art's sake. While his artistic arguments to colorization may have merit, it is unreasonable for him to simply ignore the tremendous economic motivation behind the process.

An aesthetic tragedy even greater than colorization has already been allowed to arise in Hollywood. After Technicolor films were first developed and produced, it was eventually discovered the process creates colors that are not permanent in nature.[133] While these early color films can now be restored to their original form, there is little economic incentive to do so.[134] As a result, such masterpieces as Raintree County, The Alamo, Spartacus and It's a Mad, Mad, Mad, Mad World have been allowed to deteriorate, possibly beyond repair.[135]

While the studios are probably as much at fault, neither have directors or other vocal opponents of colorization expressed much of an interest in raising the funds for this sorely needed restoration of our national culture. What is worse, unlike colorization, once lost, the originals of these Technicolor films are forever gone.[136] Ironically, the cost of restoring these films is a mere fraction of the comparative cost of colorizing black-and-white films.[137]

In contrast, colorization has created a public demand for and financial interest in otherwise non-productive older films. These films previously had a substantially lesser value because as unfortunate as it may be, many persons, particularly younger ones, simply refuse to view their films in black-and-white. While it has been said that colorization may effectively do away with black-and-white films,[138] it could be argued many of these

films were already constructively dead. As much as one may wish to enlighten the public, Justice Holmes once observed "the taste of any public is not to be treated with contempt. It is an ultimate fact for the moment, whatever may be our hopes for a change."[139]. Perhaps the plainest indication of the value of colorized versions of films is the public's very desire to view them.[140]

Possibly the strongest factor mitigating against preventing colorization by departure from our present scheme of copyright is the fact our existing model has in fact encouraged a high level of creation and dissemination of artistic and literary works. Allowed to continue, it is highly unlikely the colorization process would do anything to reverse this trend. Sufficient economic incentive will continue to fuel the creation of new films, both in color and, when artist concerns dictate, in black-and-white. While colorized versions of such films may not be prevented for all time,[141] black-and-white films will nonetheless continue to be made.

In England, as in the United States, copyright law does not generally prohibit the colorization of old films.[142] With this recognition, the Directors Guild of Great Britain has shifted its emphasis away from blanket rejection of the process. Instead, it has attempted, and with some success, to reach compromise agreements regarding colorized versions of English films. The Guild is essentially seeking to protect at least a limited number of black-and-white films designated as classics, films including Brief Encounter, Rebecca and The Third Man.[143] It has already

persuaded the BBC not to air any colorized versions of these selected films.[144] Channel 4 has gone even further by agreeing not to air any colorized film.[145]

Such an approach is reasonable in that it recognizes not all films made in the black-and-white era are what we could really consider to be "classics". Of course, under any format, this type of an agreement would require some party to determine just which films fall into which group. Such a judgment as to the relative merits of artistic works has long been condemned, at least under notions of copyright.[146] This judgment by a few would essentially dictate what the rest of the public would be able to view. Still, as this type of an agreement recognizes, the image of a colorized version of Citizen Kane may indeed be more disturbing than that of a colorized 42nd Street.

Regardless, it seems this type of a compromise would appear unlikely in our country. Unlike the relatively few British national television channels, our country offers a wide array of local, cable and satellite sources to the American viewer. Some of these, such as the Turner Broadcasting System, are owned by parties who already have a huge investment in the colorization industry. Ted Turner has already stated "I would colorize Casablanca just for controversy", and indeed he already has.[147] It is unlikely that Turner, or anyone else similarly situated, would voluntarily forgo a legal right to air colorized versions of films like Citizen Kane.

Furthermore, such agreements would not prevent the creation of such colorized films, but merely hamper the television airing

of them. The agreements would likely not touch the home video market. It would seem there would always be some available forum for these films. Perhaps most important, any restrictions on the airing of these films, once created, would appear much like censorship. Even if, due to their private nature, these agreements were not illegal, such a scheme would seem like an unduly restrictive and paternalistic abridgment of the rights of the viewing public.

