“A Vietnam Diary” by Ming Nguyen has been a best selling book for over a year. The book is the diary of Ming, who was a young girl in Saigon during the most violent days of the Vietnam War. It was translated and substantially edited by Tina Blue, the chief editor at Harbor House, which published the book.

Theatrical impresario, Sammy Schulander, thought the book could be dramatized and would make a moving stage musical. Sammy acquired dramatic rights, motion picture rights and other rights in the book. He interested Bill Shakes in writing the book and lyrics for the show, in collaboration with Elton James, who composed the music. They entered into a Dramatists Guild Approved Production Contract, and the authors proceeded to write the book and songs for the musical.

After a rough first draft was completed, Bill was not happy with the dramatic structure, and he engaged Darla Thomas, a dramaturg, to work with him in restructuring the play. Dramaturgs can render a variety of services in the development of a play [see www.dramaturgy.net], including analyzing the story and the text, doing historical research, attending rehearsals and giving detailed notes to the director. Bill didn’t intend to co-write the play with Darla, and, as an experienced and successful Broadway playwright, he expected to be the only credited writer (with Elton of course, as to the music), and to retain complete control over the play throughout its development and production. Bill paid Darla out of his own pocket, and they worked together at his apartment for weeks. Darla’s involvement with the play grew over time, and ultimately, she suggested the creation of a new character, Colonel Joe Friday, to represent the American soldier presence, created substantial dialogue for that character, changed substantial portions of Ming’s dialogue, to make it sound more like that of a young girl, and collaborated with Bill on the lyrics to several of the songs, including “Napalm Nights,” a poignant ballad which is sung by Ming in the last act. They never entered into a written agreement, or discussed much about Darla’s credit or payments, but Bill told Darla that her contributions were invaluable and that he would “take care of” her.

Sammy engaged Jimmy O’Brien to direct the show. Experienced in directing musicals about serious subjects, Jimmy’s sensitive direction contributed substantially to the mood of the play and the movement of the characters. Among the cast, Su Small as Ming and Ben Fleck as Colonel Friday stood out. Su was made up to look exactly like photos of Ming, and Fleck, well-
known from his role as a tough police detective in the hit television show “Chicago P.D. Hope,” brought similar “tough cop with a heart of gold” qualities to his Vietnam peacekeeper role. Sammy arranged for a rehearsal to be videotaped, so that the actors and others could see and critique their performance.

As ultimately presented, the play is very different from the book. Although much of Ming’s dialogue is taken from the book, and the central dramatic narrative follows from the events described in the book, new characters and dramatic incidents were added and other incidents were changed. One of the most controversial new scenes involved an attempted rape of Ming by a Viet Cong soldier in the final scene of the play, which is prevented by Colonel Friday.

“A Vietnam Diary” opened to rave reviews, and became a massive Broadway hit. Bill and Elton, were immediately approached by executives from Flashlight Pictures, the “art film” division of Giant Studios, which optioned the motion picture rights from Bill and Elton, and proceeded to develop the motion picture version. Mort Mogul, the producer who interested Flashlight in the project, was attached to produce. Mogul wanted to stay faithful to the play in many ways. Since much of the play took place in a farmhouse just outside of Saigon, much of the film will also take place in a similar location, and the movement of the characters will be virtually identical to that in the stage production. The set design will also be inspired by the fabulous sets from the stage production. In other respects, the play would be changed.

Su Small will reprise the role of Ming. Tragically, Ben Fleck was killed in a hang-glider accident in Palm Springs, so he is unavailable to play the Colonel Friday role. Flashlight’s parent company, Giant Studios, produces “Chicago P.D. Hope”, so Mogul and Flashlight believe that they can use a combination of makeup and digital image manipulation to recreate the Colonel Friday character as portrayed by Fleck using a relatively unknown actor.

