love movies should be to engender as much enthusiasm, as great an audience, for our product as possible. If there are thousands who will watch movies in color who would not watch them in black and white, and this is clearly the case, then Hurray for Hollywood! If they reject the coloring of a few movies because these movies are clearly "right" in black and white, which will doubtless happen in some cases, that is fine too.

Colorization is an absolutely harmless process which damages no person, no property, and no concept; which honors fine old movies by rescuing them from oblivion and giving them new life; and which gives great pleasure to millions.

To sum up:

1. The copyright holders have both the legal and moral right to color the old black and whites, and there would be a chilling effect on production and the preservation of film libraries were this right denied.

2. Coloring old movies is a matter of taste and choice, which nobody in a democracy wants to legislate.

3. There is overwhelming precedent, in all the arts and throughout history as well as in our own entertainment industry, for creating new versions out of old and for reinterpreting existing works. Coloring black and white movies is but another step in this cherished, important, and culturally enriching tradition.

4. Above all, coloring an old black and white movie in no way affects the existence, integrity, and availability of the original version. Moreover, it is an incentive to preserve and protect all old films. By adding color to old movies we have given new life to pleasant diversions which, for the most part, have lanquished unappreciated for decades, and we have delighted new millions with the kind of wholesome entertainment we would all want for our families.

RLM/kl
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[The analysis of the Mrazek amendment follows:]

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June 21, 1988

The Honorable Robert W. Kastenmeier
Chairman
Courts, Civil Liberties, and the
Administration of Justice Subcommittee
House Judiciary Committee
2137 Rayburn House Office Building
Washington, D.C. 20515

Dear Mr. Chairman:

I am enclosing an analysis of the Mrazek amendment to the Interior and Related Agencies appropriation for 1988, and respectfully request that it be included in the record of today's hearing. As you know, the text of the amendment has only recently been made available.

Thank you for all your courtesy and kindness.

Sincerely,

Bertram W. Carp

BWC:eca

Enclosure

cc: Members of the Subcommittee on Courts,
Civil Liberties, and the Administration of Justice

COMMENTS ON THE MRAZEK AMENDMENT
BY TURNER BROADCASTING SYSTEM, INC.
JUNE 21, 1988

On June 8 the House Appropriations Subcommittee on the Interior and Related Agencies adopted an amendment proposed by Rep. Mrazek (D-NY) to create a new, permanent government-funded agency for the purpose of establishing a national film registry. It is an overbroad measure that restricts the rights of copyright owners, broadcasters, video dealers, cable operators, theater owners and anyone else who makes our film heritage available to the public.

The Mrazek amendment proposes that the Appropriations Committee adopt far-reaching alterations in the Copyright Act with respect to treatment of motion pictures. Although the amendment is supported by the Writers' Guild and Directors' Guild (whose members would be given new economic rights and four of nine seats on a proposed National Film commission), it is opposed by Turner Broadcasting and others who own the copyrights and spend millions of dollars annually to house and preserve our motion picture heritage.

1. The Mrazek amendment is offered at the wrong time in the wrong place.

   -- it is legislation of order in an appropriations bill.

   -- it was approved without any notice or comment, either from our side or from the public.

   -- the subcommittee of jurisdiction, the House Judiciary subcommittee on Courts, Civil Liberties and the Administration of Justice, is in the midst of hearings on this subject.

   -- the Copyright Office, acting on a request from the subcommittee of jurisdiction, has begun an extensive inquiry and will hold a hearing in September on this and related issues.

2. The Mrazek amendment is based on a number of erroneous assumptions.

First, this proposal is not addressed simply to the colorization. Many other technologies could be affected -- for example, editing for television, advertising, panning and scanning, adaptation for high-definition TV, to name a few.

Second, colorization does not "deface" the original motion picture. The process is performed on a videotape copy, after great expense is devoted to preservation and restoration of the original black-and-white film.

Third, we do not "warehouse" or "lock away" the black-and-white version. Rather we market it alongside the colorized version.

Fourth, the Mrazek amendment is contrary to the public interest:

I One of the key goals of the Copyright Act is to enhance broad public access to creative works. This is certainly true of colorization which permits films that would otherwise sit in dark vaults to come alive on TV screens. It is also true of editing for free TV which makes films widely available to those who otherwise might not have access to our film heritage.

II. In contrast, this proposal is antithetical to the public interest. It is guaranteed to frustrate viewers as they become confused by new and unfamiliar movie titles and "disclaimers: about who played what role in the making of a film. In addition, copyright owners will be less inclined to go to all the effort necessary to market their property to the public for fear of suits for infringement by the various people empowered by this amendment.

Fifth, the director and screenwriter are not the only, nor even the primary "creators" of a film. To accord them that stature ignores the hugely collaborative nature of filmmaking, and the contributions of dozens of other people, not the least of which was the financial risk contributed by the front office under the old Hollywood "studio system."

3. The Mrazek amendment apparently seeks to assure preservation of film, when in fact preservation is already a long-standing policy.

Turner Broadcasting, as well as the other owners of older films, already have every incentive to preserve their vintage motion pictures. Turner Broadcasting paid $1.4 billion to acquire the MGM, RKO and pre-1950s Warner Bros. film libraries. In the last 25 years, MGM has spent over $30 million in preservation and conservation of the films, and we are continuing to spend several million dollars annually on preservation and restoration.

