

# Lawyers For The Talent

by

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# Chapter 1

## Law & Business For Artists

by Richard Dooling

### Deal Obligations

**Entertainment Contract Obligations** Here we examine contract obligations, especially in the publishing and film industries, and the reading assignments link to sample book contracts and Authors Guild materials.

Instead of asking: Did the parties make a deal? In the materials collected here we ask: Has a party breached the contract?

### Contract Obligations

- For Rights
- For Talent

### Issues Commonly Disputed

- Creative input and control.
- Moral standards.
- Noncompete agreements.
- What is “satisfactory” work product?
- What is is “best promotional efforts”?
- How to calculate “net profits” or royalties?

## Performer/Author Obligations

When contracts deal with “fuzzy” obligations like creative control or “moral behavior” or satisfactory work product the language is often vague and speculative. If called upon to interpret such language, courts often look to the course of performance between the parties under contract and industry customs and usage. How have the parties dealt with each other in the past? Yes, but also how the industry as a whole deal with these matters.

As the Restatement of Contracts 2d puts in section 202 “Rules in Aid of Interpretation”:

Where an agreement involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection is given great weight in the interpretation of the agreement.

Wherever reasonable, the manifestations of intention of the parties to a promise or agreement are interpreted as consistent with each other and with any relevant course of performance, course of dealing, or usage of trade.

[Restatement 2d Contracts § 202](#)

## Effect of a Writing

A writing helps courts divine what the parties had in mind:

When the parties have adopted a writing as a final expression of their agreement, interpretation is directed to the meaning of that writing in the light of the circumstances ... The circumstances for this purpose include the entire situation, as it appeared to the parties.

[Restatement 2d Contracts § 202](#)

But situations and circumstances change, sometimes dramatically, from the time the parties enter into their original agreements and the time a movie gets released (sometimes years later).

Take a movie like *Brokeback Mountain*. It began as a little “arthouse” film at Focus Features, directed by Ang Lee and starring Heath Ledger and Jake Gyllenhaal. Other stars, like Randy Quaid, agreed to star in the film, accepted low salaries, and secured no share of movie profits, because the producers told these minor players that *Brokeback* would be a small, arthouse movie. When

*Brokeback* was a box office hit, Quaid sued, later withdrawing and possibly settling, the lawsuit. As described in the *New York Times*:

In his lawsuit, Mr. Quaid claims he was tricked into accepting a tiny (unspecified) fee for the part of Joe Aguirre, the rancher who hires the shepherds played by Heath Ledger and Jake Gyllenhaal, because the director, Ang Lee, told him the movie was being made on a shoestring budget by Focus, the arthouse division of Universal Studios. And while the production budget was very low, \$14 million according to documents filed in Canada where the movie was shot, the lawsuit claims that Focus knew all along that it would throw millions — \$30 million, according to the complaint — into marketing the film.

The complaint says that the defendants, in this case Focus and its recent co-presidents David Linde and James Schamus, “have enriched themselves to the tune of approximately \$160 million in worldwide gross box office receipts on the back of actors who were convinced to cut their fees purportedly to ensure that the film reached the screen.” Far from being a labor of love, it says, the picture was a “movie laundering” scheme that “in reality, had studio backing and would be exploited using traditional studio marketing and distribution techniques.”

#### [Lawsuit Over ‘Brokeback Mountain’ Reveals Unease Over Pay for ‘Arthouse’ Films](#)

With a budget of roughly \$14 million, *Brokeback Mountain* has since grossed \$175 million worldwide, \$83 million in the USA alone. It won three Oscars.

Despite what transpires from the time contracts are signed to opening day and beyond:

In interpreting the words and conduct of the parties to a contract, a court seeks to put itself in the position they occupied at the time the contract was made.

#### [Restatement 2d Contracts § 202](#)

Moviemaking is an uncertain business to say the least, where most projects don’t earn back the money the studios spend on them. And a few mega hits pay the freight for many other failures.

## Interpretation of Ambiguous Terms

All else being equal, courts will favor the non-drafting party's interpretation of disputed contract provisions because:

- Drafter is more likely to protect himself;
- Drafter is more likely to know the term is vague or ambiguous;
- Drafter may have deliberately been used obscure language (so she could decide at a later, more opportune time on the meaning of the term).

We have seen the possible advantages of having unsettled contract terms, especially about something difficult to define, like creative control, or how much nudity is too much, which as we know from Supreme Court opinions is tough to define. This creates fuzzy contract terms which the talent might later exploit to get out of a deal when something more attractive suddenly appears.

Courts also favor the underdog in contract negotiations, especially if the party who wrote the contract also had a stronger bargaining position at contract time. So if an ambiguity pops up in a personal service contract courts will often interpret those contract terms in favor of the party who bargained from the weaker position.

## Creative Control

If a producer doesn't like the way the project is going, does that mean the performer can be sued for breach? Making a movie that costs tens of millions of dollars and can be very stressful for the filmmakers. Creative disagreements and arguments about the budget or filming schedules are common. When do these disputes ripen into breaches of contracts?

Under the California Labor Code, section 2924, an employer can fire an employee at any time for willful breach or "in case of his habitual neglect of his duty or continued incapacity to perform...."

Hornbook contract law requires that any alleged breach be "material" before the contract can be terminated at the violator's expense.

Is the provision of the contract material?

Factors used to test for materiality:

1. Extent to which non-breaching party is deprived of a benefit reasonably expected under the contract;
2. Whether the non-breaching party will be adequately compensated for his/her loss through a damage award;
3. Degree to which the performer has partially performed his/her obligations under the contract;

4. Willfulness of the breach.

### ***Goudal v. DeMille Pictures Corp.***

California Court of Appeals (1931)

- [Case on Westlaw.](#)
- [Jetta Goudal's career.](#)

Another oldie but goodie, this one about a famous lawsuit between a famous actress and the famous director who wanted to control her.

When she died in 1985, the Los Angeles Times described [Jetta Goudal](#) as “the tall, regal French stage actress who became a popular screen siren in the heyday of silent pictures.”

Born in Versailles, Miss Goudal came to the United States after World War I. She had appeared on stage in France and elsewhere in Europe and began her career in this country on Broadway. She moved to films in 1923 with “The Bright Shawl” and for the next 10 years made a string of successes under the aegis of such famous directors as D.W. Griffith and Cecil B. DeMille. Her early silent films included “The Green Goddess,” “Salome of the Tenements,” “The Forbidden Woman” and “Lady of the Pavements.”

*Life* magazine said that in the 1920s Miss Goudal “was the most alluring femme fatale in silent movies, also the smartest, best dressed and feistiest.”

But she also told *Life*, “I don’t like being called a silent star. I was never silent.” Four years before her death, she appeared in public for DeMille’s centenary tribute in 1981 and with a group of other silent stars at an Academy of Motion Picture Arts and Sciences symposium in 1979.

#### [Silent Film Actress Jetta Goudal Dies](#)

But decades earlier Jetta Goudal had sued DeMille and his company for breach of contract and creative differences in the lawsuit excerpted below.

**Case Excerpts *Goudal v. DeMille***

(In these excerpts, appellant has been changed to DeMille Pictures; and respondent has been changed to Goudal)

FRICKE, Justice pro tem.

This is an appeal from a judgment for plaintiff Goudal in the sum of \$34,531.23 in an action to recover damages for breach of a contract of employment entered into in April, 1925. Under this agreement Goudal was employed by DeMille Pictures as a motion picture actress for one year beginning May 19, 1925, with the option to DeMille Pictures of four yearly extensions of the contract, each yearly extension to be at a specified substantial increase in compensation. Goudal entered upon her duties, and DeMille Pictures twice exercised its option, extending the period of employment to May 18, 1928. On September 10, 1927, Goudal was discharged by DeMille Pictures.

The basic question in this case is whether such termination of the employment of Goudal was wrongful or whether it was justified by acts of the Goudal violative of the terms of the contract. The trial court found that Goudal had not violated the contract, and that her discharge was not justified....

The claim that Goudal failed or refused to perform her parts as requested is based upon many incidents set forth in detail in the record. They relate to occasions when the Goudal, instead of unquestioningly performing as directed by the director in charge, called attention to inconsistencies, inaccuracies, possible improvements, or lack of artistic quality in the performance called for as they appeared to her. In some instances this resulted in the suggested change being made by the director without argument; in other cases the change was made after some argument between them. In most instances where the director did not make the suggested change it appears that Goudal took the question up with the president of the DeMille Pictures corporation, and in a substantial number of instances he agreed with her and the changes were made. In other instances he did not agree. This presents the question, Was Goudal compelled by the contract to go through her scenes as a mere puppet responding to the director's pull of the strings, regardless of whether or not he pulled the right or the wrong string, or was she called upon by the language and spirit of the contract to give an artistic interpretation of her scenes, using her intelligence, experience, artistry, and personality to the ultimate end of securing a production of dramatic merit? We believe that the latter is the correct interpretation.

Suggestions and even objections as to the manner of enacting the various scenes, when made in good faith, were in the interest of the employer ... By the very wording of the contract "it is agreed that the services of the artist herein provided for are of a special, unique, unusual, extraordinary and intellectual character." Even without the evidence contradicting that of DeMille Pictures, the



trial court was more than justified in finding that it was not true that Goudal had refused or failed to perform her part of the contract.

Some of the incidents, stressed by DeMille Pictures as instances of a failure of Goudal to perform her contract, turn out, when reference is had to the transcript, to be dependent upon the opinion of the director as to whether Goudal performed to the best of her ability; others were dependent upon the feeling of the particular director as to whether he was or was not satisfied. The declarations of several of the directors as to their dissatisfaction with the work of Goudal is rather inconsistent with the testimony elsewhere of one of them that the picture "White Gold," in which Goudal performed under his direction, was "the best picture I ever will make," and the testimony of the director of her last picture, that he considered it one of his best American pictures. When considering the testimony of the directors who expressed dissatisfaction with the performance of her parts by Goudal, one may well wonder who was temperamental and out of step when we note in connection therewith that in the picture in which Cecil De Mille directed Miss Goudal there was no trouble whatever. There is, furthermore, a conflict in the evidence as to whether the performance given by Goudal was to the best of her ability and of an artistic character. In this conflict the trial court was fully sustained in its findings against DeMille Pictures.

The remaining ground urged as justifying her discharge is that Goudal on certain occasions was late in arriving on the sets at the time designated by her employer. The instances cited were explained by the testimony for Goudal as being due, not to any neglect or intentional absence, but to duties relating to costumes which had been voluntarily assumed by Goudal with the approval of DeMille Pictures, though not required by the contract, delays in appearing on the set due to the necessary consumption of time in the donning of a special wig, and, in the last picture, the only one made after the exercise of the last option by DeMille Pictures to re-employ Goudal for another year, delays due to the large number of costumes used, in one instance, a failure of her maid who forgot an article of clothing, and the delay of DeMille Pictures in delivering to Goudal the script, which determined the costumes required. It should also be noted that as to this last picture the director in charge, when Goudal expressed regret at being late, stated to her that he understood, and that never before had he had as little trouble as he had with her.

The case of *May v. New York Motion Picture Corporation*, 45 Cal. App. 396, so strongly relied upon by DeMille Pictures, is easily distinguishable from the case at bar. The fact that the maximum salary under the contract of the plaintiff there was \$125 per week as compared to the maximum salary of Goudal of \$5,000 per week sufficiently discloses the comparative skill of the respective artists. In that case also the plaintiff repeatedly was from one and a

half to two hours late in arriving at the place of employment, on at least one occasion failed to appear after she had been notified by telephone, and on the three days preceding her discharge failed to appear for work at all, her reason for not appearing on those days being that her contract did not require her presence, a reason not sustained by the court's interpretation of the contract. The May Case involved the willful disobedience of a reasonable order incident to the employment justifying the plaintiff's discharge. There is in the case at bar no willful tardiness nor invalid excuse for absences, the instances of tardiness here being covered by the general description that those delays were occasioned by the requirements of the scenes to be enacted on those particular days, delays while Goudal was actually engaged in performing her employer's business.

