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Colorization: Byting More Than You Can Chew?

by Joseph J. Libricz, Jr.

Indisputably, technology in the past decade has produced electronic marvels that have revolutionized the way Americans live, two of the most notable developments being the microprocessor and the video cassette recorder. Computerization has changed the workplace and the educational process through the performance of tasks such as information storage, analysis and retrieval. The video cassette recorder probably has most dramatically changed the way free time is spent, almost totally redefining the term home-entertainment. Time-shifting (recording television broadcasts for later viewing) and movie video rentals have given consumers flexibility and freedom in determining where and when they will enjoy their leisure hours; it is "the magic machine of the new Couch Potato."¹ "VCRs have come close to overtaking all forms of live out-of-house entertainment. In 1986, the number of video cassettes rented (one billion) matched the number of movie tickets that were sold. Close to 45 million homes now have VCRs—more than half the nation's TV households." In 1985, Americans spent nearly \$1.7 billion in video cassette rentals...and on top of that, Americans bought 275 million blank video cassettes in 1986.²

The personal computer and the video cassette recorder have, in fact, fostered a "nesting" phenomenon, a profound centripetal change in social patterns, particularly among baby-boomers: both the PC and VCR allow the family or individual to conduct more of their lives at home. Recently, a marriage occurred between these two technologies that is causing, if

not a full-blown revolution in its own right, at least a war of words: the colorization of black-and-white motion pictures.

The process of colorization submits a black-and-white film to a computerized system of color "enhancement," thereby producing a color version of the original black-and-white work. In colorization, the first task is finding the best existing print of the film. If none are of satisfactory quality, it must be pieced together from the best parts of several prints of the movie. The resulting black-and-white "original" 35mm positive print is then transferred to one-inch Type C video format and electronically improved by removing scratches and imperfections. Then, using an electronic scanner that highlights each frame's 525,000 dots, the art director and technicians use a paint-by-microchip technique to color in every object in the first frame of every scene. An analog computer, assisted by technicians, then follows that guide to fill in the rest of the frames in that scene by matching color values with the original black-and-white material to produce a color video. When the scene changes, so does the "canvas," and the process starts all over again. This work can be laborious, as an average movie comprises 200,000 frames, 1,000 of which are changes in scene which must be individually colored. Colorists have considerable leeway in their work, choosing from a palette of 64 (and allegedly up to 4,000) electronic hues. Authenticity is attempted by researching original hair, eye, costume and set colors, but sometimes mistakes are made: red-haired singer Jeannette MacDonald, in one of the early colorization

efforts, *San Francisco*, exited the color computer a blond.³ In *Suddenly*, with Frank Sinatra, "old blue eyes" is old brown eyes.⁴

At present, there are two major players in the colorization industry. International HRS Industries, Inc. with its subsidiary, Hal Roach Studios, has spent about \$10 million in developing colorization. They own the copyrights to about 2,000 black-and-white movies, including a large comedy collection of Laurel and Hardy films. HRS' major competition comes from Color Systems Technology, Inc., which has contracted with media mogul Ted Turner to color *Casablanca*, *The Maltese Falcon* and 98 other classics. Both companies expect to do serious business: the first two HRS releases realized \$900,000 in profit in the home video market. It sold 65,000 colorized copies of the Frank Capra classic, *It's A Wonderful Life*, which was double the sales of other companies selling the feature in black-and-white. In the syndicated television markets, it has been licensed to show its work on Home Box Office, Showtime and The Movie Channel. Color Systems has registered \$24 million in contracts, and its stock has more than quintupled in less than a year.⁵

Yet, while the financial backers of colorization hope to breathe new life and interest into old movies by making them chromatically interesting enough to wend their way into sufficient "nests" so as to reward their investment, the process has generated profound legal questions about the role of intellectual property law, particularly copyright protection afforded by Article 1, Section 8 of the Constitution.

Section 8 provides that "The Congress shall have the power to promote the progress of science . . . by securing for limited times to authors the exclusive right to their writings." According to the Copyright Act of 1976, 17 U.S.C. § 102(a)(6), motion pictures are works of authorship and their authors command copyright protection offered by § 106 of that Act.

