

Lawyers For The Talent

Entertainment Law

Richard Dooling

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Lawyers For The Talent

by Richard Dooling

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I Disclaim

I am an author and sometimes a screenwriter. I'm also a lawyer, and I teach Entertainment Law at the University of Nebraska College of Law, but I am not *your* lawyer, and the text you find here is *not* legal advice.

To paraphrase Hunter Thompson:

The entertainment industry is a cruel and shallow money trench ... a long plastic hallway where thieves and pimps run free and good men die like dogs.

It's no place to be guessing about your legal rights. If you need legal advice, please get a lawyer.

Other Rights

by Richard Dooling

Credits

Webster's 3rd New International Dictionary defines credit as:

a recognition by name of a person contributing to a performance (as the author, director, or producer of a broadcast, telecast, or stage play).

For most artists compensation and recognition go hand-in-hand. Well-known artists with lots of credits get paid more and also can ask for and get more control over their work.

As the Writers Guild of America puts it:

A writer's position in the entertainment industry is determined largely by his or her credits. Their professional status depends on the quality and number of screenplays, teleplays, or stories which bear their names. The administration of an accurate and equitable system of determining credits is, therefore, one of the most important services the Guild performs for writers.

Writers Guild of America: Credits.

History of Credits

Credits are as old as the entertainment industry itself. Silent films had no credits, only the name of the picture and the production company. When performers became more widely known, studios realized the marketing potential of publicizing and crediting actors by name, which led audiences to seek out their favorite performers. Closing credits also allowed actors and artists to take a final bow at the end of the film. And soon artists became celebrities, which gave them leverage to demand a greater share of the box office receipts generated by their star power.

Before long, contract negotiations included careful descriptions of how the talent's work would be credited. And if the credit wasn't given according to the agreed upon terms, the talent sued.

For example, in *Paramount Productions, Inc. v. Smith* (9th Cir. 1937), author Smith sold his story "Cruise to Nowhere" to Paramount Productions, Inc. for \$2,500 and the following credit agreement:

Paramount agrees to announce on the film of the motion picture photoplays that may be produced pursuant hereto that such motion picture photoplays are based upon or adapted from a story written by the Author, or words to that effect.

In 1945 Paramount began exhibiting a movie entitled *We're Not Dressing*, which was based on author Smith's story, but Smith received no credit. Paramount argued that damages were too speculative. How could the jury determine the worth of something so insubstantial as a credit? The Ninth Circuit had no trouble with that calculation, because at trial author Smith testified that he and another writer had collaborated in writing a different story and sold it without screen credit for \$10,000, which the two writers divided, making Smith's share \$5,000.

Smith sold "Cruise To Nowhere" to Paramount for \$2,500 PLUS the bargained-for credit. So the jury could do simple math and determine that if Smith was paid \$5,000 for uncredited work and \$2,500 for credited work, then the credit must be

worth at least \$2,500.

Point being: In Hollywood, credits are a form of compensation, every bit as valuable as cash.

Credits & The Talent Guilds

Modern films feature credits, not only for “above the line” contributors (the director, producer, writer, and main actors, so called because these names used to appear above an actual line on old budget formats), but also for the sometimes hundreds of “below the line” contributors (all physical production costs not included in the above-the-line expenses, including material costs, music rights, publicity, trailer, and marketing costs). Artists receive credits for contributions as obscure as being a bee wrangler in *Fried Green Tomatoes* and a moth wrangler and moth stylist in the *The Silence of the Lambs*.

Of course the principle basis for negotiating artistic credits are labor agreements with the [Screen Actors Guild](#), the [Writers Guild of America](#), the [Directors Guild](#), and the [American Federation of Musicians](#) representing those “above the line” movie contributors. But the talent’s representatives also bargain for where and how the talent’s name appears in rolling credits. Does it appear on a separate “card,” meaning a single credit: “Written by Wally Writer” or does it appear in a list with other credits, or in alphabetical order with others, or does the talent get “top billing” along with other stars and filmmakers. By and large the various talent guilds have taken over the work of refereeing credit disputes, but the original bargaining for placement and position is often accomplished by the talent’s representatives.

Especially in the case of a TV series, billing and credit considerations may evolve along with production. In 1983, highly regarded actor William Smithers brought an action against MGM when he did not receive the billing in his contract after his character was completely written out of the television show *Executive Suite*. After refusing to accept lower credit, MGM threatened to cut Smithers out of any work on future projects. The jury found for Smithers and awarded damages in the amount of \$500,000 for breach of contract, \$300,000 for breach of contract on covenant of good faith and fair dealing, \$200,000 for fraud damages for never intending to give Smithers the billing he contracted for, and \$2 million in punitive damages which the judge adjusted to \$1 million.

The testimony was considerable on the importance of billing to an actor. Several witnesses testified that billing reflects the actor’s stature in the industry, and affects his negotiations for roles, since it reflects

what his status and compensation has been in the past. Billing reflects recognition by the producer and the public of the actor's importance or "star quality," and in turn affects the actor's compensation in present and future roles.

MGM concedes that its contract with Smithers was breached, but takes the position that damages arising from such breach were speculative and incapable of ascertainment. Damages for breach of contract must, of course, be clearly ascertainable as to their nature and origin. ... However, it is clear that one who willfully breaches the contract bears the risk as to the uncertainty or the difficulty of computing the amount of damages. ... A number of witnesses established the relationship between billing and the actor's future negotiations for compensation. The jury could reasonably conclude from the evidence that Smithers suffered an economic loss by reason of MGM's failure to live up to its agreement. Although witnesses were unable to estimate with precision how much Smithers had lost or how much he would earn in future years, the jury was provided a reasonable basis upon which to calculate damages.

