

**(Published in *Modern Law Review* 77(4) (2014) 533-562)**

## **Plays, Performances and Power Struggles - Examining Copyright's 'Integrity' in the Field of Theatre**

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### **Abstract**

This article explores the notion of 'integrity' under copyright law by analysing examples of 'integrity-based objections' in the field of theatre. These objections typically involve playwrights objecting to changes being made to their copyright works by other parties, such as directors and actors. This analysis is deepened by the use of two concepts from the field of art theory – 'aura', as put forward by Walter Benjamin, and 'trajectory', as outlined by Bruno Latour and Adam Lowe. Finally, to shed further light on the issues raised, the work of Pierre Bourdieu is used to present new empirical research recently undertaken by the author in the field of UK theatre. This research demonstrates that 'power struggles' are a common feature of theatrical collaboration; that copyright is deeply implicated in the way such power struggles are conceived; and moreover, that resolving these power struggles successfully – including taking account of 'integrity-based objections' – is crucial to theatrical practice.

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## INTRODUCTION

The aim of this article is to explore the notion of ‘integrity’ under copyright law in the field of theatre. In this context, the concept of integrity refers to the fact that the author of the play, as the owner of the copyright, can object to changes being made to the play by other parties.<sup>1</sup> It is argued here that this type of objection can be broadly described as an ‘integrity-based objection’ because the author-playwright’s primary concern is with the integrity of his or her work as it is proposed to be performed.<sup>2</sup> Although under UK law there is a specific moral right of integrity by which such an objection can be put forward, in practice the author-playwright can make an integrity-based objection by either exercising this moral right to integrity or by asserting his or her economic rights (or both).<sup>3</sup> Regardless of which right is used to enforce the objection, it is the fact that the objection is founded upon the notion of integrity that is of primary importance to this article.

The theatre world represents an interesting setting for exploring this aspect of copyright because from the author-playwright’s perspective what is protected by the law – the script of the play, known under UK copyright as the dramatic work – is effectively a performative work i.e. a work which is intended to be performed, typically by people other than the author-playwright.<sup>4</sup> This is of significance because those creative participants who are involved in theatrical performance, such as directors, actors and producers, commonly seek the utmost freedom to perform the dramatic work. It almost goes without saying that this necessarily includes reimagining it, sometimes quite radically.

In order to evaluate the meaning of integrity in this context, it is necessary to outline in the first part of this article what is protected under copyright (the dramatic work), who gets the rights (the author-playwright), what the rights are (economic and moral) and how long these rights last (duration of copyright). This article then goes on to outline the concept of the integrity-based objection in the theatrical context, and further proceeds to give examples of cases where author-playwrights, such as Samuel Beckett, David Williamson and Clive Norris, have made integrity-based objections.

In addition, over the course of this article the issue of integrity is further developed by focusing on two theoretical concepts – ‘aura’ and ‘trajectory’. Walter Benjamin’s famous notion of the aura of the work of art is clearly relevant in this context.<sup>5</sup> Analysis of the aura concept helps to explain why author-playwrights often show anxiety regarding maintaining the integrity of the dramatic work - put simply, they fear the audience will fail to perceive the intended meaning of the play. Furthermore, recent research by Bruno Latour and Adam Lowe concerning the

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<sup>1</sup> Copyright Designs and Patents Act 1988 (CDPA) s 80-83. The key international treaty, setting minimum standards, and to which the UK is a party, is the Berne Convention for the Protection of Literary and Artistic Works (September 9, 1886; revised July 24, 1971 and amended 1979); accessible at [http://www.wipo.int/treaties/en/ip/berne/trtdocs\\_wo001.html](http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html)

<sup>2</sup> The ‘author-playwright’ is used here to denote the author of the script of the play, and to distinguish the playwright from other potential authors and rights-holders in the context of theatre, such as the performers, who have rights in their performances, and set designers, who have rights over the sets used in the performance.

<sup>3</sup> CDPA s 16-76 and 77-89.

<sup>4</sup> CDPA s 3(2). See also *Brighton and Dubbeljoint v Jones* [2004] EWHC 1157 (Ch); [2004] EMLR 507.

<sup>5</sup> W. Benjamin, ‘The Work of Art in the Age of Mechanical Reproduction,’ in H. Arendt (ed.), (H. Zohn trans. 1968), *Illuminations* (New York: Schocken Books, 1968), 217-251.

trajectory or 'career' of objects of art is explored here with respect to dramatic works, which even though they can be presented in material form remain to some extent intangible and ephemeral.<sup>6</sup> Moreover, this concept resonates in the theatrical context because dramatic works are intended to have a life beyond their first performance - the author-playwright intends, and hopes, that the play will have a trajectory in that it will go on to be performed by many other theatre companies for decades to come. With respect to this notion, it is argued here that a new play has three broad stages within its trajectory. These stages are: 'debut', the first stage of a new dramatic work, covering its initial development and performance; 'exceptional', the second stage, wherein a dramatic work is performed multiple times by different companies over the years; and 'classic', the final stage, wherein the dramatic work becomes an accepted, standard part of the common theatrical repertoire.

Finally, given the fact that there is a lack of UK case law concerning the issue of integrity in the theatrical context, in order to probe these issues further an empirical case study was conducted during November 2011 and March 2013, featuring interviews with actors, playwrights, theatre directors and other participants involved in the theatre field in the UK. This article represents the first results of this study.

Referring to the work of the sociologist Pierre Bourdieu in examining the research data, it is argued here that in the theatrical context creativity is very much a social practice.<sup>7</sup> Importantly, the interviews demonstrate that 'power struggles' concerning the integrity of dramatic works commonly take place between the various 'agents' active in the field of theatre, such as author-playwrights, directors and actors. Moreover, it appears that resolving such power struggles successfully is crucial to the creative process of theatre. Indeed, the eventual performance on stage is to some extent constitutive of these power struggles. However, where such power struggles are not resolved successfully projects tend to be cancelled as a result. While the effect of these creative losses is not devastating to the field of theatre as a whole, the creative participants - and the audience - are left wondering what might have been.

