

1-1-2002

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Recommended Citation

Rebekah Powell, "Breaching Moral Rights: Is There A Legal Remedy?" (2002) 11 Dal J Leg Stud 236.

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BREACHING MORAL RIGHTS: IS THERE A LEGAL REMEDY?

REBEKAH POWELL¹

ABSTRACT

Throughout the history of the theatre there have been various interpretations of dramatic work that, arguably, have not followed the original vision of the playwright. Do modern Canadian playwrights have a better chance of controlling the production of their plays? The original copyright for a play belongs to the playwright who may sell or assign it. In addition, the playwright has moral rights to the play, which are inalienable but may be waived. The essence of these rights is the ability to protect one's work from being altered, distorted or presented as the work of another. Here, the various legal issues surrounding the performance in Canada are addressed. While Canadian playwrights have legal protection for their moral rights, they rarely assert these rights in a court of law. Canadian playwrights may find informal methods more useful in settling disputes over the interpretation of their work due to factors such as cost of litigation, difficulty in establishing a breach, and the need to have plays performed.

I. INTRODUCTION

Art is an aspect of our present culture and our history; it helps tell us who we are and where we came from. To revise, censor, or improve the work of art is to falsify a piece of culture. We are interested in protecting the work of art for public reasons, and the moral right of the

¹ Originally from Liverpool, England via Winnipeg, Rebekah Powell graduated from Dalhousie Law School in 2002 and will article with Cox Hanson O'Reilly Matheson in Halifax, NS. Rebekah received a B.A. & a M.A. in Theatre History from the University of Manitoba. Her passion for the arts began at the Black Hole Theatre Company where she was an actor and stage manager, before moving to the Manitoba Theatre Centre. She would like to thank Daphne MacMillan & Laurie Lam for their assistance with modern theatre practice.

artists is in part a method of providing for the private enforcement of this public interest.¹

"A play presupposes a crowd:"² it is not written to be read, but to be performed; when a playwright writes a play, its performance is anticipated. As the playwright is the original exclusive owner of the copyright, authorization is required in order for the performance to take place.³ Problems arise when an authorized production does not resemble the original play due to unauthorized changes, and a playwright is left trying to protect his or her vision of the work.

Copyright law, the contract in which the performance was authorized, and moral rights will determine the solution to this situation. Copyright is assignable, and moral rights are inalienable, although they may be waived. Therefore in order to determine if there is a breach, it will be necessary to establish the status of both the copyright and the moral rights.⁴ If a breach is established, the remedy available is determined by whether it is a breach of copyright, contract or moral rights. In addition, non-judicial remedies may be available. The following case study is used for illustrative purposes and to provide a framework for discussion.

Victoria J. Powell is a Canadian playwright; she grew up in Liverpool, England and Winnipeg, Canada. Her latest play, *Ya Divvy*,⁵ was produced at a popular theatre ('Everyman Theatre') in Winnipeg, Manitoba. *Ya Divvy* is set in Liverpool during and shortly after the race riots of the early 1980s. The play is a criticism of the industrial and social divisions between the north and south of England, portrayed in the life of Mandy, a young teenager who lives in Toxteth, a rough area of Liverpool. Mandy and her infant brother Russell live with their mother, Julie, and her various male friends. Mandy is Russell's primary

¹ J. Merryman "The Refrigerator of Bernard Buffet," 27 Hasting L.J. 1023 (1976) at 1040 as cited by Dave Vaver in "Snow v. *The Eaton Centre*: Wreaths on Sculpture prove accolade for artists' moral rights." *Canadian Business Law Journal* Vol 8, 1983-84 81-100 at 88.

² Thornton Wilder as cited by H. Levin in *Shakespeare and the Revolution of our Times* (Oxford, New York: Oxford University Press, 1976) at 284.

³ *Copyright Act, infra*, at note 28, s.3(1). If the copyright has been assigned to a publisher or other party they may authorize performance. It is clear that unauthorized performances would breach copyright and are subject to the full remedial powers of Copyright law. See *Jassmann v. Regan*, [1992] F.C.J. No. 581 (F.C.T.D.).

⁴ *Copyright Act, infra*, at note 28, s.14(1).

⁵ *Ya Divvy*, (1985) unpublished, 1st production at Black Hole Theatre Company, 1986. Premise of *Ya Divvy* used with permission of the playwright.

caregiver. Life in Liverpool at this time is beyond bleak. During the course of the play Mandy's mother loses her job and life becomes even more intolerable, and Mandy makes the decision that Liverpool offers no future for herself or her brother, and she decides to end their lives. The play ends as Mandy exits to the bedroom carrying a cup of poisoned tea and poisoned bottle.

Ms Powell was very excited about the production; but when the curtain rose, she was shocked to see extensive changes had been made to the characters, the setting, the language and even the ending of the play. These changes were the equivalent of moving the setting from down-trodden Liverpool to luxury-soaked southern Texas, and Mandy suddenly becoming a man. What has this to do with her play? With Liverpool? The young man who was speaking bore no resemblance to the fourteen-year-old "scouser" from Toxteth Ms Powell had created.⁶

Ms Powell was outraged by the changes to her play, believing it had ruined the integrity of the work, and therefore her reputation. While most of the words remained, the interpretation has rendered them meaningless. Ms Powell owns the copyright to *Ya Divvy*, and although she had given Everyman permission to perform the play but she did not waive her moral rights. What she saw was not what she had given permission to produce: it made a mockery of her work and she wants to know what recourse is available to her.

1. Directorial Interpretation

Ms Powell's situation is not new: throughout the history of the theatre there have been various interpretations of dramatic work that, arguably, have not followed the original vision of the playwright. In Victorian Britain, in order to circumvent strict licensing laws, the "legitimate drama" had songs added to make it acceptable as musical entertainment rather than dramatic performance.⁷ More recently, *A*

⁶ "Scouser" is a colloquialism for a person who comes from Liverpool with a strong Liverpool accent.

