THE RIGHT TO FINAL CUT APPROVAL: THE STRUGGLE FOR CREATIVE CONTROL BETWEEN THE DIRECTOR AND THE STUDIO IN FEATURE FILMMAKING

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“To be a writer, you need a pen. To be a painter, a brush. To be a musician, an instrument. But to be a filmmaker, you need the collaboration of others to bring your vision to the canvas that is the movie screen.”

—Martin Scorsese, Academy Award Winning Director

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INTRODUCTION

While filmmaking is a highly collaborative process, it is not democratic one. With so many “cooks in the kitchen,” a need exists for a clear decision maker. Yet, paradoxically, filmmaking’s collaborative nature makes it a process that cannot fit squarely within one individual’s power. Filmmaking—especially with studio films—involves a complex hierarchy of authority and only a select few can significantly affect the outcome of the film. For all practical purposes, when it comes to making a film, power is synonymous with creative control, and the person with the ultimate in creative control is the individual who possesses the right of final cut—the entitlement to determine the final version of the movie for distribution and exhibition. From both an artistic and financial perspective, the individual vested with final cutting authority is at the top of the pyramid.

While, as the intellectual force, directors are often deemed the authors of films, the financing entity—generally the studio or production company—usually owns the copyright and thus is the true owner of the film. The copyright owner is vested with artistic control over the film’s final version. Unlike novelists and playwrights, directors are not considered the “authors” of creative works. Instead, studios or production companies are generally recognized as the “authors” of motion pictures through works made for hire or transfer of rights agreements. Thus, while directors are often understood as the principal creative force in the film—translating the written script into a cohesive whole—only a select group of directors have attained the level of success necessary to obtain the ultimate in creative control: the right of final cut. The lesser-known filmmakers, however, lack the reputation to wield such bargaining power and cannot risk losing the financing or release of their film by insisting on creative control. In most cases, the director’s employment contract makes clear that the producer retains all rights in the film as well as final authority for creative decisions. The Director’s Guild of America (DGA) standard  

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3 Final cut has two meanings. The right of final cut refers to the individual vested with the power to determine the final version of the film. The second definition of final cut means the final version of the film as released to the public.
4 See Joan Didion, In Hollywood, in The White Album 165 (1990) (“The spirit of actually making a picture [is] a spirit not of collaboration but of armed conflict in which one antagonist has a contract assuring him nuclear capability. Some reviewers make a point of trying to understand whose pictures it is by ‘looking at the script’: to understand whose picture it is one needs to look not particularly at the script but at the deal memo.”).
5 As used throughout this paper, “final cut” refers to the right to determine and approve the final version of the film for public viewing.
6 See Craig A. Wagner, Motion Picture Colorization, Authenticity, and the Elusive Moral Right, 64 N.Y.U. L. Rev. 628, 658-59 (1989) quoting Flore Krigsman, Section 43(a) of the Lanham Act as a Defender of Artists’ ‘Moral Rights,’ 73 Trademark Rep. 251, 259 (1983) (“For the unknown, commercially-untested artist having little or no bargaining power, insistence on contractual integrity rights may result in the loss of the contract and a prolonged stay in obscurity.”).
7 For an example of a director’s employment agreement, see Thomas D. Selz et al., Entertainment Law 3d: Legal Concepts and Business Practices app. A-18 (3d ed. 2013). Article 2 provides: “Artist’s services shall be rendered...
The contract settles the conflict between the director’s idea of artistic value and the producer’s concept of commercial appeal by surrendering ultimate decision-making authority over creative differences to the producer. Consequently, the filmmaker’s role in shaping the final cut of the motion picture is almost always undermined by the studio’s eagerness to retain broad discretion over decisions influencing the artistic and economic aspects of the movie. Therefore, directors who want creative control over the theatrical release and beyond must fight for this kind of control during negotiations in order to solidify their artistic authority in the contract. As a result, the question of creative control and deciding who is entitled to determine the film’s substance—and presentation—which scenes are ultimately chosen for public viewing the film’s public viewing—is a major issue in the motion picture industry.

This paper explores the economic and legal implications of the motion picture industry. Ultimately, the paper proposes a strategic compromise that strikes a balance between the studio’s financial interests and the director’s artistic integrity. Part I provides an overview of the motion picture industry with a brief introduction to the stages of filmmaking and the players involved. Part II examines the legal and economic structures of filmmaking and explores the distinction between authorship and ownership in the motion picture industry. This section also includes a discussion of work-for-hire agreements, joint works and the moral rights doctrine. Part III discusses the right of final cut and its significance for both directors and studios. This section considers the varying positions of the studios and the directors regarding artistic control. In addition, Part III explores how the DGA Basic Agreement deals with final cut and its effect on

promptly in a competent and professional manner, either alone or in collaboration with others, in such manner and at the times and places as Producer may reasonably direct. Producer’s judgment shall be final in all matters, including matters of artistic taste.”

8 See Directors Guild of America, Basic Agreement of 2011, art. 7, § 202 [hereinafter DGA Basic Agreement]. This provision, “Consultation After Assignment,” requires that the director be informed, and if available, participate in decisions regarding all creative elements in the production of the film including but not limited to script revisions, casting, employment of artistic and creative personnel, location selection, set design and scheduling for pre-production, principal photography and post-production. Section 7-202 also provides that “in no case will any creative decision be made regarding the preparation, production, and post-production of a motion picture without the consultation of the Director.” Finally, this provision requires that the Director’s suggestions and advice be considered in good faith. However, because the Agreement only requires consultation, the director cannot prohibit any changes to the film, making this of consultation insufficient to preserve the director’s artistic rights.

9 Wagner, supra note 6, at 658 (discussing filmmakers’ artistic control over the colorization of their movies and how an artist’s moral rights will not be recognized absent an agreement to the contrary).

10 As explained in Part I(A)(5), feature films begin the distribution cycle by opening in movie theaters. Following the theatrical release, the film is released to ancillary markets including home video (DVD/Blu-ray), pay cable, network television and digital distribution. Since films are edited throughout the distribution cycle, especially with presentation on airlines and network television, final cut approval extends beyond the film’s theatrical version.

11 Movie financiers include studios and production companies. As used throughout this paper, “studio” refers to production companies and other movie financiers who own the copyright and have the most significant financial investment in the film.
the director’s level of creative control. Part IV discusses the director’s struggle for creative control. To understand this controversy, Part IV analyzes cases and other real-life disagreements concerning final cut. Part V suggests alternative approaches to deal with final cut. In addition, Part V provides three different contractual provisions regarding final approval rights. Each contractual approach is tailored to a director depending on his level of success: (1) the A-list director; (2) the up-and-coming director; and (3) the novice director. Part VI suggests several strategic compromises to minimize post-production editing conflicts. Finally, the conclusion proposes a collaborative roadmap to implement before production in order to minimize the corporate takeover of post-production editing.

I. OVERVIEW OF THE MOTION PICTURE INDUSTRY

A. Film Through the Stages

When a film is actually produced and released, the filmmaking process comprises five stages: (1) development, the phase in which the filmmakers develop the story’s concept and transform it into a written screenplay; (2) pre-production, which comprises casting, location scouting and preparation of the shooting script and schedule; (3) production, the actual filming; (4) post-production in which the film is edited and assembled into its final version; and (5) distribution, the marketing and exhibition period. Each stage of the filmmaking process represents a shift in authority in which one of the principal creative contributors—such as the director or original writer—surrenders control over the film to the studio. Once production wraps, the investor is able to exhibit further control over the working product, as the results become viewable and market data can be applied to decide the ultimate fate of the product. As the film progresses, the stakes increase as more money is invested at each stage of production. This is particularly true considering that the marketing budget for feature films often comprises more than half of the movie’s overall budget. Thus, by the time the movie enters post-production, this shift in power is most palpable.

12 With the motion picture industry’s shift to digital technology, actual film is now rarely used. Despite the advent of digital photography, “film” is still used today as a synonym of movies and motion pictures.
13 While many projects are developed, only a few are actually produced.
14 For a flow chart of the hierarchy of the diverse roles on set, from pre-production to post-production, see Careers in Filmmaking Where Do You Fit In?, GET IN MEDIA (accessed on November 27, 2013), available at http://getinmedia.com/charts/GIM-Film-Industry-Chart.pdf.
15 For an examination of the relationship between movie budgeting and the creative process in Hollywood filmmaking, see ADAM T. DEAN, THE PARADOX OF CREATIVITY AND BUSINESS IN FEATURE HOLLYWOOD Filmmaking: THE RELATIONSHIP BETWEEN MOTION PICTURE PRODUCTION AND BUDGETING 49-64 (2005). Dean analyzes several films during production process to understand the conflicts between the investors and creators. Dean discusses how creative control shifts throughout the filmmaking process and how this shift is most evident during post-production where “the stakes are far greater.” Id. at 64.
16 For a discussion of the current landscape of the feature film industry, see GRAEME TURNER, FILM AS SOCIAL PRACTICE 8-14 (4th ed. 2006). Turner notes that “the average production cost per film for Hollywood studios has risen from $US26.8 million in 1990 to $US55 million in 2000 – to which can be added another $27 million in average
1. Development

The development phase typically begins with a story concept, treatment, book, play or magazine article that is developed into a screenplay. While a studio or producer may ask a writer to develop a screenplay or adapt an existing one, usually, a writer—through his or her agent—submits a treatment or a first draft of a screenplay to a variety of producers and studios for consideration. In most cases when a producer is interested in turning the writer’s work into a movie, he will acquire an option on the literary property. Rather than purchasing the property outright and paying a substantial purchase price for a work that may never reach production, an option contract allows the producer to pay a fraction of the purchase price for “the exclusive, irrevocable right to purchase a literary property or certain specified rights in and to a literary property (such as the film and television or Internet rights) at a set price with in a prescribed period of time.” Because no one else may acquire the property during the term of the option, the producer or studio can begin the development process and secure financing without incurring the full cost of the purchase price. By beginning the development and financing stages during the option period, the studio can “test” the market for the film and determine its commercial viability before purchasing the work outright. In this way, the purchaser reduces its up-front risk and is able to develop more scripts than it would be able to if required to purchase the property outright.

While this paper deals with the creative struggle between the director and the financing entity, this struggle is omnipresent throughout the filmmaking process. In fact, the struggle for artistic control begins with a film’s development during which the original author of the

marketing costs.” Id. at 9. For example, Batman Begins cost $135 million to produce and had an estimated marketing budget of an astounding $100 million. Id. at 9-10.

17 See SELZ ET AL., supra note 7, at app. I (Defining a “treatment” as “a brief prose outline of an original story or an adaptation of a story, book, play, or other literary material written for motion picture purposes in a form suitable for use as the basis of a screenplay, describing plot, indicating characters, using limited dialogue, that is usually less than 25 pages in length.”).

18 See Jehoshua Eliashberg et al., The Motion Picture Industry: Critical Issues In Practice, Current Research & New Research Directions, 6 MARKETING SCI. 638, 640 (2006) (“The development of a motion picture is a long succession of creative decisions with far-reaching economic implications for the different players involved.”).

19 Id.; see also DINA APPLETON & DANIEL YANKELEVITS, HOLLYWOOD DEALMAKING: NEGOTIATING TALENT AGREEMENTS FOR FILM, TV, AND NEW MEDIA 24 (2d ed. 2010) (discussing rights acquisitions agreements in the entertainment industry).

20 APPLETON & YANKELEVITS, supra note 19, at 24.

21 While the option period is subject to negotiation, ranging from three months to upwards of two years, in most cases, the option period is twelve to eighteen months. Id. at 26 (discussing the option period).

