AUTEURISM ON TRIAL: MORAL RIGHTS AND FILMS ON TELEVISION

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While we have many accounts of the rise of the idea of Romantic authorship and its impact on copyright law since the eighteenth century, we do not yet have a persuasive narrative about how U.S. copyright law came to treat Hollywood directors as a special category of artistic geniuses. Indeed, we still need to recognize that directors have historically been given greater protection than their counterparts in other media. It is no coincidence that the majority of U.S. cases involving the potential for moral rights have involved films and filmmakers. This expanded protection for Hollywood directors is a far stranger phenomenon than protections offered to novelists and playwrights. While few books or plays are written entirely in cultural and physical isolation, studio filmmaking is a highly collaborative process that requires an elaborate financial and industrial infrastructure. Moreover, the vision of a film director as an individual creator is a myth that has been perpetuated largely by the studios. American auteur cinema began as a way of competing with the popularity of European and independent films in the 1960s, and by the 1980s it had become a full-blown marketing strategy, akin to the star system. In the United States, auteurism is a phenomenon that the Hollywood studios never fully lost control over, and studios have won just about every battle over film authorship. At moments in this battle for expanded rights, the studios may have briefly lost some control over some auteurs, like George Lucas and Steven Spielberg, but, in the end, the rise in protection for film directors has served largely to increase studio control over new media.

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INTRODUCTION

In 1922, Douglas Fairbanks filed a lawsuit involving a few films that he made at the beginning of his movie career. In a contract with the Majestic Motion Picture Company, Fairbanks had included a provision stating that the legendary D.W. Griffith was to direct all of the films in which he appeared.[1] Griffith did indeed proceed to work on—even if he did not direct—Fairbanks's films for Majestic. After about a year, however, first Griffith and then Fairbanks left Majestic for new opportunities. Fairbanks's star rose quickly in Hollywood, and his early films began to increase in value. Majestic's owners decided to cash in on their early investment in the star. First they sold Fairbanks's early films and all of their attendant rights to the Triangle Film Corporation.[2] Then, in 1922, Triangle attempted to sell the Leader Company the right to re-edit the films into two-reel serials.[3]

Fairbanks immediately filed for an injunction to stop the Triangle-Leader deal.[4] He had merely been an employee of Majestic when they made the original films, and he did not hold the copyrights. Fairbanks could not stop Majestic from selling the films to Triangle. But when

1. *Fairbanks v. Winik*, 198 N.Y.S. 299, 299 (Sup. Ct. 1922).
2. *Id.*
3. *Fairbanks v. Winik*, 201 N.Y.S. 487, 488 (App. Div. 1923).
4. 198 N.Y.S. at 300.

Triangle attempted to license the right to re-edit the films, Fairbanks argued that even though he was not the copyright owner, the new versions in the less prestigious two-reel, serial format would be "detrimental to [his] standing in his profession, in that he has never appeared in a two-reel picture, but has appeared only in feature pictures of five or more reels."[5]

The New York Appellate Division that decided the case looked to Fairbanks's original contract with Majestic for guidance.[6] Although the contract failed to give Fairbanks any rights in the film, it did stipulate that Griffith was to direct the films, and, moreover, the contract gave Fairbanks the right to review the final cut of his films. A few decades later, lawsuits, contracts, and industry norms determined that final-cut contracts govern the initial theatrical release of a film but not subsequent theatrical, television, or video releases. In 1922, however, Fairbanks's final-cut case had virtually no judicial precedent, and there were no industry norms to invoke. Nevertheless, the court sided with Fairbanks and granted the temporary injunction. The judges decided that the contract perpetually protected Fairbanks's artistic vision; he had the right to continue to oversee the aesthetic quality of his work even after the first theatrical run of his films.[7]

The judges who heard Fairbanks's case did not offer much insight into their thought processes. They may have been responding to Fairbanks's unusual position in the film industry. His career was a contradiction—an amalgam of art and commerce. Fairbanks was a global box-office star who made prestigious movies. More importantly, Fairbanks had successfully fought for creative autonomy in the studio system. After leaving Majestic, Fairbanks started his own production company, and just a few years before launching his copyright case, Fairbanks—along with Griffith, Charlie Chaplin, and Mary Pickford—co-founded United Artists, a company that gave many filmmakers control over the distribution of their films. Fairbanks was thus emerging as an independent artist in the highly collaborative, commercial, and, for many, still socially suspect medium of the movie.[8]

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5. 201 N.Y.S. at 488.

6. *Id.*

7. *Id.*

8. The year 1922 also proved to be a special year for film copyright. In that year, in addition to the *Fairbanks* case, Charlie Chaplin began to sue imitators who used his tramp character and damaged his reputation. *See* Peter Decherney, *Gag Orders*, *in* MODERNISM AND COPYRIGHT 135, 148–49 (Paul K. Saint-Amour ed., 2011). A third case involving artistic integrity in Hollywood was launched the same year. In this case, a New York court stopped a film company from using the name of the

Whatever the reason, the court chose to protect Fairbanks from the commercial machine of the Hollywood studio system, which always finds new ways to repackage its content. The *Fairbanks* case is largely forgotten, but it was perhaps the first to take on what would become one of the most important, lucrative, and complicated elements of the Hollywood studio system: the licensing of residual rights. In 1922, all but a handful of avant-garde and cult films seemed destined to be forgotten after their initial theatrical runs. But with the continuous cycle of new technologies from small-gauge home-film formats to television to home video to the internet, the repackaging of films for new media has continually expanded the market for Hollywood and offered new outlets for old content.

Like Fairbanks, Hollywood filmmakers have continually seen themselves as casualties of the advance of technology and commerce. They made films for one format, and then their work was changed to suit the demands of another. In the 1920s only a few filmmakers, like the United Artists founders, saw themselves as having enough autonomy to demand that studios remain faithful to their creative products. With the rise of the auteur theory and the attendant restructuring of the studio system in the 1960s, however, things changed. Studios gave directors increased artistic control, and they began to market directors as the sole creators behind the highly collaborative and complex process of making movies. Directors then started to view themselves as a new breed of artist whose work required unprecedented protection against the perceived threat of new media. They launched a campaign in courts and in Congress to prevent truncated, colorized, low-resolution, or otherwise manipulated versions of their work from being distributed. And, I argue, the larger discourse of auteurism slowly began to infiltrate both the language of court decisions and the design of proposed legislation. Eventually we ended up with a regime in which film directors and even the studios themselves have been cast as victims of new media rather than, as has historically been the case, its greatest beneficiaries.

While we have many accounts of the rise of the idea of Romantic authorship and its impact on copyright law since the eighteenth century,[9] we do not yet have a persuasive narrative about how U.S.

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successful writer James Oliver Curwood to advertise a film adaptation of one of his stories, agreeing with Curwood that the film so transformed his story that it no longer resembled the original at all. *Curwood v. Affiliated Distribs., Inc.*, 283 F. 219, 223 (S.D.N.Y. 1922).

9. *See* Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of "Authorship,"* 1991 DUKE L.J. 455; Martha Woodmansee, *The Genius and the*

copyright law came to treat Hollywood directors as a special category of artistic geniuses. Indeed, we still need to recognize that directors have historically been given greater protection than their counterparts in other media. It is no coincidence that the majority of U.S. cases involving the potential for moral rights (a concept and doctrine discussed below), have involved films and filmmakers. This expanded protection for Hollywood directors is a far stranger phenomenon than protections offered to novelists and playwrights. While few books or plays are written entirely in cultural and physical isolation, studio filmmaking is a highly collaborative process that requires an elaborate financial and industrial infrastructure. Moreover, the vision of a film director as an individual creator is a myth that has been perpetuated largely by the studios. American auteur cinema began as a way of competing with the popularity of European and independent films in the 1960s, and by the 1980s it had become a full-blown marketing strategy, akin to the star system.[10] In the United States, auteurism is a phenomenon that the Hollywood studios never fully lost control over, and, as we will see below, studios have won just about every battle over film authorship. At moments in this battle for expanded rights, the studios may have briefly lost some control over auteurs like George Lucas and Steven Spielberg, but, in the end, the rise in protection for film directors has served largely to increase studio control over new media.

I. WHAT ARE MORAL RIGHTS?

Before looking at film directors' campaign for expanded rights, it is necessary to describe the kinds of rights they sought. To put it simply, as the auteur theory moved from Europe to the United States, American film directors wanted the same legal rights as European directors. This was a goal that should have been impossible, because European and U.S. copyright law are built on very different foundations. The Continental European and Anglo-American copyright traditions both emerged out of the same concern: how to protect individual creations without hampering the free flow of ideas. And until the late nineteenth century, as Jane Ginsburg has shown, Continental and Anglo-American law continued to reflect similar social and judicial

Copyright: Economic and Legal Conditions of the Emergence of the "Author," 17 EIGHTEENTH-CENTURY STUD. 425 (1984).

10. TIMOTHY CORRIGAN, A CINEMA WITHOUT WALLS: MOVIES AND CULTURE AFTER VIETNAM 101–36 (1991).

ambivalence about reconciling these goals.[11] In the end, however, the two traditions diverged sharply.

A. The American Tradition

Since the first U.S. Supreme Court copyright decision, *Wheaton v. Peters*,[12] American law has treated copyright as the artificial creation of governments.[13] Copyright is an ingenious bargain devised by legislators and courts. It rewards authors and artists with a limited monopoly on their expression in order to provide an incentive for producing culture and knowledge in the first place. Once the limited time period ends, however, the work enters the public domain and becomes the property of society. From the perspective of U.S. copyright law, authors and artists do not possess any natural or inalienable connection to their work; they only have the rights bestowed on them by the law.

A number of provisions of U.S. law serve to dissociate the creator and the copyright, reinforcing both the artificiality and fleetingness of copyright. Under the work-for-hire doctrine, for example, companies often hold the copyrights to their employees' creations.[14] Under this doctrine, employers are legally the authors of their employees' work. Most film copyrights, for example, are held by studios or production companies, who become the corporate authors. Fairbanks's films were works for hire made for the Majestic Company, which was the copyright owner and author.

Not only can employers rather than the creators hold copyrights, but, in addition, a copyright holder may sell the copyright to someone else, making a copyright merely another transferable commodity. The Majestic Film Company, for example, sold all of the rights in Fairbanks's films to Triangle.[15] Triangle then attempted to license some rights to the Leader Company.[16]

In the United States, an author may also forgo copyright protection and rewards entirely by dedicating a work to the public domain. Before

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11. Jane C. Ginsburg, *A Tale of Two Copyrights: Literary Property in Revolutionary France and America*, 64 TUL. L.R. 991 (1990).

12. 33 U.S. (8 Pet.) 591 (1834).

13. *Id.* at 660–62.

14. On the development of the work-for-hire doctrine see Peter Jaszi & Martha Woodmansee, *Copyright in Transition*, *in* 4 A HISTORY OF THE BOOK IN AMERICA: PRINT IN MOTION: THE EXPANSION OF PUBLISHING AND READING IN THE UNITED STATES, 1880-1940, at 90, 92–94 (Carl F. Kaestle & Janice A. Radway eds., 2009).

15. *Fairbanks v. Winik*, 198 N.Y.S. 299, 299 (Sup. Ct. 1922).

16. *Id.* at 299–300.

the 1909 Copyright Act, U.S. authors had to actively seek a copyright by registering their work with the U.S. Copyright Office.[17] The default status of all works, in other words, was as part of the public domain. After the passage of the 1909 Act, creators still needed to affix a copyright notice to their work, and since the 1976 Act, all work is automatically protected by copyright if it meets the basic criteria.[18] But creators may still use licenses to give away some or all of their rights in their works.[19]

These facets of the law reinforce the fact that U.S. copyright law is built on the idea that copyright exists as a legal construction that can be bought, sold, traded, or dissolved. There is nothing natural, inevitable, or obvious about copyright—at least not in the Anglo-American tradition. It is based on the market-driven and culture-driven theory that rewarding authors and artists is valuable because it benefits society. In the end, however, all work is made for and eventually belongs to society at large.

B. The Continental Tradition

French copyright law, in particular, and Continental copyright law more generally, have been built on a different philosophical foundation. French law assumes that creative work flows from the personality of its creator.[20] As a result, creators of copyrighted work retain some control over their work even after the economic rights have been given away. French law separates the economic rights from natural or moral rights (*droit moral*). Moral rights have nothing to do with morality. Instead, in this context, the term "moral rights" refers to a bundle of additional rights given to the creator of a work. Moral rights include

> (1) the right of paternity, i.e. the right to be identified as the author of the work; (2) the right of integrity, i.e. the right to object to derogatory treatments of the work; (3) the right of divulgation or of dissemination, i.e. the right to decide when and how a work should be made public (including the right

17. *Cf.* Act of Mar. 4, 1909, ch. 320, 35 Stat. 1075 (1909).

18. *See* 17 U.S.C. § 19 (2006); Act of Oct. 19, 1976, Pub. L. No. 94-553, 90 Stat. 2541 (1976).

19. The Creative Commons has made it much easier for authors to give away some or all of their rights by providing free licenses. *See About*, CREATIVE COMMONS, http://www.creativecommons.org/about (last visited Feb. 3, 2011).

20. Ginsburg, *supra* note 11, at 991–92.

> not to make it public); and (4) the right . . . to withdraw a work from commerce . . . .[21]

In the moral rights tradition, commerce and social benefit are ultimately secondary to the author's or artist's sacrosanct right to protect his or her creation and reputation, which is, after all, a part of his or her very being. When Douglas Fairbanks argued that the re-editing of his films would damage his reputation, for example, he invoked the equivalent of the right of integrity. The re-editing of his films, he insisted, would have damaged his reputation and gone against his intentions in making the films. The judge in the case effectively created the right of integrity for Fairbanks by finding it hidden or implied in Fairbanks's contract.[22]

As the Fairbanks case suggests, the United States has not entirely eschewed moral rights or denigrated the status of authors and artists. U.S. law protects many of the rights contained in the moral rights bundle through related legal doctrines like libel, slander, privacy, unfair competition, and passing off. Contracts can also be used to protect authors' rights, and, in 1990, the United States adopted limited moral rights in the Visual Artists Rights Act, which, significantly, excludes motion pictures.[23] It would be too easy to oppose moral rights and U.S. copyright. What we find when we look at the legislative history and case law surrounding moral rights for filmmakers is that policymakers and judges have consistently been swayed by filmmakers' pleas for moral rights. Over and over again, courts and Congress have come to the brink of adopting moral rights for filmmakers. But, in the end, the interests of the studios have always prevailed.

II. CONGRESS AND HOLLYWOOD'S ROCKY RELATIONSHIP WITH MORAL RIGHTS

The Fairbanks decision came at a time when Congress was divided about moral rights and about the role of copyright in fostering international trade, two issues that have been integrally linked. Copyright and international trade policies have remained in tension largely because of the irreconcilable foundations of Anglo-American and Continental copyright law.

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21. PASCAL KAMINA, FILM COPYRIGHT IN THE EUROPEAN UNION 285 (2002).

22. *Fairbanks v. Winik*, 201 N.Y.S. 487, 488 (App. Div. 1923).

23. Timothy M. Casey, Note, *The Visual Artists Rights Act*, 14 HASTINGS COMM. & ENT. L.J. 85, 86, 98 (1991).

A. The 1930's

1. MORAL RIGHTS AND CONGRESS

U.S. copyright law has always—perhaps not surprisingly—been geared towards the protection of national interests. The first U.S. Copyright Act of 1790 limited its benefits to American citizens or residents,[24] and the law was not updated to allow foreign authors to copyright their works until 1891.[25] What many European authors saw as state-sanctioned piracy prevented the United States from entering the international copyright agreement, the Berne Convention for the Protection of Literary and Artistic Works, when it was first ratified in 1886.[26] After a later revision in 1928, the member states placed pressure on the United States to join the Convention. The 1928 agreement, however, contained a significant impediment for the United States: at the suggestion of the French delegation, it included a moral rights provision.[27]

Throughout the 1930s, Congress wavered about whether or not to join the Berne Convention. Two U.S. Presidents and the Register of Copyrights, Thorvald Solberg, pushed for Berne membership, and between 1930 and 1941 at least seven separate bills proposed that the United States enter into the agreement.[28] Hollywood's leaders paid close attention to Congress's deliberations, and both the studios and the talent guilds took part in the debates over Berne membership and the adoption of moral rights in the United States.

