26. THE NATIONAL FILM PRESERVATION ACT OF 1988: A COPYRIGHT CASE STUDY IN THE LEGISLATIVE PROCESS

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On September 27, 1988, President Reagan signed into law the Interior Appropriations Act for fiscal year 1989,[2] containing the annual appropriations for the Interior Department and related agencies. Included in this year's funding for America's parks and forestry service was a nongermane amendment (the so-called "Mrazek-Yates amendment") containing $250,000 for each of the next three years, to establish a National Film Preservation Board, in order to select up to 25 films a year for inclusion in a newly created National Film Registry.[3]

Judged as a percentage of the overall spending levels in the Act ($9.9 billion), the National Film Preservation amendment would appear to an outside observer to be a minor amendment. It was not. Disagreements over this amendment held up the entire Act's progress through the legislative process. In addition, consider the importance of the issues and the context in which the amendment was introduced and finally adopted—moral rights, colorization and material alteration to audiovisual works, the Lanham Act, and even, United States adherence to the Berne Convention. Neither can the provisions which were finally adopted be dismissed as inconsequential. This article will examine the legislative history of the "Mrazek-Yates amendment," and what was finally enacted in September 1988. Most of the focus will be on the House of Representatives, because this is where the battle was fought until the last stages.

The Mrazek-Yates amendment was the only provision on the subject of

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[2] Public Law 100-446 (H.R. 4867, introduced on June 20, 1988).

[3] The National Film Preservation Act amendment became known as the "Mrazek-Yates amendment," named for its sponsors Congressman Robert J. Mrazek (Democrat, N.Y.) and Congresaman Sidney R. Yates (Democrat, Ill.), both members of the House Committee on Appropriations. Rep. Yates is the Chairman of the Subcommittee on Interior, and therefore, introduced the bill, H.R. 4867, making appropriations for the Department of the Interior and related agencies for fiscal year 1989. He also managed the bill on the floor of the House.

film colorization and the material alteration of audiovisual works to survive the legislative process in the 100th Congress. It was not by any means at the center stage on these issues, until it was clear, that for the time being legislatively, there would be no other activity.

In previous years, the controversial issue of moral rights had been extensively examined in the context of the United States adherence to the Berne Convention.[4] Except for the creative artists involved (principally the Directors Guild of America), the legislative strategy of all of the other parties was to keep the issue of moral rights, or at least the inclusion thereof, separate from the enabling legislation permitting United States adherence to the Berne Convention, in order to ensure that the controversy would not prevent the United States from joining Berne.

This effort was successful, for when late in the 100th Congress, our domestic copyright law was amended to adhere to Berne,[5] and the Senate ratified the treaty,[6] moral rights had been consigned to a provision declaring that the legislation neither expanded nor reduced the rights of authors, "whether claimed under Federal, State, or the common law—(1) to claim authorship of the work; or (2) to object to any distortion, mutilation, or other modification of, or other derogatory action in relation to, the work, that would prejudice the author's honor or reputation."[7] However, Congress continued to keep the issue of moral rights alive (and not just for the film industry).

In late February 1988, Rep. Robert Kastenmeier (Democrat, Wisc.) and Rep. Carlos Moorhead (Republican, Calif.), the chairman and ranking minority member of the Committee on the Judiciary subcommittee with copyright jurisdiction, asked the Copyright Office to conduct a study on the issues of colorization and other material alterations to audiovisual works by new technologies.[8] They requested completion of the study by early in 1989.

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[4] Hearings before the Subcommittee on Patents, Copyrights and Trademarks of the Senate Committee on the Judiciary, May 16, 1986 and April 15, 1986 (S. Hrg. 99-982); Hearings before the Subcommittee on Technology and the Law of the Senate Committee on the Judiciary, May 12, 1987 (S. Hrg. 100-391); Hearings before the Subcommittee on Patents, Copyrights and Trademarks of the Senate Committee on the Judiciary, February 18, 1988 and March 3, 1988 (S. Hrg. 100-801); Berne Convention Implementation Act of 1987, H.R. 1623, Hearings before the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the House Committee on the Judiciary, June 17, July 23, September 16 and 30, 1987 and February 9 and 10, 1988 (printed as a single document). This list of hearings is not meant to be exhaustive.

[5] Public Law 100-568, enacted October 31, 1988 (H.R. 4262).

[6] On October 31, 1988, President Reagan signed the implementing legislation to enable the United States to become party to the Berne Convention for the Protection of Literary and Artistic Works. The United States Senate ratified the treaty on October 20, 1988. Adherence becomes effective on March 1, 1989.

[7] Section 3(b), Public Law 100-568, enacted October 31, 1988 (H.R. 4262).

[8] Letter of February 25, 1988 to Ralph Oman, Register of Copyrights, U.S. Copy-

In addition, moral rights legislation for film artists, known as the Film Integrity Act of 1987 (the "Gephardt bill"), was introduced in the 100th Congress, with hearings scheduled before the Mrazek-Yates amendment was even conceived.[9] As it turned out, hearings on this bill in the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the Committee on the Judiciary occurred during the consideration of the Mrazek-Yates amendment in the Committee on Appropriations.[10] Similar legislation for visual artists, which was on a separate legislative track, came close to passage in the waning days of the 100th Congress, and will most likely be on the agenda early in the 101st Congress.[11]

The Mrazek-Yates amendment may not have fleshed out most, or even many of the issues in these larger legislative battles. However, it did indicate how volatile these issues are and especially what can happen when a confrontational legislative strategy is used. This is not to say anything inherently extraordinary happened, for nongermane amendments are offered and often successful in appropriation bills, even when a consensus does not exist.[12] But

right Office, from Robert W. Kastenmeier and Carlos Moorhead from the Subcommittee on Courts, Civil Liberties and the Administration of Justice. In addition, the Patent and Trademark Office of the Department of Commerce was also asked by Chairman Kastenmeier and Rep. Moorhead to do a similar but more limited study on how these issues might be resolved in the context of the Lanham Act.

[9] H.R. 2400 introduced by Rep. Richard A. Gephardt (Democrat, Mo.) on May 13, 1987.