Analysis of the empirical research also demonstrates that by giving one of the agents in the field - the author-playwright - a kind of economic capital in the form of the right to withdraw permission for the performance, copyright law is deeply implicated in the way such power struggles are conceived and resolved. In particular, there is much interplay between the notions of originality, integrity and aura, while the duration of copyright has a significant effect on denoting the trajectory of a dramatic work.

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<sup>6</sup> B. Latour and A. Lowe, 'The migration of the aura, or how to explore the original through its fac similes' 1, 5-6; accessible at <http://www.bruno-latour.fr/sites/default/files/108-ADAM-FACSIMILES-GB.pdf> - originally published in T. Bartscherer (ed.), *Switching Codes: Thinking Through Digital Technology in the Humanities and the Arts* (Chicago: University of Chicago Press, 2010), 275-297. With regard to the life and 'trajectory' of instruments see also B. Latour, *We Have Never Been Modern* (Cambridge MA: Harvard University Press, 1993), 17 and I. Hacking, 'Artificial Phenomena,' (1991) 24 *The British Journal for the History of Science* 235, 235-236.

<sup>7</sup> P. Bourdieu, *The State Nobility: Elite Schools in the Fields of Power* (Stanford CA: Stanford University Press, 1996), 264-274. See also generally P. Bourdieu, *The Logic of Practice* (Stanford CA: Stanford University Press, 1990).

## OUTLINING THE RELEVANT PROVISIONS OF COPYRIGHT LAW WITH RESPECT TO DRAMATIC WORKS

The principal way copyright operates in the realm of theatre is by giving the author-playwright economic and moral rights to control the use of the play. Under the traditional UK copyright doctrine, copyright is said to arise upon the fixation of an original expression, in this case the dramatic work.<sup>8</sup> Under the CDPA, there is no full definition of 'dramatic work', although it has been stated by the courts that a dramatic work includes a work of dance or mime.<sup>9</sup> It is also clear that a dramatic work must be capable of performance.<sup>10</sup> This performative quality of dramatic works is of great significance for the analysis undertaken over the course of this article.

Much recent research in the area of copyright law argues that 'the work' under copyright is an uncertain, 'fabricated' concept which is 'ontologically unstable'.<sup>11</sup> In fact, Griffiths is of the opinion that recent European decisions may mean that the UK's traditional work/fixation concepts are no longer tenable within the EU courts' broad, 'dematerialized' requirement of originality, which is founded upon the 'author's intellectual creation'.<sup>12</sup> Given the fact that the full consequences of this development for UK law have yet to become clear, perhaps the best way of describing the way copyright protects plays is to say that although the script of the play - traditionally viewed as the dramatic work - embodies the original creation of the author, what is protected by copyright is not limited by this material form. In the context of a performative work such as a play, this seems particularly evident.

Regarding the actual rights granted to the author-playwright as first owner of the copyright, these can be divided into two broad categories - economic and moral. With respect to the economic

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<sup>8</sup> CDPA s 1(1)(a) and 3(2). Regarding the standard of originality see *Infopaq International A/S v Danske Dagblades Forening* (C-5/08) [2009] ECR I-6569 (ECJ (4th Chamber)); [2009] ECDR 16 259, *Bezpečnostní Softwarová Asociace v. Svaz Softwarové Ochrany v. Ministerstvo Kultury* (C-393/09) [2010] ECR I-1397; [2011] ECDR 3; [2011] FSR 18, *Football Association Premier League and Others v QC Leisure and Others* (C-403/08); *Karen Murphy v Media Protection Services Ltd* (C-429/08) [2011] ECR I-0000, [2012] Bus LR 1321, *Painer v Standard Verlags GmbH* (C-145/10) [2011] ECR I-0000, [2012] ECDR 6, and *Football Dataco Ltd v Yahoo! UK Ltd* (C-604/10) [2012] ECR I-0000, [2012] Bus LR 1753. See also *Newspaper Licensing Agency v Meltwater* [2010] EWHC 3099 (Ch); [2011] RPC 7, *Newspaper Licensing Agency v Meltwater* [2011] EWCA Civ 890; [2012] Bus LR 53 and *Public Relations Consultants Association Limited v The Newspaper Licensing Agency Limited and Others* [2013] UKSC18. For analysis of the standard see J. Davis and A. Durant, 'To protect or not to protect? The Eligibility of commercially used short verbal texts for copyright and trade mark protection' (2011) 4 IPQ 345 and A. Rahmatian, 'Originality in UK Copyright Law: The Old 'Skill and Labour' Doctrine Under Pressure' (2013) 44 IIC 4.

<sup>9</sup> CDPA s 3(1). See also C. Waelde, and P. Schlesinger, 'Music and Dance - beyond copyright text?', (2011) 8 *SCRIPT-ed* 257.

<sup>10</sup> *Norowzian v Arks Ltd (No. 2)* [2000] ECHR 205 (CA), noting that a film can be a dramatic work. See also *Green v Broadcasting Corp of New Zealand* [1989] 2 All E.R. 1056.

<sup>11</sup> B. Sherman, 'What is a Work?', (2011) 12 *Theoretical Inquiries in Law* 99, 120, noting that the work is a 'fabricated concept' and J. Pila, 'Copyright and its categories of original works' (2010) 30 OJLS 229, 236-7, noting that the work concept may be 'ontologically unstable'. See also A. Pottage, 'Introduction: The Fabrication of Persons and Things,' in A. Pottage and M. Mundy (eds.), *Law, Anthropology and the Constitution of the Social - Making Persons and Things* (Cambridge: Cambridge University Press, 2004), 1-39 and M. Foucault, 'Who is an author?' in P. Rabinow and N. Rose (eds.), *The Essential Foucault: Selections from the essential works of Foucault 1954-1984* (New York: The New Press, 2003), 377-391.