When the issue of joining the 1928 convention came before the Senate Foreign Relations Committee, President Herbert Hoover enthusiastically expressed his support for joining.[29] Although the bill under consideration never made it past the committee stage, a few years later the House of Representatives passed another piece of legislation, the Vestal Bill, which again called for the United States to join the Berne Convention.[30] The Vestal Bill contained a number of provisions

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24. Orrin G. Hatch, *Better Late Than Never: Implementation of the 1886 Berne Convention*, 22 CORNELL INT'L L.J. 171, 172 (1989).

25. *Id.* at 174.

26. *Id.* at 173–74.

27. *Id.* at 175.

28. Comment, *International Copyright Protection and the United States: The Impact of the UNESCO Universal Copyright Convention on Existing Law*, 62 YALE L.J. 1065, 1080 (1953).

29. Paul J. Sherman, *The Universal Copyright Convention: Its Effect on United States Law*, 55 COLUM. L. REV. 1137, 1148 (1955).

30. *Id.* at 1147 & n.83.

that would have harmonized U.S. copyright law and Continental law. The bill would have required the United States to eliminate its registration requirement, making all eligible works automatically protected by copyright at the time of their creation. The bill would also have extended the term of copyright to fifty years after the author's death.[31]

The Hollywood studios were integrally involved in the drafting of the Vestal Bill, and they supported both joining Berne and introducing moral rights into U.S. copyright law. The Vestal Bill, however, lost support in the Senate after a Democratic senator from Washington State, Clarence Dill, denounced it as un-American.[32] Harmonization with the Berne Convention, after all, would have dramatically transformed U.S. copyright law and brought it much closer to European law. It would not be the last time that moral rights would be accused of being un-American.

Congress's interest in moral rights did not end with the Vestal Bill, however. In 1934, President Franklin Roosevelt initiated a new move to join the Berne Convention when he sent the text of the agreement to the Senate, asking that they consider ratifying it.[33] Over the next few years, the Senate ordered studies of the issue and considered a number of drafts of a bill proposed by Senator F. Ryan Duffy, a Democrat from Wisconsin.[34] However, just a few years after the Vestal Bill, Hollywood suddenly opposed the Duffy Bill, Berne membership, and moral rights.

2. MORAL RIGHTS AND HOLLYWOOD

Why did the studios change their position on Berne and moral rights? During the brief period between the two bills, many European countries had adopted strict tariffs and quotas on U.S. film imports, and Hollywood moguls argued that they had little to gain by entering into an agreement with European regulators who had grown increasingly

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31. The bill would have made it easier for Hollywood studios to bypass play producers and negotiate film rights directly with authors, and it would have allowed Hollywood to prosecute even inadvertent copyright infringers. Play producer William Brady, who had always been an active copyright lobbyist, attacked the bill as the creation of Hollywood, and the Famous-Players Lasky Company (later Paramount) in particular. *Says Movie Interests Wrote Copyright Bill*, N.Y. TIMES, May 20, 1930, at 22.

32. *Vestal Bill Vexes Dill*, THE SPOKESMAN-REVIEW, Jan. 29, 1931, at 7.

33. Comment, *Copyright Reform and the Duffy Bill*, 47 YALE L.J. 433, 433 (1938).

34. *Id.* at 434.

hostile to the American film industry. The Duffy Bill also contained a number of exemptions for charitable organizations, broadcasters, and others, which all corporate copyright holders seemed to oppose uniformly.

The biggest controversy in Hollywood, however, surrounded the congressional testimony of screenwriter John Howard Lawson, future member of the Hollywood Ten. Testifying on behalf of the Screen Writers' Guild, Lawson delivered a stirring indictment of the treatment of writers in Hollywood.[35] Lawson garnered a lot of press, and his picture of the plight of writers seemed to suggest that screenwriters supported the adoption of moral rights in the United States. In theory at least, moral rights legislation might have proven to be a boon to screenwriters if it allowed them to control their work after it fell into the hands of producers, who were only interested in the bottom line. But Lawson hadn't been briefed on all of the details: the Duffy Bill contained a specific exemption that would have permitted studios to violate the moral rights of writers by altering scripts.[36] Only a few days after Lawson appeared before Congress, the Screen Writers' Guild sent a follow-up letter to the Senate clarifying that it was now opposed to the Duffy Bill.[37] Without the support of Hollywood studios, screenwriters, and rights holders from other industries, the Senate indefinitely deferred the Duffy Bill.

The legislative skirmishes in the 1930s proved the incompatibility of moral rights and the Anglo-American tradition. American copyright law is based on statutory compromise and the idea that copyright is a negotiable commodity. Moral rights emerge from a fundamental belief in the inalienable rights of artists. Once those natural rights become subject to negotiation and compromise, they necessarily dissipate.

The Hollywood studios supported harmonization with international copyright law when they successfully negotiated exceptions that benefited their industry. In 1939, just for example, the studios reconsidered the advantages of moral rights on their own terms, and

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35. *See* Philip K. Scheuer, *Film Writers All Stirred Up by Congress*, L.A. TIMES, Apr. 5, 1936, at B4.

36. *Id.*

37. *Id.* Joining Berne did not necessarily entail adopting moral rights. Great Britain joined the 1928 Berne Convention without adopting moral rights; instead, they argued that other areas of British law offered equivalent protection for authors and artists, as the United States would do when it finally joined Berne in 1989. WILLIAM STRAUSS, STUDY NO. 4: THE MORAL RIGHT OF THE AUTHOR (July 1959), *reprinted in* 2 STUDIES ON COPYRIGHT 963, 976–77 (Arthur Fisher memorial ed. 1963).

they sent a delegation to a meeting of Berne members.[38] The Hollywood representatives argued that film producers and not directors should be considered the rightful film authors, and producers should hold moral rights in film.[39] In the collaborative and industrial medium of film, after all, the question of who is the author of a film is far from obvious. But Hollywood's occasional support for moral rights legislation is the exception. More often, the studios have opposed harmonization, seeing it as a potential threat to their reliance on corporate ownership.[40]

B. Moral Rights, Screen Credit, and the Cold War

John Howard Lawson's turn towards moral rights as a panacea for the mistreatment of writers in Hollywood portended the desperate situation for writers and other artists during the Cold War. During the era of the blacklist, in particular, credit for work on films became a highly contentious subject. Many blacklisted film writers, actors, and directors found their names removed from films they had worked on and were proud of. On occasion, debates about film credit were taken to court, but writers and the leaders of the talent guilds soon learned that suspected Communists had trouble winning the sympathies of U.S. courts.[41]

One significant dispute about screen credit during the early years of the Cold War involved a court battle over moral rights.[42] The case

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38. *Movies Seek Change in Copyright Pact*, N.Y. TIMES, July 11, 1939, at 17.

39. *Id.*

40. Determining the moral rights holder in the collaborative medium of film is extremely difficult, and different countries have found different solutions. One solution would be to ask whose personality would be harmed by the violation of the bundle of protections under a moral rights regime. In the end, when the United States did finally relent and sign an international copyright treaty, they signed the UNESCO Universal Copyright Convention, proposed in 1947, which left moral rights to national discretion. PAUL GODSTEIN, COPYRIGHT'S HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKEBOX 151 (rev. ed. 2003). The United States eventually joined the Berne Convention as well, but not until 1989, sixty years after the 1928 revision. In response, Congress passed very limited moral rights legislation, the Visual Artists Rights Act of 1990 (VARA). Visual Artists Rights Act of 1990, Pub. L. No. 101-650, 104 Stat. 5128 (1990) (codified as 17 U.S.C. § 106A (2006)). But even VARA allows artists to waive their moral rights, which again is tantamount to nullifying them. After all, what good is an inalienable right if one can alienate it?

41. *See* Thomas M. Pryor, *Film Writers Seek to End R. K. O. Suit*, N.Y. TIMES, June 5, 1952, at 39.

42. *Shostakovich v. Twentieth Century-Fox Film Corp.*, 80 N.Y.S.2d 575 (Sup. Ct. 1948), *aff'd*, 87 N.Y.S.2d 430 (App. Div. 1949).

involved four of the most famous and accomplished Soviet composers, Dmitri Shostakovich, Serge Prokofieff, Aram Khachaturian, and Nicholai Miashovsky.[43] Where blacklisted writers wanted credit for their work, the Soviet composers feared that having their names on a film would suggest that they were also responsible for, or at least sympathetic to, the film's ideological messages.[44] With a blacklist in force in Hollywood and an active Stalinist culture ministry in the U.S.S.R, such fears were more than justified.

In particular, the Soviet composers opposed the use of their names and music in the William Wellman–directed defection drama *The Iron Curtain* (1948).[45] The head of the Twentieth Century-Fox music department, Alfred Newman, used public-domain compositions of Soviet composers throughout the film, both as incidental music on the score and within the story. The credit sequence also listed the names of the four Soviet composers.[46] Fox released *The Iron Curtain* just one year after the Hollywood Ten appeared as hostile witnesses before the House Committee on Un-American Activities.[47] Everyone in Hollywood was fearful of being involved in a film sympathetic to Communism or the Soviet Union. But Newman did not seem to have known the stakes of his musical choices in this explicitly *anti*-Communist picture. Although none of the four Soviet composers were working in Hollywood, their careers were all on the line in the U.S.S.R., and one can understand their desire to protect their reputations. Shortly before the release of *The Iron Curtain*, Communist party official Andrei Zhdanov led a purge of anti-realist, formal experimentation in Soviet music. The four composers Newman had selected for the soundtrack were all condemned for their allegedly anti-Soviet compositions, and the appearance of their compositions in *The Iron Curtain* added fuel to the fire.[48]

The composers are unlikely to have seen the film, and it is not known if the composers initiated the case themselves or if Stalin's government launched the case in their names; the latter is more likely.

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43. *Id.* at 576.

44. *Id.* at 578.

45. *Id.* at 576; Daniel J. Leab, *'The Iron Curtain' (1948): Hollywood's First Cold War Movie*, 8 HIST. J. FILM, RADIO & TELEVISION 153, 170 (1988).

46. *Shostakovich*, 80 N.Y.S.2d at 576–77

47. *See* Leab, *supra* note 45, at 153–54.

48. *See id.* at 174; Per Skans, *The 1948 Formalism Campaign*, *in* IAN MACDONALD, THE NEW SHOSTAKOVICH 322 (Raymond Clarke ed. 2006); SOLOMON VOLKOV, SHOSTAKOVICH AND STALIN: THE EXTRAORDINARY RELATIONSHIP BETWEEN THE GREAT COMPOSER AND THE BRUTAL DICTATOR ch. 6 (Antonina W. Bouis trans., 2004). For more on *The Iron Curtain*, see generally Leab, *supra* note 45.

Either way, the complaint claimed that the use of the composers' names and music in the film suggested that they endorsed *The Iron Curtain*'s clear anti-Communist message.[49]

When Justice Edward Koch, who wrote the decision, came to the moral rights claims of the composers, he relied almost entirely on a speculative law review article,[50] since moral rights case law in the United States was so thin. Koch conceded that the existence of moral rights in U.S. copyright law was unclear. If moral rights did exist, he wondered, what kind of test would be used to measure when they had been violated: "good taste, artistic worth, political beliefs, moral concepts . . . ?"[51] Koch entertained the idea that works in the public domain might still be subject to the terms of moral rights, although other aspects of copyright law no longer pertained. The problem in this case, Koch explained, was that the Soviet composers had not invoked moral rights properly.[52] They did not claim, for example, that Newman's score for *The Iron Curtain* distorted their work; a significantly altered composition might have been a violation of the composers' rights of integrity. And they did not claim that the work had been incorrectly attributed to them, which might have been a violation of the right of paternity. Instead, the composers feared that audiences would connect them with the film's message. Koch, however, believed that audiences would not assume a line in the musical credits amounted to an endorsement of the political or ideological bent of a film, and he could not see how the use of the composers' music interfered with their moral rights, whether or not those rights existed in the United States.[53] Koch escaped having to decide how to apply the doctrine of moral rights; although, significantly, he acknowledged that such rights might be applicable to U.S. copyright law.[54]

The Soviet composers also sued Fox in French court, and there they won their moral rights claim, successfully preventing the continued distribution of the film in France.[55] In the high-stakes

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49. *Shostakovich*, 80 N.Y.S.2d at 578; Skans, *supra* note 48, at 326–27.

50. Martin A. Roeder, *The Doctrine of Moral Right: A Story in the Law of Artists, Authors and Creators*, 53 HARV. L. REV. 554 (1940); *see also Shostakovich*, 80 N.Y.S.2d at 577–79.

51. *Shostakovich*, 80 N.Y.S.2d at 579.

52. *Id.* at 578.

53. *See id.* at 578–59.

54. *Id.* at 579.

55. *Soc. Le Chant de Monde v. Soc. Fox Europa*, Cour d'appel [CA] [regional court of appeal] Paris, 1e ch., Jan. 13, 1953, Gaz. Pal. 1953, 191, note Ancel (Fr.).

political climate of the Cold War, French courts were willing to allow artists to use moral rights to control the public perception of their political sympathies. The Soviet composers' case further suggests some of the potential power of moral rights arguments and why they have been invoked so frequently in film cases. In the politically suspicious and intolerant climates of Cold War America and Stalinist Russia, reputation was too important to leave in others' hands. Moral rights promised to give individual artists some control over their names and works when the copyrights belonged to corporations or the work had entered the public domain. Even when the political stakes have been less dramatic, artists have looked to moral rights for some foothold in the collaborative and commercial world of Hollywood.

III. SPONSORSHIP AND THE TELEVISION FRONTIER

Although moral rights did not emerge as a weapon in the reputation battles of the Cold War, they did become important in the commercial sphere, especially after the advent of television. The repackaging of films for television (and later home video) proved to be the flash point for the conflict between filmmakers who wanted to preserve the integrity of their films, and Hollywood studios, which wanted to make money by reediting films for the small screen. But Hollywood did not embrace television all at once, and it took time for actors, directors, and studio heads to negotiate the new territory of television exhibition. Moral rights surfaced as a key term in the negotiations.

A. Initial Barriers Between Hollywood and Television

As Marshall McLuhan famously noted, "the 'content' of any medium is always another medium."[56] And so the enormous backlog of films in studio vaults should have been the natural content pool for early television. A number of factors, however, held the major studios back from releasing their films to television. At first, the studios treated television as competition rather than as a new outlet for films. Theater owners exacerbated the sense of competition by exerting enormous pressure on Hollywood not to upset their longstanding distribution contracts.[57] Another reason that studios held off on releasing films to

56. MARSHALL MCLUHAN, UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN 8 (1964).

57. *See* CHRISTOPHER ANDERSON, HOLLYWOOD TV: THE STUDIO SYSTEM IN THE FIFTIES 22 (1994); WILLIAM BODDY, FIFTIES TELEVISION: THE INDUSTRY AND ITS

television was that many film-industry leaders hoped that another financial model, such as subscription television, might win out over sponsored advertising.[58] Studios also resisted the lure of television, because the television networks were not in a position, at least at first, to offer sufficiently enticing sums for film-broadcast rights.[59] A final block in the road to releasing films to television were the negotiations with "talent"—the actors, directors, writers, and musicians—who all wanted and deserved compensation for the re-release of their work.[60] The talent had, of course, been paid for their contributions to the initial films, but how should they be compensated for the broadcast of their work in this new medium?[61]

One by one, all of the barriers preventing Hollywood from embracing television began to fall, and studios started to produce material for television. Network prices for films shot up.[62] And through collective-bargaining agreements, all of the talent guilds and licensing societies eventually arranged for residual rights to be paid to their members for the television exhibition of their work.[63] But compensation was not the only labor issue that stood in the way of Hollywood releasing its films to television. Many film stars and directors shared Douglas Fairbanks's concerns about the impact of reedited or otherwise manipulated versions of their work being prepared for display in a new medium or format. In the case of television, the medium came with a new economic model as well: sponsored advertising. And film talent worried about product pitches being inserted into their films.