On appeal, the judgment and adjusted punitive damages were affirmed.

Smithers v. Metro-Goldwyn-Mayer Studios, Inc. (Cal. 1983).

Credits As Entertainment

But along with the final bow and recognition, final credits provide yet another opportunity to entertain. Consider some of these notable movie credits:

- Moose trained to mix concrete and sign complicated insurance forms by Jurgen Wigg. *Monty Python and the Holy Grail* (1975).
- Ms. Streisand's clothes from ... her closet. *A Star is Born* (1976).
- Worst Boy – Adolph Hitler. *Airplane II: The Sequel* (1982).
- The Voice – HIMSELF. *Field of Dreams* (1989).

The Monty Python crew may have kept people in their seats who were eager to find out what other roles that Moose would play, and today bloopers and outtakes are often added to the final credits. Imagine the artist's dismay if she bargained for top billing, and instead her name appeared in the small print that no one noticed during the hilarious [Jason Bateman outtakes](#)? Every alteration is negotiated with money and recognition always being the motivating factors. As columnist Nick Madigan put it in *Variety*:

In a town where ego, bravado and the manipulation of truth create a

relentless, prickly war of one-upmanship, questions of name placement carry almost life-or-death importance.

Consult [IMDB](#) and look up the credits of your favorite star, writer, director or producer.

Possessory Credits

A film *by* Rob Reiner? Prominent Hollywood directors like Frank Capra and Alfred Hitchcock have claimed a [possessory credit](#) going all the way back to 1915. But what does the possessory credit say? That Rob Reiner is solely responsible for the film? What about the actors who played the parts? What about the tradesman who made every scene in the film? What about the editor who actually put the film together? The Writers Guild of America has objected to directors claiming possessory credit, and in 1994-1995 tried (unsuccessfully) to prohibit anyone other than a writer from receiving possessory credit. According to the [Director's Guild of America](#), everyone involved in a motion picture is eligible to seek such a credit. These negotiations, contracts and remedial procedures are almost entirely dictated by the unions. Consider the [Producers Guild of America Code of Credits](#), even adding an additional recognition of The Producer's Mark.

While many are vying to get the most credit and exposure they can, what if an artist doesn't want credit?

King v. Innovation Books

United States Court of Appeals 2nd Circuit (1992)

- [Lexis link](#)
- [Google Scholar link](#)

MINER, Circuit Judge:

Defendants-appellants, Allied Vision, Ltd. and New Line Cinema Corporation, appeal from an order of the United States District Court for the Southern District of New York (Motley, J.) granting a preliminary injunction in favor of plaintiff-appellee Stephen King in connection with King's claims under the Lanham Act and New York law. King contended that Allied and New Line falsely designated him as the originator of the motion picture "The Lawnmower Man," which was produced by Allied and distributed in North America by New Line. The injunction, which prohibits any use of King's name "on or in connection with" the movie, encompasses two forms of credit to which King objected: (1) a possessory

credit, describing the movie as “Stephen King’s The Lawnmower Man,” and (2) a “based upon” credit, representing that the movie is “based upon” a short story by King. For the reasons that follow, we affirm the district court’s order to the extent that it prohibits use of the possessory credit, but reverse the order to the extent that it prohibits use of the “based upon” credit.

Background

In 1970, King wrote a short story entitled “The Lawnmower Man” (the “Short Story”). In 1978, King assigned to Great Fantastic Picture Corporation the motion picture and television rights for the Short Story. The assignment agreement, which provided that it was to be governed by the laws of England, allowed the assignee the “exclusive right to deal with the Short Story as it may think fit,” including the rights:

1. to write film treatments and scripts and other dialogue versions of all descriptions of the Short Story and at all times to add to, take from, use, alter, adapt ... and change the Short Story and the title, characters, plot, theme, dialogue, sequences and situations thereof. . .
2. to make or produce films of all kinds ... incorporating or based upon the Short Story or any part or parts thereof or any adaptation thereof.

In return, King received an interest in the profits of “each” film “based upon” the Short Story.

In February 1990, Great Fantastic transferred its rights under the assignment agreement to Allied. In May 1990, Allied commissioned a screenplay for a feature-length film entitled “The Lawnmower Man.” By February 1991, Allied began to market the forthcoming movie by placing advertisements in trade magazines and journals. The picture generally was described as “Stephen King’s The Lawnmower Man,” and as “based upon” a short story by King. Actual filming of the movie began in May 1991. About one month later, Allied, through its United States subsidiary, licensed New Line to distribute the movie in North America. The licensing agreement was concluded in California, and a press release announcing the distribution deal was issued from that state as well. New Line initially paid \$250,000 for the distribution rights, with an additional \$2.25 million to be paid thereafter.

King learned of the forthcoming movie in early October 1991, from an article in a film magazine. He then contacted Rand Holston, an agent handling King’s film rights, in an attempt to gather information about the film; asked Chuck Verrill, his literary agent, to obtain a “rough cut” of the movie; and instructed Jay Kramer, his

lawyer, to inform Allied that King did not like the idea of a possessory credit (a form of credit apparently portended by the article).