Mogul and Flashlight hired Nora Newby to direct the film. Although a theme of the play was that the conflict that was going on in the U.S. in connection with the war weakened the American military’s ability to protect its allies in South Vietnam and ultimately led to the loss of the war, Nora had a different take on the subject matter—that the American military, represented by Colonel Friday, was looking to draw out the war for the benefit of the military-industrial industries. Nora felt that the rape scene should be handled completely differently, much more graphic and violent, and Colonel Friday should not succeed in stopping the rape, symbolizing the ineffectiveness of the U.S. forces to protect the innocent during the war.

After Nora completed her DGA cut of the film, it was completely re-edited by Mogul, who eliminated some scenes and dialogue, in order to make the film “less political.” Mogul envisioned the film as a pure action film, without either the play’s suggestion that the U.S. conflict undermined the military or Nora’s approach, indicting the military industrial complex. However, Mogul changed his mind about the rape scene, and it was returned to something closer to the play. That is, Colonel Friday succeeds in stopping the rape.

Flashlight is about to release the film, and, within days after a test screening, it has received several letters that have placed its ability to release the film in jeopardy. First, it received a letter from Darla, who claims to be a co-owner of the play. Darla wants a substantial rights payment and is threatening an injunction. Second, Jimmy O’Brien has claimed that his direction was used in the film without his permission. He also is threatening an injunction. Third, attorneys for Ben Fleck have written, claiming that the portrayal of Colonel Friday violates Fleck’s right of publicity and constitutes unfair competition and trademark infringement. Fourth, Nora Newby claims that Mogul’s editing of the film mutilates her work and will be devastating to her career.
In particular, she is outraged that the rape scene has been modified, since, in her view, the most important point of her film is the ineffectiveness and moral failure of the U.S. military in Vietnam.

### A VIETNAM DIARY—AUTHORSHIP, COLLABORATION, PERSONA RIGHTS, MORAL RIGHTS, AND CONFLICTS AMONG AUTHORS

**PRELIMINARY ANALYSIS OF ISSUES**

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I. DARLA’S CLAIM

A. CO-AUTHORSHIP UNDER U.S. COPYRIGHT LAW

Darla has claimed to be a co-owner of copyright in the play. Copyright vests initially in the “authors” of a work. In order to be an “author” under U.S. law, one must contribute original, minimally creative material that is concrete and detailed enough to be considered more than just an abstract “idea.” Originality means that the material wasn’t copied from someone else, but it does not require that the material actually be novel or unique. A person who originates such material is an “author.”

Under some circumstances, copyright in a work will initially vest in multiple authors. Under the current U.S. copyright law, a work can be considered a work of co-authorship, called a “joint work,” if it is created by two or more authors with the intent that their contributions will be merged into inseparable or interdependent parts of a unitary whole. The consequences of characterizing a work as “joint” are substantial. The co-authors share ownership of the entire work, including the material contributed by the other. Either author can use or license others nonexclusively to use the work, subject only to a duty to account to the other co-author. Unless they agree otherwise, they each own an equal proportionate share of the whole (and the revenues), regardless of the size or significance of their contribution.

Perhaps because of those consequences, courts have developed additional requirements in order for a work to be considered “joint;” namely, that each purported co-author contribute a separately copyrightable contribution, and that the authors intend to share authorship of the work.¹ In 2000, one court held that, at least in the context of a motion picture, to be a co-author, one must also superintend and control the work.² In addition, that court said that the material furnished by a co-author must contribute to the audience appeal of the work, but the contribution of each author’s material to the success of the work must not be determinable.

Did Darla satisfy those requirements, so that she could successfully claim to be a co-author of the play? Presumably, she would assert that claim in order to force the owners (the other authors and their licensees) to make a favorable deal with her, sharing revenue and possibly control over dispositions of the play. It would seem that Bill and Darla had the requisite intent to merge their contributions—Bill incorporated Darla’s contributions into the revised play. Darla’s contribution was also copyrightable. Her creation of a new character, if sufficiently delineated, her alterations to dialogue and her lyrics would all probably qualify as contributions of original, minimally creative authorship. However, it is unlikely that the playwrights intended to share authorship of the play with Darla, a dramaturg. A court would look primarily

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² Aalmuhammed v. Lee, 202 F. 3d 1227 (9th Cir., 2000).
to objective actions of the other authors, such as how they credited authorship, who entered into agreements, and who controlled what ultimately was incorporated into the play. It is unlikely that a dramaturg would be treated as a co-author in that way. Therefore, it is unlikely that a court would find that Darla is a co-author of the play as a unitary whole.