B. Moral Rights and Television

Since the invention of television, film writers, actors, and directors have used the copyright doctrine of moral rights to assert—or at least

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CRITICS 69 (1990); MICHELE HILMES, HOLLYWOOD AND BROADCASTING: FROM RADIO TO CABLE 157 (1990); William Lafferty, *Feature Films on Prime-Time Television*, *in* HOLLYWOOD IN THE AGE OF TELEVISION 235, 237–38 (Tino Balio ed. 1990).

58. *See* HILMES, *supra* note 57, at 117, 157; Lafferty, *supra* note 57, at 237.

59. *See* ANDERSON, *supra* note 57, at 22; HILMES, *supra* note 57, at 157; Lafferty, *supra* note 57, at 238.

60. *See* Lafferty, *supra* note 57, at 236–37.

61. By the early 1950s, the studios had become so stubborn about releasing their films that the Justice Department sued Hollywood (ultimately unsuccessfully), claiming that its unmovable hold on its films amounted to monopolistic behavior. *See* HILMES, *supra* note 57, at 157, 159.

62. *See* Lafferty, *supra* note 57, at 239–40.

63. *See* HILMES, *supra* note 57, at 158–59; Lafferty, *supra* note 57, at 239–40.

attempt to assert—control over the use of their work on television. Screen cowboys Roy Rogers and Gene Autry blazed the trail.

1. A SHORT-LIVED VICTORY FOR MORAL RIGHTS

Rogers and Autry were the reigning cowboy film stars in the 1930s, 1940s, and 1950s, and they both made their careers at the independent Republic Studios, which specialized in B-grade Westerns, action films, and serials.[64] While major studios held on to their films, the small Republic Studio began releasing films to television in the early 1950s.[65] But when Republic announced that it was releasing Rogers's films to television, "the king of the cowboys," as Rogers was known, protested.[66] He was not motivated entirely by a reverence for his original big-screen masterpieces; the future of his career was at stake as well.[67] In 1951, *The Roy Rogers Show* premiered on television, and Rogers viewed the Republic films as potential competition. Rogers's lawyers drew on contract law, advertising law, and the emerging legal field of publicity rights to stop Republic from selling the television rights.[68] The lawyers argued that showing the films with sponsored advertising amounted to Rogers's endorsement of the products advertised, and Republic needed Rogers's permission for that kind of promotion.[69]

Television was still relatively new, and the legal models for translating one medium (film) to another (television) were just being worked out. Taking a first stab at the issue, a federal trial court in California sided with Rogers.[70] The court awarded Rogers a permanent injunction, halting the sale of his films to television. The courts decided that Republic needed Rogers's permission to license his films for airing on television with commercials.[71] As the *New York Times* reported, after Rogers's cases, sponsors began to back away from supporting old

64. *See* DOUGLAS GOMERY, THE HOLLYWOOD STUDIO SYSTEM 184–87 (1986).

65. KERRY SEGRAVE, MOVIES AT HOME: HOW HOLLYWOOD CAME TO TELEVISION 14 (1999).

66. *See Rogers v. Republic Prods., Inc.*, 104 F. Supp. 328 (S.D. Cal. 1952), *rev'd sub nom. Republic Pictures Corp. v. Rogers*, 213 F.2d 662 (9th Cir. 1954).

67. *See id.* at 334.

68. *See id.* at 342–44.

69. *See Republic Pictures Corp. v. Rogers*, 213 F.2d at 663.

70. *Rogers v. Republic Prods., Inc.*, 104 F. Supp. at 342–44.

71. *See id.* at 342.

films released to television, fearing that other actors would join Rogers's crusade.[72]

In October of 1951, "America's favorite cowboy," Gene Autry, realized the sponsors' fears, and he filed his own suit against Republic.[73] Like Rogers, Autry had a television show, and he reiterated Rogers's successful complaints about sponsorship. Autry added some new claims as well.[74] Autry invoked moral rights, claiming that the pruning of his feature films to fifty-three minutes for airing with commercials in a one-hour television slot violated the integrity of his work.[75]

The judge who first heard Autry's case saw the issue differently from the judge who decided the *Rogers* case. Judge Benjamin Harrison took Autry's suit very seriously, as one of those special cases that had the potential to determine the future of a new medium. "This case," he wrote, "presents one of the many questions constantly arising as a result of the impact of television upon the entertainment world."[76] On the question of whether or not showing a film on television with advertisements required additional permission from the stars, Harrison disagreed with the *Rogers* decision.[77] Showing advertisements during a film, Harrison observed, was no different than displaying advertisements in a theater in which a film was shown.[78] No one asked the actors' permission to display a candy ad in the theater lobby while their film was shown inside. Why should stars be allowed to control the advertising that interrupted their films on television?[79]

2. HOLLYWOOD NARROWLY DEFEATS MORAL RIGHTS

The conflicting *Rogers* and *Autry* decisions led to confusion in Hollywood, and negotiations between television networks and studio

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72. *See* Thomas M. Pryor, *Roy Rogers Suing on Video Problem*, N.Y. TIMES, July 24, 1951, at 21.

73. *Autry v. Republic Prods., Inc.*, 104 F. Supp. 918 (S.D. Cal. 1952), *aff'd*, 213 F.2d 667 (9th Cir. 1954).

74. *Autry Sues Studio over Films for TV*, N.Y. TIMES, Oct. 31, 1951, at 31.

75. *Autry*, 213 F.2d at 669. He accused the studio of violating antitrust and labor laws by forcing actors to give away television rights when they signed new film contracts. Talent should be allowed, he argued, to negotiate rights for different media separately. *See Autry*, 104 F. Supp. at 922.

76. *Autry*, 104 F. Supp. at 920.

77. *Id.* at 922–24.

78. *Id.* at 924.

79. *Id.*

heads over the release of films to television stagnated.[80] The Ninth Circuit heard both the *Rogers* and *Autry* cases on appeal.[81] On the same day in 1954, the Ninth Circuit decided both cases, and in its decisions, the court paved the way for Hollywood to release films for television.

Writing for the court in both cases, Judge Homer T. Bone cemented the *Autry* trial court's decision: Republic did not need the actors' permission either to edit their films for television or to release the films to be shown with advertising.[82] But Bone was both a former Socialist Party member and a former senator with a reputation as a corporate watchdog.[83] In his decision, Bone left the door open for future artists to use moral rights claims in order to assert their rights in the face of corporate abuse. Republic had merely cut the films down to fifty-three minutes to be shown with seven minutes of commercials. In this instance, according to the court, Republic had not gone too far.[84] But, Bone warned, "cutting and editing could result in *emasculating* the motion pictures so that they would no longer contain substantially the same motion and dynamic and dramatic qualities which it was the purpose of the artist's employment to produce."[85] He warned further that "we can conceive that some such exhibitions could be so '*doctored*' as to make it appear that the artist actually endorses the products of the programs' sponsors."[86]

Bone's choice of words is telling. Both his fear of an "emasculated" work of art and of a film "doctored" to change its relationship to the advertising suggest a view of intellectual property as an extension of one's body. The foundation of at least one common view of intellectual property, derived from seventeenth-century philosopher John Locke, holds that the right of personal property stems from our relationship with our bodies.[87] We own and expect control over our bodies, and, by extension, we expect the same rights over our

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80. Thomas M. Pryor, *TV-Movie Tie-Ins Remain Confused*, N.Y. TIMES, May 15, 1952, at 39.

81. *Republic Pictures Corp. v. Rogers*, 213 F.2d 662 (9th Cir. 1954); *Autry v. Republic Prods., Inc.*, 213 F.2d 667 (9th Cir. 1954).

82. *Republic Pictures Corp. v. Rogers*, 213 F.2d at 666; *Autry*, 213 F.2d at 668–69.

83. Frank Chesley, *Bone, Homer Truett (1883-1970)*, HISTORYLINK.ORG, Dec. 28, 2003, http://www.historylink.org/index.cfm?DisplayPage=output.cfm&file_id=5628.

84. *Autry*, 213 F.2d at 669.

85. *Id.* (emphasis added).

86. *Id.* (emphasis added).

87. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 305–06 (Peter Laslett ed., Cambridge Univ. Press 2d ed. 1967) (1690).

personal property and possessions.[88] The expansion of this perspective to intellectual property underlies the doctrine of moral rights as well. If intellectual property is a natural extension of one's body, then it is truly brutal to separate creative work from its maker. This Lockean theory of property continually resurfaces in both American jurisprudence and American culture more broadly, despite the fact that it contradicts the legislative bargain of Anglo-American copyright. And by linking moral rights in film with Lockean property theory, Bone established the judicial formula that would eventually lead to the expansion of moral rights for filmmakers.

After the Ninth Circuit's decision, the *Los Angeles Times* joked that television viewers should not "be surprised if Roy Rogers or Gene Autry [came] up sponsored by the makers of such feminine things as perfumes."[89] Like Bone, though in a different sense, the *Times* reporter feared that advertising might prove a threat to the masculinity of the screen cowboys. But the Ninth Circuit decision proved to be prescient: audiences do not assume that the actors in a particular film endorse the products advertised during its televised showing any more than they assume that a composer endorses the ideological message of a film in which his or her music is used.

With moral rights temporarily in check, film studios were free to release their films to television without fear of interference from actors or directors. As a result, Republic stopped making new films and its primary business became licensing its old films for television. And just a few months after the conclusion of the *Rogers* and *Autry* cases, the major Hollywood studios joined Republic and began releasing their backlogs of films to television networks as well. Although moral rights is rarely, if ever, mentioned in the history of the Hollywood studios' release of films to television, the decision over Gene Autry's assertion of moral rights was clearly a pivotal event in that history.

IV. AUTEURISM COMES TO AMERICA

Hollywood's embrace of television was just one element of a larger trend towards conglomeration and consolidation. During the late 1960s and early 1970s, every Hollywood studio was either acquired by a large multinational conglomerate or became a diversified

88. *Id.*

89. Walter Ames, *Republic Sells Autry, Rogers Films to Video*, L.A. TIMES, Mar. 22, 1955, at 26.

communications company on its own.[90] Television distribution, and eventually cable, home video, and internet distribution all became part of the regular life of a feature film.[91]

A. Hollywood Adapts

At the same time that Hollywood increased its profits by exploiting new media, however, the films themselves began to lose touch with American and international audiences.[92] A series of financially successful independent films in the late 1960s like *Easy Rider*,[93] European art films like Michelangelo Antonioni's *Blow-Up*,[94] and soft-core pornography like *I am Curious (Yellow)*[95] showed Hollywood executives that they were failing to reach the growing audience for films with mature subject matter.[96] The studios responded to this crisis by giving much more control—both creative and financial—to individual filmmakers.

On the one hand, the new power given to directors emulated the model of the European cinemas, which were gaining a foothold in American and international markets. Pioneered by the French New Wave's call for an author-oriented cinema, the European art-house circuit celebrated a gallery of great directors, from Francois Truffaut and Jean-Luc Godard to Ingmar Bergman and Satyajit Ray.

On the other hand, the new economic power given to individual filmmakers resulted from the transformation of the studio system. Since the separation of exhibition from production and distribution after the 1948 Supreme Court order,[97] a.k.a. the Paramount Decision, Hollywood studios had been moving towards a leaner, blockbuster-driven production model. Studios comprising stables of writers, actors, directors, and editors seemed cumbersome and bloated. Instead, the

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90. *See* Thomas Schatz, *The New Hollywood*, *in* FILM THEORY GOES TO THE MOVIES 8, 15 (Jim Collins et al. eds., 1993).

91. *Id.* at 8–10.

92. *See* GEOFF KING, NEW HOLLYWOOD CINEMA: AN INTRODUCTION 34–35 (2002).

93. EASY RIDER (Pando Co. & Raybert Productions 1969).

94. BLOW-UP (Carlo Ponti 1966).

95. JAG ÄR NYFIKEN – EN FILM I GULT [I AM CURIOUS (YELLOW)] (Sandrew Film & Teater AB 1967).

96. JON LEWIS, HOLLYWOOD V. HARD CORE: HOW THE STRUGGLE OVER CENSORSHIP SAVED THE MODERN FILM INDUSTRY 145–47, 158–62 (2000); *see also* PETER BISKIND, EASY RIDERS, RAGING BULLS: HOW THE SEX-DRUGS-AND-ROCK'N' ROLL GENERATION SAVED HOLLYWOOD (1998).

97. *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948).

studios became primarily distributors for films made by independent production companies. In the 1950s, some of the most successful Hollywood directors, like Fritz Lang, set up their own independent production companies, and they cut deals with the studios to distribute and often fund their films.[98] In the 1960s, the studios set up a generation of film-school graduates with similar deals. Warner Brothers, for example, gave Francis Ford Coppola the seed funds to start his American Zoetrope company,[99] which produced such director-driven films as George Lucas's *THX 1138*[100] and Coppola's own *Apocalypse Now*.[101] Universal entered into a distribution deal with BBS, the production company that made *Easy Rider*.[102] And Paramount started the appropriately named Directors' Company to finance the films of Coppola, William Friedkin, and Peter Bogdanovich.

B. French Auteurism Arrives

The new model of the autonomous director-general in charge of the creative and commercial elements of a production coincided perfectly with the Americanization and popularization of the auteur theory in the 1960s. French critics writing for the film journal *Cahiers du cinema* first elaborated the *politique des auteurs* in the post–World War II period.[103] They described the ability of select directors—for example John Ford or Howard Hawks—to infuse films with an individual world view, despite the collaborative, factory-like system of Hollywood.[104] The French critics then turned to filmmaking and built on their understanding of auteurism, with its focus on individual expression and creative autonomy. American film critic Andrew Sarris began to translate the *politique des auteurs* for American readers in the 1960s. After a series of articles in the journal *Film Culture*, Sarris published his book on the auteur theory in 1968, *The American Cinema: Directors and Directions, 1929-1968*. The idea rapidly

98. Matthew Bernstein, *Hollywood's Semi-Independent Production*, 32 CINEMA J. 41 (1993).

99. BISKIND, *supra* note 96, at 90–93.

100. THX 1138 (American Zoetrope Productions 1971).

101. APOCALYPSE NOW (Omni Zoetrope Productions 1979).

102. EASY RIDER, *supra* note 93.

103. *See, e.g.*, ROBERT STAM, FILM THEORY: INTRODUCTION 85 (2000).

104. Peter Wollen, *The Listmaker*, SIGHT & SOUND, Nov. 1998, at 30 (book review).

penetrated both American culture and Hollywood, and both studios and critics had a name for the new model of studio production: auteurism.[105]

The two cultures of the New Hollywood—the complex commercial machine bent on repackaging films for new media and the director-driven system of semi-independent production—were on a collision course. Moral right would be at the center of coming conflicts between directors and studios.

C. Otto Preminger and George Stevens

Two of the early star directors and studio-supported independents, Otto Preminger and George Stevens, were the first to test moral rights in the nascent auteur culture. Preminger and Stevens both became marquee-worthy director-producers in the 1950s. *Los Angeles Times* gossip columnist Joyce Haber once remarked about Preminger that "[h]is name in an ad or on a marquee is more familiar to moviegoers than those of all but our giant performers."[106]

In 1965, both Preminger and Stevens decided to take a stand against the display of films on television, resuming the battle that Autry and Rogers had begun. Preminger and Stevens, however, were not worried about their films being used to endorse products. They feared that commercial interruptions and the shortening of films for television would destroy the integrity of their carefully crafted works of art.[107] In other words, they wanted moral rights protection against Hollywood's manipulation of films to meet the demands of the new medium.