Two major issues are raised by colorization: 1) the copyright eligibility of the colorized work as a derivative work and 2) the moral right of the author of the original black-and-white work to prevent colorization of their work.

Colorized films as derivative works:

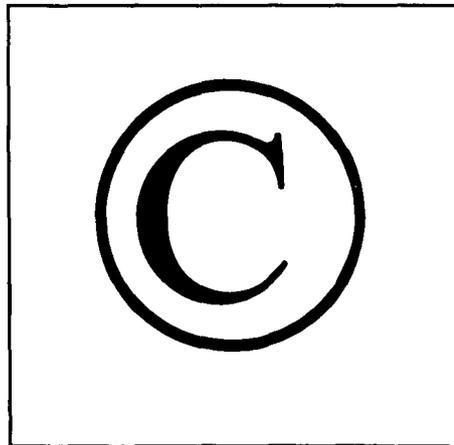
Colorizers seek to have their tinted versions of black-and-white movies recognized as derivative works under § 103(b) of the Copyright Act, which gives copyright protections to a work that contains new "material contributed by [an] author" when that work is based upon some other original work. Only the material that makes the new work a variation from the original is copyrightable for protection as a derivative work. With colorization, the "new material" added to the original work is color. As derivative works, the colorized movies would be entitled to copyright distinct from that covering the black-and-white work, whether the original copyright on the black-and-white work was still valid or had expired and so placed the work in the public domain. Most importantly, classification as a derivative work would give colorizers the right to control the preparation of other tinted versions by competitive colorizers, and thus insure protection for their stake in the coloring process.

To qualify for this protection, the colorizer must show that his film is 1) an original work of authorship and 2) that the new version demonstrates more than a "merely trivial variation" on the original work.⁶ Both of these criteria are subject to debate.

Authorship: The question arises as to who is the author of a colorized motion picture. Is the computer the author, or the individual who programmed the computer? Historically, authorship in copyright has presupposed an "impress of human intelligence" on the final product.⁷ There is no legal precedent for a machine-generated work to qualify for copyright protection. Arguably, the authorship of the colorized movie could reside with the technicians/artisans involved in devising color schemes for each new scene that dictates the computer program that colorizes the remainder of the movie. This could satisfy the requirement that the work be derived through human processes. Case

law has held that copyright law must be elastic enough to provide protection in the face of new technology,⁸ and so it is not inconceivable that there be considered a chain of authorship in colorization that involves automation only after human input. Under those conditions, the colorized product might qualify as a derivative work.

Substantial variation: Is the addition of color enough to satisfy the test for derivative works that there be more than a merely trivial variation of the original black-and-white movie? This largely subjective judgment requires that the colorized work express a difference sufficient from the original movie so that a "distinctly artistic conception" is formed, making it more than reproduction. If the colorizer "repaints the same picture with only trivial variations of detail and offers it for sale," he infringes the black-and-white copyright holder's right of reproduction.⁹ Usually, changing the color scheme is not sufficient variation from the original to satisfy this requirement. "An existing Copyright Office regulation provides that 'mere variations of . . . coloring' are not subject to copyright."¹⁰



A decision was reached on these issues on June 22, 1987, when the Copyright Office of the Library of Congress announced that colorized versions of black-and-white motion pictures are eligible for copyright registration as derivative works.¹¹ Colorized works will be found to be original works of authorship if the creation of the computer color version is a process that involves creative human authorship and technical and artistic standards that meet "copyright law standards of original, creative experience."¹² The colorization process described supra meets this standard. The Office further points out that this decision is limited to existing computer coloring technology. . . [and it] may reconsider the issue if the role of the computer in selecting colors becomes more dominant.¹³

Somewhat surprisingly, the Office found that the addition of color to black-and-white movies was sufficient to represent more than a merely trivial variation of the original work. Despite "the policy of the existing regulation prohibiting registration of mere variation of coloring," it found that this rule applies only when the authorship claimed consists of the addition of a relatively few numbers of colors to the work. Copyright registration is not precluded when, as with colorization, "the work consists of original selection, arrangement, or combinations of large numbers of colors, or where the lines of an original design are fired by gradations of numerous colors."¹⁴ Additionally, the overall appearance of the motion picture must be altered—coloring only a few frames is not sufficient.¹⁵