22 Id. at 24-25 (discussing the benefits of an option agreement from the perspective of a studio or producer.

23 Id. at 25. While a writer prefers that the studio purchase its work outright to guarantee a greater upfront purchase price, “[i]n most cases…only hot properties, such as specs scripts involved in bidding wars or bestselling novels, will be purchased outright, since the writer will, in such cases, have the leverage to require a purchase.” Id. (emphasis in the original). Thus, the demand for the property, the popularity of the writer, the relationship between the writer and the purchaser and the purchaser’s resources all affect bargaining power and the amount of the option fee and purchase price. Id. at 26.
screenplay essentially surrenders his work in order for the story to become a motion picture.\(^{24}\) Discussing the option contract in relation to creative control, Adam T. Deans notes:

> In [the option contract] process, a screenwriter, chosen by the financer, gains full access to the story, but in most cases must submit portions of the screenplay to the financer for approval, as it is being created. This suggests a great deal of compromise in the creation of a screenplay, as its financer has the ultimate say on its final draft. The screenwriter cannot, by right, decide when the script is finished, and further is subject to replacement if the financer is not satisfied with the progression of the creative product.\(^{25}\)

Depending on the writer’s contract, the fact that the writer came up with the original screenplay does not mean he will write the final script for the film. Studios often “[find] that working with an original writer often creates an obstacle for filmmakers, as many changes that better suit the budget and/or camera do not always coincide with the priorities of the original creator.”\(^{26}\) Accordingly, studios often exclude the original writer from adapting the screenplay to prevent further creative struggles.

As the original writer is often excluded from the story after the studio acquires the script for adaptation, writers are subject to replacement. Thus, during the development stage, studios interview and hire writers to write or rewrite a script. In addition to script creation and revisions, other development activities include location scouting, casting and budgeting.\(^{27}\)

### 2. Pre-Production

Once the studio gives the “green light,” \(i.e.,\) a formal commitment to produce the film\) the film goes into pre-production, the period in which all the work necessary to plan and begin production of the movie are finalized. This work includes casting, preparing the schedule and budget, scouting and selecting shooting locations, designing the sets and preparing the script, with revisions kept to a minimum.\(^{28}\) During this stage, the cast and crew are assembled including the actors, director, production manager, director of photography and art director. In addition,

\(^{24}\) Dean, supra note 15, at 32-33 (“[The development] process removes the power from the primary creative participant...and the motivating factors in creating a ‘good’ script become based on meeting or exceeding the demands of the financer. In this situation, the creative atmosphere is overshadowed by the motivation of multiple creative participants with separate and unequal authority, and each with a detached and restricted influence on the story.”).

\(^{25}\) Id. at 32.

\(^{26}\) Id. at 33 (“The process of hiring a screenwriter who is detached from the original story, and is under the order of the studio, has generally proven to be more financially viable than making expensive compromises with an otherwise empowered original writer.”).

\(^{27}\) For a critical look at the development process, see Litwak, supra note 2, at 77-81.

\(^{28}\) Appleton & Yankelevits, supra note 19, at 95 (explaining pre-production services).
contracts are finalized. Once the storyboards\textsuperscript{29} are drawn, the budget and shooting schedule are confirmed and the sets, costumes and equipment are prepared, the film is ready for production.

3. Production

Production, also called principal photography, is the actual filming of the movie in which all the scenes planned in pre-production are filmed at the applicable locations. The director—charged with transforming the script and storyboard onto the screen—determines how many takes are necessary to achieve the best scene, which will ultimately be used to assemble the film. Scenes are shot from different angles and perspectives to give the editors a variety of takes from which to choose in order to assemble the final cut. If filming is incomplete during post-production, it is often difficult or impossible to recreate and reshoot certain events due to budgetary and/or environmental constraints. Accordingly, it is crucial that the director take all the necessary shots and ensure that the filming be executed properly. Sloppy pre-production preparation can thus hinder principal photography and create a post-production nightmare. In this way, the strength of the pre-production work may directly correlate with the strength of both principal photography and post-production.\textsuperscript{30}

Films are often shot out of sequence for both financial and scheduling concerns. For example, a film may open and end with a scene in the same location, and thus the director will shoot both scenes back-to-back rather than in order of the story to save time and money. Since multiple scenes may take place in the same location, it makes sense for directors to shoot all or most of these scenes during the same time period. Given that the sequence of filming is inconsistent with the flow of the script, it is crucial that the producer and director collaborate on a roadmap for production to make the filming more seamless.

4. Post-Production

Post-production begins upon completion of filming. Post-production is the final stage in the creation of a movie in which all of the film’s elements are assembled to form the feature film.\textsuperscript{31} This phase involves picture and sound editing, music scoring and sound synchronization, special effects and titles, rerecorded dialogue and marketing for distribution into theaters.\textsuperscript{32} It is

\begin{itemize}
\item \textsuperscript{29}Storyboards detail the visual and technical requirements for each shot of the film. Storyboards enable filmmakers to visualize the scenes and identify any potential issues before the start of principal photography. They also allow the cast and crew to see the filmmaker’s vision so that everyone can be on the same page. In addition, by planning ahead, storyboards help save time and money.\textsuperscript{30}

\item \textsuperscript{30} Stages of Production, INSPIRED FILM AND VIDEO (accessed on Nov. 17, 2013), http://www.inspiredfilmandvideo.co.uk/content/stages-of-production (“[Production] is where the strength of the pre-production work is put to the test.”).

\item \textsuperscript{31} SELZ ET AL., supra note 7, at app. I.

\item \textsuperscript{32} Id.; see also Technological Alterations to Motion Pictures and Other Audiovisual Works: Implications for Creators, Copyright Owners, and Consumers—Report of the Register of Copyrights, 10 Loy. Ent. L.J. 1, 123 (1990) [hereinafter Technological Alterations] (discussing the post-production stage).
\end{itemize}
at this stage where the studio exerts its greatest control over the film as investors are able to view the film and screenings are held that determine the ultimate fate of the movie. While, under the DGA Basic Agreement, the director has the right to edit the film and submit his version, i.e., the “Director’s Cut,” after this first cut, the producer has the right to edit the film and create the final version, known as the “final cut.” While the producer will often collaborate with the director and editor on the final form of the film, the director’s control is limited. In other words, though the director can voice his vision, the producer is not obligated to follow it.

Market research is another major component of post-production. In fact, the results of market research, particularly test screenings, significantly impact studio decision-making, often determining the final form of the film and its distribution and exhibition channels. Test screenings are used to gauge viewer response to the film and questionnaires are often used to allow the audience to suggest changes. Poor test screenings and other market research can prompt the studio to limit the film’s distribution and to spend less on marketing the film. Furthermore, the results can influence the editing process, often times dictating what changes are made to increase box-office numbers.

5. Distribution

Distribution, the final stage of filmmaking, involves the advertising and exhibition of the movie. To distribute the film, “a major distributor (all the major studios have distribution arms) must be used to make the “teaser” (the coming attractions) for theaters and television, to organize the print advertising campaigns, to set the dates, terms and theaters for release of the picture, to make foreign language copies (dubbed or subtitled), to preview the film, and finally, open the film.” As the ultimate source to recoup the studio’s investments, distribution is one of the most important stages in a film’s life cycle. Feature films begin the distribution cycle by opening in movie theaters “to establish its box-office value and critical reputation.” Following the theatrical release, the film is released to ancillary markets in the following order: (1) home video

33 Dean, supra note 15, at 64 (“While studios rely heavily on opinions generated in focus groups and test screenings to determine the outcome of a film, directors rely heavily on the editors themselves.”).
34 Technological Alterations, supra note 32, at 123.
35 See Litwak, supra note 2, at 98 (“According to [Claire Townsend, former vice-president of Fox], ‘The beast known as ‘market research’ came into full being as the means for determining how best to lure the largest audience during the opening weekend, before people had a chance to hear from their friends that the picture was a turkey and its ad campaign a total lie.”)
36 See Dean, supra note 15, at 68.
37 Id. at 54-55. Perhaps the limited marketing and distribution of the film can partially explain meager box-office results in such cases.
38 Id.
39 See Litwak, supra note 2, at 98 (“In the race to perfect the art of releasing blockbuster films, marketing and distribution executives have begun to dominate studio decision-making.”).
(DVD/Blu-ray); (2) pay cable (premium cable services such as HBO and Showtime); (3) network television; (4) cable television; and (5) television syndication. As Tina Balio explains, “[t]his distribution pattern is designed to maximize the full economic potential of each market, or ‘window’ as it is called in the trade.” A feature film is exploited in one market at a time—with the exception of home video whose window is essentially indefinite—and “[i]n each window, the price paid by the consumer to view the picture drops.” This process is known as price tiering: “a film is first released to theaters where it is viewed for a period of months at top prices by ‘high value’ consumers, i.e., to those who are most anxious to see the film and are willing to pay $7 and more for a ticket.”

B. The Players: The Artists and the Businessmen

Feature filmmaking is a mixture of art and commerce. As studios tend to view motion pictures as a business first and an art form last, their commercial approach to motion pictures often conflicts with the filmmaker’s artistic sensibilities. Thus, in many ways filmmaking both combines and clashes with art and business.

Describing the Hollywood filmmaking culture, attorney Mark Litwak makes a sweeping, yet generally accurate depiction of the Hollywood players:

Hollywood is a town dividing into two camps: creative and business—each suspicious of the others. Writers, directors and actors are members of the creative community. According to the businessmen, creative types are wonderfully talented people but, like children, cannot be trusted with money. On the other hand, says the creative community, studio executives, producers, and agents are businessmen who are concerned only with making money and have no taste or artistic sensibility.

Despite this stereotype, many businessmen understand the artistic side of filmmaking and many artists are business savvy. “Nevertheless, rarely will a creative suggestion from a businessman be welcomed by a writer, director or actor; and almost never will a creative person attempt to negotiate a business deal himself.” In fact, it is this dynamic that many attribute to the decline in the quality of films.

1. Writers

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41 Id. More recently, these ancillary markets have expanded to include digital distribution channels such as online streaming services (e.g., Netflix).
42 Id.
43 Id.
44 Id.
45 Id.
46 Id.
47 Id. The late producer Don Simpson attributed the shortcoming of the motion picture landscape to “‘the fact that studio executives are by and large ex-lawyers, agents, business-oriented people, who are fantastic executives and managers who don’t have a clue about telling stories,”’ and that it is “virtually impossible to find an executive who can handle both the business and the artistic sides of an increasing complex business.” Id. at 55-56.
While the auteur theory of film recognizes the director as the “author” of the film, practically speaking, the writer of the screenplay is actually the film’s author. Despite their significant contribution to the film—indeed many films originate with the writer—writers are often on the lowest end of the totem pole as far as wielding significant power over the film’s final version. Studios sometimes see writers as easily replaceable and thus are reluctant to negotiate provisions outside the standard terms of writer agreements (except for the most successful writers). As a result, studios commonly replace the original writer with different writers as the script goes through several rewrites.

2. Directors

While many people are involved in the creation of a film, is it the director who knows how to piece all the parts together to make a whole. The director oversees all creative aspects of a film including directing the actors’ performances, guiding the film’s content and flow and managing technical details such as lighting and camera positioning. If the director is responsible for the overall structure of the film—its look and feel—it follows that is should be the director’s vision that drives the film’s assembly for distribution. The director is often “seen as a leader of others…providing a kind of guiding force.” Under this view, “the final outcome is more or less predetermined by requirements of the script, camerawork, acting, and editing…the director [provides]…[the] organizational context to the picture.” While the director may be the leader on set, the director’s role must be understood in relation to the studio. This relationship can be analogized to corporations, with the director as the chief executive officer (CEO) of the corporation and the studio serving as the board of directors:

In [the director’s] capacity as CEO, the director is the chief on-set decision maker with respect to issues ranging from casting, set, design, lighting, and even the tone and demeanor of the actors in any particular scene. Often, however, many of these decisions are subject to the studio’s (or “board of directors”) veto power.