⁷ For example, George Farquhar's *The Beaux Strategem* was billed as a burletta: Gilbert B. Cross, *Next Week – East Lynne, Domestic Drama in Performance 1820 – 1874* (Lewisburg: Bucknell University Press, 1971), at 30-31. As the licences prohibited the performance of plays, managers went to great lengths to establish that the entertainments available were not plays. See R.L. Powell, *Culture, Capital and the State: Select Committee on Licensing and Regulating Theatres and Places of Entertainment, 1866*, MA Thesis, University of Manitoba, 1997 at 55-56.

Midsummer Night's Dream was performed on stilts and trapezes.⁸ Modern audiences have been exposed to the classics staged in period dress, modern dress, futuristic dress and no dress.

Often, directors have been able to take such licence with a dramatic work because the author has been dead for centuries and there are no rights being infringed by such artistic interpretation. Ms Powell's situation is very different, as Ms Powell is very much alive and actively seeking protection for her rights. Certain modern playwrights, who are wary of directorial interpretations of their work, are vigilant in controlling productions.⁹ Two questions arise: what are Ms Powell's rights? How can they be protected?

In order to answer these questions, one must first look at the contract for the production of *Ya Divvy*, and secondly, Ms Powell's rights under copyright law must be established. To understand these rights fully, it will be helpful to look at the development of copyright law and subsequent Canadian legislation compared to American and English developments. The remedies available to Ms Powell, both judicial and non-judicial – must also be assessed. Finally, strategies to prevent breaches in the future will be suggested.

2. Contract to perform *Ya Divvy*

In English Canada, most theatres (including Everyman) are members of the *Professional Association of Canadian Theatres* and most playwrights (including Ms Powell) belong to the *Playwrights Union of Canada*.¹⁰ These organizations have developed standard contracts for regular performances, premiere performances and commissioned works that provide a framework for negotiations between playwrights and theatres.¹¹ The theatre will negotiate a contract directly with the playwright or with the playwright's agent,¹² and if the rights are available and the terms acceptable to both parties, a contract will be issued

⁸ Peter Brook's 1970 production for the Royal Shakespeare Company. Phyllis Hartnoll, *The Theatre, A Concise History*, revised ed. (London: Thames & Hudson, 1985) at 262.

⁹ For example, Edward Albee must give his approval of company members before a theatre will be allowed to produce one of his plays.

¹⁰ [hereinafter *PACT* and *PUC* respectively]

¹¹ Available at www.pact.ca/files/homepage.htm under contracts.

¹² Occasionally a producer, for example Mirvish Productions, will hold the rights for a limited amount of time and a theatre will have to contract with that producer to perform the play during that period. Interviews (via E-mail) with Laurie Lam, Producer, Manitoba Theatre Centre (Fall 2001).

outlining dates, royalty rates, and minimum royalties. Playwrights are not normally involved in the production, with the exception of a play's premiere. Their involvement usually extends no further than the granting of performance rights. Assuming that Ms Powell has a stock contract, her moral rights would be addressed in the fifth clause, "Changes in Script" which states:

[t]he Theatre shall produce the Play in accordance with the Playwright's authorized script. No changes shall be made in the script without the consent of the Playwright. All changes become the sole property of the Playwright.¹³

In addition, under clause 4, "Artistic Decisions," Ms Powell is entitled to be consulted on the choice of "director, cast, designer, musical director and choreographer," although her approval is not required.¹⁴ The *Standard Clauses* document of *PUC/PACT* makes clear that clause 5 does not override copyright law.¹⁵

3. History of Copyright Law

The essence of copyright is the ability to protect one's work from being altered, or presented as the work of another. This is not a concept limited to modern copyright law. "Substantive analogues for 'moral rights' of paternity and integrity existed in the classical, medieval and Islamic cultures of Europe, long before the advent of printing and copyright legislation."¹⁶ From medieval times to the modern period there was a "gradual transition for the communal to private ownership of transcriptions."¹⁷ In England, the impetus for copyright legislation was to protect publishers rather than authors, whereas in Europe it was the author's rights that were central.¹⁸

¹³ See Stock Contract, *supra* note 11.

¹⁴ See Stock Contract, *supra* note 11.

¹⁵ The first paragraph of the Stock Contract states that the Standard Clauses apply to all agreements and that if there is a conflict the terms of the standard clauses will prevail. See *PACT* website, *supra*, note 11, standard clauses.

¹⁶ Jeff Berg, "Moral Rights: A legal, historical & anthropological Reappraisal." *Intellectual Property Journal*, (1991) 6 I.P.J. 341-376, at 357. It is suggested that often rights were "honoured largely in the breach"; an example is given of a Greek literary contest where every person except the winner was reprimanded for "submitting literal copies from the works of well known authors." *Ibid.* at 357.

¹⁷ *Ibid.*, at 359.

¹⁸ See, for example, the French *droit moral*, and the German *Urheberpersönlichkeitsrecht*. *Supra* note 1 at 87.

The English development is informative as both home-grown and continental developments affected the position of the playwright. By the advent of the Victorian period playwrights were in a difficult position. As no "copyright in performance" existed, a playwright did not receive the performance fee once the work was published, and collected nothing from performances in the provinces regardless of whether the play had been published or not. The *Dramatic Copyright Act of 1833* was intended to correct this problem and gave an author "sole property of an unpublished work and exclusive rights of representation," however, the law was interpreted to allow performance fees to be collected by publishers who had the copyright, rather than the playwrights themselves. "Copyright in a dramatic text effectively ceased when the play was published, and the dramatist had to choose between selling his work to a manager or to a publisher."¹⁹ Vital changes emerged with the advent of *The Berne Convention for the Protection of Literary and Artistic Works, 1886*. It ended the English practice of translating and "pilfering" plays from the continent by providing copyright protection for continental authors and as a result English playwrights concentrated on writing their own pieces.²⁰

*(i) Berne Convention for the Protection of Literary and Artistic Works*²¹

The *Berne Convention* was a significant development in copyright protection as its signatories were required to provide the rights of "paternity and integrity" in their own laws.²² The 1928 revision intro-

¹⁹ Boris Ford ed. *Victorian Britain, The Cambridge Cultural History of Britain*, (Cambridge: Cambridge University Press, 1992) at 146 Some playwrights managed to avoid this rule by staging "copyright performances" as copyright could be maintained if the play had been produced before it was published. These productions were basic without set or costumes and the actors read from the script. Shaw often used this form of production to maintain copyright. Michael R. Booth, *Theatre in the Victorian Age*, (Cambridge: Cambridge University Press, 1991) at 176.

