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Colorization of Black and White Films: An Example of the Lack of Substantive Protection for Art in the United States

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Movies have long been regarded as an integral part of the artistic and cultural heritage of the United States. As original works of authorship, motion pictures receive the same protection under United States copyright law as novels, plays, paintings, sculptures, musical pieces and other forms of original expression.[1] In the United States, copyright law protects the economic rights of a copyright holder in original works of authorship.[2] Copyright law fails, however, to protect the integrity of an author's[3] vision and expression when the author no longer holds the economic rights to the work.[4] In the motion picture industry, the lack of copyright protection for an author's creative expression has again become a matter of concern with the introduction of computerized techniques for adding color to black and white films.[5]

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1 17 U.S.C. §§ 101-914 (1982 & Supp. IV 1986). Original works of authorship include:

(1) literary works;
(2) musical works, including any accompanying words;
(3) dramatic works, including any accompanying music;
(4) pantomimes and choreographic works;
(5) pictorial, graphic, and sculptural works;
(6) motion pictures and other audiovisual works; and
(7) sound recordings.

17 U.S.C. § 102(a) (1982).

Congressional authority for the extensive copyright provisions stems from U.S. CONST. art. I, § 8, cl. 8, which gives Congress the power "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries . . . ."

2 17 U.S.C. § 106 (1982) gives the copyright holder of an original work of authorship the exclusive right to reproduce the work, to prepare derivative works, to distribute the work, to perform the work and to display the work.

3 For the purposes of this note, the term "author" refers to the creative force behind an artistic or literary work.

4 United States copyright protection does not recognize the personal right of an author in a creative work but rather focuses on what the framers of the Constitution perceived as the societal benefits that result from providing authors with incentives to continue their artistic expression by giving them exclusive rights to the economic benefits of their work. For a discussion of the purpose of copyright protection in the United States, see 1 M. NIMMER, NIMMER ON COPYRIGHT § 1.03[A] (1987) (hereinafter cited as NIMMER). *See also* Twentieth Century Music Corp. v. Aiken 422 U.S. 151, 156 (1975); Mazer v. Stein, 347 U.S. 201, 219, *reh'g denied*, 347 U.S. 949 (1954); Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932). The history of United States copyright law thus contrasts with the copyright protection provided in many European countries which recognize an author's economic and personal interests in an artistic work as natural rights. *See* DaSilva, *Droit Moral and the Amoral Copyright: A Comparison of Artists' Rights in France and the United States*, 28 BULL. COPYRIGHT SOC'Y. 1, 7-17 (1980); Hauhart, *Natural Law Basis for the Copyright Doctrine of Droit Moral*, 30 CATH. LAW. 53, 58-69 (1985); Rosen, *Artists' Moral Rights: A European Evolution, An American Revolution*, 2 CARDOZO ARTS & ENTERTAINMENT L. J. 155, 176-79.

5 For a discussion of colorizing techniques and their effect on black and white films, see *infra* notes 87-91 and accompanying text.

Protection for the creative element of an author's work stems from a concept of moral right found in the copyright laws of many European countries and made a part of the Berne Convention For the Protection of Literary and Artistic Works (the Berne Convention).[6] The United States does not adhere to the Berne multilateral treaty and does not expressly recognize a concept of moral right.[7] Instead, the United States relies on general copyright principles and theories under contract, unfair competition, defamation, and privacy as well as application of § 43(a) of the Lanham Act, in order to provide authors of creative works with some protection for their creative efforts.[8] This note will examine the concept of moral right as embodied in the Berne Convention and its United States equivalents in the context of the colorization of black and white films. Part I will give an overview of the doctrine of moral right as it evolved in Europe and under the Berne Convention and will compare the European model to the protection given to art in the United States. Part II will apply these concepts to issues involving the colorization of

6 The Berne Convention For the Protection of Literary and Artistic Works is a multilateral treaty administered by the World Intellectual Property Organization. Ten nations signed the first treaty on September 9, 1886. Since that time, the treaty has undergone several revisions of which the Paris Text of July 24, 1971 is the most recent. Currently seventy-six countries have ratified Berne with the United States as the most conspicuous non-member. 3 NIMMER, supra note 4, at § 17.04[D]. For a list of those nations which adhere to Berne, see 4 NIMMER, *supra* note 4, at app. 22. The two other major countries which still have not joined are the People's Republic of China and the Soviet Union. For a discussion of the possibility of U.S. adherence, see *The Implications, Both Domestic and International, of U.S. Adherence to the International Union For the Protection of Literary and Artistic Works*, Hearings Before the Subcomm. on Patents, Copyrights and Trademarks of the Senate Comm. on the Judiciary, 99th Cong., 1st & 2d Sess. (1985-1986) (hereinafter cited as Hearings).

A doctrine of moral right became a part of the Berne Convention at the Rome Conference of 1928. Article 6*bis* now provides that:

> (1) Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation, or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.
>
> (2) The rights granted to the author in accordance with the preceding paragraph shall, after his death, be maintained, at least until the expiry of the economic rights, and shall be exercisable by the persons or institutions authorized by the legislation of the country where the protection is claimed. However, those countries whose legislation, at the moment of their ratification of or accession to this Act, does not provide for the protection after the death of the author of all the rights set out in the preceding paragraph may provide that some of these rights may, after his death, cease to be maintained.
>
> (3) The means of redress for safeguarding the rights granted by this Article shall be governed by the legislation of the country where protection is claimed.

The Berne Convention For the Protection of Literary and Artistic Works, Paris Text, July 24, 1971, art. 6*bis* (hereinafter cited as Paris Text) *reprinted in* 4 NIMMER, *supra* note 4, at app. 27.

7 The United States is a member of the Universal Copyright Convention (UCC), an international treaty administered by the United Nations Educational, Scientific, and Cultural Organization (UNESCO). While the United States withdrew from UNESCO in 1984, it remains a party to the UCC. The UCC does not specifically provide for the protection of moral rights but rather leaves such protection to the discretion of its member nations individually. For the complete text of the UCC, see 4 NIMMER, *supra* note 4, at apps. 24 & 25. For a list of member nations, see *id.* at app. 21. Those who recommend that the United States join the Berne Convention note that while the United States still has some say in the governing of the UCC, its loss of control over UNESCO programs may prove detrimental to copyright protection in the future. *See* Hearings, *supra* note 6, at 124-25 (statement of Donald J. Quigg, Acting Commissioner for Patents and Trademarks).

8 Some commentators suggest that these theories provide sufficient protection for the moral rights of authors to enable the United States to join the Berne Convention without further legislation in this area. *See infra* note 143 and accompanying text.

black and white films to see what protection a doctrine of moral right would afford as well as what protection currently exists. Part III will examine legislative efforts to protect black and white films and to implement a doctrine of moral right in the United States. Part IV will conclude that United States law currently does not provide adequate protection for art and will recommend adoption of legislative remedies.

I. The Doctrine of Moral Right

A doctrine of moral right as embodied in the Berne Convention and the copyright statutes of its signatory countries protects the right of an author to instill a creative work with aspects of her own personality.[9] To protect the personal side of a creative work, the Berne Convention expressly gives the author two basic rights: (1) the right to claim authorship;[10] and (2) the right to object to any distortion, mutilation, or other modification of the author's work or any other derogatory action with respect to such work[11] if such conduct would prejudice the author's honor or reputation.[12] Both of these rights are independent of any economic rights in the work and thus do not necessarily terminate with the transfer of the copyright in the work.[13]

While the United States does not adhere to the Berne Convention, it does protect certain aspects of an author's expression through variations on areas such as copyright, contract, defamation, privacy, and unfair competition as well as through application of § 43(a) of the Lanham Act (the Lanham Act).[14]

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9 The doctrine of moral right, while not embodied in the Berne Convention until 1928, stems from concepts which have existed for much longer in several European countries, predating even the recognition of economic rights. I S. LADAS, THE INTERNATIONAL PROTECTION OF LITERARY AND ARTISTIC PROPERTY 577-81 (1938). Countries such as France and Italy have long viewed the protection of an author's artistic expression as a natural right of the author. Under French law, which provides the most extensive protection, the "droit moral" encompasses four rights: (1) droit de divulgation, the right of an author to determine whether to publish; (2) droit de retrait ou de repentir, the right of an author to withdraw or alter a work already made public; (3) droit a 'la paternite', the right of an author to claim authorship of her work or to disclaim authorship of another's work; and (4) droit au respect de l'oeuvre, the right of an author to object to the alteration, mutilation, distortion, or excessive criticism of her work. DaSilva, *supra* note 4, at 3-4; *see also* 2 NIMMER *supra* note 4, at § 8.21[A].

10 Paris Text, *supra* note 6, at art. 6*bis*. *See infra* notes 15-19 and accompanying text.

11 Paris Text, *supra* note 6, at art. 6*bis*. *See infra* notes 47-51 and accompanying text.

12 Professor Nimmer, using the Stockholm revisions as a guide, divided moral rights into three categories: (1) the right to claim authorship; (2) the right to object to any distortion, mutilation or other alteration of the work; and (3) the right to object to any other action in relation to the work which would be prejudicial to the author's honor or reputation. Nimmer, *Implications of the Prospective Revisions of the Berne Convention and the United States Copyright Law*, 19 STAN. L. REV. 499, 520 (1967). This view gives an author a broader array of rights since the right to object to any distortion, mutilation or other alteration of the work exists independently of the need to show possible prejudicial effect to the author's honor or reputation. The 1971 Paris Text, however, leaves such an interpretation untenable. After the Paris Conference, art. 6*bis* combines the right to object to distortion, mutilation or modification with the right to object to other derogatory actions and connects both to the need to show prejudicial effect to the honor or reputation of the author, thus considerably narrowing the rights of the author. The original moral rights clause added by the Rome Conference also connected the right to object to distortion, mutilation or modification of an author's work with the prejudicial effect of such conduct.

13 Paris Text, *supra* note 6, at art. 6*bis*. For a discussion of the alienability of these rights, see *infra* notes 18 & 50 and accompanying text.

14 15 U.S.C. § 1125(a) (1982). *See infra* note 26 and accompanying text.