Perhaps the strongest argument made by opponents of colorization is not for the preservation of artistic integrity, but rather for the preservation of our cultural heritage. Films made in the black-and-white era, whether knowingly or not, capture and record the heritage and culture of a time now passed. To present altered versions of these films, it is argued, is akin to presenting an altered version of our history. Instead of educating the young as to the worth of these original films and their era, they instead present a faddish and distorted view of history.

Ironically, most film archivists actually view colorization as a boon to the preservation of these original films. Not only does the process not alter or deface the original work,[148] but it requires the making of a pristine black-and-white print of the original film, and a new negative if the original was on degradable nitrate film.[149] Thus, after the process is performed, our cultural heritage is actually better preserved, even if only in the archivists' vaults. While this may be less than perfect, it cannot be said that, before colorization, the

viewing public was breaking down the archive doors to see most of these original black-and-white films.

Thus, we are left primarily with artistic, rather than legal, objections to the colorization process. While these artistic concerns are certainly very real, the question becomes whether we should fundamentally alter our basic scheme of protection for creative works in order to specifically address these concerns. The worst thing we could do is allow existing law in the intellectual property law area be twisted beyond recognition, simply to vindicate these artistic concerns.[150] If the process is to be regulated or prevented altogether, it should be by specific legislation at the national level.[151] So far, and probably with justification, Congress has not viewed colorization as a sufficiently compelling problem to address in this manner.[152]

Perhaps the best thing to do is leave the merits of colorization in the hands of the viewing public. As with all creative works protected under copyright, it is the public alone which must judge the ultimate worth of colorized films.[153] So far, and to the chagrin of opponents of the process, the public has shown a tremendous interest in colorization.[154] This interest, however, may eventually prove to be fleeting in nature.[155] Already, at least one New York theatre house has responded to colorization with a marquee proclaiming "Maltese Falcon - Original black-and-white version!".[156]

If the public as a whole does eventually become disinterested in colorized films, this in itself will effectively

spell the end of the colorization process. It would indeed be a shame if before this time we have destroyed our law of intellectual property to vindicate artistic interests. While it may indeed be painful for a director to see colorized showings of his films, this may be the price he has to pay until the public shares his view. Until then, the artists among us may have to turn down the color knobs on our television sets and ride this one out.

1. At least on film critic has refused to use the term "colorization", instead preferring to describe the process as the "coloring" of films. See Color the Bottom Line Greenish, Los Angeles Times, Nov. 1, 1986, Part 6, at 6, col. 4, where arts editor Charles Champlin states: "...I feel about the word colorize as E.B. White felt about the word personalize. He once wrote that he would as soon Simonize his grandmother as personalize his writing. Colorizing a film seems to me in a league with rinsizing your clothes or ironizing your pants..." Id. Champlin's objection notwithstanding, this article will use the term "colorized" to describe this new generation of color films, in order to clearly differentiate them from legitimate, originally colored films.

2. Newspaper and magazine articles relied on in this article for discussion of the colorization process and surrounding controversy include the following: The Color of Money, American Film, Jan. - Feb., 1987, at 29; On Coloring

Films, New York Times, Dec. 21, 1986, Section 2, at 15, col. 3; Art Laws Don't Protect Films From Alteration, New York Times, Dec. 11, 1986, Section A, at 34, col. 4; Through a Tinted Glass, Darkly, New York Times, Nov. 30, 1986, Section 2, at 19, col. 1; "Colorizing" Black and White Movies, Los Angeles Times, Nov. 29, 1986, Part 2, at 2, col. 1; "No" Votes Win in "Color Wars", Los Angeles Times, Nov. 26, 1986, Part 6, at 1, col. 1; The Well-Trashed Art, New York Times, Nov. 26, 1986, Section A, at 27, col. 5; Ted Turner is Showing His True Colors, Los Angeles Times, Nov. 19, 1986, Part 3, at 1, col. 1; Tainted, Tinted Movies, New York Times, Nov. 16, 1986, Section 4, at 22, col. 1; War Against Colorizing Joined by John Huston, Los Angeles Times, Nov. 14, 1986, Part 6, at 1, col. 2; John Huston Protests "Maltese Falcon" Coloring, New York Times, Nov. 14, 1986, Section C, at 36, col. 1; Council Against Color, NEA Advisory Group Condemns Film Trend, Washington Post, Nov. 4, 1986, Section D, at 9; Arts Council Hits Colorizing, Los Angeles Times, Nov. 4, 1986, Part 6, at 1, col. 4; Council Opposes Coloring Old Films, New York Times, Nov. 4,