²⁰ Booth, *supra* note 19, at 145-147. See also Ford, *supra*, note 19, at 146.

²¹ Paris Act of July 24, 1971 as amended on September 28, 1979. The Convention was revised in Berlin on November 13, 1908, completed at Berne on March 20, 1914, revised in Rome on June 2, 1928, at Brussels on June 26, 1948, at Stockholm on July 14, 1967 before the current revision. Currently, there are 148 states that are parties to the Convention, including Canada, the United Kingdom and the United States. For more information on the Convention see the World Intellectual Property Organisation website at <http://www.wipo.org>.

²² *Supra*, note 1 at 88.

duced Article 6 *bis* which provides that “the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honour or reputation.” This moral right was considered independent of economic rights (copyright) and continued even after the copyright had been assigned. Moral rights were to continue after the death of the author for the same time as economic rights [Article 6 *bis*, s. 2]. The convention also required that parties to the Union respect the rights of authors from other countries[Article 5].

II. COPYRIGHT LAW & MORAL RIGHTS

As discussed, the main feature of copyright is ownership of one’s work and the ability to restrain others from passing it off as their own: it is an economic right, in that the owner of copyright has the right to be paid for its use. The two main features of moral rights are “paternity & integrity.” These rights are protected within the legislative framework of copyright law, while remaining distinct from copyright itself. Not all signatories altered their copyright legislation after the 1928 revision of the *Berne Convention* to include moral rights, as it was felt that protection could be found under the common law. “English common law was content to deal with cases on a piecemeal basis, seeing whether particular activities fell within a recognized category of wrong, and leaving it at that.”²³ Similarly, in Canada, moral rights were left to the protection of the common law and its “recognized category of wrong.”²⁴

One exception should be noted where the special nature of intellectual property was recognized by the Supreme Court of Canada in 1911, in *Morange & Co. v. LeSueur*:²⁵ “I cannot agree that the sale of the manuscript of a book is subject to the same rules as the sale of any other article of commerce ... After the author has parted with his pecuniary interest in the manuscript, he retains a species of personal or moral right in the product of his brain.”²⁶ Dave Vaver, in “*Snow v. The Eaton*

²³ Vaver, *supra*, note 1, at 89.

²⁴ Vaver, *supra*, note 1, at 89.

²⁵ (1911) 45 S.C.R. 95, as discussed by Vaver, *supra*, note 1, at 89-90.

²⁶ As cited by Vaver, *supra*, note 1, at 90.

Centre: Wreaths on Sculpture prove accolade for Artists' Moral Rights", suggests that this sort of approach created "a favourable climate" for the introduction of s.12(7) in the *Copyright Amendment Act* of 1931, which finally provided legislative protection for moral rights. The section reads as follows:

s.12(7) Independently of the author's copyright, and even after assignment, either wholly or partially, of the said copyright, the author has the right to claim authorship of the work, as well as the right to restrain any distortion, mutilation or other modification of the work that would be prejudicial to his honor or reputation.²⁷

1. Modern Copyright Law in Canada, the United Kingdom and the United States

The Canadian *Copyright Act* gives the owner "the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever, to perform the work or any substantial part thereof in public or, if the work is unpublished, to publish the work or any substantial part thereof."²⁸ The creator of the work is the original owner of the copyright and may assign the copyright to another party unless it is created "in the course of employment," in which case it belongs to the employer. Copyright lasts for the lifetime of the author plus a term of fifty years. Similar rights are provided for in the American *Copyright Act* and the English *Copyright, Design & Patents Act* with one exception: the term for copyright under American law is the life of the author plus seventy years.²⁹ Actions for breach of copyright may be brought for damages and an accounting of profits, under s.35, or for statutory damages, under s.38.1.

Moral rights are protected under Canadian law by s.14.1:

- (1) The author of a work, has subject to section 28.2, the right to the integrity of the work and, in connection with an act mentioned in

²⁷ *Copyright Act*, R.S.C. 1970, c. C-30. It is interesting to note that s.12(7) was not judicially considered until the late 1970s and early 1980s. See the discussion of *Snow v. Eaton Centre* and *Gnass et al v. La Cité d'Alma*, *infra*.

²⁸ *Copyright Act*, R.S.C. 1985 c. C-42, s. 3.(1).

²⁹ *Copyright Act*, 17 U.S.C. (1998), §106 (copyright rights), §201 (ownership), §302 (term of copyright); *Copyright, Design & Patents Act* (U.K.), 1988, c. C-48, s.16 (copyright) ss. 9,11 (ownership), s.12 (term).

section 3, the right, where reasonable in the circumstances, to be associated with the work as its author by name or under a pseudonym and the right to remain anonymous.³⁰

- (2) Moral rights may not be assigned but may be waived in whole or in part.
- (3) An assignment of copyright in a work does not by that act alone constitute a waiver of any moral rights.
- (4) Where a waiver of any moral right is made in favour of an owner or a licensee of copyright, it may be invoked by any person authorized by the owner or licensee to use the work, unless there is an indication to the contrary in the waiver.³¹

Moral rights exist for the length of the copyright in the work and may be left to a person after the author's death.³² Moral rights are infringed when the work is "distorted, mutilated or otherwise modified" or "used in association with a product, service, cause or institution" that brings prejudice to the "honor or reputation of the author."³³ A court, finding an infringement of a moral right, may grant "all remedies by way of injunction, damages, accounts, delivery up and otherwise that are or may be conferred by law for the infringement of a right."³⁴ Therefore Ms Powell's artistic vision of her play would have not only the protection of copyright, but also inalienable moral rights.