4. The Mrazek Amendment apparently seeks to ensure that colorized films are labeled as such.

In fact, all of our colorized motion pictures are advertised, promoted and labeled in a manner which fully discloses that they are colored versions of black-and-white originals. But we do not believe that federal legislation is needed to achieve appropriate labeling, in the absence of any evidence that appropriate labeling is not already taking place.

5. The Mrazek amendment is more than just a study commission.

The Film Commission established by the Mrazek amendment is designed to do far more than just select motion pictures that represent part of our national heritage. It is given carte blanche to designate what is and is not a "material alteration" of a film. The authority conveyed is very broad since the very act of conversion of theatrical motion pictures for television, as well as the cutting to make room for the insertion of commercials, and the insertion of commercials themselves would appear to be just as much a material alteration of the "artistic visio of the theatrical production as is colorization. And the Commissi is even empowered to divine whether deceased directors and screen writers of films would have approved of the changes. This is a far cry from merely awarding historic seals to special films.

6. The Mrazek amendment's proposed commission would not adequately represent affected interests.

The Commission authorized by the Mrazek amendment is to have nine members. However, the amendment designates that eight of those members must come from four specified private organizations (the Directors' Guild, the Writers' Guild, the National Society of Film Critics and the Society for Film Studies). No representatives of performing groups, other artists groups, or producers of the motion pictures are included. Nor are the owners of the films, who bear the entire financial burden, represented at all. There can be no legitimate reason to restrict membership on this Commission in this fashion. Moreover, a theatrical motion picture is the product of a collaboration among many elements, including performers, cinematographers, composers, producers, and studio owners, as well as directors and screen writers. Yet only the latter two groups are singled out under the Mrazek amendment for special recognition. We believe the only explanation is that, at bottom, this is special interest legislation.

7. The Mrazek amendment proposes far-reaching revisions to the copyright law, and may be unconstitutional.

The Mrazek amendment provides a private right of action to enforce the decrees of the Commission, invocable only by directors and screen writers. As far as we are aware, this is the first time parties without a property interest in copyrighted material have received standing under the copyright laws to enforce alleged rights.

The amendment endangers the due process rights of copyright owners because they have no right to be heard by the commission, and it is unclear whether copyright owners could even seek judicial review of the commission's actions.

The amendment delegates legislative authority to private citizens and does not adequately define Congress' interest. For example, copyright owners are made liable for infringement based on "material alteration," but this term is never defined.

Finally, the Mrazek amendment is of at best dubious constitutionality. Environmental and historic preservation measures have been upheld against due process attacks. But in these cases, legislative action was necessary to serve the public interest in preservation. Here, no preservation interest is threatened, since the original film is preserved and remains available for exhibition. Moreover, unlike environmental and historic preservation, the activities of the Mrazek Commission invade speech rights protected by the First Amendment as well as property rights protected by the due process clause.

Mr. KASTENMEIER. Mr. Mayer, what was the purpose in the 3-minute film we just saw at the outset? What did you intend to accomplish?

Mr. MAYER. What I intended was, we listen to people use words about colorization that automatically make people feel that it must be terrible, and we think that it is not terrible and we wanted somebody to see what it looks like today as it is being created. We had no other purpose other than to show that it is something that is visually pleasing to see.

Mr. KASTENMEIER. Well, that may well be the case, although I think it may also be possible that someone could show a 3-minute version of some of the less notable colorized segments.

Mr. MAYER. Yes, you absolutely could do that, Mr. Chairman. One of our points is that some of the colorization that has been shown was done 2 or 3 years ago and that the improvement in the process is substantial. And it is absolutely correct that you could show some colorized versions that are not as good as these, and we feel we have to live with that problem in the same way that when a director or anyone else makes a picture that isn't very good he has to live with that problem.

Mr. KASTENMEIER. Mr. Mayer, let me ask you—I assume as with Mr. Brown and others that you are a person who loves films. Is there any great black and white film, or any masterpiece in black and white film that you would not colorize?

Mr. MAYER. Yes. But I don't think that my list should be one that is decided on by a group of people from a national monument point of view any more than I would want to prepare a list for other people. I have personal reasons for thinking there are certain pictures I would prefer not to have colored. If they do become colored, it is my feeling that the colorization will not succeed, people will prefer the black and white, and I think that is sufficient for the marketplace. But I think everybody would have an answer to that that should be yes.

Mr. KASTENMEIER. That is to say, to explore just a bit further, in your library there are those films which you currently do not intend to colorize because of your personal reservations that you have just expressed?

Mr. MAYER. No, I don't think that would be fair to say because I only one executive of a very large company and I don't make these decisions alone.

Mr. KASTENMEIER. Thank you.

Mr. Brown, as has Mr. Mayer, you have expressed reservations about having a commission select films on some basis—that they are part of a national film heritage or they are films of unusual merit that deserve special recognition. I don't understand. Why do you oppose that? As a matter of fact, the Film Academy every year makes selections of films, all sorts of selections of films, made or merit presumably, and of art that are generally recognized. What is wrong with a national commission doing that?

Mr. BROWN. Mr. Chairman, I am opposed to a Federal commission set up for that purpose. If the Smithsonian wants to honor a film in, in the fullness of time, obviously everybody will be very pleased. And, as for the Academy of Motion Picture Arts and Sci-

ences and other private professional associations that give awards, that is entirely appropriate.

But we are talking here about designating a film a classic, and I don't believe that is what the Academy does. I don't believe that even the Pulitzer Prize Committee does that. They recognize an outstanding achievement of a particular year. It seems to me unrealistic to start designating classics and say, if you alter them, you are in some kind of violation subject to penalties.