By letter dated October 9, 1991, Kramer advised Allied that King “did not want” a possessory credit to appear on the film. Kramer also requested a copy of the movie and the tentative movie credits King was to receive. In another letter to Allied dated October 21, 1991—written after Kramer secured a copy of the movie’s screenplay—Kramer advised that “we emphatically object” to the possessory credit contained in the screenplay, and noted that he had yet to receive a copy of the tentative credits.

On March 3, 1992—four days or so before release of the movie in theaters—King viewed a copy of the movie in a screening arranged by Allied and New Line.

The film and advertising seen by King contained both possessory and “based upon” credits. On the evening of March 3, after viewing the film, King wrote to Holston:

I think The Lawnmower Man is really an extraordinary piece of work, at least visually, and the core of my story, such as it is, is in the movie. I think it is going to be very successful and I want to get out of the way. I want you to make clear to the trolls at New Line Pictures that I am unhappy with them, but I am shelving any ideas of taking out ads in the trades or trying to obtain an injunction to stop New Line from advertising or exploiting the picture. I would like to talk to you late this week or early next about doing some brief interviews which will make my lack of involvement clear, but for the time being, I am just going to step back and shut up. At least for the time being.

In a March 23, 1992 letter, Kramer again advised Allied of King’s “long standing objection” to the possessory credit, and also took note of “the apparent failure of Allied to inform New Line of Mr. King’s objection until the movie was about to be released.” However, no objection to the “based upon” credit ever was registered until May 20, 1992. From March through May 1992, New Line expended another \$2.5 million in promotion and entered into certain hotel movie and television commitments, as well as home video arrangements.

King initiated the instant suit on May 28, 1992, seeking damages as well as injunctive relief. He claimed that the possessory and “based upon” credits violated section 43(a) of the Lanham Act ... as well as the New York common law of unfair competition and contracts, the New York General Business Law, and the New York Civil Rights Law. A motion for preliminary injunction was made on June 3, and a hearing was held on June 29.

The district court agreed with King on all of his claims and granted the injunction on July 2, concluding that the possessory credit was false on its face, that the

“based upon” credit was misleading, and that the irreparable harm element of a preliminary injunction action had been satisfied. The equitable defenses of laches, estoppel and waiver interposed by Allied and New Line were rejected.

The injunction prohibited use of King’s name “on or in connection with” the motion picture, and by its terms encompassed both the possessory and “based upon” credits. The injunction applied to distribution of the film by Allied abroad as well as by New Line in North America, either in theaters or on videocassette or on television. We granted appellants’ application for a stay pending this expedited appeal, but conditioned the stay upon suspension of use of the possessory credit. At oral argument counsel for New Line informed us that the videocassettes of the movie now in circulation contain only the “based upon” credit.

DISCUSSION

I. Likelihood of Success on the Merits

The district court correctly noted that a false reference to the origin of a work, or a reference which, while not literally false, is misleading or likely to confuse, may form the basis of a claim under section 43(a) of the Lanham Act ... (prohibiting use in commerce of “any false designation of origin, false or misleading description of fact, or false or misleading representation of fact” which is “likely to cause confusion . . . or to deceive as to affiliation, connection, or association”); *Gilliam v. ABC, Inc.*, (2d Cir. 1976).

A. *The Possessory Credit*

We perceive no error in the district court’s conclusion that King is likely to succeed on the merits of his objection to the possessory credit. The district court was entirely entitled to conclude, from the testimony at the preliminary injunction hearing, that a possessory credit ordinarily is given to the producer, director or writer of the film; and that the credit at a minimum refers to an individual who had some involvement in, and/or gave approval to, the screenplay or movie itself. In contrast to other films for which he has been given a possessory credit, King had no involvement in, and gave no approval of, “The Lawnmower Man” screenplay or movie.

Under the circumstances, therefore, the arguments advanced by Allied and New Line as to why the possessory credit is not false—that the other movie credits make clear that King was not the producer, director or writer of the film, and that King has in the past received a possessory credit where he merely approved in advance of the screenplay or movie—do not alter the conclusion that King is likely to succeed on his challenge to the possessory credit. Appellants also contend that

King offered no evidence of public confusion in relation to the possessory credit. As will be detailed in our discussion of irreparable harm, however, there was some such evidence offered.

In any event, as the district court recognized, no evidence of public confusion is required where, as is the case with the possessory credit, the attribution is false on its face....

B. The “Based Upon” Credit

As the district court recognized, a “based upon” credit by definition affords more “leeway” than a possessory credit. The district court nevertheless concluded that the “based upon” credit at issue here is misleading and likely to cause confusion to the public, reasoning in essence that the “climactic scene from the Short Story is inserted into the film in a manner wholly unrelated to the Plot of the film,” and that the credit “grossly exaggerates” the relationship between the Short Story and the film.

While particular findings of fact are subject to the clearly erroneous standard of review, we have said that the weighing of factors in “the ultimate determination of the likelihood of confusion is a legal issue subject to de novo appellate review.... We believe that in so heavily weighing the proportion of the film attributable to the Short Story in the course of finding the “based upon” credit to be misleading and confusing, the district court applied a standard without sufficient support in the testimony and applicable law.