Until the *Copyright, Design & Patent Act*, moral rights were not recognized expressly in England. As one author puts it, the problem stemmed from the fact that "exploiters simply will not understand that what they regard as minor alterations to a creator's work – carried out at times with philistine relish – really do matter."³⁵ The Act introduced

³⁰ S. 28.1 states "any act or omission that is contrary to any of the moral rights of the author of a work is, in the absence of consent by the author, an infringement of the moral rights." R.S., 1985, c.10 (4th Supp), s. 6. S.3, as discussed earlier, describes what "copyright" means and gives examples of when the copyright owner has exclusive rights such as in production, reproduction, performance, publication, exhibit on film and television *etc...* *Copyright Act*, *supra*, note 28.

³¹ R.S., 1985, c.10 (4th Supp), s.4.

³² *Copyright Act*, *supra*, note 28, s.14.2(1),(2).

³³ *Ibid.*, s. 28.2(1).

³⁴ *Ibid.*, s.34(2).

³⁵ Tony Martino, "R-E-S-P-E-C-T – that's what moral rights mean to me." *New Law Journal*, July 31 1992, 1084-1086 at 1086.

protection for “paternity” and “integrity” separately. The right to be identified as the author is conferred by s.77(1). However, the author must assert this right under s.78(1), otherwise prohibited acts will not be considered an infringement.³⁶ The right of “integrity” is phrased as a “right to object to derogatory treatment of work” and derogatory treatment is defined as treatment that “amounts to distortion or mutilation of the work or is otherwise prejudicial to the honor or reputation of the author or director.”³⁷ As with the Canadian legislation, moral rights in England last the term of the copyright, are not assignable but may be waived and an author may bequeath them.³⁸ Infringements of moral rights are “actionable as a breach of statutory duty owed to the person entitled to the right.”³⁹

Under American law, the right of “paternity” is protected under the general copyright provisions and the right of “integrity” is only granted to visual art. “Integrity” lasts for the life of the creator, and cannot be assigned but may be waived.⁴⁰ It gives the creator the right to “prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation” and “to prevent any destruction of a work of recognized structure.”⁴¹ There may be some protection for playwrights under §106(2), which gives the copyright owner exclusive rights to “prepare derivative works based upon the copyrighted work,” if a playwright was successful in arguing that the changed play was in fact a derivative work and, therefore, protected by copyright.

2. International Copyright

It is clear that while Canada, the United Kingdom and the United States of America are all parties to the *Berne Convention*, their national laws are not superceded by it. Any rights claimed by an author are

³⁶ For example, in the front of the *Six Degrees of Separation* programme, *infra*, under the copyright declaration it states: “The author has asserted his moral rights.”

³⁷ *Copyright, Design & Patents Act, supra*, note 29, s.80.

³⁸ *Ibid.*, s.87, 94, 95.

³⁹ *Ibid.*, s.103.

⁴⁰ *Copyright Act, U.S.C. supra*, note 29, §106A.

⁴¹ *Copyright Act, U.S.C., supra*, note 29, §106A(3).

derived from each country's own legislation.⁴² Under the Regulations to the *Copyright Act*, Canada confers on citizens of a limited number of other countries "the benefit of copyright on substantially the same basis as to its own citizens." The list does not include the United Kingdom or the United States of America.⁴³ Recently the *World Intellectual Property Organization* created a *Copyright Treaty* which 51 countries signed including Canada, the United Kingdom and the United States of America. This treaty requires enactments of legislation to protect the copyright of authors from other party countries. Twenty-eight members have ratified the treaty and it will come into force once thirty have done so.⁴⁴ Currently there is no international copyright, and Ms Powell's rights are therefore solely determined by the national copyright laws of the countries where her play is performed.⁴⁵

3. Actions for the Infringement of Copy and Moral Rights

Copyright law and the agreement between the playwright and the producer or theatre company govern the remedies available upon breach. As discussed earlier, the *Standard Clauses* document applies to all agreements under *PUC/PACT* jurisdiction, which is significant, as it addresses the remedies available.⁴⁶ The *Standard Clauses* provide a process for dispute resolution that must be followed before a party has recourse to the courts; therefore, Ms Powell would have to follow this process before she could bring an action for breach of copyright and moral rights.

⁴² This is explicitly stated in §.104(5)(c) of the *Copyright Act*, U.S.C. which states that no right may be claimed under the *Berne Convention*, whereas the Canadian *Copyright Act* recognises that copyright may exist for citizens of treaty countries. *Supra* s.5. English copyright legislation states that copyright protection may be denied to citizens of countries that do not give adequate copyright protection to English authors. *Copyright, Design & Patents Act, supra*, note 29, s.160.

⁴³ The countries which benefit from this provision are: Andorra, Argentina, Cambodia, Chile, Costa Rica, Cuba, Ecuador, Guatemala, Haiti, Kenya, Laos, Liberia, Malawi, Malta, Mexico, Nicaragua, Nigeria, Paraguay, Peru, Republic of Panama, Venezuela and Zambia. *Schedule (s.2) Regulations, Copyright Act, supra*, note 28.

⁴⁴ Note that the United States has ratified the treaty, Canada and the United Kingdom have not. See <http://www.wipo.org>, date accessed: November 22, 2001.

⁴⁵ As a British citizen she would receive copyright protection for the performance of her plays in the United Kingdom under the *Copyright, Design & Patents Act, supra*, note 29, s.154.

⁴⁶ [*PACT* and *PUC* respectively] Available at <http://www.pact.ca/files/homepage.htm> under contracts; standard clauses.

