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COMMENTS

CLASSIC FILMS AND HISTORIC LANDMARKS: PROTECTING AMERICA'S FILM HERITAGE FROM DIGITAL ALTERATION

HELEN K. GEIB*

*Film is a uniquely American art form: we brought it to life, we made it talk, we used it to address our deepest social concerns. Classic feature films are a vital part of America's living heritage. They have become one of the most potent voices through which one generation speaks to the next.*¹

INTRODUCTION

Cinema is the most influential art form of this century. Individual films are irreplaceable records of American culture and history. Recent years have witnessed a groundswell of both critical and public appreciation of the importance of our film heritage. Yet, classic films are in greater danger today than ever before.

New digital technology used in modern feature filmmaking has made nearly undetectable alterations to old films a reality.² Recent television commercials have used digital technology to

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1. See 133 CONG. REC. E1922 (1987) (statement of Rep. Richard Gephardt) (introducing the Film Integrity Act of 1987: Preserving America's Film Heritage, H.R. 2400, 100th Cong., 1st Sess. (1987)).

2. The scope of this Comment is limited to possible alterations from digital technology. It does not extend to the insertion of commercials, content editing, and other changes made to accommodate films to television broadcast. Nor does this Comment extend to colorization or "pan and scan," the process by which feature films are formatted to fit television screens. See THE FOCAL ENCYCLOPEDIA OF FILM AND TELEVISION TECHNIQUES 281 (1981) (giving the projected image area for contemporary films as .825 or .839 and the area reproduced on the television screen as .792). Though anathema to film lovers, these processes are damaging primarily to the aesthetic value of the film, and only secondarily to its historical verity.

insert consumer products into scenes excerpted from Hollywood classics. Picture Judah Ben-Hur, who once competed in a chariot race against Messala, his mortal enemy and the cause of his family's tragic misfortunes, racing against a Pontiac Sunfire.³ Picture Errol Flynn enjoying "Miller Time" in the Spanish galley where he and his comrades were enslaved.⁴ Picture Fred Astaire dancing with a Dirt Devil vacuum cleaner.⁵ To date, only film excerpts have been altered. However, the technology is equally capable of altering scenes within films themselves.

The range of possible alterations is practically limitless and includes product placement, "correction" of racist or other objectionable material, and changes to the story to make the film more commercial.⁶ Is it only a matter of time before Jimmy Stewart drinks Coca-Cola in *It's A Wonderful Life*,⁷ Al Jolson sings "Mammy" in whiteface in *The Jazz Singer*,⁸ and Ingrid Bergman

3. BEN-HUR (Metro-Goldwyn-Mayer 1926). Critics have described the silent *Ben-Hur* as the greatest of all movie epics. 1 INTERNATIONAL DICTIONARY OF FILMS AND FILMMAKERS 89 (2d ed. 1990) [hereinafter DICTIONARY OF FILMS]. *Ben-Hur* is included in the National Film Registry. *National Film Registry of the Library of Congress* (visited Sept. 25, 1999) <<http://lcweb.loc.gov/film/titles.html>> [hereinafter *Film Registry*].

4. THE SEA HAWK (Warner Brothers 1940).

5. ROYAL WEDDING (Metro-Goldwyn-Mayer 1951). Since sales of "Dirt Devil Broom Vacs" tripled during the three weeks the commercial aired in January 1997, it is likely that television viewers will see Astaire dancing with more vacuums in the future. Jeanne Whalen, *Dirt Devil*, ADVERTISING AGE, June 30, 1997, at 6.

6. Product placement in current movies has evolved from humble beginnings into a multi-million dollar business. Steven L. Snyder, Note, *Movies and Product Placement: Is Hollywood Turning Films Into Commercial Speech*, 1992 U. ILL. L. REV. 301, 302 (1992). In 1982, sales of Reese's Pieces skyrocketed after a cute little alien named E.T. ate the candy. *Id.* at 301-02. In 1997, producers of *The Lost World: Jurassic Park* alone collected \$10 million in product placement fees, \$5 million of which came from a single company. Ron Grover & Pat Wechsler, *Please, Mr. Spielberg, Crush My Benz*, BUS. WK., June 2, 1997, at 6. Product placement in feature films has changed from a "clandestine art, a way of sneaking plugs for brand names into ad-free entertainment without the audience noticing," into marketing events like the advertising-campaign which trumpeted that James Bond would drive a BMW in *Goldeneye*. Debra Goldman, *Wheels of Fortune*, ADWEEK—W. ED., Apr. 14, 1997, at 62.

7. IT'S A WONDERFUL LIFE (RKO/Liberty Films 1946). Using digital technology, owners of old television shows now have the ability to sell "market-specific product placement in TV reruns. An episode of 'Home Improvement' airing in Chicago, for instance, could feature Tim Allen using a toolbox with a Menard's logo, while the same episode, airing in Miami, might have him reaching for the same one featuring the logo of a South Florida chain." Julia Keller, *It All Ads Up*, CHI. TRIB., Aug. 24, 1999, § 5, at 3.

8. THE JAZZ SINGER (Warner Brothers 1927). *The Jazz Singer* is a silent film with sound sequences, including several of Jolson's signature songs and one dialogue sequence. DICTIONARY OF FILMS, *supra* note 3, at 432. Although it is neither the first film to be released with a synchronized score nor the first

stays behind with Humphrey Bogart in *Casablanca*?⁹ No legal means exist today to prevent these or similar alterations to even the most revered classics of America's film heritage.¹⁰

The preservation of another part of America's cultural heritage, the "built environment," began too late to save many important landmarks.¹¹ Buildings, like films, reflect popular culture to a much greater degree than do works of fine art. Unlike great books or paintings, great films and buildings are rarely the product of a single artistic vision uninfluenced by commercial concerns. Cinema and architecture are collaborative ventures dependent on available technology, funding, materials, technical expertise, and public approbation. Today, society recognizes the cultural value of buildings and aggressively preserves the built environment through landmark laws.¹² Society has an equally strong interest in protecting the integrity of its film heritage.¹³

Part I of this Comment will begin with an explanation of how digital technology works and will continue with a discussion of three different rights: the copyright, the moral right, and the cultural property right. Part I will also describe the National Film Preservation Act and compare it with the National Historic Preservation Act. Part II will discuss the inherent limitations of attempting to protect films through either copyright law or moral rights law. Part II will then explore the advantages of founding legal protection of America's film heritage upon society's cultural

"all-talking" picture, people remember *The Jazz Singer* as the first sound film because of its enormous popular impact. *Id.*

9. CASABLANCA (Warner Brothers 1942); see Craig A. Wagner, Note, *Motion Picture Colorization, Authenticity, and the Elusive Moral Right*, 64 N.Y.U. L. REV. 628, 628-29 (1989) (positing an alternative "happy" ending to *Casablanca* as an example of the possibilities of digital technology). *It's A Wonderful Life*, *The Jazz Singer*, and *Casablanca* are all included in the National Film Registry. *Film Registry*, *supra* note 3.

10. Scholars often observe that new technologies highlight deficiencies in the law. Garrett D. Blanchfield, Jr., Comment, *Black and White (and Red All Over): 'Colorization' in the Courts and in the Government*, 10 HAMLINE J. PUB. L. & POL'Y 59, 59 (1989). In the past, film lovers have been most concerned with colorization, the process by which film owners add color to black and white feature films. From 1988-90, at the height of the debate over colorization, law journals published at least 10 articles on the subject. See, e.g., Wagner, *supra* note 9, at 712-13, 715 (proposing an amendment to the Copyright Act that would recognize the moral right of the film director, producer, and principal screenwriter to prevent material alterations, such as colorization).

11. New York City enacted its landmarks ordinance in response to the demolition of Pennsylvania Railroad Station. John Nivala, *The Future for Our Past: Preserving Landmark Preservation*, 5 N.Y.U. ENVTL. L.J. 83, 89 (1996). Destruction of historic landmarks has been described as "urbicide." *Id.*

12. Patty Gerstenblith, *Architect as Artist: Artists' Rights and Historic Preservation*, 12 CARDOZO ARTS & ENT. L.J. 431, 455 (1994).