John Breglio, an attorney of the law firm of Paul, Weiss, Rifkind, Wharton & Garrison specializing in entertainment law, testified as an expert witness for King. Breglio opined that the term “based upon,” in the context of royalty obligations under King’s assignment agreement, was not identical to the term “based upon” in a movie credit. After speaking of a test of “substantial similarity” between the literary work and movie, and opining that there was not substantial similarity between the Short Story and the film, Breglio went on to state that the industry standard for determining the meaning of a “based upon” movie credit is very similar to that used by copyright lawyers in examining issues of copyright infringement. Breglio further explained that this standard involved looking “at the work as a whole and how much protected material from the underlying work appears in the derivative work.” (emphasis added)

Indeed, in cases of alleged copyright infringement it has long been appropriate to examine the quantitative and qualitative degree to which the allegedly infringed work has been borrowed from, and not simply the proportion of the allegedly infringing work that is made up of the copyrighted material. See *Harper & Row v. Nation Enterprises* (Sct. 1985).... Accordingly, the propriety of the “based upon”

credit should have been evaluated with less emphasis on the proportion of the film attributable to the Short Story, and with more emphasis on the proportion, in quantitative and qualitative terms, of the Short Story appearing in the film.

Where a movie draws in material respects from a literary work, both quantitatively and qualitatively, a “based upon” credit should not be viewed as misleading absent persuasive countervailing facts and circumstances. Our concern is the possibility that under the district court’s apparent approach, substantially all of a literary work could be taken for use in a film and, if unrelated ideas, themes and scenes are tacked on or around the extracted work, a “based upon” credit would be deemed misleading.

In the case before us, the apparent “core” of the ten page Short Story—a scene in which a character called “the lawnmower man” uses psychokinetic powers to chase another character through his house with a running lawnmower and thereby kill him—is used in the movie. In both the movie and the Short Story, the remains of the murdered man (who is named Harold Parkette in both works) are found in the birdbath by the police; the two police officers in both works have the same names and engage in substantially similar dialogue. As King himself described it, “the core of my story, such as it is, is in the movie.” The red lawnmower seen in the movie also appears to be as described in the Short Story. A brief reference to the Pan mythology of the Short Story appears in the movie as well; dialogue between Jobe and another character includes a reference to “Pan pipes of the little people in the grass.”

We recognize that several important and entertaining aspects of the Short Story were not used in the film, and that conversely the film contains a number of elements not to be found in the Short Story. However, when the resemblances between the Short Story and the motion picture at issue here are considered together, they establish to our satisfaction that the movie draws in sufficiently material respects on the Short Story in both qualitative and quantitative aspects.

Nor are there any persuasive countervailing facts or circumstances in the record to lead us away from the conclusion that the “based upon” credit is proper in this case. King himself apparently was not bothered much (if at all) by the “based upon” credit, in marked contrast to his sustained and strong objections to the possessory credit, until shortly before he initiated this suit. He has not pointed us to evidence in the record of industry or public perception of, or confusion over, the “based upon” credit beyond the thoughts offered by Breglio. Professor George Stade, Vice Chairman of the English Department at Columbia University and King’s other expert witness, did opine that, despite similarities, the movie was not based upon the Short Story. However, even Professor Stade indicated at one point in his testimony that “substantial” portions of the Short Story appear in the film.

In *Gilliam v. ABC, Inc.* (2d Cir. 1976), we found a violation of section 43(a) by the ABC television network, which had aired, under license from the BBC, the “Monty Python’s Flying Circus” programs of the British comedy group. Monty Python’s agreement with the BBC gave the comedy group substantial control over any editing by the BBC.... However, ABC on its own substantially edited the programs it aired under the BBC license, so as to eliminate many thematically essential and humorous portions of the original programs.... King suggests, in disputing the legitimacy of the “based upon” credit, that Allied’s treatment of the Short Story is analogous to ABC’s editing in Gilliam.

However, at issue in Gilliam were original Monty Python programs which were edited by ABC and then rebroadcast as Monty Python’s work. We specifically noted that Monty Python was being “presented to the public as the creator of a work not its own, and made subject to criticism for work it has not done.” ... While Gilliam certainly supports the view we have taken of the possessory credit, the case is not very helpful in evaluating the accuracy of a “based upon” credit, which by definition deals with altered and derivative works.

It is undoubtedly the case that King’s assignment agreement does not permit Allied to use King’s name fraudulently, and we express no view as to the degree of overlap between the term “based upon” in the King assignment agreement and the term “based upon” in a theatrical credit. However, we do note that the agreement contemplates substantial alterations to the Short Story, and even obligates Allied to give King credit in the case of a film “based wholly or substantially upon” the Short Story. We think that King would have cause to complain if he were not afforded the “based upon” credit.

II. Irreparable Harm

As the district court observed, a presumption of irreparable harm arises in Lanham Act cases once the plaintiff establishes likelihood of success on a claim of literal falseness, as King has established with respect to the possessory credit.

(The court then rejected Allied’s arguments that this presumption was rebutted by King’s delay or because he enjoyed the movie.)

Conclusion

The order of the district court granting a preliminary injunction is affirmed to the extent it prohibits use of the possessory credit, but reversed to the extent it prohibits use of a “based upon” credit.

Who Is Alan Smithee?

Finally, who is the illusive director Alan Smithee? [He takes credit for a number of pictures](#) including the television version of *Dune*, a Hitchcock sequel *Birds II: Land's End* and *Hellraiser: Bloodline*. This director has a wide range of productions under his belt, but Smithee is no person at all. Instead, he is a creation of the [Directors Guild](#) to allow directors to renounce credits by removing their names from projects they no longer feel reflect their work. It is often editing disputes that cause a director to disown his work and the director must formally apply to the Guild to receive permission to use the Smithee name.

