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CONTRACT LAW: FILM DIRECTORS AND EDITING RIGHTS FOR TELEVISION

In October 1917, American journalist John Reed chronicled first-hand the events of the Russian Revolution in "Ten Days That Shook the World." His iconoclastic views conflicted sharply with American perceptions of those events and often irritated official sources. In 1981 Warren Beatty portrayed Reed in "Reds," a motion picture that he also directed, co-wrote and produced. In a strange symmetry, Beatty himself has recently caused some shaking within another empire of sorts: that of network television.

On April 15, 1985, Beatty won an expedited Directors Guild of America ("DGA") arbitration that prevented the ABC television network from cutting about six and one-half minutes from "Reds" so that ABC's local affiliates could start the 11 p.m. news on time.¹ Beatty had not opposed the cuts of about one and one-half minutes that ABC had made to comply with the network's programming standards and practices (commonly called censorship cuts, e.g., for full nudity or excessive violence). Rather, Beatty contended that his contract with Paramount Pictures Corp. ("Paramount") for the making of "Reds" gave him "final cut" even as to television broadcasts; thus the network had no right to re-cut the movie to fit its time segments. Arbitrator Edward J. Mosk agreed. As a basic principle of contract law, if Paramount had only acquired from Beatty the right to edit the movie for television standards and practices, then Paramount could not grant ABC the right to edit the movie for time.²

The local newspapers and entertainment "trade" papers generally heralded this decision as a "landmark."³ Beatty himself readily acknowledged that he had been waiting for the right movie to make a test case of the networks' practice of cutting theatrical motion pictures to fit their

1. In the Matter of Arbitration between Directors Guild of America, Inc., and Paramount Pictures Corporation, Case No. 01738 (Apr. 15, 1985) ["Beatty"]. ABC proposed to cut one minute and twelve seconds for standards and practices and six minutes and twenty-five seconds for time segment requirements. *Id.* at Arbitration Award 3.

This note is based solely on the twenty-nine page arbitration opinion. No access to the parties' briefs or the full transcript of the arbitration was available.

2. *Id.* at 14. "ABC could not acquire from Paramount any greater rights than Paramount had acquired from Beatty."

3. Variety began its front page story: "Warren Beatty and the Directors Guild of America yesterday won a landmark arbitration ruling. . . ." Tusher, *Beatty Wins 'Reds' Arbitration*, Variety, Apr. 16, 1985, at 1, col. 4.

time segments.⁴ Other directors applauded the decision and Martin Scorsese added that the "Beatty outcry might heighten awareness on the subject."⁵ Two days after the ruling, the Directors Guild of America announced that it would demand in the next collective bargaining session that the networks broadcast films on television in their theatrical version except for standards and practices cuts.⁶ The DGA proposal raises interesting issues concerning artists' rights, including the moral right of directors to protect the integrity of the films they direct.⁷

The networks maintain that respecting their time segments is necessary in order to protect their affiliates' profitable local news times.⁸ ABC's concern is for the viewer who is not already watching the movie but usually tunes in ABC for the 11 p.m. news. When that viewer does not find the news, he or she switches to another channel and ABC's sponsors have lost that viewer for the entire half-hour or hour, even if the movie ran over only three minutes.

Ultimately the issue of whether ABC had the right to cut "Reds" to fit its time segments turned on the meaning of the word "continuity" as it referred to television rights in the "final cut" provision of Beatty's production, financing and distribution contract with Paramount, dated April 10, 1979. Paragraph 3(o) of that contract provided, in relevant part:

JRS [Beatty's loan-out company] shall cut, edit and deliver the picture and shall have the "final cut" with respect to the worldwide exhibition of the picture, subject only to the following:

.

(iv) JRS shall cause WB [Warren Beatty] to make such changes in the picture as shall be required by PPC [Paramount Pictures Corp.] in order to comply with the requirements of United States, federal, state or local law, foreign censorship, *television network continuity broadcast standards*, and exhibition on airlines."⁹ [Emphasis added.]

The paragraph went on to provide that Paramount's executives would use their best efforts to obtain exhibition on television and airlines

4. Friendly, *Movie Directors versus TV Editing*, L.A. Times, Apr. 29, 1985, § VI (Calendar), at 9, col. 5. Beatty alleges that virtually all movies shown on television are now cut for time and that the networks even speed up reels to make films end sooner. *Id.* at 8, col. 5.

5. Martin Scorsese commented that Beatty's aim was to change the emphasis from commercialism to a consideration of movies as an art form. *Id.* at 9, col. 6.

6. Directors Guild of America press release (Apr. 17, 1985).

7. See *infra* notes at 50-56 and accompanying text.

8. Friendly, *Beatty Wins Battle; "Reds" Won't Be Cut for ABC-TV*, L.A. Times, Apr. 16, 1985, at 1, col. 1.

9. *Beatty* at 4.

without any reduction in length from the theatrical version.¹⁰ Paramount contended that the word "continuity" was used to distinguish it from the usual term "network standards and practices" and that the best efforts language was compromise protection for Beatty.¹¹ The opinion does not describe Paramount's interpretation of the phrase "television network continuity broadcast standards" or its explanation of why the word "continuity" meant cutting for time segments.

Beatty argued that he had insisted from the beginning that cuts for time were not included in the grant of television rights and that Paramount eventually acceded.¹² The DGA presented evidence of other DGA-network collective bargaining agreements where the term "continuity acceptance" clearly refers to censorship and not to time cuts.¹³ Although the ruling did not demonstrate that "continuity acceptance" has the same meaning as "television network continuity broadcast standards," the arbitrator was convinced that the word "continuity" in Beatty's contract referred to censorship and not time cuts.¹⁴

Paramount argued that it would never have agreed to a deal without obtaining the right to edit for time because it would have severely limited or made impossible a network television sale of "Reds." But Beatty presented evidence that his contract with Paramount for "Dick Tracy" gave him "final cut" except for "the mandates of network television Standards and Practices rules."¹⁵ Consequently, the arbitrator found that if Paramount's rigid policy on "final cut" for television rights was modified for "Dick Tracy," then it could have been and was so modified for Beatty on "Reds."¹⁶

By holding that Beatty's contract did, in fact prohibit cuts for time, the arbitrator effectively rendered invalid Paramount's July 15, 1982, television licensing agreement with ABC, which would pay Paramount \$6.5 million and which included the right to cut "Reds" for time.¹⁷ Although ABC was free to broadcast "Reds" without time cuts, ABC adamantly

10. *Id.* at 4-5.