Because director is often held responsible for the film’s ultimate quality—irrespective of whether the director actually possessed that kind of control to determine the film’s final version—the right

48 APPLETON & YANKELEVITS, supra note 19, at 43 (“[T]he entertainment industry has traditionally placed writers at the very bottom of the Hollywood hierarchy.”).
49 Id. at 43-44 (“‘As one successful writer once said, ‘In Hollywood, the word ‘writers’ is always used in the plural, as in, ‘I can always get more writers.’”).
51 Id.
52 APPLETON & YANKELEVITS, supra note 19, at 107.
of approval over all the film’s major creative elements is one of the most coveted contractual rights.\textsuperscript{53}

3. Producers

The producer is often the first person to get involved in a project, shepherding the film from its inception and through distribution.\textsuperscript{54} The producer’s responsibilities include: (1) generating the enthusiasm of the various creative elements and bringing them into fruition; (2) scouting viable filming locations that meet the artistic and technical aspects of production; (3) create a budget; (4) supervising the execution of the script and its implementation onto film; (5) supervising the editing throughout the production process; (6) consulting with the studio on advertising and publicity; (7) arranging casting; (8) engaging the kind of talent that the studio finds sufficiently attractive to justify an investment; and (9) developing the interest of a proper director.\textsuperscript{55}

Ultimately, producers acts as the liaison between the director and the studio, apprising the studio of what happens on set and ensuring the director stays on schedule and within budget. As pre-production begins, it is important that the producer and the director collaborate on the production process and establish a shared vision of the film.\textsuperscript{56} An effective producer supports the director and his vision from the start while also working with the studio to ensure that their interests are being served on-set. Collaborating with the director on a production roadmap that represents both sides’ interests serves dual purposes. It not only empowers the studio to get on board with the director’s vision but also provides a space that in which the director can create his vision within the studio’s clearly delineated parameters.

4. Studios

Studios are the corporations with the money to underwrite a film and the executives are the individuals with the power to green light projects. Studio executives decide the ultimate fate of the film, dictating which projects are developed, abandoned and produced.\textsuperscript{57} Despite their power, studio executives must answer to shareholders. In fact, many decisions—whether artistic or financial—are often the result of shareholder pressure. Furthermore, because an executive’s

\textsuperscript{53} Id. at 107-08 (“Directors often seek approval over the principal cast, key crew members, final screenplay, budget, music, locations, schedule, and even the marketing campaign and \textit{release pattern} (i.e., in which cities will the movie be first exhibited, on how many screens, and how will it subsequently be rolled out, or extended, to other cities nationwide and overseas?)”).


\textsuperscript{56} The Film Producer, FILMMAKERS.COM (Nov. 20, 2011) http://www.filmmakers.com/stories/Producer7.htm

\textsuperscript{57} APPLETON & YANKELEVITS, supra note 19, at 5.
position is tenuous,\textsuperscript{58} many are executives are afraid to take risks and instead stick to the blockbuster formula—big-name stars and directors with previous block.\textsuperscript{59}

II. LEGAL AND ECONOMIC ISSUES IN FILMMAKING: AUTHORSHIP AS AN ECONOMIC CONCEPT

Because the motion picture industry exists in a large investment/high risk environment, artistic control is often influenced by both economic and artistic considerations. In deciding issues of copyright ownership, courts often elect between two competing concepts of authorship—one based on conception and the other based on execution.\textsuperscript{60} While courts often prefer the intellectual to the muscular contribution to creation,\textsuperscript{61} in the context of the work-made-for-hire doctrine, U.S. copyright law is not based entirely on an intellectual characterization.\textsuperscript{62} This is particularly true in the context of motions pictures. Under the economic concept of authorship, the “author” is the person or entity who finances the film’s creation and distribution. Thus, U.S. copyright law protects the investors’ financial interests by granting them authorship and the right to control the film’s use, presentation and distribution. This is the concept sustaining the “works made for hire” rule of U.S. copyright law. As a result of this doctrine, film artists such as directors and screenwriters do not retain any legal control over the commercial exploitation of their work since the copyright holder, the financing entity, is vested with the ultimate control over the motion picture, rather than the artist.\textsuperscript{63} Though distinct from works made for hire, copyright assignments also recognize the economic concept of authorship by enabling an employer to obtain copyright ownership in a work that has already been created by an

\textsuperscript{58} See Litwak, supra note 2, at 52 (“Today’s [studio] executives are hired hands who can be easily dismissed... Consequently, they are not inclined to take risks. Their primary concern is with maintain short-term profits and making deals with proven talent for ‘surefire’ formula pictures. The executive who agrees to produce an unconventional story with a new director or without a star risks losing his job if the project fails. After all, how can he possibly justify such a decision to his board of directors?”).

\textsuperscript{59} For an examination of the efficacy of the blockbuster formula, see Michael Cusumano, Burning Questions: Is the Summer Blockbuster Broken?, THE FILM EXPERIENCE (July 31, 2013), available at http://thefilmexperience.net/blog/2013/7/31/burning-questions-is-the-summer-blockbuster-broken.html. “[S]tudios continue to double down on the equation “Presold Property + Big Stars + Fashionable Aesthetic × Mass Marketing Blitz = Gold” as if it were infallible.”

\textsuperscript{60} Robert A. Gorman et al., COPYRIGHT, CASES AND MATERIALS 304 (8th ed. 2011) (discussing authorship as an economic concept under works made for hire).

\textsuperscript{61} See e.g., Lindsay v. R.M.S. Titanic, 52 U.S.P.Q.2d 1609 (S.D.N.Y. 1999) (“Where a plaintiff alleges that he exercised such a high degree of control over a film operation -- including the type and amount of lighting used, the specific camera angles to be employed, and other detail-intensive artistic elements of a film -- such that the final product duplicates his conceptions and visions of what the film should look like, the plaintiff may be said to be an "author" within the meaning of the Copyright Act); see also Andrien v. S. Ocean County Chamber of Com., 927 F.2d 132, 135 (3d Cir. 1991) (“A party can be considered an author when his or her expression of an idea is transposed by mechanical or rote transcription into tangible form under the authority of the party.”).

\textsuperscript{62} Gorman et al., supra note 60, at 304.

\textsuperscript{63} Karen L. Gulick, Creative Control, Attribution and the Need for Disclosure: A Study of Incentives in the Motion Picture Industry, 27 CONN. L. REV. 53, 56 (1994). Distinguishing the broad creative control of artists outside of the motion picture industry, Gulick notes the lack of control film artists possess “is strikingly different” from the rights of other types of artists who as “the author may direct the use and disposition of the work and reap the financial benefits of his creativity.” Id.
independent contractor. A copyright assignment occurs where, for example, a screenwriter—the copyright owners—transfers all of his rights unconditionally to the studio, who thus becomes the copyright owner.  

A. Economic Authorship Under the Work Made for Hire Doctrine

Motion pictures are among the most collaborative art forms in which numerous individuals make significant creative contributions to the ultimate creative work, many of which qualify as independent copyrightable material. These individuals include “[p]roducers, screenwriters, cinematographers, editors, production designers, directors, composers, actors, and many others.” Since “[c]opyright law protects a work from the time it is created in a fixed form,” the author is understood as the owner of the copyright in the work. Accordingly, a variety of issues involving authorship and copyright ownership of a motion picture could potentially arise with so many contributors. In practice, however, these issues are infrequent since creative contributors in filmmaking are almost always employed under a work made for hire or transfer of rights agreement under which the employer—such as a studio or production company—is considered the author and copyright owner. Under the work made for hire doctrine, an “economic author” can claim initial ownership if: (1) the work was prepared by an employee within the scope of employment; or (2) the work fits within a specified list of categories and the parties expressly agree in a signed written instrument that the work will be a work made for hire.” The “work made for hire” definition expressly includes motion pictures, thus securing work made for hire status to motion pictures where there is a written agreement. Because such agreements are standard custom and practice in the motion picture industry, disputes seldom arise on the issue of authorship.

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64 See U.S.C. § 201(d)(1) (“The ownership of a copyright may be transferred in whole or in part by any means of conveyance or by operation of law, and may be bequeathed by will or pass as personal property by the applicable laws of intestate succession.”).

65 MARK S. LEE, ENTERTAINMENT AND INTELLECTUAL PROPERTY LAW § 12:4 (2013) (describing the copyright issues, particularly authorship questions, that arise in the motion picture industry).

66 Id.


68 17 U.S.C. § 201(a) (“Copyright in a work protected under this title vests initially in the author or authors of the work”).

69 See 17 U.S.C. § 101 for the definition of a “work made for hire.”


71 LEE, supra note 65, at § 12:6; see also F. JAY DOUGHERTY, NOT A SPIKE LEE JOINT? ISSUES IN THE AUTHORSHIP OF MOTION PICTURES UNDER U.S. COPYRIGHT LAW, 49 UCLA L. REV. 225, 228 (2001) (recognizing that while most contributions to a motion picture usually qualify as a work made for hire, with the hiring party deemed both the author and initial owner of the copyright in the contribution, issues can still arise regarding authorship).
B. Authorship in Joint Works

Absent an agreement recognizing a work made for hire arrangement, motion pictures would qualify as a “joint work,” defined as “a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.”\(^72\) The legislative history of the 1976 Copyright Act explains that “the touchstone [for distinguishing between joint works and collective works] is the intention, at the time the writing is done, that the parts be absorbed or combined into an integrated unit, although the parts themselves may be either ‘inseparable and’ (as in the case of a novel or painting) or ‘interdependent and’ (as in the case of a motion picture, opera, or the words and music of a song).”\(^73\) Thus, joint authorship requires intent to merge. In addition, the majority of courts require that the each author’s contribution be independently copyrightable.\(^74\) Joint authorship in the motion picture industry has significant implications for copyright ownership since each author of a joint work is a co-owner of the copyright in the work.\(^75\) Joint authorship grants the co-authors equal undivided interests in the entire work, i.e., “each joint author has the right to use or to license the work as he or she wishes, subject only to the obligation to account to the other joint owner for any profits that are made.”\(^76\) Given this power, courts are reluctant to declare an individual a joint author even where the person makes a significant contribution to a collaborative work.\(^77\)

In *Aalmuhammad v. Lee*,\(^78\) the Ninth Circuit explored the question of joint authorship in the context of motion pictures and effectively limited the definition of authorship in a movie, absent an agreement to the contrary “to someone at the top of the screen credits…someone who has artistic control.”\(^79\) According to the court, this person could be the producer, director, the writer or possibly the star.\(^80\)

\(^{72}\) 17 U.S.C. § 101 (definition of “joint works”).
\(^{74}\) See, e.g., Childress v. Taylor, 945 F.2d 500, 507 (2d Cir. 1991) (holding that joint authorship requires both intent to merge and independently “copyrightable contributions by all putative joint authors,” which “might serve to prevent some spurious claims by those who might otherwise try to share the fruits of the efforts of a sole author of a copyrightable work, even though a claim of having contributed copyrightable material could be asserted by those so inclined”); see also Erickson v. Trinity Theatre, Inc., 13 F.3d 1061, 1071 (7th Cir. 1994) (to prove joint authorship, the claimant must show that “the parties intended to be joint authors at the time the work was created” and “that its contributions to the works were independently copyrightable”); Ashton-Tate Corp. v. Ross, 916 F.2d 516, 521 (9th Cir. 1990) (“[The Ninth Circuit] holds that joint authorship requires each author to make an independently copyrightable contribution.”).
\(^{75}\) 17 U.S.C. § 201(a).
\(^{76}\) Thomson v. Larson, 147 F.3d 195, 199 (2d Cir. 1998); 17 U.S.C. § 201(a).
\(^{77}\) Lee, *supra* note 65, at § 12:7.
\(^{78}\) 202 F.3d 1227 (9th Cir. 1999).
\(^{79}\) 202 F.3d at 1233.
\(^{80}\) *Id.*
In 1991, Warner Brothers contracted with director Spike Lee and his production companies to make the movie *Malcolm X*, based on the life of the civil rights leader. Lee co-wrote, directed and co-produced the movie, which starred Denzel Washington as Malcolm X. Washington initially asked plaintiff Jefri Aalmuhammed to help him to prepare for the role and join him on the movie set because of Aalmuhammed’s extensive knowledge about Malcolm X and Islam. Ultimately, however, Aalmuhammed’s involvement became more extensive. Aalmuhammed presented evidence that he directed Washington and other actors on set, created at least two entire scenes with new characters, reviewed the shooting script for Lee and Washington, suggested script revisions, some of which were included in the released version, supplied his own voice for voice-overs, selected the proper prayers and religious practices for the characters and edited parts of the movie during post-production. Contrary to industry norms, Aalmuhammed did not have a written contract with Warner Brothers, Lee or Lee’s production companies, and while he was compensated, he did not believe it was sufficient. Aalmuhammed’s was ultimately credited as an “Islamic Technical Consultant” after his request for co-writing credit was rejected. Following the film’s release, Aalmuhammed sued Warner Brothers, Lee and Lee’s production companies seeking a declaration that he was a joint author.