Tristar Pictures v. Directors' Guild of America

United States Court of Appeals 9th Circuit (1998)

- [Google Scholar link](#)
- [Lexis link](#)

KOZINSKI, Circuit Judge:

Director Michael Apted was unhappy with the way Tristar Pictures edited his film, *Thunderheart*, for television. With the help of the Directors Guild of America (DGA), Apted sought a pseudonym for the director's credit, to avoid having his name associated with the work.

I

Cinephiles believe the director is the true author of a film: It's Coppola's *Godfather*, Spielberg's *Schindler's List* and Verhoeven's *Robocop*. So too when things go badly: It's Coppola's *One from the Heart*, Spielberg's *Lost World* and Verhoeven's *Showgirls*. With his reputation on the line, Apted was concerned when he learned that Tristar would shorten *Thunderheart* by nearly half an hour in order to show it on commercial television. Tristar asked Apted to help trim the movie from 118 minutes, its running time in theater, down to 90 minutes (a two-hour slot minus commercials). Apted refused and insisted that *Thunderheart* be shown in its entirety. Tristar decided to proceed over Apted's objection and hired an editor who made 270 separate cuts totaling 22 minutes, sped up the credits to steal two more minutes, and compressed the rest of the film electronically to gain another four. Apted then asked that his name be taken off the edited picture, but Tristar refused. After an arbitrator ruled in favor of Apted, Tristar brought a petition in state court

claiming that the arbitrator had overstepped his authority. The DGA then removed the case to federal court, and the district court upheld the award. Tristar appeals.

II

Apted's relationship with Tristar is governed by a collective bargaining agreement (the Basic Agreement) negotiated between the studios and the DGA. Two clauses of the agreement are relevant to this appeal. One of them, section 8-211, governs claims by a director that he is entitled to a pseudonym. In order to avail himself of this remedy, a director must first persuade the Director's Council of the DGA that he is entitled to a pseudonym. If the Council assents, the pseudonym question is presented to a joint panel composed of two representatives from the studio and two from the DGA. If a majority of the joint panel sides with the director, the film's directing credit goes to a fictitious director, typically "Alan Smithee." If not, the studio may continue to use the director's name.

The second relevant provision is the Basic Agreement's arbitration clause. Section 2-101 sets forth the arbitrator's jurisdiction, which embraces the capacious range of "all grievances, disputes or controversies over the interpretation or application" of the Basic Agreement. The arbitrator's authority can be invoked under a normal arbitration procedure, set forth in section 2-300 of the Basic Agreement, or under an expedited arbitration procedure, found in section 2-400.

In this case, the Director's Council agreed with Apted and on July 7th called for the convocation of a joint panel to consider whether Apted was entitled to a pseudonym. As of July 12, 1995, however, just six days before *Thunderheart* was scheduled to air, the joint panel had not yet met. The DGA therefore called for expedited arbitration of the dispute under section 2-400. The arbitration took place two days later.

The arbitrator did not rule on Apted's pseudonym claim, explaining that this was a dispute "most appropriately" resolved by the joint panel. But he agreed that Tristar's cuts were so severe as to breach Tristar's duty of good faith and fair dealing set forth in section 7-1502 of the Basic Agreement. As a result, the arbitrator made a conditional award: If the joint panel did not grant Apted a pseudonym, Tristar would have to show a disclaimer that reflected Apted's view of the edited version. 6 The awarded disclaimer read:

This film is not the version originally released. 22 minutes have been cut out. The director, Michael Apted, believes this alteration changes the narrative and characterization and is not associated with it. The film has also been electronically speeded up. The director believes that

this alteration changes the pace of the performance and is not associated with it.

This put Tristar in a box. If it used Apted's name, it would be forced to air the disclaimer, which would make it look as if the film had been butchered. If it used a pseudonym, it would lose the attraction of a respected director. Tristar chose what it saw as the lesser of the two evils, and when *Thunderheart* aired on Fox, sans disclaimer, it carried the label "An Adam Smithy Film." (The record does not explain why Tristar switched from Alan Smithee to Adam Smithy. It could be that Alan is developing a reputation. See Thomas Goetz, *King of the Bs: Appreciating Alan Smithee*, Village Voice, Sept. 2, 1997, at 78 ("The best anyone in Hollywood has to say about director Alan Smithee is that he gets the job done.")).

III

Tristar argues that the arbitrator lacked jurisdiction over the dispute. Under Tristar's reading of the Basic Agreement, all disputes concerning the editing of a film are governed by the pseudonym clause, and the only remedy available to a director unhappy with the studio's editing decision is to seek a pseudonym. While the language of the arbitration clause is very broad, Tristar argues, it should not be read so as to render superfluous the more specific procedure in the pseudonym clause, which is calibrated to resolve disputes about whether edits made to a movie so change its character as to render it no longer the director's work.