1986, Section C, at 13, col. 1; The Color Green, Tinting Old Movies by Computer: Big Business, Artistic Outrage, Washington Post, Nov. 2, Section F, at 1; "Colorization" Is Defacing Black and White Film Classics, New York Times, Nov. 2, 1986, Section 2, at 1, col. 1; Colorization's Negatives, U.S. News & World Report, Oct. 20, 1986, at 75; Raiders of the Lost Art, The "Colorizing" of Old Movies Has Directors Seeing Red, Time, Oct. 20, 1986, at 98; "Colorizing" Film Classics: A Boon or a Bane?, New York Times, Aug. 5, 1986, Section A, at 1, col. 3; High-Tech Facelift for Film Classics, U.S. News & World Report, March 31, 1986, at 68; Play it Again, Sam...in Color, Forbes, Feb. 10, 1986, at 117; Play it Again, This Time in Color, Electronic Magic Touches Up the Classics of Black-and-White, Time, Oct. 8, 1984.

3. The author in no way attempts to comprehensively study the entire subject of copyright protection. The topic is simply too broad and necessarily beyond the scope of this article. Instead, the author will attempt to pinpoint the rationale and protections afforded by copyright and other branches of

intellectual property law as they more specifically relate to the colorization issue. Likewise, models of moral rights protection as they exist in other countries will discussed by way of example only, and will by no means be exhaustively described.

4. See infra notes 20-23 and accompanying text.

5. One could imagine the amount of time and effort which would be needed to successfully colorize even a brief film montage, such as the famous "shower scene" from Hitchcock's Psycho.

6. It is doubtful, however, whether this increased market share reflects an actual viewer preference for colorized versions of films, or merely reflects a fleeting consumer interest in simply seeing the still-novel colorized product. A recent non-scientific "Color Wars" poll taken following KTLA-TV's broadcast of the colorized It's a Wonderful Life revealed 53.5% of viewers calling in actually purported to prefer the original black-and-white version. See "No" Votes Win in "Color Wars", supra note 2.

Regardless, it will certainly be long-term market share, as opposed to purported consumer preference, which will ultimately determine the success or failure of colorization.

7. Mr. Preminger died last year and his film company is now run by a management firm. Despite rationalizations by management, it appears Preminger himself never consented to this agreement. See "Colorizing" Film Classics: A Boon or a Bane?, supra note 2, at 21.

8. Colorizers may alter public domain films without the consent or agreement of anyone. See infra notes 20-23 and accompanying text.

9. Yet opposition to colorization in the Hollywood creative community is not completely unanimous. Following Stewart's speech, he was surprised to learn that Joe Walker, cinematographer of the original Wonderful Life, was himself involved in the colorization of the same film. See Raiders of the Lost Art, supra note 2.

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10. Other such groups include the Directors Guild of America, the Screen Actors Guild, the Writers Guild of America West, the American Society of Cinematographers and Hollywood locals of the International Alliance of Theatrical and Stage Employees. See Through a Tinted Glass, Darkly, supra note 2.

11. In England, the Stationers' Company Acts conferred upon the Royal Stationer until 1694 a complete monopoly in the right to copy all printed materials. In addition to protecting the Crown's economic interests, these Acts also served as an effective form of censorship. In 1709, 'An Act for the Encouragement of Learning' first granted the author the right to print and reprint his works. See V. Porter, Film Copyright: Film Culture, Vol. 19, No. 1 Screen 90, 94-95 (Spring 1978).

12. While the French refer to the author's right as droit d'auteur, a similar right appears by different names throughout Europe. For example, Spain has a derecho de autor, Italy a diritto d'autore, and Germany an Urheberrecht. See Porter, supra note 11, at 96.

13. Copyright protection is mandated in our country by U.S. Const. art. 1, § 8, which provides: "The Congress shall have Power...to Promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." Id. Both "Authors" and "Writings" have been broadly construed so as to include creators of visual art, literature and music, as well as all other types of artistic works. For example, the Copyright Act of 1976 specifically confers protection to motion pictures and other audiovisual works. See 17 U.S.C. § 102(6).