I haven't studied the bill in detail, but that is my impression of it.

Mr. KASTENMEIER. We will be having a vote, I will tell my colleagues, shortly. Obviously, we are not all going to be able to finish our questioning of these witnesses. May I inquire of my colleagues do they wish to return in order that they will have time to question this panel? All right. Then we will recess very shortly.

Let me ask just one other question—two other questions. Supposing the commission was not linked for the purposes that you just talked about. In other words, there wouldn't be any effect. We are just talking about a commission which would select films on some sort of film heritage basis, that these are part of our national cultural heritage and that these are superior films. If it had no other legal effect, would you have any objection to that?

Mr. BROWN. I think, Mr. Chairman, I am still opposed to the notion of identifying of film as a classic before its time.

Mr. KASTENMEIER. Well, let us not use the word "classic."

Mr. BROWN. But would the requirement of changing the title still be——

Mr. KASTENMEIER. No, I am saying——

Mr. BROWN [continuing]. Leaving that alone?

Mr. KASTENMEIER. Divorcing that from the proposition. That it has no legal effect in those terms.

Mr. BROWN. If it were properly constituted as, say, the National Endowment is with a very eclectic group of distinguished people recognizing that film is a mixed bag, to put it colloquially, then I would certainly consider it. I am not happy about it, but I couldn't see any great harm in it.

Mr. KASTENMEIER. One other question. What about labeling? Mr. Mayer, or Mr. Brown, do you have any problem about labeling?

Mr. BROWN. It has been done in the past, "Edited for television."

Mr. KASTENMEIER. Would you have any problem about saying this film has been colorized, this film has been edited for television, this film has been subjected to electronic techniques to make it compatible for television, etc.? Would you have any problem with that?

Mr. BROWN. I have no more problem with that, Mr. Chairman, than a television program saying this program has been recorded earlier. What you are seeing is not a live show. That is just consumer labeling for me. But I don't speak for everyone in that respect.

Mr. KASTENMEIER. Mr. Mayer, do you have any problem with labeling?

Mr. MAYER. No. Speaking for a distributor, we would like to work out language, of course. But we feel it is currently labeled. We say that it is new newly colored version of. The credits already

say that. We would have no problem reinforcing that and putting it up at the front of the film so that there would be nothing misleading about what we are doing.

Mr. KASTENMEIER. Or any other alterations in addition to coloration? You wouldn't have any problem noting other alterations in the f' n from the original?

Mr. MAYER. I would say, Mr. Chairman, that it could get out of hand in the sense that there are a number of versions of pictures and there might be alterations that are really not meaningful to the public. But it is certainly a matter for a discussion, and in general we would have no problem with it.

Mr. KASTENMEIER. Would you have any objection to a notice that Jones and Smith who were the principal director and the screenwriter, if they can be defined, wish to disassociate themselves from this version of the film? Is that a problem? Would that be a problem?

Mr. MAYER. I think that could be a problem. Usually that works on an ad hoc basis when you are making a film. Somebody says I want my name off it because I don't like it. But if you have somebody whom you have engaged at great expense because of the name value of that person, and that person is contracted to be associated with the film, then I have a problem with it. And the individual contract, as a matter of course, generally provides that such a person not receive credit under certain circumstances, and the Writers Guild themselves will allow us to remove credit for someone who has made no contribution, when we have taken his work and rewritten that person's work completely so that nothing is left of it.

Mr. KASTENMEIER. I would like to follow up on that, but I think I will need to recess the committee for 10 minutes, and I beg your indulgence.

The committee will stand adjourned for 10 minutes.

[Recess.]

Mr. KASTENMEIER. The committee will come to order.

The chair apologizes to the witnesses and to his colleagues and others for the delay in getting back. But, as a matter of fact, I was involved in talking to certain other key members about this very subject, so forgive me.

At this point I would like to yield to the gentleman from California, Mr. Lungren.

Mr. LUNGREN. Thank you, Mr. Chairman.

Mr. Mayer, one of the things I am interested in is your assertion that you folks do protect your library. That is, you do maintain copies of the originals even if you have colorized. Is there a reason for that other than the fact that you want to maintain the original? Do you need that technically if you are to colorize in the future?

Mr. MAYER. Yes, we do. The reason that—and when I say we, I have worked for a number of different companies, but the two that are involved in preservation are MGM and Turner. The reason we have spent a lot of money on preservation over the years is to prevent exactly some of the horribles that have been paraded to you; and that is, these things would deteriorate and no longer be usable. And in order to do that, you have to spend a lot of money on

proper storage, humidity and temperature, and all of that, and if and when they deteriorate, you have to replace them. That is really what preservation is.

We have done it because we have thought that there would always be another use. That there would always be a need for another copy, and that has proven to be true. When we first started on preservation, when nitrate film was deteriorating and we transferred it to safety film, the next thing that happened was a few years later videocassettes came along. That was a technology that was not then known, and we were very happy to have original negatives and original materials from which we could make tapes and therefore get into the videocassette market.

So there always has been a valid reason for preservation. Another thing that happened over the years was originally, of course, all of these pictures were made for theatrical release, and there wasn't any television. And when there started to be television, then there became syndication where you could syndicate them all over the world. We now find for the first time we are able to distribute some of these pictures in some foreign countries that are just first getting national television. So all of these things have been a good reason for the amount of money that was spent on preservation.