<sup>12</sup> J. Griffiths, 'Dematerialisation, Pragmatism and the European Copyright Revolution,' (2013) 33 OJLS 767, 787-790.

rights granted under the CDPA, the copyright owner holds the exclusive right to license and assign the work, to copy the work, to adapt the work, and to perform it, among other rights.<sup>13</sup> For the purpose of this article, the key economic rights are those that relate to the licensing of the dramatic work by the author-playwright to the theatre company for performance.<sup>14</sup>

When a theatre company wishes to perform a play which is protected by copyright, the theatre company will attempt to get a licence from the author-playwright, or his or her representative, such as an agent.<sup>15</sup> Depending on the circumstances, this licence may cover a single performance or an entire initial run of the play. As Rimmer relates, a negotiation typically occurs before this licence is granted in which the author-playwright, as copyright owner, may seek to restrict the making of changes to the play, such as textual edits, subtractions or additions, in advance of the envisaged performance.<sup>16</sup>

In addition to these economic rights, the author also has a number of moral rights.<sup>17</sup> Traditionally, moral rights have been associated with civil law jurisdictions rather than common law jurisdictions.<sup>18</sup> In particular, moral rights are associated with the French concept of *droit d'auteur*.<sup>19</sup> Under this view, the personality of the author is central.<sup>20</sup> Indeed, the law in France fully acknowledges the importance of both the economic and moral rights of the author.<sup>21</sup> This can be contrasted with UK law which gives priority to the economic aspects of copyright.<sup>22</sup> In this vein, Stamatoudi remarks that the UK legal system has traditionally not shown much enthusiasm towards moral rights.<sup>23</sup> In fact, statutory moral rights were only brought into UK law relatively

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<sup>13</sup> CDPA s 2(1) and s 16-27. For a discussion of the meaning of public performance see *Bamgboye v Reed* [2004] EMLR 61.

<sup>14</sup> M. Rimmer, 'Heretic - Copyright Law and Dramatic Works,' (2002) 2 *Queensland University of Technology Law and Justice Journal* 131, 133.

<sup>15</sup> The UK Writers' Workshop offers advice to authors on finding an agent - <http://www.writersworkshop.co.uk/literary-agents.html>

<sup>16</sup> M. Rimmer, n 14.

<sup>17</sup> Article 6bis, Berne Convention for the Protection of Literary and Artistic Works (September 9, 1886; revised July 24, 1971 and amended 1979); accessible at [http://www.wipo.int/treaties/en/ip/berne/trtdocs\\_wo001.html](http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html)

<sup>18</sup> For a comparative analysis of moral rights in continental jurisdictions see A. Dietz, 'The Artist's Right of Integrity Under Copyright Law – A Comparative Approach' (1994) 25 IIC 177, A. Bertrand, 'The Moral Rights of Performers: French Law, International Law and Comparative Law' (1994) 5 *Entertainment Law Review* 114, and N. Dalton, 'Will Remakes or Television Adaptation of Motion Pictures give rise to Moral Rights Claims by the Original Screenwriter and/or the Director under French Law' (2002) 13 *Entertainment Law Review* 75.

<sup>19</sup> E. Adeney, *The Moral Rights of Authors and Performers – An International and Comparative Analysis* (Oxford: OUP, 2006), 165-170.

<sup>20</sup> R. R. Kwall, 'Inspiration and Innovation: The Intrinsic Dimension of the Artistic Soul,' (2006) 81 *Notre Dame Law Review* 1945, 1986.

<sup>21</sup> R. Clark, S. Smyth and N. Hall, *Intellectual Property Law in Ireland* (3rd ed.: West Sussex: Tottel Publishing, 2010), 463-464.

<sup>22</sup> R. Bird and L. Ponte, 'Protecting Moral Rights in the United States and United Kingdom: Challenges and Opportunities under the UK's New Performances Regulations,' (2006) 24 *Boston University International Law Journal* 213, 213-214.

<sup>23</sup> I. Stamatoudi, 'Moral Rights of Authors in England,' (1997) 4 IPQ 478, 478. See also generally B. Ong, 'Why Moral Rights Matter: Recognising the Intrinsic Value of Integrity Rights,' (2003) 26 *Columbia Journal of Law and the Arts* 297 and C. Rigamonti, 'Deconstructing Moral Rights,' (2006) 47 *Harvard International Law Journal* 353.

recently, with the enactment of the CDPA in 1988, and even post-1988 it remains the case that UK law only weakly protects moral rights when compared to the law in France.<sup>24</sup>

A key aspect of moral rights is that they are personal to the author and they remain with the author even where the author assigns or licenses the economic rights in the work to another party.<sup>25</sup> These moral rights include the right to be identified as the author of the work, which is generally known as the attribution or paternity right,<sup>26</sup> the right to not be falsely attributed as the author of a work,<sup>27</sup> and the right of integrity, which is of key importance for this article.<sup>28</sup>

As stated above, the integrity right is of particular interest in the theatrical context because in the field of theatre, unlike for instance the case of a literary novel, the author's work is created so that it may be performed by other people. For this reason, a certain amount of the creativity that takes place in theatre depends upon other parties having the freedom to interpret the play in a way which the author-playwright might not agree with, or which he or she might not have anticipated.<sup>29</sup> Copyright, however, gives the author-playwright the moral right to object to this in certain circumstances. Specifically, it allows the author to object if use is made of the work which amounts to a derogatory or distorted 'treatment'.<sup>30</sup> As yet, there is little case law on the integrity right in the UK, and no specific cases involving dramatic works.<sup>31</sup> However, it is clear from *Pasterfield v Denham*<sup>32</sup> and *Confetti Records v Warner Music*<sup>33</sup> that it is necessary under the CDPA to show that the derogatory treatment of the work would be prejudicial to the honour or reputation of the author, something which appears to be difficult to establish under the current law.<sup>34</sup>

The French courts, by contrast, have taken a more serious view of breaches of the moral right of integrity than the UK. The French case of *Turner v Huston*<sup>35</sup> (explicitly referred to by the court in the UK case of *Confetti Records*) concerned the colourisation of a black-and-white movie. The French court held that the director of the film could object to the colourisation because it violated the integrity of the work. Another significant French case is *Godot*, a case where the estate of Samuel Beckett successfully asserted the integrity right with respect to a proposed performance

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<sup>24</sup> W. Cornish, 'Moral Rights under the 1988 Act,' (1989) 11 EIPR 449.