In its analysis, the court suggested three factors to determine joint authorship in the absence of an agreement. First, “an author ‘superintend[s]’ the work by exercising control…. a person ‘who has actually formed the picture by putting the persons in position, and arranging the place where the people are to be.’” Second, “putative coauthors make objective manifestations of a shared intent to be coauthors.” Third, “the audience appeal of the work turns on both contributions and ‘the share of each in its success cannot be appraised.’” The court concluded that in many cases, control is the most important factor.

In applying these factors, the court found that “Aalmuhammed did not at any time [superintend] the work.” Rather, Warner Brothers and Lee controlled the film. Furthermore,
Lee, not Aalmuhammed, was “the person ‘who…actually formed the picture by putting the persons in position, and arranging the place....’” Analogizing Aalmuhammed to the dramaturg in *Thomson v. Larson*, the court concluded that while Aalmuhammed “could make extremely helpful recommendations…Spike Lee was not bound to accept any of them.” Accordingly, the court concluded that Aalmuhammed lacked control over the work—strong evidence of the absence of co-authorship. As to the third factor, the court found that “neither Aalmuhammed, nor Spike Lee, nor Warner Brothers, made any objective manifestations of an intent to be coauthors.” Therefore, the court concluded that while Aalmuhammed substantially contributed to the film, he was not one of its “authors.”

In holding that a “valuable and copyrightable contribution” is not enough to establish authorship, the court appears to base its reasoning at least in part on standard practices in the motion picture industry. In considering the question of authorship, the court rejected the minimal level of creativity requirement, stating that such a “measure of a ‘work’ would be too broad and indeterminate to be useful if applied to determine who are ‘authors’ of a movie.” This reflects the court’s concern that “[s]o many people might qualify as an ‘author’ if the question were limited to whether they made a substantial creative contribution that that test would not distinguish one from another…[which is] precisely why the motion picture industry uses work made for hire agreements.” Thus, the court concluded that a “valuable and copyrightable contribution” is not enough to establish authorship. In its quest to define a movie author in the absence of a contract, the court provided:

> The word [author] is traditionally used to mean the originator or the person who causes something to come into being…For a movie, that might be the producer who raises the money. Eisenstein thought the author of a movie was the editor. The “auteur” theory suggests that it might be the director, at least if the director is able to impose his artistic judgments on the film. Traditionally, by analogy to books, the author was regarded as the person who writes the screenplay, but often a movie reflects the work of many screenwriters. Grenier suggests that the person with creative control tends to be the person in whose name the money is raised, perhaps a star, perhaps the director, perhaps the

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95 *Id.*
96 *Id.*
97 *Id.*
98 *Id.*
99 *Id.* at 1232.
100 *Id.* at 1232.
101 *Id.* at 1233.
102 *Id.*
103 *Id.* at 1232.
producer, with control gravitating to the star as the financial investment in scenes already shot grows.\textsuperscript{104}

By limiting authorship in this context “to someone at the top of the screen credits,” the court effectively held there is only one author of a film, notwithstanding the significant contributions by many individual individuals.

The court’s rationale for refusing to grant author status to Aalmuhammed is that his creative contributions did not reflect a significant level of creative control.\textsuperscript{105} With this emphasis on control, the court appeared to employ the agency test rather than a traditional joint authorship analysis.\textsuperscript{106} This is clear where the court noted that “Spike Lee was not bound to accept any of [Aalmuhammed’s suggestions], and the work would not benefit in the slightest unless Spike Lee chose to accept them.”\textsuperscript{107} While Lee, as the director, had creative control, he was still not the film’s “author” because of the work made for hire contract between him and Warner Brothers. The court’s reasoning thus mirrors the traditional notions of authorship in the motion picture industry recognizing the financier as the author of the film.\textsuperscript{108}

\section*{C. Moral Rights}

Moral rights are based on the concept “that authors of copyrightable works have inalienable rights in their works that protect their moral or personal interests and that supplement the set of economic rights traditionally granted to copyright holders in all jurisdictions.\textsuperscript{109} Thus, moral rights promote the author’s right to control. Three basic rights comprise the moral rights doctrine: (1) the right of authors to claim authorship (right of attribution); (2) the right to prevent unauthorized alterations and changes to works (right of integrity); and (3) the right to decide when and how to publish the work (right of disclosure).\textsuperscript{110} Section 106A of the Copyright Act,\textsuperscript{110} 108

\begin{itemize}
\item \textsuperscript{104} Id.
\item \textsuperscript{105} See Dougherty, supra note 71, at 281 for a critique of the Ninth Circuit’s decision in Aalmuhammed v. Lee. Dougherty suggests that in “[holding] that the term “author” means something very different in the context of joint works than it does in general…motion pictures will almost never qualify as joint works and contributors to motion pictures will virtually never qualify as joint authors.” Id.
\item \textsuperscript{106} Id. at 270 (“Control can be relevant to distinguish mere fixation from original expression, and may be a factor in determining whether or not the creator is an employee, but control is otherwise irrelevant to authorship. Control, in the sense of a right to accept or reject a contribution and use it in a work, is not authorship. Yet because the financing company, Warner Bros., and the director, Spike Lee, had the right to accept Aalmuhammed’s contributions or not, the court found that Aalmuhammed “lacked control over the work,” which, according to this approach shows a lack of coauthorship.”)
\item \textsuperscript{107} Aalmuhammed, 202 F.3d at 1235.
\item \textsuperscript{108} See Dougherty, supra note 71, at 280 (“[The court’s] approach creates the possibility for a motion picture to have no author. This result occurs if the person with control does not also contribute the required creative expression. By making the determinative factor in a joint work analysis the right to control, the court limits joint works to those in which it can be proven that individuals share a veto power over what is included in the work and also contribute separately copyrightable material. This effectively means that commercial motion pictures can rarely be held to be joint works.”).
\item \textsuperscript{110} Id.
\end{itemize}
known as the Visual Artists Rights Act (VARA), protects only the moral rights of attribution and integrity to authors of narrowly defined works of visual art. Like traditional moral rights theory, VARA “[conceptualizes]…moral rights as inalienable rights of authors in their works that supplement the traditional set of economic rights listed in Section 106 of the U.S. Copyright Act. However, VARA diverges from European moral rights legislation in its narrow scope of moral rights. In fact, VARA excludes most copyrightable works from protection by making the rights of attribution and integrity applicable only to works of visual art, which is essentially limited to “paintings, drawings, prints, photographs produced for exhibition purposes, or sculptures.” Motion pictures are—by no coincidence—excluded from protection. Prior to VARA’s enactment, lobbies representing artists and producers/studios testified before Congress regarding the issue of moral rights. Ultimately, studios won the battle by arguing that moral rights impeded on the efficient exploitation of works of authorship by discouraging the investment in production and distribution. By exempting films from VARA’s protection, filmmakers cannot always prevent alterations to their films and have no guarantee that their films will be exhibited as they originally created them.

III. THE RIGHT OF FINAL CUT: THE ULTIMATE IN CREATIVE CONTROL

Final cut has two meanings. On the one hand, final cut means the final version of the film that is exhibited to the public. The right of final cut, however, refers to the individual vested with the authority to create the film’s final version. The director with final cut possesses the ultimate creative control, giving him “the final, indisputable say as to the content, editing, and delivered version of the film.” Typically only those directors with proven artistic and commercial success can obtain final cut. However, in some cases, a novice director with a hot film that every studio is competing for can wield more power in the negotiations to ensure final cut or a derivative thereof. In such instances, the unknown director does not risk losing the deal altogether since the buzz surrounding the film increases his bargaining power. Nevertheless, the right of final cut does not give directors control over the film’s trailer and the way in which the

112 Rigamonti, supra note 109, at 406.
113 Id.
114 See generally Technological Alterations, supra note 32.
117 Movie trailers are short promotional films exhibited in movie theaters as a preview of coming attractions or as commercials on television. The most action-packed, funny or otherwise memorable scenes are selected to entice viewers to the theaters.
film is exhibited, publicized and marketed. Thus, the studio’s control over the distribution can undermine the director’s right of final cut. Where a disagreement arises with no hope of a resolution, “a production company can bury a film through lackluster distribution and a meager marketing budget.” The studio can thus retaliate against the director’s vision by neglecting to market the film effectively. In such cases, the director may ultimately yield to the studio’s vision in fear of losing an audience.

The right of final cut is a significant negotiating point not only between producers and directors, but also between producers and distributors as many film distribution agreements provide that the distributor has sole discretion to edit the film.

A. The Studio’s Position Regarding Final and the Director’s Response

The studios’ positions regarding final cut appear to be economic rather than aesthetic. The Motion Picture Association of America has argued that “[i]n order to improve the odds of financial success, copyright owners must have the freedom to adapt their productions to the differing needs of the various markets. If legislation were enacted that called into question the copyright owner’s ability to do that, the widespread performance of their products so essential to recoupment of these huge investments would be seriously jeopardized.” Much of the concern regarding final cut surrounds the studio’s fear that the director will exercise his right of creative control irresponsibly and work interminably on the film believing that always needed improvement. However, directors have their own reasons in exercising their final cutting rights reasonably given that they risk future employment if they do not agree to an alteration of a finished film desired by the studio.

In response to the studio’s economic arguments, directors contend that allowing studios to make unauthorized alterations to their finished films infringes their moral rights of attribution and integrity. When the studio makes unauthorized changes and exhibits the film with the director’s name attached, the director is still held responsible for the film’s ultimate quality even though he did not control the final version. Nevertheless, the directors’ claims to final cut—grounded in moral rights—lack the force of copyright law and are not guaranteed unless there is an argument to the contrary.

118 Id.
119 Id.
121 Technological Alterations, supra note 32, at 53-54.
122 Id. at 54.
123 Id.
B. Default Position: DGA Basic Agreement

The DGA’s Basic Agreement provides a set of minimum conditions for the development, production, post-production and distribution (post-theatrical release editing) stages of motion pictures. While directors are given an absolute right to a “Director’s Cut,” directors do not have the “Final Cut;” i.e., the right to determine the form of the theatrical release. While directors have the right of consultation regarding post-theatrical alterations to motion pictures, this right of consultation falls short by failing to provide an absolute right to permit or prohibit such alterations. Thus, unless the director has been expressly granted final cut, the studio can alter the film through reedits or reshoots over the director’s objections.