Mr. LUNGREN. I am trying to determine whether there is a compelling reason for you to maintain the original. The reason I say that is, if we move in the direction of labeling, I guess the next question is would we make a requirement if one were to colorize that they maintain at least one good copy of the original. I don't know whether we need to do that, whether there is market compulsion for you to keep it and so forth.

Mr. MAYER. Well, there would be no problem. Actually, our relationship with the Copyright Office currently provides that we must deposit a copy with them, so that type of preservation currently takes place.

Mr. LUNGREN. In what type of condition? Is there a requirement on the condition you must give them?

Mr. MAYER. My attorney, to my right.

Mr. BAUMGARTEN. Mr. Lungren, that is in the process of being worked out. The Office, after issuing the final decision—I am a bit quizzical as to why the Register referred to it as a tentative—colorized films would be registered, initiated a separate proceeding as to what the deposit shall be. And the Office proposed to require a copy of the colorized version and of the black and white version.

Mr. LUNGREN. You folks don't have any objection to that?

Mr. BAUMGARTEN. Most of the people commenting on that proposal, including the people at this table, agreed in principle to provide a copy of the black and white. There has been some question as to the burden of providing a particular type or quality of print. But there has been little objection to providing a copy that is reasonably available, for example, a black and white videocassette.

Mr. MAYER. The only real protection we have for the asset value of this gigantic library is to preserve these elements. So we would be happy to agree to do that. We already do.

Mr. LUNGREN. Is there a process by which you can go from colorization back to black and white?

Mr. MAYER. Black and white produces a colorized videocassette master. Could we make a black and white copy of that? I think we probably could. But there would be no purpose to it because the quality would not be as good as the original black and white we can get from the original negative today.

Mr. LUNGREN. I was just wondering, if something happened to the original black and white, however.

Mr. MAYER. Well, please understand that in most cases there is not one negative.

Mr. LUNGREN. Sure. I understand that.

Mr. MAYER. We not only have the original negative, but we have a copy of that original negative in a salt mine in Kansas. So we always have two original copies of everything to protect ourselves, insurancewise, against earthquakes and things like that.

Mr. LUNGREN. Mr. Brown, you brought up the question of who is the actual artistic author of a film, and I think you suggest it is a collaborative effort. But at least in your experience, your suggestion is that the producer would be more the complete author than either the writer or the director; is that correct?

Mr. BROWN. If I did say that it wasn't what I intended to say. I intended to say that the producer along with the writer, along with the director, and often along with the creative head of production of the studio, and also with all the other crafts and arts such as the composer, lyricist, film editor, all are collectively the author of a film. That is what distinguishes it from other works.

Mr. LUNGREN. OK. Now, in the Gephardt bill, as you know, it defines artistic authors as the principal director and principal screenwriter of the work. Let us just assume that also it would include the principal producer. It goes on to say if you are to have the ability or the right of consent to allow colorization or some other material alteration that that right of consent may be transferred but only to "another qualified artistic author."

Can you conceive of some difficulty we might have in determining who is and who is not a "qualified artistic author"?

Mr. BROWN. I can conceive of endless difficulty.

Mr. LUNGREN. I am an attorney and I love lawsuits.

Mr. BROWN. Well, that would be a growth industry for attorneys. You know, it isn't that there cannot be with each film, perhaps, a primary author. It may be the head of the studio who said I would like to do a film about the prison system. Let us get some writers in here and let us toss around some ideas. Occasionally an actor such as Mr. Redford will come up and say let's do All The President's Men. I think I know who can do it. So there is an ad hoc situation on films and there is also the general rule, which is that it is pretty hard to identify a single author.

Mr. LUNGREN. And, as I take your testimony, you don't object to a labeling. I mean, we may run into exactly how you label, but you would see it more in the nature of consumer labeling if——

Mr. BROWN. I see it in the nature of consumer labeling.

Mr. LUNGREN. And up front so that people would see it at the beginning.

Mr. BROWN. Oh, absolutely.

Mr. LUNGREN. OK. What do you think of the argument, and I don't mean this to be just a leading question, but really, the argu-

ment that one way to induce, if you want to use that expression, induce people to look at some of what we conceive to be classics in black and white is to get them to see the colorized version first?

Mr. BROWN. I think the argument has merit. At least it familiarizes the public with the fact that there was a basic, somewhat different version. Many of the films we regard as classics today—Mr. Valenti was reminding me—were not successful when they first came out. "It's A Wonderful Life" put the company that produced it out of business because it was so poorly received. Had there been a commission at that time or even 5 years later, it never would have made the list.

Notwithstanding this, I am all for labeling provided there isn't an onerous bureaucratic selection process.

Mr. LUNGREN. Let me just go back to the other approach, the Mrazek approach, which is establishing this commission. I guess the bottom line of what you are saying is that the first thing is to determine whether a film is a success in the marketplace, and to determine whether it is a classic it is the marketplace plus the passage of time?

Mr. BROWN. It is not the marketplace necessarily, sir. It may well be a failure in the marketplace, but in the fullness of time it will be recognized by the artistic community, as many works of art are. I don't think films are art—not yet anyway—and I think the marketplace is not the proper auspice—it may be that after it becomes recognized as a work of art the marketplace will respond. But I would say that the fullness of time and due consideration by a great many people determine whether a work is a classic. Certainly not the declaration of the artist himself.

Mr. LUNGREN. Or declaration of a national commission?

Mr. BROWN. Or even a producer.