[10] Rep. Kastenmeier issued a press release on March 15, 1988 announcing that his Subcommittee on Courts, Civil Liberties and the Administration of Justice would hold hearings on moral rights and specifically on H.R. 2400 and H.R. 3221. He said that "having previously focused on artists rights in the context of the Berne treaty, there is considerable interest among subcommittee members in the issue as separate from the need for the U.S. to become a member of the Berne Convention." He made reference to the Berne bill he had introduced, H.R. 1623, on March 16, 1987 (with Rep. Moorhead, the ranking Republican member), which would have "granted artists certain rights to control alterations of his or her works after they are completed and displayed in public." The subcommittee's hearings were held on H.R. 3221 on June 9, 1988 and on H.R. 2400 on June 21, 1988.

[11] H.R. 3221, introduced by Rep. Edward J. Markey (Democrat, Mass.) on August 7, 1987 and its Senate companion bill, S. 1619, introduced by Senator Edward M. Kennedy (Democrat, Mass.) introduced on August 6, 1987, would have created moral rights for authors of pictorial, graphic and sculptural works.

[12] Nongermane amendments (known as "legislative amendments") are common in omnibus spending bills (known as "continuing appropriations" bills), and are less common in the annual general appropriations bills. Legislative amendments in the House are considered any amendments which "change existing law." These amendments are subject to a point of order unless a waiver of clause 2 rule XXI of the standing rules of the House of Representatives is granted either by unanimous consent or in the Committee on Rules. *Rules of*

in this case, drastic changes in copyright law were proposed in the Committee on Appropriations, over the objections of many of the key members of the Committee on the Judiciary—the committee of jurisdiction for copyright matters.

The level of emotion was high, and the intensity of the lobbying was, to say the least, overwhelming. The resulting legislative product, modified considerably from the early proposals, left many participants and nonparticipants disappointed. Given the complexity of the subject matter, and the legislative process it endured, it is no wonder that the end result left so many unhappy. In its wake, many of the key issues were left unresolved. Indeed, the chief sponsor of the amendment, Rep. Mrazek, conceded that what was enacted was only "a first step."

Eventually, the issues of moral rights, colorization and the material alteration of audiovisual works will be handled by the Judiciary Committee. All the parties have admitted this. Before that occurs, the Copyright Office study on colorization and other technologies in the film industry will be completed. But the subject of this article is what was enacted in Public Law 100-446, The National Film Preservation Act.

What is probably the most surprising of all is that the four Members of Congress, (Reps. Mrazek and Yates and Senators Patrick Leahy (Democrat, Vt.) and Dennis DeConcini (Democrat, Ariz.)) who worked the hardest on the amendment, were able, in the face of huge opposition, to enact anything at all. It has often been said that the two things people should not see being made are sausages and the law. Some would say this should surely be true in the case of the Mrazek-Yates amendment. There were so many participants (especially from the outside) and so many drafts in the creation of the final product that a chronological legislative history is the only way to understand what happened.

A Legislative History of PL 100-446, The National Film Preservation Act

The starting point of what will later be known as the Mrazek-Yates amendment was a "discussion draft" in late May 1988, which Rep. Mrazek drafted and circulated privately but never introduced in the House. Any doubts that the fight was about copyright law were silenced by the fact that the original bill amended title 17, creating in a new chapter 10, a free standing National Film Commission and providing for the establishment of a National Film Registry.[13]

The bill would have created a new section 119 limitation on exclusive

the House of Representatives, 100th Congress, adopted January 6, 1987 (House Resolution 5).

[13] May 26, 1988 "Discussion Draft" of Rep. Mrazek. Future drafts of the amendment, however, were changed so as to facially avoid direct jurisdictional con-

rights to prevent the public performance, distribution, leasing or sale of any "materially altered" motion picture as determined by the Commission. This right would have vested in the principal director or principal screenwriter. In addition, the proposed section 119 would have required that any colorized film (originally released in black and white) use a new title, different from the one under which it was originally released.[14] This bill was the genesis of provisions which, though substantially changed over the next four months, eventually became law.

On June 8, 1988, the Subcommittee on Interior of the Committee on Appropriations held its mark-up of the fiscal year 1989 appropriations bill for the Department of Interior and related agencies. Rep. Mrazek, a member of the Appropriations Committee, but not a member of this subcommittee, privately convinced Interior subcommittee Chairman Yates to offer an amendment along the lines of his May "discussion draft" bill.

With a minimal amount of discussion at the mark-up, Chairman Yates explained that he had an amendment for a $500,000 film commission that related to issues of film colorization. The committee staff later explained that the purpose of the commission was to list films that are culturally, historically and aesthetically significant, and to grant protection to these films by disclosing alterations and restricting some of their uses. But at that time, according to the staff, "only the concept of a film commission was agreed to" in the subcommittee by a voice vote, because no printed amendment was offered.[15]

The Interior Appropriations subcommittee finished marking up the bill on June 8, and sent its recommendations on the entire bill to the full Appropriations Committee. Not until June 16, when the subcommittee printed its recommendations in the full committee print, making appropriations for the Interior Department for FY 1989, was the Mrazek-Yates amendment language revealed.

The Mrazek-Yates amendment, called the "National Film Preservation Act of 1988," as reported by the subcommittee would have:

> (1) contained in its findings, the declaration that "motion pictures are being defaced by technologies that directly threaten the integrity of motion pictures and fundamentally alter artistic vision of the artists who created these works;"
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> (2) authorized and appropriated $500,000 to create a National Film Commission within the National Foundation on the Arts and the Humanities;

flict with the Committee on the Judiciary, by taking the amendment out of title 17.

[14] Ibid.

[15] Phone conversation with Committee on Appropriations staff November 16 and December 14, 1988.