Is that appropriate? Many collaborators don’t enter formal agreements, so the law’s default rules are important. Should courts deny co-authorship in those circumstances, or should they instead accept co-authorship but restructure the results to more fairly allocate rights among the co-authors? Perhaps also keep in mind the following section in considering those questions.

B. IMPACT OF A FINDING THAT A CONTRIBUTOR OF SEPARATELY COPYRIGHTABLE MATERIAL IS NOT A CO-AUTHOR OF THE RESULTING WORK

1. Use is an infringement of copyright
   However, that Darla is not a co-author does not necessarily mean that she has no rights with regard to her contributions. In fact, as the author of those contributions, she would own the copyright in that material. Unless a court found that she had licensed the other authors the right to use her material, any copying, distribution, performance or adaptation of her material would constitute a copyright infringement.

2. What’s the appropriate remedy?
   There are many potential remedies for copyright infringement. Although copyright owners are entitled to damages (e.g. the market value of the use, or any reduction in market value as a result of the use) and any of the infringer’s profits from the use, courts often award injunctive relief. That is, the court will order the infringer not to use the material, with serious consequences if the order is ignored, including jailing the infringer. Some have argued that courts should not readily give injunctions in all cases, particularly where the infringing material is a small part of a work that contains other material, access to which would benefit the public.

   Obviously, the threat of an injunction gives the copyright owner substantial leverage to negotiate a favorable settlement. One way that courts have limited the impact of such remedies in some cases is to find that the author has licensed the use. Under U.S. copyright law, most transfers of copyright must be in a signed, written form. But “non-exclusive” licenses may be oral, or implied from conduct and circumstances. Where an author has prepared material at the request of another, knowing it is intended to be used by the other in certain ways and has “delivered” it to the other, a court will find an implied license.

   This part of the problem is similar to a real case involving the Broadway hit show, “Rent.” In that case, the court found that the dramaturg was not a joint author of the show. Shortly after that decision, the dramaturg filed a claim seeking an injunction against the producers of the show and others who planned to exploit the show or its by-products, such as the cast album. The parties quickly settled the case, reportedly giving a significant share of revenues from the play to the dramaturg.

   In “Rent” the court did not have to consider whether there was an implied license, since the parties settled. Would an injunction be appropriate here, with the implications on the leverage of the parties? Would an implied license be fair to Darla?

II. JIMMY O’BRIAN’S CLAIM

A. IS STAGE DIRECTION COPYRIGHTABLE?
   Commentators have taken contrasting positions as to whether that which is contributed to a stage play by the director should be considered copyrightable. There has been virtually no case law on the question.

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3 Thomson v. Larson, 147 F. 3d 195 (2d Cir., 1998).
4 Compare Jessica Litman, Copyright in the Stage Direction of a Broadway Musical, 7 COLUM.-VLA J. ART & LAW 309 (1982) (stage direction copyrightable) with David Leichtman, Most Unhappy Collaborators: An
A person who actually originates and controls the creative expression that is rendered in a tangible form by another is the author of that expression. To the extent that the stage director contributes herself or originates and controls the creation of original, minimally creative expression, then, she is an author and copyright owner of that material. A stage director’s contribution might be reflected in actors’ movements, production design or changes in the dialogue of the play.

B. CONTRACTUAL RELATIONS BETWEEN AUTHORS AND DIRECTORS IN THEATRE
To the extent it comprises copyrightable material, if O’Brian assigned or licensed rights in the direction to the producer it would have probably been “merged” with the other elements of the play and conveyed to the playwrights. Presumably, O’Brian did not do that in this case.