Mr. LUNGREN. I just think we would have an interesting time making up the membership of a commission. They can go in two directions oftentimes. One is the lowest common denominator, and the other one is an elitist approach to what a classic is. Sometimes I think in Congress we try and reach a compromise which sounds good on paper, but in terms of its workability proves to be impractical.

Thank you, Mr. Chairman.

Mr. KASTENMEIER. The gentleman from California, Mr. Berman.

Mr. BERMAN. Thank you, Mr. Chairman.

I was wondering if you folks, particularly Mr. Brown, could reflect on what you think is motivating people like Arthur Hiller and Spielberg and Lucas and all these people who are coming to Washington, including in the summer, investing an incredible amount of time on something which has to have very little economic benefit for them. I mean, in some of these cases these folks have directed movies so recently that they have contracted to prevent all of the horrors that they are concerned will happen to films that aren't protected by those kinds of contracts.

Is this just some quixotic flight of fancy? Or is there something more here? That may be as a result of the change in the motion picture industry—I mean, you are now a producer in a company which is part of another company. We have big conglomerates in an industry that has very much changed from the days of the old

studio. Your role as a producer in the end may give you very, very little say on what happens to the copyright that Coca-Cola or Gulf & Western or somebody else now has as one of their corporate assets and decides that they want to exploit.

I would just be interested in—because there are many points to criticize in the Gephardt bill, it seems to me. This commission idea makes me very, very nervous. I mean, Henry Hyde said a little while ago, "Why did they have to put that marijuana scene in E.T.?" I don't even remember the marijuana scene in E.T., but apparently—I could see a commission with all kinds of different factors coming in. "This is an un-American movie." Look, we see it in the Academy. We keep reading stories about why some director didn't get the Academy award. It was hostility from the other directors. Or this person got it because it was a sympathy vote for him. Translate that to a Government process. Give a right to an infringement lawsuit to somebody involved in a movie that the governmental commission has decided has a certain status. So I have some concerns about all of that.

But there is something underlying this here that seems substantial and real and worthy of giving more than just passing regard to.

Mr. BROWN. Thank you. I have two points. Regarding conglomerates and producers, it still begins the way it did in the early days of—the motion picture industry. It begins with an idea and a story. No computer has been able to devise an idea for a movie. They can copy things. They can project things. So it starts with the producer who has a vision of what he wants to make, and he takes that to a company which may well be owned by a conglomerate and sells that idea.

But the creative process is unaffected.

We, as producers, still have the time-honored function of finding the story on which the movie is based, finding writers who will adapt it successfully, and selecting directors. That has not changed.

As for why eminent colleagues of mine—Mr. Hiller, Mr. Spielberg, Mr. Lucas—have seized on this, I don't question their motivation. I think the motivation is a sincere one. But I believe that they are misinformed, I don't know why. They are misinformed concerning the issues. There has always been a kind of class warfare among directors and producers, and writers and directors themselves. I don't know why this internecine struggle goes on. It is bizarre. But the point is they have seized on colorization. Colorization is the buzzword, and they have forgotten all of the historical precedents that Mr. Mayer pointed out. And it has got sex appeal. It has got pizazz. And it is an issue that seems to have a lot of emotional content They speak of destroying the heritage of films when, in my estimation, their own films are not yet part of the heritage. They may be lauded. They may be wonderful. They may win the Academy Award. But "Citizen Kane" didn't win the Academy Award, nor did "It Is A Wonderful Life."

Mr. BERMAN. We have had the directors whose films have stood the long test of time here as well as the directors of more recent films.

Mr. BROWN. I read an article in a publication called Gentleman's Quarterly, which is owned by Conde Nast, in which a member of

Hal Roach Studios remembered and, said in print that Frank Capra came in and said, "I'd love to see 'It's A Wonderful Life' colorized." It is in print. I haven't heard of any lawsuit or anything. I can imagine at that time Disney was colorizing things. It is not a new idea.

I can't answer the question of why this has taken fire, but I really feel that all of these people coming into Washington, just as we have, have been inflamed with the idea that the heritage is being destroyed and I don't think they are well informed on the issue.

Mr. BERMAN. Well, when a Ted Turner is quoted as saying, "The last time I looked I owned it," there is not——

Mr. BROWN. That is inflammatory.

Mr. BERMAN [continuing]. There is not in that sentence a great deference to the longstanding heritage of his product. I mean, could it not be that they are fearful that the economics of film-making is moving to a place where all of this is going to be like a piece of meat and we would just figure out how to cut it up into as many slices as possible and sell it?

Mr. BROWN. With all respect, Mr. Turner's remark is no different from the remarks that Jack Warner and other founders of this industry made in their time. The industry was started as a business. It was started by theater owners who had to found studios in order to provide product. This is a business which occasionally rates art treatment.

When I was a movie critic, and I was years ago, the job went to the junior member of the newspaper. Nobody wanted to critique movies. They weren't considered art. In those days you sold out to Hollywood. All of these movies now being exalted as classics were made in order to put bread on the table. Jimmy Cagney couldn't wait to get home after a film job. My God, he would say, "When is this picture going to end?"

In fact, most of these pictures were written, as Mr. Mayer points out, because a mogul said: What are we going to do with this commitment we have with Marilyn Monroe? Or much before, Norma Talmadge. Jack Warner once referred to writers as "Schmucks with Underwoods." There is nothing new about the attitude of the businessmen who finance this industry. Mr. Turner is part of an ancient heritage of business-minded management.

[Laughter.]

Mr. BERMAN. The labeling, paternity and integrity. Do these concepts fit into your notion of permissible labeling?