In the 1950s, Preminger made a series of critically successful films for his own independent company, Carlyle Productions. The outspoken Preminger publicly railed against the showing of films on television, referring to commercial interruptions as "scandalous, barbaric, awful."[108] He boasted that he successfully withheld his films *The Moon is Blue*[109] and *The Man with the Golden Arm*[110] from TV, although the explicit treatment of sex and drug addiction in those films made them

105. On Sarris's influence, see STAM, *supra* note 103, at 89–90; Wollen, *supra* note 104, at 30–31.

106. Joyce Haber, *Otto Preminger Likes and Earns His Reputation*, L.A. TIMES, July 19, 1970, Calender, at 13.

107. *Stevens v. NBC*, 76 Cal. Rptr. 106 (Ct. App. 1969); *Preminger v. Columbia Pictures Corp.*, 267 N.Y.S.2d 594 (Sup. Ct. 1966).

108. Philip K. Scheuer, *Otto's Midas Touch Pays Off*, L.A. TIMES, Mar. 30, 1965, pt. IV, at 9.

109. THE MOON IS BLUE (Holmby Productions 1953).

110. THE MAN WITH THE GOLDEN ARM (Carlyle Productions 1955).

unlikely candidates for television in the first place.[111] When Columbia Pictures licensed Preminger's 1959 masterpiece *Anatomy of a Murder* to be aired on ABC, Preminger opposed the sale in court.[112] Preminger had a final-cut contract, but by this point, industry norms and court decisions had made clear that final cut did not preclude editing for television. Columbia and its TV subsidiary, Screen Gems, had acquired the television rights to the film, and Preminger's claim rested on his moral rights assertion, though he did not use that phrase explicitly. Preminger argued that the editing of his film for television would

> a) detract from the artistic merit of "Anatomy of a Murder";
> b) damage Preminger's reputation;
> c) cheapen and tend to destroy "Anatomy"'s commercial value;
> d) injure [Preminger and Carlyle Productions] in the conduct of their business;
> e) falsely represent to the public that the film shown is Preminger's film.[113]

If it were a French court, Preminger could have claimed that his rights of integrity and attribution had both been violated. Borrowing the bodily language from the Autry case, Preminger described the edited version of his film as "mutilate[ed]."[114]

Working with very little time, the New York Supreme Court issued a temporary injunction,[115] and ABC aired *Anatomy of a Murder* without commercials in Los Angeles and Chicago. But when the court heard the case again with more time to deliberate, Preminger lost.[116] Justice Arthur Klein reached a conclusion similar to the Ninth Circuit's decision in the Autry case. If Preminger's one-hundred-and-sixty-one-minute film had been cut to one hundred minutes, as ABC's brochure had falsely advertised, Klein decided, "such cuts would not be minor and indeed could well be described as mutilation."[117] But ABC's cuts were less extensive, so he allowed the edited and interrupted version to

111. Scheuer, *supra* note 108.

112. *Preminger*, 267 N.Y.S.2d at 596–97.

113. *Id.* at 596.

114. *Id.* at 601 ("[P]laintiffs consistently refer to the practice of interrupting and making minor cuts as 'mutilation' . . . . ").

115. *Id.* at 597.

116. *Id.* at 604.

117. *Id.* at 603.

be shown.[118] Across the country, in California, George Stevens's very similar case ended with a similar conclusion.[119]

It is strange that Bone in the *Autry* case and Klein in the *Preminger* case both considered the amount of material cut from the original film to be the single factor that determined whether or not integrity had been compromised. A much more valuable test would have been whether the quality or impact or aesthetic importance of the original had been compromised. Quantitative measures can only go so far in assessing the "mutilation" of an original. Eliminating a few key moments can transform a work. On the other hand, more lengthy deletions might have little effect. The number of minutes cited in the two cases appears almost arbitrary. A fifty-three-minute Autry movie is acceptable; a one-hundred-minute Preminger movie is too short. The arbitrariness of these assertions suggests that these judges were not willing to take on the aesthetic evaluation necessary to oversee the stewardship of moral rights, although they were willing to lay the groundwork and necessary precedent for subsequent decisions to take advantage of moral rights.

Not only did courts and the press regularly discuss reediting of films for television as "mutilation" and "dismemberment,"[120] but the public, now tutored in the auteur theory, was starting to use the same language of bodily harm. Both the judge who decided the *Stevens* case and an allegedly random television viewer from Reseda, California, who was interviewed by the *Los Angeles Times*, used the same word to describe the editing of films for television: "emasculat[ion]."[121] It is also the word that Bone had used in *Autry*,[122] and with its popularization and formalization in court decisions, the reediting of films for television took on violent, gendered connotations, in addition to absorbing Lockean property theory.

D. The Industry Responds

The *Preminger* and *Stevens* cases sent ripples through the film and television industries. The National Association of Broadcasters (NAB)

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118. *Writ to Keep Film off TV Is Refused*, N.Y. TIMES, Oct. 14, 1965, at 53.

119. *Stevens v. NBC*, 76 Cal. Rptr. 106, 110–11 (Ct. App. 1969).

120. *See, e.g.*, Peter Bart, *N.B.C.-TV Is Sued by Film Director*, N.Y. TIMES, Oct. 27, 1965, at 39; Hal Humphrey, *TV Commercials Play Knock-Knock*, L.A. TIMES, Nov. 18, 1965, pt. V, at 16.

121. Humphrey, *supra* note 120.

122. *Autry v. Republic Prods. Inc.*, 213 F.2d 667, 669 (9th Cir. 1954) ("[W]e can conceive that some such cutting and editing could result in "emasculating" the motion pictures . . . . ").

began to fear an uprising of auteurs, possibly supported by the public. In 1965, while both the *Preminger* and *Stevens* cases were underway, NAB executive Howard Bell recommended to the NAB board that they "establish some standards on frequency and placement of commercial messages" for use when showing "certain types of movies."[123] The NAB waited for the cases to be resolved, however. When the courts effectively stopped the auteurs' revolt, the NAB decided not to change their methods of sponsorship.

Responding to the *Stevens* and *Preminger* cases, director Mervyn LeRoy explained the stakes of the cases for Hollywood directors. LeRoy had been directing high-profile studio movies since the 1920s, including *Little Caesar,*[124] *Gold Diggers of 1933,*[125] *The Bad Seed,*[126] *Gypsy,*[127] and an uncredited directing stint on the *Wizard of Oz*.[128] Unlike Preminger and Stevens, however, LeRoy was willing to meet the new technology halfway. For example, he helped advertise the television showing of his film *Quo Vadis*,[129] even though it had thirty-three commercial interruptions. He even expressed a willingness to help edit his films down for television if anyone asked. What was most important to LeRoy was attribution—the assurance that people saw the films and knew who directed them. "A man makes something like a Mervyn LeRoy production," he explained, "and when its television showing is advertised, they leave out the names of the producers and directors . . . . I worked for years on *Quo Vadis*, and I want people to know who made it."[130] LeRoy and many other filmmakers feared losing credit for their work as much as they feared assuming credit for lesser versions of their films. In both scenarios, moral rights would have helped the handful of concerned directors. But, as responses from the studios and television networks make clear, moral rights law would also have hampered or at least complicated the sale of films to television.

In all of the early television cases involving moral rights, the courts chose to nurture the new medium of television by protecting studios' rights to license new versions (or derivative works) over individual directors' rights to protect their artistic vision. Of course,

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123. Humphrey, *supra* note 120.

124. LITTLE CAESAR (First National Pictures 1931).

125. GOLD DIGGERS OF 1933 (Warner Bros. Pictures 1933).

126. THE BAD SEED (Warner Bros. Pictures 1956).

127. GYPSY (Warner Bros. Pictures 1962).

128. THE WIZARD OF OZ (Metro-Goldwyn-Mayer Corp. 1939).

129. QUO VADIS (Metro-Goldwyn-Mayer Corp. 1951).

130. Walt Dutton, *Television-Movie Tiff Shaping Up*, L.A. TIMES, Feb. 18, 1966, pt. IV, at 16.

Hollywood directors had been on the other end of the equation for years: fending off complaints that their films destroyed great works of literature. The irony was not lost on everyone. An opinion piece in the *Los Angeles Times* pointed out that Hollywood directors generally responded to such claims by explaining that film is an entirely different medium.[131] But the same directors who liberally adapted novels, like Preminger and Stevens, now sought to stop the new medium of television from tarnishing their work. "Suddenly," the *Times* piece accused, "[Hollywood directors have] become worshippers at the shrine of art—their own."[132]

V. AUTEURISM ON TRIAL

Viewed from one angle, moral rights are simply a contract issue. Neither individual directors nor the Directors Guild of America were powerful enough to demand perpetual artistic control of their work, so they hoped that the law would recognize an inalienable natural right to control their art; they hoped that moral rights would make up for their lack of negotiating power. After the many reversals in the *Rogers*, *Autry*, *Stevens*, and *Preminger* cases, however, Hollywood began to solve the issue of television editing and commercial interruptions as they had solved most copyright problems: through contracts and labor-guild policies. Hollywood, in other words, kept the problems in house and out of the courts. Directors and other film talent were required to sign contracts explicitly waiving television rights, even when the contracts gave directors final say in the editing of the theatrical release, that is, the final cut. Standard industry contracts also began to reserve for the studios the right to adapt films infinitely into the future, for "devices not yet invented or imagined," as contracts started to read.[133]

A. A Film by Alan Smithee

The invention of the pseudonym Alan Smithee is another example of Hollywood bringing attribution and moral rights in house. Starting in 1969, the Directors Guild of America developed a policy for those

131. Ben Gross, *Artistic Last Laugh May Be on Hollywood*, L.A. TIMES, Feb. 8, 1966, pt. IV, at 13.

132. *Id.*

133. For a discussion of contracts that involve rights to publication using future technologies see, for example, RHONDA BAKER, MEDIA LAW: A USERS GUIDE FOR FILM AND PROGRAMME MAKERS (1995), and *New York Times Co. v. Tasini*, 533 U.S. 483 (2001).

cases in which directors were so horrified by the studio's version of their films that they wanted their names removed from it. During the Golden Age of the studio system, when directors were on annual contracts to studios and were assigned films to work on, they had no expectation of having their individual vision come through. Critics developed the auteur to identify the moments when directors left an individual imprint on a film, despite the factory-like process of the studio system.[134] After the transformation of the studio system in the 1960s, however, directors, critics, and the public all began to expect films to bear the individual vision of their directors. Directors, in turn, began to take steps to protect their reputations and the integrity of their work.

It was at this moment in the late 1960s that directors began to demand that their names be removed from films when they lost control of their vision. Starting with the film *Death of a Gunfighter*,[135] the Directors Guild formed a board to arbitrate disputes over credit and anonymity.[136] Directors could then appeal to the board, which had the power to decide that a director's work had been so distorted that he or she had the option of having his or her name removed and replaced with the pseudonym Alan Smithee (or some variation).[137] Directors could always have used pseudonyms. But as a shared pseudonym, the Alan Smithee designation also served as a marker of tensions between directors' and studios' intentions. The Alan Smithee pseudonym served as an extralegal compromise to the moral rights dilemma. Directors could withdraw their name from a distorted work, but the studio could still profit from the work. In some ways, the Alan Smithee solution is more effective than the legal version of moral rights. Moral rights might have allowed a director to withdraw a work from circulation. But the Smithee credit and the often well-publicized battles that surrounded its adoption publicly announced the integrity of the directors and often pointed audiences towards the inevitable release of the authentic version, the director's cut.[138]

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134. For an early attempt to form a coherent theory around auteur criticism see PETER WOLLEN, SIGNS AND MEANING IN THE CINEMA 74–115 (3d ed., rev. 1972).

135. DEATH OF A GUNFIGHTER (Universal Pictures 1969).

136. DIRECTED BY ALLEN SMITHEE 9 (Jeremy Braddock & Stephen Hock eds., 2001).

137. *Id.* at 7–8.

138. *Id.* In Smithee's directorial debut, the *New York Times* noted that *Death of a Gunfighter* was "sharply directed by Allen Smithee." Howard Thompson, *Screen: Tough Western: 'Death of a Gunfighter' Stars Widmark*, N.Y. TIMES, May 10, 1969, at 34.

The directors who have taken advantage of the Alan Smithee option have invariably come from the generation reared in the auterist New Hollywood of the late 1960s and 1970s: Robert Altman, William Friedkin, Dennis Hopper, and many others. And it will be no surprise that directors have frequently petitioned for an Alan Smithee credit when they have been unhappy with the versions of their films that studios reedited for television. Friedkin (*The Guardian*, 1990), Hopper (*Backtrack*, 1990), David Lynch (*Dune*, 1984), and Martin Brest (*Scent of a Woman*, 1992; *Meet Joe Black*, 1998) are among the directors who have used the Smithee credit for television versions of their films, even when they attached their real names to theatrical versions.[139]

B. "No One Owns the Genre"[140]

The New Hollywood auteurs have occasionally asserted their rights by asking to have their names removed from work changed by the studios. More often, however, they have sought to prevent others from building on their names, reputations, and original creations. In general, trademark, unfair competition, and defamation law are better suited than copyright to protecting reputations, especially in a country without moral rights. Coppola, Lucas, and their cohorts have aggressively used these elements of the law. But they also discovered copyright law early in their careers, and they have frequently used copyright law to safeguard the new authorial powers that the studios granted them. Where filmmakers and studios spent the first decades of Hollywood's existence fighting to use age-old genre conventions without having to ask permission, the New Hollywood auteurs have, on occasion, fought for control of entire genres through copyright law.

1. GEORGE LUCAS

In the mid-1970s, three of the most successful auteurs, William Friedkin, Steven Spielberg, and George Lucas, made blockbuster genre films—*The Exorcist*,[141] *Jaws*,[142] and *Star Wars*,[143] respectively. If they

139. CATCHFIRE (Vestron Pictures 1990); DUNE (Dino De Laurentiis Corp. 1984); THE GUARDIAN (Nanny Enterprises 1990); MEET JOE BLACK (City Light Films Production 1998); SCENT OF A WOMAN (City Light Films 1992).

140. *Twentieth Century-Fox Film Corp. v. MCA, Inc.*, 715 F.2d 1327 (9th Cir. 1983).

141. THE EXORCIST (Hoya Productions, Inc. 1973).

142. JAWS (Zanuck/Brown Co. 1975).

143. STAR WARS (Lucasfilm, Ltd. 1977).

did not invent the blockbuster, they brought it to a new level, and they each reinvigorated the genres that they worked in. They did not transform the genres, as critic John Cawelti has described the function of many films from the same period, like *Chinatown*;[144] Lucas, Spielberg, and Friedkin did not criticize or subvert genre conventions. They paid homage to established genres; they amplified the genres' conventions; and they infused the genres with studio budgets, special effects, and stars. They turned B movies into blockbusters and converted formulaic genre fare into bold authorial statements. All three films also became the subject of copyright lawsuits.[145]

Star Wars, for example, is steeped in the genres of science fiction and fantasy, and it is filled with allusions to other films, including the re-creation of an iconic shot from John Ford's Western, *The Searchers*.[146] Lucas borrowed most directly, however, from the science-fiction serials of the 1930s and 1940s like *Flash Gordon*[147] and *Buck Rogers*,[148] with their outrageous villains, wipe transitions between scenes, and hanging endings. Despite his generous use of film history, Lucas has always had a low tolerance for work that he thinks takes inspiration from his films. Throughout his career, Lucas has used copyright law to control—or at least attempt to control—the influence of his films. Shortly after the release of *Star Wars,* Lucas created a licensing bureau to review fan fiction for potential copyright infringement. [149] This was an aggressive approach to fans who were simply sharing their own homemade creations with each other. It is especially aggressive considering that science fiction has a long history of stimulating creative work from fans. Lucas took an even stronger stance toward commercial work. Just a year after the release of *Star Wars*, the science-fiction television series *Battlestar Galactica*[150] appeared on U.S. television screens, presenting Lucas with his first opportunity to respond to a high-profile work that was clearly indebted to the science-fiction craze he had started (Just a few years later, all of the studios were feeding the demand for science fiction with films like

144. CHINATOWN (Long Road Productions, Inc. 1974).

145. JOHN G. CAWELTI, Chinatown *and Generic Transformation in Recent American Films*, *in* MYSTERY, VIOLENCE, AND POPULAR CULTURE 193, 208–09 (2004).