<sup>25</sup> CDPA s 94.

<sup>26</sup> CDPA s 77. This right must be asserted by the author under CDPA s 78, a provision which has provoked criticism for undermining moral rights - see E. Adeney, n 19, 398-400. The CDPA also provides that moral rights can be waived by written consent - CDPA s 87(2). Regarding attribution, see *Sawkins v Hyperion Records Ltd* [2005] EWCA Civ 565.

<sup>27</sup> CDPA s 84.

<sup>28</sup> For analysis of the integrity right see E. Adeney, n 19, 405-415, E. Adeney, 'The Moral Right of Integrity: The Past and Future of Honour,' (2005) 2 IPQ 111, J. Griffiths, 'Not Such a "Timid Thing": The UK's Integrity Right and Freedom of Expression' in J. Griffiths and U. Suthersanen (eds.), *Copyright and Free Speech: Comparative and International Analyses* (Oxford: OUP, 2005), 211-244 which reassesses moral rights in the UK in light of a previous article - W. Cornish, n 24.

<sup>29</sup> A. M. Adler, 'Against Moral Rights,' (2009) 97 *California Law Review* 263.

<sup>30</sup> CDPA s 80(1)(a). The case of *Morrison Leahy Music Ltd v Lightbond Ltd* [1993] EMLR 144 is the leading case on this kind of distortion in the context of music.

<sup>31</sup> See *Morrison Leahy Music Ltd v Lightbond Ltd*, n 30, *Tidy v Trustee of the Natural History Museum* [1996] EIPR-D 86; 39 IPR 501, *Pasterfield v Denham* [1999] FSR 168, and *Confetti Records v Warner Music UK Limited* [2003] EMLR 35.

<sup>32</sup> *Pasterfield v Denham*, n 31.

<sup>33</sup> *Confetti Records v Warner Music Inc*, n 31.

<sup>34</sup> W. Cornish, n 24. See also J. Griffiths, n 28, 221-225.

<sup>35</sup> *Turner Entertainment Company v Huston* Cour Cass 1 ch civ, 28 May 1991. See also CA Versailles, ch civ reunites, 19 December 1994 (1995) 164 RIDA 389.

of 'Waiting for Godot'.<sup>36</sup> For the purpose of this article, the *Godot* case is a highly relevant one and it is discussed in detail later on.

With regard to UK copyright law, one final thing is of interest - the duration of copyright. In the UK, copyright in the work lasts for 70 years after the life of the author.<sup>37</sup> As a result, classic works by luminaries such as Sophocles, Shakespeare, Chekhov and Ibsen are no longer protected by copyright – they are in the 'public domain'.<sup>38</sup> This has two major consequences: first, performances of these public domain works no longer require a licence for use from the author-playwright's estate; secondly, the author-playwright's estate can no longer take legal action in order to protect the integrity of the work.<sup>39</sup> Nevertheless, the long term of copyright means that works which were written by playwrights who died within the last 70 years, such as Samuel Beckett, Eugene O'Neill, Agatha Christie and Harold Pinter, remain in copyright.

## **WHAT IS AN 'INTEGRITY-BASED OBJECTION' IN THE CONTEXT OF THEATRE? INVESTIGATING SOME OBJECTIONS MADE BY PLAYWRIGHTS (AND THEIR ESTATES)**

Developing theatrical performances often involves a 'workshop' process, where the director and actors perform and re-animate the dramatic work, sometimes quite radically.<sup>40</sup> The author-playwright may or may not be present during this process. Yet, the author-playwright, who is often not the one performing the work, has the right to object to changes being made to the dramatic work, and may choose to do so if he or she fears the play's integrity is at stake.

As noted above, the way the integrity right has been interpreted in the UK means it is of itself a relatively weak right in practice.<sup>41</sup> Nonetheless, as acknowledged earlier, in the context of theatre even without using this moral right directly there is a clear way for the author-playwright to ensure that any changes made to the play remain within his or her specifications - the parties can agree to this during negotiations over the licensing of the play. During these negotiations, the author-playwright will often specify, as a term of the licence, which uses, changes and edits are acceptable, and which are not.<sup>42</sup>

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<sup>36</sup> *Godot* TGI Paris 3e ch, 15 October 1992 (1993) 155 RIDA 225.

<sup>37</sup> CDPA s 12.

<sup>38</sup> For in depth discussion of the concept see J. Litman, 'The Public Domain,' (1990) 39 Emory LJ 965, 969 and J. Boyle, *The Public Domain: Enclosing the Commons of the Mind* (New Haven CT: Yale University Press, 2008).

<sup>39</sup> It is notable that unlike the situation in the UK, in France moral rights are actually considered to be 'perpetual'. However, the French courts have confirmed that after the author's death the moral rights of the author must be relaxed - *Hugo v Plon SA* Cour Cass 1 ch civ, 30 January 2007 (2007) 212 RIDA 248.

<sup>40</sup> A recent example of a radical theatrical performance of a public domain work was the all female production of *King Lear* set in a female prison which took place at Donmar Warehouse, London, in late 2012. See L. Gardner, 'All female *King Lear*? It's about time,' (4th September 2012) *The Guardian*; accessible at <http://www.theguardian.com/stage/theatreblog/2012/sep/04/theatre-shakespeare>

<sup>41</sup> See *Confetti Records v Warner Music UK Ltd*, n 31 and *Tidy v Trustees of the National History Museum*, n 31.