13. Wagner, *supra* note 9, at 649.

property rights. Part III will propose statutory protection of films inspired by historic landmarks laws.

I. COPYRIGHT, MORAL RIGHTS, AND CULTURAL PROPERTY RIGHTS: THREE OPTIONS FOR PROTECTION

A film owner can use digital technology to alter a film in many ways.¹⁴ Film artists and their supporters continue to call for legal protection of artistic rights to limit the film owner's ability to make alterations.¹⁵ Society's cultural property rights offer an alternative means for protecting America's film heritage. Congress recognized the compelling public interest in the preservation of America's film heritage by enacting the National Film Preservation Act.¹⁶

A. How Digital Technology Works

While a digital image and a photograph may look alike to the human eye, they are as different from each other as a photograph and an oil painting.¹⁷ A photograph is an analog, or continuous

14. See *infra* note 23 for further discussion of these techniques.

15. During the debate over colorization, labeling of altered films emerged as an alternative to U.S. recognition of the moral rights of film artists. See, e.g., Warren H. Husband, *Resurrecting Hollywood's Golden Age: Balancing the Rights of Film Owners, Artistic Authors and Consumers*, 17 COLUM.-VLA J.L. & ARTS 327, 329 (1994) (advocating labeling of altered films as an alternative to recognition of film artists' moral rights). The National Film Preservation Act (NFPA) of 1988 included a labeling provision for films listed in the National Film Registry. 2 U.S.C. § 178c (1988) (repealed 1992). The NFPA of 1988 required that a label informing the public that the film had been altered precede every broadcast of a materially altered film. *Id.* However, Congress removed the provision from the NFPA of 1992. See H.R. REP. NO. 104-558, pt. 1, at 11-12 (1996) reprinted in 1996 U.S.C.C.A.N. 3818 (stating the labeling requirement contained in the NFPA of 1988 did not meet the concerns of filmmakers, scholars, or the public and was removed from the NFPA of 1992).

Congress did not enact the proposed National Film Disclosure Act of 1993, which would have amended the Lanham Act to give artistic authors the right to insist on a label for a materially altered film. H.R. 1731, 103d Cong., 1st Sess. (1993); see generally David A. Honicky, *Film Labelling [sic] as a Cure for Colorization [and Other Alterations]: A Band-Aid for a Hatchet Job*, 12 CARDOZO ARTS & ENT. L.J. 409, 425-30 (1994) (describing the debate surrounding the Film Disclosure Act). The Lanham Act is the federal trademark, false advertising, and unfair competition statute. 15 U.S.C. § 1051 (1994). Its purpose is to protect the public from misleading advertising. *Id.* Likewise, truth in advertising is also the main purpose of a labeling provision. Honicky, *supra*, at 425-26.

16. 2 U.S.C. § 178 (1988) (repealed 1992).

17. WILLIAM J. MITCHELL, *THE RECONFIGURED EYE: VISUAL TRUTH IN THE POST-PHOTOGRAPHIC ERA* 4 (1992). For instance, a photograph degrades in quality each time it is reproduced. *Id.* at 6. A digital image will never degrade, however many times it is reproduced. *Id.* An analog image is composed of an indefinite amount of information, which is why a photograph shows more detail when it is enlarged. *Id.* In contrast, a digital image is

representation of an image, while a digital image is composed of discrete points, called pixels.¹⁸ A computer programmer creates a digital image by dividing a picture into color-coded pixels of uniform size; the programmer assigns an integer representing a given intensity to each pixel to color-code it.¹⁹ The computer stores the array of integers, called a raster grid, and "interprets" the grid to reproduce the image.²⁰ Once the programmer converts an analog image to digital information, the programmer can manipulate the image by removing, adding, or shifting points around.²¹

Society trusts photographs and film because, it is said, "pictures don't lie."²² In the future, an image's "truth" may be uncertain.²³ Director George Lucas captured filmmakers' fears of the possibilities of the new technology: "we may live to see [our motion picture creations] re-cast with stars we never directed, uttering dialogue we never wrote—all in support of goals and masters we never imagined we would serve."²⁴

B. Copyright and the Moral Right

Most American feature films are under copyright, which is a property right in a work of art.²⁵ The studios that produced the films hold the copyrights.²⁶ In contrast, the artist holds the moral

composed of a finite amount of information. *Id.*

18. *Id.* at 4-5.

19. *Id.* at 5.

20. *Id.*

21. *Id.* at 7.

22. MITCHELL, *supra* note 17, at 24.

23. Digital technology exploded into the public eye with the critical and commercial success of *Forrest Gump*. MARK COTTA VAZ & PATRICIA ROSE DUGNAN, *INDUSTRIAL LIGHT AND MAGIC: INTO THE DIGITAL REALM* 247 (1996). The filmmakers inserted the title character into archival footage in which he appeared to interact with, among others, Presidents John Kennedy, Lyndon Johnson, and Richard Nixon. *Id.* at 253-54. The filmmakers used a two-dimensional technique in which they scanned the archival footage into a computer and then manipulated it. Erin Giacoppo, Note, *Avoiding the Tragedy of Frankenstein: The Application of the Right of Publicity to the Use of Digitally Reproduced Actors in Film*, 48 HASTINGS L.J. 601, 605 (1997). For the scene with Nixon, the filmmakers digitally altered the president's facial movements to bring his "performance" into harmony with the script. VAZ, *supra*, at 254; cf. MITCHELL, *supra* note 17, at 16-17 (giving examples of digital alteration of photographs). Predictions of the digital resurrection of actors no longer seem fanciful. More than one writer has already addressed the legal consequences that would flow from casting dead movie stars in contemporary feature films. See, e.g., Giacoppo, *supra*, at 605-08 (discussing the technical process used to reanimate dead actors).

24. *Lucas and Spielberg Speak Out for Artists' Rights*, ENT. LITIG. REP., Jan. 27, 1992, at 5395. Ironically, Lucas is a pioneer of digital effects in film. VAZ, *supra* note 23, at 8.

25. 17 U.S.C. § 106 (1994).

26. Wagner, *supra* note 9, at 656.

right in a work and retains it when the work is sold.²⁷ The U.S. does not currently recognize moral rights of film artists.²⁸

1. U.S. Copyright Law

The U.S. Constitution grants Congress the power to “promote the Progress of Science and the useful Arts, by securing for limited Times to Authors . . . the exclusive Right to their respective Writings.”²⁹ “Original works of authorship fixed in any tangible medium of expression” are eligible for copyright protection.³⁰ The copyright includes exclusive rights to reproduce and distribute the work, to perform and display it, and to prepare derivative works based on the copyrighted work.³¹ The Copyright Clause exists primarily to serve the public interest in the arts.³² Creating a property right for artists in their creations stimulates creative activity that in turn benefits the public.³³ The limited term of copyright protection also benefits the public because it promotes wide dissemination of the work following the term’s expiration.³⁴

The 1909 Copyright Act granted a twenty-eight year copyright term for motion pictures.³⁵ The copyright owner could renew the copyright for an additional twenty-eight years at the expiration of the original term.³⁶ The total length of possible copyright protection therefore was fifty-six years. The 1976 Copyright Act, as amended by the 1998 Sonny Bono Copyright Term Extension Act, extends the copyright term for motion pictures to ninety-five years.³⁷ The 1976 Act also adds an

27. *Id.* at 688.

28. Matthew J. McDonough, Note, *Moral Rights and the Movies: The Threat and Challenge of the Digital Domain*, 31 SUFFOLK U. L. REV. 455, 472-73 (1997).

29. U.S. CONST. art. I, § 8, cl. 8.

30. 17 U.S.C. § 102 (1994).

31. *Id.* § 106. A colorized version of a film is a derivative work that is eligible for independent copyright protection. Wagner, *supra* note 9, at 652-53.

32. *Mazer v. Stein*, 347 U.S. 201, 218 (1954); *accord Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932) (stating that “[t]he sole interest of the United States and the primary object in conferring the [copyright] monopoly lie in the general benefits derived by the public from the labors of authors”).

33. *Mazer*, 347 U.S. at 219.

34. 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 1.05[D], at 66.16-.17 (1999) [hereinafter NIMMER].