A. *Right to Claim Authorship*

Countries subject to the Berne Convention commonly recognize three distinct rights under the general right to claim authorship.[15] These rights, together commonly known as the right of paternity, include: (1) the right to require that the author's work carry the author's name; (2) the right to prohibit the use of another's name in connection with the author's work; and (3) the right to prohibit the use of the author's name in connection with a work that the author did not create.[16] These rights do not require a showing of possible harm to the author's honor or reputation, but rather focus on the unique relationship between the author and her work.[17] Because of the personal nature of these rights, they survive even the transfer of economic interests in the work and cannot be assigned or otherwise alienated.[18] This protection exists during the author's life and continues at least fifty years after her death.[19]

The well-established characteristics of the right to claim authorship under the Berne Convention distinguish this right from similar but less clearly formed protection in the United States. Although the United States does not expressly recognize a doctrine of moral right or the right to claim authorship as defined in the Berne Convention, United States law does provide some protection under various other legal theories.[20]

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15 The Berne Convention sets the minimum standards pursuant to which signatory countries must mold their copyright protection. Each country determines the form and level of protection beyond the minimum standards. Nimmer, *supra* note 12, at 523.

16 Nimmer, *supra* note 12, at 520. *See also* Roeder, *The Doctrine of Moral Right: A Study in the Law of Artists, Authors and Creators*, 53 HARV. L. REV. 554, 561-62 (1940). In addition, some commentators list under the right of paternity, the right of an author to insist on the use of a nom de plume and the right of an author to remove her name from distorted or mutilated versions of her work. *See* DaSilva, *supra* note 4, at 28; Hathaway, *American Law Analogues to the Paternity Element of the Doctrine of Moral Right: Is the Creative Artist in America Really Protected?* 30 COPYRIGHT L. SYMP. (ASCAP) 121, 125 (1983).

17 Sarraute, *Current Theory on the Moral Right of Authors and Artists Under French Law*, 16 AM. J. COMP. L. 465, 478-79 (1968). The right of paternity stems from personal aspects of the act of creation. An author infuses her work with part of her personality. Thus the author's name stands for more than who owns the work. The author's name connects the author to this unique personal expression. Any misuse of the author's name breaks this connection. *See generally id.* at 465; I S. LADAS, *supra* note 9, at 585-86.

18 Under art. 6*bis* of the Berne Convention, moral rights exist "[i]ndependently of the author's economic rights," and continue even after the transfer of the economic rights. Paris Text, *supra* note 6, at art. 6*bis*. The Berne Convention does not clearly indicate whether the author can expressly transfer moral rights along with economic rights. At least with respect to the right of paternity, some commentators indicate that an author cannot alienate her rights. *See* I S. LADAS, *supra* note 9, at 599. Some countries like France expressly take this view. Sarraute, *supra* note 17, at 478-79. With respect to the alienability of the right of integrity, see *infra* note 50 and accompanying text.

19 Art. 6*bis* (2) provides that moral rights shall exist at least as long as the economic rights which pursuant to Art. 7 last for the life of the author and continue fifty years after the author's death. Paris Text, *supra* note 6, at art. 6*bis*. Several countries, including France and Italy, protect moral rights beyond this minimum term. Each country determines who is to enforce an author's moral rights after the author's death. Some countries allow the author's heirs to enforce such rights as long as they do so in accordance with the author's interests. DaSilva, *supra* note 4, at 14-15. Berne countries also commonly give a public or governmental agency the power to exercise a deceased author's moral rights on behalf of the author. Gantz, *Protecting Artists' Moral Rights: A Critique of the California Art Preservation Act as a Model for Statutory Reform*, 49 GEO. WASH. L. REV. 873, 889, n.117 (1981). *See also* Sarraute, *supra* note 17, at 486.

20 *See infra* notes 21-46 and accompanying text. "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." Gilliam v. American Broadcast-

In the United States, an author's right to claim authorship of a work exists only to the extent that the author retains the copyright in the work or contracts to receive recognition.[21] United States copyright law provides that the author of an original work has exclusive rights of publication and reproduction.[22] Through exclusive publication and reproduction, the author can insure that her name remains associated with her work as long as she retains the copyright.[23] If the author transfers the copyright, however, the transferee does not have to publish the author's name in connection with the work, unless the author contractually retains such a right.[24] Generally, courts broadly interpret contracts which transfer copyright interests. Often they will deem the author to have relinquished the right to have her name associated with the work even if the parties did not expressly agree to such a provision.[25]

While an author who transfers the copyright in a creative work without retaining any interest cannot compel recognition, she may still prohibit the use of another's name in connection with the work under a theory of unfair competition or through application of the Lanham Act.[26]

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ing Cos., 538 F.2d 14, 24 (2d Cir. 1976) *See also* Vargas v. Esquire, Inc., 164 F.2d 522, 526 (7th Cir. 1947); 2 NIMMER, *supra* note 4, at § 8.21[B].

21 2 NIMMER, *supra* note 4, at § 8.21[E] *See also* Geisel v. Poynter Prods., Inc. 295 F. Supp. 331 (S.D.N.Y. 1968); Roeder, *supra* note 16, at 564.

22 17 U.S.C. § 106 (1982). Copyright law provides certain limitations to these exclusive rights including fair use under 17 U.S.C. § 107 (1982); reproduction by libraries and archives under 17 U.S.C. § 108 (1982); and certain educational uses under 17 U.S.C. § 110 (1982).

23 Pursuant to 17 U.S.C. § 201(a) (1982), the copyright in a protected work "vests initially in the author or authors of the work." The author may transfer the copyright or any of its exclusive rights in whole or in part. The transferee becomes the copyright owner to the extent of the rights transferred, thus supplanting the author with respect to those rights. *See* 1 NIMMER, *supra* note 4, at § 5.01. Different rules apply to "works made for hire" such as movies made under the direction of a particular studio. 17 U.S.C. § 201(b) (1982) provides that "[i]n the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author . . . and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all the rights comprised in the copyright." For a discussion of what constitutes a "work made for hire", see 1 NIMMER, *supra* note 4, at § 5.03. Since the author of a "work made for hire" does not own the copyright in the work, the author must use an employment contract to ensure that her name appears in connection with the work.

24 *See, e.g.*, Vargas v. Esquire Inc., 164 F.2d 522 (7th Cir. 1947) (artist did not retain the right to have his name associated with his artwork); Harris v. Twentieth Century Fox Film Corp., 43 F. Supp. 119 (S.D.N.Y. 1942) (author transferred all rights to her story and thus could not complain that her name did not appear in connection with the work); De Bekker v. Frederick A. Stokes Co., 168 A.D. 452, 153 N.Y.S. 1066 (1915) *modified*, 172 A.D. 960, 157 N.Y.S. 576, *aff'd*, 219 N.Y. 573, 114 N.E. 1064 (1916) (author was not entitled to have his name appear in his book since he did not reserve that right in the publishing contract); Jones v. American Law Book Co., 125 A.D. 519, 109 N.Y.S. 706 (1908) (publisher was under no obligation to publish author's name where the contract made the publisher sole owner of the copyright). *See also* 2 NIMMER, *supra* note 4, at § 8.21[E].

25 Comment, *Toward Artistic Integrity: Implementing Moral Right Through Extension of Existing American Legal Doctrines*, 60 GEO. L. J. 1539, 1556 (1972). Courts tend to interpret the rights that the author retains narrowly, and the rights that the author conveys broadly. *See, e.g.*, Harris v. Twentieth Century Fox Film Corp., 43 F. Supp. 119, 121 (S.D.N.Y. 1942). The court's interpretation will, to a certain extent, depend on the type of work involved, general practice in the field, and the parties' reasonable expectations. 2 NIMMER, *supra* note 4, at § 8.21[E]. *See, e.g.*, Jones v. American Law Book Co., 125 A.D. 519, 109 N.Y.S. 706, 709-10 (1908).

26 The common law doctrine of unfair competition developed as an effort to curb fraudulent and deceptive trade practices and to promote "fair dealing" in the market place. Courts use the doctrine to prohibit a wide range of competitive practices including misappropriation, trademark infringement, false representations, false advertising and any other conduct which a court feels violates fair and honest business conduct. 1 J. MCCARTHY, TRADEMARKS AND UNFAIR COMPETITION 14-16 (2d ed.

Courts have held that a false description as to origin amounts to a deceptive practice under a theory of unfair competition[27] and violates the Lanham Act which prohibits any such false designation.[28] In order to succeed under either theory, a plaintiff must show that: (1) the defendant's representation is false or tends to create a false impression; (2) the representation is material; (3) the representation deceives or is likely to deceive the public; and (4) the deception is likely to or does cause injury to the plaintiff.[29]

With respect to a claim of false designation of an artistic work, an author would have to prove that the use of another's name in connection with the author's work tends to deceive the public as to the origin of the work, and thus deprives the author of the advertising value and goodwill that would result from having her name associated with the work.[30] If

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1984). One of the more typical examples of unfair competition involves a plaintiff who claims that the defendant tried to sell certain goods as those of the plaintiff ("passing off") or tried to sell the plaintiff's goods as those of the defendant ("reverse passing off"). Smith v. Montoro, 648 F.2d 602, 604-05 (9th Cir. 1981).

To a great extent, the Lanham Act has supplanted the state law doctrine of unfair competition as the means of redressing unfair trade practices. *See generally* Bauer, *A Federal Law of Unfair Competition: What Should Be the Reach of Section 43(a) of the Lanham Act?*, 31 U.C.L.A. L. REV. 671 (1984). Section 43(a) of the Lanham Act provides in relevant part that:

> Any person who shall affix . . . or use in connection with any goods . . . or any container . . . for goods, a false designation of origin, or any false description or representation, including words or other symbols tending falsely to describe or represent the same, and shall cause such goods . . . to enter into commerce, . . . shall be liable to a civil action . . . by any person who believes that he is or is likely to be damaged by the use of any such false description or representation.

15 U.S.C. § 1125(a) (1982).

27 Courts most commonly apply the doctrine of unfair competition to deceptive practices involving the sale of commercial goods and services. However, courts have also applied the doctrine to product and service equivalents in the literary, artistic, and entertainment fields, including the use of titles, names, characters, and likenesses. *See generally* 1 J. MCCARTHY, *supra* note 26, at 322-50, 362-70. In the case of certain literary, artistic and entertainment rights, including the use of titles, characters, and authors' names, the court may require the plaintiff to show that the title or character name has a secondary meaning in the minds of the public apart from its descriptive aspects. In a case where the defendant uses her name in connection with another author's work, the court may require the plaintiff/author to show that the public identifies the author's name with certain works or ideas. *Id.* at 348.