It may also be noted that the references to alleged breaches of the contract consist largely of incidents prior to May, 1927, when DeMille Pictures, for the second time, had exercised its option to continue and extend the contract for another year, and by which time Goudal had completed seven of the eight pictures in which she performed for DeMille Pictures. It is rather difficult to reconcile as sincere the DeMille Pictures's criticism and faultfinding as to Goudal's services in the pictures made during the two years prior to May, 1927, with the fact that in that month DeMille Pictures voluntarily availed itself of its option to secure the talents and services of Goudal for another year. Particularly is this significant when we consider that the salary under the latter option would amount to \$39,000 more than Goudal's salary for the preceding year. This circumstance alone would fully justify the trial court in considering as of little or no weight the testimony as to alleged breaches of contract prior to May, 1927. The exercise of the option not only evinced a desire on the part of DeMille Pictures to retain Goudal's services, but expressed an approval of the manner in which she had performed her services in the past, and was an indication that a continuation of the former services was desired. Having thus placed the stamp of approval upon Goudal's conduct and services as rendered prior to May, 1927, it is not reasonable that a continuance of such services and conduct was unsatisfactory, and, from DeMille Pictures's viewpoint, constituted a breach of the contract warranting Goudal's discharge. Furthermore, the exercise of the option may be considered as a declaration by act that the past conduct of the artist was not such conduct as was intended by the contracting parties as a justification for the termination of the contractual relations. This would be particularly true where, as here, the duties of the performing party are described in the contract by such general phraseology as that the artist shall render the services "conscientiously" and "artistically." It might well be said that an artist who performed her part as directed without remonstrance or suggestion, in spite of the fact that the action was inartistic, crude, and illogical, would not be rendering services either conscientious or artistic in character, while the artist

who made an effort to secure a change in the action to produce an artistic result would be complying with the letter and spirit of the contract. These matters and the intent and good faith of the Goudal were matters of fact to be passed upon by the trial court, and, since their decision adversely to DeMille Pictures is sustained by the evidence, the findings of the trial court are not subject to review here.

To constitute a refusal or failure to perform the conditions of a contract of employment such as we have here, there must be, on the part of the actress, a willful act or willful misconduct *May v. New York Motion Picture Corp.*, 45 Cal. App. 396; *Ehlers v. Langley & Michaels Co.*, 72 Cal. App. 214, 221), a condition which is absent when the actress uses her best efforts to give an artistic performance and to serve the interests of her employer. The trial court was fully warranted by the evidence in finding that Goudal neither failed nor refused to perform the services required of her under the contract.

Even in the most menial forms of employment there will exist circumstances justifying the servant in questioning the order of the master. Would the discharge of a ditch digger be justified if, instead of immediately driving his pick into the ground at the point indicated, he in good faith suggested to the employer that the pipes they were to uncover lay on the other side of the highway? And when the employment is of the services of “a special, unique, unusual, extraordinary and intellectual character,” as is agreed by the contract here under consideration, to be rendered “conscientiously, artistically and to the utmost of her ability,” sincere efforts of the artist to secure an artistic interpretation of play, even though they may involve the suggestion of changes and the presentation of argument in favor of such changes, even though insistently presented, do not amount to willful disobedience or failure to perform services under the contract, but rather a compliance with the contract which basically calls for services in the best interests of the employer. What may in the case of the extra girl be rank insubordination because of a refusal to do exactly what she is ordered to do by a director may be even praiseworthy co-operation in the interests of the employer when the refusal is that of an artist of the exceptional ability expressly stipulated in the contract here before us....

The judgment is affirmed.

### Notes on *Goudal v. DeMille*

Goudal made a deal with DeMille pictures. Demille exercised an annual option to renew the deal. Twice! Midway through the 3rd year (1927), the studio terminated Jetta Goudal's contract. Goudal won a trial verdict for \$34K for wrongful dismissal. DeMille appealed.

DeMille's argument on appeal was that Goudal violated her obligations under the contract, justifying its termination. Goudal's contract terms were very

general. She had agreed to render the services “conscientiously” and “artistically” and the parties “agreed that the services of the artist herein provided for are of a special, unique, unusual, extraordinary and intellectual character.”

DeMille took a “my way or the highway” approach because he felt that Goudal was not obeying his wishes. Was Goudal a mere puppet responding to the director’s pull of the strings, regardless of whether he pulled the right or the wrong string? Or was she called upon to give an artistic interpretation using her intelligence, experience, and artistry?

The biggest problem for Director Demille was that the evidence he proffered to support his claims that Goudal had willfully breached her contract with him consisted of incidents that had happened **before** May, 1927, the date when DeMille Pictures exercised its option to hire Goudal for a second time and gave her a raise.

The court ruled in favor of Goudal because DeMille was unable to produce evidence of Goudal’s willful disobedience during the most recent contract term.

Some directors try for a first among equals camaraderie, and some are tyrants and perfectionists who fire anybody who disobeys. Some actors passively do what they are told; most would like a chance to try it their way. These relationships are far too complex and personality-driven to be regulated by the courts.

Screenwriters often experience the same tension when producers or studio executives give them notes and ask for something specific to be done with the screenplay. Is the screenwriter a secretary or scrivener who must bow to the wishes of others on the creative team? Most producers and directors don’t want a passive writer, they’d like a collaborator. In other words, the writer is expected to politely push back and offer her own ideas and then the collaborators compromise.

### **Morals Clauses**

A morals clause is a provision in a contract or official document that prohibits certain behavior in a person’s private life. They deal with behavior such as sexual acts and drug use. They were commonly used in the contract between actors/actresses and film studios to uphold the public image sought to be portrayed by the studio. Morals clauses are included today in certain contracts of public figures, such as athletes, actors/actresses, and others. A morals clause may also be made part of a judgment for divorce or marital dissolution, typically preventing unmarried cohabitation or overnight guests of the opposite sex while children are present.

### [Morals Clause Law & Legal Definition Morals Clauses.](#)

In 1921 and 1922, American silent film actor, comedian, director, and screenwriter, [Roscoe “Fatty” Arbuckle](#) endured three widely publicized trials for the rape and manslaughter of actress Virginia Rappe. Rappe had fallen ill at a party hosted by Arbuckle at the St. Francis Hotel in San Francisco in September 1921; she died four days later. Arbuckle was accused by Rappe’s acquaintance of raping and accidentally killing Rappe. After the first two trials, which resulted in hung juries, Arbuckle was acquitted in the third trial and received a formal written apology from the jury.

Because of the media outcry attending the trials, Universal Studios decided to add a “morals clause” to its performer contracts that read as follows:

The actor (actress) agrees to conduct himself (herself) with due regard to public conventions and morals and agrees that he (she) will not do or commit anything tending to degrade him (her) in society or bring him (her) into public hatred, contempt, scorn or ridicule, or tending to shock, insult or offend the community or outrage public morals or decency, or tending to the prejudice of the Universal Film Manufacturing Company or the motion picture industry. In the event that the actor (actress) violates any term or provision of this paragraph, then the Universal Film Manufacturing Company has the right to cancel and annul this contract by giving five (5) days’ notice to the actor (actress) of its intention to do so.

### [From Wikipedia on Fatty Arbuckle](#)

Shortly thereafter, legendary baseball player Babe Ruth also had a “morals clause” added to his contract with the Yankees.

## **What About Political Activity?**

Sexual or moral misbehavior is tough enough to define. What about unpopular political positions?

During the [“Red Scare” of the 1950s](#), when Congressional Committees investigated the motion picture industry for evidence that it had been infiltrated by Communists, Hollywood screenwriters and actors were “blacklisted” and prohibited from belonging to the Hollywood guilds and being paid by studios from practicing their craft.

This movie looks promising and tells the story of [Dalton Trumbo](#), a Hollywood screenwriter, blacklisted during the 1950s: [Bryan Cranston Goes](#)

From Drug Lord to Communist in Blacklist Saga 'Trumbo': "A Socialist, But He Loved Being Rich"



The following case dramatizes the blacklisting of another screenwriter, Lester Cole, one of the infamous Hollywood Ten, along with Dalton Trumbo.

*Loew's, Inc. v. Cole*

United States Court of Appeals Ninth Circuit (1950).

- [Case on Westlaw.](#)

In 1947, the Committee on Un-American Activities (HUAC) of the House of Representatives conducted a public hearing, at Washington, for the purpose of inquiring into alleged Communist infiltration into the motion picture industry. Among dozens of witnesses called, beginning October 20, and concluding October 30, were Lester Cole (a screenwriter), and a number of the executives of the appellant, Loew's, Incorporated, a Delaware Corporation, engaged, under the trade name of Metro-Goldwyn-Mayer, in the production and distribution of motion pictures. Cole had been employed by Loew's as a writer of screenplays since 1945.

At the hearing Cole, and some nine other screenwriters, who came to be known in the current newspaper accounts of the hearing (which had extremely wide notice in the press and on the radio) as the ten "unfriendly" witnesses, were accompanied by counsel who challenged the validity of the investigation and the power of the Committee to conduct the inquiry or to issue the subpoenas served,

by a so-called motion to “quash the subpoenas”. When Cole was called to the stand he was asked “Are you now or have you ever been a member of the Communist Party?” The statement he then made was interpreted by the committee as a refusal to answer, and he was cited on November 24, 1947, by the House of Representatives for contempt, and was thereafter indicted for contempt of Congress.

Shortly thereafter, MGM informed Cole that he would have to return to testify before HUAC that he was not now a member of the Communist party. When Cole refused, MGM fired him under the standard morals clause of his personal service contract, which was almost identical to the clause found in Fatty Arbuckle’s contract:

The employee agrees to conduct himself with due regard to public conventions and morals, and agrees that he will not do or commit any act or thing that will tend to degrade him in society or bring him into public hatred, contempt, scorn or ridicule, or that will tend to shock, insult or offend the community or ridicule public morals or decency, or prejudice the producer or the motion picture, theatrical or radio industry in general.”

Cole filed suit in federal district court for wrongful dismissal. The trial court found that Cole had acted within his rights and had not violated the morals clause to which we shall presently refer.

MGM appealed and the Ninth Circuit Court of Appeals reversed, holding that Cole should have heeded his employer’s command to return to HUAC and testify truthfully about his membership or lack of it in the Communist Party:

A film company might well continue indefinitely the employment of an actor whose private personal immorality is known to his employer, and yet be fully justified in discharging him when he so conducts himself as to make the same misconduct notorious.

- [Morals Clauses.](#)
- [Hold That Tiger: After Woods Scandal, More Lawyers Teeing Up “Morals Clauses”](#)

Blacklisting of the Hollywood 10, including such prominent writers as Dalton Trumbo and Ring Lardner, and the infamous witch-hunts conducted by the House Un-American Activities Committee (HUAC) (one of whose members was a newly elected congressman named Richard Nixon) were dark periods in our nation’s history and in the entertainment industry.

If you have trouble believing that writers could be blacklisted, hauled before Congress, and asked about their party affiliations in the United States of America, try imagining Ronald Reagan as a liberal Democrat and president of the screen actors guild (both of which he was at the time).

As to Senator Joseph McCarthy's "Red Scare" demagoguery, the studios took the position that HUAC's hearings were nonsense and that they were not going to penalize talent for refusing to answer questions about their political affiliations. But when public pressure started to build in the form of boycotts by the American Legion and other politically powerful groups, the box office was threatened, and the studios caved.

### **NBC's Brian Williams**

NBC Nightly News anchor Brian Williams' recent mythomania about his imaginary adventures that didn't quite actually happen to him while he was covering the Iraq war for NBC news are the latest example of a moral clause invocation.

[Contract 'morality clause' could determine Brian Williams' future](#)

By Emily Smith February 15, 2015.

Sources say that the "public morals" clause that appears in NBC News employees' paperwork includes the verbiage:

If artist commits any act or becomes involved in any situation, or occurrence, which brings artist into public disrepute, contempt, scandal or ridicule, or which justifiably shocks, insults or offends a significant portion of the community, or if publicity is given to any such conduct ... company shall have the right to terminate.

Reports have said NBC execs seriously considered firing Williams before settling on the suspension.

NBC declined to comment, and Barnett didn't get back to us.