35. Copyright Act of 1909, ch. 320, 35 Stat. 1075 (codified at 17 U.S.C. § 24 (1947)) (revised 1976). “Motion pictures’ are audiovisual works consisting of a series of related images which, when shown in succession, impart an impression of motion, together with accompanying sounds, if any.” 17 U.S.C. § 101 (1994).

36. 17 U.S.C. § 24 (revised 1976).

37. 17 U.S.C. § 302(c) (1994), *amended by* Pub. L. No. 105-298, § 102(b)(3), 112 Stat. 2827 (1998). The copyright endures for 95 years from the date of the first publication or 100 years from the creation of the work, whichever expires first. *Id.*

additional term to subsisting copyrights—to create a uniform ninety-five year term of protection for films made before and after the act took effect. The 1976 Act gives the owner of a motion picture, in its first term of protection on January 1, 1978, an additional term of sixty-seven years.³⁸ For a motion picture in its renewal term on the effective date of the Copyright Term Extension Act, the Act extends the copyright term to ninety-five years from the original copyright date.³⁹ Thus, silent films made before 1922 are now in the public domain, while most films of the sound era are under copyright.⁴⁰

Under copyright law, motion pictures fall into the special category of “works made for hire.”⁴¹ A work for hire is defined as “a work specially ordered or commissioned . . . as a part of a motion picture or other audiovisual work.”⁴² The “author” of a work for hire is the employer who commissioned the work, rather than the artist or artists who created it.⁴³ Thus, in the case of a motion picture, the studio that produced the film holds the copyright.⁴⁴

2. Moral Rights Theory

In an effort to limit the copyright owner's ability to alter a film, many film artists advocate U.S. recognition of filmmakers' moral rights.⁴⁵ The doctrine of moral rights originated in France in the mid-1800s.⁴⁶ Many European countries recognize some

38. 17 U.S.C. § 304(a)(1)(B) (1994) (amended 1998).

39. *Id.* § 304(b).

40. Cinema was born in France in 1895. GERALD MAST, A SHORT HISTORY OF THE MOVIES 21 (5th ed. 1992). By the end of World War I, the American film industry had become the dominant industry in the world, both artistically and commercially. *Id.* at 94-95. D. W. Griffith's *The Birth of a Nation* (1915) inaugurated the era of American silent feature filmmaking, and *The Jazz Singer* (1927) heralded its demise. *Id.* at 67, 185. Although studios continued to release silent films through 1929, production of “talkies” began in earnest after the success of *The Jazz Singer*. *Id.* at 190.

41. 17 U.S.C. § 101 (1994).

42. *Id.* In general, any “work prepared by an employee within the scope of his or her employment” is a work for hire. *Id.*

43. *Id.* § 201(b). As the “author,” the employer “owns all of the rights comprised in the copyright” unless there is a contrary written agreement between the parties. *Id.* Architects also have very limited rights under the copyright act. Gerstenblith, *supra* note 12, at 435. Copyright law considers architects, like filmmakers, to have been fully paid at the time their work is completed, unlike writers and visual artists who must rely on profits from later sales of either the original work or of copies. *Id.* at 446.

44. Wagner, *supra* note 9, at 656.

45. McDonough, *supra* note 28, at 469.

46. Raymond Sarraute, *Current Theory of the Moral Right of Authors and Artists Under French Law*, 16 AM. J. COMP. L. 465, 465 (1968). Initially a product of judicial decisions, French lawmakers codified moral rights in 1957. *Id.* at 466. *Le droit moral* does not have an exact English translation;

variation of moral rights.⁴⁷ The Berne Convention for the Protection of Literary and Artistic Works (Berne) also grants significant moral rights protection to artists.⁴⁸

In contrast to copyright, moral rights are personal to the artist.⁴⁹ The artist retains moral rights in the work even after selling it; retention of the moral right is independent of copyright ownership.⁵⁰ The most important component of the moral right is the right of integrity.⁵¹ This enables the artistic author to prevent substantial alterations to the work.⁵² However, possession of a moral right does not compel an artist to exercise it.

Protecting the artist's livelihood is the most common justification for recognizing the artist's moral rights.⁵³ Material alteration of a work has a negative impact on the quality of the

"spiritual," "non-economic," and "personal" are close in meaning. NIMMER, *supra* note 34, § 8D.01A, at 4.

47. Janine V. McNally, Comment, *Congressional Limits on Technological Alterations to Film: The Public Interest and the Artists' Moral Right*, 5 HIGH TECH. L.J. 129, 139 (1990).

48. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886 (Paris text 1971) art. 6bis [hereinafter Berne Convention]. Berne is an international copyright convention that requires member-nations to protect an artist's moral rights of paternity and integrity. *Id.* The artist can prevent "any distortion, mutilation or other modification of . . . [the] work, which would be prejudicial to his honour or reputation." *Id.*; compare *id.* with 17 U.S.C. § 106A (1994) (adopting substantially similar language). Under Berne, moral rights expire concurrently with the copyright term. Berne Convention, *supra*, art. 6bis. In the alternative, member-nations may choose to provide that the moral right will expire upon the artist's death. *Id.* The convention was signed at Berne, Switzerland in 1886, and approximately 80 nations have joined as signatories. McNally, *supra* note 47, at 145. The U.S. Congress adhered to the Convention in 1989. *Id.*

49. Wagner, *supra* note 9, at 688. Under French law, the artist or the artist's heirs can enforce the moral right in perpetuity. Sarraute, *supra* note 46, at 483.

50. Wagner, *supra* note 9, at 688.

51. McDonough, *supra* note 28, at 468. There are two other significant components of the moral right: the right of paternity or attribution and the right of public disclosure. Sarraute, *supra* note 46, at 467. The right of paternity allows the artist to claim authorship of a work of art. *Id.* Disclosure is the artist's right to decide when a work is finished. *Id.* This right poses particular problems with films and other works of collective authorship. *Id.* at 473. Since the artists may not agree on when the work is complete, one artist could delay the exhibition of a collaborative work against the wishes of the co-authors. *Id.* at 474. Concerned about the major financial investment required for filmmaking, French lawmakers curtailed the moral right of disclosure for film artists. Wagner, *supra* note 9, at 698.

52. See, e.g., 17 U.S.C. § 106A (1994) (granting a visual artist the right to prevent intentional alterations that would have a negative impact on the artist's reputation).

53. Wagner, *supra* note 9, at 690. Another rationale is that the artist should retain some rights in a creative work because it is an extension of the artist's personality. *Id.* at 689-90.

work, which in turn harms the artist's reputation and subsequently lowers the pecuniary value of the artist's creations.⁵⁴ Moral rights thus protect the private interest of the artistic author.⁵⁵ Any public benefit is incidental.⁵⁶

Despite repeated calls by film artists and their supporters, Congress has declined to adopt moral rights protection for film artists.⁵⁷ In 1988, the U.S. did become a signatory to the Berne Convention.⁵⁸ However, the implementing legislation explicitly stated U.S. adherence to Berne did not expand an artistic author's rights of attribution or integrity.⁵⁹ Moral rights advocates were also disappointed when Congress did not enact the Film Integrity Act, which would have amended the Copyright Act to prohibit material alterations of films without the permission of the artistic author.⁶⁰ Although the Visual Artists' Rights Act (VARA) of 1990 granted limited moral rights protection to visual artists,⁶¹ it

54. *Id.* at 690.

55. Gerstenblith, *supra* note 12, at 438.

56. *Id.* at 439.

57. McDonough, *supra* note 28, at 472-73. Nevertheless, film artists and their supporters continue to seek federal moral rights legislation. *See, e.g., id.* at 458 (calling for new efforts to gain moral rights protection for film artists). Scholars have found judicial "backdoor" recognition of moral rights in some cases. Courts have manipulated defamation law, the right of publicity, contractual rights, and the Lanham Act as alternatives to explicit enforcement of artists' moral rights. Michael S. Wantuck, Note, *Artistic Integrity, Public Policy and Copyright: Colorization Reduced to Black and White*, 50 OHIO ST. L.J. 1013, 1023-28 (1989). The Lanham Act has been manipulated more than other legal theories to protect artists' moral rights. *Id.* at 1026.

58. Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (codified as amended in 17 U.S.C. *passim*).

59. *Id.* § 3.

60. H.R. 2400, 100th Cong., 1st Sess. (1987); *see generally* Nicholas Swyrydenko, Comment, *Film Artists Bushwhacked by the Coloroids: One-Hundredth Congress to the Rescue?*, 22 AKRON L. REV. 359, 366-67 (1989) (discussing provisions of Film Integrity Act). Commentators criticized the Film Integrity Act for its definition of "artistic author" and for granting perpetual protection to artists and their heirs. Dan Renberg, *The Money of Color: Film Colorization and the 100th Congress*, 11 HASTINGS COMM. & ENT. L.J. 391, 409 (1989).

61. 17 U.S.C. § 106A (1994). VARA gives visual artists the moral rights of paternity and integrity. *Id.* § 106A(a). Visual artists have the right to claim authorship of their own work and to prevent the misattribution to them of works they did not create. *Id.* The author of a work of visual art has the right to prevent any intentional "distortion, mutilation, or other modification" to the work that would have a negative impact on the artist's "honor or reputation." *Id.* The artist can also prevent the destruction of a work of "recognized stature." *Id.* The author cannot prevent modifications that are the result "of the passage of time or the inherent nature of the materials," or that are the result of conservation or public display. *Id.* § 106A(c). The author cannot transfer his moral rights, but can waive them in an express, signed written instrument. *Id.* § 106A(e). An artist possesses moral rights under VARA regardless of whether the artist also owns the copyright, and selling a work of

specifically excluded film artists.⁶²

C. U.S. Protection of Cultural Property

Archaeological and historic objects, artistic and architectural works, and other objects that “embody the culture” constitute cultural property.⁶³ Cultural objects serve a number of social functions.⁶⁴ Cultural objects embody our cultural identity,⁶⁵ carry our cultural memory,⁶⁶ awaken a sense of community,⁶⁷ and give us pleasure.⁶⁸ The preservation of artistic works also stimulates contemporary artistic endeavors.⁶⁹

The preservation of historic buildings and districts is a powerful example of legal protection of cultural property in the United States.⁷⁰ All fifty states and more than one thousand local

art does not constitute a waiver of the rights. *Id.* §§ 106A(b), (e). The term of protection endures for the life of the author. *Id.* § 106A(d).

62. VARA applies to authors of “work[s] of visual art.” *Id.* § 106A(a). Works of visual art include paintings, drawings, and sculpture. *Id.* § 101. By definition, works of visual art do not include motion pictures or other works for hire. *Id.*

63. J. H. Merryman, *The Public Interest in Cultural Property*, 77 CAL. L. REV. 339, 341 (1989).

64. *Id.* at 346-49.

65. *Id.* at 349. Cultural objects are a record of the great social and artistic achievements of the past. M. Catherine Vernon, Note, *Common Cultural Property: The Search for Rights of Protective Intervention*, 26 CASE W. RES. J. INT’L L. 435, 445 (1994).

66. Merryman, *supra* note 63, at 347. One of the purposes of VARA was to protect artistic works from distortions that “cheat the public of an accurate account of the culture of our time.” See VISUAL ARTISTS’ RIGHTS ACT OF 1990, H.R. REP. NO. 101-514, at 7 (1990), reprinted in 1990 U.S.C.C.A.N. 6915, 6916 (quoting sculptor Weltzin Blix).

67. Merryman, *supra* note 63, at 349. Cultural objects “communicate across time and distance.” *Id.*

68. *Id.* at 354. Cultural property also gives us a feeling of truth and certainty through the emotional satisfaction we feel when we see an authentic artifact (“the real thing”). *Id.* at 346. Cultural objects both create nostalgia for the past and constitute an archaeological record. *Id.* at 348, 353.

69. *Id.* at 353-54. Old works of art are the textbooks of new artists, and new artistic movements are often rebellions against the past. *Id.* at 354.

70. Marilyn Phelan, *A Synopsis of the Laws Protecting Our Cultural Heritage*, 28 NEW ENG. L. REV. 63, 107 (1993). The preservation movement has evolved in response to three theoretical rationales. Carol M. Rose, *Preservation and Community: New Directions in the Law of Historic Preservation*, 33 STAN. L. REV. 473, 479 (1981). The earliest was the conviction that historic landmarks have an inspirational value because they encourage people’s patriotism and civic pride. *Id.* As emblems of the nation’s common past, monuments inspire a sense of national community. *Id.* at 482. This rationale, epitomized by the movement to save Mount Vernon in Virginia and preserve it as a national monument, dominated the preservation movement in the nineteenth century. *Id.* at 479-80. The desire to preserve buildings of significant artistic merit motivated the second wave of the preservation movement. *Id.* at 480. Beyond the continued physical existence

governments have enacted historic preservation legislation.⁷¹ Congress has also recognized the important public interest in preservation.⁷² In particular, the National Historic Preservation Act articulates the cultural importance of our built environment.⁷³

1. *The National Historic Preservation Act and the National Trust*

The National Historic Preservation Act (NHPA) of 1965 followed several other legislative efforts to protect important historical sites.⁷⁴ In particular, Congress chartered the National Trust for Historic Preservation as a privately funded, non-profit

of the building, this rationale promotes the preservation of the "artistic integrity" of the structure, and, therefore, discourages non-historical alterations to the facade. *Id.* The third rationale is that preservation of the physical environment helps to preserve local communities. *Id.* at 480, 488. Preservationists contend that buildings exert a considerable psychological effect on people and that old, familiar buildings give people a "sense of identity and place." Nivala, *supra* note 11, at 108; cf. 16 U.S.C. § 470 (1994) (declaring that "the historical and cultural foundations of the Nation should be preserved . . . in order to give a sense of orientation to the American people"). Preservation also maintains the physical integrity of neighborhoods. Rose, *supra*, at 488. This conception of preservation has dominated the preservation movement over the past several decades. *Id.* at 489.

71. Gerstenblith, *supra* note 12, at 455. Local preservation efforts are frequently impelled by concern for property values. Tyler E. Chapman, Note, *To Save and Save Not: The Historic Preservation Implication of the Property Rights Movement*, 77 B.U. L. REV. 111, 144 (1997). In Indianapolis, property values in a neighborhood designated as a historic district appreciated at a much greater rate over a 15-year period than property values in an adjacent, comparable neighborhood that did not have preservation designation. DONOVAN D. RYPKEMA, PRESERVATION AND PROPERTY VALUES IN INDIANA 9 (1997). The study reported similar findings in other Indiana towns. *Id.* at 1. There is also considerable anecdotal evidence that preservation raises property values. Chapman, *supra*, at 144.

72. See *infra* note 74 and accompanying text for further discussion of congressional recognition.

73. 16 U.S.C. § 470 (1994).

74. Phelan, *supra* note 70, at 70. The Antiquities Act of 1906 was the first congressional act to protect historic landmarks. *Id.* at 67. The Antiquities Act was, in part, a response to the looting of American Indian sites in the Southwest, as well as the popular movement to preserve Mount Vernon. *Id.* The Antiquities Act authorized the President to designate selected landmarks of "historic or scientific interest" as national monuments. 16 U.S.C. § 431 (1994). National monuments established under the Act include Carlsbad Caverns, the Edison Laboratory, and the Statue of Liberty. *Id.* The Act also penalized the destruction of antiquities on public lands. *Id.* § 433. The Historic Sites, Buildings and Antiquities Act of 1935 declared that it is a national policy to preserve important sites for the benefit and inspiration of the public. *Id.* § 461. The Historic Sites Act authorized the Secretary of the Interior to acquire, restore, and maintain historic sites for public use and appreciation. *Id.* § 462. National Historic Sites include Ford's Theatre, the Knife River Indian Villages, and the Vanderbilt Mansion. 16 U.S.C. § 461 (1985).

corporation in 1949.⁷⁵ The National Trust acquires, preserves, and administers significant sites, buildings, and objects for the public benefit.⁷⁶ The NHPA established a national register of historic sites, districts, and buildings significant to American history, architecture, archaeology, and culture.⁷⁷ In a ringing endorsement of the important public interest in historic preservation, the NHPA described historic properties as part of an "irreplaceable heritage" providing a "vital legacy of cultural, educational, aesthetic, inspirational, [and] economic" benefits.⁷⁸ The NHPA encouraged broad public acceptance and support of preservation by conferring a new stature and legitimacy to the historic preservation movement.⁷⁹

2. Takings Challenges to Historic Preservation Laws

Some landowners resist historic preservation and attack preservation laws as unconstitutional takings of private property.⁸⁰ In the landmark 1978 case of *Penn Central Transportation Co. v. New York City*, the U.S. Supreme Court held historic preservation laws were constitutional.⁸¹ Most takings challenges focus on a

75. 16 U.S.C. § 468 (1994). Congress created the National Trust to further the policies of the Historic Sites Act. *Id.*

76. *Id.* The NHPA authorized federal grants to the National Trust to preserve historic sites for the public benefit. *Id.* § 470-1.