146. THE SEARCHERS (C.V. Whitney Pictures, Inc. 1956).

147. FLASH GORDON (King Features Productions 1936).

148. BUCK ROGERS (Universal Pictures 1939).

149. WILL BROOKER, USING THE FORCE: CREATIVITY, COMMUNITY AND *STAR WARS* FANS 164 (2002).

150. *Battlestar Galactica* (ABC television broadcast series Sept. 17, 1978–Apr. 29, 1979).

Paramount's *Star Trek: The Motion Picture*[151] and Disney's *Black Hole*.[152]).

Battlestar Galactica clearly owed a lot to *Star Wars*. Television critic Tom Shales dubbed *Battlestar Galactica* a "'Star Wars' superclone."[153] The similarities between the space battles of the film and television show are particularly striking and for good reason: John Dykstra headed the special-effects departments for both. According to Dykstra, Lucas had not sufficiently compensated him for his work on *Star Wars*,[154] and when Lucas moved his special-effects company, Industrial Light and Magic (ILM), from Van Nuys to San Rafael, Dykstra took over the old building, setting up a special-effects house of his own.[155] Dykstra urgently needed a client to pay the mortgage when the *Battlestar Galactica* job appeared. Having honed his skills at ILM, Dykstra used many of the same techniques and pieces of equipment—including his own Dykstraflex camera—that had been developed for *Star Wars*.

Dykstra's contributions to both *Star Wars* and *Battlestar Galactica* raised some novel questions for studio copyright lawyers. In *Battlestar Galactica*, did Dykstra use new techniques of storytelling that were discovered while making *Star Wars* but available to all once the ideas were uncovered? Or were these techniques so closely identified with Lucas's authorial style that any use of them infringed on Lucas's monopoly on expression? Or—another possibility—was Dykstra really a co-author of both special-effects-laden works?

Lucas was not flattered by the comparisons between his movie and the television series that resembled it, nor was he willing to attribute the similarities to the genius of his special-effects guru. Lucas published a letter in *Variety* accusing *Battlestar Galactica* of selling itself as "*Star Wars* for TV," and he claimed that people were mistakenly attributing the workmanlike television series to him.[156] "I got hundreds of letters," Lucas told biographer Dale Pollock, "from people saying, 'I think your TV show is terrible.' It was very upsetting."[157] *Battlestar Galactica* producer Glen A. Larson defended himself in the press, protesting that he had been developing the idea for eleven years, before the success of

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151. STAR TREK: THE MOTION PICTURE (Century Associates 1979).

152. THE BLACK HOLE (Walt Disney Productions 1979).

153. Tom Shales, *Viewpoint*, L.A. TIMES, Sept. 24, 1978, at P7.

154. STAR WARS (Lucasfilm, Ltd. 1977).

155. DALE POLLOCK, SKYWALKING: THE LIFE AND FILMS OF GEORGE LUCAS 197 (1983).

156. POLLOCK, *supra* note 155, at 198.

157. *Id.*

Star Wars proved to the networks that science fiction could reach a mass audience.[158]

Lucas, however, saw deep similarities between the two works, and he insisted that Fox, the producer of *Star Wars*, sue MCA/Universal, the producer of *Battlestar Galactica*.[159] The lawsuit made Lucas look like a sore winner, since Universal had foolishly passed on *Star Wars* even after Lucas gave them the successful *American Graffiti*[160] just a few years earlier. Universal responded by countersuing Fox, making the even more outrageous claim that *Star Wars* infringed on Douglas Trumbull's 1972 environmental-themed science-fiction film *Silent Running*,[161] which also featured cute, small robots who beeped. The whole row sounds like internal Hollywood politics, but Lucas's investment in redefining authorship and ownership was serious, and he pursued the case for years.

In the district court, Universal asked Judge Irving Hill to decide whether or not the case had enough merit to be heard by a jury.[162] A relatively new legal standard held that only the "total concept and feel"[163] needed to be similar for Hill to allow the case to proceed. This new standard, as Siva Vaidhyanathan explains, made film copyright law much "more unpredictable" in the 1970s,[164] as California courts worked out the contours of the new jurisprudential concept. After viewing the film and television show, however, Hill thought that all of the similarities that Lucas saw between his film and the television show were merely similar uses of well-worn science-fiction conventions. As an example of the similarities, Fox noted that at one point in the Canadian theatrical release of *Battlestar Galactica* the word android is abbreviated as "droid," as it is abbreviated throughout *Star Wars*.[165] But Hill was not convinced. He "doubt[ed] very much that the plaintiffs own that word," and he found most of the other examples of

158. *Id.*; Kirk Honeycutt, *Are TV Films 'Ripping Off' Hollywood?*, N.Y. TIMES, May 18, 1980, at D41.

159. POLLOCK, *supra* note 155, at 198.

160. AMERICAN GRAFFITI (Lucasfilm, Ltd. 1973).

161. SILENT RUNNING (Universal Pictures 1972).

162. *Twentieth Century-Fox Film Corp. v. MCA, Inc.*, 209 U.S.P.Q. (BNA) 200, 201 (C.D. Cal. 1980).

163. *Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1167 (9th Cir. 1977).

164. SIVA VAIDHYANATHAN, COPYRIGHTS AND COPYWRONGS: THE RISE OF INTELLECTUAL PROPERTY AND HOW IT THREATENS CREATIVITY 114–15 (2001).

165. *Twentieth Century-Fox Film Corp. v. MCA, Inc.*, 209 U.S.P.Q. (BNA) at 201.

similarities to be so general that no one could own them either.[166] Fox's claims amounted to a purchase on the entire science fiction genre, and "[n]o one," Hill concluded, "owns the genre of space fantasy and of warfare in space."[167] Fox continued to push the case, and after three years of delays, the Ninth Circuit Court of Appeals—the court that initially introduced the "total concept and feel" standard—issued a decision reversing Hill's ruling and finding sufficient merit to let the case proceed to a trial.[168] Before a jury could hear the case, however, Fox dropped the case.[169] According to one account, Lucas only agreed to the settlement after he received a personal apology from Universal's president, Hollywood's "last mogul," Lew Wasserman. An apology from Wasserman was no small gesture, and Lucas had successfully proven the power of the auteur in the New Hollywood.[170]

2. STEVEN SPIELBERG AND WILLIAM FRIEDKIN

Fox v. Universal was only the beginning of George Lucas's lifelong crusade to control both commercial and fan creations that built on *Star Wars*. Fox's case against Universal, however, stemmed from a systemic change in the studio system, and not simply from George Lucas's personal feelings about authorship and intellectual property. At the same time that Lucas tried to change the dynamics of film authorship, similar lawsuits involving films directed by Lucas's fellow New Hollywood auteurs William Friedkin and Steven Spielberg were also underway.

Like *Star Wars*, both *The Exorcist* and *Jaws* borrowed heavily from genre conventions, which they then polished and marketed with studio support. In *Jaws,* Spielberg took the low-budget, teen-exploitation films that filled drive-in screens, and he added the taut pacing, natural acting, and crisp cinematography of a major studio release. Despite the studio veneer, however, *Jaws* was true to its roots, and the film announced itself as a classic teen shark movie from its opening credit sequence. Under the credits we see teenagers drinking around a beach bonfire before the eponymous shark eats a skinny-dipping coed. *The Exorcist* similarly took the conventions of the low-

166. *Id.*

167. *Id.*

168. *Twentieth Century-Fox Film Corp. v. MCA, Inc.*, 715 F.2d 1327 (9th Cir. 1983).

169. DENNIS MCDOUGAL, THE LAST MOGUL: LEW WASSERMAN, MCA, AND THE HIDDEN HISTORY OF HOLLYWOOD 426 n.3 (1998).

170. *Id.*

budget horror film and dressed them up with expensive special effects, Academy Award–nominated performances, and haunting imagery.

In contrast, Film Ventures International (FVI) was exactly the kind of company that produced the low-budget horror films and shark attack movies *The Exorcist* and *Jaws* drew on. Starting in the 1970s, FVI's president, Edward Montoro, realized that the studios were moving into his territory, and he relocated his company to Los Angeles and developed a new business plan. Montoro began to wait for studios to renew interest in a time-tested genre before he would release a similar film.[171] Montrose very clearly imitated the 1970s blockbusters, and he often announced as much in advertisements. But, in a sense, this is exactly what B-movie producers had always done. When one sea-creature or alien-invasion film found a large audience, independent producers responded by churning out lookalike films for midnight screenings and drive-ins. Even Hollywood studios made a practice of cycling though genre films after one struck a nerve with audiences. But were the genre pictures of the New Hollywood auteurs different? Did they contain so much personal vision and so many innovations that they demanded more protection than other genre films?

Montoro discovered the answer when he released exorcism and shark-attack films on the heels of Friedkin's and Spielberg's hits. In 1974, FVI distributed the exorcism film, *Behind the Door*, one year after *The Exorcist*.[172] Two years later, and one year after *Jaws*, FVI made the shark film *Grizzly*,[173] which by some accounts grossed over $30 million that year. Throughout the 1970s, FVI continued to release low-budget exploitation films, including *Beyond the Door II*[174] and *Day of the Animals* with Leslie Nielson.[175] Then, in 1981, FVI picked up the U.S. distribution for an Italian film called *L'ultimo squalo,* which was released in some countries as *The Last Jaws*, though FVI distributed it in the United States as *Great White*.[176] One year earlier, Universal had released *Jaws 2*,[177] and the studio was preparing *Jaws 3-D*.[178] Montoro's run as a B-movie copycat was coming to an end.

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171. *See FVI: What You Didn't Know (An Exclusive Interview!)*, THE UNKNOWN MOVIES, http://www.badmovieplanet.com/unknownmovies/reviews/fvi.html (last visited Feb. 21, 2011) [hereinafter *FVI: What You Didn't Know*].

172. THE EXORCIST (Hoya Productions, Inc. 1973).

173. GRIZZLY (Film Ventures International 1976).

174. BEYOND THE DOOR II (Laser Cinematografica 1977).

175. DAY OF THE ANIMALS (Film Ventures International 1977).

176. GREAT WHITE (1981); *see FVI: What You Didn't Know supra* note 171.

177. JAWS 2 (Universal Pictures 1978).

178. JAWS 3-D (Universal Pictures 1983).

The studios behind both Friedkin's and Spielberg's films took FVI to court.[179] They had paid for singular cinematic statements by rising auteurs, and they were not going to share their investment with others. Ironically, Universal Studios, the studio that made *Battlestar Galactica,* also made *Jaws*, and in the case against FVI, it was protecting the same broad claim to Spielberg's authorship that it fought in the case against Lucas. Of course, intellectual property always looks different when it belongs to you.

There may have been contradictions in Universal's positions, but Montoro was not the most sympathetic defendant. In fact, he resembled a B-movie anti-hero himself. While fighting multiple copyright lawsuits against the studios, Montoro also ended up in court for failing to pay actors and directors,[180] and he clearly made a living by capitalizing on the success of others' films. He may also have ended his career abruptly after absconding with $1 million in company funds.[181] But did Montoro really take Friedkin's and Spielberg's original ideas, or was he simply using the genre conventions that they used, too?

The same court heard both *The Exorcist* and *Jaws* cases, although it came down on different sides in each. In *The Exorcist* case, Warner Brothers did not claim that the story of FVI's *Behind the Door* was substantially similar to Friedkin's.[182] Instead, it used the "total concept and feel" standard in a novel way, arguing that FVI's film copied *The Exorcist*'s style of special effects, and it also claimed that FVI had copied the character of the possessed child Regan.[183] The court denied a preliminary injunction, which would have halted exhibition of *Behind the Door*. Like the *Star Wars* decision, this court found that both FVI and Friedkin had drawn from the same well of "haunted-house type" effects, and they had not used the effects in a substantially similar sequence.[184] As for the character of Regan, the court explained that no one could own the idea of demonic possession, which the court imbued with some pseudo-scientific validity by calling it a "phenomenon."[185] Moreover, the judges opined, the inner turmoil experienced by the children in both films was the logical response of a person struggling

179. *Universal City Studios, Inc. v. Film Venture Int'l., Inc.*, 543 F. Supp. 1134 (C.D. Cal. 1982); *Warner Bros. Inc. v. Film Venture Int'l.*, 403 F. Supp. 522 (C.D. Cal. 1975).

180. *See, e.g.*, *Smith v. Montoro*, 648 F.2d 602, 603 (9th Cir. 1981).

181. *See FVI: What You Didn't Know*, *supra* note 171.

182. *Warner Bros. Inc.*, 403 F. Supp. at 523.

183. *Id.* at 523–24.

184. *Id.* at 525–26.

185. *Id.* at 526.

with demonic possession. In other words, these films were both using the same genre elements and similar, logical plot lines.

In the *Jaws* case, however, the same court found that *Great White* resembled Spielberg's shark film too much to simply be two instances of the same genre or even subgenre.[186] I have not seen *Great White*, which the court enjoined from further distribution. But reading the court's comparison, the similarities sound simply like the recipe for a shark movie. "The opening scene in both films," the decision tells us, for example, "depicts teenagers playing on the beach."[187] Moreover, "the salty skippers, both . . . have heavy English-type accents and are experienced shark hunters."[188] In other instances, the court seemed to stretch very far to find connections. "[T]he local shark expert in 'Great White'" the decision explained, "is a combination of two characters in 'Jaws.'"[189] All of the characters that the court describes sound like stock characters from a shark-attack movie: the politician concerned only with the image of the town, reckless teenagers, "salty" skippers. If *Great White*'s creators combined two characters from *Jaws*, that is a significant difference, not a similarity. Further, most of the action that the court describes also sounds like predictable genre storytelling: a shark attacking a dingy, a girl who falls into the water only to be saved from a lurking shark at the last minute, a finale in which the skipper is eaten but the shark is ultimately killed. The one persuasive comparison described in the court decision was that the shark in *Great White* was accompanied by bass tones on the soundtrack, clearly a reference to the signature of John Williams' unforgettable soundtrack. The two films may have been substantially similar, but the decision does not do a convincing job of outlining the similarities. The originality of a genre film comes from the subtleties, not from the use of stock characters and predictable plots. Nevertheless, the court thought that enough similarity existed for an "ordinary observer" to notice the shared "total concept and feel" of the two works—the standard introduced by the Ninth Circuit.[190]

It may very well be true that *Great White* took too many elements from *Jaws*, and the other FVI films borrowed less from the blockbusters they resembled. But clearly two larger structural elements

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186. *Universal City Studios, Inc. v. Film Ventures Int'l, Inc.*, 543 F. Supp. 1134, 1141 (C.D. Cal. 1982).

187. *Id.* at 1138.

188. *Id.* at 1137.

189. *Id.*

190. *Id.* at 1137, 1141 (quoting *Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1164 (9th Cir. 1977)).

had collided to reopen debates over the ownership of film ideas. The Ninth Circuit had introduced a vague standard for determining similarity, and Hollywood had redefined film authorship in such a way that rising auteurs felt entitled to new levels of protection for their contributions to genre categories. These were not moral rights cases, although they all used copyright to police the reputation and integrity of filmmakers. This spate of cases, however, revealed that the New Hollywood auteurs were prepared to defend their authorial claims. And it would not be long before Lucas, Spielberg, and others turned to the legal doctrine of moral rights to protect their vision of the auteur.