Tristar's argument is not without force. The pseudonym procedure does contain a carefully negotiated mechanism for dealing with precisely the type of dispute that arose between Apted and Tristar. Notably, the procedure gives the studio considerable leverage in resisting a claim by the director. Because the joint panel is made up of an equal number of members nominated by the studio and the DGA, a director can only obtain a pseudonym by persuading at least one member nominated by the studio; a tie vote denies the director the pseudonym. By contrast, the studio has no particular leverage for resisting a ruling by the arbitrator - other than the inertial force of being the non-moving party. The pseudonym clause also gives the director only one possible remedy - a pseudonym - while (as we see in this case) the arbitrator can grant other types of relief. Finally, the contract provides no standard for obtaining relief from the joint council, while the arbitrator is limited to any ground available under the terms of the contract and applicable principles of contract law, such as breach of the covenant of good faith and fair dealing. Given these differences, it would seem almost foolish for a director to avail himself of the pseudonym procedure rather than seeking relief under the arbitration clause. Indeed, a director might proceed under the pseudonym procedure and, if unhappy

with the result, then seek a separate remedy under the arbitration clause over the same issue.

Tristar also notes that the arbitrator himself saw a tension between the broad sweep of the arbitration clause and the pseudonym procedure. He therefore found that arbitration was not the “most appropriate way” to resolve a dispute over a pseudonym, noting that the parties had established the pseudonym clause as the method for resolving disputes of that sort. Seizing upon this concession by the arbitrator as to the scope of his authority, Tristar argues that the pseudonym provision carves out an area where even the expansive arbitration clause does not reach. By making the arbitration award provisional upon whether a pseudonym is granted, Tristar claims, the arbitrator impermissibly tread upon ground he admitted he had no right to occupy.

Were we interpreting the Basic Agreement in the first instance, this would be a difficult case, but we are not. We are reviewing the award of an arbitrator who ruled on this issue and held that Tristar had violated the implied promise of good faith and fair dealing contained in Article 7 of the Basic Agreement. Tristar’s challenge to the arbitrator’s jurisdiction fails, not only because of the broad language of the arbitration clause, but also because of Tristar’s prior actions. Although Tristar did suggest at the arbitration hearing that the arbitrator had no authority to decide certain issues, it chose to argue that the arbitrator lacked authority rather than simply refusing to come to the table. In this manner, Tristar “by its conduct evinced clearly its intent to allow the arbitrator to decide not only the merits of the dispute but also the question of arbitrability.” *George Day Constr. Co. v. United Bhd. of Carpenters* (9th Cir. 1984) ... Instead of resting on its present contention that the arbitrator could not grant Apted the relief he sought, Tristar put on evidence of its good faith in editing the film, tacitly admitting that it was plausible for the arbitrator to assume jurisdiction over the dispute.

Tristar’s complaint that the arbitrator effectively forced it to grant Apted a pseudonym, thereby circumventing section 8-211 of the Basic Agreement and impermissibly extending the limits of his jurisdiction, also fails. Our review of the scope of an arbitrator’s award is extremely narrow: We may ask only “whether the arbitrator’s solution can be rationally derived from some plausible theory of the general framework or intent of the agreement.” ... The Basic Agreement gives the arbitrator ample leeway in fashioning remedies: Section 2-501 empowers the arbitrator “to require the studio to change or re-do any film titles ... or to order any other reasonable relief the Arbitrator deems appropriate in the circumstances, whether relating to credit on the screen or in advertising or any other arbitrable matter...” This clause invokes the rule that “where it is contemplated that the arbitrator will determine remedies for contract violations that he finds, courts have no authority to disagree with his honest judgment in that respect.” ... The

arbitrator's ruling that the covenant of good faith and fair dealing gives an aggrieved director more remedies than just seeking a Smithee is not completely implausible.

Tristar also seems to argue that the arbitrator abused whatever authority he did have by making his award conditional on the actions of the joint panel, effectively forcing Tristar to give Apted a pseudonym. But the arbitrator was entitled to consider the possibility that his remedy might be rendered redundant if the joint panel awarded a Smithee. If the arbitrator had authority to order the disclaimer, he surely had the lesser power of awarding the disclaimer only in the absence of certain conditions. Further, we observe that the disclaimer didn't take away the studio's right, arguably granted by section 7-509 of the Basic Agreement, to edit the film as it sees fit. It only required Tristar to disclose Apted's view of the changes Tristar made to his film.

Tristar finally argues that affirming this award will create a per se rule prohibiting studios from editing movies for television. We are unconvinced that a single award will have any such effect. Although section 2-309 says that awards interpreting a term of the Basic Agreement are binding on the DGA and the studio, it also instructs that "in any subsequent arbitration ... involving an interpretation of the same term or terms of the Basic Agreement, the Arbitrator may determine whether or not, as a result of the different combination of facts, the prior arbitration award is relevant or determinative of the issue in such subsequent arbitration."

Furthermore, if the arbitrator's decision was indeed so far removed from the spirit of the agreement, the parties are free to renegotiate the governing rules to preclude such awards in the future.

We are bound by the very deferential standard of review that we must give arbitral decisions. "Courts ... do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts.... That a court is convinced an arbitrator committed serious error does not suffice to overturn his decision." ... Regardless of whether this is the solution that we would come up with through our own independent interpretation of the Basic Agreement, we must abide by the arbitrator's plausible interpretation of the agreement. (Citing no cases, Tristar also claims that the arbitrator's evidentiary rulings violated due process. We see no reason to depart from our usual deference to the procedural rulings of arbitrators.

AFFIRMED.

Moral Rights (*Droit Moral*)

The talent may bargain for credits, for compensation, and for control. But what happens, as in Apted's case, when the purchaser modifies or mutilates the work, and then, over the objection of the talent, presents the final product as the work of the aggrieved artist?