77. *Id.* § 470a.

78. *Id.* § 470.

79. Scott H. Rothstein, Comment, *Takings Jurisprudence Comes in From the Cold: Preserving Interiors Through Landmark Designation*, 26 CONN. L. REV. 1105, 1108 (1994). In particular, the National Register of Historic Places focuses public attention on the historic significance and artistic merit of individual buildings. *Id.*

80. The U.S. Constitution provides that no state shall "deprive any person of life, liberty, or property, without due process of law," U.S. CONST. amend. XIV, § 1, "nor shall private property be taken for public use without just compensation," U.S. CONST. amend. V. State and lower federal courts regularly uphold preservation statutes, finding that preservation serves diverse public purposes. Rothstein, *supra* note 79, at 1106. Preservation encourages economic growth, tourism, education, historical values, and neighborhood quality. *Id.*

81. *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 138 (1978). *Penn Central* is the leading case in the area of takings challenges to historic preservation laws. Rothstein, *supra* note 79, at 1113. The Court upheld the constitutionality of the New York City landmarks ordinance based on a two-pronged analysis. *Penn Central*, 438 U.S. at 138. First, the Court analyzed the public interest in historic preservation, finding that the ordinance was "substantially related to the promotion of the general welfare." *Id.* Preservation enhances the quality of life because historic buildings "embody precious features of our heritage, [and] serve as examples of quality for today." *Id.* at 108. Second, the Court analyzed the economic effect of the ordinance on the individual landowner. *Id.* at 130-37. The economic analysis focuses on the regulation's effect on the value of the property as a whole, rather than its effect on a discrete segment of the property. *Id.* at 130-31. The Court

regulation's economic impact on the individual landowner, while conceding that historic preservation serves a public purpose.⁸²

Since *Penn Central*, the Supreme Court has decided several takings cases based on challenges to land-use regulations.⁸³ A regulation is unconstitutional if it fails to substantially advance a legitimate state interest,⁸⁴ if there is no "nexus" between the governmental interest and the restriction,⁸⁵ or if the regulation denies the landowner all economically viable use of the property.⁸⁶ Preservation statutes would survive a renewed constitutional challenge under the post-*Penn Central* line of land-use cases.⁸⁷

D. The National Film Preservation Act

Congress recognized the important public interest in film preservation with the enactment of the National Film Preservation Act (NFPA).⁸⁸ The primary purpose of the Act is to preserve films for future generations.⁸⁹ The NFPA also established a National Film Registry to maintain and preserve "films that are

determined that Penn Central Co. was not unjustly burdened, since the ordinance did not limit the existing uses of the property or prevent the company from realizing a "reasonable return" on its investment. *Id.* at 136. A regulation is not a taking simply because it does not impose uniform burdens on all landowners: "[l]egislation designed to promote the general welfare commonly burdens some more than others." *Id.* at 133. The dissenting opinion argued that the New York ordinance was unduly burdensome because, in addition to use restrictions, it imposed an affirmative duty on landowners to maintain their properties at their own expense. *Id.* at 140 (Rehnquist, J., dissenting).

82. Rothstein, *supra* note 79, at 1106-07. In *Penn Central*, Penn Central Co. conceded that preservation was a legitimate public goal. *Penn Central*, 438 U.S. at 129. The Court discussed the issue anyway, noting that every state, many local governments, and the federal government have all recognized the importance of historic preservation. *Id.* at 107-08.

83. See generally Nivala, *supra* note 11, at 94-99 (determining that *Penn Central* would be decided the same way in light of subsequent developments in Supreme Court takings jurisprudence).

84. *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980).

85. *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 837 (1987).

86. *Agins*, 447 U.S. at 260; see also *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1030 (1992) (reaffirming the validity of the "total taking" standard).

87. Nivala, *supra* note 11, at 106-07, 117.

88. 2 U.S.C. § 179l-w (Supp. 1997) (originally enacted at 2 U.S.C. § 178-78l (1988) (repealed 1992) and renewed at 2 U.S.C. § 179-79k (1992) (repealed 1996 by current act)). In the NFPA of 1988, Congress found "it is appropriate and necessary for the Federal Government to recognize motion pictures as a significant American art form deserving of protection." 2 U.S.C. § 178 (1988) (repealed 1992).

89. H.R. REP. NO. 104-558, pt. 1, at 11 (1996). Other purposes of the NFPA include encouraging public and private preservation efforts and public support for preservation. 2 U.S.C. § 179m (Supp. 1997).

culturally, historically, or aesthetically significant."⁹⁰ Inclusion in the Film Registry signifies that a film has become "an enduring part of our national cultural heritage."⁹¹ The NFPA, in turn, conferred a new status on films by recognizing their importance as cultural landmarks.⁹²

Congress established the National Film Preservation Foundation in 1996 as a private, charitable, non-profit corporation.⁹³ The Film Foundation has the usual powers of a corporation, including the power to administer property and bring suit.⁹⁴ The Film Foundation was chartered to further the protection, preservation, and accessibility of American films "for the benefit of present and future generations of Americans."⁹⁵

E. NFPA and NHPA: Protection of Cultural Landmarks

Films, like historic buildings, are an important part of the nation's cultural heritage. Congress recognized the public interest in preserving our film heritage in the NFPA and our built environment in the NHPA.⁹⁶ The acts are strikingly similar in purpose and effect.⁹⁷ Both recognize the strong public interest in protecting cultural property and confer a new status on buildings and films as cultural landmarks.⁹⁸

The NHPA begins with a congressional finding that "the spirit and direction of the Nation are founded upon and reflected in its historic heritage."⁹⁹ The preservation of that heritage for the benefit of future generations is in the public interest.¹⁰⁰ Similarly,

90. 2 U.S.C. § 179l (Supp. 1997). A film's distributor can place a Registry seal on a film that the librarian of the Library of Congress approves as a Registry version. *Id.* § 179m.

91. 2 U.S.C. § 178 (1988) (repealed 1992). The National Film Registry includes Hollywood classics, newsreels, short films, and independent films. *Film Registry*, *supra* note 3. The selections range from *Adam's Rib*, a romantic comedy from Hollywood's Golden Age, to the "Zapruder film" of the assassination of President Kennedy. *Id.* The selections give the public "a better appreciation both of the vibrant richness and diversity of American cinema." H.R. REP. NO. 104-558, pt. 1, at 12 (1996).

92. Swyrydenko, *supra* note 60, at 380.

93. 36 U.S.C. §§ 5701-08 (Supp. 1997). Members of the Board of Directors of the Film Foundation represent diverse sections of the film community, including artists, historians, critics, exhibitors, and producers. *Id.* § 5702(a).

94. *Id.* § 5703(c).

95. *Id.* § 5701(b). The Film Foundation receives most of its funding from private donations, but is also eligible to receive limited matching federal funds. *Id.* § 5708(a).

96. 2 U.S.C. § 179l-w (Supp. 1997); 16 U.S.C. § 470 (1994).

97. See McNally, *supra* note 47, at 149-50 (comparing NFPA of 1988 and NHPA).

98. Rothstein, *supra* note 79, at 1107-08; Swyrydenko, *supra* note 60, at 380.

99. 16 U.S.C. § 470.