11. *Id.* at 11.

12. *Id.* at 10. Negotiations were carried on not only by counsel but by Paramount President Barry Diller and Warren Beatty personally. Neither side could determine when the exact wording was settled. *Id.* at 12.

13. "Cutting for time restrictions are set forth in separate paragraphs with different rules and requirements from the requirements for editing for 'censorship.'" *Id.* at 12.

14. *Id.* at 13. "This evidence when coupled with other testimony is convincing that the word 'continuity' as used in Paragraph 3(o) related to television censorship criteria and not to abridgment to meet time segmenting." The "other testimony" is not described in the opinion.

15. *Id.* at 13.

16. *Id.*

17. "[W]hen Paramount granted to ABC the right to edit and abridge the film for time

refused to do so. Since ABC could not receive what it had bargained for, Paramount would have to take the film back. However, an alternative ground for holding that Paramount was obligated to take "Reds" back was the arbitrator's finding that an oral agreement between Beatty and Paramount President Barry Diller, on behalf of Paramount, was enforceable against Paramount. The terms of the oral agreement provided that if Beatty were not satisfied with the ABC version of "Reds," Paramount would buy back the movie.¹⁸

Nevertheless, ABC argued that licensees have an independent customary right to make minor deletions for time, censorship and commercials and that it intended to broadcast the abridged version. ABC maintained that Beatty's dispute was with Paramount since ABC was not a party to the Beatty-Paramount contract.¹⁹ ABC further argued that because it was not Beatty's employer, but merely a third-party exhibitor, ABC could not be deemed to have agreed to submit to arbitration nor could it be bound.²⁰

However, ABC was a signatory to the 1978 DGA collective bargaining agreement which made director cutting disputes subject to mandatory arbitration.²¹ Furthermore, ABC had agreed to be bound by all DGA-collective bargaining agreement provisions as if it were specifically named as an employer.²² The arbitrator did not agree that simply because a signatory was wearing an exhibitor's hat instead of a producer's hat it was no longer bound by the collective bargaining agreement which made cutting disputes arbitrable.²³ For the arbitrator, it was crucial that ABC and Paramount were both signatories to the DGA col-

cuts, it exceeded the rights granted to it by Beatty, and its conveyance of the right to edit and abridge the film in that manner to ABC was invalid." *Id.* at 14.

18. *Id.* at 14. The deal is rather intriguing for its glimpse at business affairs and power deals. In consideration for Beatty refraining from buying the rights to "Dick Tracy" when Paramount's option expired, and for Beatty's assistance in getting Paramount an extension, Barry Diller, then President of Paramount, made an oral agreement that if Beatty was not satisfied with ABC's proposed television version, Paramount would buy "Reds" back. Although the present Paramount executives claimed they knew nothing of the deal and it was never memorialized, the arbitrator found that Diller had the authority to bind Paramount. The arbitrator found valid consideration in that Paramount had the benefit of the option. No objective standard had been set for Beatty's satisfaction and since he was not satisfied, Paramount was obligated to take "Reds" back. *Id.* at 14-18.

19. One ABC executive stated: "We are innocent bystanders. The problem Warren has is with Paramount." Harmetz, *ABC Cancels 'Reds' After Prohibition on Editing*, N.Y. Times, Apr. 17, 1985, at 18, col. 3.

20. *Beatty* at 21.

21. *Id.* at 19.

22. *Id.* at 24.

23. *Id.* at 21.

lective bargaining agreement which specifically covered both the motion picture at issue and the nature of the dispute. Thus, ABC was bound by the results of the arbitration, notwithstanding any lack of direct privity between ABC and Beatty.²⁴

Since prior to the arbitration ABC had intended to broadcast "Reds" with about six and one-half minutes cut to accommodate the start of the 11 p.m. news, Mosk enjoined the television broadcast of the film if it was abridged other than for network standards and practices.²⁵ Because this was an arbitration, it technically has no precedential value, although at least one writer has noted attempts by lawyers to attach some importance to prior rulings in arbitration briefs.²⁶ If this is so, the legal significance of *Beatty* for future cases may lie in the arbitrability holding which means that the collective bargaining agreement satisfies the privity element in a breach of contract action, thereby binding licensee signatories (and presumably a sublicensee also) to the terms of the contracts made between other signatories.

Although the interpretation of both the oral and the written Beatty contract presented no novel application of contract law, that does not mean that the arbitrator's decision may not be questioned. When faced with an ambiguous contract phrase, such as in *Beatty*, the court (or arbitrator) is free to look at all circumstances relevant to the transaction, including prior negotiations and conduct of the parties and any applicable course of dealing, course of performance, or trade usage or custom is especially relevant.²⁷ When the parties have attached different meanings to the same language, as here, the arbitrator's task is to apply a standard of reasonableness to determine which party's intention is to be carried out at the expense of the other's.²⁸

24. *Id.* at 19-20. There is "nothing in the basic agreement exempting any signatory, accused of violating either the basic agreement or the subsumed personal services contract of an employee, from the Arbitration provisions . . . whether or not the employee is in privity of contract with that particular employer."

25. *Id.* at 27-28. Since what ABC proposed to exhibit was not the same motion picture which was the subject matter of the Beatty-Paramount contract but was an abridgement, the arbitrator was satisfied that the only fair and appropriate method of enforcing the agreement between Beatty and Paramount was an injunction prohibiting ABC from violating Beatty's contract rights. *Id.*

26. Schiff, *At a Disadvantage—Independent Producers in Arbitration with the DGA and WGA*, 4 THE ENTERTAINMENT & SPORTS LAWYER, (Summer 1985) at 7. Gunther Schiff, former president of the DGA, criticizes the practice since outside lawyers do not have access to the rulings.