Section 7-101 of the Basic Agreement provides that the director’s position “requires his or her participation in all creative phases of the film-making process, including but not limited to all creative aspects of sound and picture.” This section also makes clear that no one other than “the Director assigned to the picture” may direct the film and provides that “[t]he Director’s function is to contribute to all of the creative elements of a film and to participate in molding and integrating them into one cohesive dramatic and aesthetic whole.”

C. The Director’s Cut: Not so Final

Following the culmination of principal photography, the director is responsible for presenting the “Director’s Cut,” which is the penultimate form in which the motion picture is released. The right of the “Director’s Cut” is absolute and no one can “interfere with the Director of the film during the period of the Director’s Cut.” After the director presents his Director’s Cut, the producer prepares the “Final Cut.”

Discussing the Director’s Cut and its implications for commerciality and auteurism, Geoff King describes the Director’s Cut as “the modified edition sometimes released in the cinema but more often found in belated video or DVD release.” Questioning whether the director’s cut is “a return to the original vision of the auteur-director” or “just a cynical marketing ploy,” King suggests that the Director’s Cut “could be both.” Ultimately, “[w]hat the
phenomenon of the director’s cut version implies…is the role a commodified version of auteurism continues to play in Hollywood’s industrial calculations and marketing strategies.”

Since the director’s cut usually fails to reach theaters in the film’s initial release, the final cut represents a modification of the director’s vision that is adapted to reach mass audiences. Thus, qualitatively speaking, the final cut is not necessarily an enhanced version of the director’s cut, but rather a marketable one. A comparison of Blade Runner’s theatrical version and the director’s cut provides support for this assumption. After director Ridley Scott ran over budget during production and the film tested poorly, the studio took control, forcing him to add an unnecessary voice-over by the film’s principal character and an absurdly happy ending. The result: “[Ridley Scott’s] masterpiece [played] to near-empty theaters, ultimately retreating to the art-house circuit as a cult oddity.”

Nevertheless, Blade Runner’s “unique postmodern production design became hugely influential within the sci-fi genre, and the film gained a significant cult following that increased its stature.” Years later, an accidental showing of a rough-cut work print generated surprise demand for a re-release, which prompted Scott to issue his director’s cut. In his version, Scott deleted the voice-over and the ending, essentially undoing the changes made in the interests of greater commercial appeal. As most critics agree, “Blade Runner was undoubtedly ‘improved’, from a qualitative point of view, in the director’s cut.” This is ironic considering the film’s poor box office performance and the critical and financial success of the director’s cut.

IV. THE STRUGGLE FOR CREATIVE CONTROL

Given the significance of final cut for both sides, final cut is a right that studios are loathe to relinquish. The importance of final cut does not fully come into play until principal photography is completed and the editing process begins. At this stage, where the film is first cut, viewed and tested. More significantly, by this point, the studio has invested an enormous amount

131 Id. at 112.
132 Released in 1982, Blade Runner blends two genres: science fiction and noir detective fiction.
135 Id.
136 Id. Scott also “added a twist — a dream sequence suggesting that Rick Deckard, the film’s protagonist, is an android, just like those he was hired to dispatch.”
137 Id. See also ShortList.com, “10 Best director’s cuts” (accessed on November 22, 2013), available at http://www.shortlist.com/shortlists/10-best-directors-cuts (listing Blade Runner as number one on the top ten list of best director’s cut and proclaiming that Ridley Scott’s recovery of the “original cut made the remarkable seem miraculous”).

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of money and thus has a considerable interest in ensuring that it receives an adequate return on its investment.

A. The Impact of Marketing Research on Post-Production Editing Control

Screenings can be the demise of the film. Where “screenings are about ‘the numbers,’” significant editing to increase the numbers is like trying to fit a round peg—the director’s vision—into a square hole—the studio’s vision. By incorporating the results of market research strategies, “[t]he studio’s final cut represents a perceived marketable version of the director’s cut.” The perceived marketability can effectively extinguish the director’s vision, resulting in a film that feels like another person’s creation. The results of market research heavily influence the decisions made in the editing room as screenings of the first cut are often used to measure the movie’s audience appeal. As a result of these screenings, “[a]spects of the film that do not test well can be changed…[s]cenes can be reedited or excised, and confusion can be remedied by adding new material.” For example, The Big Chill director Lawrence Kasdan decided to drop a flashback scene of the characters having dinner with their friend (whose funeral opens the film) after an screening revealed that the audience found the scene “disconcerting and enjoyed the film more without it.” While the results of market research can prove fruitful, as was the case with The Big Chill, critics of market research argue that it is “an unreliable predictor of audience taste.” Support for this opposition is evident in Twentieth Century-Fox’s research, which “indicated that Star Wars would not appeal to women because the word ‘war’ was a turnoff and because neither its robots nor its science fiction subject matter tested well.” Similarly, the studio’s research on E.T. suggested that only eight-year-olds would be interested in the movie. Joseph Farrell, the former head of The National Research Group, believed that market research polarized the motion picture industry: “[t]he believers tend to have backgrounds in business, and think Hollywood should be run in a more business like and ‘scientific’ fashion” while “[t]he critics tend to be writers, directors and other creative types who rely on gut instinct for what makes a good picture.”

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140 Peter Biskind, Down and Dirty Pictures: Miramax, Sundance, and the Rise of Independent Film 332 (2005). As producer Christine Vachon put it, “the [National Research Group] ratings were…the last nails in the coffin” for director Todd Haynes’ film Velvet Goldmine. Id.
141 Id. For director Todd Haynes, the distributor’s cuts on Velvet Goldmine felt like “somebody [took] his movie and just [mashed] it.” Id. at 333.
142 Dean, supra note 15, at 72.
143 Litwak at 233.
144 Id.
145 Id. at 233-34.
146 Id. at 232.
147 Id.
148 Id.
149 Id.
B. Creative Control in Independent Filmmaking

Independent filmmaking is better suited to allow for more creative control. While American independent cinema is “not entirely separable from Hollywood,” it is nevertheless distinguished by: “lower budgets and less marketing-driven filmmaking’ to increase creative control; ‘challenging perspectives on social issues, a rarity in Hollywood’; and disruption of ‘the smoothly flowing conventions associated with mainstream Hollywood style.”

Yet, even when a studio acquires an independent film, a director’s vision is still never safe. Director Brad Anderson, whose film Next Stop Wonderland was acquired by Miramax for distribution, learned that lesson after then-Miramax president Harvey Weinstein—who paid an astounding $6 million for the film—made Anderson reshoot the ending. Explains Anderson of the experience:

My assumption was that you sell the movie and that’s the movie they buy. But [the studios] look at it as a product. A product needs to be reworked or altered in order to fit the consumer’s needs. And you’re just the obstacle in their way.

At times, post-production editing can be so extensive that after so many reshoots, the director ends up with a movie that is unrecognizable as his own.

With independent film overrun by studios, the executive has replaced the filmmaker as auteur. Discussing the corporate takeover of independent filmmaking, Peter Biskind notes that “the new rules of the indie game are weighted heavily toward box office success, with promising or even brilliant but uncommercial films failing to get picked up for distribution…” Thus, the risk-taking indie sensibility is ill suited for the risk-averse studio culture, which strives to create films for mass appeal.

Nevertheless, “the independent filmmaker [does not] work in a statute of creative bliss without concern for business matters. [The independent filmmaker] is burdened with accounting,
legal and administrative chores—tasks that studios often handle for their filmmakers.” As Academy-Award-Nominated filmmaker Gregory Nava notes that while the independent filmmaker spends “‘an inordinate amount of his time dealing with noncreative things…that is the price [he] pays for [his] freedom.’” Unlike feature film directors, independent filmmakers “[have] the burden of fund-raising” and thus “[t]he time saved not meeting with studio executives is spent soliciting potential investors.” Yet, despite these obstacles, an increasing number of filmmakers try independent filmmaking because of its promise of creative freedom.

C. Cases Dealing with Final Cut

While litigation over final cut is sparse, the few reported cases provide insight into how to resolve some of the legal questions surrounding a director’s right of final cut.

1. Bogdanovich v. Universal Pictures

In the fall of 1984, Academy-Award-nominated director Peter Bogdanovich handed the completed version of the film Mask to Universal Pictures, which planned to release the film in the spring of 1985. Pursuant to his agreement with Universal, Bogdanovich had the right of final cut for the theatrical release, with the producer permitted to assist in cutting and editing. A few months later, Bogdanovich discovered that Universal had cut several Bruce Springsteen tracks as well as eight minutes of footage that Bogdanovich regarded as key scenes. The studio deleted a scene of a biker’s funeral and a happy campfire sequence featuring Rocky and his mother singing a funny and tender duet of “Little Egypt,” which Bogdanovich believed provided the “necessary leavening to the otherwise unrelenting seriousness of the film.” While the studio insisted that it was Bogdanovich who cut the biker scene, Frank Price, then-head of Universal, acknowledged that the studio had indeed cut the “Little Egypt” scene from Bogdanovich’s final version, describing it as “…an artistic difference which [Universal] felt

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157 Litwak at 269.
158 Id.
159 Id. For example, it took Joel and Ethan Cohen a year to raise their budget of $1.5 million for before they could begin shooting Blood Simple while Gregory Nava and Anna Thomas spent two years raising money for El Norte.
160 Id.
161 Michelle Green, The Drama Behind Mask, 23 PEOPLE MAG. 11, March 18, 1985, available at http://www.people.com/people/archive/article/0,,20090192,00.html. Mask is based on the real life of Rocky Dennis, a young boy afflicted with craniodiaphyseal dysplasia, an extremely rare and disfiguring congenital disease that deposits abnormal amounts of calcium in the skull that causes swelling. The disease distorted Rocky’s face, making it grow twice its normal size as a result.
163 John J. Dellaverson, The Director’s Right of Final Cut-How Final Is Final?, 7 ENT. & SPORTS LAW. 7, 10 (Summer/Fall 1988).
164 Yule, supra note 162, at 207.
165 Id. When Rusty Dennis—the real-life mother of Rocky—saw the film, she asked Bogdanovich “what happened?” to the movie. Recalls Bogdanovich: “[Rocky’s] son loved Bruce Springsteen, but didn’t even know Bob Seger. She also told me that the cutting of the biker’s funeral robbed movie audiences of finding out what Rocky felt about death that it was it beginning, not an end.” Id. at 209.
improved the film and eliminated another four minutes.\textsuperscript{166} Nevertheless, Universal released the film at 120 minutes despite Bogdanovich’s agreement to a 115-minute movie.\textsuperscript{167}

As for the music cuts, Universal explained that the Springsteen tracks—which the film’s main character loved—were too expensive to license, forcing them to replace the songs with Bob Seger tunes.\textsuperscript{168} After Universal refused to restore the film to the director’s final version, Bogdanovich sued Universal and producer Martin Starger for $11 million.\textsuperscript{169} Ironically, Universal’s version of Mask opened to rave reviews and Bogdanovich received some of the best reviews in his career, which left most to wonder what Bogdanovich was fighting?\textsuperscript{170} Ultimately, Mask became Universal’s biggest hit in years and with no battle to fight, Bogdanovich dropped the suit.\textsuperscript{171} Nevertheless, the case shows the kinds of artistic struggles that are commonplace in feature filmmaking and how even a contract granting final cut does not mean the film is safe from studio interference.