(3) constituted a Commission of four people, each appointed by the Chairmen of the Endowment for the Arts and the Endowment for the Humanities and one person appointed by the President (also designating that the 8 persons appointed by the chairmen shall come, two each, from the following four organizations: the Directors Guild of America (DGA), the Writers Guild of America (WGA), the National Society of Film Critics, and the Society for Cinema Studies);

(4) required that the Commission pick films (the bill refers to "theatrical motion pictures" only) that are "culturally, historically, or esthetically significant" for inclusion in a National Film Registry;

(5) required that the Commission determine the content and form of labeling to disclose "material alterations" in *any* film (the Commission was required to determine what a material alteration was, but no definition was provided in the bill). The label designed by the Commission was also to include information that "the principal director or principal screenwriter of the film desires to be disassociated from the materially altered version of the film" (the bill provided that for directors or screenwriters who are dead, the Commission can decide whether they would have desired inclusion of this information);

(6) created a new section 119 of title 17 to make it unlawful to "publicly perform, distribute, sell or lease a motion picture" which the Commission decided had been materially altered without the proper labeling and disclosures, and to do the same using the original title of a film originally released in black and white which had been colorized;

(7) provided that remedies for violations of this new section 119 be those found in sections 502 through 505 of title 17;

(8) required the Copyright Office to notify the Directors Guild of America and the Writers Guild of America of any films selected into the National Film Registry (the Copyright Office would have been notified by the Commission of the films it selected).[16]

On June 8, the subcommittee reported the amendment to the full committee and caught the opponents of the amendment off guard. This was, in fact, the legislative strategy of the proponents of the Mrazek-Yates amendment, chiefly the Directors Guild of America. The Guild later explained that

[16] U.S. House of Representatives, Committee on Appropriations, Full Committee Print, June 16, 1988, making appropriations for the Department of Interior for fiscal year 1989, pages 73-82.

its reason for moving the amendment through the Appropriations Committee and not the Judiciary Committee was its fear of being beaten in Judiciary by the motion picture and publishing industries, who opposed moral rights. The Guild also felt that if the opposition had enough time, they would be able to stop the provisions even in the Appropriations Committee and so designed a fast-track strategy.

On June 15, Rep. Mrazek held a press conference in Rep. Thomas S. Foley's (Democrat, Wash.) Capitol office. Rep. Foley, as Majority Leader of the House, played a key role in the eventual success of the amendment, and at the press conference, though absent, he was described as a supporter of the amendment. Actor Jimmy Stewart appeared at the press conference, and stated that he had talked to President Reagan about stopping the colorization of films and the President was "very positive." Ironically, Nancy Reagan, in 1985, had sent a letter to Colorization, Inc., the Toronto based company which colorized a number of the first motion pictures, expressing her and the President's delight after their screening of the colorized version of *Topper*.

Also on June 15th, a letter was sent from Office of Management and Budget Director James C. Miller III to House Appropriations Committee Chairman Jamie L. Whitten (Democrat, Miss.) stating the Administration's opposition to the Mrazek-Yates provision because "no hearings have been held on this agency, there is no known compelling need for it, and the resources are clearly only a small beginning for what could well become a massive and intrusive new Federal regulatory authority."[17]

The next day, June 16, the public had its first view of the amendment printed in preparation for the day's full Appropriations Committee mark-up of the Interior bill. At the mark-up, Rep. Vic Fazio (Democrat, Calif.) moved to strike the Mrazek-Yates amendment from the Interior Appropriations bill. Rep. Fazio noted that nongermane amendments in the House Appropriations Committee were rare, especially when the committee of jurisdiction, in this case, the Judiciary Committee, had not refused to move the legislation.

In fact, Rep. Fazio observed that the Judiciary Committee had agreed to schedule hearings on the issue and the Copyright Office was moving forward with its study on colorization and related issues. Chairman Whitten agreed with Rep. Fazio that the legislation should be dealt with in the Judiciary Committee.[18]

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[17] Letter dated June 15, 1988, reprinted in the Congressional Record, June 29, 1988, page H 4867.

[18] Rep. Fazio's position on the Mrazek-Yates amendment turned out to be crucial, because, when, in its final form, the National Film Preservation Board was created, it was established within the Library of Congress, which receives its annual appropriations from Chairman Fazio's Appropriation's subcommittee on Legislative [sic].

Ultimately, however, Reps. Yates and Mrazek carried the vote, with the aid of Jimmy Stewart (present in the Appropriations Committee room), defeating the Fazio motion on a division (an unrecorded show of hands) by a vote of 20-25. In part, Rep. Mrazek was successful because he predicted in his remarks to the Committee, that the legislation would not be approved at the next legislative step, the House Committee on Rules. It is up to the Rules Committee to waive the standing House rule (clause 2 of rule XXI) which prohibits the House from considering legislation in an appropriations bill. Waiver was required before the Mrazek-Yates amendment could be considered by the full House, or the amendment would be stricken on the House floor.

Rep. Mrazek argued that the Appropriations Committee should approve his amendment and "show Jimmy Stewart and the American people that they care about American movies." Rep. Yates said that he was unaware of any objections by Rep. Kastenmeier, and that if the amendment was opposed by the Judiciary Committee, he would offer an amendment to take care of those objections. These arguments proved convincing and on June 20, the Appropriations Committee reported H.R. 4867, the Interior Appropriations Act for FY 1989, including intact the Mrazek-Yates amendment as reported from the subcommittee. The Committee report summarized in three paragraphs the provisions of the amendment, stating that films would be selected for the National Film Registry that are "culturally, historically or esthetically significant," and would be "granted protections requiring disclosure of alterations and restriction on [their] use if chromatically altered."[19]

The next day, in accordance with his announcement several weeks earlier, Chairman Kastenmeier's Judiciary subcommittee on Courts, Civil Liberties and the Administration of Justice, held a hearing on the issue of moral rights in motion pictures. Specifically, the hearing was on H.R. 2400, the Film Integrity Act of 1987, introduced by Rep. Gephardt in May 1987. H.R. 2400 proposed to:

> (1) amend the 1976 Copyright Act to include a new section 119 limiting the exclusive rights of copyright owners of motion pictures. Under new section 119, the owner of a copyright in a published motion picture could not materially alter the work without the written consent of the "artistic authors" of the work. The bill specifically provided that colorization is a material alteration;
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> (2) provide for the transferability of the artistic author's right to consent to a material alteration both inter vivos and post mortem;
>
> (3) provide that the artistic author's right to consent to mate-

[19] House Report 100-713, pages 113-114.

rial alterations would not expire when the copyright in the work expired;

(4) provide that the artistic authors would be considered the "legal or beneficial owners of an exclusive right under a copyright." Also, unauthorized derivative works would be ineligible for copyright protection;

(5) give the Copyright Office a new duty of establishing regulatory procedures for directors and screenwriters to be formally designated as the artistic authors of motion pictures they create.