27. E. A. FARNSWORTH, CONTRACTS, § 7.10 at 492 (1982). "All courts agree that the parol evidence rule permits them to do this even though the language is contained in an integrated agreement, as long as the language itself is 'ambiguous' or 'vague.'" *Id.* § 7.12 at 501.

28. *Id.* § 7.9 at 492.

Arbitrator Mosk examined the course of dealing between the parties by looking at the "Dick Tracy" contract and demonstrated trade usage by showing how the term "continuity" was customarily used in the industry by the DGA contract. However, neither of these methods produced entirely convincing results. First, the "Dick Tracy" contract was negotiated much later than "Reds"; it is dated as of April 30, 1984, and could have benefited from the hindsight provided by the problems encountered with the "Reds" television negotiations. Evidence of a course of dealing is only relevant to *prior* dealings between the parties.²⁹ Second, the arbitrator's opinion did not show that the DGA evidence regarding the term "continuity acceptance" was identical in meaning or context to "continuity" as used in the "Reds" contract.³⁰

Another accepted principle of interpretation is to look to the conduct of the parties during the performance of the contract. If Mosk's view that Paramount knowingly agreed to no time cuts in 1979 is accepted, then that fact was either overlooked when ABC licensed "Reds" in 1982 or Paramount made a conscious business decision to breach Beatty's 1979 contract. No bad faith allegations were mentioned in the opinion and although it seems unlikely that the 1982 ABC license agreement was drawn up without reviewing the 1979 production agreement, Paramount clearly gave ABC the right to edit for time in its 1982 license.³¹

Another possible explanation for Paramount's actions in 1982 however, is that Paramount believed that it had acquired those television editing rights from Beatty in 1979. Paramount's contentions would seem to have some merit. If only standards and practices cuts were to be allowed, the word "continuity" in the ambiguous and undefined phrase, "television network continuity broadcast standards" was redundant since

29. *Id.* § 7.13, at 508. "The concept of a course of dealing, therefore, is relevant only when the parties to an agreement have dealt with each other in similar transactions on previous occasions."

30. The writer has asked several network employees what "continuity" means when applied to films shown on television. To them "continuity" referred to breaking a film for commercials, not necessarily to time cuts, but it did not mean "censorship" cuts. However, none of these informants were speaking for the network and wished to remain "off the record." (Conversations on various dates in January 1986.)

Such an interpretation of "continuity" would favor Beatty's contention that his contract did not allow cutting for time since only commercial inserts and standards and practices deletions would have been excepted from Beatty's right of "final cut." However, the opinion does not indicate that this argument was made.

31. *Beatty* at 6. "The license agreement to ABC provided . . . that 'ABC shall have the right to edit the film and elements thereof for purposes of time segment requirements. . . .'" The rights to make commercial inserts and standards and practices cuts were also included in ABC's license. *Id.*

everyone agrees that "broadcast standards" refers to censorship. Since generally it is assumed that words are there for a reason, it is reasonable to think that "continuity" was intended to mean something other than broadcast standards.

Another venerable contract interpretation principle states that contracts are to be construed most strictly against the drafter.³² Here, although the first deal memo was prepared by Paramount, all other versions of the contract and the contested phrase were drafted by Beatty's lawyers. Still the ambiguity was interpreted in Beatty's favor.³³

While the arbitrator's decision is a reasonable interpretation and is neither capricious nor an abuse of discretion, general contract principles show that a finding in Paramount's favor might have been equally reasonable.

The result of the ruling is also troubling. The arbitrator relied on *Gilliam v. American Broadcasting Cos.*³⁴ as authority for the propriety of issuing an injunction, and the arbitrator enjoined any broadcast of "Reds" which was edited beyond the necessities of standards and practices. However, the preliminary injunction in *Gilliam* was in fact denied because of the great harm it would cause defendant ABC; the permanent injunction was only granted *after* the broadcast of the second special and applied only to future broadcasts, which ABC had no plans to make.³⁵ Therefore, the effect of the injunction in the two cases is exactly opposite.

32. "An especially common rule of construction is that if language supplied by one party is reasonably susceptible to two interpretations, one of which favors each party, the one that is less favorable to the party who supplied the language is preferred." FARNSWORTH, *supra* note 23, § 7.11 at 499.

33. *Beatty* at 12. If nothing else, this case casts considerable doubt on the legal maxim that there is a premium on clear drafting.

34. 538 F.2d 14 (2d Cir. 1976). In *Gilliam*, "the Court enjoined further broadcasts of the truncated version because *inter alia* ABC could not acquire more rights than the [British Broadcasting Corp.] had initially received from the owners." *Beatty* at 28.

In *Gilliam*, the Monty Python comedy group brought suit against ABC for broadcasting drastically edited versions of some one-half hour comedy skits which Monty Python had written and performed for the British Broadcasting Corp. The group had editing control over its scripts and retained all rights not specifically granted to the BBC. By a series of license agreements, ABC obtained the broadcast rights and the right to further edit the shows. When ABC finished cutting out the "naughty bits" and adding commercials, some twenty-four out of ninety minutes (twenty-seven percent) of the program was deleted. After the first special was broadcast, Monty Python sued to enjoin the telecast of the second special.

35. *Gilliam*, 538 F.2d at 19. "Thus a last minute cancellation . . . would injure defendants financially and in its reputation with the public and its advertisers." However, on appeal, after the second broadcast: "any injury to ABC is presently more speculative. No rebroadcast of the edited specials has been scheduled and no advertising costs have been incurred for the immediate future." *Id.*

By enjoining "Reds" prior to its broadcast, Mosk produced the very harm which *Gilliam* sought to avoid.