Should a stage director own a copyright in his direction? In what exactly should he be able to claim copyright? To some extent, these questions arise again in connection with the film director’s claim. A film director may contribute similar material to a film as that contributed by a stage director to a play, although there are other elements of film authorship that may be contributed by a film director. Should the playwrights be entitled to own the directorial material for purposes of adaptations like film versions of the play, or should film producers making motion picture versions of plays be required to obtain rights from the stage director too? The sale of motion picture rights in plays is regulated by the Dramatists Guild to reduce potential conflicts of interest. Should there be similar regulation as to stage directors?

III. BEN FLECK’S CLAIM

A. RIGHT OF PUBLICITY—CHARACTER COPYRIGHT vs. ACTOR PERSONA
The right of publicity developed from roots as a form of invasion of privacy when a person’s name or photograph is used in advertising or on commercial products without her consent. Unlike the right of commercial appropriation privacy, the right of publicity is viewed as a form of intellectual property right, reflecting the commercial value of a celebrity’s association with a product.

The subject matter of the right of publicity has gradually expanded to encompass not just name, photograph or likeness, but also other indicia of a particular person’s identity or persona. The use of the phrase “Here’s Johnny,” associated with talk-show host Johnny Carson, as the name of a portable toilet was found to violate the right. The use of artists singing “soundalikes” of the voice of well-known and distinctive singers in commercials for consumer products has also been found to violate the right of publicity.

Some cases have found that a character can be so closely associated in the public mind with a particular actor that use of that character’s name, or of other elements of the program in which the character appeared, may violate the actor’s right of publicity. Thus a bar called “Spanky McFarland” was found potentially violative of the actor George McFarland’s publicity rights. The Ninth Circuit has been in the avant garde in so expanding the right of publicity. It found that the use in an advertisement of a robot dressed in an evening gown and wig violated Vanna White’s publicity rights because the robot was seen on a game-show set reminiscent of “Wheel of Fortune,” the show on which Ms. White played a similar role.

None of those cases confronted the owner of copyright of the show from which the character was taken against a claim by the actor who became known for playing the character. In a case currently pending in the Federal courts in California, that confrontation is taking place. Paramount Pictures licensed Host Hotels to create a bar in some hotels that recreated the bar from the well-known TV show, “Cheers.” Host created two robots who sit at the bar and who bore a slight resemblance to the two characters in the show who also sit at the bar. The actors who played those characters have sued Host for violation of

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5 But see Apple Barrel Productions, Inc. v. R.D. Beard, 730 F.2d 384 (5th Cir., 1984)(children’s country music show format and other elements may be copyrightable when viewed as a whole).
their rights of publicity. The lower court has rejected the claim at several stages, but the Court of Appeals has consistently reversed and sent the case back to the District Court, where it will now receive a trial.

Here, Flashlight presumably could acquire a license from its parent company to use the original cop with a heart of gold character that became so associated with Ben Fleck. Presumably some people who see that character (or the similar character he portrayed in the play) will think of Fleck. Should this be considered an unlawful appropriation of Fleck’s persona?

Should the copyright owner’s ability to exploit or authorize adaptations or remakes of its properties be limited by persona appropriation claims by the actors who were closely associated with the fictional characters in those properties? Or should the state law rights in persona be pre-empted by Federal copyright law?

B. RIGHT OF PUBLICITY—COMMERCIAL USES vs. EXPRESSIVE WORK USES

Generally, the right of publicity protects against “commercial” uses of persona, such as use in advertising or on consumer product packaging. But uses in expressive, speech works are often found not to be violative of the right of publicity, at least where the use is not one permeated by falsity but held out to the public as true. For example, if there were a real Col. Joe Friday, it is unlikely he would be able to succeed in a right of publicity claim against a truthful biography or docudrama in which he was portrayed. Hence, freedom of speech interests can often defeat potential right of publicity concerns. However, in the one case in which the U.S. Supreme Court addressed the right of publicity, it found that the First Amendment did not prohibit a right of publicity action against a news program that broadcast an unauthorized film of the “entire performance” of a human cannonball. The court viewed the state interest in encouraging creative productions by protecting the proprietary interests of performers as outweighing the news broadcaster’s interests. What is the proper analysis of these issues in the context of imitative performances such as that in the film version of “A Vietnam Diary”? Is such imitation a taking of an “entire performance”? Would permitting such imitation destroy important incentives to performers?