(i) Dispute Procedure

Either party may approach *PACT* or *PUC* for assistance with a dispute. The Executive Director, or designate, of either organization will attempt to resolve the dispute.⁴⁷ A party may submit a written request for a meeting to resolve the dispute at any time during the process, and all parties have equal representation at any meeting.⁴⁸ If the dispute is ongoing, either party may request a referral of the dispute to the *PUC/PACT* Joint Standing Committee. The committee comprises an equal number of representatives from *PUC* and *PACT*, with at least three from each group. The Executive Directors of each organization attends the meetings, although “they shall have voice but no vote.” The parties provide written submissions of their position and the committee may call witnesses or “obtain evidence as it sees fit.” The committee is empowered to reach a compromise between the parties or find for one side by a majority decision, although it cannot modify or delete any part of the Agreement.⁴⁹ Under the *Standard Clauses* agreement, “[s]uch compromise or decision shall be final and binding on both parties.”⁵⁰

The parties may proceed to arbitration if the Joint Standing Committee cannot come to a compromise or a majority decision that favours one party.⁵¹ A board of three will govern the arbitration: one nominee from *PUC*, one from *PACT* and a neutral chair.⁵² The decision of the arbitration board is “final and binding” on the parties. This process is obligatory as “[n]o recourse shall be had to a court of law by either party unless and until the other party has failed to comply with these arbitration procedures.”

(ii) Jurisdiction

If a playwright does turn to the courts for a remedy, jurisdiction is the first issue. Under Canadian copyright law, the Federal Court has “concurrent jurisdiction with provincial courts to hear and determine all

⁴⁷ This must be done within 2 days of receiving the notice for assistance. *Standard Clauses*, *ibid.*, Clause 31.

⁴⁸ The meeting must take place within 14 days of the written request. *ibid.*, Clause 31.

⁴⁹ The decision must be submitted in writing to *PUC* and *PACT*.

⁵⁰ *Standard Clauses*, *supra*, note 46, Clause 31.

⁵¹ This must be done within 14 days of the committee’s final meeting.

⁵² If the parties cannot agree to a chair, the matter will be submitted to a “constituted arbitration institute.”

proceedings, ... for the enforcement of a provision of this Act or of the civil remedies provided by this Act.”⁵³ In the *Standard Clauses*, while Clause 5 states that the document does not override copyright law, Clause 17, which addresses conflict of laws, states the “agreement shall be subject to and interpreted according to the laws of the Province in which the Theatre’s offices are located.” Therefore a playwright may go to Federal Court even if provincial laws may be applied to certain aspects of the dispute.

III. JUDICIAL AND NON-JUDICIAL MEASURES & REMEDIES

As Ms Powell has a contract governed by the *Standard Clauses*, she must therefore abide by the *PUC* and *PACT* dispute procedure. If this fails to bring about a favourable resolution, Ms Powell must bring her action within three years of when the infringement occurred, or within three years of the time when she could reasonably be expected to know that there was an infringement.⁵⁴ The remedies of an injunction, damages, accounts, delivery up and otherwise are available to Ms Powell for the infringement of both moral rights and copyright. As Ms Powell assigned the right to perform the piece to Everyman, she would likely frame her action as a breach of moral rights. If she seeks damages, it may be difficult to quantify her ‘direct economic loss’ and loss to reputation. As one British author noted, “the chance of obtaining damages for outrage and loss of reputation is slight in such cases.”⁵⁵ An interlocutory injunction will meet her immediate goal – that is, stopping the performance of the altered play.

1. Injunctions

In asking the court for a specific remedy, such as an injunction, the court will look at three main factors: whether a right has been infringed, whether there is irreparable harm and, using the discretion of the court, whether another remedy such as damages is more appropriate. The

⁵³ *Copyright Act, supra*, note 28, s.37.

⁵⁴ *Copyright Act, supra*, note 28, s.41.

⁵⁵ Nicola Solomon, David Mitchell, “Moral rights – a case study.” *New Law Journal* December 6, 1991, 1654-1656 at 1656.

Supreme Court of Canada established the test for interlocutory injunction applications in *R.J.R. v. MacDonald*⁵⁶ and *Manitoba (A.G.) v. Metropolitan Stores*⁵⁷ where it accepted a modified version of the *American Cyanamid v. Ethicon* approach.⁵⁸ A plaintiff must demonstrate that the action raises a serious issue to be tried, that irreparable harm would be suffered if the injunction was not granted, and that on a balance of convenience the injunction is the favoured outcome. The Federal Court has held that evidence of irreparable harm must be “clear and not speculative”⁵⁹ and the Federal Court of Appeal has stated that a breach of copyright on its own is not enough to establish irreparable harm in an action where copyright is at issue.⁶⁰

There is little case law addressing breaches of moral rights where artists have sought injunctive relief.⁶¹ Perhaps the most well known case – at least among lawyers and law students – is *Snow v. Eaton Centre Ltd.*⁶² Mr. Snow, a sculptor, brought the action, seeking an injunction against the Eaton Centre regarding his work “Flight Stop.” The sculpture comprised 60 geese and was displayed at the Eaton Centre in Toronto. As part of a seasonal marketing strategy, red bows had been placed around the necks of the geese. Mr. Snow claimed that the ribbons

⁵⁶ [1994] 1 S.C.R. 311.

⁵⁷ [1987] 1 S.C.R. 110.

⁵⁸ [1975] A.C. 396 (HL (Eng.)). See also the earlier Canadian decision that accepted the *American Cyanamid* test, *Yule Inc. v. Atlantic Pizza Delight Franchise (1968) Ltd. et al* (1977), 35 C.P.R. (2d) 273 affirming 34 C.P.R. (2d) 284.(Ont. H.C.). See generally J.B. Berryman, et al., *Remedies, Cases, Materials & Commentary*, 4th ed, (Toronto: Emond Montgomery Publications Limited, 2001).