28 *See, e.g.*, Smith v. Montoro, 648 F.2d 602, 605 (9th Cir. 1981) (film distributor's removal of actor's name from credits and advertising material held actionable under the Lanham Act); L'Aiglon Apparel, Co. v. Lana Lobell, Inc., 214 F.2d 649, 651 (3d Cir. 1954) (Lanham Act cause of action upheld against defendant who used plaintiff's product in advertisement for its product); Yameta Co. v. Capitol Records, Inc., 279 F. Supp. 582, 586-87 (S.D.N.Y.), *rev'd on other grounds*, 393 F.2d 91 (2d Cir. 1968) (use of plaintiff's name in such a way as to overstate his contributions to record was actionable). *See also* Follett v. New Amer. Library, Inc., 497 F. Supp. 304 (S.D.N.Y. 1980). *But see* Litchfield v. Spielberg, 736 F.2d 1352, 1357-58 (9th Cir. 1984), *cert. denied*, 470 U.S. 1052 (1985) (court rejected Lanham Act violation claim because defendant's movie was not substantially similar to plaintiff's play).

29 *See generally* Yameta Co. v. Capitol Records, Inc., 279 F. Supp. 582, 586-87 (S.D.N.Y), *rev'd on other grounds*, 393 F. 2d 91 (2d Cir. 1968); Maslow, *Droit Moral and Sections 43(a) and 44(i) of the Lanham Act - A Judicial Shell Game?*, 48 GEO. WASH. L. REV. 377, 388 (1980). A plaintiff who seeks injuctive relief does not have to prove that the false representation actually deceived anyone. 2 J. MCCARTHY, *supra* note 26, at 358-59.

30 Smith v. Montoro, 648 F.2d 602, 607 (9th Cir. 1981). Some commentators suggest that this reasoning may apply not only where another's name appears on the author's work, ("express reverse passing off"), but also where no name appears on the work ("implied reverse passing off"). In *Montoro*, the Ninth Circuit suggests that "implied reverse passing off" constitutes a violation of the Lanham Act. *Montoro*, 648 F.2d at 605-07. Under this reasoning, if no name appears on the work,

the author proves the violation, she may obtain an injunction to prevent another from claiming credit.[31]

Use of the doctrine of unfair competition and application of the Lanham Act protect an author not only from having her work attributed to another, but also from having her name used in connection with the work of another.[32] To sustain such a cause of action, the author must show that the use of her name tends to deceive the public as to her actual contribution to the work, and that injury is likely to result.[33] Courts will also grant relief if use of something other than the author's name would tend to imply that the author was involved with the work.[34] However, the cause of action will not succeed as long as proper labeling shows the extent of the author's contribution. For example, courts have held that the words "based on" or "derived from" the work of an author do not indicate that the author contributed to the work in question.[35]

As an alternative to claims based on unfair competition and violation of the Lanham Act, an author may argue that the wrongful use of her name violates a right of publicity[36] or amounts to defamation.[37] An action for invasion of privacy under a right of publicity stems from the proprietary interest that one has in one's own identity.[38] Such an action

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the author may also claim a Lanham Act violation for false designation. *See* 2 NIMMER, *supra* note 4, at § 8.21[E].

31 *See* 1 J. MCCARTHY, *supra* note 26, at 55 (Supp. 1987) ("[T]his comes close to creating a general right to attribution, similar to the continental 'droit moral paternity' right").

32 Courts most commonly use a theory of unfair competition and application of the Lanham Act to prohibit the latter type of conduct which they refer to as "palming off" or "passing off". For a discussion of this practice as well as "reverse passing off", see 2 J. MCCARTHY, *supra* note 26, at 237-38. *See also* Smith v. Montoro, 648 F.2d 602, 604-05 (9th Cir. 1981).

33 *See, e.g.*, Drummond v. Altemus, 60 F. 338, 338-39 (C.C. Pa. 1894); Follett v. New Amer. Library, Inc., 497 F. Supp. 304, 312 (S.D.N.Y. 1980); Yameta Co. v. Capitol Records, Inc., 279 F. Supp. 582, 586-87 (S.D.N.Y.), *rev'd on other grounds*, 393 F.2d 91 (2d Cir. 1968); Gieseking v. Urania Records, Inc., 17 Misc. 2d 1034, 155 N.Y.S.2d 171, 172 (1956). The court held in L'Aiglon Apparel Co. v. Lana Lobell, Inc., 214 F.2d 649 (3d Cir. 1954) that the Lanham Act gives relief to anyone who is injured or likely to be injured by the defendant's conduct. *Id.* at 651. *See also* Smith v. Montoro, 648 F.2d 602, 607 (9th Cir. 1981). Courts have interpreted "injury" very broadly. In *Montoro*, the court looked to the "vital interest of actors in receiving accurate credit for their work . . . ." *Montoro*, 648 F.2d at 608.

34 *See* L'Aiglon Apparel Co. v. Lana Lobell, Inc., 214 F.2d 649, 651 (3d Cir. 1954) (picture of plaintiff's dress used to advertise defendant's dress). For a discussion of the unfair use of distinctive characterizations, see 1 J. MCCARTHY, *supra* note 26, at 368-70.

35 *See, e.g.*, Landon v. Twentieth Century-Fox Film Corp., 384 F. Supp. 450, 459 (S.D.N.Y. 1974) (television credits properly stated that scripts were "based on" plaintiff's stories); Geisel v. Poynter Prods., Inc., 295 F. Supp. 331, 353 (S.D.N.Y. 1968) (label on dolls properly stated that they were "based on" plaintiff's illustrations); 2 NIMMER, *supra* note 4, at § 8.21[D].

36 *See, e.g.*, Maritote v. Desilu Prods. Inc.,, 345 F.2d 418 (7th Cir.), *cert. denied*, 382 U.S. 883 (1965) (use of Al Capone's name and likeness in television broadcast); Fairfield v. American Photocopy Equipment Co., 138 Cal. App. 2d 82, 291 P.2d 194 (1955) (unauthorized use of plaintiff's name in advertisement). *See generally* 2 NIMMER, *supra* note 4, at § 8.21[D]; 1 J. MCCARTHY, *supra* note 26, at 372-89.

37 *See infra* notes 41-42 and accompanying text.

38 Four distinct invasions comprise the law of privacy: (1) intrusion upon the seclusion, solitude, or private affairs of another person; (2) public disclosure of embarrassing private facts concerning another person; (3) publicity which places another person in a false light in the public eye; and (4) appropriation of another's name or likeness for personal gain. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 389 (1960). The first three of these torts involve one's right to be free from unwarranted intrusions into one's solitude. The fourth category involves a property right which courts and commentators commonly refer to as the "right of publicity." *See generally* Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977); Haelan Laboratories, Inc. v. Topps Chewing Gum, 202 F.2d

emphasizes the pecuniary value of certain aspects of a person's personality and protects those aspects from economic exploitation by others. Recognizing this type of proprietary interest, courts will generally prohibit the unauthorized commercial use of a person's name.[39] Under this reasoning, an author may seek to enjoin the unauthorized use of her name in connection with a work that she did not create by arguing that such a use violates a right of publicity.[40]

Unlike the right of publicity which protects a property right in one's identity, the tort of defamation protects a personal interest in one's reputation.[41] Relying on this interest, one may argue that attributing an inferior work to an author will damage the author's reputation and thus will amount to defamation.[42]

While in some cases these causes of action offer protection which resembles the Berne Convention's right to claim authorship, they often suffer from limitations which do not exist under Berne. For example, unlike actions based on the right to claim authorship, actions for breach of contract, defamation, unfair competition, violation of the Lanham Act, and actions based on the right of publicity all require that the plaintiff show injury or a likelihood of injury.[43] Thus, such causes of action sur-

866 (2d Cir.), *cert. denied*, 346 U.S. 816 (1953); Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203 (1954); Prosser, *supra* at 401-07. Under a right of publicity, courts give a monopoly on the use of aspects of one's own personality for economic gain. State law sets the boundaries for the exercise of this right where it exists. Generally, since the right of publicity does not involve invasion of solitude, one does not lose the right by courting the public eye. Similarly, since the right does not try to redress injury to feelings, a plaintiff need not prove that the conduct resulted in offensive publicity. The cause of action generally requires only the unauthorized use of one's name or likeness for commercial purposes. *See* Nimmer, *supra* at 215-16. For a discussion of recent cases which reunite the right of publicity with its privacy roots, see Halpern, *The Right of Publicity: Commercial Exploitation of the Associative Value of Personality*, 39 VAND. L. REV. 1199, 1211-15 (1986).

39 Nimmer, *supra* note 38, at 217-18. *E.g.*, Manger v. Kree Inst. of Electrolysis, 233 F.2d 5 (2d Cir. 1956); Price v. Hal Roach Studios, Inc. 400 F. Supp. 836, 843-44 (S.D.N.Y. 1975); Lugosi v. Universal Pictures, 25 Cal. 3d 813, 160 Cal. Rptr. 323, 326, 603 P.2d 425 (1979); Fairfield v. American Photocopy Equipment Co., 138 Cal. App. 2d 82, 291 P.2d 194, 197 (1955). The mere use of a person's name does not give rise to a cause of action under the right of publicity. Rather, the plaintiff must show that the defendant used the plaintiff's name to appropriate the plaintiff's identity for commercial purposes. W. KEETON, PROSSER & KEETON ON TORTS 852 (5th ed. 1984).

40 *See, e.g.*, Follett v. New Amer. Library Inc., 497 F. Supp. 304, 310-11 (S.D.N.Y. 1980) (author has a right to accurate attribution); Gieseking v. Urania Records, Inc., 17 Misc. 2d 1034, 155 N.Y.S. 2d 171, 172 (1956) ("A performer has a property right in his performance that it shall not be used for a purpose not intended, and particularly in a manner which does not fairly represent his service."); 2 NIMMER, *supra* note 4, at § 8.21[D]. Authors may invoke other aspects of the right of privacy in order to prevent their names from being used in connection with an inferior work. This use of privacy law will be discussed under the right of integrity. *See infra* notes 76-78 and accompanying text.

41 "Defamation is rather that which tends to injure reputation in the popular sense; to diminish the esteem, respect, good-will or confidence in which the plaintiff is held, or to excite adverse, derogatory or unpleasant feelings or opinions against him." W. KEETON, *supra* note 39, at 773 (footnotes omitted).

42 *See* 2 NIMMER, *supra* note 4, at § 8.21[D]. This theory more closely resembles the Berne Convention's right of integrity and will be discussed in greater detail in that part of this note. *See infra* notes 73-75 and accompanying text.