Furthermore, Mosk's statement that the two cases are "almost on all fours factually"³⁶ is hard to reconcile with the extremely different nature of the two programs. "Reds" was one continuous story whereas the Monty Python specials were composed of three one-half hour programs, each one containing skits of approximately nine to twelve minutes. Certainly, cutting even thirty seconds from such a skit could be crucial to its meaning. About twenty-seven percent of the Monty Python special was deleted, whereas the six and one-half minutes ABC proposed to cut from "Reds" was less than five percent of the total film. The decision in *Gilliam* was clearly based on the extensive nature of the editing and the resultant mutilation.³⁷ Beatty made no such claim of mutilation but based his claim solely on a contractual rights theory. One writer questions whether more moderate editing in *Gilliam* would have produced the same result.³⁸

The *Beatty* ruling was clearly based on an express "final cut" provision in one director's contract for one particular film. It stated no broad holding on the rights generally of broadcasters to edit for time absent an express prohibition of such cuts. Since few other directors have the necessary bargaining power to negotiate "final cut" provisions for either the theatrical release or the television broadcast, the effect of *Beatty* on other directors should be extremely limited.

Nevertheless, two days after the ruling, Gilbert Cates, President of the DGA, announced that in the next collective bargaining negotiations with the networks, the DGA would demand that the networks broadcast the theatrical version of all motion pictures directed by DGA directors, except for cuts necessitated by standards and practices.³⁹ Incorporating a prohibition against time cuts in the DGA Minimum Basic Agreement would benefit all directors because this would eliminate the factor of the individual director's bargaining power in negotiations. The DGA would

36. *Beatty* at 28.

37. *Gilliam*, 538 F.2d at 23-24: "It also seems likely that appellants will succeed on the theory that, regardless of the right ABC had to broadcast an edited program, the cuts made constituted an actionable mutilation of Monty Python's work." The *Gilliam* case has generated much comment, both favorable and unfavorable, for applying § 43(a) of the Lanham Act to prohibit the edited work from being misrepresented as Monty Python's own work.

For a discussion and sources see Diamond, *Legal Protection for the "Moral Rights" of Authors and Other Creators*, 68 TRADEMARK REP. 244, 268 (1978).

38. DaSilva, *Droit Moral and the Amoral Copyright—A Comparison of Artists' Rights in France and the United States*, 28 BULL. COPYRIGHT SOC'Y 1, 48 (1980).

39. DGA press release, Apr. 17, 1985.

simply like to eliminate the network practice of cutting motion pictures to fit television time segments.

Historically, the practice of allowing broadcasters a limited editing right dates back to radio, where rigid time segments were considered a programming necessity.⁴⁰ As a descendant of radio, television merely inherited and continued this practice. These minor deletions caused acute and long-standing distress not only to directors but to actors and writers as well. The early cases indicate that artists opposed the commercial interruptions as strongly as the minor cuts for time.⁴¹ However, it was often the time needed for commercials that resulted in the movie being cut.

By 1966 the industry custom of allowing broadcasters the right to edit for time and censorship as well as to insert commercials was firmly established in suits by Otto Preminger in New York and George Stevens in California.⁴² Considering the importance of commercials to network television, it is not surprising that both courts were unwilling to find that a director's "final cut" prohibited commercial interruptions of their films when shown on television.⁴³ However, the California court in *Stevens v. National Broadcasting Co.* did impose a limited injunction against commercial inserts that would distort or damage the effect of the film.⁴⁴

As to the right to edit for time, the court in New York in *Preminger v. Columbia Pictures Corp.* found that a director's "final cut" extended

40. Amarnick, *American Recognition of the Moral Right: Issues and Options*, 29 COPY-RIGHT L. SYMP. (ASCAP) 31 (1979). In 1938, a broadcaster testified before a Congressional subcommittee that it was "an absolute necessity [that] modifications and concisions of the works broadcast" be made to conform programs to the needs of "perfect timing." *Id.* at 43.

41. See, e.g., *Autry v. Republic Productions*, 213 F.2d 667 (9th Cir. 1954); *Republic Pictures Corp. v. Rogers*, 213 F.2d 662 (9th Cir. 1954).

42. *Preminger v. Columbia Pictures Corp.*, 49 Misc. 2d 363, 267 N.Y.S.2d 594 (Sup. Ct. 1966), *aff'd*, 25 A.D.2d 830, 269 N.Y.S.2d 913 (1966) (Judge Rabin, dissenting, filed a separate opinion), *aff'd*, 18 N.Y.2d 659, 273 N.Y.S.2d 80 (1966); *Stevens v. National Broadcasting Co.*, 148 U.S.P.Q. 755 (Calif. Super. Ct. 1966). Following the NBC broadcast of the film with nine commercial interruptions and with ten and one-half seconds cut, Stevens sued for contempt. At trial, the court found no violation of the order in either the manner or number of commercial interruptions but agreed that the ten and one-half seconds cut were not necessary to the broadcast of the film and ordered them reinstated. *Stevens v. National Broadcasting Co.*, 150 U.S.P.Q. 572 (Calif. Super. Ct. 1966), *aff'd*, 270 Cal. App. 2d 886, 76 Cal. Rptr. 106 (1966);

43. "[I]t should not be overlooked that the industry, like every other business, has as its primary objective the accumulation of profits. Sponsorship of programs, by advertisers, provides a station with its only source of revenue. . . ." *Preminger*, 49 Misc. 2d at 369, 267 N.Y.S.2d at 602.