⁵⁹ *Specialty Sports Ltd. v. Kimpex International Inc.*, [1997] F.C.J. No. 308. at Paragraph 24 (F.C.T.D.).

⁶⁰ *Syntex Inc. v. Novopharm Ltd* (1991), 36 C.P.R. (3d) 129 at 138 (F.C.A.) as cited in *Specialty Sports Ltd v. Kimpex International Inc.*, [1997] F.C.J. No. 308, at Paragraph 23.(F.C.T.D.) Note that while *Syntex* is a case about Trademark and not Copyright, the Trial Division has held that “the distinction is not a relevant one.” *Titan Linkabit Corp v. S.E.E. See Electronic Engineering Inc.* (1993), 62 F.T.R. 241; 48 C.P.R. (3d) 62 (F.C.T.D.) as discussed in *Specialty Sports*, *ibid* at paragraph 23.

⁶¹ For an example of a successful application see *Pollock v. CFCN Productions Ltd et al* (1983), 73 C.P.R. (2d) 204. In this case, a playwright was granted an injunction against the televising of a film based on her play. For an example of an unsuccessful application see *Cardinal v. Parish of the Immaculate Conception*, [1995] F.C.J. No. 1609. In this case an architect was unsuccessful at stopping modifications to a church he had designed.

⁶² (1982) 70 C.P.R. (2d) 105, Online: QL (Ont. H.C.) [hereinafter *Snow*].

were a distortion of his creation, which affected his reputation, and he sought relief under s. 12(7) of the *Copyright Act*.⁶³

The defendant argued that the section was unconstitutional, as it protected rights outside copyright law and the federal government had no jurisdiction to legislate in this area. However the court seems to have accepted its constitutionality.⁶⁴ The court held that the phrase “prejudicial to his honour or reputation” was partly subjective, although an author’s judgment must be “reasonably arrived at.”⁶⁵ Snow claimed “his naturalistic composition ha[d] been made to look ridiculous by the addition of the ribbons and suggest[ed] it [was] not unlike dangling earrings from the Venus de Milo.”⁶⁶ The court was persuaded by Snow’s interpretation, as other “respected artists” agreed with him. The court determined that the addition of the ribbons breached s.12(7), as it “distorted or modified” the sculpture, and that Snow’s claim of prejudice was reasonable, and therefore granted the injunction and ordered the bows removed.

This case must be contrasted with the earlier decision of *Gnass et al. v. La Cité d’Alma*⁶⁷ where the Quebec Court of Appeal affirmed a judgment that s.12(7) did not impose an affirmative duty regarding a work of art. The case focused on a number of sculptures that had not been maintained properly (one was thrown into a river) but nonetheless, the court held that s.12(7) had not been breached. The court may have been influenced by the fact that the plaintiff claimed damages – a remedy not available under s.12(7) – rather than injunctive relief.

⁶³ R.S.C. 1970, c. C-30. It should be noted that s. 12(7) was originally restricted to a remedy of injunctive relief. Dave Vaver suggests that the statement of the Secretary of State (Mr. Cahan) during the parliamentary debates on the bill explains why stronger remedies were not used: “This bill, so far as it deals with moral rights, is merely educative... It will educate the people of this country; they will know that even though they purchase an author’s rights outright, they cannot distort or mutilate his work.” 1931 H.C. Debates p. 2402 as cited by Vaver, *supra* note 1 at 90. The current copyright legislation provides for damages and specific remedies.

⁶⁴ Vaver, *supra*, note 1 at 97. Vaver goes on to state that “the fact that such an exercise of power trenches to some extent on provincial powers over civil rights or matters of a purely local nature [passing off, defamation, or injurious falsehood] should not invalidate s. 12(7)” at 98-99.

⁶⁵ *Snow*, *supra*, note 62, at 106.

⁶⁶ *Ibid.*, at 106.

⁶⁷ Unreported Judgement delivered June 13, 1977 (C.A., 09-000032-745) by Crête, Rinfret & Bernier J.J.A as discussed by Vaver, *supra*, note 1 at 91. See also, Thomas W.E. Prowse, “Moral Rights under the Copyright Act: Beyond ‘be-ribboned’ geese.” *Canadian Intellectual Property Review*, Oct 1989 6n1 98-103.

The breach of licence case *Patsalas v. National Ballet of Canada*⁶⁸ is informative of how the courts have dealt with the issue of an injunction to stop a performance. In 1985 Patsalas granted a licence to his former employer, the National Ballet, to perform his *Concerto for the Elements: Piano Concerto*, in which he has copyright as the choreographer. Patsalas granted “licence to perform this ballet in stage ballet and concert performances throughout the world, with discretion”⁶⁹ in exchange for a licensing and royalty fees. The agreement stated that the National Ballet would not alter or change the choreography and that Patsalas would be consulted about any future cast changes.

After being fired from the National Ballet, Patsalas argued the choreographer’s presence was required at rehearsals for the *Concerto* in order to avoid breaching the agreement, in order to oversee the quality and nuance of movement that comprised the choreographer’s vision for the production.⁷⁰ Patsalas further claimed the performance would bring him “irreparable harm & prejudice to his reputation, profession & honour,” and so sought an injunction to prevent the ballet from being rehearsed, performed, and filmed or video taped.⁷¹

The court rejected this claim on two grounds. First, it accepted the evidence of Valerie Wilder, Associate Artistic Director of the National Ballet, who stated that it was “not unusual to rehearse or produce a ballet in the absence of the choreographer.”⁷² It also accepted the evidence of Lynn Wallis, another Associate Artistic Director, who confirmed that it was not an unusual practice and that she had often, in her nineteen years of experience, “reproduced” a ballet from “videotape or from film alone.”⁷³

Second, the court held that due to the very nature of the work at issue – a live performance – it would not hold the possibility of “some slight variation of movement or nuance”⁷⁴ to constitute a breach of the agreement. Gray, J. stated, “[i]t would seem to me that there may be many performances of a particular ballet over a lengthy season, in which, on

⁶⁸ (1986) 13 C.P.R. (3d) 522, Online: QL (Ont. H.C.)