In testimony at the hearing, Register of Copyrights Ralph Oman testified to several reservations he had about the provisions in H.R. 2400, including the Constitutional and practical problems these new provisions might create. The written testimony of the Register provided a lengthy explanation of the provisions in the bill and noted some of the problems.[20] His written testimony also detailed the provisions of a related bill, H.R. 3221, the Rep. Markey bill (and its Senate companion S. 1619 introduced by Sen. Kennedy)[21] known as the Visual Artists Right Act of 1987. This bill would have created explicit moral rights of paternity and integrity for visual artists.

In his oral testimony, Mr. Oman testified that issues of moral rights for the authors of any works, including films, should be considered in the Judiciary Committee. He discussed the Mrazek-Yates amendment stating a preference for a form of labelling over a statutory moral right as a better starting point than the Mrazek-Yates approach. He also stated a preference for an all film labelling approach.

On June 21, a private meeting was held in Rep. Foley's Majority Leader's Office with Foley, and Reps. Yates, Mrazek, House Majority Whip Tony Coelho (Democrat, Calif.), Fazio and representatives of the Directors Guild and the Motion Picture Association of America (MPAA) present. No members of the Judiciary Committee attended. Rep. Mrazek presented his case, and Jack Valenti, President of the Motion Picture Association, offered to label all films but said he opposed the idea of a Film Commission, citing objections to Mrazek's provision calling for a change in the title of colorized or materially altered films. Mrazek said he wanted to provide a disincentive to altering films.

Rep. Coelho said that an industry-wide body should be deciding these issues, especially in coming up with definitions for material alterations. After allowing both sides to present their cases, Foley, who chaired the meeting, told the MPAA and the DGA to reach an agreement in order to let the legislation proceed successfully.

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[20] Hearings before the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the House Committee on the Judiciary, June 21, 1988.

[21] The Kastenmeier subcommittee had held hearings on H.R. 3221 on June 9, 1988.

On June 22, Rep. Kastenmeier introduced a bill containing his solution, at least so far as film labeling was concerned. The bill, H.R. 4897, was called the "Film Disclosure and Preservation Act of 1988." The bill proposed to:

(1) amend the Lanham Act to create a new section 43(c) to require that *all* films (defined as a "theatrical motion picture after its first publication") that are materially altered (including colorized) be labeled;

(2) include on the label a description of the alteration and the objections of up to four "aggrieved parties;"

(3) define the aggrieved parties as: the principal director, principal screenwriter, principal editor and the principal cinematographer of a film;

(4) provide for penalties under the Lanham Act for failure to properly label films, including statutory damages of up to $100,000 plus punitive damages for violations;

(5) establish a National Film Preservation Commission made up of 6 individuals appointed by the President from the film industry and the Librarian of Congress, the Chairman of the National Endowment for the Arts and the Chairman of the National Endowment for the Humanities;

(6) require the Commission to: (a) encourage the restoration and preservation of films, (b) annually report to Congress on the effectiveness of the new Lanham Act section 43(c), and (c) report to Congress on whether other categories of audiovisual works other than films should be brought into the disclosure requirements.

On June 23, The House Rules Committee began its consideration of the Interior Appropriations bill containing the Mrazek-Yates amendment. It heard testimony from Appropriations Committee members Reps. Yates and Mrazek, among others. In light of criticism the Appropriations Committee heard privately from Judiciary and other committee members on the bill, and following up from the Foley meeting two days earlier, Chairman Yates proposed an amended version of the Mrazek-Yates provision (from the June 20th version). The June 23rd Yates' amendment would:

(1) authorize and appropriate $100,000 for the creation of a National Film Registry in the Department of the Interior, to be administered by the Secretary of Interior;

(2) require that films (defined as theatrical motion pictures) which are "culturally, historically, or esthetically significant" be included in the Registry and given a seal;

(3) require the Secretary, after consultation with a National Film Registry Advisory Board, to determine which films shall be included and removed from the Registry; establish criteria for de-

termining when a film has been "materially altered (including colorization)" (but no definitions were provided in the amendment); and determine the content and appropriate form of labeling for films that are materially altered;

(4) require the Secretary to establish a nine member Board to hold hearings and advise him about including and removing films from the Registry; the Board members were to come from nine organizations designated in the bill (and in all cases are the Presidents/Chairmen of the organizations);

(5) seek to obtain, by gift, where possible, films designated for inclusion in the Registry.

Rep. Yates explained the key reason he amended his original version of the bill was because the legislation authorizing the Film Commission within the National Foundation for the Arts was within the jurisdiction of the House Administration Committee chaired by Rep. Frank Annunzio (Democrat, Ill.), who objected to the provisions of the bill.

Chairman Yates testified that House Interior Committee Chairman Morris K. Udall (Ariz.), who had jurisdiction over the Interior Department, did not object to the Film Registry's inclusion there. Chairman Udall's endorsement, however, was at best lukewarm, and more akin to being equivocal, due to his reluctance to offend the Judiciary Committee.

Chairman Whitten, in a letter to the Rules Committee and in his testimony, opposed the request of subcommittee Chairman Yates that rule XXI be waived.[22] Also at the House Rules Committee hearing, Judiciary Committee members, including Chairman Peter W. Rodino Jr. (Democrat, N.J.), Rep. Jack Brooks (Democrat, Tex.), and Rep. Kastenmeier all objected to both the original and the second draft of the Yates amendment claiming it was within their jurisdiction to amend the copyright laws (title 17), and that provisions in the amendment change the section 106 exclusive rights of copyright owners. They further argued that their Committee's jurisdiction over the Lanham Act would be infringed upon by film labeling.