100. *Id.*

the NFPA declares that "it is appropriate and necessary for the Federal Government to recognize motion pictures as a significant American art form deserving of protection."¹⁰¹ Each act contains provisions authorizing the national government to assist and encourage public and private preservation efforts.¹⁰² Congress also established two private, non-profit organizations to aid in preservation efforts: the National Trust and the Film Foundation.¹⁰³

In addition, the NHPA and the NFPA encourage public appreciation of our historic heritage through the establishment of national registers.¹⁰⁴ The National Register and the Film Registry recognize culturally and historically significant buildings and films.¹⁰⁵ The registries educate the public about the nation's past by identifying a diverse range of buildings and films as cultural landmarks.¹⁰⁶

II. LEGAL PROTECTION OF FILMS THROUGH CULTURAL PROPERTY RIGHTS

Preservation and protection of America's film heritage is an important public interest.¹⁰⁷ Cinema is the preeminent art form of the twentieth century.¹⁰⁸ American movies enjoy enormous popularity and success domestically and internationally.¹⁰⁹ They help shape American popular culture, influencing how people in

101. 2 U.S.C. § 178 (1988) (repealed 1992).

102. 2 U.S.C. § 179m (Supp. 1997); 16 U.S.C. § 470.

103. See 16 U.S.C. § 468 (1994) (establishing National Trust to further the policies of the Historic Sites Act, a legislative precursor to the NHPA); 36 U.S.C. § 5701 (Supp. 1997) (establishing Film Foundation to further the policies of the NFPA).

104. 16 U.S.C. § 470-70a (1994); 2 U.S.C. § 178a (1988) (repealed 1992).

105. 16 U.S.C. § 470; 2 U.S.C. § 179l (Supp. 1997). During the House debate over the NFPA of 1988, Representative Yates drew an analogy between the National Register and the Film Registry, describing the Film Registry as an extension of the federal government's existing program to recognize "national, distinctive treasures." 134 CONG. REC. H4853, 4855 (1988).

106. See H.R. REP. NO. 104-558, pt. 1, at 12 (1996) (finding that the Film Registry educates the public about the diversity of American cinema).

107. See 2 U.S.C. § 178 (1988) (repealed 1992) (stating that cinema is an "indigenous American art form" that occupies an important place in American culture and history). The American film heritage is a "heritage at-risk": a majority of films produced before 1950 are already lost, and many more are decomposing due to chemical instability in the film stock. H.R. REP. NO. 104-558, pt. 1, at 9-10 (1996) (quoting Dr. James Billington).

108. MAST, *supra* note 40, at 7. The early filmmakers first overcame major technical and financial difficulties, then the disdain of the educated and social elite. *Id.* at 5, 7.

109. See *id.* at 94-95 (stating American films have dominated world cinema since the end of World War I). The average American movie is technically and artistically superior to the average product of any of the major foreign film industries. *Id.* at 7.

other countries view Americans and how Americans see themselves.¹¹⁰ Further, films have great emotional power as works of art; they have “educated, entertained, and enthralled Americans and the world.”¹¹¹

Films are a unique record of American history.¹¹² Individual films record the realities of contemporary life and reflect society’s preoccupations and attitudes.¹¹³ An altered version of a film is a distortion of American history and a misrepresentation of American culture.¹¹⁴

We need a new approach if we are to protect America’s film heritage. Protection must be permanent, must prevent all alterations, and must not rely on the discretion of an individual rights holder. Legal protection of films based on society’s cultural property rights satisfies all three requirements.

A. *Copyright Law and Moral Rights Theory Will Not Protect America’s Film Heritage*

The development of digital technology poses a serious threat to the integrity of America’s film heritage.¹¹⁵ A copyright owner is free to alter a copyrighted work in any way.¹¹⁶ Even if the owner refuses to alter the film, copyright law provides no protection after the film has entered the public domain.¹¹⁷ Moral rights theory is also inherently inadequate to prevent alterations to classic films.

1. *Copyright Law*

Copyright law does not provide an effective means of safeguarding America’s film heritage for two reasons. First, a

110. H.R. REP. NO. 104-558, pt. 1, at 9 (1996) (quoting Librarian of Congress Dr. James Billington: “[t]hroughout its history, film has been a powerful force in American culture and national life, often shaping our very notion of contemporary events”).

111. H.R. REP. NO. 104-558, pt. 1, at 9 (1996).

112. *Colorization: The Arguments Against*, 17 J. ARTS MGMT. & L. 79, 84 (1987) [hereinafter *Colorization*] (director Sydney Pollack stating: “films are a part of our cultural history. Like all accurate representations of who and what we were, they deserve preservation in their *authentic* form. . . . We need an accurate understanding of the past in order to point us accurately toward the future”).

113. MAST, *supra* note 40, at 5. The history of American film is also a history of American culture: movies are an explicit visual and dramatic record of our culture, as well as vehicles for the implicit affirmation of values and beliefs. *Id.*

114. David J. Kohs, *Paint Your Wagon—Please!: Colorization, Copyright, and the Search for Moral Rights*, 40 FED. COMM. L.J. 1, 36 (1988). Cultural objects are meaningful because they are genuine; counterfeits “falsify history [and] misrepresent the culture.” Merryman, *supra* note 63, at 359.

115. See *supra* text accompanying notes 21-24 for further discussion.

116. Honicky, *supra* note 15, at 429.

117. Kohs, *supra* note 114, at 11.

copyright has a limited term.¹¹⁸ Any perpetual term would violate the express language of the Copyright Clause.¹¹⁹ However, films must have perpetual protection if they are to be preserved for the benefit of future generations. Many films, particularly from the silent period, are in the public domain and, therefore, already outside the realm of copyright law.¹²⁰

Second, copyright holders can alter films at their discretion.¹²¹ Since films are classified as works for hire, the studio that produced the film owns the copyright.¹²² The studio has an immediate economic interest in digital alteration and, unlike the artist, no emotional attachment to the work.¹²³ For example, film owners frequently alter films to accommodate the demands of television broadcast through time compression, content editing, and panning and scanning. Protection subject to the whim of an individual copyright owner fails to fairly represent society's interest.

2. Moral Rights Theory

U.S. recognition of moral rights for film artists cannot protect our film heritage from alteration. First, moral rights are not perpetual since, like copyright, the moral right has a limited term.¹²⁴ For example, the moral rights of visual artists under VARA expire when the artist dies.¹²⁵ Expanding VARA to include film artists would fail to provide even temporary protection for many films. Contemporary recognition of the moral rights of film artists would come too late to protect silent films, and many sound

118. See 17 U.S.C. § 302(c) (1994), amended by Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, § 102(b)(3), 112 Stat. 2827 (1998) (setting the copyright term for works for hire at 95 years).

119. See U.S. CONST. art. I, § 8, cl. 8 (granting to Congress the power to "secur[e] for limited Times to Authors . . . the exclusive Right to their respective Writings"). The limited term of copyright promotes public access to works of art. NIMMER, *supra* note 34, § 1.05[D], at 66.16-17. Perpetual protection of our film heritage for the benefit of future generations would lose much of its meaning in the absence of public access.

120. See *supra* note 40 and accompanying text for further discussion.

121. See Honicky, *supra* note 15, at 429 (discussing the ability of copyright owners to make unrestricted alterations to copyrighted work).

122. See 17 U.S.C. § 101 (1994) (classifying films as works for hire); *id.* § 201(b) (designating the employer who commissioned the work as the author of a work for hire).

123. Wagner, *supra* note 9, at 629.

124. See, e.g., Berne Convention, *supra* note 48, art. 6bis (setting the moral right term concurrent with the copyright term).

125. See 17 U.S.C. § 106A(d) (1994) (setting the term of moral rights protection for visual artists at the life of the artist). Although French law recognizes a perpetual moral right, this is a minority position in international law. Sarraute, *supra* note 46, at 483. Under Berne, the duration of the moral right is concurrent with the copyright term. Berne Convention, *supra* note 48, art. 6bis.

films as well.¹²⁶

Second, legal recognition of moral rights does not require artists to exercise those rights to prevent alterations.¹²⁷ Third, even if the artist wishes to preserve the integrity of a work of art out of emotional attachment or in order to preserve the artist's reputation,¹²⁸ the artist may not be able to do so. The moral right only empowers the artist to prevent substantial changes to the work.¹²⁹ Many alterations that digital technology makes possible could fall outside the definition of a "substantial alteration."¹³⁰ Yet, any digital alteration to a film is an assault on the integrity of our film heritage because it destroys the historic truth of the film.¹³¹

In addition to its limited duration and scope, moral rights theory is inherently unsuited to film production. Filmmaking is a collaborative process involving many artists and technicians.¹³² Principal artists include, among others, the screenwriter, director, and cinematographer.¹³³ Films rarely have a single creative "author" in who would vest the moral right.¹³⁴ Recognizing the

126. Since the silent era ended in 1929, there are few silent era filmmakers living today, and many filmmakers from the early sound years are also deceased.