43 To recover damages in an action for defamation the plaintiff generally must show that the defamatory conduct impaired the plaintiff's reputation. W. KEETON, *supra* note 39, at 843. Such proof may be difficult if an author does not have a reputation in the literary or artistic community. The other causes of action require a showing that either the defendant's conduct puts the plaintiff at a pecuniary disadvantage or gives the defendant an unjust economic advantage.

vive an author, if at all, only to the extent that another plaintiff would be injured by the omission or wrongful use of the author's name.[44] Similarly, while under the Berne Convention an author retains the right to claim authorship even after the transfer of economic interests, an author in the United States may waive or assign any interest in her name, thus defeating any personal claim of injury.[45] Finally, in many cases, United States courts will find that constitutional interests such as freedom of speech and freedom of the press outweigh an author's ability to control the use of her name and thus will defeat causes of action which might otherwise afford some protection.[46]

B. *Right of Integrity*

Apart from the right to claim authorship, the Berne Convention gives an author the right to "object to any distortion, mutilation, or other modification of, or other derogatory action in relation to," a creative work that would prejudice the author's honor or reputation.[47] The exact nature of this right, which commentators commonly refer to as the right of integrity, depends to a great extent on the laws of the signatory countries.[48] The Berne Convention provides only that the right of integrity, like the right to claim authorship, shall exist independently of the author's economic interests and shall continue even after the author transfers such interests.[49] Whether or not this provision allows an author to alienate or waive the right of integrity remains unclear, although some

44 Courts under a theory of unfair competition or the right of publicity, or through application of the Lanham Act, generally recognize the right to exploit one's name as a property right which may be alienated or assigned and, if used to the person's advantage during life, may pass at death. *See, e.g.*, Factors Etc., Inc. v. Pro Arts, Inc., 444 F. Supp. 288, 290-91 (S.D.N.Y. 1977), *aff'd*, 579 F.2d 215 (2d Cir. 1978), *cert. denied*, 440 U.S. 908 (1979) (right to exploit the name of Elvis Presley passed to plaintiffs at his death); Price v. Hal Roach Studios, Inc., 400 F. Supp. 836, 844 (S.D.N.Y. 1975) (right of publicity does not terminate upon death). *But see* Maritote v. Desilu Prods., Inc. 345 F.2d 418 (7th Cir.), *cert. denied*, 382 U.S. 883 (1965); Lugosi v. Universal Pictures, 25 Cal. 3d 813, 603 P.2d 425, 160 Cal. Rptr. 323, 329 (1979) ("[T]he right to exploit name and likeness is personal to the artist and must be exercised, if at all, by him during his lifetime"). Rights under defamation and certain forms of invasion of privacy are personal and generally do not survive one's death. *See Price*, 400 F. Supp. at 844; W. KEETON, *supra* note 39, at 778.

45 Once assigned, those who have the right to exploit one's name also have the right to bring a cause of action for unfair competition or under the right of publicity or to claim a violation of the Lanham Act. *See* Price v. Hal Roach Studios, Inc., 400 F. Supp. 836, 844 (S.D.N.Y. 1975) (right of publicity is assignable); Lugosi v. Universal Pictures, 25 Cal. 3d 813, 603 P.2d 425, 160 Cal. Rptr. 323, 329 (1979) (right to exploit one's name and likeness can be assigned). For a discussion of "implied waiver" of the right of publicity, see 1 J. MCCARTHY, *supra* note 26, at 384-86.

46 When a private plaintiff uses the courts as a means to enjoin certain speech, "government action" exists so as to raise possible first amendment objections. 2 J. MCCARTHY, *supra* note 26, at 664. In most cases where the defendant's conduct is deceptive, it does not merit first amendment protection. *Id.* However, in certain situations, the public's right to know or other public policy considerations may outweigh one's exclusive right to exploit one's name. 1 J. MCCARTHY *supra* note 26, at 386-87. For a general discussion of the balancing of copyright interests and first amendment concerns, see 1 NIMMER, *supra* note 4, at § 1.10[B].

47 Paris Text, *supra* note 6, at art. 6*bis*.

48 *Id. See supra* note 15.

49 Paris Text, *supra* note 6, at art. 6*bis*. Like the right to claim authorship, the right of integrity continues fifty years after the death of the author. Individual countries determine who can enforce the right after the author's death. *See supra* note 19.

Berne countries expressly provide that an author cannot do so.[50] Clearly, under the Berne Convention, an author cannot object arbitrarily to any changes to her creative work. Rather, an author may object only to prejudicial changes.[51]

The United States does not expressly recognize a right of integrity.[52] However, United States courts in many cases provide the same type of protection through legal theories purportedly unconnected with a doctrine of moral right.[53]

Generally, in the United States, an author who transfers the copyright in a work loses all power to dispose of that work except to the extent that she contractually retains control. Under United States copyright law, the copyright holder has the exclusive right to exploit an original work of authorship.[54] Courts generally hold that the right to exploit implicitly includes the right of the copyright holder to alter the work to suit her particular needs or uses.[55] Unless the author retains an interest or contractually requires the copyright holder to maintain the work in its original form, the author generally cannot object on contractual grounds to any changes. Where the author does retain an interest or bargains for control, the use of contracts can provide extensive protec-

50 French law, for example, expressly provides that the right of integrity ("droit au respect") is personal, perpetual, inalienable, and unassignable. DaSilva, *supra* note 4, at 4. French courts will in practice, however, often enforce contracts which transfer or relinquish the right of integrity. *Id.* at 16. For a discussion of the inalienability of moral rights, see Strauss, *The Moral Right of the Author*, in 2 STUDIES ON COPYRIGHT 115, 123-25 (Moral right is personal and thus not capable of transfer but it can be waived by contract). *See also* Nimmer, *supra* note 12, at 523-24 (Article 6*bis* "means that the transfer of economic rights does not in and of itself include the transfer of moral rights and does not necessarily mean that moral rights themselves are incapable of transfer.")

51 Some courts and commentators suggest that this standard creates problems in that, to a certain extent, it may require a court to make artistic judgments. DaSilva, *supra* note 4, at 37. *See, e.g.*, Shostakovich v. Twentieth Century Fox Film Corp., 196 Misc. 67, 80 N.Y.S.2d 575, 579 (1948), *aff'd*, 275 A.D. 692, 87 N.Y.S.2d 430 (1949). However, the Berne Convention does not seem to require judgments as to literary and artistic merit. Rather, the inquiry focuses on prejudice to honor and reputation, an issue which would be familiar to United States courts which make such determinations now in the areas of privacy and defamation. Courts would have to decide whether to use an objective or subjective standard with respect to such prejudice. Courts would also have to decide which community it would use to determine such standards. Given the nature of artistic creation and the personal nature of the right, a subjective standard seems suitable.

52 *See, e.g.*, Gilliam v. American Broadcasting Cos., 538 F.2d 14, 24 (2d Cir. 1976); Granz v. Harris, 198 F.2d 585, 590 (2d Cir. 1952) (Frank, J., concurring); Vargas v. Esquire, Inc., 164 F.2d 522, 526 (7th Cir. 1947); Crimi v. Rutgers Presbyterian Church, 194 Misc. 570, 89 N.Y.S. 2d 813, 818 (1949); Shostakovich v. Twentieth Century-Fox Film Corp., 196 Misc. 67, 80 N.Y.S.2d 575, 579 (1948), *aff'd*, 275 A.D. 692, 87 N.Y.S.2d 430 (1949).

53 *See infra* notes 54-84 and accompanying text. For a discussion of United States equivalents to the right of integrity, see DaSilva, *supra* note 4, at 45-48; Nimmer, *supra* note 12, at 521-23; Roeder, *supra* note 16, at 565-72; Strauss, *supra* note 50, at 132-35.

54 17 U.S.C. § 106 (1982). *See supra* note 2.

55 *See, e.g.*, Manners v. Famous Players-Lasky Corp., 262 F. 811, 813 (S.D.N.Y. 1919) (right to make motion picture from a play must include right to make some alterations, eliminations and additions); Edgar Rice Burroughs, Inc. v. Metro-Goldwyn-Mayer, Inc., 205 Cal. App. 2d 441, 23 Cal. Rptr. 14, 18 (1962) (inherent in the right to remake a story is the "right to update, modernize and adapt the story to life in today's generation and employ current methods and techniques"); Preminger v. Columbia Pictures Corp., 49 Misc. 2d 363, 367, 267 N.Y.S.2d 594, *aff'd*, 25 A.D.2d 830, 269 N.Y.S.2d 913, *aff'd*, 18 N.Y.2d 659, 219 N.E.2d 431, 273 N.Y.S.2d 80 (1966) ("Implicit in the grant of television rights is the privilege to cut and edit.")

tion.[56] However, authors often do not have the bargaining power necessary to protect the integrity of their work. The transfer of interests in creative works usually involves standard form contracts which give the transferee broad powers to dispose of the property.[57] Even where the author does have bargaining power, contracts generally offer protection only against those types of alterations, distortions or modifications that the parties expressly contemplated at the time of transfer.[58]

To alleviate the harshness of this result, United States courts look to other legal theories to provide redress for an author whose work has been distorted, altered, or otherwise modified. For example, some courts suggest that an author may object to material changes under a theory of unfair competition.[59] A cause of action under unfair competition may arise when the licensee of a work changes the work such that attribution to the author would deceive the public and put the author at an unfair economic disadvantage.[60]

In *Gilliam v. American Broadcasting Cos.*,[61] the Second Circuit extended this theory by applying the Lanham Act to an author's claim of distortion.[62] In *Gilliam*, the British comedy group Monty Python sought to enjoin the American Broadcasting Companies (ABC) from showing an edited version of its television show. The group argued that the "editing done for ABC mutilated the original work and that consequently the broadcast of those programs as the creation of Monty Python violated

56 Treece, *American Law Analogues of the Author's "Moral Right"*, 16 AM. J. COMP. L. 487, 499 (1968) (key against mutilation of creative works in the United States is contract rights). *See, e.g.*, Manners v. Famous Players-Lasky Corp., 262 F. 811, 813 (S.D.N.Y. 1919) (author retained right to approve any alterations, eliminations, or additions); Crimi v. Rutgers Presbyterian Church, 194 Misc. 570, 89 N.Y.S.2d 813, 819 (1949) ("The time for the artist to have reserved any rights was when he and his attorney participated in the drawing of the contract"); Fairbanks v. Winik, 206 A.D. 449, 201 N.Y.S. 487, 488 (1923) (plaintiff retained right to supervise direction, approve stories and inspect footage); Royle v. Dillingham, 53 Misc. 383, 104 N.Y.S. 783, 784 (1907) (plaintiff retained the right to supervise general production and to consent to changes, alterations, or additions). *See also* 2 NIMMER, *supra* note 4, at § 8.21[E].