The term “moral rights” is a translation of the French term “droit moral,” and refers not to “morals” as advocated by the religious right, but rather to the ability of authors to control the eventual fate of their works. An author is said to have the “moral right” to control her work. The concept of moral rights thus relies on the connection between an author and her creation. Moral rights protect the personal and reputational, rather than purely monetary, value of a work to its creator.

The scope of a creator's moral rights is unclear, and differs with cultural conceptions of authorship and ownership, but may include the creator's right to receive or decline credit for her work, to prevent her work from being altered without her permission, to control who owns the work, to dictate whether and in what way the work is displayed, and/or to receive resale royalties. Under American Law, moral rights receive protection through judicial interpretation of several copyright, trademark, privacy, and defamation statutes, and through [17 U.S.C. §106A](#), known as the [Visual Artists Rights Act of 1990 \(VARA\)](#). VARA applies exclusively to visual art. In Europe and elsewhere, moral rights are more broadly protected by ordinary copyright law.

In the United States, the term “moral rights” typically refers to the right of an author to prevent revision, alteration, or distortion of her work, regardless of who owns the work. Moral rights as outlined in [VARA](#) also allow an author of a visual work to avoid being associated with works that are not entirely her own, and to prevent the defacement of her works.

[Moral Rights Basics](#), by Betsy Rosenblatt, Harvard Law School.

Except visual works of art protected under [VARA](#), United States courts don't recognize moral rights as such, but courts do typically afford similar protections to aggrieved artists using other well-settled legal remedies (copyright, trademark, contract, privacy, defamation, and others).

In the following case, the court in essence protects the moral rights of a composer by using a contract theory.

Granz v. Harris,

United States Court of Appeals 2nd Circuit (1952).

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

Facts

Norman Granz, well-known promoter and producer of jazz concerts, had one of his concerts recorded featuring two popular pieces titled “How High The Moon” and “Lady Be Good.”

Granz LICENSED Herbert Harris a record producer to manufacture and sell recordings WITH THE CREDIT LINE “Presented by Norman Granz.”

Harris produced records, but he omitted 8 minutes of the original songs because the performances would not fit onto the 10-inch records Harris was using at the time.

Granz sued Harris for breach of contract. Not a copyright violation necessarily because Harris has a LICENSE.

Question becomes: Do we need “moral rights” to protect Granz?

Court says no. A contract will suffice. The contract conveying the license said that Harris could sell the recordings but only if he used the legend: “Presented by Norman Granz.”

The court said that the contract IMPLIED a duty not to sell records which would make the legend “Presented by Norman Granz” a false designation by cutting 8 minutes out of the session Granz presented.

Sale of the ten-inch abbreviated records was a breach of the contract . . . and [because] the harm to the plaintiff’s reputation as an expert in the presentation of jazz concerts is irreparable, injunctive relief is appropriate.

Excerpts from *Granz v. Harris*

SWAN, Chief Judge.

We are therefore faced with the question whether the manufacture and sale by the defendant of the abbreviated ten-inch records violated any right of the plaintiff. Disregarding for the moment the terms of the contract, we think that the purchaser

of the master discs could lawfully use them to produce the abbreviated record and could lawfully sell the same provided he did not describe it as a recording of music presented by the plaintiff. If he did so describe it, he would commit the tort of unfair competition. But the contract required the defendant to use the legend "Presented by Norman Granz," that is, to attribute to him the musical content of the records offered for sale. This contractual duty carries by implication, without the necessity of an express prohibition, the duty not to sell records which make the required legend a false representation. In our opinion, therefore, sale of the ten-inch abbreviated records was a breach of the contract. No specific damages were shown to have resulted. As such damages are difficult to prove and the harm to the plaintiff's reputation as an expert in the presentation of jazz concerts is irreparable, injunctive relief is appropriate. Hence we think the plaintiff was entitled to an injunction against having the abbreviated ten-inch records attributed to him unless he waived his right. As already noted the district court found that the album cover of the shortened record was corrected "at the plaintiff's insistence," and consequently the defendant was not "attributing to the plaintiff the work of some one else." The only evidence we can discover to support the theory of waiver is the following bit of testimony by the defendant who was called as a witness by the plaintiff:

"As soon as I have received the letter from his [Granz's] attorney, probably about a couple of weeks later or month later, I called in my attorney and he said, What is Norman Granz's complaint, and he said he wanted to see his attorney, and he said he did not like the arrangement, and that was the question discussed, change the cover."

What this testimony means is far from clear. Even if Granz's attorney requested that the cover be corrected immediately and without waiting for the case to come to trial, we are not satisfied that this would necessarily operate as a waiver of Granz's right to an injunction, if sale of the abbreviated records under the legend "Presented by Norman Granz" constituted a breach of contract or the tort of unfair competition, as we have found it did. Whether he intended to waive all claims or whether that result would follow regardless of his intention depends upon what was said and done in the negotiations regarding correction of the cover. We think the case must be remanded for additional evidence on this point and a finding as to what, if anything, Granz did consent....

FRANK, Circuit Judge, (concurring).