## **Studio-Publisher Obligations**

### **Satisfactory Work Product & The Recording Industry**

Neil Young has always followed his restless muse into whatever project caught his fancy—a fact that music mogul David Geffen apparently didn't take into consideration when he signed Young to a deal with his new company in the early '80s. Young's first effort for Geffen was 'Trans,' a disastrous foray into electronic music. Young



then turned in 'Everybody's Rockin', a rockabilly collection. Geffen filed suit against Young on Dec. 1, 1983, arguing that the albums he had delivered were "unrepresentative" of his music and that he had violated his contract. Young countersued, claiming his contract gave him complete artistic freedom. The suit eventually settled, with Geffen apologizing to Young. Bizarrely, Young recorded two more albums for Geffen before returning to Reprise.

### [Geffen Records vs. Neil Young – Infamous Rock Lawsuits](#)

Arguably Geffen sued Neil Young because Young refused to "be himself", and this lawsuit is just one of many suits brought by artists who are committed by contract to certain record companies, but those companies tend to demand that the artist stick to the formula that sold on the first few albums. *Newsweek* magazine described another conflict between Geffen and the grunge rock band Nirvana:

Alternative rock and big business are strange bedfellows, and it seems they've finally woken up and stared each other in the face. Late last month the Chicago Tribune reported on rumors that the world's pre-eminent post-punk band, Nirvana, had returned from the studio with an abrasive uncompromising album-an album that Geffen Records found "unreleasable." Both the label and Nirvana's management company, Gold Mountain, insist that the Geffen staff hasn't even heard the album. But sources confirm the Tribune's story. And Nirvana has now agreed to commission a hit-making engineer named Andy Wallace to tinker with the band's tapes and give them a more commercial sheen. Geffen Records faces a possible lawsuit from the record's producer, Steve Albini. Nirvana, whose success inspired a generation of alternative bands to migrate to major labels, faces a chorus of "Say it ain't so."

### [You Call This Nirvana?](#)

Even ex-Beatle John Lennon reportedly wondered aloud "How much longer can I go on pretending that I'm 19 years old?" The talent typically wants to grow and explore, change their style, and record more "mature" perhaps more difficult music. But record companies tend to want more of whatever sold last time.

The same often happens to authors who have early successes with novels written in a certain genre or style. What happens when a hot new novelist

presents their publishers with the third book in a three-book deal and it's something altogether different, perhaps even experimental.

These conflicts are as old as the industries who struggle with them, and at bottom represent the time-honored tension between artistic creativity and commercial viability. These clashes probably never go away in the book and music industries, but they are less of a problem in the movie industry.

Paul Weiler puts it this way:

Whether the product is satisfactory does tend to be a greater source of conflict in literary publishing and sound recording than in the film industry. One reason is that the book and music settings involve bilateral transactions with clearly definable entities on each side. In music, the artist has to answer to the label, in books, the author answers to the publishing house. In movies, however, while one side of the transaction has a clearly delineated entity (the studio), the other side includes a host of people working toward completing the movie. Should the studio hold the producer accountable for an unsatisfactory product? The director? The screenwriter? The actor? The gaffer? The legal and practical problems in singling out any one party as contractually responsible for a bad movie result are daunting and ultimately prohibitive.

*Entertainment, Media, and the Law: Text, Cases, and Problems*, 4th edition., by Paul C. Weiler and Gary Myers (p. 680).

Also, because major motion pictures are so expensive to make, studios tend to supervise production from the beginning and will only “greenlight” each stage of production after careful review. Even after principal photography begins, the studio receives “dailies,” copies of all “footage” shot each day. If there is a problem, or if the filmmakers fall behind schedule, the studio will send representatives to the set to straighten things out before the project gets in serious trouble.

## **Satisfactory Work Product In The Publishing Industry**

### **How Book Advances Work**

Just another reminder about how book contracts work, before taking a look at how these satisfactory work product problems play out in the publishing industry.

Author signs a book contract and agrees to a 15% royalty with a \$120k advance payable as follows:

- 1/3 (\$40k) on signing.
- 1/3 (\$40k) on delivery of the manuscript.
- 1/3 (\$40k) on publication.

(Sometimes these payments will be split into four parts or even five, with payment made on submission of “changes” to the manuscript, or payment made upon publication of the paperback in a hard-soft publishing deal.)

These payments will go to the author’s agent, who extracts her 15% (\$6,000), and then to the author’s lawyer (if the author has one) who takes another 5% (\$2,000).

**Now the question:** What happens if, after the first portion or portions of the advance are paid, the author turns in a manuscript which the publisher does not care for?

### *Harcourt Brace Jovanovich, Inc. v. Goldwater & Shadegg*

United States District Court (SDNY 1982)

- [Case on Google Scholar](#)
- [Case on Westlaw](#)
- [Read about it at NYTimes](#)

#### OPINION

GRIESA, District Judge.

#### FINDINGS OF FACT AND CONCLUSIONS OF LAW

[The issue in this case is whether Jovanovich, Inc. is entitled to rely upon the provision of its contract which provides that the author is obligated to deliver a manuscript satisfactory to the publisher in form and content.]

As we all know, if it can be concluded that the manuscript here was not satisfactory to the publisher in form and content, and if it can be concluded that there was no breach of obligation by the publisher, then the publisher had the right to terminate the contract and to obtain the return of the advance which had been paid...

This is a lawsuit by Harcourt Brace Jovanovich, Inc., a publishing house, against Barry Goldwater and Stephen Shadegg. The case has been tried to the Court without a jury and consequently I am making findings of fact and conclusions of law now. The facts are as follows, and I so find them.

In early 1977 a proposal was submitted to Harcourt Brace Jovanovich, which I will refer to hereafter as HBJ, for the publication of the memoirs of Barry Goldwater.

The proposal was to have Stephen Shadegg act as the actual writer, working closely with Goldwater who was to provide the material and work and comment on the substance of what was presented.

Shadegg had previously had a long relationship with a literary agent by the name of Oscar Collier and he relied on Collier to market this proposal. Oscar Collier was associated as a literary agent with his daughter, Lisa Collier.

The Collier firm submitted the proposal to certain publishers, including HBJ, in early 1977. An editor at HBJ by the name of Carol Hill received the proposal. She talked about it to her editor-in-chief, Daniel Okrent. There was a meeting involving Hill, Okrent and the Colliers. The HBJ people were very enthusiastic and quickly agreed to publish the Goldwater memoirs on the basis of the proposal which had been submitted.

There is testimony demonstrating that although the HBJ people were enthusiastic about having the Goldwater memoirs, they had reservations about the writer Shadegg. There is a dispute as to whether they communicated these reservations to the Colliers. Whether they did or did not communicate the reservations is unimportant. But it is important to note that the HBJ people did have reservations and would have preferred another writer.

However, it is also to be noted that the Colliers furnished the HBJ people with four books previously written by Shadegg, a writer of long experience, who had engaged in journalistic writing as well as having written books, political biographies and so forth. The HBJ people were fully on notice as to exactly the degree of talent possessed by Shadegg.

There was a meeting in Washington, D. C., the main purpose of which was to meet Senator Goldwater. The contract was then signed January 26, 1977. It names Stephen Shadegg and Barry Goldwater as the authors and HBJ as the publisher.

The contract contains the normal provisions about royalties and many other detailed provisions not relevant here. It contains certain paragraphs referring to the concept of the manuscript being “satisfactory to the publisher in form and content,” particularly paragraph 2 which states as follows:

“The author will deliver to the publisher on or before October 1, 1978, one copy of the manuscript of the work as finally revised by the author and satisfactory to the publisher in form and content.”

The agreement provided for an advance totaling \$200,000, a remarkably high advance. \$65,000 was to be paid at the time of contract signing. Another \$75,000 was due on delivery and acceptance of the completed manuscript. The balance of \$60,000 was due on publication.

There was an exchange of letters in February 1977 between Hill and Goldwater in which Hill in effect offered to do a vigorous job of editing and Goldwater made it clear that he welcomed such editing. He stated in his letter of

February 15, 1977 that Hill should not hesitate to criticize or make suggestions, even though he might be a little bullheaded here and there.

The project began between Shadegg and Goldwater. One of the things which was a feature of these memoirs was that Goldwater had over the years collected what he called the Alpha File. It consisted of memos and notes of conversations he had with other political and governmental leaders in the United States and he had dictated these notes and memos and prepared them at the time of various meetings and events.

These items had been collected in the Alpha File and one of the ideas of the memoirs was to publish materials of substance, anecdotes and so forth, from the Alpha File, to the extent they did not involve purely personal information or the normal kind of information which sometimes is held back until the death of certain living people in order not to hurt them.

In any event, materials from the Alpha File were turned over to Shadegg and other materials were given to Shadegg. Goldwater commenced consulting with Shadegg and Shadegg set to work writing.

This process continued over the period of time involved in the lawsuit. Shadegg would write a section and submit it to Goldwater; Goldwater would comment, offer criticisms, provide additional material, and so forth.

On June 22, 1977, Shadegg wrote a letter to Hill enclosing a draft of seven chapters, approximately 30,000 words. At the same time Shadegg sent Oscar Collier the same draft material. The letter to Hill concluded with the following paragraph:

We would be most interested in having your comments and your suggestions. One of the problems we face is how much to put in and how much to leave out. The available material is almost overwhelming. Your objective viewpoint will be extremely helpful.

Hill did not communicate with either Shadegg or Goldwater in response to the receipt of this draft material. This caused understandable puzzlement on the part of Shadegg and Goldwater. They were eager to have her reaction and they did not have it.

Goldwater has made it clear in his testimony in the case that he expects and needs editorial work on the part of a publisher. He has published a number of books and feels the need of editorial work. He expected it here and he was particularly puzzled that none was forthcoming.

Goldwater relied on Shadegg for the principal communications with either the publisher or the agent and, pursuant to this, Shadegg made inquiries of Oscar Collier as to what was going on. Shadegg has testified that he placed one telephone call to Hill at about this time which was not returned. He candidly admitted at trial that he did not act more persistently in going to Hill directly

because he was angry and hurt at the lack of what he considered a normal response.

In any event, in September of 1977, there was a discussion between Hill and Oscar Collier. Hill gave a general unfavorable comment about the seven-chapter draft, criticizing the tone, the lack of drama and what she considered flat writing.

There is a question as to whether Oscar Collier at this point urged Hill to refrain from direct contact with the authors. Hill has testified that she was requested to refrain from such direct contact because Oscar Collier felt that her views were so inflammatory she might disrupt the project.

Oscar Collier has flatly denied that, at this time, or at any time, he urged or requested Hill to refrain from direct contact with the authors.

It is difficult to believe that Oscar Collier requested that there be no direct contact. In any event, both Goldwater and Shadegg had expressly requested Hill's editorial comments, and Collier possessed no authority to countermand these requests.

Even Hill's comments to Collier did not involve normal, detailed editorial work. They did not convey specific comments as to what should be cut or what should be added or what was unclear or any of the other things that one would expect in editorial work.

Consequently, in connection with the first seven chapters, it is clear that Hill did not perform any editorial work, either directly with the authors or indirectly through Collier.

The evidence indicates strongly that Hill was considering, and to some degree pursuing, the idea of replacing Shadegg with another writer.

In late September 1977, an item appeared in the Washington Post indicating that Goldwater was looking for a ghost writer. Goldwater and Shadegg heard about this. They inquired and were told by Hill that there was nothing to it. Hill wrote them a letter of reassurance which indicated that she was in fact enthusiastic about the book and expected that it would be an important one.

Thus, in her only direct contact with the authors at this juncture, Hill was not only withholding her negative views of the draft, she was indicating support and enthusiasm.

Behind the scenes, there were certain maneuvers going on about the possibility of getting a new writer. Apparently there was talk at HBJ on this subject, and the desire for a possible new writer was known. This resulted in some communications with a literary agent about a possible writer by the name of Clay Blair. Hill went so far as to write the agent to try to see if Clay Blair would be available. Hill did not expressly mention the Goldwater project. She spoke in veiled terms, at least to the outsiders. But the point is that a new writer for the Goldwater book was definitely on her mind.