44. In *Stevens*, although Judge Nutter thought commercial interruptions might in extreme cases actually emasculate or destroy the mood and effect of the work, he allowed commercials so long as they did not "substantially or materially distort the mood, effect or continuity of the film." *Stevens*, 148 U.S.P.Q. at 758.

only to the production phase of filmmaking, and that a television broadcast was a distribution activity.⁴⁵ Since Preminger's contract for "Anatomy of a Murder" had not expressly provided for "final cut" as to television broadcasts, and he was aware of the industry custom in existence for at least fifteen years which gave broadcasters the right to make commercial interruptions and make minor cuts for time segment requirements or censorship, he was bound by the custom.⁴⁶

Unlike the contract in *Preminger*, Stevens' contract for "A Place in the Sun" was entirely silent as to television broadcasts. The court found that neither party had contemplated the film's use on television. However, in deference to the "unusual grant of sole control over production," which Stevens had had over the theatrical film, NBC was prohibited from making any cuts in "A Place in the Sun" which were not absolutely necessary (i.e., for standards and practices) in order to broadcast the film on television.⁴⁷

Taken together, these two cases seem to state a rule that broadcasters may make commercial interruptions so long as they do not emasculate or distort the effect of the film. In the absence of a specific contractual provision prohibiting editing for time in the television broadcast, the accepted industry custom is that a grant of television rights allows a broadcaster to make minor cuts for both censorship and time segment requirements.⁴⁸ *Beatty* does not disturb this custom since the arbitrator found that Beatty's contract had an express contract provision which limited editing.

The DGA proposal poses a direct challenge to this custom. Of course, to succeed, the DGA proposal depends on the networks' voluntary acceptance. Nevertheless, the legal basis of the custom could itself be challenged.

Commentators and courts alike suggest that the legal basis for the editing custom is the notion that in licensing a work for adaptation in a new medium, a licensee acquires the right to make those changes neces-

45. *Preminger*, 49 Misc. 2d at 369, 267 N.Y.S.2d at 601.

46. *Id.* at 367, 267 N.Y.S.2d at 598. Judge Rabin, dissenting, would have found that the "final cut" language in Preminger's contract prohibited anyone else from further editing. Since the contract provided for cutting rights, "there is no room for proof of custom contrary to such provision." *Preminger*, 25 A.D.2d at 832, 269 N.Y.S.2d at 915.

47. *Stevens*, 270 Cal. App. 2d at 889, 76 Cal. Rptr. at 110.

48. *Preminger*, 49 Misc. 2d at 368, 267 N.Y.S.2d at 600. In dictum, the *Preminger* court suggested that if the 161 minute feature were cut to 53 minutes or even to 100 minutes, such cuts would amount to mutilation and Preminger would be entitled to injunctive relief on a tort theory regardless of the absence of a contract provision for television broadcasts. *Preminger*, 49 Misc. 2d at 372, 267 N.Y.S.2d at 603.

sary for the licensee to make use of the work in the new medium.⁴⁹ It is this so-called "transfer of medium" rule that has resulted in courts recognizing a limited right of broadcasters, as licensees, to edit.⁵⁰ By insisting that the television medium requires censorship changes, commercial insertions and rigid time segments, broadcasters have been successful in including the right to edit in their contracts with theatrical distributors.⁵¹ Therefore, as the cases reflect, a grant of television rights implicitly includes broadcaster editing unless such editing is expressly prohibited.

Perhaps one way to challenge the custom of broadcasters' editing rights is to question whether the television broadcast of a completed theatrical motion picture involves a transfer of medium which requires any "adaptation" of the work. Presently, both courts and scholars agree that television broadcasts of feature films involve a transfer of medium which permits three kinds of editing: editing for time segments, editing for commercial insertions and editing for censorship.⁵² Therefore, it would be necessary to find a basis for distinguishing censorship cuts for standards and practices (which the DGA proposal admits are necessary) and commercial inserts (which interrupt but do not delete material) from actual content editing because of time restrictions. If the television broadcast were considered similar to a reproduction of the film then it is not customary for licenses to reproduce the work to give the licensee any editing rights (e.g., the contract for publishing a paperback version of a book does not give the publisher the right to make any editorial changes).⁵³ Of course, broadcasters will protest that maintaining their

49. Amarnick, *supra* note 40, at 50, citing other American scholars who suggest that "when an author agrees to have his work transposed to another medium or distributed to the public in other than its original form, he should be deemed to have waived any right to object to 'reasonable' or 'necessary' changes."

50. "Courts have recognized that licensees are entitled to some small degree of latitude in arranging the licensed work for presentation to the public in a manner consistent with the licensee's style or standards." *Gilliam*, 538 F.2d at 23.

51. A program director for KHJ in Los Angeles testified that his station had "never purchased any motion picture without the right to make interruptions as well as minor cuts." *Preminger*, 49 Misc. 2d at 369, 267 N.Y.S.2d at 600.

52. The judge in the preliminary hearing for *Gilliam* distinguished *Preminger* as "a vehicle which was made as a regular production movie . . . and it was reasonable . . . to assume that if you sold that for television you are going to have to do something to be able to produce it on television" while *Gilliam* involved material produced for television and "it is . . . less reasonable to assume that there would be further editing." Comment, *The Monty Python Litigation—Of Moral Right and the Lanham Act*, 125 U. PA. L. REV. 611, 633 n.108 (1977). Amarnick, *supra* note 40, at 42, states that certainly the transformation of a theatrical movie into a television broadcast is a transfer of medium as it involves fitting the movie "into the timing pattern and advertisement structure of commercial television."

53. Giocanti, *Moral Rights: Authors' Protection and Business Needs*, 10 J. INT'L L. & ECON. 627, 640 (1975): "A distinction must be made among the rights to reproduction, repre-

time segments is just as vital to advertisers as commercials.

One writer has suggested that a user who buys an already completed work for distribution in the medium for which it was created has no need to invest additional creative or interpretive effort since the work is being put to the use the author intended and should therefore have no editing rights.⁵⁴ By analogy, although theatrical film may be a different medium from television, most theatrical films are intended to be shown on television and broadcasters are buying already completed works which really require no further creative investment by the broadcaster. Of course, this would necessitate a change in reasoning as to what adaptation to a "new" medium really entails.