2. \textit{Gilliam v. American Broadcasting Companies, Inc.}

The Second Circuit’s decision in \textit{Gilliam v. ABC,}\textsuperscript{172} Inc. is frequently cited for its discussion of moral rights. In \textit{Gilliam,} Monty Python, a British comedy group, sued to enjoin ABC from broadcasting edited versions of three programs originally written and performed by Monty Python for broadcast by the British Broadcasting Corporation (BBC).\textsuperscript{173} In addition to the infringement claim, the group sued for breach of contract and unfair competition.\textsuperscript{174} Under the licensing agreement, Monty Python retained all rights in the script.\textsuperscript{175} In addition, BBC could make only “minor alterations” and such alterations necessary to avoid legal action or disrepute.\textsuperscript{176} BBC licensed the U.S. broadcasting rights in the programs to Time-Life Films, which subsequently licensed the episodes to ABC.\textsuperscript{177} According to ABC, some of the editing was done

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\textsuperscript{166} Id. at 210-11.
\textsuperscript{167} Id. at 211.
\textsuperscript{168} Id. at 207.
\textsuperscript{169} Id. at 208. (“Bogdanovich grimly reflected on the likely consequences to his career of standing up to the studio. Few ever dared take on the mighty giants like Universal and its parent company MCA, but he felt that if he allowed himself to be steamrollered in this situation, he would be surrendering not only for himself but for Rusty and Rocky as well.”).
\textsuperscript{170} Id. at 208-09 (“Four days after the movie’s opening, and with box office tills already signaling a major hit, Bogdanovich called a press conference in Hollywood to clarify his position on the lawsuit. He began by listing the alterations that Universal had made in his ‘final cut’ and charging that they had been made by the studio behind his back. ‘This is not just about a movie,’ he declared, ‘but about a real mother and a real son.’”).
\textsuperscript{171} Id. at 219.
\textsuperscript{173} Id. at 17 (2d Cir. 1976).
\textsuperscript{174} Id.
\textsuperscript{175} Id.
\textsuperscript{176} Id. at 17, n.2.
\textsuperscript{177} Id.
\end{flushleft}
to allow time for commercials while other material was edited for its “offensive and obscene matter.” 178

The court first held that plaintiffs were likely to succeed on the merits, emphasizing “the fact that the editing was substantial, i.e., approximately 27 per cent of the original program was omitted, and the editing contravened contractual provisions that limited the right to edit Monty Python material.” 179 Regarding the Lanham Act claims, the court held that plaintiffs were likely to succeed on the theory that ABC’s cuts constituted an “actionable mutilation” of plaintiff’s work. 180 Acknowledging the issue of artistic integrity, the court stated as follows:

American copyright law, as presently written, does not recognize moral rights or provide a cause of action for their violation, since the law seeks to vindicate the economic, rather than the personal, rights of authors. Nevertheless, the economic incentive for artistic and intellectual creation that serves as the foundation for American copyright law cannot be reconciled with the inability of artists to obtain relief for mutilation or misrepresentation of their work to the public on which the artists are financially dependent. 181

In finding that the broadcast of the edited programs as the creation of Monty Python violated the Lanham Act s 43(a), the court concluded that “[i]t is sufficient to violate the Act that a representation of a product, although technically true, creates a false impression of the product’s origin.” 182

3. Beatty v. Paramount Pictures Corporation

The issue in this dispute between Warren Beatty and Defendants Paramount and ABC was whether ABC—the network distributor of the movie Reds—had the right under ABC’s distribution agreement with Paramount—the theatrical producer—to cut approximately six and one-half minutes from the film 183 in order to accommodate network scheduling. 184 Beatty argued that his contract with Paramount entitled him to final cut over all forms of distribution, including television broadcasts, and thus ABC had no right to recut the movie to fit its programming. 185 Paragraph 3(o) of Beatty’s production, financing and distribution agreement with Paramount provided, in relevant part:

178 Id. at 18.
179 Id. at 19.
180 Id. 23-24.
181 Id. at 24.
182 Id.
184 Dellaverson, supra note 163, at 10.
185 French, supra note 183, at 95.
JRS [Beatty’s loan-out company] shall cut, edit and deliver the picture and shall have the “final cut” with respect to the worldwide exhibition of the picture, subject only to the following:

....

(iv) JRS shall cause WB [Warren Beatty] to make such changes in the picture as shall be required by PPC [Paramount Pictures Corp.] in order to comply with the requirements of United States, federal, state or local law, foreign censorship, television network continuity broadcast standards, and exhibition on airlines.186

The contract further provided that Paramount executives would use their best efforts to exhibit the film on television and airlines without any reduction in length from the theatrical version.187

Paramount’s licensing agreement with ABC, which gave ABC television rights for three network broadcasts, provided that the film could be edited to conform to ABC’s broadcast standards and practices, policies and time segment requirements.188 Beatty argued that he had absolute final cutting authority and that none of the specified exceptions in his contract included the right to cut for time.189 In addition, Beatty contended that his agreement with Paramount limited the studio’s right to transfer the cutting rights to ABC.190

In opposition, Paramount argued that the word “continuity” was used to distinguish “network standards and practices” and contended that the best efforts language was compromise protection for Beatty.191 Beatty, on the other hand, argued that the best efforts language was an example of further protection for the standards and practice exception.192 Paramount further argued that it was their “unwaivering policy never to enter into an agreement that would restrict its right to sell television rights to a network, and that prohibition of network abridgement in a film of this nature would have made a network television deal impossible.”193 However, Beatty presented evidence that his contract with Paramount for Dick Tracy gave him absolute final cut except for compliance with standards and practices.194 As a result, the arbitrator concluded that if Paramount’s strict policy on final cut for television rights was altered for Dick Tracy, then it was likely modified for Beatty on Reds.195

186 Id.
187 Id. at 95-96.
188 Dellaverson, supra note 163, at 10.
189 Id.
190 Id.
191 French, supra note 183, at 97.
192 Dellaverson, supra note 163, at 10.
193 Id.
194 French, supra note 183, at 97.
195 Id.
Relying on evidence that the word “continuity” refers to cutting for censorship purposes, the arbitrator determined that Paramount only had the right to cut for censorship purposes and thus the studio exceeded its authority when granting ABC the right to cut for time.196

The Red’s decision illustrates the importance of clear contractual language. Thus, a producer who wants to limit the director’s right of final cut over any medium must state that limitation clearly.197

4. Cimino v. Gladden Entertainment Corporation

Director Michael Cimino had final cut over the movie The Sicilian subject to good faith consultation with producer Gladden Entertainment.198 Cimino’s contract also required the film’s length to be no less 105 minutes and no more than 125 minutes.199 In the event the film exceed 125 minutes, the right of final cut would transfer to the producer, David Begelman.200 Begelman became concerned that Cimino would be unable to meet the running time when Cimino’s initial version (“rough cut”) ran 155 minutes.201 Thereafter, Cimino delivered a 125-minute version to Begelman, which he rejected as a “bad joke,” lacking continuity.202 After Begelman suggested several cuts to reduce the running time by 20 minutes, Cimino delivered two alternative versions—one running 121 minutes and the other running 143 minutes.203 Finding both versions unsatisfactory, Begelman informed Cimino that he was in breach of his contract and that final cut would revert to him.204

Cimino then filed a claim in federal district court as well as a claim with the DGA to prohibit the producer from cutting the long version of the film.205 The controversy over the two versions was based on the fact that Cimino had deleted 22 minutes of action scenes that were crucial to the film, which had action and violence at its core.206 Therefore, the producer claimed that without the action or violent scenes, “the picture was (1) not what they had bargained for, (2) did not conform to the screenplay, (3) was incomprehensible and (4) completely uncommercial.”207 In addition, the producer argued that the short version was not a serious effort

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196 Dellaverson, supra note 163, at 10-11.
197 Id. at 11.
199 Id.
200 Id.
201 Id.
202 Id.
203 Id.
204 Id.
205 Dellaverson, supra note 163, at 11.
206 Id.
207 Id.
by Cimino to complete the film under his contract, but rather a maneuver to technically comply with the time requirements.\(^{208}\)

At the outset of his decision, arbitrator Murray L. Schwartz observed that:

A director’s final cut is an uncommon, if not rare, event [and] is solely a matter of private contract between the director and producer…[A]bsent qualifying language in the personal services agreement, a director with final cut has ultimate decision-making authority over creative and artistic decisions about the final version of the picture…It gives the producer the benefit of the name and reputation of the director in the financing, distribution, and exhibition of the film.

The arbitrator found that “in effect, [Cimino’s] first cut, made as a ‘proposal,’ became his final cut, despite his awareness that [Begelman] had rejected it absolutely [and] that behavior scarcely amounts to consultation, let alone ‘good faith consultation,’ as required by the contract.”\(^{209}\) Recognizing that “it is—and should be—a rare case in which an arbitrator will be asked to deny a director his final cut [and that] a director’s claim of final cut is not vulnerable to every claim of procedural irregularity or creative misjudgment,” the arbitrator ultimately found that this was such a rare case.\(^{210}\) While the arbitrator ultimately denied Cimino’s right of final cut, he nevertheless recognized that “a director [with] final cut…is entitled to great weight.”\(^{211}\)

This case highlights the importance of limiting the director’s artistic control through scheduling and budgetary conditions. In addition, this decision demonstrates that while a director with final cutting rights is afforded great deference, this power is not unlimited. The length requirements were particularly important for Gladden as it had entered into agreements with domestic and foreign distributors that provided the same length requirements as Cimino’s personal service agreement.\(^{212}\)

V. CONTRACTING FOR FINAL CUT

Because U.S. copyright law does not recognize a filmmaker’s moral rights, it is particularly important that the parties establish the boundaries of creative control in their contract. Recognizing the importance of specifying these rights, one court noted:

“[A]ny copyright owner who really cares about his moral rights can protect them by inserting appropriate clauses in his contracts with publishers and producers, for example, by expressly

\(^{208}\) Id.
\(^{209}\) Id. quoting Directors Guild of America, Inc. and Michael Cimino v. Gladden Entertainment Corp., Relating to The Sicilian, No. 2183 (M. Schwartz, 1987) [hereinafter Cimino v. Gladden].
\(^{210}\) Id. at 249.
\(^{211}\) Id. quoting Cimino v. Gladden.
\(^{212}\) Id. at 11.
forbidding any alterations or omissions made without his consent."\textsuperscript{213}

However, “[e]ven contract law, which is the purported basis for decision in many cases concerning the integrity and paternity components of the moral right doctrine, cannot function as an adequate substitute” and “relatively unknown creators face a disparity of bargaining power that frequently results in a loss of valuable protections.”\textsuperscript{214}

An individual’s final cutting right does not always include final cut for all media forms. The most common form of final cut—within the small group of directors lucky enough to obtain such a right—refers to final cut for the domestic theatrical release of the film and, sometimes, the film’s home video version.\textsuperscript{215} The grant of final cut for foreign theatrical version and ancillary markets such as television and airlines is even less common, especially when it comes to non-theatrical media where the studios rely on these markets to recoup their costs.

Directors with little to no experience will almost never obtain more than the DGA’s minimum of one cut and one preview.\textsuperscript{216} More experienced directors may be able to secure two cuts and two previews, but studios will only rarely grant three cuts to A-list directors.\textsuperscript{217} In short, only the most esteemed directors can obtain the elusive “final cut.”

Studios often subject the grant of the second or subsequent cut to a condition such as conditioning the director’s second cut on the film being at or below the approved budget, schedule and length. Thus, the studio may ultimately be able to withhold the director’s second cut or preview if the director fails to meet certain requirements. This type of arrangement incentivizes the director to stay within the studio’s fiscal and time restraints in order to procure the right of final cut, a compromise that can potentially benefit both parties.