⁶⁹ Paragraph 3 of Licence Agreement as cited by the Court, *ibid.* at 525.

⁷⁰ See paragraph 22 of Plaintiff’s affidavit as cited by the Court, *ibid.* at 525.

⁷¹ Plaintiff’s motion, Introduction & Paragraph 8, as cited by the Court, *ibid.* at 524.

⁷² Paragraph 25 of Wilder’s affidavit as cited by the Court, *ibid.* at 526.

⁷³ Paragraph 6 of Wallis’ affidavit as cited by the Court, *ibid.* at 527.

⁷⁴ *Ibid.* at 528.

different nights, a particular nuance might be slightly differently performed.”⁷⁵

The Court did not express an opinion whether the National Ballet would have suffered irreparable harm if the injunction had been granted; however, the claim by Patsalas of irreparable harm was addressed. The Court stated that Patsalas’ reputation was not at risk because the dancers from the 1985 ballet were involved with the current production and their “collective effort” would be sufficient to ensure his reputation remained intact.⁷⁶

Courts, due to equity, have required *clean hands* in other cases and this doctrine may be a factor when an author or artist is seeking injunctive relief. As there was an opportunity for Patsalas to participate in the rehearsals, this action could have been characterized as seeking injunctive relief, not for breach of his copyright under the agreement, but more in reaction to the termination of employment and, therefore, he might not have passed the clean hands test. However, Justice Gray did not address this issue.⁷⁷ English courts have also accepted a hardship defence from a defendant. In the context of the case study, the theatre could argue that the financial hardship in having to cancel the performance and the large number of other contracts that it would breach due to the cancellation should be taken into account.⁷⁸ It is unlikely that a Canadian court would accept this hardship defence.⁷⁹

(i) Why are there so few actions for the breach of moral rights?

In the context of the case study, there are a number of reasons why a dispute may not go to court. As discussed, the *PUC/PACT* contract has its own dispute mechanism that must be followed before a party goes to court. It is clear that if an injunction is sought, the party will have to establish irreparable harm. As one commentator has put it, “Moral rights actions need a large amount of expert advice as to what constitutes derogatory treatment; consequently they are potentially very expensive

⁷⁵ *Ibid.*, at 529.

⁷⁶ *Ibid.*, at 529.

⁷⁷ For interpretations of the clean hands doctrine see *Yule, Inc. v. Atlantic Pizza Delight, supra*; *Cerilli v. Klodt* (1984), 48 O.R. (2d) 260; *Hong Kong Bank of Canada Ltd v. Wheeler Holdings Ltd.*, [1993] 1 S.C.R. 165.

⁷⁸ See *Patel v. Ali*, [1984] Ch. 283.

⁷⁹ See *Stewart v. Ambrosina* (1975), 10 O.R. (2d) 483, *aff’d* (1977), 16 O.R. (2d) 221 (C.A.).

if contested all the way to a formal trial.”⁸⁰ Cost will be a factor to the theatres as well. As most are run as not-for-profit organizations, there may not be finances available for a court case, and moreover donors are unlikely to approve of their money being spent on legal fees rather than to operate the theatre, and these facts may encourage settlement.

Perhaps one of the most important reasons for not going to court is the size and nature of the theatre community. A playwright like Ms Powell needs to have plays produced to earn income as well as gain a reputation. In Canada, where there are a limited number of venues where a play may be produced and a limited number of directors to direct them, she may feel pressure not to complain about changes and infringements in order to survive and have a career as a Canadian playwright. If this is the case, the best way to protect Ms Powell’s interests is to negotiate a contract that protects her rights and at the same time use other non-legal forms of control. Following are some suggestions as to how playwrights can protect their work.

2. Legal Forms of Control

(i) *Changes to Script*

In addition to the current standard clause regarding script changes, which states “no changes shall be made in the script without the consent of the Playwright”, a clear process for consultation with the playwright regarding changes may be inserted in the contract. The *PUC/PACT* contract for a Premiere production provides an example of this:

[t]he Playwright shall be informed, and afforded the opportunity, to make any and all changes. Where the Playwright is unavailable, the Theatre may make temporary changes, but the Playwright shall review and, if necessary, amend such changes at the earliest opportunity. All changes become the sole property of the Playwright.

The Theatre shall send a copy of any temporary changes to the Playwright at the earliest possible opportunity.

The Playwright shall then respond in writing within amendments and/or approval at the earliest possible opportunity.⁸¹

⁸⁰ Solomon, *supra*, note 55, at 1656.

⁸¹ <http://www.pact.org>, *supra*, Premiere Contract, Clause 7.

As the rehearsal process is limited in time, any approval process must be efficient. The clause could have a “within 4 days” option, in which the theatre company could assume that tacit approval has been given if a response has not been received within four days. Occasionally, the running time of a play may become an issue; any cutting of lines required in such a situation would be covered by this clause. The playwright may extend the meaning of the clause to cover not only changes in the script, but also changes to the setting of the play, both in location and time and changes to the gender of characters.

(ii) Director, Actor & Designer Approval Clauses

By inserting these approval clauses in a contract for the rights to a play, a playwright is asserting a legal right but also asserting a non-legal form of control.⁸² While a playwright cannot directly control the choices of a director, actors or the design of the set designer or lighting designer, she or he can approve the person who will be entrusted with those tasks.⁸³ A playwright may protect the gender of characters in the play by having an actor approval clause. Ms Powell could, in this manner, ensure that the actor cast as Mandy is always a woman. Any actor approval clause must clearly state what rights are granted to avoid misinterpretation.