What the DGA proposal is actually seeking to accomplish is analogous to a part of the civil law known as "moral rights."⁵⁵ The right to prohibit unauthorized editing of any work of art is a central tenet of the moral rights doctrine. The main components of the moral rights doctrine include (1) the right to determine when or whether to publish the work; (2) the right to be credited as the author of the work and to prevent false attribution of a work not one's own; and (3) *the right to protect the integrity of the work and to prevent unauthorized alterations to the work.*⁵⁶ [Emphasis added.] By demanding that their films be shown on television with the fewest possible cuts, the directors are defending the integrity of their works. If successful, the DGA would partially validate a doctrine that American law has refused to recognize either judicially or legislatively.⁵⁷

sensation and adaptation. . . . In the United States courts have stated that a reproduction of a work shall adhere strictly to the original work." *Id.*

54. Amarnick, *supra* note 40, at 44-45.

55. Giocanti, *supra* note 53, at 627. Moral rights are premised on the belief that a creator has certain personal rights in the work of art created which supercede the economic interests protected by copyright. At least in theory, moral rights are personal, perpetual, inalienable and unassignable and cannot be abandoned by the author by contract or will. DaSilva, *supra* note 38, at 4-5. The doctrine arose in France during the 18th century and has been adopted by most civil law countries in Europe and South America. *Id.* at 5.

56. Diamond, *supra* note 37, at 245.

57. Laws embodying moral rights principles have been passed by the California and New York legislatures but are applicable only to works of fine arts, not motion pictures. See the California Art Preservation Act of 1979, CAL. CIV. CODE § 987 (Deering Supp. 1982); N.Y. GEN. BUS. LAW § 228-m (1983).

Since the adoption of the 1976 Copyright Act, a proposed federal amendment for a limited extension of moral rights has been presented to four different Congresses, however there has been no action taken. Comment, *Moral rights and the Realistic Limits of Artistic Control*, 14 GOLDEN GATE U.L. REV. 447, 456 (1984) [cited as Comment, GOLDEN GATE].

The proposed federal "Visual Artists Moral Rights Amendment," which would add a new subsection (d) to § 113 of the 1976 Copyright Act, reads:

Independently of the author's copyright in a pictorial, graphic or sculptural work,

It is this right to protect the integrity of the work that is considered by legal scholars and artists themselves to be the most essential moral right because it gives the artist the right to control the manner in which his work is presented to the public.⁵⁸ Whether or not the DGA is predicating its demand on the moral rights doctrine, the desired result is the same.

The topic of moral rights is a great favorite with scholars.⁵⁹ Most modern writers advocate extending protection of artists' personal rights and point to the film industry as an area of particular concern, both for writers whose works are adapted and for directors whose films are edited when shown on television.⁶⁰ However, the views of the writers are not uniform. Several writers believe that our present law protects artists as well as the moral rights doctrine does in civil law countries.⁶¹ Other writers have expressed concern about the effect of importing the doctrine wholesale into the common law and question whether the doctrine conflicts with the basic propositions of copyright law.⁶² Scholars favoring American adoption of the moral rights doctrine suggest either extending existing common law causes of action such as tort or contract or amending the federal copyright statute.⁶³ The strongest criticism of moral rights obviously comes from producers and distributors who invest substantial sums in making films and contend that the moral rights doctrine

the author or the author's legal representative shall have the right, during the life of the author and fifty years after the author's death, to claim authorship of such work and to object to any distortion, mutilation, or other alteration thereof, and to enforce any other limitation recorded in the Copyright Office that would prevent prejudice to the author's honor or reputation.

H.R. 8261, 95th Cong., 1st Sess. (1977);

H.R. 288, 96th Cong., 1st Sess. (1979);

H.R. 2908, 97th Cong., 1st Sess. (1981);

H.R. 1521, 98th Cong., 1st Sess. (1983).

Comment, *GOLDEN GATE*, *supra*, at 464-65 n.81.

58. DaSilva, *supra* note 38, at 31. Of course, to exploiters of creative works such as producers and publishers, the right of integrity is the most dangerous as it limits their flexibility in adapting the work. Amarnick, *supra* note 40, at 32.

59. For a general discussion of the doctrine and its implications for American law in addition to the sources cited herein, see Roeder, *The Doctrine of Moral Right: A Study in the Law of Artists, Authors and Creators*, 53 HAR. L. REV. 554 (1940); Stevenson, *Moral Right and the Common Law: A Proposal*, 6 ASCAP COPYRIGHT L. SYMP. 89 (1955).

60. Comment, *GOLDEN GATE*, *supra* note 57, at 464. A need for sensitive editing of feature films for television is mentioned as an area of critical concern.

61. See, e.g., Monta, *The Concept of "Copyright" versus the "Droit d'Auteur."* 32 SO. CAL. L. REV. 177 (1959).

62. DaSilva, *supra* note 38, at 55-57.

63. See generally Diamond, *supra* note 37, as one writer who favors extending common law remedies and Amarnick, *supra* note 40, as one who advocates amending the federal copyright statute.

does not adequately consider their interests in exploiting the work.⁶⁴ Indeed, the doctrine did not anticipate the modern process of film production involving many artists and substantial investment by third parties. Most countries have found it necessary to pass special rules applying to film and television. Since France extends the greatest moral rights protection to authors, that country's special rules will be examined.⁶⁵ The moral rights statute recognizes that there may be up to five authors of a film, and limits any one artist's ability to protest a moral rights violation by requiring that the artists act unanimously.⁶⁶ Furthermore, no one has a right to protest until after the work is completed, so the producer is not subject to crippling work stoppages during production.⁶⁷

The concept of multiple authorship is particularly relevant to the DGA proposal. In this respect the DGA proposal would go even further than the moral rights doctrine in that it puts directors' rights above those of other artists. If a theatrical film was successful at the box office, then the television broadcast usually means additional money for the principal actors and the screenwriter as well as the director. It is legitimate to ask if a director's right to protect the integrity of "his" film should exist at the cost of defeating other artists' pecuniary interests in the film, assuming that the network would not broadcast the film if it could not be edited for time.

Another criticism of the moral rights doctrine is that it fails to consider that society also has legitimate interests in works of art.⁶⁸ This, in fact, is the principal difference between American copyright law and moral rights. The American copyright law embodies a constitutionally recognized social purpose and seeks to balance equitably the interests of

64. Indeed, even zealous proponents of *droit moral* have criticized the failure of the French system to reconcile the interests of the business community with those of the artist under contract. DaSilva, *supra* note 38, at 57.