Rep. Kastenmeier testified that his copyright subcommittee had just begun to hold hearings (noting the June 21 hearings) on the issues involved in the amendment and that he had introduced his own version of a film labeling bill (H.R. 4897). He also mentioned that the Copyright Office was in the process of studying the issues of colorization, and would issue a report for use by Congress in drafting future legislation. Rep. Hamilton Fish, Jr. (Republican, N.Y.) also testified in support of Kastenmeier's position.

Rep. Mrazek replied that these were controversial issues but that this session of Congress would not see a bill out of the Judiciary Committee with

[22] Letter to Members of the House Committee on Rules dated June 21, 1988.

all of these issues resolved, which is why he wanted to move ahead with his amendment.

The Rules Committee decided not to take action on the bill on June 23 and scheduled a meeting for June 28 to resolve the issue. Over the next few days, at least five or six other versions of the bill were drafted and "floated," both on and off the Hill, moving the jurisdiction over the Film Commission into and then out of the Interior Department, the Smithsonian Institution, the Patent and Trademark Office, the National Endowment for the Arts, and finally the Library of Congress.

Rep. Don Edwards (Democrat, Calif.), Chairman of the Judiciary subcommittee on Civil and Constitutional Rights, wrote to the Rules Committee members on June 27, 1988, out of concern that provisions in the bill had serious First Amendment implications and "smack[ed] of censorship." A letter was also sent to the Rules Committee members from ten of the Judiciary Committee members including Chairman Rodino, and subcommittee chairmen Brooks and Kastenmeier, amplifying the testimony of the Judiciary Committee members before the Rules Committee and urging the Rules Committee not to grant the rule XXI waiver.[23]

The letter stated that: (1) it was bad precedent to have the Film Registry determining whether a film had or had not been materially altered especially if such a determination conflicts with the Copyright Office's examination for registration purposes of the colorized or altered work; (2) the Mrazek-Yates amendment would upset the copyright balance between competing interests of proprietors and artists; (3) the Mrazek-Yates amendment could provide a substantive defense to a claim of trademark infringement (using *Gilliam v. American Broadcasting Co. 538 F.2d 14 (1976)*); and (4) the "new" Mrazek-Yates amendment, although attempting to avoid the jurisdiction of the Judiciary Committee, (i.e. by not expressly amending copyright or trademark laws), nevertheless had the practical effect of doing just that.

Private sector lobbying was now in full swing. The Turner Broadcasting Company sent a letter dated June 27, 1988 to all of the Rules Committee members stating its opposition to the Mrazek-Yates amendment and its support for the Judiciary Committee members' position. The letter stated that Turner would voluntarily abide by an all film label for all color-converted videotapes, including information "where applicable, that the original director or cinematographer did not participate in the color conversion." The let-

[23] Letter dated June 27, 1988 from Reps. Peter W. Rodino, Jr., Robert W. Kastenmeier, Jack Brooks, Don Edwards, Patricia Schroeder (Democrat, Colo.), Benjamin L. Cardin (Democrat, Mary.), Howard L. Berman (Democrat, Calif.), Hamilton Fish, Jr., Carlos Moorhead and Bruce A. Morrison (Democrat, Conn.) to Rep. Claude Pepper (Democrat, Fla.), Chairman, Committee on Rules.

ter said nothing about the rights of the other creative participants in motion pictures, nor did it mention anything about material alterations.

In a letter dated June 27, 1988 from the Coalition to Preserve the American Copyright Tradition (CPACT) to the Rules Committee members outlined their opposition to the Mrazek-Yates amendment and their support for the MPAA position on this issue.[24] The broadcast, airline and advertising industry also lobbied against the Mrazek-Yates provisions because of fears that their current use of films would be disrupted.

On June 28, the Rules Committee met to receive a third draft of the Mrazek-Yates amendment presented by its two chief sponsors. By a voice vote, the Committee agreed to make the amendment in order and reported out the rule (H. Res. 485) on the bill H.R. 4867. Under House floor procedures, the House first has to consider the rule and agree to it by a majority vote before getting to the bill's substantive provisions. However, a recorded vote was not necessary in the Rules Committee itself because Reps. Mrazek and Yates apparently had eight of the thirteen Rules Committee members agree to allow their amendment to be considered on the House floor, and because of Rep. Foley's directive to have many of the parties opposed to the original provisions work toward a final draft they could agree with. The newly drafted amendment did, in fact, contain the work of many of the parties on all sides of the issues who were brought together, however reluctantly, by Chairman Yates, Rep. Mrazek, and a few other members, including some previously opposed Judiciary Committee members.

The actual provisions of the new Mrazek-Yates amendment were printed in the Rules Committee report on the bill H.R. 4867.[25] The rule on the bill (H. Res. 485) made in order the Mrazek-Yates amendment waiving all points of order against it, allowing for one hour of debate on the amendment; however, it did not allow for any amendments to the amendment when it was considered on the floor. When the House finally considered the June 28th draft of the Mrazek-Yates amendment, only a motion to strike the amendment in toto would be in order. Failing this, when the House passed the Interior bill, the Mrazek-Yates amendment would also be passed.

The June 28th draft of the Mrazek-Yates amendment, which passed the next day in the House:

> (1) authorized and appropriated $100,000 for the creation of a National Film Preservation Board in the Department of the Interior, to be administered by the Secretary of Interior;
>
> (2) required that films (defined as theatrical motion pictures)

[24] CPACT is comprised of many of the nation's largest publishing (and a few broadcasting) companies, including magazine, book, newsletter and software publishing, and broadcasting and video programming companies.

[25] House Report 100-737.

that are "culturally, historically, or esthetically significant" be selected for inclusion in the National Film Registry and given a seal;

(3) required that the Secretary establish a 13 member Board (made up of all the members of the June 23rd draft of the bill but adding the MPAA, the National Association of Broadcasters (NAB), the Association [sic] of Motion Picture and Television Producers,[26] and the Screen Actors Guild);

(4) required that the Secretary, "as empowered by the Board" establish criteria for selecting films and for determining which films have been materially altered;

(5) required that the Secretary, in consultation with the Board, (a) determine which films shall be included and removed from the Registry (no more than 25 a year could be selected); and (b) establish criteria for determining when a film has been "materially altered (including colorization)" (Unlike the June 23rd draft, a definition was provided for material alterations. These included "fundamental changes in the film such as colorization, substitution of characters' bodies and faces, significant changes in theme, plot and character");

(6) required that all films that are materially altered contain the specified label and provided that the labelling requirement could be changed by a two-thirds majority vote of the Board;

(7) stated that films designated for inclusion in the Registry are to be obtained, where possible by gift, by the Secretary of Interior, and stored in "an appropriate place to be determined by the Secretary" (in consultation with the General Services Administration);

(8) fixed the effective date so that the provisions of the amendment did not apply to any film materially altered prior to the effective date of the Interior Appropriations bill (thereby grandfathering all previously colorized or materially altered films).