14. See 17 U.S.C. § 106.

15. 17 U.S.C. § 106(2) provides in relevant part: "...the owner of copyright...has the exclusive right to...prepare derivative works based upon the copyrighted work". Id.

16. A copyright owner can, if he wishes, transfer to another any or all of the exclusive rights granted by copyright, either with or without compensation. See 17 U.S.C. § 201(d).

Thus, needing cash but still wishing to preserve the integrity of his black-and-white work, a copyright owner could sell all but the right to prepare a derivative colorized version of his film.

17. 17 U.S.C. § 201 provides:

Ownership of Copyright

(a) Initial Ownership. Copyright in a work protected under this title vests initially in the author or authors of the work. The authors of a joint work are coowners of copyright in the work.

(b) Works Made for Hire. In the case of a work make for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.

(c) Contributions to Collective Works. Copyright in each separate contribution to a collective work is

> distinct from copyright in the collective work as a whole, and vests initially in the author of the contribution. In the absence of an express transfer of the copyright or of any rights under it, the owner of copyright in the collective work is presumed to have acquired only the privilege of reproducing and distributing the contribution as part of that particular collective work, any revision of that collective work, and any later collective work in the same series.

Id.

18. While such films are few in number, some recent examples, are Warren Beatty's Reds, George Lucas' Starwars films, and Roman Polanski's Knife in the Water.

19. This is not to say the economic, as opposed to "moral", ends of copyright are not served by this "work for hire" scheme. The mere fact that the film director's mise en scene is protected should ensure that he receives economic benefit from his

contribution, regardless of who holds the right to enforce the copyright. Thus, a production company, assured in the knowledge that it will be able to exploit and prevent unauthorized duplication of the director's mise en scene, will be willing, at least in theory, to pay to the director the economic value of his creative contribution.

20. 17 U.S.C. § 302 provides in relevant part:

Duration of Copyright: Works Created on or after January 1, 1978

(a) In General. Copyright in a work created on or after January 1, 1978, subsists from its creation and, except as provided by the following subsections, endures for a term consisting of the life of the author and fifty years after the author's death.

(b) Joint Works. In the case of a joint work prepared by two or more authors who did not work for hire, the copyright endures for a term consisting of the life of the last surviving author and fifty years after such

last surviving author's death.

(c) Anonymous Works, Pseudonymous Works, and Works Made for Hire. In the case of an anonymous work, a pseudonymous work, or a work made for hire, the copyright endures for a term of seventy-five years from the year of its first publication, or a term of one hundred years from the year of its creation, whichever expires first....

Id.

21. See 17 U.S.C. § 24 (repealed 1976) (granting a term of protection of 28 years from initial publication or registration plus an additional 28 year renewal term). The 1976 Act recognizes continued protection for works first published and protected pursuant to the old (pre-1976) Copyright Statutes, but for no longer than the aforesaid 56 year maximum period. See 17 U.S.C. § 304.

22. See supra note 14 and accompanying text.

23. See supra text accompanying note 8 for public domain films already available in colorized versions.

24. France, Law 57-296, Article 1, UNESCO translation.

25. Specifically, Professor Nimmer would define a film director's moral rights as encompassing: (1) attribution as the director of his work; (2) prevention of attribution of his work to another; (3) prevention of attribution with respect to work he has not in fact directed, or which is not in the form in which he created it; (4) prevention of others from altering, mutilating or deforming his works; (5) withdrawal of a published work from distribution if it no longer represents his views; and (6) prevention of others using his work or name in such a way as to reflect on his professional standing. See 2 M.Nimmer, Nimmer On Copyright § 8.21[A], at 8-247 (1986).

26. See Sarraute, Current Theory on the Moral Right of Authors and Artists Under French Law, 16 Am. J. Comp. L. 465, 467 (1968) ("Only the author can decide whether his work corresponds

to his original conception, at what moment it is completed, and whether it is worthy of him."). The right to disclosure is sometimes said to also include the right of withdrawal of previously published works, but this element is not universally recognized by the all countries recognizing moral rights. Id. at 477. Where right to withdrawal does exist, it is usually in relation to literary works. See Merryman, The Refrigerator of Bernard Buffet, 27 Hastings L.J. 1023, 1028 (1976).