C. RIGHTS RIGHT OF PUBLICITY—SURVIVAL AFTER DEATH

Does the analysis change if the performer is no longer alive, so he would no longer be capable of doing the job himself? Although the commercial appropriation privacy/right of publicity cause of action does not survive death under the law of all states, most states that view the right of publicity as a proprietary, rather than personal, right find that it does survive death. Should that apply with respect to imitative performances of a character associated with the actor?

D. UNFAIR COMPETITION/TRADEMARK RIGHTS AS AN ALTERNATIVE TO RIGHT OF PUBLICITY

In some instances, celebrities bring claims for unfair competition or infringement of trademark against certain uses of their name, likeness or other material associated with the celebrity. This type of cause of action reflects a concern to prevent public confusion as to approval, endorsement or association with a product or service. For example, a purely imitative performance of Elvis Presley that used names and images associated with Elvis was found to violate such rights, even after his death. In many instances, public confusion can be limited by the use of accurate credit information or disclaimers. Would an unfair competition/trademark type claim apply to the use of a characterization associated with a particular actor in a film? Does it add anything to the right of publicity action? Would an appropriate disclaimer eliminate that cause of action? What would be an “appropriate” disclaimer?

IV. NORA NEWBY’S CLAIM

Although United States copyright law has largely focused on protecting intellectual property rights in works of authorship in order to encourage the production of such works, it has been increasingly recognized that works of the mind also reflect the personality of the author, a rationale for the approach of “author’s rights” jurisdictions that is also recognized in the Berne Convention, the major international treaty regarding protection of such works, to which the United States became a signatory in 1989.
A. MORAL RIGHTS—INTEGRITY AND ATTRIBUTION

Pursuant to that approach, in addition to the economic property rights in works, many countries also enforce another set of rights to protect the more personal interests of the author, including the right of attribution and the right of integrity. The right of attribution usually means the right to receive an accurate credit for one’s work, and a concomitant right not to be credited for works one did not create. The right of integrity usually protects against modifications to a work, particularly if they would be harmful to the author’s honor or reputation. Often such changes are referred to as “distortions” or “mutilation.”

To some extent the United States has recognized similar rights through actions such as common law copyright and unfair competition law. More recently, the copyright law has been amended to specifically cover those rights with regard to a limited class of works called “works of visual art.”6 That category primarily covers works of fine art, and, notably, excludes motion pictures and other works made for hire.7 Directors of motion pictures have long sought to have more control over changes made to their works, motivated in part by the prevalence of practices such as cutting films for purposes of commercial television exploitation or technologies such as “colorization.” Current copyright law does not provide protection of the director’s creative vision of a motion picture. Should it? Is legislation the appropriate or best means for allocating creative rights with respect to motion pictures? Does existing U.S. law comply with its obligations under the Berne Convention to recognize rights of integrity and attribution?

Often the director’s arguments are countered by the argument that motion pictures are extremely expensive to produce and that the financier/producer/distributor should have the right to modify them if they deem it necessary in order to protect and make a return on their investment. This problem illustrates another aspect of the issue. Namely, the fact that motion pictures are created by many authors and are often themselves modifications of other pre-existing works such as novels or plays complicates morally-based arguments that directors should be the authors who have definitive control over the form in which the motion picture is distributed. Flashlight’s economic argument for modifying the rape scene might be that they feel that the film will secure a less restrictive rating and receive a larger general audience if the rape is less graphic and is ultimately prevented. Regardless of the validity of that argument, it can also be argued that the film was modified to be more like the underlying play on which the film is based. Indeed, one might wonder if Flashlight would receive a complaint from the playwrights if they were to permit Nora’s version to stand, yet permit credits and advertising indicating that the film is based on the play by Bill and Elton. It can also be argued that Mogul, the producer, is an author of the film. After all, the editing of the film is one of the most important components of its authorship, and, to the extent that Mogul actually controls those creative editorial elements, he is an author, too. Which “author” should prevail in these circumstances? Should all the “authors” have a veto power? What would be the impact of that approach on the film-making enterprise?