<sup>42</sup> See generally B. Salter and A. Hui, 'Empirical Studies of Moral Rights in Cases of Dramatic and Musical Works,' (2010); accessible at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1641472](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1641472)



Regardless of whether the economic or moral rights are used, the author-playwright's primary concern is with maintaining the integrity of the dramatic work as it is proposed to be performed. Therefore, it is argued here that this type of objection can be broadly deemed to be an integrity-based objection. This notion is posited here in order to encompass the fact that negotiations over the licensing of the economic rights to perform the play may be used by authors to protect the integrity of their works - in addition to, or as an alternative to, invoking the specific moral right.<sup>43</sup> For the purpose of this article, therefore, the notion of the integrity of the work is used broadly, even where the specific moral right to integrity as envisaged under UK law would not apply, or where a derogatory 'treatment' may be difficult to prove in court.<sup>44</sup>

It is easy to see why the making of an integrity-based objection in the context of theatre might be controversial. Although not many cases on this issue have come to light, those cases that do exist are highly illustrative. It is well known that since Samuel Beckett died in 1989 his estate has been, and continues to be, notoriously strict about maintaining the integrity of his plays. To take one example, upon viewing a production of 'Footfalls' in London during the 1990s, representatives of the Beckett estate became so infuriated by the lack of adherence to the script that the estate forced the production to close.<sup>45</sup> To some extent, this reflects Beckett's own belief that his stage directions should be followed to the letter.<sup>46</sup> Indeed, Beckett was not shy about expressing his opinion where a production deviated from his express instructions - following a performance of 'Not I' in the early 1970s in New York, Beckett reportedly told the actress in the one-woman show, Jessica Tandy, that she had ruined 'his' play.<sup>47</sup>

In line with this, the case *par excellence* of an integrity-based objection is the case of *Godot*.<sup>48</sup> Here Beckett's estate successfully took a challenge to prevent an all-female production of *Waiting for Godot*.<sup>49</sup> Beckett had always maintained that only male actors could perform the central roles. The French courts found that the doctrine of moral rights rights could be used to prevent the proposed production from taking place. It is worth pointing out that the courts in jurisdictions other than France have not been as sympathetic to Beckett's estate – a similar case taken in Italy 'failed to stop women waiting for Godot'.<sup>50</sup> *Godot*, therefore, represents a rare case where the specific moral right was invoked successfully in court by the playwright's estate.

A similar dispute between an author-playwright and a director occurred in the late 1990s in Sydney concerning the play 'Heretic'. The author-playwright, David Williamson, accused the director, Wayne Harrison, of 'taking liberties with the script'.<sup>51</sup> In particular, Williamson claimed

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<sup>43</sup> M. Rimmer, n 14.

<sup>44</sup> J. Griffiths, n 28.

<sup>45</sup> See for instance a discussion of the controversy created by Fiona Shaw's radical performance of 'Footfalls', which was directed by Deborah Warner, in F. Shaw, 'Buried in Beckett,' (23rd January 2007) *The Guardian*; accessible at <http://www.guardian.co.uk/theguardian/2007/jan/23/features11.g21>

<sup>46</sup> See for example his directions for 'Footfalls' in S. Beckett, *Complete Dramatic Works* (London: Faber and Faber, 2006), 399.

<sup>47</sup> N. Lezard, Play Samuel Beckett's Mouth? Not I,' (8th July 2009) *The Guardian*; accessible at <http://www.theguardian.com/stage/theatreblog/2009/jul/08/samuel-beckett-not-i>

<sup>48</sup> *Godot*, n 36.

<sup>49</sup> *Godot*, n 36.

<sup>50</sup> *Fondazione Pontedera Teatro v SIAE (Società Italiana Autori ed Editori and Ditta Paola D'Arborio di Paola Perilli)* Tribunale di Roma, 2 December 2005. The case was widely reported in the news media - see B. MacMahon, 'Beckett estate fails to stop women waiting for Godot' (4th February 2006); accessible at <http://www.guardian.co.uk/world/2006/feb/04/arts.italy>

<sup>51</sup> M. Rimmer, n 14, 131.



that changes to one of the characters in the play, based on the historical figure of Margaret Mead, had damaged the integrity of the character.<sup>52</sup> The licence agreement between Williamson and the theatre company stated that no alterations to the text could be made without the author's permission.<sup>53</sup> Interestingly, Rimmer notes that the director felt strongly that the playwright was not the only one involved in the theatrical process who had a stake in maintaining the integrity of the work via its performance:

'The only way a playwright can really ensure the "integrity" of what is written is by reading/performing the text him/herself. The minute you seek collaborators you enter the territory of interpretation, subjectivity and trust. Choose your collaborators carefully, but don't impose a tyranny of integrity and singular moral rights on those you need to transform your skeletal 'map for a performance' into a play.'<sup>54</sup>

In this case, Williams initially considered legal action, and consulted with his lawyers about the possibility of taking out an injunction to prevent the play from being performed. However, once the disagreement became public he withdrew this threat in the face of a highly negative reaction from other members of the theatrical community.<sup>55</sup>

The final case examined here is the 2012 dispute over the play 'Clybourne Park'. The Deutsches Theatre in Berlin planned to mount a production of the play with the black character played by a white actress in 'blackface' make-up, something which is relatively normal in German theatrical practice but highly taboo in the United States. In his open letter Norris states:

'Disbelievingly, I contacted my agent who put me in touch with the management of Deutsches Theatre. Yes, they confirmed, it is true, we have cast a white ensemble member in this role, and we see no logical reason why we should cast an "Afro-German". (If you are familiar with my play at all, the reasons are self-evident.) After much evasion, justification and rationalizing of their reasons, they finally informed me that the color of the actress's skin would ultimately be irrelevant, since they intended to "experiment with makeup". At this point, I retracted the rights to the production.'<sup>56</sup>

In the letter Norris goes on to explain the nature of his integrity-based objection in further detail, acknowledging the fact that use of 'blackface' is common within the German theatrical tradition. However, ultimately this makes no difference to him - what concerns him is maintaining the integrity of his play:

'Whatever rationale the German theatre establishment might offer for their brazenly discriminatory practice is of no interest to me. For, as little power as we playwrights have, we always retain one small power and that is the power to say no. To say, no thank you, I'd rather not have my work performed in Germany, today, under those conditions.'

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<sup>52</sup> D. Williamson, 'Some like it hot... but I don't,' *The Sydney Morning Herald*, 9 April 1996, 13.

<sup>53</sup> M. Rimmer, n 14, 134.