57 Nimmer, *supra* note 12, at 524; *see also* Comment, *supra* note 25, at 1559-60 (suggesting that courts should interpret vague literary and artistic standard form contracts against the drafter or as unconscionable).

58 *See supra* note 25. Courts disfavor a theory of implied reservation of rights. *See, e.g.*, Goodis v. United Artists Television, Inc., 425 F.2d 397, 406 (2d Cir. 1970) (court should look at intent and expectations of parties as well as customs of the artistic or literary community); Vargas v. Esquire, Inc., 164 F.2d 522, 526 (7th Cir. 1947) (Reservation of rights "will not be presumed; it must be expressed and clearly implied"); 2 NIMMER, *supra* note 4, at § 8.21[C]. For a discussion of the effect of such an interpretation when new techniques such as colorization are involved, see *infra* notes 97-100 and accompanying text.

59 For a discussion of unfair competition, see *supra* notes 26-27 and accompanying text.

60 Roeder, *supra* note 16, at 567-68. *See, e.g.*, Granz v. Harris 198 F.2d 585, 588 (2d Cir. 1952) (sale of abbreviated version of record using plaintiff's name could be enjoined under a theory of unfair competition); Drummond v. Altemus, 60 F. 338, 339 (C.C. Pa. 1894) (publication of altered form of plaintiff's reports); Jaeger v. American Int'l Pictures, Inc., 330 F. Supp. 274, 278 (S.D.N.Y. 1971) ("[T]here is enough in plaintiff's allegations to suggest that he may yet be able to prove a charge of unfair competition or otherwise tortious misbehavior in the distribution to the public of a film that bears his name but at the same time severely garbles, distorts or mutilates his work.")

61 538 F.2d 14 (2d Cir. 1976).

62 Other courts have suggested that the Lanham Act might apply but did not expressly apply it. *See, e.g.*, Jaeger v. American Int'l Pictures, Inc., 330 F. Supp. 274, 278 (S.D.N.Y. 1971). For a discussion of application of the Lanham Act, see *supra* note 26 and accompanying text.

the Lanham Act . . . ."[63] The Second Circuit, expressly recognizing a cause of action under the Lanham Act, enjoined future broadcasts.[64] The court found that the edited version omitted essential elements of the story line and "impaired the integrity of appellants' work and represented to the public as the product of appellants what was actually a mere caricature of their talents."[65]

If the use of a theory of unfair competition and application of the Lanham Act continue in the direction of *Gilliam*, United States authors will receive protection which resembles the Berne Convention's right of integrity.[66] Even with this expansion, however, important differences remain. For example, in order to have a cause of action under either unfair competition or the Lanham Act, an author must establish that the misrepresentation has impaired or is likely to impair the author's reputation and cause economic injury.[67] The Berne Convention, on the other hand, protects against any prejudicial conduct, potentially a much broader category of injury.[68] Furthermore, the courts base causes of action under unfair competition and the Lanham Act on the right to exploit one's own name, a property right which the author can assign or transfer. Along with the transfer of this interest, the author relinquishes the right to claim that an inferior version of her work creates an economic disadvantage.[69] Arguably, an author subject to the Berne Convention may also relinquish the right of integrity; however, where possible, such an action generally requires express language to that effect.[70]

Even if an author retains the right to exploit her own name, remedies under a theory of unfair competition or through application of the Lanham Act may prove insufficient. Courts may allow the defendant to rectify any false representation by affixing labels or legends which properly identify the work and disclaim the plaintiff/author's participation in any alteration, modification or distortion.[71] While such a remedy allevi-

63 *Gilliam*, 538 F.2d at 24.

64 In the first part of its opinion, the Second Circuit determined that the unauthorized editing infringed on Monty Python's copyright in the work. The court held that the group, by reserving all rights not granted under the contract, had retained the right to control alterations. *Id.* at 21. Not all courts and commentators agree with this contractual interpretation. *See* 2 NIMMER, *supra* note 4, at § 8.21[C]. *See also supra* notes 55 & 58. Perhaps the deciding factor is the degree of alteration. *See, e.g.*, Preminger v. Columbia Pictures Corp., 49 Misc. 2d 363, 372, 267 N.Y.S.2d 594, *aff'd*, 25 A.D.2d 830, 269 N.Y.S.2d 913, *aff'd*, 18 N.Y.2d 659, 219 N.E.2d 431, 273 N.Y.S.2d 80 (1966) (while the privilege to make minor cuts may be implied in the contract, the power to make major cuts may not).

65 *Gilliam*, 538 F.2d at 25. For a criticism of the extension of the Lanham Act in this direction, see Goldberg, *Commentary: The Illusion of "Moral Right" in American Law*, 43 BROOKLYN L. REV. 1043 (1977).

66 Presently, no court has gone as far as the *Gilliam* court in providing moral rights protection through application of the Lanham Act.

67 *See supra* note 29 and accompanying text. The plaintiff and the defendant need not compete in order for the plaintiff to have a cause of action. The plaintiff must show a likelihood of economic damage either through loss of sales or through damage to reputation which causes a decline in income. 2 J. MCCARTHY, *supra* note 26, at 354-56.

68 Paris Text, *supra* note 6, at art. 6*bis*.

69 *See supra* notes 44-45 and accompanying text.

70 *See supra* note 50 and accompanying text.

71 *See supra* note 35 and accompanying text. *See also* Goldberg, *supra* note 65, at 1049. The *Gilliam* court, however, would enjoin the defendants even in that situation. *Gilliam*, 538 F.2d at 25, n.13 ("We are doubtful that a few words could erase the indelible impression that is made by a television

ates any economic disadvantage, it does not soften the injury to feeling that an author may suffer.[72]

In the United States, causes of action for defamation and invasion of privacy remedy injuries to feelings. Some courts have extended these theories to protect an author's personal interest in having the integrity of her work respected.[73] Of the two theories, defamation offers the greater protection. An action for defamation protects a person from that which tends to impair her reputation or standing in the community.[74] Under this theory, an author may argue that the publication or display of an inferior version of her work tends to damage her reputation and elicit ridicule or contempt from the public or from members of a particular artistic or literary community.[75] A similar cause of action may arise under a theory of false light invasion of privacy.[76] False light invasion of privacy protects a person from highly offensive publicity.[77] Under this theory, an author may argue that the alteration, distortion, or modification of her creative work causes embarassment, scorn, uninvited publicity, and emotional distress.[78]

Like a doctrine of moral right, causes of action for defamation and invasion of privacy protect personal interests. Courts, however, face serious limitations when they attempt to apply these theories to offer the

broadcast, especially since the viewer has no means of comparing the truncated version with the complete work in order to determine for himself the talents of plaintiffs.")

72 Roeder, *supra* note 16, at 567-68. *See Gilliam*, 538 F.2d at 24 ("Although such decisions are clothed in terms of proprietary right in one's creation, they also properly vindicate the author's personal right to prevent the presentation of his work to the public in a distorted form.")

73 *See, e.g.*, American Law Book Co. v. Chamberlayne, 165 F. 313, 316 (2d Cir 1908) (acknowledging the possibility of recovering damages for libel resulting from publication of mutilated or altered form of author's work); Clevenger v. Baker Voorhis & Co., 8 N.Y.2d 187, 168 N.E.2d 643, 203 N.Y.S.2d 812, 815 (1960), *app. denied*, 9 N.Y.2d 755, 174 N.E.2d 609, 214 N.Y.S.2d 736 (1961) (action for libel in the inaccurate use of plaintiff's name in connection with revised edition of his book); Locke v. Benton & Bowles, Inc., 253 A.D. 369, 2 N.Y.S.2d 150, 151-52 (1938) (action for libel in the inaccurate presentation of newswriter's observations).

74 *See* W. KEETON, *supra* note 39, at 773. A prima facie case requires that: (1) the defendant communicate the statement to someone other than the plaintiff; (2) the statement is defamatory; and (3) the statement defames and concerns the plaintiff. *Id.* at 802. In recent years, courts have wrestled with the standard of liability to which a defendant will be held. In New York Times Co. v. Sullivan, 376 U.S. 254 (1964), the Supreme Court held that a public plaintiff must show actual malice, defined as knowledge that a statement was false or reckless disregard as to its truth or falsity, in order to recover against a media defendant. *Sullivan*, 376 U.S. at 279-80. This standard does not apply to private individuals who may, if state law allows, recover for negligence against a media or non-media defendant. *See* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc. 472 U.S. 749 (1985); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

75 *See, e.g.*, Geisel v. Poytner Prods., Inc., 295 F. Supp. 331, 357 (S.D.N.Y. 1968). *See also supra* note 73. The removal of the plaintiff's name from the work does not eliminate the cause of action. A defamatory meaning may attach to the plaintiff even though the defendant makes no such reference as long as others reasonably identify the work with the plaintiff. W. KEETON, *supra* note 39, at 783.

76 For a discussion of invasion of privacy, see *supra* note 38.

77 W. KEETON, *supra* note 39, at 864. The statements which shed false light do not have to be defamatory to be actionable. A plaintiff may recover for false accounts which are highly offensive to the plaintiff and need not prove injury to reputation, but rather may recover for emotional distress. The plaintiff must, however, prove that the defendant's conduct was outrageous. Generally this requires that the defendant have deliberately falsified information regarding the plaintiff. *Id.* at 865-66.