\textbf{A. Alternatives to Final Cut}

As industry practice and precedent typically dictate the majority of contractual arrangements in feature filmmaking, most directors accept that the studio will retain final cutting rights. There are, however, ways to reduce the sting of the loss of creative control. The following contractual provisions provide a compromise to compensate the director yielding creative control to the studio. It must be noted, however, that even where a contract provides for final cut or some variation thereof, any breach by the studio of these provisions will rarely be litigated as the director does not want to risk his reputation and being ostracized from the industry.

\textsuperscript{215} APPLETON & YANKELEVITS, supra note 19, at 107.
\textsuperscript{216} Id.
\textsuperscript{217} Id.
1. Development Fees

Sometimes studios agree to pay the director a development fee, which compensates the director for development services rendered.\textsuperscript{218} Given that most development projects never reach production and the director’s fixed compensation is payable only if the movie is produced, the development fee is particularly important to directors as it may be the only payment the director receives on a project.\textsuperscript{219}

2. Pay-or-Play

The issue of when a director’s fixed compensation is guaranteed is particularly significant for directors who, unlike actors, are often hired during the development stage of the film before it is determined whether the project will proceed to production.\textsuperscript{220} While not an equal substitute for final cut, pay-or-play guarantees payment of the directing fee—subject to very limited exceptions—irrespective of whether the director actually directs the film.\textsuperscript{221} Given that directors spend a significant time working on a film (and not working on other projects), pay-or-play protects directors when the studio replaces them or decides to stop production of the film since the studio must nevertheless pay the entire director’s fee.\textsuperscript{222}

In the rare instances where directors are able to secure a pay-and-pay commitment from the studio, it is important that the contract clearly defines the events that must occur before the studio must remit the director’s fee.\textsuperscript{223} In such cases, studios usually agree to pay the director’s full development fee if the director has not been terminated during development.\textsuperscript{224} A director will then be considered pay-or-play provided that all of the following conditions are met: (1) “[t]he studio approved the final screenplay”; (2) “[t]he studio has approved the final budget”; (3) “[t]he studio has engaged the producer on a pay-or-play basis”; and (4) “[t]he studio has engaged the principal cast on a pay-or-play basis”; and (5) “[t]he studio has set a firm start date for beginning principal photography.”\textsuperscript{225} While the studio does not usually anticipate replacing the director, it will nevertheless try to defer its obligation to pay the director’s fee until it is certain the movie will reach production.\textsuperscript{226}

3. The Right to Remain Anonymous

\textsuperscript{218} APPLETON & YANKELEVITS, supra note 19, at 97.
\textsuperscript{219} Id. at 98-99.
\textsuperscript{220} Id. at 102 (describing pay-or-play compensation scheme for feature film directors).
\textsuperscript{221} Id.
\textsuperscript{222} Id.
\textsuperscript{223} Id.
\textsuperscript{224} Id. at 103.
\textsuperscript{225} Id. (“In...negotiations, a director may be able to whittle away at some of [these] requirements...For instance, the studio may agree to modify condition 4 above by limiting it to the employment of one or two principal cast members...Additionally, the studio may waive the condition relating to the hiring of a producer, or at least agree to specify the type of producer that must be hired.”).
\textsuperscript{226} Id.
Where final cut is not available to the director, one alternative is to give the director the right to dissociate his name from the film in the event that he disagrees over the final version. A provision such as “In the event that Director does not agree with the final cut of the Picture, Director shall have the right to dissociate his name from the Picture.” This provision can include conditions such as allowing dissociation only if the principal marketing campaign has not begun or if the director has not spoken publicly about the creative differences.227 Where dissociation is conditioned on certain requirements, a provision should be included to ensure that the Director sees the final cut and has sufficient time to make his decision before the condition becomes effective.

This provision is particularly important for directors who are hired because of their name and ability to attract wide audiences. Movie trailers and other advertisements crediting the movie as “from the Director of XYZ Blockbuster” or from “Academy Award winning Director” can be a valuable marketing tool. In some cases, the studio may even allow the Director to make changes out of fear of dissociation if the studio believes the director’s name is that valuable of an asset.

4. Defining Consultation

Section 7-202 of the DGA Agreement provides that the director must be consulted for “any creative decision…regarding the preparation, production, and post-production of a motion picture” the right of consultation is ambiguous and easily dismissed.228 Defining the nature and extent of consultation gives directors a leg to stand on when boxed out of the editing room. It also emphasizes the importance of the director’s role and the director’s right to, at the very least, be consulted regarding any changes to the film—minor or significant.

One way to define consultation and create an additional right is through restricting the types of editorial changes that can be made without the director. One example is a provision providing that the studio cannot add a new scene or reshoot a scene without the director first being asked to perform these reshoots.

5. No Substitution

227 For a look at director Tony Kaye’s attempt to dissociate himself from the movie American History X, see Craig Saper, Artificial Auterism and the Political Economy of the Allen Smithee Case in DIRECTED BY ALLEN SMITHEE 44 (Jeremy Braddock and Stephen Hock eds. 2001). New Line Cinema allowed Edward Norton, the star of American History X, to cut a number of scenes and reinsert some scenes that Kaye had excised, changing the final quarter of the film. Id. After publicly criticizing Norton and the producer, claiming they had ruined the film, Kaye filed a grievance with the DGA requesting permission to use the name Allen Smithee. Id. However, the DGA reserved that name for directors who agreed not to publicize their creative differences with a producer. Id. Since Kaye already publicly complained about the problems, the DGA rejected his request. Id.

228 DGA, supra note 8, at art. 7, § 2-202.
To ensure that the director is not replaceable, a provision such as “Under no circumstances may Studio replace Director with a substitute director without first allowing Director to make the changes requested by Studio.” Such a provision ensures that the director participates in all reshoots and other significant post-production editing. Even where the director opposes these changes, he is not ostracized from his own film. As mentioned above, there are times where a studio makes significant edits—even so far as changing the entire ending—without the director’s knowledge.

6. Agreed Upon Editor

Another way to lessen the tension during post-production is to include a provision in the director’s agreement that provides that in the event of artistic differences between the parties regarding modifications to the film, an editor—agreed upon by both parties—will make the decision. While finding an editor to agree upon may be difficult where both the studios and the directors, especially tenured ones, trust and prefer certain editors to others, it nonetheless places an intermediary to minimize the studio dominance.

B. Final Cut Provisions

For a sample of three different contractual provisions pertaining to the director’s right of final cut, see Appendix A, B and C. Appendix A is an example of the ultimate in creative control: final cut over the film’s theatrical release and beyond. Given how rare studios relinquish this right to directors, Appendix A is for A-List directors such as Martin Scorsese and Steven Spielberg. Appendix B represents an intermediary level of final cutting rights for the up-and-coming director. This provision attempts to strike a balance between the studio’s financial interests in the film and the director’s right of attribution and integrity by establishing that the director and the studio seek to mutually agree upon the final cut. While the director’s decisions are final in the event of a disagreement, this right is subject to a good faith/reasonableness standard as well as a set of conditions that recognize the studio’s financial concerns, particularly relating to distribution standards. Finally, Appendix C provides a modified version of the typical director’s agreement by offering the director an opportunity to have a second cut and preview provided that the director meet certain scheduling, technical and other business requirements.

VI. STRATEGIC COMPROMISES TO MINIMIZE POST-PRODUCTION EDITING CONFLICTS

The studio’s tight grip over the film does not allow for the creation of original films with diversity and cultural appeal. This high degree of control erects a creative barrier between the studio and the director, leading to films that lack substance. Filmmakers must be empowered to create these kinds of films in order to change the current landscape of the film industry. While a
laissez-faire approach by the studio would be ideal for filmmakers, it would affect the film’s profitability, as filmmakers may run wild with such a hands-off approach, unrestricted by time and budget. Furthermore, this approach does not consider the studio’s financial interests and their contractual obligations with distributors. Yet, the current model in place—“forcefully reinstating recycled and safe cinematic trends, models, and personnel”229—is equally unsatisfactory. Thus, a better compromise for creative control is needed to balance the interests of the studios and the filmmakers.

A. Collaborating on a Roadmap Before Production

While many of the creative struggles with respect to editing deal with concepts of marketability following screening analysis, clearer expectations from both parties about the final outcome of the film can be solidified during pre-production in order to lessen the impact of editing during post-production. Thus, greater studio participation and collaboration with the director before the start of principal photography may reduce the post-production editing as the director will have clearer guidelines to make his final cut without studio interference.230 Knowing precisely what the studio’s expectations are upfront prevents interference in the end, providing the director more control over the film’s final version. These kinds of collaborative efforts can also positively impact the quality of the film as well. With so many players in the making of a movie, films often fail because of clashing visions of the film, which, ironically, lead to films without any vision. Such was the case with Miramax Film’s flop 54. According to Jack Lechner, former Executive Vice-President of Development at Miramax, “[t]he root of everything [with 54] was that [the director’s] vision of the movie and [the studio head’s] vision of the movie were two different things.”231 These conflicting visions will often make the film suffer, leading to the kiss of death for the director’s creative control – testing poorly. Movies that do not test well are “at the very least…shortened, and at the most reconceptualized.”232 In the most extreme cases in which the film is restructured, the studio essentially attempts to make the film “as the auteur” by re-cutting, re-voicing and reworking the film in every aspect, including the addition of new footage.233

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229 DEAN, supra note 15, at 64 (discussing the relationship between the budgeting and the creative process in the motion picture industry and its effect on the creative process).
230 BISKIND, supra note 140, at 320 (“When you’re in production, your left entirely alone to make the movie. The company influence is felt most keenly during the cast, and post-production.”
231 Id. at 322-23.
232 Id. at 323. When Miramax was under the Weinstein Brother’s reign, Harvey Weinstein, Miramax’s co-chairman, was known as “Harvey Scissorhands” because of his reputation for radically restructuring a film during post-production. Id. at 148.
233 Id.
Demonstrating the power of a clear vision upfront for producing films with both commercial success and critical acclaim, Lechner explains:

The weirdness of being at Miramax was, on one hand, you have in the works at the same time, *The English Patient, Shakespeare in Love, Good Will Hunting*, where everyone agrees on what the movie is up front and you let the filmmakers get on with it, everything Miramax does helps it to be better, and it makes a zillion dollars. But ultimately everyone at Miramax ended up spending more time on *Wide Awake, 54*, and *Talk of Angles*, which was in [post-production] for three years.”

In this way, the power of pre-production planning cannot be underestimated. In some instances, it can make or break the movie both commercially and financially speaking.

Thus, providing a framework in which the director can create his film—even if this meant more studio involvement during pre-production and perhaps even principal photography—could provide a strategic compromise to secure a director’s right to final cut, reduce post-production editing conflicts and improve the quality of the film. By setting the stage for a more united front early on in the process, the director has a better space within which to work in order to arrive at a cohesive final cut. This, in turn, would allow both the studio and the director to achieve their goals—a final product that meets both sides’ interests (financial, contractual and artistic).

**B. Gross Participation as Compensation for Creative Control**

Considering that the financing entity holds the most control, compensation is closely related to artistic control in the motion picture industry. While movies made inside the system are subject to the financial, risk-averse pressures from the studio, there are ways to reduce these influences. Studios may be more open to negotiating final cut when the director is flexible on the amount of up-front payment. In such cases, compensation is tied to artistic control decisions. For example, Academy Award-Winning actor Dustin Hoffman traded his multi-million dollar up-front salary for final cut over two films, *Agatha* and *Straight Time.*

Thus, to further strengthen the approach in Section VI(A) above, the director may waive some or all of his compensation in exchange for a percentage of the gross receipts of the film. As opposed to pay-or-play or the standard fixed compensation scheme, when the director has gross profit participation in the film, he has an obvious stake in the financial success of the work. In

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234 *Id.* at 343.
236 Also called “contingent compensation” and “net participation.” For a more thorough explanation of the variants of gross participation see *APPLETON & YANKELEVITS, supra* note 19, at 198-99.