127. Filmmakers who advocate U.S. recognition of moral rights are primarily concerned with asserting the continued authority of the artist, particularly the director, to *control* whether or not a film is altered, not with preventing all alterations. See, e.g., *Colorization*, *supra* note 112, at 80 (quoting director Woody Allen: "[i]f a movie director wishes his film to be colorized, then I say by all means, let him color it").

128. See *id.* at 89 (quoting director Elliot Silverstein: "our sensibilities are acutely bruised when we see 'our children' publicly tortured and butchered on television by the various instruments of the new technologists").

129. See, e.g., 17 U.S.C. § 106A(a) (granting a visual artist the right to prevent a material alteration to a work of art that would have a negative impact on the artist's reputation).

130. For example, a court might consider product placement to be an insignificant alteration, or the deletion of racist dialogue to be more likely to enhance than to harm the artist's reputation.

131. See Wagner, *supra* note 9, at 630 (arguing that altering a film inevitably diminishes its value as a historical document); see also Honicky, *supra* note 15, at 429 (noting that minor changes can have a major cumulative effect on a film's meaning); cf. *Colorization*, *supra* note 112, at 85 (stating that a colorized version of a film is a qualitatively different film than the original).

132. See MAST, *supra* note 40, at 3 (describing the collaborative nature of film production).

133. *Id.* While some critics subscribe to the auteur theory, which identifies the director as the "author" of the film, this theory is generally incompatible with the reality of film production. *Id.* at 3; see generally Kohs, *supra* note 114, at 13-14 (finding a degree of symmetry in the fact that the auteur and moral rights theories both originated in France).

134. See Wagner, *supra* note 9, at 695-96 (describing a French moral rights statute which grants authorship rights in a film to five artists); cf. Renberg, *supra* note 60, at 409 (discussing criticisms of Film Integrity Act's identification of the director and principal screenwriter as the authors of a

moral rights of more than one contributing artist carries the danger that the artists could take adverse positions in exercising their rights, and thus "paralyze" the collaborative process.¹³⁵

Even if moral rights proponents could surmount the practical difficulties of adapting the theory to film production, they would still need to convince Congress to extend moral rights protection to film artists.¹³⁶ Two major concerns form the basis for the hostility towards recognizing a moral right of film artists. First, militant directors or other film artists, empowered by moral rights legislation, could disrupt the film industry.¹³⁷ Second, the moral right is a limitation on the copyright, since it recognizes concurrent rights over the work of art in someone other than the copyright holder.¹³⁸ For instance, the "author" of a film could prevent the copyright owner from digitally re-writing the ending of the film to provide a happy ending in place of a tragic one.¹³⁹ The copyright serves the important public function of encouraging artistic creativity, while the moral right merely protects an artist's personal interest.¹⁴⁰ To date, despite repeated lobbying efforts by segments of the film community, Congress has been unwilling to abridge the copyright by recognizing the moral rights of film artists.¹⁴¹

B. Cultural Property Rights Will Protect America's Film Heritage

Society's cultural property rights, unlike copyright and the moral right, can protect films from digital alteration. First, because society has a continuing interest in preserving its heritage for future generations, cultural property rights protect a work of

film).

135. Sarraute, *supra* note 46, at 473-74.

136. See 17 U.S.C. § 106A (1994) (recognizing the moral rights of visual artists only).

137. See Sandrine Cahn & Daniel Schimmel, *The Cultural Exception: Does it Exist in GATT and GATS Frameworks? How Does it Affect or is it Affected by the Agreement on TRIPS?*, 15 CARDOZO ARTS & ENT. L.J. 281, 281-82 (1997) (reporting that the audiovisual industry was the country's second largest export industry in 1997, after the aerospace industry). In 1996, the film industry collected \$5.9 billion at the box office and \$16.3 billion from video sales and rentals. *Where Were You 10 Years Ago?*, PREMIERE, Oct. 1997, at 39, 40.

138. See Wagner, *supra* note 9, at 656, 688 (explaining that the studio is the legal author of the film for purposes of copyright law while the moral right is held by the artistic author).

139. See, e.g., 17 U.S.C. § 106A (granting visual artists the right to prevent a material alteration to a work of art).

140. See Gerstenblith, *supra* note 12, at 439 (contrasting the copyright, which primarily serves the public interest, with the moral right, which protects the individual artist).

141. See generally McDonough, *supra* note 28, at 457-58 (discussing film artists' failed efforts to gain moral rights protection).

art for as long as the work is extant and the statute that guards the work is in force.¹⁴² Second, because they are public rights, public agencies enforce cultural property rights.¹⁴³ Accordingly, enforcement does not depend on the discretion of individual rights holders. Lastly, cultural property protection can prevent all alterations to a work.¹⁴⁴

Society has a tripartite interest in the arts: creation, dissemination, and preservation. The copyright, though a private property right, exists to serve the public interest in artistic creativity.¹⁴⁵ Further, the Constitution limits the term of protection to ensure public access to works of art.¹⁴⁶ Additionally, Congress has recognized the strong public interest in the preservation of our cultural heritage with the enactment of the NFPA and NHPA.¹⁴⁷

Historic preservation laws are a significant restriction on the rights of landowners, preventing property owners from altering buildings in ways that would damage their historical integrity.¹⁴⁸ This restriction recognizes and effectuates the public interest in the preservation of our built environment. Public interest in preservation, not the architect's moral right of integrity, justifies

142. Telephone Interview with George W. Geib, President, Indianapolis Historic Preservation Commission (Jan. 30, 1999) [hereinafter Geib Interview].

143. See, e.g., Rothstein, *supra* note 79, at 1109 (describing authority of preservation commissions to preserve historic buildings).

144. Historic preservation laws typically permit landowners to make reasonable alterations to buildings in order to maintain and adapt them for normal use. Geib Interview, *supra* note 142. For instance, landowners can make repairs using non-historical materials if the original materials are difficult to obtain or prohibitively expensive. *Id.* Landowners can also build additions if the design of the new construction does not alter the fundamental character of the historic structure. *Id.* People need a degree of regulatory flexibility because they live and work in buildings. *Id.* The analogy between films and buildings ends at this point, since there is no corresponding necessity to alter films.

145. See *Mazer v. Stein*, 347 U.S. 201, 219 (1954) (holding that the primary purpose of the copyright is to serve the public interest by encouraging artistic creativity).

146. See NIMMER, *supra* note 34, § 1.05[D], at 66.16-.17 (explaining that the limited term of copyright promotes the public interest of access).

147. See 2 U.S.C. § 178 (1988) (repealed 1992) (declaring that "motion pictures [are] a significant American art form deserving of protection"); 16 U.S.C. § 470 (1994) (declaring that it is in the public's interest to preserve its "historic heritage").

148. Geib Interview, *supra* note 142; see also Rothstein, *supra* note 79, at 1110 (reporting that over 80% of local preservation commissions have authority to review changes to building exteriors, over 50% can refuse to grant demolition permits, and over 60% can review building plans for new construction). The Indianapolis Preservation Commission, which is representative of urban preservation efforts, has all three powers. Geib Interview, *supra* note 142.

preservation laws; only the public interest in preservation will take precedence over landowners' property rights.¹⁴⁹

Society has a corresponding interest in preserving the historic integrity of its film heritage.¹⁵⁰ This public interest in preservation justifies limiting the private property interest of the copyright holder. The copyright is already constrained by society's first two interests in the arts: the copyright exists to encourage the creation of art and its term is limited to ensure public access.¹⁵¹ Prohibiting the digital alteration of films will promote preservation, the third important public interest in the arts.