There is in the record a document dated September 23, 1977, which is in

the form of a letter from Hill to Goldwater and Shadegg making complaints about the draft material thus far received. In addition to the negative comments, this document contains a suggestion about a possible third person coming in to assist in the writing. This letter was not sent. The probable reason is that the letter was drafted at about the time that the item appeared in the Washington Post and apparently the plans about the approach to Goldwater and Shadegg about a new writer were thrown awry.

As I have already described, Oscar Collier had received from Hill some general negative comments, which he conveyed to Shadegg and which were in turn conveyed to Goldwater.

There is a letter dated November 14, 1977, to Hill from Lisa Collier indicating that comments had been passed on and that work was going forward.

The intention of Shadegg and Goldwater and their agents was to keep going ahead with the writing in the hopes that whatever problems there were would work out with the further production of manuscript. Obviously, the authors had an obligation under the contract to write and they continued to fulfill that obligation.

In the absence of any editorial work forthcoming from Hill, Shadegg solicited comments from Oscar Collier, who made detailed suggestions on draft material. These comments were not the substitute of editorial work from the publisher. They tended to deal with rather trivial points about precise phrasing and so forth. But at least Shadegg was soliciting what assistance he could from the agent.

On July 13, 1978, 24 chapters were sent to Hill. These were sent by Goldwater. The idea had been adopted that if Goldwater himself submitted the material there might be a better chance of getting some editorial work from Hill. Also it was hoped that the production of a substantial part of the book would encourage some progress with the publisher.

The Goldwater letter of July 13, 1978, concludes with the following:

If you have any suggestions or would like to make some we could arrange to meet in Arizona at your convenience, in Washington or even New York. Let me know your honest opinion of what has been done so far and let me have any suggestions as soon as possible that might be incorporated in further writing.

The letter was not responded to. Hill made no attempt to communicate with Shadegg or Goldwater in order to offer the kind of opinions, suggestions, or comments which had been solicited in the Goldwater letter.

Hill has testified that she felt that the materials submitted in the 24-chapter package were poor and she was very concerned about whether the book could be successfully marketed. She asked two other editors at HBJ to read the materials.

The other two editors were also negative about the contents of the 24-chapter package.

However, as I have said, there was no attempt to communicate with the authors and go over the matter in detail and see what, if anything, could be done to remedy the perceived difficulties.

Hill's communications again were with the agents, particularly with Oscar Collier. She conveyed her negative impression of the 24 chapters in a general way and, at this time, expressly suggested that another writer be brought in. This suggestion was rejected by Oscar Collier.

At this time Hill indicated to Oscar Collier that HBJ would probably not publish the book and would probably reject the manuscript.

Oscar Collier and Hill discussed seeking another publisher. It was indicated to Collier that he was free to do this and Collier, in order to cover the contingency he was faced with, and in order to ensure publication of the book, commenced inquiries about the possibility of another publisher.

However, Shadegg and Goldwater kept on working on the book to finish it and the intention still was to submit the final manuscript to HBJ pursuant to the existing contract.

It should be noted that on August 31, 1978, Hill sent a memo to the head of the firm, Mr. Jovanovich, which stated, among other things, "that the original idea was to have Taylor Branch rewrite the manuscript when it was delivered." Taylor Branch was a writer who had been favored by the HBJ people for this project if they could have chosen the writer.

The memo has significance, in indicating that there was an intention to refrain from doing editorial work with Shadegg in the hopes that another writer could come in and do the job.

On September 29, 1978, the full manuscript was submitted to HBJ. It contained revisions of materials earlier submitted and certain additional chapters. The full manuscript was submitted with a letter from Oscar Collier which attempted to explain what Collier felt were the merits of the manuscript.

There was further review by Hill and certain of her colleagues at HBJ, and submission to a free-lance manuscript reader. All took a very negative view of the manuscript. However, one suggestion by an associate editor was that the manuscript be reworked and that the authors be bargained down to a lower advance.

On August 31, 1978, HBJ wrote Oscar Collier returning the manuscript, stating that it was unacceptable, and demanding the return of the \$65,000 advance.

Prior to this time neither Hill nor any other editor at HBJ had communicated directly with Shadegg or Goldwater regarding the manuscript material. No one at that firm attempted to do so. There was never any detailed



comment about what should be added, what should be deleted, what was unclear, or about any other specific matters in the manuscript. There was no such comment made either directly to Shadegg or Goldwater, or indirectly through the agent, Collier.

Following the rejection of the manuscript by HBJ, there were discussions by Collier with a few other publishers. The result was that the book was bought by William Morrow & Company who agreed to pay an advance of \$80,000. The same manuscript which had been rejected by HBJ was the one submitted to Morrow.

An experienced editor at Morrow by the name of Howard Cady has testified that he found the manuscript fascinating. He saw problems with it but felt that it could yield a best-selling book.

Prior to entering into any agreement with Shadegg and Goldwater, Cady went to see Shadegg in Phoenix, Arizona, where Shadegg lived to see whether he could work with Shadegg. This was in January 1979.

Cady found Shadegg thoroughly professional and cooperative. Cady had certain comments that were discussed with Shadegg at that time, and the two developed an immediate working relationship.

Over the next few weeks, after Morrow had bought the rights to the book, Cady sent off to Shadegg in Phoenix communications with detailed comments about items to cut, questions to be answered and so forth. In other words, Cady was engaging in the normal editorial activity.

Cady later went to Phoenix and again conferred with Shadegg. Shadegg had already started to return revised material. Cady found Shadegg to be satisfactory in all respects. Shadegg responded intelligently to his requests for changes and Cady has testified that Shadegg would generally improve on Cady's suggestions with his own creative efforts.

The book was ready for galley proofs in a relatively short time. It was published in the fall of 1979 by Morrow under the title "With No Apologies" and it became a best-seller.

Cady has testified that the process he went through with Shadegg was a normal editorial process. There were substantial cuts of superfluous material, which he has testified is not unusual in work on a manuscript of a book being prepared under contract. The cuts were made leaving what Cady felt was valuable narrative and commentary material.

As far as additions to the manuscript which had been submitted to Cady, he said that there was less than 1 percent of the material in the present book which was added pursuant to his requests and questions. Again Cady said this involved normal editorial effort.

We come to the conclusions of law to be drawn. It is true that under the contract which was in force here between HBJ and the authors, the publisher has

a very considerable discretion as to whether to refuse a manuscript on the ground that it is unsatisfactory to the publisher in form and content.

It cannot be, however, that the publisher has absolutely unfettered license to act or not to act in any way it wishes and to accept or reject a book for any reason whatever. If this were the case, the publisher could simply make a contract and arbitrarily change its mind and that would be an illusory contract. It is no small thing for an author to enter into a contract with a publisher and be locked in with that publisher and prevented from marketing the book elsewhere.

It is clear, both as a matter of law and from the testimony in this case, that there is an implied obligation in a contract of this kind for the publisher to engage in appropriate editorial work with the author of a book. Both plaintiff's and defendants' witnesses testified to this effect, based on the custom of the trade.

It is clear that an author who is commissioned to do a work under a contract such as this generally needs editing to produce a successful book. There has been testimony by Goldwater, as I have mentioned, to the effect that he feels the need of editing work and expected it here. The letters from both Shadegg and Goldwater to the publisher indicated their desire for editorial work on the part of the publisher.

In a general way, it is clear that the editorial work which is required must consist of some reasonable degree of communication with the authors, an interchange with the authors about the specifics of what the publisher desires; about what specific faults are found; what items should be omitted or eliminated; what items should be added; what organizational defects exist, and so forth. If faults are found in the writing style, it seems elementary that there should be discussion and illustrations of what those defects of style are. All of this is necessary in order to allow the author the reasonable opportunity to perform to the satisfaction of the publisher.

If this editorial work is not done by the publisher, the result is that the author is misled and, in fact, is virtually prevented from performing under the contract.

There is no occasion in this decision to determine the full extent or the full definition of the editorial work which is required of a publisher under the contract. Here there was no editorial work. I emphasize, no editorial work. There was nothing approaching any sensible editorial activity on the part of the publisher. There were no comments of a detailed nature designed to give the authors an opportunity to remedy defects, even though such comments were specifically invited and requested.

The evidence does not indicate any desire or intention on the part of the HBJ people to edit. The evidence indicates a desire to have another writer and a lack of a bona fide commitment to abide by the contract.

As far as any qualms about having Shadegg as writer, it should be

emphasized that the contract was with Shadegg as well as with Goldwater. The contract was not with Goldwater alone. And, as I have already indicated, the publisher entered into this contract with a full opportunity to determine the exact abilities and talents of Shadegg.

In a given situation it could be that after a contract is entered into of the kind we have here, and after draft material is submitted, the material is so hopeless that editorial work might be fruitless. It is difficult to imagine such a situation occurring but I suppose it is conceivable. But this was far from the case here.

I note that the publisher claims that there were no revelations of fact, no “revelatory material” as the term has been used. It is difficult to even comprehend that claim. The book as it was published is full of facts. It is full of conversations with illustrious personages. It is full of comments and judgments in detail about presidents and other public figures, presidential administrations and so forth. It is simply not true that the book had no factual material in it of a valuable nature.

It is quite clear that the bulk of the manuscript which was submitted to HBJ must have contained valuable and interesting factual material. This is not the case of a manuscript of no merit which ended up unpublished or was published in a book of clearly low-grade quality.

A distinguished editor, Howard Cady, found the manuscript fascinating. He edited the manuscript in the normal way and produced a successful book.

Consequently, I conclude that HBJ breached its contract with Shadegg and Goldwater by willfully failing to engage in any rudimentary editorial work or effort. Consequently, HBJ cannot rely on the concept that the manuscript was unsatisfactory in form and content and can be rejected. HBJ had no right under its contract to reject that manuscript...

#### *Notes on HBJ v. Barry Goldwater*

In January 1977, HBJ entered into a book contract with Barry Goldwater (and writer Stephen Shadegg).

Goldwater’s advance (\$200,000, high for the late 1970s) was broken down as follows:

- \$65,000 on signing;
- \$75,000 on delivery of a SATISFACTORY manuscript;
- \$60,000 dues on publication

The HBJ contract also contained a clause that provided:

The author will deliver to the publisher ... one copy of the manuscript of the work ... satisfactory to the publisher in form and content.

The authors in this case got off on the wrong foot early by sending a partial and unpolished draft of the first seven chapters to the editors. Consider the editors and publishers. They paid a lot of money to a high-profile politician and a professional writer. They are hoping for a thing of beauty, a work of well-wrought prose, to arrive one day in the mail so they can congratulate themselves and the publisher and squeal with delight: “Let’s publish this thing!”

Instead they receive a tentative draft from authors who sound uncertain about how to proceed. How much to put in? How much to leave out? This is dealing from weakness. Remember, the first piece of advice (also sometimes the hardest piece of advice) you can give your client? FINISH THE BOOK!

It’s similar in one respect to the *Elvin v. Aretha Franklin* case, namely, the talent is having unusual conversations with the producers (publishers/editors) that the talent should not be having.

If the authors were uncertain about how to proceed, the manuscript should have gone to the agent first. The agent could have warned the authors, perhaps by advising that the manuscript was not yet ready for the buyer’s eyes.

Ultimately, HBJ attempts to rely on the unsatisfactory manuscript clause, and the court is inclined to defer to the publisher’s wishes:

the publisher has very considerable discretion as to whether to refuse a manuscript on the ground that it is unsatisfactory to the publisher in form and content.

But the court went further and observed that the publisher does not have an absolutely unfettered license to act or not to act in any way it wishes, and to accept or reject a book for any reason whatever. The *Goldwater* court found an implied obligation on the publisher’s part to do at least SOME editing, which requires some reasonable degree of communication. At a minimum, the publisher must provide an opportunity for the authors to rectify any perceived shortcomings in the initial draft.

“This is not the case of manuscript of no merit,” said the court, “which ended up unpublished or was published in a book of clearly low-grade quality,” which leaves one wondering if the ruling might have gone the other way if the manuscript truly had been shoddy or low quality.

If the publisher could make a deal and then arbitrarily change its mind about the project, then the result might be an illusory contract, especially if the “author is virtually prevented from performing under the contract.”