27. See Strauss, The Moral Right of the Author, 4 Am. J. Comp. L. 506, 508 (1955). The right of paternity also guarantees that the author's work will appear under an appropriate pseudonym or even anonymously, where the author wishes to preserve his privacy. See Diamond, Legal Protection for the 'Moral Rights' of Authors and Other Creators, 68 Trade-Mark Rep. 244, 254-55 (1978).

28. See Diamond, supra note 27, at 257; Merryman, supra note 26, at 1027.

29. Berne Convention, Cmnd 5002, Article 6bis(1).

30. See Porter, supra note 11, at 96.

31. See supra notes 17-19 and accompanying text.

32. See generally Porter, supra note 11, at 97.

33. See R. Ray, A Certain Tendancy of the Hollywood Cinema, 1930-1940 32-55.

34. See supra notes 17-19 and accompanying text.

35. See Magill, Magill's Survey of Cinema 405-06.

36. See Amarnick, American Recognition of the Moral Right: Issues and Options, 29 Copyright L. Symp. (ASCAP) 31, 47-48 (1983) (a French author who wants to be certain of controlling the movie adaptation of his work must specifically bargain for this right with the producer regardless of his otherwise "non-waiverable" moral rights).

37. Berne Convention, Article 14bis(2)(a)&(b) provides:

Ownership of copyright in a cinematographic work shall

be a matter for legislation in the country where protection is claimed....However, in the countries of the Union which, by legislation, include among the owners of copyright in a cinematographic work authors who have brought contributions to the making of the work, such authors, if they have undertaken to bring such contributions may not, in the absence of any contrary or special stipulation, object to the reproduction, distribution, public performance communication to the public by wire, broadcasting or any other communication to the public or to the subtitling or dubbing of texts of the work.

Id.

38. See supra note 29 and accompanying text.

39. See 17 U.S.C. § 115(a)(2).

40. See generally 17 U.S.C. § 115(c), which sets forth royalties payable to owners of copyright in musical works,

pursuant to the Act's compulsory license scheme.

41. See supra notes 15-16 and accompanying text.

42. See supra note 40.

43. While the ultimate owner of copyright in an original musical work is more likely to be the publisher than the songwriter, the songwriter may, at least in theory, insist contractually that the publisher prevent any travesties of his work as a condition to transfer of such copyright to the publisher. See generally infra notes 53-54 and accompanying text.

44. 538 F.2d 14 (2d Cir. 1976).

45. Id. at 17.

46. Id. at 17-18.

47. Id. at 18.

48. Id.

49. Id. at 19.

50. Id. at 17, 20-21. While the Gilliam case was decided under the old (pre-1976) Copyright Statutes, this does not affect the case's continued relevance to our current 1976 Act. Like the current Copyright Act, neither did the predecessor Copyright Statutes generally recognize moral rights of authors and artists. See generally supra note 13 and accompanying text.

51. Id. at 19-23.

52. Id. at 23-24. The majority also went on to state, apparently as dicta, that the editing for the American broadcasts would additionally constitute a violation of the Lanham Act Section 43(a), 15 U.S.C. § 1125(a). Id. at 24-25. Gurfein, J., concurred specially in order to refute the majority's application of this trademark protection to the instant case. Id. at 26-27. For a discussion of Lanham Trademark protection as it relates to colorization, see infra notes 85-92 and accompanying text.

53. See supra notes 17-19 and accompanying text.

54. See supra note 16.

55. See supra notes 20-23 and accompanying text.

56. See The Trademark Cases, 100 U.S. 82 (1879).

57. See supra note 13.

58. See 17 U.S.C. § 102(a).

59. Alfred Bell & Co. Ltd. v. Catalda Fine Arts, Inc. et.al., 191 F.2d 99 (2d Cir. 1951); Franklin Mint Corp. v. National Wildlife Art Exchange, Inc., 575 F.2d 62 (3d Cir. 1978), cert. denied, 439 U.S. 880 (1978).