On June 29, the House of Representatives considered the rule, H. Res. 485, on the Interior Appropriations bill, H.R. 4867, and passed the rule by a vote of 342-57, making the Mrazek-Yates amendment in order.[27] The House then moved to consider and pass the bill by a vote of 361-45 with the June 28th Mrazek-Yates amendment intact.[28]

Several Members of the Appropriations and Judiciary Committees spoke

[26] Although at one time called the Association of Motion Picture and Television Producers, the organization is now known as the Alliance of Motion Picture and Television Producers and the authors' intent here is clearly to name the Alliance to the Board. This error will repeat itself into the enacted law.

[27] Congressional Record, June 29, 1988, page H 4853.

[28] Congressional Record, June 29, 1988, beginning at page 4857.

on the bill, including Reps. Yates, Mrazek, Fazio, Berman. Although the House passed version of the bill (the June 28th draft) was written with the input of Rep. Brooks of the Judiciary Committee, and with the MPAA's agreement not to fight its passage, Ted Turner and others continued to fight for its defeat. In addition, other Judiciary Committee members, including Rep. Kastenmeier, did not agree to the draft and voted against the rule, presumably for this reason. Nevertheless, the amendment was described by some as a compromise agreed to by the Judiciary Committee in part because of the participation Rep. Brooks, the ranking Democrat on the Committee and Rep. Rodino's successor as chairman beginning in the 101st Congress.

The next day, Rep. Kastenmeier inserted a written statement in the Congressional Record which discussed the issue of moral rights for film directors and screenwriters both in the context of the Berne Convention and separately in H.R. 2400, the Gephardt bill. He stated that now that the Yates amendment had been inserted into the Interior bill: "I am glad that the various interested parties have found language that seems to satisfy them, and so far as I am concerned, the matter of moral rights in the motion picture context is settled for the foreseeable future." He also said that he "look[ed] forward" to the Copyright Office's study on colorization which he and Rep. Moorhead requested.[29]

For the time being, that was the final word on the debate in the House and the focus shifted to the Senate. Although not required by the rules of the House or Senate, traditionally the Senate Committee on Appropriations waits until the House has passed an appropriation bills before the Senate committee reports its version of the same bill.[30]

A fight over the Mrazek-Yates provision never ensued in the Senate Appropriations Committee. The most likely explanation for this is that the proponents of the Mrazek-Yates amendment feared that it would only be further watered down in the Senate Committee (or for that matter on the floor of the Senate), in part because of resistance to it from key Appropriation Committee Senators. As a result, both proponents and opponents passively awaited Senate passage of the Interior bill, and set their sights on the smaller arena of the House-Senate conference committee.

On July 6, the Senate Appropriations Committee reported the Interior Appropriations bill, with Senate amendments to the House-passed provisions. There were no provisions contained in the Senate version on film colorization, a film commission, or anything resembling the Mrazek-Yates amendment. In

[29] Congressional Record, June 30, 1988, page E 2242.

[30] There are 13 regular appropriation bills which must be enacted by Congress before the end of the fiscal year on September 30. When the individual appropriation bills are not enacted, in years past, several have been grouped together into so-called "continuing appropriation" bills, which are then enacted as one.

fact, the Senate Appropriations Committee adopted the Subcommittee on Interior's recommendation to strike the Mrazek-Yates amendment.

One week later, on July 13, the full Senate passed the Interior Appropriations bill by a vote of 92-4.[31] The Senate, in passing the Interior bill, also agreed to the committee amendment (number 38) to delete the Mrazek-Yates provisions altogether.[32] There were never any votes of any kind up to this point in the Senate on the Mrazek-Yates provision. The subcommittee recommendation to delete the Mrazek-Yates provisions had been contained in a package of Senate amendments which the full Committee accepted without discussion or votes in its committee mark-up.

Clearly the issue of the Mrazek-Yates provisions needed to be resolved in the House-Senate conference committee. The Senate asked for a conference and appointed its conferees on July 13. The House did not agree to a conference until August 2 when it appointed its own conferees to resolve the differences with the Senate bill.[33]

During the end of July there was other activity which had an impact on the final legislative product. Dr. James H. Billington, the Librarian of Congress, sent a letter to Rep. Yates updating him on the Library's efforts in the areas of film preservation and the Copyright Office's ongoing study for Rep. Kastenmeier on colorization and related issues.[34]

The letter highlighted the Copyright Office's action on the registration requirement for colorized films,[35] and included a copy of the proposed deposit requirement requiring a black and white copy for all colorized works registered with the Copyright Office. (The final rule was not issued until August 9).[36] Dr. Billington complimented Rep. Yates on his film labelling pro-

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31 Congressional Record, July 13, 1988, page S 9582.

32 See the Congressional Record of July 13, 1988 at page S 9450, which begins with the Senate agreeing to the Senate Appropriation's Committee amendments.

33 The Senate conferees appointed were: Democrats Robert C. Byrd (W. Va.), J. Bennett Johnston (La.) Patrick J. Leahy, Dennis DeConcini, Quentin N. Burdick (N. Dak.), Dale Bumpers (Ark.), Ernest F. Hollings (S. Car.), Harry Reid (Nev.), and Chairman John C. Stennis (Miss.). The Republicans were: James A. McClure (Id.), Ted Stevens (Alas.), Jake Garn (Utah), Thad Cochran (Miss.), Warren Rudman (N. Hamp.), Lowell P. Weicker, Jr. (Conn.), Don Nickles (Okla.) and Mark O. Hatfield (Oreg.).