As the court observed: “allowing unfettered license to publishers to reject a manuscript submitted under contract would permit overreaching by publishers attempting to extricate themselves from bad deals.”

### The Satisfactory Manuscript Clause

Consider the description of this provision contained in the Authors Guild Model Trade Book Contract: “Conditions Governing the Manuscript and Termination” Section 3, p. 12.

Almost all publishers’ boilerplates contain “satisfactory manuscript” clauses that allow them to terminate contracts despite the work’s actual fitness for publication and professional competence.... When invoked by the publisher, the satisfactory manuscript clause effectively: transforms the advance into a repayable loan; dissolves the publishing commitment; deprives you of your valuable investment of time, labor, and money; gives the publisher a free exclusive option on the book; and makes the contract one-sided and not fully binding.

The Authors Guild suggests the following language be used instead:

Author shall deliver a complete manuscript of the Work which, in style and content, is professionally competent and fit for publication.

And let the negotiations begin!

### Modern Editors

Unlike the most prominent editor of the 20th Century, Maxwell Perkins, who was famous for lavishing great care and hands on improvements to authors such as Thomas Wolfe, Ernest Hemingway, and F. Scott Fitzgerald, modern editors are often too busy to do any actual editing.

Modern editors are more like managers and agents. They bid on manuscripts, wheel and deal, acquire books and authors and then *position* those books to advantage within the publishing house.

These days line editors do the work of cleaning up syntax, punctuation and fact-checking, while senior acquiring editors are off doing deals.

Just how much editing is an editor required to provide to the author who submits an “unsatisfactory manuscript”? That’s the next case!

### *Doubleday & Company, Inc. v. Tony Curtis*

United States Court of Appeals Second Circuit (1985)

- [case on Google Scholar](#)
- [case on Westlaw](#)

IRVING R. KAUFMAN, Circuit Judge.

Mindful of the limited function of the judiciary in the private contractual realm, and aware of the dangers arising from judicial interference with the editorial process, we are today required to interpret an agreement entered into by an author and his publisher.

This dispute arose when, pursuant to the terms of a standard publishing agreement, Doubleday & Co. rejected as unsatisfactory a manuscript submitted by Tony Curtis. Each party then sued for breach of contract; Doubleday brought an action for recovery of the advance it remitted Curtis, and Curtis counterclaimed for anticipated earnings.

The district court dismissed both actions ... finding that Doubleday's unfavorable evaluation of the manuscript had been made in good faith and, assuming the publisher had a duty under the contract to provide editorial assistance to Curtis, this obligation had been fulfilled. Doubleday's complaint was dismissed on the basis that the company had waived its right to demand return of its advance. For the reasons set forth below, we affirm the dismissal of Curtis's counterclaims, but reverse the dismissal of Doubleday's claim.

Before discussing the relevant legal principles, we believe they will come into sharper focus if we set forth the underlying facts and procedural history of this dispute.

## I.

### BACKGROUND

In the early 1970s, Tony Curtis, a respected dramatic and comedic actor, sought to enrich his career by becoming a novelist. He prepared a manuscript — later titled *Kid Andrew Cody and Julie Sparrow* (“Kid Cody”) — and enlisted the aid of Irving Paul (“Swifty”) Lazar, a well-known literary agent. Doubleday & Co., the venerable New York publishing house, foresaw within Curtis the potential for great commercial success and entered into a two-book contract with him in the winter of 1976.

As part of their arrangement, Doubleday promised to pay Curtis royalties on hardcover sales, and a share of the proceeds from the sale of subsidiary rights (e.g. paperback rights), provided Curtis could deliver — within a specified period of time — final manuscripts, “satisfactory to Publisher in content and form.” The agreement was a standard industry form, and did not elaborate on the meaning of the penultimate condition — “satisfactory to Publisher in content and form.”

Amid much fanfare, *Kid Cody* was accepted for publication. The final draft was generally acknowledged to have been a joint effort of Curtis and Larry Jordan, a Doubleday editor. Through a series of face-to-face meetings in New

York, the experienced Jordan was able to assist the novice Curtis in the successful completion of his first novel.

Inspired by Curtis's literary debut and somewhat intrigued by an eight-page outline for his next novel, Doubleday agreed to renegotiate the contract governing publication of the second book. On September 7, 1977, the parties executed the document that spawned this litigation.

Curtis was to receive one hundred thousand dollars as an advance to be charged against future royalties. One-half of the advance was paid upon the signing of the contract, with the balance due on "acceptance of complete satisfactory manuscript." In addition, Curtis was to receive fifty percent of any proceeds Doubleday might earn from the sale of reprint rights. Doubleday's performance was again contingent upon Curtis's ability to produce a "satisfactory" manuscript by a date no later than October 1, 1978. This deadline, as well as the conditions relating to acceptable "form" and "content," were expressly stated to be "of the essence of the Agreement." The document further stated that failure to comply with the satisfaction clause granted the publisher the right to terminate the contract, and require Curtis to return any sums advanced. As with the *Kid Cody* contract, this agreement did not speak to the methods and standards by which the publisher would determine whether a manuscript was "satisfactory." Indeed the contract omitted any reference to the plot, subject, title, length or tone of the proposed novel.

If Doubleday's arrangement with Curtis appeared to favor the publishing house, the company's subsequent reprint agreement with New American Library ("NAL") epitomized the firm's bargaining acumen. NAL promised to pay Doubleday \$200,000 merely for the right to publish Curtis's second novel in paperback, in the event it was accepted for publication by Doubleday. NAL's position was thus wholly dependent upon Doubleday's opinion of the manuscript. Indeed, no matter how inferior or unsaleable the novel might prove to be, if Doubleday published the work before December 31, 1980, NAL was bound by the terms of the contract and Doubleday was ensured a handsome profit.

The great expectations that surrounded the project never materialized. It was not until April 1980 that Curtis delivered even a partial first draft of his would-be second novel, *Starstruck*, a rags-to-riches story of a lascivious Hollywood starlet. Doubleday appeared unperturbed, however, and blithely ignored the October 1978 deadline. Equally generous was NAL, which willingly extended its own deadline one year to December 31, 1981.

Those portions of *Starstruck* that Curtis had forwarded to Doubleday were routed from one editor's desk to another, finally coming to rest in August 1980 with Adrian Zackheim, then a stranger to Curtis. Zackheim's review of the first half of *Starstruck* was slow but painstakingly thorough. After four months of

intermittent reading — totaling perhaps fifty hours — he sent Curtis a seven-page letter. In it, Zackheim criticized the numerous inconsistencies and inherent contradictions that pervaded the manuscript and exhorted Curtis to tighten the plot. Yet, sprinkled among this criticism was praise for the author's story-telling ability. To this end, Zackheim emphasized he was generally "charmed" with the "wonderful possibilities" of *Starstruck* and was not expecting substantial changes in "the basic outlines of the novel."

The following months, however, did not prove conducive to *Starstruck*'s completion. The few telephonic and face-to-face conversations between Curtis and Zackheim contrasted dramatically with the considerable contact Curtis had maintained with Larry Jordan. To a large extent, the dearth of communication was a product of circumstance rather than neglect. Curtis was preoccupied with complex divorce proceedings, and his visits to New York became more and more infrequent. Zackheim, for his part, was willing to review changes and additions piecemeal, but Curtis eschewed this alternative.

The spring of 1981 elapsed without any significant progress being made on the manuscript. As a result, Doubleday executives became increasingly anxious that they would be unable to accept *Starstruck* for publication before the December 31, 1981 deadline with NAL. The prevailing sentiment at Doubleday was that it would prove fruitless to appeal to NAL for a further extension.

In early August, Curtis finally forwarded to Zackheim what he represented to be a completed draft of the book. Zackheim was appalled at the product, and reluctantly concluded that *Starstruck* was unpublishable. Not only had Curtis ignored suggestions involving the story's first half, but he had composed such an unexpectedly poor conclusion that *Starstruck* was transformed from a potential success into an almost certain debacle.

Without apprising Curtis of his impressions, Zackheim asked his supervisor at Doubleday, Elizabeth Drew, to read the revised manuscript. Drew's response, in the form of an intrafirm memorandum, clearly demonstrates the dilemma then confronting Doubleday. She acknowledged that rejecting *Starstruck* would require forfeiture of the lucrative reprint arrangement with NAL, but nonetheless recommended that Doubleday abandon the book. In her opinion, *Starstruck* was "junk, pure and simple," and could not be "edited into shape or even rewritten into shape." To accept the manuscript for publication solely because of the NAL contract was, in Drew's words, "not a way to sleep nights, at least not if one's concerned with ethics."

As a final means of salvaging the book and the NAL deal, Zackheim approached Lazar and suggested that Curtis submit the manuscript to a "novel doctor" in an attempt to put the shine back on the fallen *Starstruck*. When Lazar demurred, Doubleday finally admitted defeat. It cancelled the reprint deal with NAL, formally terminated the September 1977 agreement with Curtis and



demanded repayment of the original \$50,000 advance. When Curtis refused, Doubleday commenced this litigation.

### *Proceedings in the District Court*

Invoking the diversity jurisdiction of the federal courts, Doubleday filed a complaint on April 3, 1983 in the United States District Court for the Southern District of New York, claiming Curtis breached the 1977 contract and seeking recovery of its \$50,000 advance. Curtis, in turn, counterclaimed for breach of the agreement, and sought \$150,000. Curtis alleged, both as a counterclaim and as an affirmative defense, that Doubleday's failure to provide adequate editorial services — a duty derived from its implied obligation to perform in good faith — prevented him from completing a satisfactory manuscript. He contended that had Doubleday followed "the usual and customary editorial process," *Starstruck* would have been published and he would have received a second \$50,000 advance, as well as fifty percent of the \$200,000 reprint sale to NAL....

At trial, as in a prior deposition, Curtis bitterly recounted his experiences with Doubleday. Not only did he regard Zackheim as an apathetic and incompetent editor by comparison to Larry Jordan, but he was also particularly distressed by the duplicity in which he believed Doubleday had engaged. Until he was informed by Lazar of Doubleday's irreversible decision to reject the book, Curtis claimed he had not received the slightest indication that *Starstruck* would not be accepted for publication.

Curtis's lament was basically corroborated by Zackheim, who admitted overstating the first draft's strengths and minimizing its weaknesses. At the same time, Zackheim asserted that his carefully considered suggestions were all but ignored by Curtis, and that the second half of the manuscript was abysmal. Both Zackheim and Drew testified that they had sincerely believed Curtis's completed manuscript was irreparable. In light of Curtis's refusal to surrender *Starstruck* to a "novel doctor" and the impending deadline with NAL, the editors testified that their decision to terminate the contract was motivated by both ethical and artistic considerations.

### *The Decision of the District Court*

Characterizing the litigation as a "dispute about creativity and the respective responsibilities of an author and his publisher," the district court dismissed Doubleday's complaint and Curtis's litany of counterclaims. In considering whether to infer a duty to edit from a clause requiring delivery of a manuscript "satisfactory to the publisher," the court acknowledged that New York's appellate courts had yet to resolve this issue. Without deciding the issue, Judge

Sweet concluded that, “even if a duty to provide editorial services is accepted as required under New York law, here, Doubleday performed it.”

Turning to the question of bad faith, the trial judge deemed the testimony of Doubleday’s witnesses credible, and held that the decision to reject Curtis’s manuscript had been animated by a genuine belief that *Starstruck* was unpublishable. Curtis’s remaining counterclaims were summarily dismissed as contrary to the relevant provisions of the 1976 and 1977 contracts.

Finally, the court dismissed Doubleday’s claim seeking recovery of the \$50,000 advance. Judge Sweet held that Doubleday had waived the “time of the essence” clause by accepting Curtis’s manuscript nearly eighteen months after the original deadline had passed. Moreover, the court found that because Doubleday had led Curtis to believe that *Starstruck* would eventually be published, it had also waived its right to a return of the advance even if it found the manuscript unsatisfactory.