60. L. Batlin & Son, Inc. v. Snyder, 536 F.2d 486 (2d Cir. 1976); Gracen v. Bradford Exchange, 698 F.2d 300 (7th Cir. 1983); Sherry Manufacturing Co., Inc. v. Towel King of Florida, Inc., 753 F.2d 1565 (11th Cir. 1985).

61. See supra note 8 and accompanying text.

62. Most of these underlying films were first published and afforded copyright protection pursuant to the old (pre-1976) Copyright Statutes, which provided for no longer than 56 years of

copyright protection. The 1976 Act recognizes continued copyright protection for such works, but for no longer than this original 56 year period. See supra note 22 and accompanying text.

63. Bleistein v. Donaldson Lithographing Co., 188 U.S. 239 (1903).

64. See supra 59-60 and accompanying text.

65. H. Rep. No. 1476, 94th Cong., 2d Sess., reprinted in 1976 U.S. Code Cong., & Ad. News 5664.

66. See e.g., Pantone, Inc. v. Friedman, Inc., 294 F.Supp. 545 (S.D.N.Y. 1968) (arrangement of colors in color matching booklet held copyrightable); Sargent v. American Greetings Corp., 588 F.Supp. 912 (N.D. Ohio 1984). (coloring in of a pencil sketch held to withstand defendant's motion for summary judgment). See also M. Nimmer, Nimmer on Copyright § 32 (1986).

67. See e.g., Alva Studios, Inc. v. Winninger, 177 F.Supp. 265 (S.D.N.Y. 1959) (skill and originality in producing a smaller but nearly exact scale reproduction of a sculpture properly

considered in finding valid copyright).

68. This issue was early put to rest by the U.S. Supreme Court in Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53 (1884), which found a photograph of poet Oscar Wilde was properly subject to copyright protection, in spite of the fact it was a mechanically aided reproduction. Id. at 59. See also Jeweler's Circular v. Keystone, 274 F. 932 (S.D.N.Y. 1921) (all photographs are copyrightable). Thus, courts implicitly recognize that technological aids do not negate originality, but rather facilitate an author in expressing his creativity.

69. Henderson v. Tompkins, 60 F. 758 (D.Mass 1894).

70. A famous copyright case dealing with a process factually similar to colorization and reaching this same result is Alfred Bell & Co. Ltd. v. Catalda Fine Arts, Inc. et.al., 74 F.Supp. 973 (S.D.N.Y. 1947), aff'd at 191 F.2d 99 (2d Cir. 1951). In Bell, plaintiff used mezzotint, an elaborate and tedious photoengraving method, to create reproductions of old master oil

paintings in the public domain. Id. at 974-75. While the process required much more skill and patience than traditional photographic techniques, defendants' relied on the fact the finished products were almost identical reproductions of the underlying works and argued plaintiff's versions lacked sufficient originality to support an independent copyright. Id. at 975-76. The court rejected defendants' argument, relying on the extensive skill and time required by the mezzotint process. Id. at 975. Noting that no two such engravers could ever produce exactly identical interpretations of the same oil painting, the court found plaintiff's versions contained more than trivial variations and were sufficiently original to support independent copyrights. Id. at 974-75. Nearly an identical line of reasoning can be used in support of the colorization process. But see L. Batlin & Son, Inc. v. Snyder, 536 F.2d 486 (2d Cir. 1976), cert. denied, 427 U.S. 857 (1976) (questioning certain of the assumptions made by Bell regarding originality).

71. Pursuant to 17 U.S.C. § 410(b), the Register of

Copyrights' refusal to issue a certificate of copyright registration constitutes the Copyright Office's belief that the subject matter deposited does not comprise copyrightable subject matter. Id.

72. 51 Fed. Reg. 32,665 (1986).

73. See 17 U.S.C. § 410(c), 17 U.S.C. § 411(a).

74. See, e.g., supra note 52 and accompanying text.

75. Zacchini v. Scripps-Howard Broadcasting Company, 433 U.S. 562 (1977).

76. See W. Prosser & W. Keeton, Law of Torts 851 (5th ed. 1984). A typical state statute is Cal. Civ. Code § 3344(a) (West Supp. 1986), which provides in relevant portion:

> Any person who knowingly uses another's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without such

person's prior consent, or, in the case of a minor, the prior consent of his parent or legal guardian, shall be liable for any damages sustained by the person or persons injured as a result thereof....