The House conferees appointed were: Democrats Sidney R. Yates, John P. Murtha (Penn.), Edward P. Boland (Mass.), Les AuCoin (Oreg.), Tom Bevill (Ala.), and Chairman Jamie L. Whitten. The Republicans were: Ralph Regula (Ohio), Joseph M. McDade (Penn.), Bill Lowery (Calif.) and Silvio O. Conte (Mass.).

34 Letter dated July 25, 1988.

35 Notice of Registration Decision issued June 22, 1987 in Vol. 52, number 119 of the Federal Register pp. 23443-46.

36 Final Rule on Copyright Registration for Colorized Versions of Black and White

posal and offered the suggestion that all films that are colorized or materially altered be labelled.

The letter also addressed the National Film Preservation Board legislation. It stated that to establish a preservation collection anywhere outside of the Library of Congress would be a duplication of governmental efforts and might impede the Library's current preservation programs. The Library's collection consists of 75,000 titles and is the largest motion picture collection in the U.S., and one of the largest collections in the world.[37] Rep. Yates, in response, suggested moving the film collection of the Film Registry into the Library of Congress.

In the same week, a Congressional Research Service memo from the American Law Division to Rep. Kastenmeier was completed (at the request of Rep. Kastenmeier) on the constitutionality of the provisions of the House passed Mrazek-Yates amendment.[38] The memorandum raised serious doubts about whether the Mrazek-Yates amendment, as passed by the House, could pass constitutional muster. Specifically, it raised issues dealing with the Constitution's appointments clause, the delegation of authority to private groups, separation of powers problems, the rulemaking authority of the Board, and finally First Amendment concerns about a government body making content-based restrictions on film.

On August 2, the Interior Appropriations bill conference formally began to resolve the differences between the House and Senate passed bills, although staff discussions had already occurred, as is common. The Mrazek-Yates amendment (now formally called amendment number 38) was considered to be in technical disagreement since the Senate had moved to strike the House passed provisions.[39]

On August 1, 1988, the Office of Management and Budget Director James Miller sent a letter to Senate Minority Leader Robert Dole (Republican, Kan.) outlining the Administration's position on the entire Interior Appropriations bill in preparation for the conference. The letter reiterated the Administration's opposition to the House passed Mrazek-Yates amendment, noting the Judiciary Committee's jurisdiction over this matter and the Copyright Office and Patent and Trademark Office's ongoing studies on the issues of colorization and new technologies in the motion picture industry.

The letter added that the Mrazek-Yates amendment "would impair efforts to effect a balanced resolution of this issue (the 'material alteration' of motion pictures through the use of new technologies, such as colorization),

Motion Pictures issued August 9, 1988 in Vol. 53, number 153 of the Federal Register pp. 29887-90.

[37] Ibid.

[38] Congressional Research Memo dated July 26, 1988.

[39] H.R. 4867 was reprinted on July 13, 1988, the day the Senate passed the bill, with the Senate amendments numbered and included in the bill.

after study by the government agencies charged with administration of the relevant federal laws."[40] It also noted the Administration's "considerable concerns" with the enforcement provisions in the Mrazek-Yates amendment requiring the Patent and Trademark Office Commissioner to bring actions, for violations of the labelling requirements.[41]

Finally, on August 10, an agreement was reached between the House and Senate conferees on the entire Interior Appropriations bill including the Mrazek-Yates amendment. The final draft of the Mrazek-Yates amendment was negotiated in closed door sessions by four Members of Congress and their staffs, and then agreed to by the other members of the conference committee. On the House side, Rep. Yates and Rep. Mrazek (even though he was not officially a conferee), negotiated the final deal with Senators Leahy and DeConcini. Both Senators served on the conference committee as members of the Appropriations Committee, but they also both happen to be members of the Judiciary Committee, serving on the Subcommittee on Patents, Copyrights and Trademarks, which Sen. DeConcini chairs.

At the beginning of the conference, it seemed possible that the Senate position would prevail and that the Mrazek-Yates amendment would die. But the persistence of the House Members and an agreement with the Senators to adopt major changes in the provisions allowed the Mrazek-Yates amendment to live. In the final agreement, many changes in the House passed amendment were made, including moving the entire Film Board and Registry into the Library of Congress. And, in a major concession, the House Members agreed that all of the provisions of the Mrazek-Yates amendment will be sunsetted after 3 years, so that the provisions of the amendment will no longer be in effect unless Congress, by an act of law, reconstitutes it.[42]

The final Mrazek-Yates amendment had many significant differences from the House-passed version. First, it moved the National Film Preservation Board and the Film Registry from the Interior Department into the Library of Congress and transferred the powers to the Librarian of Congress. Second, all of the provisions of the amendment expire after 3 years, with the Board/Librarian choosing no more than 25 films a year for inclusion in the Registry. Thus, only a total of 75 films will be affected by the provisions of the amendment. The amount of money was halved from the House-passed bill to no more than $250,000 a year.

Third, films are not eligible for selection to the Film Registry until 10

[40] Letter dated August 1, 1988, page 10.

[41] Ibid., page 10-11.

[42] The final Mrazek-Yates amendment is printed in the conference report for the bill H.R. 4867 (H. Rept. 862) on August 10 and is reprinted the same day in the Congressional Record on page H 6801. There are however, several typos in the agreed to text which were not corrected until the final bill was enacted into law in September.

years after their first theatrical release and no film can be removed from the Film Registry once it is selected for inclusion. Fourth, the labeling requirement cannot be changed at a later time by the Board; it is fixed in the bill, with exceptions to the labelling requirements provided for videos already in distribution or on the shelves of video dealers (for rental or sale). But films already colorized or materially altered are subject to the provisions of the amendment retroactively (except for copies owned for personal use or videocassettes distributed or in the inventory of retailers or wholesalers).

Fifth, a new definition of "material alteration" is provided in section 11, stating, in relevant part, that this includes alterations made "to colorize or to make other fundamental post-production changes in a version of a film for marketing purposes but does not include changes made in accordance with customary practices and standards and reasonable requirements of preparing a work for distribution or broadcast." Excluded from this definition are "practices such as the insertion of commercials and public service announcements for television broadcast." Finally, the Librarian is to endeavor to obtain archival quality copies of the films selected for the Registry and shall keep them in a special collection in the Library of Congress. All of these provisions were part of the substantial amount of compromising that took place to enact the final version of the Mrazek-Yates amendment.