<sup>54</sup> M. Rimmer, n 14, 137, referring to personal correspondence with Wayne Harrison undertaken during 1999.

<sup>55</sup> M. Rimmer, n 14, 131.

<sup>56</sup> 'A Letter from Bruce Norris' (16 October 2012); accessible at <http://www.dramatistsguild.com/dgaction.aspx>

It is clear that in this case concern over the integrity of the dramatic work led to the withdrawal by the author-playwright, Clive Norris, of the economic rights to perform it.<sup>57</sup> No explicit recourse was made to the specific moral right of integrity, but the need to protect the integrity of his play was clearly central to Norris' decision.

In all of these highlighted cases it is clear that the author-playwrights and the other creative participants (directors, actors, producers) were at odds with each other over the perceived need to maintain the integrity of the play. Given the existence of these disputes and controversies, it is worth considering the positives and negatives of the existence of this notion of integrity under copyright.

The positive case for protecting the integrity of the work tends to emphasise the inherent link between the artist and his or her work of art.<sup>58</sup> In this vein, it is commonly argued that moral rights protect 'the superior interests of human genius' by ensuring that the work is kept 'as it emerged from the imagination of its author'.<sup>59</sup> The notion of a singular, Romantic author is clearly the archetype here, rather than any idea of authorship which reflects the collaborative nature of theatre.<sup>60</sup> It is also sometimes argued that along with the need to protect 'the personality interests of the individual artist' moral rights also protect the public interest by 'preserving' the work for the public.<sup>61</sup> In other words, it is not only the artist who benefits from the moral right of integrity; it is the public as well.

Nonetheless, there is also a counter-argument, one which is framed around the need to allow creative reinterpretation of the work by others.<sup>62</sup> In this view, Adler argues that the right of integrity 'threatens art because it fails to recognize the profound artistic importance of modifying, even destroying, works of art, and of freeing art from the control of the artist'.<sup>63</sup> This point is an important one, and as is developed further below it gets to the crux of why the issue of integrity is of particular significance in the context of theatre.

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<sup>57</sup> M. Trueman and K. Connolly, 'Bruce Norris stops Berlin staging of Clybourne Park after blacking up row,' (18th October 2012) *The Guardian*; accessible at <http://www.guardian.co.uk/stage/2012/oct/18/bruce-norris-clybourne-park-blackface-row>

<sup>58</sup> J. H. Merryman and A. E. Elsen and S. K. Urice, *Law, Ethics and the Visual Arts* (5th ed: Alphen aan den Rijn, The Netherlands: Kluwer Law International, 2006), 423, arguing that to mistreat the work is to mistreat the artist.

<sup>59</sup> J. H. Merryman, *Thinking about the Elgin Marbles: Critical Essays on Cultural Property, Art and Law* (2nd ed.: Alphen aan den Rijn, The Netherlands: Kluwer Law International, 2009), 412, quoting from *Millet*, Tribunal de la Seine, 20 May 1911 (1911) Amm. I. 27, a case where the son of the great French artist Jean-François Millet took a case to prevent the publication of reproductions of his father's paintings, allegedly because they were so poorly produced the reproductions 'distorted' his father's works.

<sup>60</sup> For a perspectives of authorship which take account of non-individualist practices see C. J. Craig, *Copyright, Communication and Culture: Towards a Relational Theory of Copyright Law* (Cheltenham: Edward Elgar, 2011), J. E. Cohen, 'Creativity and Culture in Copyright Theory,' (2007) 40 *UC Davis Law Review* 1151, R. J. Coombe, *The Cultural Life of Intellectual Properties: Authorship, Appropriation and the Law* (Durham NC: Duke University Press, 1998), K. Aoki, '(Intellectual) Property and Sovereignty: Notes Toward a Cultural Geography of Authorship,' (1996) 48 *Stanford Law Review* 1293.

<sup>61</sup> A. M. Adler, n 29, 270.

<sup>62</sup> L. A. Mills, 'Moral Rights: Well-Intentioned Protection and its Unintended Consequences,' (2011) 90 *Texas Law Review* 443. See also M. A. Hamilton, 'Appropriation Art and the Imminent Decline in Authorial Control over Copyright Works' (1994) 42 *Journal of the Copyright Society of the U.S.A.* 93 and M. Rimmer, 'The Grey Album: Copyright Law and Digital Sampling' (2005) 114 *Media International Australia* 40.

<sup>63</sup> A. M. Adler, n 29, 265.

## ANALYSING HOW THE CONCEPTS OF 'AURA' AND 'TRAJECTORY' APPLY IN THE CONTEXT OF THEATRE

In light of the examples of integrity-based objections outlined above, it is worth considering how such objections relate to Walter Benjamin's famous notion of the 'aura' of the work of art, a notion which at a basic level refers to the uniqueness and authenticity of the work, or 'that which withers'.<sup>64</sup> Benjamin argues that since it is possible with modern technology to make innumerable reproductions of once unique, tangible art works this will inevitably destroy their aura.<sup>65</sup> In other words, Benjamin states that as more and more copies, images, and reproductions of a fine art work enter the public sphere, the aura of the original, authentic work begins to dissipate.

It is notable that in the context of theatrical works the precise opposite is true - the more the work gets performed, or reproduced, the more the aura surrounding the play is likely to increase in esteem.<sup>66</sup> Furthermore, rather than the playwright, it is those directly involved in the acts of performance who are capable of maintaining the aura of the play. In this respect, Benjamin remarks:

'The aura which, on the stage, emanates from Macbeth, cannot be separated for the spectators from that of the actor.'<sup>67</sup>

Despite this - or perhaps more accurately, because of it - the author-playwright may fear that the director and actors will contrive to harm the play's aura if the performance is misconceived and the text misinterpreted on stage. In this sense, there is considerable overlap between the notions of integrity and aura - the integrity-based objection discussed above could be said to rely to a large degree upon anxiety on the part of the author concerning the possible withering away of the aura of the work.