Moral rights of the original authors:

A tremendous outcry against colorization has arisen over the issue of the moral right of the author (in the case of movies, the director or screenwriter) not to have his work altered, regardless of who owns the copyright or even if the work is in the public domain. The basis of this view is the ethical belief that colorization essentially destroys the artistic integrity of a black-and-white film. The creator of a film on black-and-white stock needed to consider particular judgments of lighting and shading in order to produce a specific mood and effect using that medium. Opponents of colorization claim that that specific vision is ignored and bastardized in the coloring process. A statement from the American Film Institute board of directors opined "that it is the ethical responsibility of the copyright holders to preserve and protect the artistic integrity of black-and-white films . . . what is at stake is the film's 'life'—how a specific film is experienced by audiences, not only today . . . but by future generations. . . ."¹⁶

The American Society of Cinematographers board of governors voted to oppose the colorization process, stating that it "represents an unwarranted intrusion into the artistry of the cinematographer who photographed the work."¹⁷ In response, the colorists claim that they actually improve the original black-and-white film by restoring it before the coloring process begins, thereby preserving a black-and-white *and* color version of the feature.¹⁸ "The color enhanced movies are not substitutes for the black-and-whites; they are merely alternatives."¹⁹

To further rebut, opponents emphasize that transferring the film to videotape loses the absolute "whites, blacks and sharp contrasts that inhibit the colorization process. This distorted, flattened videotape

master is what we will be passing on to posterity with a flattened 35mm print that serves only their [the colorists] short-term aims and does nothing for preservation."²⁰

Among directors, the most vociferous critic of colorization has been Woody Allen, who has called colorized films "cheesy artificial symbols of one society's greed." He feels the colorists see the American public as "very stupid, very infantile...they can't enjoy a film unless it's full of bright colors...the story means nothing—the plot, the acting—just give the fools reds and yellows and they'll smile."²¹

Steven Spielberg has said:

the use of color stock in the earlier decades was not solely an economical decision on the part of studio leaders...[many directors] had the clout to make that aesthetic choice. It is not the privilege of this generation to overrule our founding fathers because somebody in marketing research discovered that kids today will flip past anything in black-and-white with their TV remotes. You cannot remake a movie simply by giving it a new paint job, but you can easily destroy one.²²

Frequently, the bottom-line in these opinions of movie moralists revolves around the real or imagined sleaziness of the colorists' profit motive—the corruption of commerce versus the sanctity of art. But legally, it is simply a matter of right that copyright holders like Hal Roach Studios or Ted Turner who want to earn money on their investment can do so. And with the recent announcement of the Copyright Office giving colorized movies the status of derivative works, that right includes altering black-and-white motion pictures with the addition of color. An American counterpart to *Le Droit Morale*, the European copyright theory of moral rights which prevents the alteration of artistic works, does not exist; works created under American copyright law are not immutable. So, if modifying a movie by adding color benefits the copyright holder financially, the offense of that practice to the original author's sensibilities is of no legal significance.

In fact, the primary stated purpose of copyright law is not to reward the author, but rather to secure the "general benefits derived by the public from the labors of the authors." The Supreme Court in *Mazur v. Stein* stated the purpose as follows: "The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by

personal gain is the best way to advance public welfare through the talents of authors..."²³ This rule rests on the principle that the purpose of copyright is not to reward authors as an end in itself, but rather to encourage them to produce works that consumers want. Judging from the response of consumers, infantile or not, to colorized movies, they do want them, and copyright supports that choice.