Id.

77. See Restatement (Second) of Torts § 652C (1977).

78. See R. Greenstone, A Coat of Paint on the Past? Impediments to Distribution of Colorized Black and White Motion Pictures, Vol. 5, No. 2 Entertainment & Sports Lawyer 12, 17 (Fall 1986).

79. See Greenstone, supra note 78, at 17.

80. Id.

81. Id.

82. See supra notes 20-23 and accompanying text.

83. See generally supra notes 20-23 and accompanying text; Cohen, Duration, 24 U.C.L.A. L.Rev. 1180 (1977).

84. Lugosi v. Universal Pictures, 25 Cal. 3d 813, 820, 160 Cal. Rptr. 323, 327 (1979), citing W. Prosser, The Law of Torts § 117, at 814-15 (4th ed. 1971).

85. See Greenestone, supra note 78, at 19-20.

86. While most commonly cited as Section 43(a), it is actually 17 U.S.C. § 1125(a) which provides:

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

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

Id.

87. See Greenstone, supra note 78, at 19.

88. Id.

89. See supra note 52.

90. See supra note 86 and accompanying text.

91. The majority and minority in Gilliam in fact bickered about what level of disclaimer might finally constitute an effective disclaimer, i.e. one disclaimer at the beginning of the broadcast or several disclaimers throughout. 538 F.2d at 25, n.13 and 27, n.1. In spite of this difference, it does seem apparent that a disclaimer would at some level become "effective" and thus prevent a Lanham Act violation.

92. See supra note 25 and accompanying text.

93. See Art Laws Don't Protect Films From Alteration, supra note 2. These states are New York, California, Massachusetts and Louisiana. Id.

94. 17 U.S.C. § 202 provides:

> Ownership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied. Transfer of ownership of any material object, including the copy or phonorecord in which the work is first fixed, does not of itself convey any rights in the copyrighted work embodied in the object; nor, in the absence of an agreement, does transfer of ownership of a copyright or of any exclusive rights under a copyright convey property rights in any material object.

Id.

95. A typical statute, The California Art Preservation Act, provides in relevant part:

> No person, except an artist who owns and possesses a work of fine art which the artist has created, shall intentionally commit, or authorize the intentional commission of, any physical defacement, mutilation, alteration, or destruction of a work of fine art.

Cal. Civil Code § 987(c)(1).

96. Mass.Gen.Laws Ann. c. 231, § 85S(b) defines "fine art" as: "any original work of visual or graphic art of any media which shall include, but not limited to, any painting, print, drawing, sculpture, craft object, photograph, audio or video tape, film, hologram, or any combination thereof, of recognized quality". Id.

97. See supra note 96.

98. The Massachusetts Act denies protection to "art... created by an employee within the scope of his employment".

Mass.Gen.Laws Ann. c. 231, § 85S(b).

99. See supra note 17 and accompanying text.

100. See generally supra notes 24-27 and accompanying text.

101. See generally supra notes 13-23 and accompanying text.

102. A similar misconception also exists as to the silent era of Hollywood film making. While it is often assumed that Hollywood made the transition to sound as soon as the state of the art permitted it, sound films in fact did not arise until years after technology clearly permitted it. In spite of the availability of sound films, the public did not clearly demand, nor film directors generally utilize, the sound medium until years after its inception. See M. Kerr, The Silent Clowns 6-7 (1975). Of course, some of the earliest silent works were done truly out of necessity, and not necessarily by choice. See infra note 105 and accompanying text.

103. See On Coloring Films, supra note 2.

104. Id.

105. Id.

106. This distinction is crucial in the application of state fine art statutes. See supra notes 93-97 and accompanying text.

107. A similar phenomenon has already occurred in regard to 16-millimeter versions of films. Distribution of 16-millimeter films to campus film societies and the like used to be prevalent. With the advent of video cassette, these versions are increasingly difficult to come by. Many distributors can no longer justify the large initial outlay for making 16-millimeter versions, and this will probably eventually spell the death of this form of film. See Through a Tinted Glass, Darkly, supra note 2, at 24.