65. Giocanti, *supra* note 53, at 627 n.1.

66. Article 10 of the 1957 French statute which codified moral rights states that cinematographic works "shall be the joint property of the co-authors" and that they "shall exercise their rights by common accord." The French statute of March 11, 1957, *Journel Officiel de la Republique Francaise* [J.O.] 2723 (hereinafter cited as the 1957 Statute. The 1957 Statute will be cited as translated by the English citing sources.) Giocanti, *supra* note 53 at 629. Article 14, paragraph 2 of the 1957 Statute provides: "The authors of a cinematographic work, unless proved otherwise shall be deemed: (1) The author of the script; (2) the author of the adaptation; (3) the author of the dialogue; (4) the author of the musical compositions with or without words especially composed for the work, and (5) the director." Giocanti, *supra* note 53, at 629-30.

67. Sarraute, *Current Theory on the Moral Right of Authors and Artists Under French Law*. 16 AM. J. COMP. L. 645 (1968). Article 16, paragraph 2, of the 1957 Statute states that "the author's rights may be exercised only over the completed cinematographic work." *Id.* at 475.

68. DaSilva, *supra* note 38, at 58.

society, those who use the works of art, and the artist.⁶⁹ Even the advocates of the doctrine admit that an artist's moral right is self-serving, intended to vindicate the artist's personal interests and that it does not balance itself against the interests of contracting parties or even the interests of other artists.⁷⁰

In practice, however, this supposedly inalienable, absolute moral right of an artist to protect his work from unauthorized editing is not nearly as formidable a barrier as the producer fears nor as ultimate a weapon as the artist would like.⁷¹ One writer notes only one French case where an injunction actually blocked a producer (or distributor) from exploiting the work because the re-editing violated the director's moral rights.⁷² Most often the remedy for such violations will be damages, a disclaimer, or the right of the artist to withdraw his name from the project.⁷³ Damages, when awarded, are often nominal and the French courts do not hesitate to throw out frivolous claims brought by writers or directors.⁷⁴

Therefore, in practice, the right is a good deal less absolute than it appears on paper. Not every slight alteration gives rise to a violation of moral rights. Furthermore, the French courts regularly hold that a contracting artist who has not expressly withheld all editing rights has impliedly agreed to minor editing necessary when adapting the work to a new medium.⁷⁵ In essence, this is the same judge-made "transfer of medium" rule applied in American courts.⁷⁶

One American writer on moral rights has suggested that the need to preserve the integrity of certain works is not so strong when multiple copies of the entire work exist and are available to the public.⁷⁷ This is particularly true of motion pictures, where videocassettes, pay-cable services and even revival cinema houses assure the preservation of the theatrical version. One author, in pointing out the difference between film and

69. *Id.* at 55.

70. *Id.* at 57.

71. See generally Lewis, *The 'Droit Moral' in French Law - Part I*, 5 EURO. INTELL. PROP. REV. 341 (1983). "[T]he courts have recognized that there must be limits, or the author would become a sovereign power able to ignore all contractual obligations at a whim." *Id.*

72. "In practice the courts rarely come to the aid of an author who has parted with his financial rights and seeks an injunction solely to enforce his moral right." *Id.* The case was *Productions Fox Europa v. Luntz et la Societe des Realisateurs de Films (Association of Film Directors)*, Court of Appeal, Paris, 24 Feb. 1970, Cassation, 7 Feb. 1973. *Id.* at 343 n.11.

73. *Id.* at 343.

74. *Id.*

75. *Id.*

76. See *supra* notes 45-48 and accompanying text.

77. Amarnick, *supra* note 40, at 44-45.

other art forms blithely stated: "Lopping 10% from a statue would be more likely to have a devastating effect on the work than lopping 10% from a two hour movie."⁷⁸

If adopted, the DGA proposal is likely to have some impact on the kind and even the number of movies available for television broadcast. One network executive pointed out that the directors may be cutting off their noses to spite their faces. For some years now, the sale of television rights has been an effective financing tool, often providing up to one-half of the production budget.⁷⁹ Even with the increased importance of products such as videocassettes, the network television sale is not insignificant. If the networks were subject to a strict ban on editing for time, they would be reluctant to make pre-sale agreements unless they could strictly limit the length of the film prior to production—something directors maintain is impossible to do.⁸⁰ The cost of strictly interpreting a director's moral right to preserve the integrity of his film might well be to limit the opportunities the director has to get his work produced.⁸¹

Practically speaking, introducing the topic to negotiations is a far cry from having the networks accept the DGA proposal. The networks are not likely to give up their insistence on maintaining time segments nor are they likely to volunteer to insert fewer advertising minutes to accommodate lengthy movies. Since standards and practices cuts must be justified, the networks would, under the DGA plan, probably opt not to buy any film which exceeded the allotted time segment.

Moreover, the directors' proposal comes at a time when the demand for movies on network television is particularly flat. Videocassette rentals, pay-cable services and the networks' own increase in miniseries programming have resulted in fewer movies being bought by the networks and at lower prices than in 1982 when "Reds" was sold.⁸² Therefore,

78. Treece, *American Law Analogues of the Author's "Moral Right,"* 16 AM. J. COMP. LAW 487, 505 (1968). Not surprisingly, directors do not see a difference: "What would you think of a guy who chops two feet off Michelangelo's statue of David because the ceiling is too low?" asks director Milos Forman. "Would you think he's barbaric? Uncivilized? That's the same thing these people are doing." Friendly, *supra* note 4, at 9, col. 6.

79. Conversation with network executive who did not wish to be quoted. (Feb. 4, 1986.)

80. Beatty's position, according to his attorney Burt Fields, was that "you can't cut movies like sausages to fit preconceived time slots." Friendly, *supra* note 8, at 1, col. 2.