C. Monty Python's "Naughty Bits"

Contemporaneously with the rise of the New Hollywood auteurs, another group of fiercely independent artists were making their way into British living rooms, challenging social mores and pushing accepted standards of representation. *Monty Python's Flying Circus* first aired in Britain on October 5, 1969,[191] but it would take another five years before the show premiered in the United States. When the *Flying Circus* appeared on New York City's PBS station, Channel 13, it quickly became the most popular and profitable series in the station's history, and other PBS stations across the country picked up the show as well.[192] On public television, however, the Pythons only reached a limited market. Then, in 1975, ABC offered to syndicate the show for a national audience.[193] At the time, the Pythons were about to launch a feature film, *Monty Python and the Holy Grail*,[194] and they were reaching for a wider American public. Nevertheless, they turned down the ABC offer, wary of the artistic compromises that would come with commercial television.[195] The Pythons initially made the *Flying Circus* for the British Broadcasting Company (BBC), and they had not designed the format to be interrupted by commercials or truncated to fit new timeslots.[196] Undeterred, ABC officials did some further investigation, and they learned that Time-Life Films held the U.S. syndication rights to the Python shows. ABC proceeded to license

191. MARCIA LANDY, MONTY PYTHON'S FLYING CIRCUS 4 (2005).

192. Les Brown, *B.B.C.'s 'Monty Python' Surprise Hit on Public TV*, N.Y. TIMES, Mar.15, 1975, at 55; Thomas Meehan, *And Now for Something Completely Different . . .*, N.Y. TIMES, Apr. 18, 1976, at 34.

193. ROBERT HEWISON, MONTY PYTHON: THE CASE AGAINST 41 (1981).

194. MONTY PYTHON AND THE HOLY GRAIL (Michael White Productions 1975).

195. Hendrik Hertzberg, *Onward and Upward with the Arts: Naughty Bits*, NEW YORKER, Mar. 29, 1976, at 69, 70.

196. *Id.* at 69.

several of the later Python episodes for a late-night program called *The Wide World of Entertainment*.[197] Thus began the next pivotal chapter in filmmakers' (and television makers') campaign for moral rights as protection against television editing. For the first time, however, the artists would triumph against the commercial film studios and television networks.[198]

Still suspicious of commercial television, the Pythons thought they had been assured by ABC executives that the shows would air unchanged and in their entirety, although they understood that there would be commercial interruptions. When the Pythons saw a tape of the ABC show, however, the comedy team realized that it had been misled. ABC cut approximately twenty-four minutes of each ninety-minute program.[199] ABC not only abbreviated the shows, however; they cut out more than forty clips that the network deemed offensive or indecent. Sketches lacked endings. Seemingly tame gags, like a cat being used as a doorbell or a woman wiping her feet on a loaf of bread, were excised.[200] According to Python illustrator Terry Gilliam, who served as the lead plaintiff in the case, "[a]ll mentions of the body were cut out," including bleeping out the Pythons' signature euphemism, "naughty bits."[201] Earlier judges had warned that television editing might result in the emasculation of films. Did the Pythons losing their naughty bits to ABC's scissors qualify?

With less than two weeks to the next scheduled airdate, the Pythons asked for an injunction to stop ABC from showing the recut version of the *Flying Circus*. Like Preminger's and Stevens's claims, the Pythons sought to protect their artistic integrity. But this was also a clash of cultures. The iconoclastic Pythons built their reputation on challenging social conventions and the stodgy limitations of television representation. Marcia Landy observed that:

> The Pythons' type of experimentation was at odds with the needs of commercial television to satisfy sponsors, the direct and indirect forms of censorship, and concerns about ratings. In short, the philosophy of the BBC world inhabited by the

197. Dick Adler, *Python Objects to ABC Editing*, L.A. TIMES, Dec. 18, 1975, at H31; Hertzberg, *supra* note 195, at 70.

198. Hertzberg, *supra* note 195, at 86–87.

199. *Id.* at 70.

200. *Id.*

201. Adler, *supra* note 197, at H31 (internal quotations omitted); Hertzberg, *supra* note 195, at 70–72.

> Pythons and that of the major networks of American television tended to utilize the medium differently.[202]

Editing the *Flying Circus* to conform to the very standards that it attempted to subvert robbed the show of its humor and its appeal. In the *Python* case,[203] courts were asked to decide whether standards of network television nullified the essence of the Pythons' irreverent humor. Terry Gilliam and the other Pythons did not complain about the number of cuts or the amount of time deleted from the shows, as Preminger and Stevens had. They complained that the continuity, the humor, and the integrity of their shows had been lost.[204] The case would hinge on the qualitative transformation of the shows' content, rather than an arbitrary quantification of art (minutes cut or percentages deleted).

From a contractual perspective, this case looked a bit different than the *Autry*, *Rogers*, *Preminger*, and *Stevens* cases. The Pythons had the British television equivalent of a final-cut contract, but in the world of British broadcasting, the authorial rights seemed to stretch beyond the first airing of a show. The Pythons also retained the rights to their scripts, and they claimed that the ABC version was an unauthorized adaptation—a derivative work—based on their scripts.[205] The question of who controlled the rights remained throughout the many permutations of this case, but judges who heard the arguments all agreed that the Pythons retained some right to complain about the distortion of their work.[206]

The Pythons may have had a stronger claim to control their work than the American directors who had gone down the same path before them, but their complaint was couched in the same bodily (Lockean) language. The Pythons called the ABC versions "amazingly bowdlerized and butchered,"[207] and the official complaint used the term that had emerged as the technical legal designation for moral rights violations through television editing: "mutilation."[208] The Pythons hired

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202. LANDY, *supra* note 191, at 28.

203. *Gilliam v. ABC*, 538 F.2d 14 (2d Cir. 1976).

204. Hertzberg, *supra* note 195, at 72, 78.

205. HEWISON, *supra* note 193, at 46.

206. See Peter Jaszi, *When Works Collide: Derivative Motion Pictures, Underlying Rights, and the Public Interest*, 28 UCLA L. REV. 715, 753–58 (1981), for a discussion of the contract issues in the case.

207. Adler, *supra* note 197, at H31.

208. HEWISON, *supra* note 193, at 46. Note that the term "mutilation" had been used in different contexts in earlier copyright cases. *See, e.g.*, Robert Spoo, *Copyright*

young copyright litigator Robert Osterberg to represent them, and they asked for the headline-garnering sum of $1,000,000 in damages.[209] The edited versions of the Python shows, Osterberg argued, had hurt the Pythons' reputation and falsely represented their work; ABC, moreover, had failed to get the Pythons' consent before creating a derivative work.[210]

With only seven days before the *Flying Circus*'s ABC airdate, Terry Gilliam and Michael Palin flew to New York to testify before Judge Morris Lasker. In a day-long hearing, Lasker heard from ABC executives, the editor who worked in ABC's Standards and Practices office, and, of course, Gilliam and Palin. The ABC employees explained that they were simply doing the business of a television network, and that cancelling a show at this late date would be a significant financial burden.[211] At one point during the day, ABC's lawyers accused the Pythons of having "unclean hands," of simply using the case for publicity, but the speciousness of that accusation was soon revealed.[212]

On behalf of the Pythons, Gilliam spoke eloquently about the dangers of censoring art, and he brought the case back to the larger issues of the clash of corporate and artistic cultures and the right of integrity—the moral rights—at stake in the case. Gilliam worried that the ABC version would give the impression that: "Monty Python has finally accepted the standards of commercial television, as opposed to our own standards."[213] And he explained that: "[T]here is an element of integrity in what we have done. Good, bad, or indifferent, it doesn't really enter into it. It seems to me, it is an element of integrity. I think the show that is going out compromises that integrity."[214]

The star witness in the case turned out to be not the comedians or the heavy-handed ABC editor but a color television that the court clerk wheeled in, so that Lasker could compare an original BBC show with the edited ABC version.[215] (Just one year after Sony had released its Betamax video recorder, such technical displays were themselves novel and impressive.) For the demonstration, the Pythons and their lawyers brazenly chose an episode that included a courtroom scene mocking a

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Protectionism and Its Discontents: The Case of James Joyce's Ulysses *in America*, 108 YALE L.J. 633 (1998).

209. HEWISON, *supra* note 193, at 46.

210. Adler, *supra* note 197, at H31; HEWISON, *supra* note 193, at 46.

211. MICHAEL PALIN, DIARIES 1969-1979: THE PYTHON YEARS 275–77 (2006).

212. Hertzberg, *supra* note 195, at 82.

213. *Id.* at 78.

214. *Id.*; HEWISON, *supra* note 193, at 53.

215. PALIN, *supra* note 211, at 277.

military judge.[216] Luckily for the Pythons, Lasker seemed to enjoy the show thoroughly, exchanging grins with his law clerk during the trial sketch.[217] Lasker also let slip that he had seen a half-dozen episodes of the *Flying Circus* on PBS as well as *Monty Python and the Holy Grail*.[218] The court reporter had apparently never seen the Pythons before, and he laughed heartily throughout the entire episode. When the edited ABC version was shown, it not only lacked the naughty bits, it also had long segments of black leader where commercials would have been inserted.[219] After everyone in the courtroom had already laughed at the jokes and situations the first time, the ABC version would most likely have fallen flat even if there were no changes.

At the end of the proceeding, Lasker returned to his quarters for only thirty minutes before emerging with the good and bad news. Lasker was clearly sympathetic to the Pythons' claims; he described the ABC version as "an impairment of the integrity of [the Pythons'] work," which caused the material to "lose its iconoclastic verve."[220] But he decided not to grant an injunction.[221] ABC's lawyers had convinced Lasker that preventing the airing of the show so close to the scheduled airdate would harm the network financially more than the airing would harm the Python's reputation. In an attempt to find a compromise, Lasker proposed another solution. The Pythons, he suggested, could preserve their integrity by adding a disclaimer at the beginning of the show. The ABC executives liked this idea, and a producer approached Palin and Gilliam about collaborating on a humorous disclaimer.[222] But the ABC executives underestimated the Pythons' seriousness in this matter. Gilliam and Palin refused to collaborate with ABC, and the disclaimer they drafted was decidedly not funny: "The members of Monty Python wish to disassociate themselves from this program, which is a compilation of their shows edited by ABC without their approval."[223] Needless to say, the ABC team did not immediately begin printing the disclaimer. Instead, the livid ABC lawyers immediately filed a motion with the Second Circuit Court of Appeals (conveniently located upstairs in the same courthouse

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216. Hertzberg, *supra* note 195, at 72.

217. *Id.*

218. *Id.* at 84.

219. PALIN, *supra* note 211, at 277.

220. Hertzberg, *supra* note 195, at 84–85.

221. *Id.* at 85; *Judge Allows ABC to Air Its Monty Python Special*, WALL ST. J., Dec. 26, 1975, at 3; *U.S. Judge Upholds ABC-TV Showing of Monty Pythons*, N.Y. TIMES, Dec. 25, 1975, at 43.

222. PALIN, *supra* note 211, at 278.

223. Hertzberg, *supra* note 195, at 86.

as the district court), and a three-judge panel heard their concerns the next day.[224]

The ABC lawyers appealed to the panel of judges with an unusually frank statement that captured the media industry's general objection to moral rights:

> To accept the conditions imposed by the Court [i.e. the Python's disclaimer] would only invite actions for injunctive relief by every writer, artist, cameraman, director, performer, musician, lighting engineer, set and dress designer, editor and sound-effects man and many others who contribute to making a motion picture or television program on the claim that his component part in the composite undertaking was not according to his liking or artistic sense.[225]

Film and television are, for the most part, collaborative arts, especially when practiced as part of a large, mainstream media company. Giving some or all members of the process of media production the right to control the integrity of their work by removing it from public or removing their name from the work, even after contractual obligations have been met, would threaten to disrupt the smooth functioning of mass media industries.

Sympathetic to ABC's concerns, the appellate judges amended Lasker's solution slightly to favor the network, and they allowed ABC to draft a milder alternative to the Pythons' disclaimer.[226] ABC's version read simply, "EDITED FOR TELEVISION BY ABC."[227] As the Pythons' good friend, Hendrik Hertzberg, pointed out in the *New Yorker*, this was a very strange statement. *Monty Python's Flying Circus* had originally been edited for television: British public television. "RE-EDITED FOR ABC TELEVISION BY ABC," Hertzberg wrote, "would have been less concise and more embarrassing, but also more exact."[228] This was not a case of editing in order to translate a film to a new medium. It was editing as cultural translation, fitting iconoclastic British public television into the box of commercial American network television.[229]

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224. *Id.*
225. *Id.*; *see also* HEWISON, *supra* note 193, at 52–53.
226. Hertzberg, *supra* note 195, at 87.
227. *Id.*
228. *Id.*
229. *Id.* at 70; PALIN, *supra* note 211, at 271.

The Second Circuit Court of Appeals heard the case again the following April.[230] Although the judges had appeared sympathetic to ABC in the first round of the case—denying an injunction and softening Lasker's disclaimer solution—the court emerged as the Pythons' greatest champion. In a stunning decision—perhaps the strongest defense of moral rights in U.S. case law—the Second Circuit reversed the earlier decision, finding completely in the Python's favor.[231] Writing for the majority, Judge Joseph Lumbard argued that the Pythons were likely to succeed in their claim that ABC's version violated their contract with the BBC.[232] But he did not think copyright law, as it stood, provided enough protection for the Pythons or for other creative artists threatened by corporate misuse of their work. He quickly dismissed the idea that a disclaimer at the beginning of a show could adequately account for the harm done; what if someone tuned in after the start of the show? As a remedy to the plight of artists, Lumbard insisted on writing moral rights into U.S. case law. Fully aware of the implication of his decision, Lumbard first reminded readers that up to that point in time, moral rights had not been recognized by U.S. copyright law: "American copyright law, as presently written, does not recognize moral rights or provide a cause of action for their violation, since the law seeks to vindicate the economic, rather than the personal, rights of authors."[233]

But then he went on to argue that the U.S. copyright law was insufficient: "Nevertheless, the economic incentive for artistic and intellectual creation that serves as the foundation for American copyright law cannot be reconciled with the inability of artists to obtain relief for mutilation or misrepresentation of their work to the public on which the artists are financially dependent."[234] To meet the needs of artists, Lumbard turned to the 1946 Lanham Act, which protected consumers from misleading advertising. The Lanham Act, he argued, could also be invoked to protect the Pythons from ABC's distorted and "caricature[d]" version of their show.[235]

The Pythons' lawyer, Robert Osterberg, warned his clients that ABC was most likely prepared to take the case to the Supreme Court to protect its business. So having won an important victory, the Pythons

230. *Gilliam v. ABC,* 538 F.2d 14 (2d Cir. 1976).
231. *Id.* at 26.
232. *Id.* at 21.
233. *Id.* at 24.
234. *Id.* (citations omitted).
235. *Id.* at 24–25.

agreed to drop the pursuit of a monetary award in exchange for putting an end to the case.[236]

The *Monty Python* case has had many repercussions, both for the Pythons and for the entertainment industry. For the Pythons, this victory hardened their commitment to defending their unique artistic vision. Many critics thought that the Python's legal battle was vindicated when the ABC version of the *Flying Circus* lost the Emmy award to Shirley MacLaine's television special *Gypsy in My Soul*; the BBC version would surely have won.[237] As a result of the legal debacle, the BBC returned all *Flying Circus* rights to Monty Python, with the exception of United Kingdom broadcast rights. This ensured that the group would enjoy a financial cushion, and it gave them tremendous power to control the use of their material. Just a few years later, they fought a high-profile legal battle over the censorship of *The Life of Brian*,[238] and the Pythons gained a reputation for tirelessly policing their work.

