

Actors' moral rights—digital replacement in films

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TMT analysis: Christina Michalos, barrister at 5RB, 5 Gray's Inn Square, who specialises in media law, copyright and related rights, considers the issues implicit in Kevin Spacey's digital replacement in the Ridley Scott film 'All the Money in the World', due to the recent investigations with regard to Spacey's improper conduct.

What is the background to Kevin Spacey being cut out of the (already completed) film and replaced by Christopher Plummer?

Kevin Spacey had been cast as J Paul Getty Snr in the film 'All the Money in the World', directed by Ridley Scott. It is based on John Pearson's 1995 book 'Painfully Rich: The Outrageous Fortunes and Misfortunes of the Heirs of J Paul Getty'. The film had been shot earlier in 2017 and production reportedly finished in August 2017.

From the end of October 2017, various allegations of sexual assault and sexual harassment were made against Kevin Spacey. This followed sexual assault allegations against film producer Harvey Weinstein. The media spotlight was firmly on Hollywood and its response to allegations that as an industry it had failed to deal with a long-standing (and now alleged to have been widely-known) history of sexual harassment.

As a result, of the media reports of sexual misconduct allegations against Spacey, the scheduled premiere of the film was cancelled. It was then announced that Ridley Scott had recast the part of J Paul Getty Snr. The scenes featuring Spacey were to be re-shot with Christopher Plummer in the role.

The film was set for a release date of 22 December 2017, so to get this done in time posed something of a logistical challenge. Re-shooting began on 20 November and concluded on 29 November. Amazingly, the release date of the 22 December 2017 is still scheduled to be met.

By what technical process might Spacey or someone in a similar situation be cut from the film?

At a basic simplest level, someone could just be cut from the film and the scenes omitted, or the actors replaced and only long-shots of existing footage used. This is not a new phenomenon. In 1953, Vivien Leigh withdrew from the production of 'Elephant Walk' due to mental illness and was replaced with Elizabeth Taylor. Some of the scenes already filmed with Leigh (where she was unidentifiable because she was shot from behind or too far away) remain in the film.

Replacing an actor has an even longer history. In 1937, when Jean Harlow died aged 26 during the filming of 'Saratoga', the film was finished using stand-ins.

Today, at a more sophisticated level, a person could be completely removed using computer generated imagery (CGI) technology. Alternatively, by using a combination of motion-capture and CGI, another actor's head could be electronically grafted onto the original actor's body. This technique was used in 'TRON: Legacy'

to re-create a younger, 30-year-old version of Jeff Bridges who starred in the film aged 61. The CGI younger version of Bridges was mapped on to the face of his double, actor John Reardon. You can read more about this fascinating process in detail here: www.fxguide.com/featured/tron_legacy_face_off/

In the case of 'All the Money in the World', the scenes were simply reshot using a different actor.

Would any UK performers' rights, such as a right to object to derogatory treatments made to their performance, be breached by this process?

The recognition of moral rights as part of the intellectual property rights (IPRs) of performers is a fairly recent occurrence. In the UK, it was not until 1 February 2006, when the Performances (Moral Rights, etc) Regulations 2006, [SI 2006/18](#) came into force that a performer was granted the right to:

- be identified as the performer, and
- to object to derogatory treatment of her or his performance

A performer's right to object to derogatory treatment is contained in [section 205F](#) of the Copyright, Designs and Patents Act 1988 ([CDPA 1988](#)). Any modifications to a performance which are consistent with normal editorial or production practice are expressly excluded from being an infringement of this right—[CDPA 1988, s 205G\(3\)](#). In addition, a performer's moral rights can be waived—[CDPA 1988, s 205J](#).

In most film contracts, it is to be expected that there would be a relevant waiver. Removing someone completely from a film in such circumstances may very well be argued to be part of normal editorial practice—the director's cut is their final choice after all.

Beyond that, derogatory means 'any distortion, mutilation or other modification that is prejudicial to the reputation of the performer'. The question of whether the treatment is prejudicial to a person's reputation involves an objective evaluation of the evidence—*Tidy v Trustees of the National History Museum* (1995) IPR 501 and *Prise de Parole Inc v Guerin* 60 ACWS (3d) 390 (Canada).

In circumstances where the reputation of the performer is the very reason she or he was being re-cast, it is difficult to imagine a realistic basis to contend that removal would be prejudicial to their reputation.

Could a director's moral right of integrity be breached by the performer's performance staying in the film?

No. This is because for the purposes of a director's moral rights 'derogatory treatment' means 'any addition to, deletion from or alteration to or adaptation of the work'—[CDPA 1988, s 80\(2\)](#). If the film had been finalised post-production, release in that form would not have had any addition, deletion or alteration to it. Even if the director later objected to the inclusion of a particular performance, there would be no 'treatment' within the statutory definition as there would have been no changes.

In the UK what impact might such situations have on contractual agreements between performers and production companies? What can those advising performers and production companies do to prepare for such a situation?

The reality is that most performers are in a weak bargaining position as against the corporate film industry machine. Film contracts will require waiver of moral rights and only those in the strongest bargaining position—the most A-list of the A-list performers—would have any real prospect of retaining their own moral rights so far as a right of integrity is concerned.

In all situations, it is worth attempting to negotiate and carve out some limited moral rights for a performer, but it is unrealistic to pretend that any but a very select few could ever hope to contractually avoid ending up on the cutting-room floor.

From a production company perspective, the key thing is to ensure that contractually all power remains with the producers and that there are relevant disrepute or moral clauses within the contract. A disrepute clause (referred to in the US as a moral clause) is one that allows termination if the performer does anything to bring herself/himself or the production into disrepute. Historically, these were more common in television contracts (where there was ongoing regular work) or endorsement contracts, but it is inevitable that these types of clauses will become more prevalent in film contracts following recent events.

In the light of the Harvey Weinstein situation, and the criticism that also attached to his company for failing to address the problem, the future may see star performers trying to negotiate a 'reverse disrepute clause'—a term of the contract which would allow the performer to terminate the arrangement if the company engaging them falls into disrepute or acts in a scandalous manner.

Interviewed by Tracey Clarkson-Donnelly.

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