Further, whether an individual prefers viewing *Casablanca* in black-and-white or color is a matter of taste. "The critics' real fear is that colorization will win the market...[and]...so corrupt tastes that people will lose their appreciation for the black-and-white original. The print will exist, but in a vault. In the culture it will die. Junk will drive out art."²⁴ "What worries me," says producer George Stevens, Jr., "is that, psychologically, the films will cease to exist in black-and-white. The new version will replace the old in the public's mind." In short: the market shapes tastes; a corrupt market will corrupt taste."²⁵

As to taste, however,

copyright law has consistently refused to play the role of cultural arbiter. So long as some degree of authorship is evident, copyright will protect the lowest, most common works alongside the most exalted. As Justice Holmes observed in a decision giving copyright protection to circus posters, "It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial

"The critics' real fear is that colorization will win the market... [and]... so corrupt tastes that people will lose their appreciation for the black-and-white original."

illustrations... This prudent rule rests in part on First Amendment tradition that cautions against discriminating on the basis of transient or elitist notions of artistic worth.²⁶

Therefore, under present copyright law, the only recourse a movie director or producer has to prevent colorization of his work and control the right to reproduce and prepare derivative works is to maintain his copyright on the work. Otherwise, the author may have a non-copyright cause of action in tort under false light or false attribution of authorship; he may claim unfair competition by "passing off" under the Lanham Act, 15 U.S.C. § 1125; he may win labeling of the colorized version so that he is not imputed to be the creator of the colorized version. All of these actions seek to remedy the improper use of the author's name in connection with a work he prefers to disclaim.

Future sanctions for colorization may come in the form of an amendment to the Copyright Act itself. On May 12, 1987 Rep. Richard Gephardt introduced H.R. 2400, *The Film Integrity Act of 1987*, which proposes to amend Title 17 of the United States Code "to provide artistic authors of motion pictures the exclusive right to prohibit the material alteration, including colorization, of the motion pictures."²⁷ "Artistic authors" as used in the bill includes the principal director and principal screenwriter of the work. "Simply put, this legislation gives the screenwriter and director of a film the right of consent for any alteration of their work. It leaves these artists with the right to decide whether the artistic integrity of their film is being violated."²⁸

Though H.R. 2400 speaks to any alteration of the film, the thrust is clearly against colorization and the granting of a copyright for such a work.²⁹ Gephardt points out that the legislation is not meant to

stand in the way of advancements in film technology... but it does restrain film editors and computer technicians who would distort the original intent of our films... It holds those who would tamper with our American heritage [of classic black-and-white films] to a higher standard than mere dollar signs.³⁰

However, until such time that this type of legislation would be implemented, the announcement of the Copyright Office making colorized movies derivative works rules and supports the viability of the practice.

(continued on page 24)

the payment of costs of the proceeding and reasonable expenses, including attorneys' fees, by a party, an attorney, or both, if the arbitration panel finds that maintaining the proceeding or defending the proceeding is in bad faith or without substantial justification, may deter frivolous law suits and give the arbitration panel the same power that has been afforded our circuit courts in discouraging such litigation.

Finally, this commentary would not be complete without acknowledging the efforts of the 1987 General Assembly in enacting legislation which, while applicable to medical malpractice cases, are not part of the Health Care Malpractice Claims Act. For example, the "remittitur bill" which is applicable to medical malpractice cases only, allows, but does not require, the court to receive evidence of collateral source payments. Further, in the area of malpractice, a change in the statute of limitations with respect to the filing of claims by a minor, will shorten the number of years for which physicians treating minors are at risk. Specifically, in medical malpractice cases only, a claimant must file suit either within three years from the date of discovery or five years from the date of injury, whichever is shorter, once the claimant reaches 11 years of age. Section 5-109 of the Courts & Judicial Proceedings Article of the Annotated Code of Maryland remains applicable to medical malpractice cases and sets forth the statute of limitations for adults and remains applicable to minors when the cause of action is related to foreign objects left in the body or injury to the reproductive organs.

Conclusion

It remains to be seen whether the attempted legislative resuscitation of the Act will breathe new life into the insurance industry or will result in a long and painful death due to increasingly expensive litigation.