At this point, it may be helpful to briefly summarize the provisions of the amendment.

SUMMARY OF THE FINAL MARZEK-YATES AMENDMENT

- Creates a National Film Preservation Board within the Library of Congress for 3 years (all the provisions of the Act expire after 3 years unless Congress reenacts them);
- Authorizes (and appropriates for FY 1989) $250,000 for each of the three years for any and all of the purposes of the Act;
- Directs the Librarian of Congress to establish guidelines and criteria for the selection of films into a National Film Registry—up to 25 films a year are selected for inclusion in the Registry by the Librarian after consultation with the Film Board;
- Stipulates that films selected for inclusion in the Film Registry be given a seal (designed by the Librarian) which can be used to promote the films so designated;
- Consists of a Film Board composed of thirteen individuals selected from each of thirteen designated organizations that choose three candidates for the Board. The Librarian picks one individual from each of the thirteen groups to sit on the Board (and one alternate from each group). The Librarian then selects a Chairperson for the Board from the

individuals picked. All members of the Board sit for a single three year term;

- Requires that the Film Board meet at least twice a year (the first meeting must take place before January 29, 1989) to nominate to the Librarian up to 25 films a year for inclusion in the Film Registry;
- Limits inclusion of films in the Film Registry until ten years after they have been theatrically released. There are no other restrictions on the films that can be selected except that they must meet the guidelines and criteria set out by the Librarian and the purpose of the Film Registry to register films that are "culturally, historically, or aesthetically significant."
- Requires that, while films selected for inclusion in the Film Registry can be colorized or materially altered, they must be labelled if they are colorized or if they are materially altered (defined as beyond the "customary practices and standards and reasonable requirements of preparing a work for distribution or broadcast");
- Specifies that the label for colorized or materially altered films (beyond the "customary" alterations) must be contained on all copies of the film including videotapes and its packaging materials.
- Provides enforcement provisions to prevent misuse of the Film Registry seal and to ensure proper labelling, with the remedies geared toward adding the proper labels before any criminal or civil penalties are sought;
- Instructs the Librarian to obtain by gift, archival quality copies of all the films selected for inclusion in the Film Registry and to keep the films in a special collection available to the public in the Library of Congress;
- Directs the Librarian to establish a special 4 member panel (separate from the Board) to make recommendations, when necessary, to Congress to change the definition of "material alteration" contained in the Act.

On September 8, the House passed the conference report containing the Mrazek-Yates amendment by a vote of 359-45. The House agreed to recede from its disagreement to Senate amendment number 38 (Mrazek-Yates) and concurred with an amendment (the agreed to "final draft" of the amendment) by a voice vote.[43]

Reps Mrazek and Yates had a colloquy about the changes adopted by the conferees, including a discussion of how they interpreted the new definition of "material alteration." They stated that the definition includes editing for television, time compression and colorization, but not panning and scan-

[43] Congressional Record, September 8, 1988, beginning at page H 7222. The Mrazek-Yates amendment is reprinted at pages H 7244-6.

ning.[44] Rep. Fazio, in his own statement, disagreed that the conference agreement was as restrictive as described in the colloquy. In addition, there was a disagreement over the placement of the label.[45]

In the Senate, Senator DeConcini (with the concurrence of Senator Johnston) stated that panning and scanning, time compression or expansion, and the customary editing to meet time formats common in the industry are excluded from the definition of material alteration.[46] The Senate passed the conference report and passed the Mrazek-Yates amendment as passed by the House (concurring in the House amendments), by a voice vote.[47]

Finally, on September 27, the President signed the Interior Appropriations Act for FY 1989 containing the Mrazek-Yates amendment as agreed to by the conferees in the conference report of August 10, 1988. The Act became Public Law 100-446.

CONCLUSION

The Librarian of Congress, in consultation with the newly established National Film Preservation Board, will begin in 1989 to select no more than 25 films "culturally, historically or aesthetically significant,"[48] for inclusion in the National Film Registry. The conflicting House and Senate colloquys about what films need to be labelled leave it clear that the Film Board and the Librarian of Congress will have to make some tough decisions about the film labelling provisions in the absence of future congressional guidance.[49]

In the final analysis, after months of legislative fights, the worth of what was enacted will be judged in time. Certainly the Film Board can encourage and educate the public to appreciate certain films as "art," and one can hope that this broadens the public's appreciation for film, something of value to both copyright owners and users.

The labelling provisions can be used to educate the public (and Congress) about practices, both good and bad, in the film industry, after a film is theatrically released. In addition, the Board can bring significant publicity to the plight of film preservation and the problems associated with the wide dissemination of some of our culturally significant films which have been forgot-

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[44] Ibid., page 7246.

[45] Ibid., pages 7246-7.

[46] Congressional Record, September 8, 1988, beginning at page S 11994, with the DeConcini-Johnston colloquy on pages S 12009-10. The amendment is reprinted at pages S 12011-12.

[47] Ibid., page S 12016.

[48] Section 2, Public Law 100-446, enacted September 27, 1988 (102 Stat. 1782).

[49] For its part, the Turner Entertainment Company has agreed as a company policy matter to label all colorized films and film packages (including video cassettes) to contain the label required by section 4 of Public Law 100-568, the National Film Preservation Act of 1988, even for films not selected for inclusion in the Film Registry.

ten or abandoned. Whether this legislation helps the parties involved in film colorization or the material alteration of films to reach some agreement is not likely except, in a very limited sense, for no more than 75 films.

In conclusion, the legislative history of the Mrazek-Yates amendment sheds some light on the legislative process when actual consensus building is not attempted except in the rush to "legislate something" even if it is a "first step." That is not meant to be critical of the parties who used this legislative strategy unless it causes Congress pause in enacting future legislation that would resolve the tougher issues of moral rights, colorization, and the material alteration to films because of a feeling on the part of some in Congress that they had somehow already resolved these issues when they have not.