81. Amarnick, *supra* note 40, at 40.

82. Nicholas Counter, President of the Alliance of Motion Picture and Theatrical Producers (AMPTP) noted that "videocassettes and pay-tv are . . . driving down the price of pictures sold to free television." Address to AMPTP, *reprinted in* Variety, Oct. 24, 1985, at 18, col. 5. Furthermore, in 1985-86 the networks will offer a total of 116 hours of new miniseries programming. Gendel, *Miniseries—A Quick Ratings Fix*, L.A. Times, Oct. 15, 1985, § VI (Calendar) at 1, col. 1.

there is little, if any, incentive for the networks to agree to the DGA demand.

At the January 1986 meeting of the National Association of TV Program Executives (NAPTE), an alternative solution to the problem of editing films for television was suggested.⁸³ It is not known if this alternative was initiated because of negative network reaction to the original DGA proposal. However, at the NAPTE meeting, directors Warren Beatty, Milos Forman and Mark Rydell appearing as "official" representatives of the DGA, but expressing their own opinions, suggested a labeling approach by which a disclaimer would tell the audience if the movie was uncut, cut with the director's input, or edited without the director's cooperation.⁸⁴ Once again the directors stressed that their concern was not censorship, but rather the practice of editing movies to meet time constraints without informing the public.⁸⁵

Some have questioned whether the broadcasters would accept this proposal since it implies that a director objected to the broadcaster's version of a film. It is also uncertain whether directors would provide versions of the film that meet the broadcaster's needs.⁸⁶ At any rate, this meeting was a constructive attempt to open a dialogue between the two camps. The limited state moral rights laws specifically exclude motion pictures. The federal Copyright Act is unlikely to be amended in the near future. Most courts, until recently, have been reluctant to even discuss moral rights, let alone find ways to extend the common law to apply them.⁸⁷ Accordingly, the DGA seems to have recognized that the best way to address entertainment problems is from within the industry.⁸⁸

Lately, there are encouraging signs that some television stations are sympathetic to the directors' plight. For some time the Los Angeles independent stations, KTLA and KCOP, have been limiting commercials to two interruptions per film. Both stations broadcast many more films than the networks: a feature film every weekday night and three to four films a day on weekends. Both stations have started successfully bidding against the networks for the first television release of recent films. "The French Lieutenant's Woman" is an example of a film which appeared

83. Daniels, *Directors Seek TV Disclaimer on Edited Films; Eye '86 Pact*, Variety, Jan. 22, 1986, at 32, col. 1.

84. *Id.*

85. *Id.* at 32, col. 3.

86. *Id.* at 32, col. 2.

87. The *Gilliam* case, *supra* note 30, is a notable recent exception in its favorable discussion of moral rights and its extension of the Lanham Act to protect artists' integrity and paternity interests.

88. Comment, *GOLDEN GATE*, *supra* note 57, at 465-66.

first on an independent station. On February 18, 1986, "One Flew Over the Cuckoo's Nest" was shown on KTLA uncut and uncensored. The DGA took full-page ads in the trade papers saluting KTLA "for its enlightened position in its support of the creative artist."⁸⁹

The best news for the DGA is that the ratings were among the highest KTLA has ever had.⁹⁰ Nothing is more likely to influence the networks to change their editing practices than the proof that the public knows and appreciates having feature films shown uncut. Audience response reflected by high ratings translates into advertising dollars. If the large independent stations continue to obtain first-run films and get higher ratings by showing them in their entirety, the networks will be under pressure from their advertisers to follow suit.

Ironically, the same crass commercialism that Beatty cited as the reason for the proposed cuts to "Reds"⁹¹ may be the very force that will change the networks' practice of editing for time. An aroused and sensitized public could make advertisers and networks alike want to be known for only sponsoring and showing theatrical films in their entirety.

Nevertheless, in the absence of such voluntary adoption by the networks, the question remains whether directors should have the right to prohibit editing of their films shown on television either by common law or by adopting some version of the moral rights doctrine. No one questions that directors, rightfully, resent their films being cut for time on television, particularly considering the purely philistine reasons for such cuts. But whether this resentment rises to the level of an absolute right, including the right to prevent the film being shown at all, raises serious questions. It may be that the minor cuts made to the motion pictures, whatever the cost in aggravation to the directors, are outweighed by the benefit the public receives by having movies shown on free television.

Before one advocates too quickly making the DGA proposal an absolute right, akin to the moral rights doctrine, perhaps the net effect of *Beatty* should be examined. The fact is that "Reds" has yet to be shown on either network or independent free television. ABC and the other networks have not yet given way on requiring strict time segments. Before all directors are given a similar right to control time cuts, the effects this may have on the choice of available movies for network televi-

89. Hollywood Reporter, Feb. 20, 1986, back page. KCOP followed shortly by broadcasting "All That Jazz" uncut and uncensored.

90. Data from radio broadcast on Los Angeles station KNX, by Gary Franklin, entertainment commentator, Feb. 20, 1986.

91. Harmetz, N.Y. Times, *supra* note 19, at 18, col. 6.

sion, and the interference with the usual contract expectations of producers and other investors in film, must be carefully weighed.

One writer in the Los Angeles Times seemed to think that *Beatty* produced a patented Hollywood ending because in his opinion everyone involved came out a winner.⁹² Hardly. Almost everyone involved lost. Paramount got an option on "Dick Tracy" which it is unable to exercise since Warren Beatty has been unavailable. Paramount did get its film back and is free to make another television deal. However, prices for television licenses have fallen drastically since 1982, so that is really not an advantage. ABC won because it did not have to pay a price that would be inflated by today's standards. Still, prior to the arbitration, ABC intended to broadcast the edited "Reds" so the advertising must have covered its costs. But the biggest losers were the considerable numbers of Americans who did not see "Reds" in a movie theater, do not own a videocassette recorder or subscribe to pay television, but conceivably would have watched when "Reds" came into their living room for free. Perhaps under those circumstances, a million dollars a minute for directorial pride may be too high a price for the public to pay.

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92. Friendly, *supra* note 4, at 9, col. 6.