Because of the Pythons' reputation, other artists have exercised extra caution when invoking the Pythons. Years after the ABC case, for example, *South Park* creators Trey Parker and Matt Stone asked the Pythons permission to parody the classic "Dead Parrot" sketch, even though fair use probably protected their parody.[239] *South Park* regularly relies on fair use to parody other works, but *Monty Python* is different. Even in an age of ubiquitous online video clips, the Pythons have broken new ground in order to control their reputation. After low-resolution excerpts of the group's most famous sketches began to appear on YouTube, the Pythons refused to engage in the futile activity of trying to take down every infringing copy. Instead, they uploaded high-quality versions themselves and gave them away for free. They would rather give away their work than see its integrity compromised. Integrity can pay, however, and their free giveaway resulted in more purchases of their full-length television shows and films.[240]

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236. HEWISON, *supra* note 193, at 56.

237. John J. O'Connor, *TV: Emmy Ceremonies, Efficient but Rather Dull*, N.Y. TIMES, May 19, 1976, at 60.

238. *Judge in Georgia Lifts Ban on Film Satirizing Jesus*, N.Y. TIMES, Oct 31, 1979, at A18.

239. Susanne Ault, *'South Park' Creators Prove Python Charmers*, VARIETY (October 11, 1999, 11:00 PM), http://www.variety.com/article/VR1117756472?refCatId=14.

240. PALIN, *supra* note 211, at 355; Ault, *supra* note 239. On the Pythons' decision to upload clips to YouTube, see CHRIS ANDERSON, FREE: THE FUTURE OF A RADICAL PRICE 1–2 (2009).

On a broader scale, the Pythons achieved the victory that had eluded Hollywood directors for decades. They demonstrated that the line between acceptable and egregious transformations of film and media work could indeed be crossed, and rights of attribution and integrity could be protected through the related legal doctrines. Many years later, in 2003, a Supreme Court decision, *Dastar v. Twentieth Century Fox*,[241] limited the precedent set by Monty Python. But at a crucial moment in film directors' campaign for moral rights, the Python decision offered a public image of artists standing up to media conglomerates. It was an image that gave hope to the New Hollywood auteurs who were engaged in similar legal battles on the west coast, and it is a precedent that has continued to fuel the campaign for authorial rights in Hollywood.

D. Congress and New Technologies

1. COLORIZATION AND THE BERNE CONVENTION

Film actors and directors had been fighting for moral rights in court since the studios first began releasing films to be aired on television. But they had not returned to ask Congress for moral rights since the 1930s. An opportunity to seek a legislative solution arose again in the mid-1980s when, almost simultaneously, Congress revived discussions about joining the Berne Convention and several Hollywood studios began experimenting with new methods of computer-altered video, most notably adding color to black and white films, or "colorization" as the process became known.

The new move to join Berne gained momentum when Hollywood's lobbyists at the Motion Picture Association (MPAA) reversed their fifty-year-old stance and started to push for Berne membership. The studios and the MPAA decided that the international treaty might offer a new weapon in the fight against global film and video piracy, and they thought this could be achieved without adopting moral rights in the United States. They suggested that current defamation, privacy, unfair competition, and contract law already protected the same bundle of rights as moral rights law, and there was no need to give directors or screenwriters more control over their work than they already had.[242]

MPAA head Jack Valenti chose a surprising moment to raise the issue of Berne membership. On the one hand, rising home-video markets were fueling global piracy, so joining the international treaty

241. 539 U.S. 23 (2003).

242. Casey, *supra* note 23, at 89.

had the potential to give the United States greater leverage in many Berne countries. That motivation is clear. But, on the other hand, several studios were already engaged in an all-out war with the New-Hollywood auteurs over the colorization process. Adding the possibility of Berne membership and the statutory moral rights provisions that could potentially accompany it dramatically raised the stakes of the colorization conflict.

The colorization story begins in the 1960s when engineers in the United States and Canada developed processes for using computers to add color to black-and-white films. But the technique only began to stir controversy in the mid-1980s when the Hal Roach Studios bought a majority stake in one of the colorization companies and announced that it intended to colorize many films in its library, starting with *Topper*,[243] Laurel and Hardy's *Way Out West*,[244] *The Outlaw*,[245] and Frank Capra's *It's a Wonderful Life*.[246] One year later, Ted Turner bought the MGM film library and declared his plans to colorize a virtual canon of classics, including the untouchable *Citizen Kane*.[247]

Colorization provoked strong responses from every interested party. Initially, consumers seemed to love colorized versions of black-and-white films, which sold far better than black-and-white versions of the same film. Former actress and, at the time first lady, Nancy Reagan agreed with the colorization boosters, remarking that "I didn't think *Topper* could ever be improved, but [President Reagan and I] were most impressed with the colorization of that fun movie."[248] An equal number of filmmakers, critics, and other purists spoke passionately about the harmful effects of the colorization process. "Colorization," explained Woody Allen, "it's like elevator music. It has no soul."[249]

Frank Capra initially offered partial funding for the colorization of *It's a Wonderful Life* in exchange for a share in the profits. He soon

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243. TOPPER (Metro-Goldwyn-Mayer Corp. 1937).

244. WAY OUT WEST (Metro-Goldwyn-Mayer Corp. 1937).

245. THE OUTLAW (Hughes Productions 1943).

246. IT'S A WONDERFUL LIFE (Liberty Films 1946).

247. CITIZEN KANE (Mercury Productions 1941). *See generally* ANTHONY SLIDE, NITRATE WON'T WAIT 122–33 (1992); Stuart Klawans, *Rose-Tinted Spectacles*, *in* SEEING THROUGH MOVIES 150–85 (Mark Crispin Miller ed., 1990); Eric J. Schwartz, *The National Film Preservation Act of 1988: A Copyright Case Study in the Legislative Process*, 36 J. COPYRIGHT SOC'Y USA 138 (1989); Craig A. Wagner, *Motion Picture Colorization, Authenticity, and the Elusive Moral Right*, 64 N.Y.U. L. REV. 628, 658 n.174 (1989); Michael Cieply, *Movie Classics Transformed to Color Films*, WALL ST. J., Sept. 11, 1984.

248. SLIDE, *supra* note 247, at 123.

249. Woody Allen, Op-Ed., *The Colorization of Films Insults Artists and Society*, N.Y. TIMES, June 28, 1987, §4.

realized, however, that the film had entered the public domain for failure to renew the copyright (the renewal year came during a transfer of ownership and was overlooked). When Capra learned that the Hal Roach Studios did not need his permission or his funding, he quickly became an opponent of colorization on ethical and aesthetic grounds.[250] But the real opposition to colorization did not come from the filmmakers whose films were being colorized; it came from the New-Hollywood auteurs, who were already engaged in a protracted power struggle with the studios over control of their films. George Lucas, Steven Spielberg, and Woody Allen emerged as some of the most outspoken voices on the issue; all three testified before Congress and published op-ed pieces on the subject.[251]

Newspapers, film journals, and law reviews from the late 1980s and early 1990s are filled with articles, opinion pieces, and essays about the specific implications of the colorization process. Today, however, the spat over colorization looks more like the inevitable culmination of Hollywood directors' engagement with moral rights that we have been tracing in this Article. Timing more than technology made colorization a major national debate. If the colorization episode had not arisen in the 1980s, some other catalytic event would have to have been invented.

The New-Hollywood auteurs—a decade after they first discovered copyright law as a means of protecting authorship—attempted to use moral rights legislation to wrest even more power from the studios. Ted Turner, for his part, summed up both the studio's position on colorization and the general theory underlying U.S. copyright law in a pithy formulation: "The last time I checked, I owned those films," he said, defending his colorization of films in the MGM library; "I can do whatever I want with them."[252] In addition to the "we own it" argument, the studios saw another proprietary advantage to colorization. They successfully convinced the U.S. Copyright Office that colorized films were derivative works, entailing sufficient creativity in the colorization process to earn new copyrights for colorized versions of films.[253] After the Copyright Office's ruling, one of the colorization companies ran an ad in *Daily Variety*, declaring: "Add 75 Years to Your Life," touting colorization's promise of adding

250. Klawans, *supra* note 247, at 157–58; Jack Mathews, *A Colorful Copyright Campaign*, L.A. TIMES, Oct. 17, 1986, pt. 6 (Calendar), at 1.

251. SLIDE, *supra* note 247, at 130; Klawans, *supra* note 247, at 162–63, 176.

252. Klawans, *supra* note 247, at 159.

253. SLIDE, *supra* note 247, at 124; Klawans, *supra* note 247, at 175.

years of protection to commercial versions of works that had entered or were entering the public domain.[254]

The Directors Guild of America took the lead in opposing colorization and in advocating for joining the Berne Convention and adopting moral rights in the United States. During one meeting of the Senate Subcommittee on Patents, Copyrights, and Trademarks, guild members George Lucas and Steven Spielberg took time off from the set of *Indiana Jones and the Last Crusade*[255] to explain why U.S. directors needed moral rights.[256] It was the first time any Hollywood figure had done so since John Howard Larson testified on behalf of the Duffy Bill fifty years earlier.

In their testimony, Lucas and Spielberg drew directly on the nationalistic dimension of the auteur theory to make their case for Berne membership. Film theorist Robert Stam pointed out

> In [Andrew] Sarris's hands the auteur theory also became a surreptitiously nationalist instrument for asserting the superiority of American cinema. Sarris declared himself ready to "stake his critical reputation" on the notion that American cinema has been "consistently superior" to what Sarris dismissively and ethnocentrically called "the rest of the world."[257]

Lucas and Spielberg hoped that the senators on the subcommittee were equally convinced that Hollywood directors were necessary for preserving American hegemony in the global market. Lucas began by emphasizing his own power in the film industry (while at the same time denying it), and he invoked the need for moral rights for artists (while confusing *droit moral* with morality). He told the committee:

> I am not here today as a writer, director, or as a producer or as the chairman of a corporation. I have come as a citizen of what I believe to be a great society that is in need of a moral anchor to help define and protect its intellectual and cultural heritage. It is not being protected.[258]

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254. SLIDE, *supra* note 247, at 124.

255. INDIANA JONES AND THE LAST CRUSADE (Lucasfilm 1989).

256. Klawans, *supra* note 247, at 176.

257. ROBERT STAM, FILM THEORY: AN INTRODUCTION 89 (2000).

258. *The Berne Convention: Hearing on S. 1301 and S. 1971 Before the Subcomm. On Patents, Copyrights and Trademarks of the S. Comm. on the Judiciary*,

Speaking during the final days of the Cold War, Lucas quickly moved to the accusation that there was something communistic about not joining Berne: "For over fifty years in seventy-six nations," he explained, "with the notable exception of the United States and Russia, the arbitrator of the artistic disposition of a work of art has been the creator or creators of that work."[259] (Neither the United States nor the Soviet Union were Berne signatories at the time.) Although nationalist fervor dominated his remarks, Lucas also used his time to defend artists against commercial tampering. He countered Ted Turner's infamous "I own it" axiom with one of his own: "Buying a copyright," Lucas exclaimed, "does not make one an artist."[260]

Spielberg picked up on Lucas's nationalist rhetoric, which became a theme of the Directors Guild during this period. Spielberg referred to motion pictures as "perhaps our Nation's foremost ambassadors to the world,"[261] and he worried that no law would protect film from being edited for television, noting that his film *The Sugarland Express*[262] had been cut down from 110 to 76 minutes. He called on Congress to pass moral rights legislation to protect the singular vision of the director and screenwriter,[263] and in a very strange formulation, Spielberg declared that: "The creation of art is not a democratic process, and in the very tyranny of its defined vision lies its value to the Nation."[264] This statement was, in its way, another nod to Cold War cultural diplomacy. Throughout the 1960s, 1970s, and 1980s, the State Department, the CIA, and the National Endowment for the Arts promoted and circulated U.S. art, from Abstract Expressionist painting to Hollywood films, to promote the ideological position that only American-style democracy could foster the work of individual geniuses and, at the same time, make their work profitable. In the 1930s, senators successfully labeled

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100th Cong. 482 (1988) (prepared statement of George Lucas, Chairman of the Board, Lucasfilm, LTD.).

259. *Id.* at 483.

260. *Id.*

261. *The Berne Convention: Hearing on S. 1301 and S. 1971 Before the Subcomm. On Patents, Copyrights and Trademarks of the S. Comm. on the Judiciary*, 100th Cong. 506 (1988) (statement of Steven Spielberg on behalf of the Directors Guild of America) [hereinafter Spielberg Statement].

262. THE SUGARLAND EXPRESS (Zanuck/Brown Productions 1974).

263. *Final Say over Films at Issue*, N.Y. TIMES, Mar. 4, 1988, at C18 (Ironically, *Jaws* producer David Brown argued against the directors).

264. Spielberg Statement, *supra* note 261, at 509.

Berne membership and moral rights as un-American; in the 1980s, Lucas and Spielberg tried to reverse the equation.[265]

According to one reporter who attended the hearing, the Senate panel was far from star struck, and they appeared skeptical of the auteurs' pleas for greater power and control.[266] (A common mistake of the film and music industries is putting forward their most successful and independent artists to cry poverty or bemoan their lack of power.) If the subcommittee had been wooed by the directors, it would not have been alone. In the midst of a presidential election in 1987, presidential hopeful Richard Gephardt proposed a bill that would have given film directors the moral rights that they asked for and exempted film directors from the work-for-hire contracts that gave studios ownership of their films.[267] Gephardt had won the Iowa caucuses, but he was having trouble raising money in Hollywood. The Directors Guild gained his ear on one trip out west, and they persuaded Gephardt to introduce HR 2400, "the Film Integrity Act of 1987."[268] Gephardt, however, misjudged Hollywood. Power still lay with the studios, not with the talent. As Ronald Brownstein of the *Los Angeles Times* reported, Lew Wasserman, head of Universal Studios and the man most responsible for launching Ronald Reagan's political career, called Gephardt's top campaign staffers and said, "What is the smartest young man in Congress running around worrying about who is colorizing films? . . . . Tell him if he doesn't like colorized films to go to every television in America and take the color knob off."[269] Wasserman may have been willing to apologize to Lucas over the *Star Wars*/*Battlestar Galactica* lawsuit, but he wasn't going to sit still and allow the Directors Guild to write moral rights for directors into the Copyright Act.

Despite pressure from the MPAA and prominent Hollywood figures, different members of Congress proposed a half dozen additional pieces of related legislation designed to protect the rights of film directors and sometimes writers as well. But on all counts, the studios got exactly what they wanted. The United States ratified the Berne Convention, giving the studios power to enforce copyright policy

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265. *Final Say over Films at Issue*, *supra* note 263. *See generally* FRANCIS STONOR SAUNDERS, THE CULTURAL COLD WAR: THE CIA AND THE WORLD OF ARTS AND LETTERS (1999).

266. *Final Say over Films at Issue*, *supra* note 263.

267. Klawans, *supra* note 247, at 174–78.

268. *Id.* at 174–75.

269. RONALD BROWNSTEIN, THE POWER AND THE GLITTER: THE HOLLYWOOD - WASHINGTON CONNECTION 218 (1990).

in many more countries.[270] The Visual Artists Rights Act of 1990 created limited moral rights in some artworks, but it explicitly excludes motion pictures from the category of protected works. The one small concession that the directors received came in the form of the National Film Preservation Act of 1988, which established the National Film Preservation Board and the National Film Registry. The bill empowered the board to select twenty-five films each year which would be placed on the film registry. Films on the registry were protected from being shown or distributed in altered form without a label announcing the changes.[271]

2. THE NATIONAL FILM PRESERVATION ACT

The creation of the board and registry were very small concessions for the studios to make, but Jack Valenti bristled even at these token gestures.[272] To be fair, Valenti did not like the National Film Preservation Act from the start.[273] The Act had emerged out of an amendment that representatives Robert Mrazek and Sidney Yates introduced into an appropriations bill for the Department of the Interior (an unusual route for copyright legislation, to say the least).[274] The Mrazek-Yates Amendment called for labeling of films that had been colorized or altered in other ways.[275] In response to the bill, Valenti arranged for a meeting with representatives from the Directors Guild and other interested parties in the offices of House Majority Leader Thomas Foley.[276] In the closed-door meeting, they hammered out an agreement that eventually became the National Film Preservation Act. When asked why he arranged for the truce, Valenti told Kara Swisher of the *Washington Post* that Mrazek, "had the votes to roll me. So I felt it was better to make a compromise."[277] Even after the passage of the bill, however, Valenti continued to voice his disgust with the resolution. Throughout the first meetings of the National Film

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270. Schwartz, *supra* note 247, at 138–39.