78 *See, e.g.*, Landon v. Twentieth Century-Fox Film Corp., 384 F. Supp. 450, 459 (S.D.N.Y. 1974); Kerby v. Hal Roach Studios, Inc., 53 Cal. App. 2d 207, 127 P.2d 577, 580 (1942).

same types of protection that exist under the Berne Convention. For example, unlike the right of integrity, the rights of action under defamation and false light invasion of privacy generally do not survive the person claiming them.[79] These rights also may not apply to all persons equally. An action for defamation, for example, requires that the defamatory statement tend to impair the plaintiff's reputation. Many authors, however, do not have a following in the literary or artistic community and thus may find it difficult to claim that a certain action harms their reputation.[80] On the other hand, courts may find that persons who seek publicity to a certain extent may waive claims for false light invasion of privacy.[81] Even an author who does have a cause of action under either theory may find the remedies limited. Courts generally do not grant injunctive relief in an action for defamation.[82] Some courts do allow injunctive relief, where practical, in actions for invasion of privacy.[83] In either case, the court may deny any relief if the defendant properly labelled the altered work as "based on" the author's work or if the work has entered the public domain.[84]

II. Colorization of Black and White Films

In theory, United States law offers some protection for artistic expression. In practice, however, it falls far short of the protection which the Berne Convention and laws made pursuant to Berne offer.[85] The

79 W. KEETON, *supra* note 39, at 778. *See, e.g.*, Maritote v. Desilu Prods., Inc., 345 F.2d 418, 419 (7th Cir.), *cert. denied*, 382 U.S. 883 (1965) (action brought by Al Capone's widow objecting to fictionalized account of Capone's life); James v. Screen Gems, Inc., 174 Cal. App. 2d 650, 344 P.2d 799, 801 (1959) (action brought by Jesse James' daughter-in-law objecting to account of her husband's life as Jesse James' son). Some state statutes expressly include actions for defamation of a deceased person. W. KEETON, *supra* note 39, at 779.

80 Comment, *supra* note 25, at 1549-50. In most cases, the question of the extent of the plaintiff's reputation would go to the issue of damages. If the plaintiff does not have a reputation then the publication of an inferior version of her work will not cause much damage.

81 W. KEETON, *supra* note 39, at 867. Some courts have held that, for certain purposes, those who seek publicity consent to invasions of their privacy. *See, e.g.*, Estate of Hemingway v. Random House, Inc., 23 N.Y.2d 341, 244 N.E.2d 250, 296 N.Y.S.2d 771, 781-82 (1968). Where the plaintiff consented to publicity, it is less likely that she will be able to prove the outrageous conduct required for a false light action. W. KEETON, *supra* note 39, at 866-67.

82 DaSilva, *supra* note 4, at 45.

83 *See, e.g.*, Zacchini v. Scripps Howard Broadcasting Co., 433 U.S. 562, 573 (1977), in which the Court, in distinguishing the right of publicity from false light invasion of privacy, states: "In 'false light' cases the only way to protect the interests involved is to attempt to minimize publication of the damaging matter . . . ."

84 *See, e.g.*, Landon v. Twentieth Century-Fox Film Corp., 384 F. Supp. 450, 459 (S.D.N.Y. 1974) ("Any person may truthfully state that a work is 'based on' or 'suggested by' the work of that author"); Geisel v. Poynter Prods., Inc., 295 F. Supp. 331, 357 (S.D.N.Y. 1968) ("This claim must also fail because defendants' activities . . . do not imply that plaintiff created, designed or approved of the dolls"); Shostakovich v. Twentieth Century-Fox Film Corp., 196 Misc. 67, 80 N.Y.S.2d 575, 578 (1948), *aff'd*, 275 A.D. 692, 87 N.Y.S.2d 430 (1949) (no implication of plaintiff's participation exists where the work is in the public domain).

85 *See, e.g.*, Crimi v. Rutgers Presbyterian Church, 194 Misc. 570, 89 N.Y.S.2d 813, (1949) (artist could not object to the painting over of his mural); Shostakovich v. Twentieth Century-Fox Film Corp., 196 Misc. 67, 80 N.Y.S.2d 575, 578 (1948), *aff'd*, 275 A.D. 692, 87 N.Y.S.2d 430 (1949) (Soviet composers could not enjoin use of their music in a manner derogatory to their country); Meliodon v. School Dist. of Philadelphia, 328 Pa. 457, 195 A. 905 (1938) (court refused to order defendant to remove altered form of plaintiff's sculptural work).

recent debate over the colorization of black and white motion pictures highlights these deficiencies.[86]

A. *The Colorization Process*

As commonly used, the term "colorization" refers generally to the several techniques which use computers to add color to black and white films.[87] The colorization process involves five basic steps: (1) the black and white film is transferred onto a videotape; (2) the film is broken down frame by frame, scene by scene; (3) an art director develops a color plan for each scene and for the film as a whole; (4) a computer operator selects the appropriate colors from an electronic palette; and (5) a high speed computer tracks these colors through other frames based on similarities in shadings of gray in the black and white film.[88] Art directors research the coloring of the film's actors, as well as the actual props, costumes and sets. Color selections reflect this research as well as a study of the shadings of the film, but to a great extent depend on the aesthetic judgment and personal taste of the art directors as to the colors that will be consistent with the mood of the original film.[89]

B. *Application of United States Law*

Many people oppose efforts to colorize black and white films.[90] Yet despite this opposition, no recourse seems available even for those who participated in the production of the original films.[91] The limited protec-

86 The ongoing debate between "purists" and "colorists" began in 1984 with the showing of the first colorized version of a black and white film, *Miracle on 34th Street*. The battle continues today as members of the artistic community wage a seemingly losing effort to prevent the coloring of such classic black and white films as *Casablanca* and *Citizen Kane*.

87 Two processes exist for adding color to black and white films: (1) the chromoloid process; and (2) the colorization process. The "chromoloid process" produces three prints of the film in red, blue, and green and combines these prints into a single color film. "Colorization" generally involves the use of a computer to distribute hand picked colors throughout each frame of a film. 34 PAT., TRADEMARK, & COPYRIGHT J. (BNA) No. 836, at 223 (June 25, 1987). This note will focus on the "colorization" process.

88 *Id.* Three companies: Hal Roach Studios (Colorization Inc.), Color Systems Technology, Inc., and American Film Technologies, Inc., use the "colorization" process. New York Times, Apr. 22, 1987, at D-7, col. 1. *See also* 34 PAT. TRADEMARK & COPYRIGHT J. (BNA) No. 836, at 223 (June 25, 1987). The process costs between $300,000 and $500,000 per film. Los Angeles Times, Jan. 19, 1988, at 4-2A, col. 1. Since 1984, more than fifty colorized movies have been released with another fifty scheduled to be released this year. Los Angeles Times, Jan. 19, 1988, at 4-2A, col. 1. These movies include *It's a Wonderful Life*, *Bells of St. Mary's*, *The Maltese Falcon*, *Yankee Doodle Dandy*, and *Topper*. The Turner Entertainment Co. with its Turner Broadcasting System (TBS) has been the leading exhibitor of the colorized versions of such films.

89 New York Times, June 24, 1987, at A-27, col. 1.

90 Opponents of colorization argue that colorizing black and white films distorts the creative effect of the original. They claim that the addition of color changes the atmosphere, mood, and tone of the black and white footage and destroys the artistic impression that the director intended to create. Los Angeles Times, Sept. 12, 1986, at 6-1, col. 3. Proponents, on the other hand, argue that a market exists for colorized films that does not exist for their black and white counterparts. They suggest that prohibiting colorization would infringe upon the freedom of consumers to judge whether these works have artistic merit. Proponents also argue that the market for colorized films gives owners of old films the financial motivation to preserve them and gives audiences a chance to see films that otherwise would not be readily available. 34 PAT., TRADEMARK & COPYRIGHT J. (BNA) No. 830, at 34, (May 14, 1987).

91 *See* Federing, U.S. NEWS & WORLD REP., Oct. 20, 1987, at 75 (discussing Orson Welles, director of *Citizen Kane*, "who observed that no truly great performance had ever been given on color film.

tion which art receives in the United States does not readily extend to either the authors of motion pictures or to the black and white films themselves.

General copyright principles give an author the right to object to colorization but only if the author[92] holds the copyright and only to the extent that any other rights transferred do not include the right to colorize.[93] Under the current statute, the copyright in an original work of authorship expires fifty years after the life of the author.[94] Many black and white films, however, predate the current statute and have already entered the public domain.[95] Even if a valid copyright does exist, the creative forces behind the film do not usually hold it. 17 U.S.C. § 201(b) provides:

> In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a

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His view was that color detracted from the pathos, the empathy, the drama, that color bridged the last gap between imagination and reality.") *Id. Citizen Kane* has not as yet been colorized. Recently, however, the Turner Broadcast System acquired rights to the film as part of its acquisition of a portion of the RKO film and television library.

Many directors, producers, and actors associated with black and white films have argued against colorization. For example, Woody Allen writes: "I have chosen on a number of occasions, even fought for the privilege to tell stories with black and white photography. Indeed, the different effect between color and black and white is often so wide it alters the meaning of scenes." Allen, N.Y. REV. OF BOOKS, Aug. 13, 1987, at 38. Similarly, James Stewart stated that when he watched the colorized version of *It's a Wonderful Life*, "he turned it off in disgust halfway through the film." Nat'l. L. J., July 27, 1987, at 10, col. 2. He labelled it "morally and artistically wrong.'" *Id.* at 11, col. 3.

92 The term "author" with respect to films will refer to the creative forces behind the films, including directors, screenwriters, cinematographers, and producers.

93 The right to colorize would fall under the bundle of exclusive rights which a copyright holder has in an original work of authorship. These rights include the exclusive right to prepare derivative works. 17 U.S.C. § 106 (1982). The United States Copyright Office has determined that some computer-colorized films contain sufficient original authorship in their color selection to justify registration as derivative works. 34 PAT., TRADEMARK, & COPYRIGHT J. (BNA) No. 836, at 214 (June 25, 1987). The Copyright Office, in its Proposed Deposit Rule, established five criteria for determining when a colorized film is of sufficient originality to justify registration:

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

34 PAT., TRADEMARK, & COPYRIGHT J. (BNA) No. 836, at 224 (June 25, 1987).

Opponents of the colorization process argue that colorized films do not contain a sufficient degree of original authorship to qualify as derivative works. Issues involving the copyrightability of colorized films under existing laws are beyond the scope of this note. For a complete discussion, see Bader, *A Film of a Different Color: Copyright and the Colorization of Black and White Films*, 5 CARDOZO ARTS & ENTERTAINMENT J. 497, 505-23 (1986).

94 17 U.S.C. § 302 (1982) Copyright protection continues during this period as long as the copyright holder fufills all statutory requirements.

95 Under the 1909 Copyright Act, copyright protection lasted for twenty-eight years from the date of first publication, subject to renewal for an additional twenty-eight year period.

written instrument signed by them, owns all of the rights comprised in the copyright.[96]

Generally, the director, cinematographer, screenwriter, and other creative forces behind a film "work for hire". Thus under section 201, the studios which employ them hold the copyright.