## II.

### DISCUSSION

#### *A. The Publisher’s Duty to Perform in Good Faith.*

We note at the outset that Curtis has never defended his August 1981 manuscript as a work of publishable quality. Rather, Curtis maintains that but for Doubleday’s inability and unwillingness to provide adequate editorial assistance, *Starstruck* would have met the “satisfactory to publisher” condition. Curtis concedes that his proposed interpretation is not supported by a literal reading of the 1977 agreement. On its face, the document is completely silent regarding any obligation on Doubleday’s part to ensure that Curtis’s rough drafts are transformed, through the company’s affirmative efforts, into a polished novel.

Our task, then, is to delineate the extent to which New York law requires us to infer such an obligation from the agreement. Because New York’s appellate courts have not yet addressed this question, we must attempt to divine the likely response of our state brethren.

The 1977 agreement expressly granted Doubleday the right to terminate the contract if it deemed Curtis’s manuscript to be unsatisfactory. In similar circumstances — where the satisfactory performance of one party is to be judged by another party — New York courts have required the party terminating the contract to act in good faith. In *Baker v. Chock Full O’Nuts Corp.*, (1st Dep’t 1968), for example, where payment to an advertiser was contingent upon the client’s “satisfaction” with the completed promotional campaign, the court implied a requirement that the client terminate its arrangement only if motivated

by “an honest dissatisfaction with the performance.” 292 N.Y.S.2d at 62 (quoting 3A A. Corbin, *Contracts* § 647 at 104 (2d ed. 1960)).

This principle — that a contract containing a “satisfaction clause” may be terminated only as a result of honest dissatisfaction — would seem especially appropriate in construing publishing agreements. To shield from scrutiny the already chimerical process of evaluating literary value would render the “satisfaction” clause an illusory promise, and place authors at the unbridled mercy of their editors.

A corollary of this duty to appraise a writing honestly is an obligation on the part of the publisher not to mislead an author deliberately regarding the work required for a given project. A willful failure to respond to a request for editorial comments on a preliminary draft may, in many instances, work no less a hardship than would an unjustifiable rejection of a final manuscript. A publisher’s duty to exercise good faith in its dealings toward an author exists at all stages of the creative process.

Although we hold that publishers must perform honestly, we decline to extend that requirement to include a duty to perform skillfully. The possibility that a publisher or an editor — either through inferior editing or inadvertence — may prejudice an author’s efforts is a risk attendant to the selection of a publishing house by a writer, and is properly borne by that party. To imply a duty to perform adequate editorial services in the absence of express contractual language would, in our view, represent an unwarranted intrusion into the editorial process. Moreover, we are hesitant to require triers of fact to explore the manifold intricacies of an editorial relationship. Such inquiries are appropriate only where contracts specifically allocate certain creative responsibilities to the publisher.

Accordingly, we hold that a publisher may, in its discretion, terminate a standard publishing contract, provided that the termination is made in good faith, and that the failure of an author to submit a satisfactory manuscript was not caused by the publisher’s bad faith.

### ***B. Doubleday’s Good Faith.***

Evaluating the Doubleday-Curtis relationship in light of these principles, we are convinced that *Starstruck*’s failure was not attributable to any dishonesty, willful neglect or any other manifestations of bad faith on the part of Doubleday. The factual landscape illustrates the complete frustration experienced by Doubleday’s editors, who were forced to harmonize an inferior manuscript, a lucrative reprint agreement and a recalcitrant author. Zackheim sincerely endeavored to assist Curtis in the completion of his manuscript. Although Zackheim’s suggested revisions may have been offered somewhat belatedly, the evidence indicates that

he extended numerous offers to discuss the novel with Curtis, as well as to review portions of the second draft. Indeed, it was Curtis who refused these renderings of assistance. That Zackheim's editing was perhaps inadequate is beside the point, as is any comparison with Larry Jordan. Curtis neither alleged, nor does the record support a finding that Doubleday deliberately or even recklessly assigned *Starstruck* to an editor unfit or unsuited for the project.

Admittedly, the selection of an editor is a matter of paramount importance to a writer, but we note once again that the power to control this decision — like all aspects of the publication process — could have been reserved to Curtis in his contract.

Turning our attention to the actual termination of the contract, we believe the district court's finding that Doubleday rejected *Starstruck* in good faith is amply supported by the record before us. Zackheim and Drew were in complete agreement that no amount of in-house editing could save the project. Moreover, the suggestion that Curtis consult a "novel doctor" — though perhaps somewhat humiliating — appears to have been made sincerely, rather than as a stratagem for avoiding the responsibilities attendant to a difficult editing job.

(footnote: Curtis relies on two district court decisions that denied publishers recovery of their advances after rejecting manuscripts as "unsatisfactory." *Dell Publishing Co. v. Whedon* (S.D.N.Y.1984); *Harcourt Brace & Jovanovich v. Goldwater* (S.D.N.Y.1982) Although both decisions appear to recognize a duty on the part of publishers to provide adequate editorial services, the results reached in those cases are consistent with the framework we have adopted. In marked contrast to the supervision Zackheim offered Curtis on *Starstruck*, the authors in *Whedon* and *Goldwater* received no response to their requests for guidance and assistance in the preparation and revision of their manuscripts.)

Curtis argues with some force that Doubleday terminated his contract in November 1981 primarily because of the impending NAL deadline. Although we agree the two events were not unconnected, we choose to characterize the relationship between them quite differently. Were it not for the extremely lucrative arrangement with NAL, it is likely that Doubleday would have abandoned *Starstruck* without hesitation, and perhaps at a much earlier date. Only the prospect of a commercially profitable reprint deal prevented Zackheim from rejecting the August 1981 manuscript immediately. Doubleday's decision to sacrifice financial reward for "ethics," as Zackheim's superior Drew framed the choice, can hardly be said to constitute an act of bad faith.

In light of all the circumstances, we agree with the district court's finding that Doubleday exercised good faith in its dealings with Curtis, and thus affirm the dismissal of Curtis's counterclaim.

### *C. Doubleday's Action For Return of the Advance.*

In dismissing Doubleday's complaint, which sought recovery of the \$50,000 advance paid to Curtis, the district court found that Doubleday had waived its right to demand return of the advance. Because the issue was not properly before the court, we conclude dismissal on that basis was improper.

Among the cardinal principles of our Anglo-American system of justice is the notion that the legal parameters of a given dispute are framed by the positions advanced by the adversaries, and may not be expanded *sua sponte* by the trial judge. The dismissal of Doubleday's claim based on an issue never pleaded by Curtis — or even implicitly raised at trial — is inconsistent with the due process concerns of adequate notice and an opportunity to be heard. Moreover, such a result runs counter to the spirit of fairness embodied in the Federal Rules of Civil Procedure.

## III.

### CONCLUSION

Accordingly, we affirm the district court's dismissal of Curtis's counterclaims. We reverse the judgment of the district court dismissing Doubleday's complaint and remand the cause with instructions to enter judgment in favor of Doubleday for recovery of its \$50,000 advance, plus interest.

### *Notes on Doubleday v. Tony Curtis*

Famous actor and part time novelist Tony Curtis ("Curtis") signed a book contract to provide two novels to the publisher Doubleday & Co., Inc. ("Doubleday"). The parties used a standard industry form that required Doubleday to pay royalties on hardcover sales and a share of the proceeds of the sale of paperback rights if Curtis delivered manuscripts "satisfactory" to Doubleday in content and form.

The publisher published the first novel and renegotiated the deal on the second novel to give Curtis a \$100,000 advance, half on signing and half on acceptance by Doubleday of a "complete satisfactory manuscript."

Curtis delivered a partial first draft, which Doubleday's editor reviewed and commented on. When Curtis delivered the completed manuscript, Doubleday deemed it "unsatisfactory." Doubleday terminated the contract and sued to recover the advance. Curtis counterclaimed for the balance of the advance and other damages on the theory that Doubleday had a duty to provide editorial services. The trial court dismissed both claims, and both parties appeal.

Issue: Does a publisher have a duty to assist an author in the preparation of a manuscript where the contract requires the author to provide a manuscript that is “satisfactory” to the publisher?

Held: No. Judgment reversed in part.

- The law requires the party who terminates a contract to act in good faith. Where a contract contains a satisfaction clause, it may be terminated only as a result of honest dissatisfaction. A corollary of this duty is an obligation on the publisher’s part not to mislead the author about the work required for a given project; i.e., the publisher cannot refuse to provide editorial comments on a preliminary draft.
- The publisher’s duty of good faith includes providing editorial assistance while the manuscript is being developed, especially when the contract requires the final manuscript to be satisfactory to the publisher in content and form. However, if the author rejects such editorial assistance, the publisher is entitled to reject the manuscript if it is not satisfactory.
- In this case, Doubleday attempted to assist Curtis in completing the manuscript, but Curtis was not cooperative. The publisher discharged its duty to act in good faith and was entitled to terminate the contract. The publisher is also entitled to the return of the advance.

Curtis never defended by arguing that his book is publishable as is, rather he is arguing that Doubleday has a duty to perform skillful editing. Never mind an implied obligation to edit, Curtis seems to be arguing for an implied obligation to SKILLFULLY edit.

The Second Circuit Court of Appeals held that a publishing house need provide ONLY good faith editing, not “skillful editorial assistance”

Curtis argues that this case is like the *Goldwater* case. But the court says not quite. In those cases the editors didn’t respond. Here Zackheim offered to help. Curtis was insulted. And then sued.

Curtis says that the REAL reason is the impending NAL pull out. Doubleday is selling the rights to the paperback.

What about publisher obligations to market and promote an author’s book? That’s yet another case.

### ***Zilg v. Prentice-Hall, Inc.***

Second Circuit Court of Appeals (1983)

- [case on Google Scholar](#)
- [case on Westlaw](#)

WINTER, Circuit Judge:

Prentice-Hall, Inc. (“P-H”) appeals from a judgment entered after a bench trial before Judge Brieant ordering it to pay damages of \$24,250 plus pre-judgment interest to the plaintiff, Gerard Colby Zilg, for breach of contract. Zilg cross-appeals the judgment in favor of E.I. DuPont de Nemours & Co., Inc. (“DuPont Company”) on his claim of tortious interference with contract. We reverse as to Zilg’s breach of contract claim against P-H and affirm the judgment in favor of the DuPont Company.

## BACKGROUND

Gerard Colby Zilg is the author of *DuPont: Behind the Nylon Curtain*, an historical account of the role of the DuPont family in American social, political and economic affairs. Early in 1972, after one partially successful and several unsuccessful efforts to find a publisher for his proposed book, Zilg’s agent introduced him to Bram Cavin, a senior editor in P-H’s Trade Book Division. Cavin expressed interest in the book, and he and Zilg submitted a formal proposal to John Kirk, P-H’s Editor-in-Chief at that time. Kirk approved the proposal...

As it passed through the editorial and corporate hierarchy, the proposal received a notation from P-H’s publicity director that the book’s potential for radio and television coverage was “slight to non-existent unless matter in [the] book is highly controversial and print [media] says so first.”

P-H and Zilg executed a form contract which provided in relevant part:

3. The manuscript ... will be delivered ... by the AUTHOR to the PUBLISHER in final form and content acceptable to the PUBLISHER....
4. When the manuscript has been accepted and approved for publication by the PUBLISHER ... it will be published at the PUBLISHER’S own expense....
12. The PUBLISHER shall have the right: (1) to publish the work in such style as it deems best suited to the sale of the work; (2) to fix or alter the prices at which the work shall be sold; (3) to determine the method and means of advertising, publicizing, and selling the work, the number and destination of free copies, and all other publishing details, including the number of copies to be printed, if from plates or type or by other process, date of publishing, form, style, size, type, paper to be used, and like details.

Zilg submitted the first half of his completed manuscript to Cavin in November, 1972, and the remainder a year later. Cavin authorized acceptance of the work on behalf of P-H, apparently without the participation of Peter Grenquist, who had become president of P-H's Trade Book Division sometime after execution of the contract but before submission of the manuscript. P-H's legal division scrutinized the manuscript for libelous content and concluded that, if a libel action were brought, P-H "would ultimately prevail" because the subject matter of the work was constitutionally privileged and the plaintiffs would have to prove actual malice. The division's opinion noted, however, that litigation against the DuPonts would be very costly.