While such a prohibition would greatly benefit the public, the corresponding limitation on the copyright owner would be minor. A prohibition on alterations does not abridge the copyright holder's right to copy, sell, perform, and display the work.¹⁵² The restriction only slightly limits the right to prepare derivative works; the copyright owner can still produce new works based on the copyrighted work, such as a "remake" or "novelisation." Increased preservation efforts may themselves be of long-term economic benefit to the film industry, since public recognition of the cultural importance and artistic merit of classic films would likely create greater consumer interest in those films.¹⁵³

III. AMEND THE NFPA TO PROHIBIT DIGITAL ALTERATIONS TO AMERICAN FILMS

Society has a great interest in preserving the authenticity of its film heritage. Amending the NFPA to prohibit digital alterations to American films will safeguard America's film heritage for the benefit of our own and future generations. The protection must be perpetual in duration and must prohibit all changes to the films.¹⁵⁴ Protection must extend to all films, not just a few great ones. Minor artistic works also teach us about our history, and we will have a deeper understanding of the great works if we also understand the context in which they were

149. See Gerstenblith, *supra* note 12, at 462-64 (concluding that historic preservation laws based on the public interest in preservation provide a better means of saving historic buildings than recognition of architects' moral rights).

150. See *supra* text accompanying notes 96-98 (comparing NFPA and NHPA).

151. See *supra* notes 32 & 34 and accompanying text for further discussion.

152. Cf. Gerstenblith, *supra* note 12, at 458 (noting that historic preservation laws prohibit alterations to buildings, but allow prior use to continue).

153. Honicky, *supra* note 15, at 419.

154. Granting protected status to films on an individual basis will inevitably allow important works to be altered because they were not protected in time. Cf. Gerstenblith, *supra* note 12, at 464 (noting that landmarking is a slow process; many important buildings have been destroyed while they awaited landmark protection).

made.¹⁵⁵

Film owners argue that preventing alterations to films interferes with the right of consumers to choose the version they prefer.¹⁵⁶ However, this is a hollow protest. For all but the most famous films, film owners will only market the version in which they have the greatest financial investment.¹⁵⁷ Since the public does not have the option of renting the film from an archive, the only choices will be to watch the film in its altered version or not at all.¹⁵⁸

The NFPA is an appropriate platform for this proposed legislation.¹⁵⁹ The NFPA is a strong statement of the public interest in protecting America's film heritage. Currently, the NFPA's primary purposes are to encourage the physical preservation of films and to increase public appreciation of, and access to, older films.¹⁶⁰ A prohibition on digital alterations complements the NFPA's program of physical preservation. The Film Foundation can assume the responsibility of enforcing the act. The Film Foundation's mandate is to further the policies of the NFPA, and this organization has the necessary corporate powers, including the power to bring suit.¹⁶¹

The following is a proposed statutory language model:

No one, including the copyright owner, shall digitally alter an American feature film after its first publication. A "digital alteration" includes, but is not limited to, the addition of new images or sounds, the deletion of existing images or sounds, and the manipulation of existing images or sounds through digital technology. Archival restoration that attempts to restore a film to the condition it was in at its first publication

155. Cf. Geib Interview, *supra* note 142 (explaining that modern preservation efforts focus on protecting the setting as well as the individual landmark). The Indianapolis preservation ordinance protects 10 historic districts, and only two individual landmarks. *Id.*

156. *Colorization: The Arguments For*, 17 J. ARTS MGMT. & L. 64, 68 (1987) [hereinafter *Arguments for Colorization*].

157. Kohs, *supra* note 114, at 30.

158. *Id.* Film owners also argue that they should have the same freedom to alter films as filmmakers have to alter novels or plays when producing film adaptations. See, e.g., *Arguments for Colorization*, *supra* note 156, at 66 (stating that filmmakers constantly alter their sources when producing film adaptations). This argument has a flawed premise. A film adaptation of a novel does not re-write the novel itself. Anna Karenina could live happily ever after in a thousand film adaptations, but she will always die at the end of Tolstoy's novel. Altering the ending of *Casablanca* would be akin to re-writing the ending of Hawthorne's *The Scarlet Letter*.

159. Federal legislation to protect films is appropriate, given the national character of film production, marketing, and distribution. Wagner, *supra* note 9, at 712-13.

160. 2 U.S.C. § 179m (Supp. 1997); see also H.R. REP. NO. 104-558, pt. 1, at 11-13 (1996) (discussing legislative purpose for the NFPA).

161. 36 U.S.C. § 5703(c) (Supp. 1997).

is excluded from the scope of this Act.

The NFPA defines "film" and "publication."¹⁶² Since the amendment applies only after a film's initial release, it does not affect film production.¹⁶³ Digital alteration does not include changes that are made by employing different technologies. For instance, alterations for the purpose of television broadcast, such as the insertion of commercials, time compression, and content editing, are excluded. Likewise, traditional methods of restoration are excluded because they rely on standard film editing techniques.¹⁶⁴ The amendment excludes the small class of digital alterations made in the course of archival restorations, as the purpose of those alterations is to return the film to its original condition. These changes are made in the service of preserving films in their authentic form.

This legislation would withstand a takings challenge brought by a copyright owner. The amendment serves a legitimate public purpose in protecting the integrity of our film heritage.¹⁶⁵ There is a close nexus between the goal and the means: the public interest in the preservation of films in their authentic form will be effectuated by prohibiting alterations to those films.¹⁶⁶ Finally, the proposed amendment does not deny the film owner all

162. "Film" means a "motion picture" as defined in section 101 of title 17, except that it excludes works that were not originally fixed on film stock. 2 U.S.C. § 179u (Supp. 1997). "Publication" means "publication" as defined in section 101 of title 17. *Id.* "Publication" is the distribution of copies . . . of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending." 17 U.S.C. § 101 (1994).

163. *Cf. Wagner, supra* note 9, at 709 (noting that moral rights under the Film Integrity Act were to vest after publication of the film, thus avoiding potential conflicts with the production process).

164. Similarly, the amendment excludes "director's cuts." In an attempt to re-create the artist's cut, a director's cut re-integrates original film footage that was not included in the final cut released in theaters. See RALPH S. SINGLETON, *FIMMAKER'S DICTIONARY* 48, 63 (1986) (defining "director's cut" as "[t]he director's version of the completed picture containing his audio and visual selections," and "final cut" as "[t]he finished version of the workprint to which the negative is conformed in order to strike the release prints that will be shown in theaters"). Archival restoration typically re-creates the final cut. In contrast to digital alteration, neither process creates new images or manipulates existing ones.

165. See *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980) (stating that the first test of validity is whether the regulation serves a legitimate public purpose).

166. See *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 837 (1987) (holding that a regulation effects a taking when there is no nexus between the purposes of the legislation and the restriction on the property owner); *cf. Nivala, supra* note 11, at 108 (noting that the means of historic preservation, the prohibition of alterations, are essential to the end, the preservation of historic integrity).

economically viable use of the property.¹⁶⁷ The copyright owner will still realize a reasonable return on his investment. The film owner may broadcast, sell, and otherwise exploit the film. In addition, no affirmative obligation is imposed on the film owner to physically preserve the film.¹⁶⁸ The statute would only prevent the owner from destroying the film's authenticity.

CONCLUSION

Filmmaker Martin Scorsese, an ardent supporter of film preservation, has described the importance of America's film heritage: "[f]ilm is history. With every foot of film that is lost, we lose a link to our culture, to the world around us, to each other, and to ourselves."¹⁶⁹ Digitally altering a film, whatever the motive, destroys a piece of America's cultural heritage and deprives us of another link to our past. Films, like historic buildings, are national treasures. We must protect them.

167. See *Agins*, 447 U.S. at 260 (holding that there is a taking when the property owner is deprived of all economically viable use of the property).

168. The affirmative duty to maintain buildings that some historic preservation laws impose on landowners is a strong argument against the validity of the laws. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 140 (1978) (Rehnquist, J., dissenting).

169. *National Film Preservation Foundation* (last modified Sept. 22, 1999) <http://www.filmpreservation.org/why_preserve.html>.