I agree, of course, that, whether by way of contract or tort, plaintiff (absent his consent to the contrary) is entitled to prevention of the publication, as his, of a garbled version of his uncopyrighted product. This is not novel doctrine: Byron obtained an injunction from an English court restraining the publication of a book

purporting to contain his poems only, but which included some not of his authorship. American courts, too, have enforced such a right. Those courts have also enjoined the use by another of the characteristics of an author of repute in such manner as to deceive buyers into erroneously believing that they were buying a work of that author. Those courts, moreover, have granted injunctive relief in these circumstances: An artist sells one of his works to the defendant who substantially changes it and then represents the altered matter to the public as that artist's product. Whether the work is copyrighted or not, the established rule is that, even if the contract with the artist expressly authorizes reasonable modifications (e. g., where a novel or stage play is sold for adaptation as a movie), it is an actionable wrong to hold out the artist as author of a version which substantially departs from the original. Under the authorities, the defendant's conduct here, as my colleagues say, may also be considered a kind of "unfair competition" or "passing off." The irreparable harm, justifying an injunction, becomes apparent when one thinks what would be the result if the collected speeches of Stalin were published under the name of Senator Robert Taft, or the poems of Ella Wheeler Wilcox as those of T. S. Eliot.

If, on the remand, the evidence should favor the plaintiff, I think we should grant him further relief, i. e., an injunction against publication by the defendant of any truncated version of his work, even if it does not bear plaintiff's name. I would rest the grant of that relief on an interpretation of the contract.

Plaintiff, in asking for such relief, relied in part not on the contract but on the doctrine of artists' "moral right," a compendious label of a "bundle of rights" enforced in many "civil law" countries. Able legal thinkers, pointing out that American courts have already recognized a considerable number of the rights in that "bundle," have urged that our courts use the "moral right" symbol. Those thinkers note that the label "right of privacy" served to bring to the attention of our courts a common center of perspectives previously separated in the decisions, and that the use of that label induced further novel and valuable judicial perspectives.

To this suggestion there are these objections: (a) "Moral right" seems to indicate to some persons something not legal, something meta-legal. (b) The "moral right" doctrine, as applied in some countries, includes very extensive rights which courts in some American jurisdictions are not yet prepared to acknowledge; as a result, the phrase "moral right" seems to have frightened some of those courts to such an extent that they have unduly narrowed artists' rights. (c) Finally, it is not always an unmitigated boon to devise and employ such a common name. As we have said elsewhere: "A new name, a novel label expressive of a new generalization, can have immense consequences...."

Without rejecting the doctrine of "moral right," I think that, in the light of the

foregoing, we should not rest decisions on that doctrine where, as here, it is not necessary to do so.

Scope of Rights

Gilliam v. ABC

United States Court of Appeals 2nd Circuit (1976)

- [Case on Westlaw](#), 538 F.2d 14 (2d Cir. 1976).
- [Case on Google Scholar](#)
- [Gilliam/Monty Python case at Wikipedia](#).

The British comedy group Monty Python sued ABC for violating copyright and damaging their artistic reputations by broadcasting drastically edited versions of their shows.

The Second Circuit Court of Appeals ruled that ABC had arguably engaged in “actionable mutilation” and banned further broadcasts by ABC. The Court said that the Lanham Act (Trademark) could provide protection in the United States similar to that provided by moral rights in Europe and that ABC had also probably infringed Monty Python’s copyright. Monty Python’s original license to the BBC did not include BBC’s right to drastically edit the episodes, and BBC could convey no more rights to ABC than BBC owned.

Visual Artists Rights Act of 1990 (VARA)

- [Wikipedia summary of VARA](#).

As indicated, moral rights finally found their way into United States copyright law in the Visual Artists Rights Act of 1990.

VARA grants the authors of certain VISUAL works the following exclusive rights:

- right to claim authorship
- right to prevent the use of one’s name on any work the author did not create
- right to prevent use of one’s name on any work that has been distorted, mutilated, or modified in a way that would be prejudicial to the author’s honor or reputation
- right to prevent distortion, mutilation, or modification that would prejudice the author’s honor or reputation

Additionally, authors of works of “recognized stature” may prohibit intentional or grossly negligent destruction of a work. Exceptions to VARA require a waiver from the author in writing. To date, “recognized stature” has managed to elude a precise definition. VARA allows authors to waive their rights, something generally not permitted in France and many European countries whose laws were the originators of the moral rights of artists concept.

In most instances, the rights granted under VARA persist for the life of the author (or the last surviving author, for creators of joint works).

Covered works.

VARA provides its protection only to paintings, drawings, prints, sculptures, still photographic images produced for exhibition only, and existing in single copies or in limited editions of 200 or fewer copies, signed and numbered by the artist. The requirements for protection do not implicate aesthetic taste or value.

Under what circumstances may an artist invoke the protections of VARA? What if a collector decides that almost nobody can afford the paintings of Andy Artist, a prominent American painter. So the collector buys one painting from Andy Artist and then cuts the painting up into a thousand pieces, because the collector plans to sell the pieces to interested parties. Can anybody stop the collector?

Totally Optional Reading & Viewing

- [New York Film Academy: Glossary](#)
- [How Effective Has VARA Been?](#)
- [Deconstructing Moral Rights](#)
- [International Film Distribution: Striking a Deal in the Global Market](#)
- [Moral Rights and Creator Control](#)
- [Who is Alan Smithee?](#)
- [Hollywood Accounting](#)
- [‘Gump,’ a Huge Hit, Still Isn’t Raking In Huge Profits? Hmm.](#)
- [Jonah Hill paid \\$60k for *Wolf of Wall Street* role.](#) Instead of earning his usual high-seven-figures, Hill opted to agree to SAG’s “minimum wage” for the seven-month shoot, which is around \$60,000 before commissions and taxes.