B. CREATIVE CONTROL UNDER THE DGA COLLECTIVE BARGAINING AGREEMENT

Article 7-500 of the AMPTP-Directors Guild of America Basic Agreement (“DGA Agreement”) covers the director’s minimum creative rights with respect to editing and post-production of a motion picture. The director is entitled to supervise the editing of her first cut, the “director’s cut,” of the film,8 and the DGA Agreement prohibits interference with that cut and “cutting behind” the director.9 The director is also entitled to a preview of her cut,10 and is entitled to be present and consult with the producer throughout the postproduction process, including an opportunity to screen and discuss the last version of the film before negative is cut.11 Moreover, the DGA Agreement contains other provisions protecting, to some extent, the director’s creative rights and limiting the modification of the film. For example, the producer is required to endeavor to limit editing of motion pictures for network telecast to changes required for

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6 17 U.S.C. §106A.
8 DGA Agreement Art. 7-508.
9 DGA Agreement Art. 7-504.
10 DGA Agreement Art. 7-704.
11 DGA Agreement Art. 7-506.
network “standards and practices,” and the director is to be given the first opportunity to make the cuts required.12 At a minimum, agreements for U.S. network free TV or national network pay TV broadcast must obligate the network to consult with the director, even as to placement of advertisements. The director is to have the right to make cuts if the film is licensed for syndication,13 and there are limitations on cutting films for in-flight performance.14 The producer must consult with the director as to certain other modifications, such as coloring, time compression/expansion, “panning and scanning,” and changes to allow exhibition in three dimensions.15

Still, the DGA Agreement recognizes that, subject to specific rights granted directors, all creative decisions of the producer are final.16 Hence, the DGA Agreement probably would not protect Newby against the producer’s changes to “A Vietnam Diary.” Should the question of a director’s creative rights with respect to a motion picture be resolved through collective bargaining, that is, should further minimum creative rights be required in the collective bargaining agreement?

C. CONTRACTUAL RELATIONS BETWEEN PRODUCERS AND DIRECTORS IN FILM--
WORK FOR HIRE AND MORAL RIGHTS

At this time, the respective creative rights of directors and producer/financiers are determined primarily through their bargaining and the resulting contract for the director’s services on a film. Virtually all motion picture authors sign agreements stating that their contributions to the film are rendered as work made for hire. They also grant the right to modify the film and waive the author’s moral rights. To the extent work for hire is ineffective to vest rights in the producer, most such agreements also contain alternate provisions assigning all rights to the producer. In general, such agreements are enforceable in the United States. A director with market power may negotiate for cutting rights beyond the DGA-required rights. Some directors bargain for “final cut” rights, which grant the director the right to determine the final version of the film for some media and territories. Are such private market transactions the appropriate or best means to balance the respective interests of the parties?

Here, if Nora Newby had sufficient market power, she may have been successful in negotiating for the right to determine the final cut of the film. Nothing in the problem’s facts suggest that she obtained such a right, so it is unlikely that she would have a successful breach of contract claim against Mogul or Flashlight Pictures.

It is possible that contractual allocations of creative rights would not be recognized in territories outside the United States. In a much-publicized dispute between the heirs of John Huston and Turner Broadcasting, the heirs were successful in persuading a French court to reject the work made for hire and moral rights waiver provisions of their American contract, and to enjoin the broadcast of a colorized version of “Asphalt Jungle,” which had been directed by Mr. Huston. To what extent will and should foreign courts implement their own public policy concerns and ignore the contractual provisions negotiated between U.S. filmmakers and producer/financiers?

12 DGA Agreement Art. 7-509.
13 DGA Agreement Art. 7-509(d).
14 DGA Agreement Art. 7-509(f).
15 DGA Agreement Art. 7-513.
16 DGA Agreement Art. 7-1501.