271. National Film Preservation Act of 1988, 2 U.S.C. §§ 178–178*l* (1988); Schwartz, *supra* note 247.

272. Andrew L. Yarrow, *Action but No Consensus on Film Coloring*, N.Y. TIMES, July 11, 1988, at C13.

273. *Id.*

274. Schwartz, *supra* note 247, at 138.

275. Irvin Molotsky, *Film-Color Panel Seeks Meaning of "American,"* N.Y. TIMES, Jan. 24, 1989, at C19.

276. Kara Swisher, *House Takes Steps on Colorization*, WASH. POST, June 30, 1988, at B3.

277. *Id.*

Preservation Board, Valenti made sarcastic comments under his breath, and he refused to vote on the films for inclusion. He told several reporters that he thought it was "desperately wrong for the Government to get involved in the motion-picture business."[278]

Valenti and the studios were able to reign in the New-Hollywood auteurs, but the directors won several subsequent consolation victories. They should have been pleased with the results of a Copyright Office report on the alteration of motion pictures. Congress frequently delays or entirely sidesteps controversial issues by ordering agencies or government offices to conduct studies. In this case, Congress requested a study of the moral rights issue from the Copyright Office of the Library of Congress.[279] Copyright Office employees Eric Schwartz and William Patry (now both distinguished copyright experts in their own right) undertook the effort with a thoroughness and energy unusual for such reports. They heard testimony from scholars and technicians, in addition to filmmakers. Rutgers University film professor John Belton, for example, explained the difficulties of teaching films when alternate versions existed.[280] Belton also commented that colorization was a minor problem for scholars and teachers compared to panning and scanning (i.e., reframing) of widescreen films transferred to videotape.[281] During the hearings, American University law professor Peter Jaszi drew on popular critical theory of the 1970s and 1980s and European countries' varied experience with moral rights film law to explain the complications of determining the author of a collaborative work like a motion picture.[282] The final report took account of the much larger context in which the colorization controversy took place. And, in the end, the report recommended that the United States adopt some form of moral rights protection for filmmakers. Unfortunately, the report appeared too late to have an effect on legislation.

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278. Yarrow, *supra* note 272.

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

280. Comments of Professor John Belton on Behalf of the Society for Cinema Studies, Hearing on New Technology and Audioviual Works, United States Copyright Office (September 8, 1988), *reprinted in* CO REPORT, *supra* note 279.

281. *Id.*

282. Comments of Professor Peter Jaszi Before the Copyright Office in the Public Hearing on New Technology and Audiovisual Works, United States Copyright Office (September 8, 1988).

3. A FRENCH VICTORY

Film directors also scored a major victory in the French court system, proving once again that Anglo-American and Continental copyright law had taken divergent paths.[283] Along with Spielberg, Lucas, Capra, and Woody Allen, film director John Huston had spoken out against colorization shortly before his death in 1987. When Turner Entertainment colorized his 1950 film *The Asphalt Jungle* for French television, Huston's heirs, Angelica, Daniel, and Walter, sued for violation of moral rights. *Asphalt Jungle* screenwriter Ben Maddow and many of the French motion picture guilds joined them.[284] In 1994, six years after the case was initiated and also six years after the colorization battle had ended in the United States, France's highest court, the *Cour de cassation*, ruled in favor of the Huston heirs. The court held that the colorization of the film without Huston's or his estate's consent violated his moral rights, and they awarded substantial cash settlements to the heirs, Maddow, and the French guilds.[285] It was a decisive victory, but one that came too late to have more than a symbolic impact. By 1994, even Turner had given up on colorization; that same year he started a cable channel, Turner Classic Movies (TCM), devoted to showing movies uncut and in their original form.[286]

After decades of facing off with studios on the question of moral rights, directors achieved a pyrrhic victory. Their work would be protected like historic landmarks or natural treasures. But they gave away their chance for statutory moral rights at perhaps the one moment in the history of U.S. copyright law since the 1930s when moral rights were really on the negotiating table, the moment when Congress had international pressure to adopt moral rights as part of its ratification of the Berne Convention. Once again, lawmakers proved to be sympathetic to the condition of directors when studios altered their work. But, as they had done since the 1930s, studio leaders and representatives outmaneuvered the directors.

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283. *French Appellate Court Rules that Colorization and Broadcast of the "Asphalt Jungle" Violated the Moral Rights of Director John Huston and Screenwriter Ben Maddow*, 16 ENT. L. REP., Mar. 1995, http://www.entertainmentlawreporter.com/ (click "Back Issues: 1978-2007"; then find the appropriate volume and month).

284. *Id.*

285. *Id.*

286. Elizabeth Kolbert, *A Turner Channel Seeks Carriers*, N.Y. TIMES, Apr. 11, 1994, at D5; Lawrie Mifflin, *Clash of the Old-Movie Titans*, N.Y. TIMES, Mar. 19, 1995, at 38.

4. NEW MEDIA AND NEW ALLEGIANCES

Many of the issues raised in the colorization episode resurfaced fifteen years later when several film directors learned that new companies were using home-video technologies to bowdlerize their films. Some of these companies, CleanFlicks for example, bought Hollywood DVDs and sold edited versions with violence removed.[287] Other companies, like ClearPlay, developed set-top boxes that could skip scenes and mute dialog or sound effects in real-time as a DVD played on a consumer's television.[288] The CleanFlicks version of Steven Spielberg's *Schindler's List*,[289] for example, had forty-three audio or video cuts and ten minutes shaved off of the movie's total running time. Even Mel Gibson's passion play, *The Passion of the Christ*,[290] had three minutes of graphic violence removed. Directors had been complaining for years about studios creating shortened or distorted versions of their films; they were certainly not going to be happy about new start-up companies creating sanitized versions.

There was a twist this time, however, and the legal dispute over film sanitizing marked an important transformation in film directors' quest for moral rights. Where directors and studios had faced off over moral rights for three-quarters of a century, they now found themselves united against a common enemy. The democratization of video-editing software and the explosion of innovation in consumer video products lowered the barrier of entry for the creation of new versions of Hollywood film.[291] Fans and amateur filmmakers had circulated their own cuts of studio films for decades, but ClearPlay, CleanFlicks, and their competitors were starting legitimate businesses based on the re-editing of Hollywood films.[292] The sanitizing companies represented a dual threat both to the artistic integrity of the directors' work and to the studios hegemony over ancillary distribution markets. And the directors and the studios both had reasons to stop this new business model before it established itself.

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287. Drew Clark, *Bowdlerizing for Columbine?*, SLATE (Jan. 20, 2003, 6:34 PM), http://www.slate.com/id/2077192/.

288. *Id.*

289. SCHINDLER'S LIST (Universal 1993).

290. THE PASSION OF THE CHRIST (Universal 2004).

291. Randy Picker, *CleanFlicks and Digital Rights Management*, UNIVERSITY OF CHICAGO LAW SCHOOL FACULTY BLOG (July 12, 2006, 9:52:18 PM), http://uchicagolaw.typepad.com/faculty/2006/07/cleanflicks_and.html.

292. Clark, *supra* note 287.

This lawsuit actually came to the directors, rather than the other way around.[293] In 2002, owners of one of the bowdlerizing companies, Trilogy Studios, grew so proud of their work that they decided to show their edited versions to a group of Hollywood directors, including Rob Reiner and Wes Craven.[294] Trilogy's owners hoped to license its scene-skipping software to Hollywood, and they were, apparently, surprised when the directors not only failed to praise their work but also threatened a lawsuit.[295] It is not clear whether or not the directors really intended to follow through on their threats. But in response, Trilogy joined a number of other editing and scene-skipping companies who jointly filed a preemptive declaratory judgment case against twelve top Hollywood directors, including Steven Soderbergh and Steven Spielberg.[296] They asked the District of Colorado to decide if their method of copying and editing films was covered under the fair-use doctrine.[297] The directors turned around and counter-sued, joined by the Directors Guild of America.[298]

A Directors Guild representative echoed Ted Turner's famous "I own it" defense and explained that the editing and scene-skipping companies "have decided what the vision of the movie is to be. Copyright is about ownership, and these guys don't own it."[299] Yet directors did not own the films either; the studios did. And without the studios' support, the directors and the guild initially relied on moral rights claims, basing their arguments on the Monty Python decision. The early court documents filed by the directors and the guild explicitly invoke the Monty Python decision as precedent.[300] One Directors Guild document described the decision as, "remain[ing] good law after nearly two decades."[301]

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293. Press Release, Directors Guild of America, DGA Denounces Lawsuit Filed Against 16 Directors by Two Entities Engaged in Unauthorized Editing of Films (Aug. 29, 2002), *available at* http://www.dga.org/news/pr_expand.php3?279.

294. Clark, *supra* note 287.

295. *Id.*

296. Second Amended Complaint and Jury Demand, *Huntsman v. Soderbergh*, No. 02-M-1662 (MJW) (D. Colo. Oct. 2002).

297. Clark, *supra* note 287.

298. Press Release, Directors Guild of America, DGA Responds and Counterclaims Against Robert Huntsman and CleanFlicks; Adds Motion Picture Studios to Suit (September 20, 2002), *available at* http://www.dga.org/news/pr_expand.php3?281.

299. Clark, *supra* note 287.

300. *Id.*

301. Director Parties' Motion for Leave to File Surreply, *Huntsman v. Soderbergh*, No. 02-M-1662 (MJW) (D. Colo. Jan. 7, 2004). Michael Apted states: "We had, as a guild, a legal obligation to protect the work of our members. But what I

It would have been fascinating if a court had decided this case under these circumstances, where the directors faced off against consumer technology and editing companies rather than the copyright holders. But the studios and the MPAA decided to join the directors as parties in the case.[302] The studio heads' motivations, however, were not entirely clear. In public statements MPAA president Jack Valenti defended Hollywood's role as a moral custodian of culture. Valenti worried aloud that if the courts permitted companies to create G-rated versions of films, other companies would create X-rated versions. "To allow one," he said, "it would seem you must allow the other. That is unacceptable to parents and the public."[303] Hollywood, he seemed to be arguing, had established a reputation as a moral guardian, and this role entitled them to control films' integrity as well.

In addition to the studios, Congress became involved as well. And after almost a century of dithering about the rights of filmmakers, Congress took quick and decisive action.[304] As a longtime member and sometime chair of the Senate Judiciary Committee, Utah Senator Orrin Hatch is frequently involved in the crafting of copyright legislation. He is also a singer-songwriter with many recorded albums and published compositions. As his legislative record shows, he is clearly sympathetic to the position of artists and the music and film industries that promote their work.[305] In this case, Hatch had sympathies on both sides of the issues, since many of the companies and much of the audience for the

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was also saying is that we have a moral obligation to do so as well. . . . It was a very well-planned and orchestrated campaign from the beginning, but it was made much stronger once the studios joined us. There was not just good legal basis, in my mind; there was a very strong moral claim, and that is what I thought was so important and exciting that we took that stand." *Dialogue with Michael Apted*, HOLLYWOOD REP., Aug 18, 2003 (publishing *The Hollywood Reporter* labor/legal reporter Peter Kiefer's interview with Michael Apted).

302. *Dialogue with Michael Apted*, *supra* note 301.

303. Press Release, Motion Picture Association of America, Statement by Jack Valenti: President and CEO, Motion Picture Association of America Speaks Out Against Unauthorized Editing of Motion Pictures (Sept. 20, 2002), *available at* http://www.dga.org/news/pr_mpaaasupportsdgastance.php3.

304. Family Entertainment and Copyright Act of 2005, Pub. L. No. 109-9, 119 Stat. 218.

305. In one speech, for example, Hatch remarked, "There are many who do not understand that ideas, inventions, artistic works, and other commercially-viable products created out of one's own mental processes deserve the same protection under the law as any other tangible product or piece of real estate. . . . As I hope you can tell, the protection of intellectual property has been and is one of my top priorities in the Senate." Orrin G. Hatch, Remarks at the International Confederation of Societies of Authors and Composers *World Copyright Summit* (June 9, 2009), *available at* http://msl1.mit.edu/furdlog/docs/usgov/Speech_Hatch_WCS.pdf.

edited film versions resided in his home state. In response to the CleanFlicks lawsuit, Hatch proposed a new bill that offered a compromise between the different sides, and the bill eventually became the Family Movie Act of 2005.[306]

The Act has three parts, and together they tell a fascinating story of legislative compromise. First, the Artists' Rights and Theft Prevention Act of 2005 makes it illegal to use a camcorder in a movie theater.[307] Even in the digital age, most pirated new releases are the result of someone taping a feature film with a camcorder. The MPAA had been pushing for this legislation at the state level for years, and a federal law was a big gift to the film industry. The second part of the Act, the Family Movie Act, legalized the scene-skipping set-top boxes, like ClearPlay, although it did not mention companies that edited and resold copies of films, like CleanFlicks.[308] This section of the Act clearly defined a legitimate business model for companies and audiences that wanted bowdlerized versions of mainstream films.[309] A final section of the Act renewed the National Film Preservation Act, acknowledging continuity with the last time that such a compromise over altered versions of films had been considered by Congress.[310]

The Family Movie Act, however, left open the question of whether the companies that sold edited versions of films were protected, and the case continued to go forward without ClearPlay and the other scene-skipping companies that Congress had sanctioned.[311] In a decision that relied on a fair-use analysis, Judge Richard P. Matsch of Colorado adopted a heavily artist-centered view of copyright, asserting that "the intrinsic value of the right to control the content of the copyrighted work . . . is the essence of the law of copyright."[312] He decided in favor of the directors and the studios, claiming that they had "the right to control the reproduction and distribution of the protected work in their original form."[313] With both the artists and owners—the directors and the studios—on the same side, the case for preserving

306. Family Entertainment and Copyright Act of 2005, 119 Stat. 218.

307. Artists' Rights and Theft Prevention Act of 2005, Pub. L. No. 109-9, § 102, 119 Stat. 218.

308. Family Movie Act of 2005, Pub. L. No. 109-9, § 202, 119 Stat. 223.

309. *Id.*

310. National Film Preservation Act of 2005, Pub. L. No. 109-9, § 302, 199 Stat. 224.

311. *Clean Flicks of Colo., LLC v. Soderbergh*, 433 F. Supp. 2d 1236 (D. Colo. 2006).

312. *Id.* at 1242.

313. *Id.* at 1243.

films' integrity proved to be much more persuasive than it had been when the directors made it alone.

They may have been victorious, but the novel alliance between directors and studios undid decades of conflict. And the case marks an important turn in the history of moral rights for filmmakers. Although directors routinely lost their moral rights campaigns, they successfully forged a legal language for evaluating authorial rights and reputations. Moreover, they persuasively portrayed studios' exploitation of new technology as a threat to the work of American cinematic artists. By joining the directors in the fight against film-sanitizing companies, the studios were able to successfully co-opt this image of the embattled artist and use it as a front for corporate protection. As a result, the rights of filmmakers have become a familiar rallying cry in the studios' attempts to contain digital technologies.

CONCLUSION

For the filmmakers, this new alliance represents a complete capitulation. The studios clearly did not join the case because they were opposed to editing films for new markets. Creating shortened and sanitized versions of films for television and airplane showings have long been a normal part of the distribution of a film. It is unlikely that the studios joined the *CleanFlicks* case to defend the films' integrity, as the directors had. Instead, the studio heads were defending their exclusive right to make derivative works; a stance that puts the directors in a very strange position. The directors ended up defending the studios' right to be the sole entities that could mutilate their work. They settled for the very situation they had been fighting against since Douglas Fairbanks took the Triangle Company to court, embracing the devil they knew rather than submitting to a dispersed new industry of editors.