Further insight is brought to this discussion by examining the application of this notion of aura by Bruno Latour and Adam Lowe in their comparative analysis of 'copies' and 'performances' in the realms of fine arts and theatre respectively.<sup>68</sup> Latour and Lowe do not accept Benjamin's key insight that the aura of works of fine art diminishes with the prevalence of copies. In their view, searching for a supposed original, authentic piece of fine art is fruitless because we know that materially all works of fine art tend to wither and fade over time. Consequently, they need to be preserved, restored, repaired - something which inevitably changes their nature, and their aura. For this reason, Latour and Lowe prefer to think of works of art as having a trajectory or career

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<sup>64</sup> W. Benjamin, n 5, 220-221.

<sup>65</sup> W. Benjamin, n 5. This can be contrasted with the opinion of Jean Baudrillard who states that sometimes the audience cannot distinguish between the two, and at other times the audience prefers the reproduction - see J. Baudrillard, 'The Precession of Simulacra,' in B. Wallis (ed.), *Art After Modernism: Rethinking Representation* (Boston, MA: David R. Godine Inc., 1991), 253-281.

<sup>66</sup> From the perspective of copyright law, it is important to note that the notion of a reproduction used by Benjamin here does not refer to 'copies' of an object or a play which effectively amount to copyright infringement e.g. where another playwright has taken the play, or a substantial part of it, and put his own name, and perhaps a new title to it. Instead, it refers to performances of the play which are fully acknowledged as such, and which are, where appropriate, licensed.

<sup>67</sup> W. Benjamin, n 5, 228.

<sup>68</sup> B. Latour and A. Lowe, n 6, 4-6.

within which the only question that matters is whether the particular reproduction the viewer encounters is done well or done poorly.<sup>69</sup> In their view, a poor restoration of an original will do more harm to the aura of the work than a superb reproduction.

While Latour and Lowe are in disagreement with Benjamin concerning fine art reproductions, all three thinkers are in agreement that the aura of the theatrical play is primarily maintained via performance. In this respect, Latour and Lowe use the notion of trajectory in the theatrical context to chart the progress of a play from its first performance onwards, noting that in the context of a play it is fully expected that it will have a trajectory - a life of its own beyond the hands of its initial creator. Importantly, Latour and Lowe note that with respect to classic works, such as 'King Lear', the audience at a theatrical performance is prepared for their prior understanding of the play, and its aura, to be challenged and altered by what they experience:

'No one will complain on hearing King Lear: "But this is not the original, it is just a representation!'. Quite right. That's the whole idea of what it is to play King Lear: it is to replay it... There is nothing extraordinary in considering that "one good representation of King Lear" is a moment, a segment, in the career of the work of art called King Lear, the absolute Platonic ideal of which no one has ever seen and no one will ever be able to circumscribe.'<sup>70</sup>

Latour and Lowe go on to state that 'clearly, in the case of performance art at least, every new version runs the risk of losing the original —or of regaining it'.<sup>71</sup> This notion, of the need to recover 'the original', is in line with Rebecca Kwall's argument that the essence of the moral right of integrity 'is the idea of respect for the author's original meaning'.<sup>72</sup> In this view, what the author-playwright fears when making an integrity-based objection is that the original expression - the intended meaning of his or her authored work - will be lost, rather than regained in the aura of performance. This links back directly to the concept of originality which lies at the heart of copyright law.<sup>73</sup>

As noted above, in light of recent European decisions the concept of originality under UK law appears to now be an entirely 'dematerialized' one - one that has been stripped of any material limitations set by the boundaries of e.g. literariness or musicality.<sup>74</sup> If this is the case, then what the law ultimately protects is a dematerialized expression of originality defined by the author's intellectual creativity. Moreover, if the concept of the aura is concerned with how the work is perceived by the audience, and the concept of originality encompasses the author's intended meaning, then in the specific case of dramatic works the aura of the performance on stage could be said to represent the re-conjuring of this originality. Anxiety on the part of the author as to whether or not the original intended meaning will be re-conjured in the form of the performance aura could lead to the making of an integrity-based objection. But as Latour and Lowe point out, over the lifetime of the play, this re-conjuring of the author's originality into the performance aura tends to happen in ever more radical ways, so much so that performances can move quite

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<sup>69</sup> For further analysis of this notion of trajectory see A. Appadurai (ed.), *The Social Life of Things. Commodities in Cultural Perspective* (Cambridge: CUP, 1986) and M. Tamen, *Friends of Interpretable Objects* (Cambridge MA: Harvard University Press, 2001).

<sup>70</sup> B. Latour and A. Lowe, n 6, 6.

<sup>71</sup> B. Latour and A. Lowe, n 6, 6.

<sup>72</sup> R. R. Kwall, n 20, 1986. See also A. Chander and M. Sunder, 'Copyright's Cultural Turn,' (2013) 97 *Texas Law Review* 1397.

<sup>73</sup> B. Latour and A. Lowe, n 6, 6-9.

<sup>74</sup> J. Griffiths, n 12. For discussion of music cases in light of recent EU decisions on originality see L. McDonagh, 'Is Creative use of Musical Works without a licence acceptable under Copyright?' (2012) 43 *IIC* 401.

drastically away from the author's original intentions - and perhaps even subvert these intentions entirely. It is for this reason that Latour and Lowe quip that 'the notion of the author has become just as fuzzy as that of the aura — not to mention what happens to copyright royalties'.<sup>75</sup> Indeed, in the context of theatre it seems important that the notion of originality envisaged by copyright is interpreted so that it can take account not only of the author's intended meaning, protected via the integrity right, but also of the author's 'unintended meanings' - the aspects of the text that may be reinterpreted, and perhaps even subverted, via performance, to uncover new layers of understanding.