Although the director and others who contribute to the making of a film do not hold the copyright and do not have the right to object to colorization under general copyright principles, they may contract for such a right.[97] For example, a director may, as a condition of employment, require that the studio agree not to colorize any of the films which she directs. The use of such provisions may help prevent the colorization of black and white films made in the future. It does not, however, protect the majority of black and white films which existed well before the process was developed.[98] The directors of those films could not have contemplated such a development and thus would not have retained the power to object to it.[99]

Even those who hold the copyright in black and white films may have no power to prevent colorization once they've transferred the right to display or reproduce the film. Courts may interpret the transfer of such rights to include the right to colorize.[100]

While at best, theories of contract and copyright provide minimal options for an author who objects to colorization, other theories ordinarily used to protect authors in the United States provide no relief at all. For example, in order to have a cause of action under the Lanham Act or for unfair competition, the author of a black and white motion picture must establish that colorization of the film tends to injure her reputation and will likely cause economic injury.[101] A director, for instance, might argue that colorization produces an inferior color version of a black and white film, which may damage the director's reputation for creating supe-

96 17 U.S.C. § 201(b) (1982). *See, e.g.*, Stevens v. National Broadcasting Co., 270 Cal. App. 2d 886, 76 Cal. Rptr. 106, 108 (1969) (interpretation of employment contract as creating rights in employer). This definition of author differs from that under a doctrine of moral right because United States law focuses on economic rights while a doctrine of moral right focuses on personality rights. Thus, United States copyright law protects the studio which puts money into a film while a doctrine of moral right protects the creative forces who infuse the film with aspects of their personalities.

97 *See supra* notes 56-57 and accompanying text. The creative forces behind a film will, however, very rarely have sufficient bargaining power to contract for rights akin to the right of integrity.

98 This includes over 17,000 black and white motion pictures and over 1,400 black and white television series in the United States alone. New York Times, Apr. 22, 1987, at D-7, col. 1.

99 The director and other creative forces may have retained other rights with respect to the film. However, courts generally interpret these types of provisions narrowly to include only that contemplated by the parties at the time they made the contract. Thus, the rights retained generally would not include the right to object to colorization. *See supra* note 58 and accompanying text.

100 *See supra* note 93. *See also supra* notes 55-58 and accompanying text. Since, however, the United States Copyright Office views a colorized movie as a derivative work, the transferee of the right to display or reproduce a film may not acquire the right to colorize. Under 17 U.S.C. § 106 (1982), the right to prepare derivative works is a separate exclusive right of the copyright holder. A copyright holder may argue that the transfer of the right to exploit does not affect the separate right to prepare derivative works and thus does not include the right to colorize. *See* 2 NIMMER, *supra* note 4, at § 8.09[A].

101 *See supra* notes 26 & 60 and accompanying text.

rior works.[102] Since, however, most black and white films were made over thirty years ago, even those closely identified with a certain film would find it difficult to prove that the colorized version in any way injures their current reputations.[103] Because of the collaborative nature of filmmaking, most of those involved in the process are not sufficiently identified with a film to make even an initial claim of impairment.[104]

Similar problems exist with respect to causes of action for invasion of privacy and defamation. Like actions based on the Lanham Act and unfair competition, actions for invasion of privacy and defamation, in some cases, may afford relief for personal and reputational injury caused by the display of an inferior version of an author's work.[105] However, because of the narrowness of these causes of action, neither provides effective relief from colorization.[106] Arguably, the colorization of black and white films damages the reputations of the colorizers more than the reputations of those involved with the original films. Generally, those who know the reputations of those involved with an original film do not associate them with the colorized version of the work. Thus an author would find it difficult to prove the reputational injury necessary for defamation or the offensiveness and embarrassment necessary to show false light invasion of privacy.[107] Where the author has died, as is the case with many of the older black and white films, a cause of action may not exist at all.[108]

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102 *See supra* notes 60-67 and accompanying text. Even if the author can prove injury, this argument still depends on judicial extension of Gilliam v. American Broadcasting Cos., 538 F.2d 14 (2d Cir. 1976).

103 An even tougher task exists with respect to proving damages. With some notable exceptions, the commercial success of films does not depend on the audience knowing the work of the director or other creative forces behind the film (aside from the actors). A director could argue, however, that the showing of the colorized version impairs her ability to get more work. This stretches the Lanham Act and the doctrine of unfair competition even further than *Gilliam*. Since courts have been reluctant to accept *Gilliam*, it seems doubtful that they would go even further. The argument is made even more difficult by the fact that many of those involved in the making of older black and white films have died. Courts generally recognize that the right to exploit one's name may pass at death. However, this reasoning does not apply where the only claim for damages is present impairment of one's ability to get work.

A person who proves that a colorized version of a black and white film violates the Lanham Act may still find it difficult to prevent colorization. Courts have held that proper labels will remedy the false designation underlying a violation of the Lanham Act. *See supra* notes 35 & 71 and accompanying text. Thus, a court may only require that the colorizer indicate that the film has been "colorized." *But see* Gilliam v. American Broadcasting Cos., 538 F.2d 14, 25, n.13 (2d Cir. 1976).

104 *See supra* note 27.

105 *See supra* notes 73-78 and accompanying text.

106 *See supra* notes 79-84 and accompanying text.

107 The same difficulties apply here as apply to causes of action under the Lanham Act and unfair competition. Many of those involved in the filmmaking process, either because of their position or the passing of time, are not closely identified with particular films. Such persons would find it difficult to prove the type of public ridicule that forms the basis for defamation or the embarassment that forms the basis for false light invasion of privacy. The cause of action under defamation may be further limited by the proper use of the "colorized" designation. *See supra* note 84 and accompanying text.

108 *See supra* note 79 and accompanying text. For example, the late John Huston, director of such classics as *The Maltese Falcon* and *Treasure of the Sierra Madre*, vehemently opposed the colorization of his films. Nat'l. L. J., July 27, 1987, at 11, col. 3.

C. *Application of a Doctrine of Moral Right*

No one has as yet challenged colorization under United States law or under any laws made pursuant to the Berne Convention. Even theoretically, however, United States law offers little chance of relief. The Berne Convention, on the other hand, in certain circumstances, may give an author the right to object to colorization.

The Berne Convention gives an author the right to object to any distortion, mutilation, or other modification of, or other derogatory action with respect to a work, which would be prejudicial to her honor or reputation.[109] At the very least, colorization amounts to the modification of a creative work and thus in all cases satisfies the first aspect of the Berne Convention's right of integrity.[110] Whether colorization prejudices an author's honor or reputation depends both on the specific factual situation involved and how each country interprets the language of the provision.[111] Since the doctrine of moral right stems from personal rather than pecuniary interests, this provision does not require the economically oriented injury to reputation that forms the basis of United States defamation actions.[112] Rather, the provision seems to contemplate allowing an author to object to that conduct which changes the author's personal expression and damages the work's literary and artistic value.[113] Under this standard, an author may object to colorization if the process impairs the artistic expression of the original film. For example, if the black and white shadings uniquely contributed to the mood or tone of the film, or the message which the author meant to convey, the addition of color would destroy the integrity of the work.[114]

On a practical level, application of a doctrine of moral right to cinematographic works may create several problems. For example, the Berne Convention does not clearly define who qualifies as the "author" of a cinematographic work. Article 15(2) provides only that: "The person or body corporate whose name appears on a cinematographic work in the usual manner shall, in the absence of proof to the contrary, be presumed to be the maker of the said work."[115] Interpretation of this language depends to a great extent on the laws of the individual signatory coun-

109 Paris Text, *supra* note 6, at art. 6*bis*.

110 *See supra* notes 47-51 and accompanying text.

111 Commentators criticize the language of this provision as overly vague. Such vagueness, however, satisfied countries such as Great Britain who wanted to join the Berne Convention but were reluctant to seriously change their existing laws. I S. LADAS, *supra* note 9, at 592. This flexibility may eventually alleviate the United States' fears that joining the Berne Convention will require material changes in existing laws. *See infra* notes 141-142 and accompanying text. At least one commentator would prefer that the right of integrity protect an author from every action which would distort the manner in which an author wished to show her work. I S. LADAS, *supra* note 9, at 592. The Berne nations will likely leave such an interpretation to the discretion of the individual countries.

112 *See* I S. LADAS, *supra* note 9, at 591 ("[T]here may be cases of alteration of an author's work, which cannot be deemed to injure the reputation of the author, and yet are prejudicial to his moral interest in the integrity of his creation.")

113 *Id.*

114 *See supra* note 90.

115 Paris Text, *supra* note 6, at art. 15(2).

tries.[116] On its face at least, Article 15(2) would include as authors: the director, producer, screenwriter and anyone else whose name appears as maker of the film.[117] In addition, article 14*bis* provides that: "The owner of copyright in a cinematographic work shall enjoy the same rights as the author of an original work . . . "; and "Ownership of copyright in a cinematographic work shall be a matter for legislation in the country where protection is claimed."[118] Most motion pictures do not result from the effort of only one person but rather represent the combined talents of many people. The Berne Convention does not give any guidance as to how several authors can protect their efforts in a creative work.

Applying the Berne Convention provisions to colorization also presents difficulties since proponents of the colorization process view the final product as an adaptation or derivative work rather than a modification of the original work.[119] The issue then becomes to what extent an adaptation violates the right of the author of the original work to object to the mutilation, distortion or modification of the work. By their definition, adaptations require a certain amount of modifications which might otherwise violate the original author's right of integrity. Generally, either a contract will exist between the author and the adapter or the original work will have entered the public domain.[120] In either case, the author may still argue that the adaptation violates the integrity of the original work.[121] At this point, however, the author's right of integrity may only apply to the extent that the adaptation distorts the spirit of the original.[122] The extent to which colorization distorts the spirit of the

116 French law, which provides broad protection under the right of integrity, defines the "author" of a cinematographic work as the persons who brought about the intellectual creation. In the absence of proof to the contrary, such authors include: (1) the author of the script; (2) the author of the adaptation; (3) the author of the dialogue; (4) the author of the musical compositions; and (5) the director. Giocanti, *Moral Rights: Authors' Protection and Business Needs*, 10 J. OF INT'L. LAW & ECON. 627, 629-30 (1975). *But see* I S. LADAS, *supra* 9, at 461 (criticizing this definition).

117 Paris Text, *supra* note 6, at art. 15(2). This should be distinguished from art. 14*bis* which creates a presumption in favor of the producer of the film with respect to exploitation rights in a cinematographic work. Article 14*bis*(2)(b) provides that:

> [I]n the countries of the Union which, by legislation, include among the owners of copyright in a cinematographic work authors who have brought contributions to the making of the work, such authors, if they have undertaken to bring such contributions, may not, in the absence of any contrary or special stipulation, object to the reproduction, distribution, public performance, communication to the public by wire, broadcasting or any other communication to the public, or to the subtitling or dubbing of texts, of the work.