108. See supra note 17 and accompanying text.

109. See supra notes 18-19 and accompanying text.

110. See supra note 32 and accompanying text.

111. Such a situation has apparently already occurred, where an actor opposed, but a cinematographer favored, colorization of their original black-and-white film. See supra note 9 and accompanying text.

112. The Berne Union is an international convention of which the United States is not a signatory to. See supra notes 29-30 and accompanying text.

113. See supra note 37 and accompanying text.

114. See supra note 36 and accompanying text.

115. See supra note 63 and accompanying text.

116. See generally supra notes 13-23 and accompanying text, notes 39-43 and accompanying text.

117. See supra notes 44-52 and accompanying text.

118. Consider that copyright to a novel, by traditional industry practice, is generally owned not by the author, but rather by a publisher who is better suited to commercially

exploit it. In spite of the fact the author no longer has an economic interest in the book, he might still be said to have a moral right to insure that no alterations are ever made to his work. Since some degree of alteration is always required in making a film adaptation of a novel, the author might effectively be able to prevent a movie version of his work from ever being made.

119. See supra notes 89-91 and accompanying text.

120. Id.

121. See generally supra notes 13-23 and accompanying text.

122. See supra note 13 and accompanying text.

123. See 17 U.S.C. § 301(a),(b)(1). Sections 102 and 103 of the Act specify the subject matter of the copyright law. Motion pictures are specifically proper subject matter of the Act. See supra note 13.

124. Consider the Act's express recognition of the moral

right in the limited instance of songwriters. See supra notes 39-43 and accompanying text.

125. The legislative history regarding displacement of state law indicates "Section 301 is intended to be stated in the clearest and most unequivocal language possible, so as to foreclose any conceivable misinterpretation of its unqualified intention that Congress shall act preemptively, and to avoid the development of any vague borderline areas between State and Federal protection." H.R. Rep. No. 1476, 94th Cong., 2d Sess. 109, reprinted in 1976 U.S. Code Cong. & Ad. News 5659, at 5745-46. See note 123 and accompanying text.

126. State fine art statutes avoid this constitutional infirmity by protecting only the material object embodying a copyrightable work, and not the copyrighted work itself. See supra notes 93-94 and accompanying text.

127. See Art Laws Don't Protect Films From Alteration, supra note 2. For a discussion of state fine art statutes, see supra

notes 93-99 and accompanying text.

128. Id.

129. See supra notes 13-23 and accompanying text. While the Act does in one isolated instance recognize a moral right of one type of author, songwriters, this exception is reasonably justified in light of the limited nature of other exclusive rights granted the same. See supra notes 39-43 and accompanying text.

130. See supra notes 18-20 and accompanying text.

131. The author argues the "special" moral protection afforded songwriters by the act is justified by the Act's otherwise statutory expropriation of the songwriter's work via its forced royalty scheme. See supra note 129, notes 39-43 and accompanying text.

132. See supra notes 129-30 and accompanying text.

133. See Colorization's Negatives, supra note 2.

134. Id.

135. Id.

136. The colorization process does not alter or deface the original print of the black-and-white film. See supra text accompanying notes 96-97.

137. Colorization costs can run in excess of $300,000 per feature length film.

138. See supra notes 106-07 and accompanying text.

139. Bleistein v. Donaldson, supra note 63, at 252.

140. See text accompanying note 6.

141. See generally notes 20-23 and accompanying text.

142. See generally Porter, supra note 11.

143. See The Color of Money, supra note 2, at 52.

144. Id.

145. Id.

146. See supra note 63 and accompanying text.

147. See The Color Green, supra note 2, at 5.

148. See supra text accompanying notes 96-97.

149. See John Houston Protests "Maltese Falcon" Coloring, supra note 2.

150. See supra notes 108-15 and accompanying text.

151. See supra notes 116-26 and accompanying text.

152. See supra notes 127-28 and accompanying text.

153. See supra text accompanying notes 69-70.

154. See supra text accompanying note 6.

155. See supra note 6.

156. See Art Law Don't Protect Film From Alteration, supra note 2.