Mr. BROWN. It is a part of the consumer movement. I think you have to tell people out front. It is just a question of——

Mr. BERMAN. Right to withdraw your name from a product that has been altered and you don't like?

Mr. BROWN. Not unless you personally contracted for it or there is a guild movement that says——

Mr. BERMAN. Well, wait. Why isn't that a part of the consumer labeling?

Mr. BROWN. You mean you would then say the writer of this movie has asked to have his name removed?

Mr. BERMAN. This film is colorized—I mean, you could do it two ways. One, to have the disclaimer or the absence of consent of the

director or writer; or, secondly, just—Hey, I didn't put my name on this. And yes, I would like to have had a contract like Woody Allen has, a contract that protects Manhattan, but I didn't know about colorization in those days, and I don't want my name associated with this.

Mr. BROWN. I believe, if I remember the contracts, that most of those contracts protected the copyright owner—"any use now existing or to be devised in the future." They really covered colorization.

Mr. BERMAN. Except for that contract that was just ruled on by the Ninth Circuit Court of Appeal, where they knocked the whole music out of a film because of the changes.

Mr. BROWN. Well, whatever the courts decide. But, to answer your question, I think that labeling—perhaps you would agree that labeling cannot encompass everything. It is the public's right to know, wouldn't you say, that we are dealing with, and does the public really care whether a writer wanted his or her name off. It might be that there is an ego problem. It might be that the writer was wrong in that judgment. So I would say the public doesn't need to know whether a writer—I would think that the label—I can imagine certain circumstances. An actor can't take his name off a picture, unfortunately. A director would have difficulty.

And in the past, I am ashamed to say, but the problem has been solved with fictitious names. There have been a number of names of writers who were not the writers themselves, just to fill the blanks in.

But I can't answer the question authoritatively, sir. I don't know——

Mr. BERMAN. Well, there was a time when there were fictitious names because they wouldn't let the real folks work.

Mr. BROWN. That is correct. But I just think consumer labeling has to stop somewhere.

Mr. BERMAN. Thank you, Mr. Chairman.

Mr. KASTENMEIER. If there are three levels of labeling, labeling as to alterations including colorization, labeling in this case as to the identification with this version of the film by the screenwriter or screen director. There is yet another and that is whether or not the title of the film should be altered or removed, if indeed the film is colorized, as you know.

Let me ask you this. I don't have to ask whether you are for that or not, but I should ask you of what significance would that be if you were required to change the name, for example, of the Maltese Falcon, to the Black Bird. Of what consequence is that to the copyright holder? Is it something that could be achieved or is it an order of much greater importance than the other kinds of labels that the title be changed?

Mr. BROWN. You want my answer, sir?

Mr. KASTENMEIER. Yes, sir.

Mr. BROWN. In my opinion, if it were a celebrated work, it would be very damaging to the copyright holder. If it were just another movie that was unknown, it wouldn't matter that much.

Mr. KASTENMEIER. Mr. Mayer.

Mr. MAYER. Well, I would agree with that. I think that the title is one of the more valuable things that the copyright holder owns,

and to force him to change the title is, in effect, saying that he has made an alteration so that this is not a version of the same movie, and we think it clearly is a version of the same movie.

And really, we keep talking about the writer and the director. But when you talk about colorization, the work that has been done to make this version or make these changes is really in the sense of art direction and photography and set direction, much more than any contribution the director or the writer made. The work of the director and the writer have remained exactly the same. The performances, the direction, the writing—none of that has been touched. It is just color.

And I know that the directors will say, well, just color is an exaggeration. We think that that is more than just something. But we think that the problem is greater than whether or not one of these individuals can take their name off.

And I would also like to make the comment that when somebody has the right to take their name off something, it really gives it somewhat the mark of Cain. And we are saying to the public then that there is something wrong with it. We think it is enough that we say to the public this is what we have done and we are not misleading you. We would hope that would be sufficient.

Mr. KASTENMEIER. Mr. Baumgarten, what is your legal analysis of any of those three labeling provisions; that is, labeling for colorization or other alteration, labeling in terms of screenwriter or screen director, labeling in terms of loss of original title?

Mr. BAUMGARTEN. I think, Mr. Chairman, the answer would be the same with simply a slightly different tint to it. Regarding disclosure of what the company has done, these gentlemen have already responded. And Mr. Mayer has noted that colorization is already in fact disclosed.

But I would express concern over the removal of the asset value of the property. A requirement which in any way inhibits the dissemination of the product, which is the social objective of the Copyright Act, is to be avoided. If labeling goes to a level or to a form of language that interferes with the ability to get the picture to the audience while simply stating that certain things have been done to it, or if labeling becomes in effect mislabeling and confusing to the consumer, for example, a requirement that the title be changed, which I think would just cause more confusion than anything else, then I think you are defeating the business expectations and the economic incentives that underly the Copyright Act. These objectives are also what colorization is all about—to get films to the public who might not see them otherwise.

Mr. KASTENMEIER. You raise the issue, as raised before, of confusion. Supposing you had required a change in title. If the title could say this movie is The Black Bird as colorized, and in parentheses "The colorized version of the Maltese Falcon," now that would be a full disclosure and not be confusing. Would it?

Mr. BAUMGARTEN. I am not sure what would happen at the point of sale, people coming into the video store and saying, "I want the Maltese Falcon," and somebody saying, "Well, we have The Black Bird, that that is the same thing." By the time the transaction was completed, I think the consumer would walk out, probably with a

completely different film, because he or she was confused, not informed.