Notes

- ¹ Although the Health Care Malpractice Claims Act has remained in full force and effect for more than a decade, Medical Mutual Liability Insurance Society of Maryland, the state's largest insurer of physicians, continues, each year, to request and receive authorization for significant premium increases.
- ² It is one of the cardinal rules of statutory construction that provides that when the legislature has chosen to make express mention of one item in a definition, the exclusion of others is implied. In the case of the Health Care Malpractice Claims Act, the legislature listed as health care providers, a hospital, a physician, an osteopath, an optometrist, a chiropractor, a registered or licensed practical nurse, a dentist, a podiatrist, and a physical therapist.
- ³ There are other issues lurking within the confines of this section including, for example, where, jurisdictionally, one health care provider seeks indemnity or

contribution from another health care provider when the underlying litigation was traditional malpractice.

- ⁴ This requirement is qualified, however, by Section 3-2A-03(c) (3) (ii) which provides that if the attorney's name appeared on the list of persons willing to serve before January 1, 1986, then that person continues to be eligible to serve.
- ⁵ *Attorney General v. Johnson*, 282 Md. 274, appeal dismissed, 439 U.S. 805 (1978)
- ⁶ Section 3-2A-04 (b) (2) provides, *inter alia*, that if the defendant disputes liability and fails to file a certificate within 120 days from the date the claimant filed his certificate, all issues of liability will be adjudicated against the defendant.

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(continued from page 17)

Notes:

- ¹ Blum, *Couch Potatoes*, *The New Nightlife* New York vol. 20 n. 28 July 20, 1987 at 26
- ² *Id.*
- ³ Sullivan, *Black and White in Living Color* Canadian Business vol. 60 February 1987 at 59
- ⁴ *The Color Guard*, Rosenfeld *The Washington Post*, May 13, 1987 at F1
- ⁵ Sullivan, *Black and White in Living Color* Canadian Business vol. 60 at 59-60
- ⁶ *Alfred Bell Co. v. Catalda Fine Arts* 191 F.2d 99 (1951)
- ⁷ Hearings on the Colorization of Black-and White Motion Pictures Before the Subcommittee on Technology and the Law of the Senate Judiciary Committee (Statement of Professor Paul Goldstein) 100th Cong. 1st Sess. (May 12, 1987)
- ⁸ *Burrows-Giles Lithographic Co. v. Sarony* 111 U.S. 53; 4 S. Ct. 279; 28 L. Ed. 349 (1884)
- ⁹ *Gross v. Seligman* 212 F. 930 (1914)
- ¹⁰ 37 C.F.R. §202.1(a)
- ¹¹ 52 Fed. Reg. 23,443 (proposed June 22, 1987)
- ¹² *Id.*
- ¹³ *Id.*
- ¹⁴ *Id.*
- ¹⁵ *Id.*
- ¹⁶ *AFI Squares Off Against Colorization*, *McCarthy Variety*, vol. 324 October 8, 1986 at 5
- ¹⁷ *Variety*, vol. 324 October 15, 1986 at 5
- ¹⁸ Hearings on the Colorization of Black and White Motion Pictures before the Subcommittee on Technology and the Law of the Senate Judiciary Committee (Written statement of Rob Ward, President of Hal Roach Studios) 100th Cong. 1st Sess. (May 12, 1987)
- ¹⁹ Hearings on Colorization before Senate Judiciary Committee (Statement of Roger L. Mayer, President, Turner Entertainment Co.) 100th Cong. 1st Sess. (May 12, 1987)
- ²⁰ *Tinting Makes Film Buffs See Red*, *Gagliano The Wall Street Journal*, Jan. 12, 1987 at 25
- ²¹ *The Color Guard*, *Rosnfield The Washington Post*, May 13, 1987 at F8
- ²² *Variety*, vol. 324 October 8, 1987 at 5
- ²³ *Nimmer on Copyright*, Melville B. Nimmer West Publishing Company, § 1.03 [A]
- ²⁴ *Krauthammer, Casablanca in Color? I'm Shocked, Shocked!* *Time* Jan. 12, 1987 at 82
- ²⁵ *Id.*
- ²⁶ Hearings on Colorization before Senate Judiciary Committee (Statement of Professor Paul Goldstein) 100th Cong. 1st Sess. (May 12, 1987)
- ²⁷ H.R. 2400, 100th Congress, 1st Sess. 1987
- ²⁸ 100 Cong. Rec. E1922
- ²⁹ *Id.*
- ³⁰ *Id.*

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