A decision was made to accept the manuscript which was distributed to selected wholesalers, reviewers, and booksellers. Copies were also sent to the editorial director of the Book of the Month Club ("BOMC"). Although BOMC decided not to offer the book as a selection of its main club, a subsidiary, the Fortune Book Club, which appealed to a readership composed largely of business executives, did choose it as a selection.

A committee of various P-H department representatives, including the book's editor, met on March 28, 1974, to discuss production plans. The sales estimates of committee members varied from 12 to 15 thousand copies for the first year although by May two members were predicting sales of only 10 thousand. Estimates of from 15 to 20 thousand sales over a five year period were also made. Cavin, an ardent supporter of the book, made estimates of 20 to 25 thousand in the first year and 25 to 35 thousand over five years. The committee decided on a first printing of 15,000 copies at a retail price of \$12.95 per copy. At a later meeting, the committee decided to devote roughly \$15,000 to advertising.

Although the literary or scholarly merits of the book are not our concern, its nature, tone and marketability among various audiences are key facts in this litigation, for they bear upon the book's prospects for commercial success and illuminate the negative reactions which later set in at P-H. The book is a harshly critical portrait of the DuPont family and their role in American social, political and economic history. Indeed, it is a harshly critical portrait of that history itself. The reactions of readers and reviewers in the record indicate that the book is polarizing, the difference in viewpoint depending in no small measure upon the politics of the beholder. A significant number of readers regard the book as a strident caricature, drawing every conceivable inference against the DuPont family and firms with which members of the family were or are associated. One judge at BOMC, for example, described it as "300,000 words of pure spite." On the other hand, the book has a loyal band of admirers. It received a favorable review in many newspapers, including the *New York Times* Book Review section. Its comprehensiveness and the extensive research on which it was based



were frequently noted. The book also has some appeal to another audience, namely readers with a taste for gossip about the rich and powerful, particularly readers in Delaware. Indeed, it was once first in non-fiction sales in that state.

In the American market, the book's appeal is somewhat limited by the fact that it is not a work critical of business on grounds that reform of capitalism is necessary in order to save it, a viewpoint with mainstream appeal. Rather, it presents a Marxist view of history. Also weighing against its overall marketability were its size (586 pages of text, 2 inches thick, three and one-half pounds), complexity (almost 200 family members with the surname DuPont and 170 years of American history) and price (\$12.95 in 1974 dollars).

Prior to June, 1974, Grenquist appears not to have been aware of the nature and tone of the book, of the intensity of negative feeling it might arouse in some readers or of evidence of serious inaccuracies. He may have been reassured partly by Cavin's enthusiasm and partly by the book's selection by the Fortune Book Club. That selection itself remains something of a mystery since the Club's inside reader concluded it was "a bad book, politically crude and cheaply journalistic." However, instead of accepting his recommendation that it "be fed back to the author page by page," BOMC contracted with P-H to have it adopted by the Fortune Book Club.

In June, 1974, a chain of events was set in motion which apprised Grenquist of the negative aspects of Zilg's work. A member of the DuPont family obtained an advance copy of the manuscript from a bookseller and, predictably outraged, turned it over to the Public Affairs Department of the DuPont Company. Members of that department sought to locate individuals in P-H's management whom they knew personally in order to speak privately about the book, but to no avail. They advised the family member to do nothing before the book was published.

In July, the DuPont Company learned that the book had been accepted as a Fortune Book Club selection and decided to act before publication anyway. Harold Brown of DuPont ("DuPont-Brown") telephoned Vilma Bergane, a manager of Fortune Book Club, having received her name from the managing editor of *Fortune Magazine*. He told her that the book had been read by several persons, some of whom were attorneys, and that the book was "scurrilous" and "actionable." Bergane passed on a version of DuPont-Brown's remarks to F. Harry Brown, Editor-in-Chief of BOMC ("BOMC-Brown"). DuPont-Brown then told BOMC-Brown that DuPont family attorneys found the book abusive and that he was to try to locate someone at P-H with whom to discuss the book. He also told BOMC-Brown that the DuPont Company did not intend to throw its weight around. BOMC-Brown referred DuPont-Brown to Peter Grenquist at P-H.

Some days later, apparently in an effort to quash rumors or inaccurate

messages to the contrary, DuPont-Brown phoned Grenquist to assure him that DuPont was not attempting to block publication of the book, initiate litigation, or even approach P-H in any kind of adversarial posture. One such rumor, allegedly passed on to Cavin by an editor at BOMC who does not remember the conversation, was that DuPont had gone to *Fortune Magazine* and threatened to pull all its advertising. *Fortune*, owned by Time, Inc., had no connection with the Fortune Book Club at this time.

Meanwhile, BOMC-Brown decided to look into the matter personally. Over the July 27-28 weekend, he “spent a horrible two days reading” the book and decided it was an unsuitable selection for the Fortune Book Club. He later stated he felt no pressure from the DuPont Company in reaching this decision. In view of the nature of the book and the Club’s audience of business executives, his decision seems an inevitable result of his reading the book. BOMC immediately notified P-H of its decision not to distribute the book. The reason given was BOMC’s belief that the book was malicious and had an objectionable tone.

P-H’s own detailed examination of the manuscript may also have introduced or heightened skepticism on Grenquist’s part. A toning down was found to be necessary even after the book was in page proof. Mistakes of fact, such as a statement that Irving S. Shapiro (DuPont’s Chief Executive Officer) had served as an Assistant District Attorney in Queens County, New York, were discovered. More serious matters also came to light. The original manuscript attacked Judge Harold R. Medina for matters irrelevant to the DuPonts and in a fashion which the district court characterized as libelous. Zilg admitted at trial that there was no factual foundation for this attack. Some eyebrows at P-H may well have been raised when this passage was discovered and deleted, since it was not only unfounded but also irrelevant.

P-H continued to correct and tone down the book, hoping to reverse BOMC’s decision not to offer it through the Fortune Book Club. A certain defensiveness also began to creep into P-H’s attitude toward the book. On August 2, Grenquist circulated a memorandum which noted that questions had arisen regarding both the tone of the book and Zilg’s approach and recommended that the adjective “polemical” henceforth be used because “[t]he book is a polemical argument and no pretense is made that it is anything else.” More importantly, he also cut the first printing from 15,000 copies to 10,000, stating that 5,000 copies were no longer needed for BOMC. The proposed advertising budget was also slashed from \$15,000 to \$5,500.

Judge Briant held that the DuPont Company had a constitutionally protected interest in bringing the “scurrilous” nature of the book and its unsuitability as a Fortune Book Club selection to the attention of senior officials at BOMC and P-H. He expressly found that the Company did not engage in coercive tactics but limited its actions to the expression of its good faith opinion.

As to P-H, Judge Brieant found that the publishing contract required the publisher to “exercise its discretion in good faith in planning its promotion of the Book, and in revising its plans.” This obligation required that Prentice-Hall use “its best efforts ... to promote the Book fully and fairly.” He held that P-H breached this obligation because it had no “sound” or “valid” business reason for reducing the first printing by 5,000 volumes and the advertising budget by \$9,500, which allowed the book to go briefly out of stock (although wholesalers had ample copies) just as it gained sales momentum. He expressly found that since BOMC did its own printing of club selections, the first printing cut could not be attributed to the cancellation of the BOMC order. He also found that the book would have sold 25,000 copies had P-H not taken these actions.

Having concluded that P-H had no sound or valid business reason for reducing the first printing and advertising budget, Judge Brieant held that P-H “privished” Zilg’s book on the basis of the testimony of plaintiff’s expert, William Decker. Decker testified that publishers often mount a wholly inadequate merchandising effort after concluding that a book does not meet prior expectations in either quality or marketability. Such “privishing” is intended to fulfill the technical requirements of the contract to publish but to avoid adding to one’s losses by throwing “good money after bad.”

## DISCUSSION

We agree with Judge Brieant that DuPont did not tortiously interfere with Zilg’s beneficial commercial relationships. We disagree, however, with his conclusion that P-H breached its contract with Zilg and reverse that judgment....

### *2. P-H’s Breach of Contract*

We believe Judge Brieant’s discussion of P-H’s obligations under its contract with Zilg, and his finding of a breach of those obligations, is more troubling than his dismissal of the case against the DuPont Company. Judge Brieant read the contract in question to oblige P-H “to use its best efforts ... to promote the Book fully....” and found that the decision to cut the first printing and original advertising budget resulted in a loss of sales momentum when the book was briefly out of stock. These actions by P-H, he held, breached its agreement with Zilg because they lacked a sound or valid business reason.

Putting aside for the moment P-H’s motive in slashing the first printing and advertising budget, we note that Zilg neither bargained for nor acquired an explicit “best efforts” or “promote fully” promise, much less an agreement to make certain specific promotional efforts. The contract here thus contrasts with that in issue in *Contemporary Mission, Inc. v. Famous Music Corp.*, 557 F.2d

918 (2d Cir. 1977), which contained specific promotional obligations with regard to a musical group. While P-H obligated itself to “publish” the book once it had accepted it, the contract expressly leaves to P-H’s discretion printing and advertising decisions. Working as we must in the context of a surprising absence of caselaw on the meaning of this not uncommon agreement, we believe that the contract in question establishes a relationship between the publisher and author which implies an obligation upon the former to make certain efforts in publishing a book it has accepted notwithstanding the clause which leaves the number of volumes to be printed and the advertising budget to the publisher’s discretion. This obligation is derived both from the common expectations of parties to such agreements and from the relationship of those parties as structured by the contract.

Zilg, like most authors, sought to take advantage of a division of labor in which firms specialize in publishing works written by authors who are not employees of the firm. Under contracts such as the one before us, publishing firms print, advertise and distribute books at their own expense. In return for performing these tasks and for bearing the risk of a book’s failure to sell, the author gives a publisher exclusive rights to the book with certain reservations not important here. Such contracts provide for royalties on sales to the author, often on an escalating basis, *i.e.*, higher royalties at higher levels of sales.

While publishers and authors have generally similar goals, differences in perspective and resulting perceptions are inevitable. An author usually has a bigger stake in the success or failure of a book than a publisher who may regard it as one among many publications, some of which may lose money. The author, whose eggs are in one basket, thus has a calculus of risk quite different from the publisher so far as costly promotional expenditures are concerned. The publisher, of course, views the author’s willingness to take large risks as a function of the fact that it is the publisher’s money at peril. Moreover, the publisher will inevitably regard his or her judgment as to marketing conditions as greatly superior to that of a particular author.

One means of reconciling these differing viewpoints is “up-front” money — \$6,500 in Zilg’s case — which provides a token of the publisher’s seriousness about the book. Were such sums not bargained for, acquisition of publishing rights would be virtually costless and firms would acquire those rights without regard to whether or not they had truly decided to publish the work.

However, up-front money alone cannot fully reconcile the conflicting interests of the parties. Uncertainty surrounds the publication of most books and publishers must be cautious about the size of up-front payments since they increase the already considerable economic risks they take by printing and promoting books at their own expense. Negotiating such matters as the number of volumes to be printed and the level of advertising efforts might be possible but

such bargaining in the case of each author and each book would be enormously costly. There is never a guarantee of ultimate agreement, and if a set of negotiations fails over these issues, the bargaining must begin again with another publisher. Moreover, publishers must also be wary of undertaking obligations to print a certain number of volumes or to spend fixed sums on promotion. They will strongly prefer to have flexibility in reacting to actual marketing conditions according to their own experience.

The contract between Zilg and P-H was a printed form with formal and negotiated matters — *e.g.*, the parties' names and the amount of the advance to the author — typed in. Under the terms of the printed form, once P-H accepted the manuscript it was obliged to publish the book but had discretion to determine the number of volumes to be printed and the level of advertising expenditures. These clauses are, of course, interrelated and the extent to which the language regarding promotional efforts and the promise to publish modify each other is the central issue before us. In resolving it, we must attempt to preserve the major interests of both parties. *Sharon Steel Corp. v. Chase Manhattan Bank*, 691 F.2d 1039 (2d Cir. 1982).