(iii) Style of Performance Clauses

Many classic plays were written for performance without an intermission, because of the different nature of the Elizabethan theatrical experience: there was more movement in the audience, as the play was performed during the day and the more rowdy parts of the audience were closer to the stage. Modern theatre audiences expect an intermission, a

⁸² An example of this kind of clause can be seen in the *Premiere Contract* for *PUC/PACT* at clause 6 which states: “A Director for the Play shall be engaged who is mutually acceptable to both the Theatre and the Playwright. Agreement shall not be unreasonably withheld by either party.”, *supra*, note 81, *Premiere Contract*.

⁸³ The second part of Clause 6 of the *Premiere Contract* for *PUC/PACT* is an example of this type of clause. “The Theatre (and/or the director) and the Playwright must fully collaborate on the selection of each of the individual creative team members for the Play. The following members of the creative team will be engaged only if they are mutually agreeable to both the Theatre (and/or the director) and the Playwright. Agreement shall not be unreasonably withheld by either party.” The team members that must be mutually agreeable can be listed in the contract itself. *supra*, note 81, *Premiere Contract*.

practice that arose in part because intermission bar sales provided a secondary profit source for theatre. Modern playwrights frequently write into their scripts details setting the style of performance, including the timing of any intermissions or their absence, stage organization and audience seating, such as cabaret-style, where the audience is seated at tables rather than in rows. Playwrights can include in performance contracts clauses requiring approval before an intermission or other aspect of the style of performance is changed.

3. Non-Legal Forms of Control

(i) *Clout*

Unfortunately, much control is exercised in an informal manner and a playwright's success in this area can be correlated to her *clout* in the theatre world. For example, it is known that Samuel Beckett's estate is very protective of the moral rights in Beckett's work.⁸⁴ Given the continuing popularity of Beckett, failure to obtain the rights to one of his plays could have financial consequences for a theatre company. The Beckett estate's *clout* is access to the Beckett plays. It would seem therefore that if a playwright does not have *clout*, inclusion of specific rights clauses in the contract are the best route to protect the playwright's vision.

(ii) *In-Text Reference*

Some playwrights are very specific in the script itself. A playwright who often used this technique was George Bernard Shaw, who gave detailed descriptions of the setting and definitive stage directions. In many cases, Shaw used this technique due to the difficulties experienced regarding copyright.⁸⁵ A playwright may also include reference to a

⁸⁴ It is common knowledge that the Beckett estate does not permit female actors to perform *Waiting for Godot* even though this stipulation is not written in any contract. Interview (via E-mail) with Laurie Lam, Producer, Manitoba Theatre Centre (Fall 2001).

⁸⁵ The words at the beginning of Act 1 in *Heartbreak House* are an excellent example of Shaw setting the stage: "The hilly country in the middle of the north edge of Sussex, looking very pleasant on a fine evening at the end of September, is seen through the windows of a room which has been built so as to resemble the after part of an old-fashioned high-pooed ship with a stern gallery; for the windows are ship built with heavy timbering, and run right across the room as continuously as the stability of the wall allows. A row of lockers under the windows provides an un-upholstered window-seat interrupted by twin glass doors, respectively halfway

specific prop. A specific reference may be of assistance when seeking injunctive relief, as it clearly establishes the vision of the playwright and it is arguable that, as it is in the text, the theatre company knew of the vision when arranging for the rights to perform the play. It could also be argued that the theatre company might be held to a higher standard regarding alteration to the setting, *etc.* as the playwright had established the setting in the text.

(iii) Script as Programme

If a playwright is concerned about a production adhering to the text, she or he may want to give the audience a chance to assess the production for itself by making available the script as part of the programme. This would involve significant negotiations with the theatre company in question. This arrangement would not control the interpretation on the stage but would ensure that the script in its entirety was available to the public to judge for itself.⁸⁶

between the stern post and the sides. Another door strains the illusion a little by being apparently in the ship's port side, and yet leading, not to the open sea, but the entrance hall of the house. Between this door and the stern gallery are bookshelves. There are electric light switches beside the door leading to the hall and the glass doors in the stern gallery. Against the starboard wall is a carpenter's bench. The vice has a board in its jaws; and the floor is littered with shavings, overflowing from a waste-paper basket. A couple of planes and a centrebit are on the bench. In the same wall, between the bench and the windows, is a narrow doorway with a half door, above which a glimpse of the room beyond shows that it is a shelved pantry with bottles and kitchen crockery." *Heartbreak House*, first published 1919 (Middlesex: Penguin Books, 1964) at 49.

⁸⁶ The Royal Court Theatre in London, England embarked on such an arrangement under the Royal Court Writers Series. The series began in 1981, published by Methuen Drama in association with the theatre. For example, when John Guare's play *Six Degrees of Separation* starring Stockard Channing opened in 1992 the programme, for a nominal charge, included the history of the production, actor biographies as well as the complete text of the play. It is not suggested that the series was conceived as a way to protect moral rights but it does make the text available to the audience and this may be of some value to certain playwrights. The playwright may have to allow the theatre to profit from the sales of these special programmes. The playwright would still receive royalties from the printing even if profits from sales were donated to the theatre.

IV. CONCLUSION

Ms Powell has the option of raising the matter with *PUC* and following the dispute process. The *Copyright Act* grants her protection against the distortion of her work. If Ms. Powell proceeds with an action for infringement of her moral rights she will have to bring evidence that the changes to *Ya Divvy* are a distortion, and they prejudice her honour or reputation. This will require expert evidence as well as her testimony. She will have to satisfy the test for an interlocutory injunction by showing that irreparable harm will occur if Everyman's production is not stopped.

While the law offers a legal remedy for breach of moral rights, few playwrights in Ms Powell's situation have sought it. The need for a playwright to have work produced may be influential in the decision not to go to court. Cost and time restraints are prohibitive for both sides. Formal methods, such as clauses in the contract or the dispute procedure under *PUC/PACT*, and informal methods, such as textual reference, are used to resolve these matters.

In order to protect herself in the future, Ms Powell should use the strategies discussed such as negotiating a better contract or using non-legal forms of control. Informal surveillance may be the best solution for the playwright – get to know the directors, the theatre community and get involved with the production.