Paris Text, *supra* note 6, at art. 14*bis*. *See also* Ulmer, *International Copyright After the Paris Revisions*, 19 BULL. COPYRIGHT SOC'Y. 263, 266 (1972). It is not entirely clear that either the "maker" of art. 15 or the "copyright holder" of art. 14*bis* qualifies as the "author" as the term is used under art. 6*bis* with respect to moral rights. For an historical discussion of the special problems involving cinematographic works, see S. ROTHENBERG, COPYRIGHT LAW 753-56 (1956). *See also* I S. LADAS, *supra* note 9, at 458-69.

118 Paris Text, *supra* note 6, at art. 14*bis*.

119 *See supra* note 93 and accompanying text.

120 In the more typical situation, a literary work is adapted for use as a motion picture. In that case, certain modifications are necessary to transfer the work from one medium to another. In comparison, colorization more closely resembles mere alteration since it is not an alteration imposed by the nature of the medium. *See* I S. LADAS, *supra* note 9, at 590-92.

121 DaSilva, *supra* note 4, at 34-35.

122 *Id.* at 34. *See also* I S. LADAS, *supra* note 9, at 590. ("Ordinarily, the adapter must respect only the intrinsic form of the work, its subject, its artistic or literary substance, but not its extrinsic form, the literary or artistic expression.")

black and white film depends on the nature of the original film and the extent to which the black and white filmmaking contributes to the character of the film.[123]

III. Legislative Efforts

The ineffectiveness of United States equivalents to a doctrine of moral right have prompted many efforts towards reform. On the federal level, these efforts include proposed legislation implementing a doctrine of moral right[124] and proposed legislation specifically dealing with colorization.[125] In addition, members of the artistic and literary communities continue to push for United States adherence to the Berne Convention in the hopes that such an action will ensure greater protection for creative works.[126]

A. *Express Adoption of a Doctrine of Moral Right*

The current debate over colorization focuses attention once again on the lack of substantive protection for art in the United States. While legislators have often acknowledged this problem, past attempts to rectify the situation have proven unsuccessful.[127] The latest of these efforts is the proposed Visual Artists Rights Act of 1987 which Senator Edward Kennedy introduced in August of 1987.[128] The Act would amend the copyright laws to give the author of a pictorial, graphic or sculptural work of fine art the right to claim authorship of such a work, as well as the right to disclaim authorship of any works which have been distorted, mutilated or otherwise altered.[129] The author may assert infringement of copyright for such actions whether or not she actually holds the copyright.[130]

The Kennedy bill would substantially increase protection for art in the United States. The Act does not, however, completely parallel a doc-

123 *See supra* note 90.

124 *See infra* notes 127-131 and accompanying text. While implementation of a doctrine of moral right on the federal level has not as yet been successful, three states, California, New York, and Massachusetts, have enacted comprehensive statutes designed, in varying degrees, to protect the integrity of artistic works. *See* CAL. CIV. CODE § 987 (West 1982 & Supp. 1988); N.Y. ARTS & CULTURAL AFF. LAW § 14.03 (McKinney Supp. 1988); MASS. GEN. LAWS ANN. ch. 231 § 85(S) (Law. Co-op 1986). For a general discussion of these statutes, see Gantz, *Protecting Artists' Moral Rights: A Critique of the California Art Preservation Act as a Model for Statutory Reform*, 49 GEO. WASH. L. REV. 873 (1981); Koven, *Observations on the Massachusetts Art Preservation Act*, 71 MASS. L. REV. 101 (1986); Note, *The New York Artists' Authorship Rights Act: Increased Protection and Enhanced Status for Visual Artists*, 70 CORNELL L. REV. 158 (1984). Note that the Ninth Circuit has held that United States copyright laws do not preempt certain state copyright initiatives. Morseburg v. Balyon, 621 F.2d 972, 978 (9th Cir.), *cert. denied*, 449 U.S. 983 (1980) (The Court focuses on the extent to which the two laws "function harmoniously rather than discordantly.") Since federal copyright law does not address the issue of moral rights, it does not seem to preempt state moral rights statutes.

125 *See infra* notes 132-139 and accompanying text.

126 *See infra* notes 140-144 and accompanying text.

127 *See* Note, *supra* note 124, at 159, n.6.

128 S. 1619, 100th Cong., 1st Sess. (1987).

129 The bill also provides full copyright protection for all works of fine art even if the author fails to affix notice to the work. *Id.* at § 5. The legislation would also provide royalty payments for resale of such work. *Id.* at § 3(d)(1),(2).

130 After the author's death, her estate would have the exclusive right to exercise these rights. This protection continues for fifty years after the author's death. *Id.* at § 3(c)(1).

trine of moral right since it applies only to pictorial, graphic and sculptural works of recognized stature.[131] It does not, for example, prevent the distortion, mutilation or alteration of cinematographic works and would not enable the author of a black and white film to object to its colorization. Thus the bill, while recognizing the need to protect artistic expression, offers a solution that falls short of the needs of many members of the artistic and literary communities.

B. *Film Integrity Act of 1987*

While efforts to provide general protection for art in the United States have historically suffered from the apathetic responses of legislators and the public, the debate over the colorization of black and white films has been heated and unrelenting.[132] As a specific response to the intense opposition to colorization, Representative Richard A. Gephardt, in May of 1987, introduced the Film Integrity Act of 1987.[133] This bill would amend the copyright laws to allow the artistic author of a motion picture to prevent material alterations of the work.[134] The alterations prohibited under the proposed Act specifically include colorization.[135] The Act provides that: "[I]n the case of a motion picture, once the work has been published, no material alteration, including colorization, of the work shall be permitted without the written consent of the artistic authors of such work."[136]

These provisions provide protection which parallels the Berne Convention right of integrity and in many ways exceeds it, at least with respect to colorization. For example, the bill provides that the artistic author of a motion picture may transfer the right to consent only to another qualified artistic author.[137] Furthermore, at the author's death, the right passes either to another artistic author or to the deceased author's successors or heirs at law.[138]

The Film Integrity Act suffers both because of its narrowness and because of its breadth. Like the Kennedy bill, the Act fails to address the problems of certain members of the literary and artistic communities. The Act protects motion pictures, but does not enable the authors of other types of artistic works to protect the integrity of their expression. For the authors of cinematographic works, the Act offers protection which in many ways surpasses that of the Berne Convention. While opponents of colorization applaud the extent of this protection, the expansiveness of these provisions with respect to motion pictures will most likely doom the legislation. A legislature reluctant to adhere to the

131 The bill defines a "work of fine art" as a pictorial, graphic or sculptural work of recognized stature as defined by the trier of fact taking into account the opinions of members of the artistic community. *Id.* at § 2.

132 *See supra* note 90.

133 H.R. 2400, 100th Cong., 1st Sess. (1987).

134 The Act defines "artistic author" of a motion picture as the principal director and the principal screenwriter of the work. *Id.* at § 3.

135 *Id.* at § 2.

136 *Id.*

137 *Id. Compare supra* note 50 and accompanying text.

138 *Id. Compare supra* note 49 and accompanying text.

Berne Convention because of its doctrine of moral right will not likely accept a bill which provides even greater protection even in the narrow context of cinematographic works.[139]

C. *Adherence to the Berne Convention*

Even if Congress adopts the Film Integrity Act, which does not appear likely, the lack of substantive protection for other forms of art in the United States would persist. Increasingly, proposed solutions to this problem center on the possibility of the United States adhering to the Berne Convention and its doctrine of moral right.[140] While in the past such proposals have proven unsuccessful, recent developments including United States withdrawal from UNESCO and increasing dissatisfaction with the UCC, as well as international pressure to conform to international copyright standards may finally persuade the United States that its participation in the Berne Convention is long overdue.[141]

Several major obstacles exist, however. Opponents of the Berne Convention fear that adoption of a doctrine of moral right would interfere with the usual practices governing the transfer and use of literary and artistic works.[142] Other commentators argue that existing statutory and common law protection already conforms to the Berne provisions and that adherence would not require new legislation or any material changes to existing laws.[143] Still others contend that United States' adherence to the Berne Convention would create rights and duties with respect to artistic works even without further legislation.[144]

Despite the obstacles, the United States' adherence to the Berne Convention would provide the most efficient and effective means of ensuring the protection of artistic expression. Unlike the Film Integrity Act and the Visual Artists Rights Act, adherence to the Berne Convention would protect all literary and artistic works and would crystallize current protection into an express body of rights.

IV. Conclusion

As the example of colorization demonstrates, United States law does not currently provide adequate protection for the personal expression embodied in an artistic work. Common law and statutory equivalents to

139 *See generally* Sandison, *The Berne Convention and the Universal Copyright Convention: The American Experience*, 11 COLUM. J. L. & ARTS 89 (1986).

140 *See supra* note 6.

141 *See supra* note 7. Other reasons for joining the Berne Convention include: the possibility of an increased voice in international copyright decisions; and protection against future retaliation by member countries whose nationals do not receive adequate protection in the United States. *See* Hearings, *supra* note 6, at 148-50 (statement of Irwin Karp, Chairman of the Ad Hoc Working Group on U.S. Adherence to the Berne Convention).

142 Obstacles also exist in the areas of notice and registration, compulsory licenses, and the manufacturing clause. *See* Hearings, *supra* note 6, at 127-28 (statement of Donald J. Quigg, Acting Commissioner for Patents and Trademarks).

143 *See generally* Nimmer, *supra* note 12, at 524. *See also* Hearings, *supra* note 6, at 155-56 (statement of Irwin Karp, Chairman of the Ad Hoc Working Group on U.S. Adherence to the Berne Convention).

144 *See* Hearings, *supra* note 6, at 196 (statement of Prof. Donald Wallace, Jr.).

a doctrine of moral right contain serious limitations. Such concepts do not apply in every situation and often are subject to the vagaries of judicial interpretation. The United States lacks an express body of rights that would allow the author of a creative work to protect her authorship and the artistic integrity of the work against distortions, mutilations, and modifications such as colorization.

The solution to this problem lies in the express adoption of a doctrine of moral right. In particular, the United States' adherence to the Berne Convention would provide the protection which existing law lacks. Adherence would require the United States to adopt a doctrine of moral right and would give authors and artists the means to prevent the kind of artistic violation that colorization represents.

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