Also, although the title per se, as the chairman knows, is not itself technically protected by the copyright law, it does hold the key to the marketplace, and the objective of colorization is to get the film to that marketplace. The objective of the Copyright Act is similarly to allow people the opportunity—not the assurance—of an economic reward so that they will spend time and effort getting works to the marketplace.

If the distributors of colorized films find that a form of labeling—I find it difficult to react to specific examples at this point—in fact inhibits distribution with fair disclosure, then I think it would be objectionable from a policy point of view and from a legal point of view.

Mr. KASTENMEIER. Thank you.

The gentleman from North Carolina, Mr. Coble.

Mr. COBLE. Thank you, Mr. Chairman.

Gentlemen, we have had a marathon hearing today and I have not been here in its entirety, so if this question has been submitted, I will withdraw it. But if not, I would like to hear your comments.

H.R. 2400, as has been discussed time and again today, prohibits material alteration of a motion picture including colorization, as I understand it, without the consent of artistic authors. Now someone out there it seems to me is going to say, well, my gosh, this bill satisfies our problem. This bill bridges the gap between the anti-colorists on the one hand and the proponents of colorization on the other since colorization is allowed after the author's consent has been obtained.

Now I am not saying that, but somebody is going to say it. What say you to that?

Mr. MAYER. Well, with regard to obtaining the author's consent, I would say that my experience over the years has been such that the author will not consent to any change, and therefore we are in effect giving the author, if that author can be defined, the right to prevent it from happening. Because the authors have already made up their minds that they don't desire any material alteration, assuming we can define one, and therefore the idea of giving them this right, number one, we can't define if they are the proper author, and, number two, once we have defined that I don't think there will be any circumstances under which that permission would be given.

Mr. BROWN. I agree. And nobody has spoken up for the copyright owner, which is usually the company that has put up the money. This is a piece of property under our system. If people other than the owner are going to decide on whether or not to allow material alteration, they might decide that they didn't want the film to be dubbed in Germany or in France or in Italy for some artistic reason and without taking any of the economic risks, it will be harmful to the rightful owners. So I find, too, that the process will not protect the copyright owner and not necessarily the public.

Mr. BAUMGARTEN. If I may add just one thought, Mr. Coble. The 1976 Copyright Act, under the stewardship of the chairman and this committee, made a very conscious decision as to the identity of the "author" of a motion picture. Taking into account the variety

of collaborators, the Congress decided that it would be the producing entity. The entity which, coincidentally, takes the risk, makes the investment, and generally seeks to assure the film is available to the public; rather than an entity that will try to inhibit its dissemination.

So when we talk about the author's consent, the author in that sense should be viewed as the copyright owner, as Mr. Brown has suggested. And that is the person who Congress has already decided should have the control.

Mr. COBLE. Thank you, gentlemen. Thank you, Mr. Chairman.

Mr. BERMAN. Mr. Chairman.

Mr. KASTENMEIER. The gentleman from California.

Mr. BERMAN. Are those terms synonymous, "copyright holder" and "author"?

Mr. BAUMGARTEN. The original copyright owner will be the author. If the copyright is sold, there could be another copyright owner who is not the author. But in an employment-for-hire situation the producing entity in films will be both the initial copyright owner and the author.

Mr. BERMAN. Well, what about in the contemplation of the Berne Convention? Is the author there the copyright holder?

Mr. BAUMGARTEN. The ad hoc committee that studied this issue concluded rather firmly that the work made for hire concept in the United States law was fully compatible with the notion of author in the Berne Convention, and that the Convention leaves it up to each country to decide for itself who the authors will be. And in most countries the rights go to the producing entity by one vehicle or another.

Mr. BERMAN. Thank you, Mr. Chairman.

Mr. KASTENMEIER. If there are no further questions, the committee thanks you, gentlemen—Mr. Brown, Mr. Mayer, and Mr. Baumgarten—for your contributions. You are the concluding panel today and we deeply appreciate your contributions.

Mr. BAUMGARTEN. Thank you, sir.

Mr. BROWN. Thank you, Mr. Chairman.

Mr. MAYER. Thank you.

Mr. KASTENMEIER. Accordingly, this concludes today's hearing and the committee stands adjourned.

[Whereupon, at 2:35 p.m., the subcommittee adjourned, to reconvene subject to the call of the Chair.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

Arent, Fox, Kintner, Plotkin & Kahn

Washington Square 1050 Connecticut Avenue, N W
Washington, D C 20036 5339

Burton V Wides
Counsel
(202) 857-6035

June 21, 1988

The Honorable Robert W. Kastenmeier
Chairman
Subcommittee on Courts, Civil Liberties,
and the Administration of Justice
2137 Rayburn House Office Building
Washington, D.C. 20515

Dear Mr. Chairman:

I am enclosing an analysis of the Mrazek amendment on film colorization to the Interior and Related Agencies appropriations bill for 1988, which I previously submitted to the House Appropriations Committee on behalf of the Video Software Dealers Association.

We respectfully request that it be included in the record of today's hearing. As you know, the text of the amendment has only recently been made available, and the Appropriations Committee has not held public hearings on this issue.

We appreciate your subcommittee's intention to review this issue carefully. Thank you for your time and attention to our concerns.