Once P-H had accepted the book, it obtained the exclusive right to publish it. Were the clause empowering the publisher to determine promotional expenses read literally, the contract would allow a publisher to refuse to print or distribute any copies of a book while having exclusive rights to it. In effect, authors would be guaranteed nothing but whatever up-front money had been negotiated, and the promise to publish would be meaningless. We think the promise to publish must be given some content and that it implies a good faith effort to promote the book including a first printing and advertising budget adequate to give the book a reasonable chance of achieving market success in light of the subject matter and likely audience.

However, the clause empowering the publisher to decide in its discretion upon the number of volumes printed and the level of promotional expenditures must also be given some content. If a trier of fact is free to determine whether such decisions are sound or valid, the publisher's ability to rely upon its own experience and judgment in marketing books will be seriously hampered. We believe that once the obligation to undertake reasonable initial promotional activities has been fulfilled, the contractual language dictates that a business decision by the publisher to limit the size of a printing or advertising budget is not subject to second guessing by a trier of fact as to whether it is sound or valid.

The line we draw reconciles the legitimate conflicting interests of publisher and author as reflected in the contractual language, for it compels the publisher to make a good faith effort to promote the book initially whether or not it has had second thoughts while relying upon the profit motive thereafter to create the incentive for more elaborate promotional efforts. Once the initial obligation is

fulfilled, all that is required is a good faith business judgment. This is not an interpretation harmful to authors. Were courts to impose rigorous requirements as to promotional efforts, publishers would of necessity undertake to publish fewer books with unpredictable futures.

Given the line we draw, a breach of contract might be proven by Zilg in two ways. First, he might demonstrate that the initial printing and promotional efforts were so inadequate as not to give the book a reasonable chance to catch on with the reading public. Second, he might show that even greater printing and promotional efforts were not undertaken for reasons other than a good faith business judgment. Because he has shown neither, we reverse the judgment in his favor.

As to P-H's initial obligation, Zilg has not shown that P-H's efforts on behalf of his book did not give it a reasonable chance to catch on with the reading public. It printed or reprinted 13,000 volumes (3,000 over the volume of sales at which the highest royalty was triggered), authorized an advertising budget of \$5,500 (1974 purchasing power), distributed over 600 copies to reviewers, purchased ads in papers such as the *New York Times* and *Wall Street Journal*, and made reasonable efforts to sell the paperback rights. The documentary record shows that Grenquist took a continued interest in marketing the book, made suggestions as to promoting it effectively and ordered that "rave reviews" be sent to BOMC as late as January, 1975.

The fact that initial decisions as to promotional efforts were trimmed is of no relevance absent evidence that the actual efforts made were so inadequate that the book did not have a reasonable chance to catch on with the reading public. The record is barren of such evidence. P-H's estimates of first year sales made at the peak of the book's standing within the firm were only 12,000-15,000. By May, before the BOMC reversal, the low estimate was 10,000. It can hardly be contended that an initial printing of 10,000 and reprinting of 3,000 is so low that it breaches the obligation to give the book a reasonable chance to sell. Plaintiff's expert, Decker, himself testified that these efforts were "perfectly adequate," although they were "routine" and P-H "did not follow through as they might have."

Judge Briant found only that an "unexplained" reduction in the first printing and advertising budget caused the book to go out of stock for a brief period of time and prevented the exploitation of growing sales momentum. He thus did not find that P-H's promotional efforts gave the book no reasonable chance to sell. Rather, he found that sales momentum was generated but not adequately exploited because the book was briefly out of stock. That situation, however, was not an inevitable outcome of the size of the first printing since a timely reprinting would have prevented it. Indeed, Grenquist ordered a reprinting when over 10% of the original volumes were still in stock and a delivery delay in

that reprinting led to the three week out of stock situation. Moreover, the book was always available from wholesalers although, as Judge Briant found, book sellers prefer to buy from publishers who provide a discount.

The district court read the contract as imposing on P-H a continuing obligation to use “its best efforts ... to promote the Book fully and fairly” and as empowering a trier of fact to second guess a publisher’s judgments as to the soundness of the decisions made. We disagree. So long as the initial promotional efforts are adequate under the test we outline above, a publisher’s printing and advertising decisions do not breach a contract such as that before us unless the plaintiff proves that the motivation underlying those decisions was not a good faith business judgment. Zilg failed to produce such evidence. His case was based on the theory that economic coercion by the DuPont Company caused P-H to reduce its promotional efforts. Judge Briant found against him on this issue and, for reasons stated above, we affirm this determination.

This district court’s finding that the reduction of promotional efforts was not based on a sound or valid business reason thus does not support the conclusion that the contract was breached. The district court took a different view of the legal obligations imposed by the contract and its conclusion was based on its highly optimistic opinion of the marketability of Zilg’s book. Even at the peak of the book’s standing within P-H, at a time when the Fortune Book Club was going to offer it as a selection and before the problems of tone and accuracy had come into focus, no one at P-H save Cavin thought the book would be as successful as the district court later found. P-H’s March, 1974, estimate for five year sales, for example, was 15,000 to 20,000, the low estimate being closer to actual sales than the high estimate is to Judge Briant’s finding. Indeed, Judge Briant’s view of the book’s potential is entirely inconsistent with Decker’s definition of privishing — not throwing “good money after bad” — for he in essence found that P-H had managed to avoid a small bonanza by breaching its contract.

As explained above, we think the contract between P-H and Zilg left the decisions in question to the business judgment of the publisher, the author’s protection being in the publisher’s experience, judgment and quest for profits. P-H’s promotional efforts were, in Decker’s words, “adequate,” notwithstanding the reduction of the first printing and the initial advertising budget. Indeed, those reductions, coming on the heels of BOMC’s decision not to distribute the book, appear to be a rational reaction to that news. Decker himself testified that the Fortune Book Club selection was an important barometer of marketability since it was an independent judgment that the book had an audience. Zilg’s contract with P-H did not compel the publisher to ignore the implications of BOMC’s change of heart.

Reversed.

### Notes on *Zilg v. Prentice-Hall*

The contract in this case required Author Zilg to deliver a manuscript: “in final form and content acceptable to the publisher.”

Okay, so we have a contract to publish, and we have the usual odious satisfactory manuscript clause.

The book is published in a timely manner, but Zilg’s complaint is that his publisher violated its good faith obligation to extend best efforts to promote the author’s book when it reduced the number of copies in the first printing and lowered the ad budget.

In short, Zilg’s complaint is every author’s complaint when the publisher decides to allocate promotional resources to other authors and books in their stable.

Zilg’s publisher promised to publish in the style “it deems best suited to the sale of the work.” Zilg did NOT bargain for best efforts, and based on what we’ve seen (*Pinnacle Books v. Harlequin Books*) such clauses are vague and unenforceable, without some objective measure of compliance. The contract leaves printing and advertising to Publisher’s discretion.

What is the best way for an author or her representative to protect the author? The court answers: Upfront money. AKA: The Advance. If the publisher decides not to push Zilg’s book they will forfeit any money they paid to obtain the rights to publish it. The higher the advance, the more skin they have in the game, and the more incentive they have to publish the book well and attempt to recoup their investment.

- *Zilg v. Prentice Hall, Inc.*, 717 F.2d 671 (2nd Cir. 1983)([nice summary of case here](#)).

## Royalties & Profits

### Hollywood Accounting:

Winston Groom’s price for the screenplay rights to his novel *Forrest Gump* included a 3% share of the profits; however, due to Hollywood accounting, the film’s commercial success was converted into a net loss, and Groom received only \$350,000 for the rights and an additional \$250,000 from the studio.

Stan Lee, co-creator of the character Spider-Man, had a contract awarding him 10% of the net profits of anything based on his characters. The movie Spider-Man (2002) made more than \$800 million in revenue, but the producers claim that it did not make any profit as defined in Lee’s contract, and Lee received nothing. He has filed a lawsuit against Marvel Comics.



The estate of Jim Garrison sued Warner Bros. for their share of the profits from the movie JFK (1991), which was based on Garrison's book *On the Trail of the Assassins*. The case was settled in 1999, with Garrison's estate receiving a "very small settlement."

The 2002 film *My Big Fat Greek Wedding* was considered hugely successful for an independent film, yet according to the studio, the film lost money. Accordingly, the cast (with the exception of Nia Vardalos who had a separate deal) sued the studio for their part of the profits. The original producers of the film have sued Gold Circle Films due to Hollywood accounting practices because the studio has claimed the film, which cost less than \$6 million to make and made over \$350 million at the box office, lost \$20 million.

Peter Jackson, director of *The Lord of the Rings*, and his studio Wingnut Films, brought a lawsuit against New Line Cinema after "an audit ... on part of the income of *The Fellowship of the Ring*". Jackson stated this is regarding "certain accounting practices", which may be a reference to Hollywood accounting. In response, New Line stated that their rights to a film of *The Hobbit* were time-limited, and since Jackson would not work with them again until the suit was settled, he would not be asked to direct *The Hobbit*, as had been anticipated. Fifteen actors are suing New Line Cinema, claiming that they have never received their 5% of revenue from merchandise sold in relation to the movie, which contains their likeness. Similarly, the Tolkien estate sued New Line, claiming that their contract entitled them to 7.5% of the gross receipts of the \$6 billion hit. Overall according to New Line's accounts the trilogy made "horrendous losses" and no profit at all.

According to Lucasfilm, *Return of the Jedi* despite having earned \$475 million at the box-office against a budget of \$32.5 million, "has never gone into profit".

#### [Hollywood Accounting:](#)

### ***Buchwald v. Paramount Pictures***

**Superior Court of California (1990)** Art Buchwald received a settlement after his lawsuit *Buchwald v. Paramount* over Paramount's use of Hollywood accounting. The court found Paramount's actions "unconscionable", noting that it was impossible to believe that a movie (1988's Eddie Murphy comedy *Coming to America*) which grossed \$350 million US failed to make a profit, especially since the actual production costs were less than a tenth of that. Paramount settled for \$900,000, rather than have its accounting methods closely scrutinized in open court.

In the Buchwald case, one of Hollywood's most famous, Buchwald and his producing partner Alan Bernheim sued Paramount for failure to pay 19% of

“net profits” of the Eddie Murphy comedy.

At trial, Paramount maintained that they were \$18 million short of net profits, even though the film had actually earned \$350 million in world wide box office receipts. Now what?

Buchwald and Bernheim argued that this was “unconscionable” and a contract of adhesion, because they had no bargaining power to fight the “net profits” formula.

Paramount countered that it had paid more than \$150 million in net profits over the past 15 years using the same formula found in all of its other studio contracts. Paramount’s own “turnaround” provision provides for Paramount to receive “net profits.”

Furthermore, Buchwald and Bernheim are Hollywood players with high-powered agents. Everybody knows what “net profits” mean in Hollywood.

### Two Accounting Methods

[Hollywood Accounting](#) typically involves two sets of books:

- One for calculating profits to shareholders.
- One for calculating performer share of profits.

How to defend against this nonsense?

One way is to say that your client’s share of net profits participation shall be calculated using the SAME FORMULA as ALL other net profits participants. The other way is to simply advise the talent that these clauses are meaningless and almost never result in any “new money.”

- *Buchwald v. Paramount Pictures*, (Cal. App. 1992)([read about examples of Hollywood Accounting](#)).
- *Buchwald v. Paramount Pictures*, 1992 WL 1462910 (Cal. App. 1992).
- [LA Times on Buchwald suit](#)

### Totally Optional Readings & Viewings

- [Ben Stein Sues Firm For Backing Out Of Contract](#). Stein, the prolific actor, author, spokesperson, pundit and one-time star of Comedy Central’s game show *Win Ben Stein’s Money*, has sued a Japanese company and its New York ad agency for \$300,000 for allegedly backing out of a deal to hire him to act in commercials when they found out about his beliefs on global warming.

- [Penguin Group files lawsuits against prominent writers who fail to deliver books](#). A New York publisher this week filed lawsuits against several prominent writers who failed to deliver books for which they received hefty contractual advances, records show. The Penguin Group's New York State Supreme Court breach of contract/unjust enrichment complaints include copies of book contracts signed by the respective defendants.