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this way, the director’s compensation scheme may incentivize him to make commercial considerations, thereby making the studios more comfortable with the idea of relinquishing more creative control to the director. This alters the usual structure of the motion picture industry where the artists bear the reputational risks and the studios bear the financial risks by placing the filmmaker more financially instep with the studio. This arrangement is advantageous to both sides—while the director gains the benefit of more creative control with the right of final cut, the studio can lower its production costs and cash outlay, which in turn can lower the potential losses in the event of a box office failure. This is particularly where “the effect to make blockbusters has increased the studios’ financial risk.”

These kinds of deals are more common with proven talent and directors. For example, actors Danny DeVito and Arnold Schwarzenegger and director Ivan Reitman waived their usual up-front salaries for Universal Studio’s movie Twins in return for considerable percentages of gross film rentals. As a result, Universal was able to keep production costs to approximately $15 million.

This can be seen as a kind of strategic alliance between the director and the studio whereby the filmmaker and the studio begin the filmmaking process with the director more commercially aligned with the studio and the studio more creatively in step with the director. Such an arrangement can minimize the adversarial relationship commonplace in the motion picture industry between the artistic and financial side by overlapping the goals of both parties.

C. Creating and Incentivizing a Realistic Budget and Schedule

By not cutting corners in the first place and having a better roadmap to proceed with during production, studios will not have to pour a significant amount of time and money to doctor the damage. Without a clear roadmap—polished script, clear vision with cast, set and wardrobe—and a reasonable budget within which to work, a lot of time will be spent in the editing room. Creating a budget that is financially practical for the studio and suitable to implement the script on camera can even reduce post-production costs.

As mentioned previously, where a director is given clear directions as to where he can and cannot take vision, less studio interference will be required. Adherence to these restrictions

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237 SELZ ET AL., supra note 7, at § 21:16 (discussing how compensation can be designed to decrease or shift the risks involved in the high stakes entertainment industry).
238 Id. § 21:16. (Providing examples of these agreements, which are known “gross point deals.”).
239 LITWAK, supra note 2, at 90 (“In an attempt to obtain the hot stars, directors and scripts, the studios have bid up the prices of these commodities. But spending a lot of money is no guarantee of success. Only a few films each year become blockbusters, and they often are the pictures nobody expected to succeed.”).
240 Id. § 21:16.
241 See BISKIND, supra note 140, at 342 (“As was their custom, the Weinsteins slashed the budget way beyond point that was reasonable, tormented [the director] for exceeding it, and then when their self-fulfilling prophecy was fulfilled, threw money at post-production, allowing Harvey to flex his producing muscle.”).
is strongest where the director’s right of final cut is contingent on meeting certain budget and scheduling requirements. The result is a strategic compromise between the studio and the director. Regarding a director who sticks to the budget, Academy Award winning director Woody Allen says:

It seems to me that there has got to be mutual responsibility. The director agrees to work for a certain budget, and as long as he sticks to the budget, allowing for a few reasonable misjudgments, then it’s imperative that he have 100% absolute, total control of the creation of the film. Once the studio agrees to go ahead on a project, whether it's budgeted at $1 million or $50 million, control of every phase of creation must be the director’s.\textsuperscript{242}

Consequently, Allen, a triple threat, resolves the creative control issues as writer, director and producers of his films. However, for the filmmaker who does not wear all three hats, conditioning the right of final cut upon observance of the budget and schedule may be the kind of compromise a studio is comfortable taking during negotiations.

\section*{VII. CONCLUSION}

In an ideal world a filmmaker would have complete freedom to make a film of his own creation by writing the script and producing the movie on whatever budget needed—with final cut, no interference and sufficient resources for marketing and distribution.\textsuperscript{243} But given that feature filmmaking is a massive undertaking that requires a multitude of people and a large sum of money, it is an endeavor that one person alone cannot tackle. This reflects two pervasive issues in the motion picture industry—the fact that one person cannot take on such a massive undertaking alone and that investors demand a return on their investment or they will not take the financial risk.

Thus, in a more realistically ideal world, a director would be hired for his vision. In such cases, the studio signs on to the director’s vision, at least insofar as it conforms to the studio’s budgetary and scheduling requirements. Taking the time to create a roadmap before production allows for the director’s vision to be realized on screen while also meeting the studio’s expectations. However, when a director is hired as a piece of a puzzle and not for his vision, the director’s vision will always be lost. By “piece of the puzzle,” consider that under the blockbuster formula, directors, like actors, are often brought to the film for their commercial appeal, and in such cases the director’s name rather than his vision is the driving force for his employ. Similarly, a studio may hire a director who is known for success in a particular genre such as action because of his history of box-office success. All else being equal (director’s status

\textsuperscript{242}Selz et al., supra note 7, at § 20:3.

\textsuperscript{243}King, supra note 129, at 110.
and availability, film budget, etc.), where a director is hired for any other reason than for being the individual with the best vision to transform the screenplay to film, the studio may treat the director as a prop rather than the creative leader.

This is not to suggest that studio filmmaking is inherently bad or that a filmmaker should never work with a studio. To the contrary, there are many benefits to making a studio film, not the least of which include the opportunity to work with top-notch talent, significant compensation and an ample production budget (without the responsibility of securing financing). Additionally—and perhaps most significantly—with international distribution and exhibition channels, studio filmmakers have the opportunity to create a movie on a worldwide platform. Thus, rather than condemning studio filmmaking, the purpose of this paper was merely to explore the conflicts between studios and filmmakers in order to find ways to modify industry practices in a way that suits both sides’ interests.

Given its inherent risks and corporate structure, studio filmmaking may always be a highly political process. Nevertheless, industry norms can certainly be adapted to allow for more creative control for filmmakers. Indeed, as the blockbuster formula has become just that—a formula that has ceased to produce actual box-office success—the studio way of making movies is due for an overhaul. With the old way no longer working, creating a space for the director to create his vision within the parameters of studio control could perhaps be the next formula for the motion picture industry.
VIII. APPENDICES

A. The A-List Director Contract

Article [#]. Final Cut

(a) Director shall cut, edit and deliver the motion picture and shall have the “final cut” for exhibition in all media throughout the world including but not limited to the domestic and foreign theatrical release, network television, home video, pay cable and in-flight exhibitions of the motion picture, subject only to the following conditions:

(1) Theatrical Distribution. The Picture, as delivered, shall conform to all of the specifications and delivery requirements imposed upon Studio by the United States theatrical distributor. If the Picture does not so conform to such specifications, then Producer shall have the right to take such actions as may be required to make the Picture so conform.

(2) Ancillary Markets. Director shall make such changes in the picture as required by Studio in order to comply with the requirements of United States, federal, state or local law, foreign censorship, television network standards and practices, exhibition on airlines and other distribution and exhibition requirements.

(A) Notice. Studio will give Director three (3) months advance notice of the date on which such changes must commence. Director will be entitled to a period of sixty (60) days within which to complete such changes. This sixty-day (60) period will be reduced if the distributor does not afford Studio sufficient time. In any event, Director will have at least thirty (30) days within which to complete such changes. The Picture will not be shortened solely to fit a network time slot without the Director’s consent. However, Director shall perform such editing, including shortening, as may be required so that Studio does not lose a network deal solely on account of length.

(3) Rating. The Picture, as delivered, shall qualify for an MPAA rating of no more restrictive than “PG-13.”

(4) Length. Unless otherwise provided by Studio in writing, the Picture shall have a running time of not less than ninety-five (95) minutes and not more than one hundred ten (110) minutes, inclusive of all credits in the main and end titles.

(5) Picture Specifications. The Picture shall be shot in color.

(6) Screenplay Conformity. The Picture shall conform in all material respects to the final approved screenplay, i.e., the version of the script approved by Studio and submitted to Distributors, subject only to such minor changes as may be required by the exigencies of production; provided, however, that any such changes shall not alter the characters, characterizations, relationships, storyline and structure of the Picture.

(7) Budget, Schedule, and other Business Policies. The Picture shall be produced and delivered in accordance with the approved budget and schedule subject only to the changes approved by Studio in writing. In addition, the Picture shall comply with Studio’s other business policies to the extent Director is informed of the same.

(8) Principal Photography. Principal photography is completed under the direct supervision of Director as the director thereof.
B. The New “It” Director Contract

Article [#]. Final Cut for Domestic Theatrical Release and Home Video Distribution

(a) The Director and Studio will seek to mutually agree, on a reasonable basis and in good faith, upon the final cut of the motion picture for exhibition in domestic theaters. If after full consultation Director and Studio cannot agree, Director’s decision shall be final, provided Director has acted reasonably and in good faith with Studio and has met the following conditions:

1) Distribution Requirements. The Picture, as delivered, shall conform to all of the specifications and delivery requirements imposed upon Studio by the United States theatrical distributor and the completion guarantor (of which Employee shall be given notice) and customarily completed by directors of motion pictures in the motion picture industry. If the Picture does not conform to such specifications, Producer shall then have the right to take such actions as may be required to make the Picture so conform.

2) Rating. The Picture, as delivered, shall qualify for an MPAA rating of no more restrictive than “PG-13.”

3) Length. Unless otherwise provided by Studio in writing, the Picture shall have a running time of not less than ninety-five (95) minutes and not more than one hundred ten (110) minutes, inclusive of all credits in the main and end titles.

4) Picture Specifications. The Picture shall be shot in color.

5) Screenplay Conformity. The Picture shall conform in all material respects to the final approved screenplay, i.e., the version of the script approved by Studio and submitted to Distributors, subject only to such minor changes as may be required by the exigencies of production; provided, however, that any such changes shall not alter the characters, characterizations, relationships, storyline and structure of the Picture.

6) Budget, Schedule, and other Business Policies. The Picture shall be produced and delivered in accordance with the approved budget and schedule subject only to the changes approved by Studio in writing. In addition, the Picture shall comply with Studio’s other business policies to the extent Director is informed of the same.

7) Principal Photography. Principal photography is completed under the direct supervision of Director as the director thereof.

(b) In the event the Picture does not so conform to the specifications of this Article or Director fails to act in good faith or does not provide a full consultation, then Producer shall have the right to take such actions as may be required to make the Picture so conform.
C. The Novice Director Contract

Article [#]. Cuts and Previews

(a) Director shall be entitled to two cuts and two public previews of the Picture in connection with its initial U.S. theatrical release only if the all following conditions are met:

(1) **Change in Release Date.** The Picture’s release date shall not be pushed forward.

(2) **Rating.** The Picture, as delivered, shall qualify for an MPAA rating of no more restrictive than “PG-13.”

(3) **Length.** Unless otherwise provided by Studio in writing, the Picture shall have a running time of not less than ninety-five (95) minutes and not more than one hundred ten (110) minutes, inclusive of all credits in the main and end titles.

(4) **Picture Specifications.** The Picture shall be shot in color.

(5) **Screenplay Conformity.** The Picture shall conform in all material respects to the final approved screenplay, i.e., the version of the script approved by Studio and submitted to Distributors, subject only to such minor changes as may be required by the exigencies of production; provided, however, that any such changes shall not alter the characters, characterizations, relationships, storyline and structure of the Picture.

(6) **Budget, Schedule, and other Business Policies.** The Picture shall be produced and delivered in accordance with the approved budget and schedule subject only to the changes approved by Studio in writing. In addition, the Picture shall comply with Studio’s other business policies to the extent Director is informed of the same.

(7) **Principal Photography.** Principal photography is completed under the direct supervision of Director as the director thereof.