Sincerely,

Burton V. Wides

Burton V. Wides
Legislative Counsel, VSDA

BVW/ice
Enclosure

cc: All members of the Subcommittee on Courts, Civil Liberties, and the Administration of Justice

Arent, Fox, Kintner, Plotkin & Kahn

Washington Square 1050 Connecticut Avenue N W
Washington D C 20036 5339

June 15, 1988

The Honorable Jamie L. Whitten
Chairman
Committee on Appropriations
Room H218, U.S. Capitol
Washington, D.C. 20515-6015

Dear Chairman Whitten:

We are writing on behalf of the Video Software Dealers Association to oppose adoption by the full committee of the Mrazek amendment on motion picture films to the Interior Appropriations bill.

The Video Software Dealers Association ("VSDA") is the national trade association for home video distributors and retailers, who rent and sell videocassettes every day to millions of Americans. VSDA represents about 20,000 of the roughly 30,000 retail home video outlets across the country. Our members are dedicated to assuring quality control of their product for the consumer public. Toward that end, in cooperation with the motion picture industry, VSDA implements a vigorous anti-counterfeiting program to keep unlawfully pirated, inferior copies off the market.

At the same time, VSDA is equally committed to meeting consumer preferences in home video. Indeed, the hallmark of the industry is serving the public by providing "freedom of choice" for the consumer. In that context, VSDA strongly opposes this amendment.

The motion picture industry and others have already detailed for your committee many of the disturbing implications, practical problems and fundamental inequities of this ill-advised legislation -- including the basic point that the bill would stand copyright law on its head by permitting the copyright owner to be sued under the very laws designed to protect his copyright.

Therefore, we would like to focus on the three main reasons why VSDA opposes this amendment:

- It denies consumers "freedom of choice" and constitutes inappropriate government interference in the marketplace.

- It is directly harmful to VSDA's members. The amendment unfairly exposes them to liability for a dispute and circumstances about which they have no direct knowledge and over which they have no control.

• The bill is not necessary in order for viewers to retain the option of seeing the film in its original black and white format.

The proposal empowers an independent commission to designate films as part of our national cultural heritage and then sharply circumscribes the editing, colorization or other alteration of such films.

We leave aside the Pandora's Box inevitably opened whenever someone acting for the State is authorized to rule on questions of artistic taste. The bill proposes a direct and unjustified threat to the VSDA members and to other video retailers throughout the United States.

If a movie that has been designated for the National Film Registry is "materially altered" -- a term left dangerously vague -- retailers would be prohibited from selling or leasing it without disclaimers being displayed upon the cassette package in a form prescribed by the Commission. Failure to comply would expose retailers to liability under the copyright law.

There simply is no reason to put such a vague and onerous burden on thousands of video dealers throughout the Nation. Unlike large film production enterprises, most video retailers are small operations; many are family businesses capitalized with personal savings. These video retailers have had no involvement in the production or alteration of the film. The dealer would have to constantly check to see which films might have been added to the Federal Registry. He or she would then have to try to determine whether the film had been substantially altered in the view of the Commission and also determine whether the package displayed the required disclosures. All of this information rests with those who made the film and those who may have altered it.

For these reasons, while we oppose this bill in principle, we urge that if any prohibitions and disclosure obligations are imposed they be limited to those parties directly involved.

Second, if a movie originally filmed in black and white has been colorized then it is unlawful to sell or lease it under the original title. Once again, this puts an unreasonable burden upon each retailer to ascertain whether the film was originally produced in black and white and, if so, to determine whether the title has not been sufficiently changed. That is an unfair and unreasonable burden to impose on small businesses.

Third, the public's freedom of choice will be seriously impaired. VSDA has just completed a survey of its members with respect to the colorization of black and white films, the issue driving this amendment. The results are clear. VSDA members overwhelmingly oppose legislation to curtail colorization because their customers prefer to view films in color and are eager to see older films in that format. The

members of VSDA strongly believe that the public should be allowed to decide. With all due respect, the marketplace is the best arbiter on this issue, not the Congress.

Proponents of the amendment may argue that the provision does not literally preclude colorization. It merely requires a change of title and full disclosure. Nonetheless, the ensuing disruption and confusion will be enormous.

Can you imagine anything more confusing, and possibly deceptive, than requiring the public to ascertain the "alias" of the classic film they wish to see in color? At best, dealers and customers would have to go through a meaningless charade in which the customer asks for the film he wants to see and the dealer assures him that, for example, he must rent the "Life and Times of George M. Cohan, Set to Music," rather than "Yankee Doodle Dandy." What is the point? That simply will create unnecessary chaos. It also will impede the potential enjoyment of wonderful older movies by new generations of the viewing public.

Finally, the bill is unnecessary to preserve the ability of the viewing public to enjoy the black and white version of the film if they wish. The fact is that, those consumers who do wish to see a film in its original black and white format need only turn the color knob on their TV all the way down. They will then see the film in black and white. They will even enjoy an extra bonus in film quality. The colorized print will have been made from the best quality black and white print available.

Our views may be colored by our devotion to freedom of choice for the consumer, but to us the issue is black and white. We urge the Committee to follow a sound admonition -- "Let the people decide."

In any event, if the Committee nevertheless does create an official arbiter of artistic integrity, our members urge you to use reasonable restraint in any enforcement scheme and to impose liability only upon those directly involved in producing the altered films.

On behalf of VSDA members throughout the Nation, we thank you for your time and consideration of their concerns.

Sincerely,

Charles B. Ruttenberg

Charles B. Ruttenberg
General Counsel, VSDA

Burton V. Wides

Burton V. Wides
Legislative Counsel, VSDA

cc: All Members of Appropriations Committee

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