Given that this is the case, while the views of the author-playwright are of importance it is necessary to question the extent to which in a collaborative creative medium such as theatre, the views of one party - the author-playwright - ought to override the views of the other collaborators. In this respect, it is worth noting that all works of art necessarily 'evolve over time based on how they are presented and received'.<sup>76</sup> After all, there are examples where other parties have directly violated the author's wishes, but ended up creating works possessing even greater value and wider acclaim.<sup>77</sup> This point seems particularly resonant in the context of the collaborative environment of theatre. Indeed, this very argument was made by the theatre director in the 'Heretic' dispute, as described earlier. In line with this, Adler poses the pertinent question:

'Does the artist know what's best for his art?'<sup>78</sup>

This question, of course, is a highly complex one, and particularly so in the theatrical context because all the creative parties – author-playwright, director, actors - typically consider themselves to be artists in their own right, and all are given acknowledgement of their specific artistic roles in the performance programme. In fact, in a collaborative medium such as theatre it is plausible to imagine a scenario where the enforcement of the author-playwright's anxieties over the integrity of the dramatic work may actually end up being counter-productive to maintaining its aura. Indeed, a fresh, radical take on the text by a creative director and set of actors might actually improve the play's standing, as there may be layers of meaning within the play that can only be uncovered through such subversive performances. In other words, even if the author's original intended meaning is subverted, the aura of the play may still be maintained, and may actually be enhanced.

Could the French all-female production of *Waiting for Godot* have proved to be a seminal one? Similarly, might the use of 'black-face', controversial in American theatre, but part of Germany's theatrical tradition, have revealed yet more layers of depth within Clybourne Park's exploration of race relations? In both cases, an integrity-based objection was made by the author-playwright, and the specific production was called to a halt. As a result, we'll never know what the critical and popular response to these productions might have been. We'll never know, in fact, whether 'the original' of the play would have been lost, or triumphantly regained, in the aura of performance - or indeed, whether the subversion of that original meaning might have actually enhanced the play's aura.

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<sup>75</sup> B. Latour and A. Lowe, n 6, 9.

<sup>76</sup> A. M. Adler, n 29, 271.

<sup>77</sup> A. M. Adler, n 29, 272, referring to the example of Clement Greenberg modifying the works of David Smith as noted by R. Serra, 'Art and Censorship,' 17 *Critical Inquiry* (1991) 574, 576.

<sup>78</sup> A. M. Adler, n 29, 271.

At its worst, therefore, the integrity-based objection, if applied strictly by the author-playwright, has the potential to freeze works in time and undermine the kind of interpretive practices common in the field of theatre.

## WHAT IS THE LINK BETWEEN A PLAY'S TRAJECTORY AND THE PUBLIC DOMAIN?

It is argued here that a new play has three broad stages within its potential trajectory. The first 'debut' stage follows the initial development of the dramatic work all the way through to its first performance run. This developmental stage can occur in a number of different ways, including where an entire text is written solely by the author-playwright on his own, or conversely, where there is full or partial collaboration between playwright, director and actors during a workshop process.<sup>79</sup> The harsh realities of theatre mean that most new plays appear to exist solely with respect to this first stage - they disappear after their first run. The second 'exceptional' stage, which is comparatively rare, is where a dramatic work gets picked up - due to critical or popular acclaim - for subsequent performances by companies other than the initial one. This stage may encompass a long period of time, even many decades. Moreover, not every exceptional dramatic work will be comparable - within this stage there will of course be a large deviation between dramatic works which become world famous, such as *Waiting for Godot*, and plays which are popular, but not as well known, such as *Clybourne Park*. What is crucial for the purpose of this article is that the play has crossed from the debut stage to the exceptional stage; it is now a work of some popular esteem. Crucially, however, it is still under copyright, and thus, the possibility of an integrity-based objection being made is very much a live one.

The final 'classic' stage is where a dramatic work enters the public domain, at the expiration of copyright, whereby it may be performed by anyone without the need for a licence from the author-playwright or his or her estate. Where popular, such dramatic works become part of the universal theatrical canon. As with the exceptional stage, there will inevitably be a distinction between different plays within the classic stage - *The Cherry Orchard* is a much more modern play than *King Lear* for example - but again what is important for this article is that via the expiration of copyright the dramatic work moves from the exceptional stage to the classic stage.<sup>80</sup> Thus, copyright plays a crucial underlying role along each play's trajectory, defining when it passes into the final stage. Furthermore, in light of the above discussion of integrity-based objections, this final stage is of particular significance since the possibility of the writer's estate making an integrity-based objection disappears with the end of the copyright term of protection.<sup>81</sup>

Therefore, even if there is frustration at present with rights restrictions, it is known that at some point in the future dramatic works which are currently held under tight control by authors, or their

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<sup>79</sup> It is notable that even where plays are developed via workshops, it is commonly the case that the copyright in the resulting dramatic work will belong to the author-playwright, unless the author-playwright has been given a specific written scenario which he or she then goes on to develop – as noted in *Brighton and Dubbeljoint v Jones*, n 4.

<sup>80</sup> This is not to say that every work for which copyright has expired will be seen in a positive light. Critical and popular tastes change constantly and there are many plays that were highly popular during e.g. the 19th century which are never performed today.

<sup>81</sup> See however the legal situation in France, where moral rights are perpetual, n 39.

estates, will be freely usable.<sup>82</sup> In fact, it seems logical that during the first and second stages author-playwrights may be careful with respect to the way their dramatic works are presented. Conversely, once a play has reached the classic stage its inherent quality might be so evident that even where a performance or interpretation is very weak, and the aura fails to migrate, the audience will nonetheless accept that it was merely the performance that should be considered a failure. In such a case, the esteem of the underlying dramatic work itself would not be diminished. For instance, to use the primary example highlighted by Latour and Lowe - King Lear - there is no doubt that each year there are many modern interpretations of the play, which vary, sometimes drastically, both in ambition and quality. Yet, the ideas of originality and integrity seem less important in the context of King Lear - a dramatic work at the classic stage of its trajectory - than in the case of a new play, for which early judgments over quality will be crucial for it to pass successfully from the first to the second stage of its trajectory. Regarding King Lear, Latour and Lowe remark:

'... spectators have no qualm whatsoever at judging the new version under their eyes by applying the shibboleth: "Is it well or badly (re)played?" They can differ wildly in their opinions, some being scandalized by what they take as some revolting novelties ("Why does Lear disappear in a submarine?") or bored by the repetition of too many clichés, but they have no difficulty in considering that this moment in the whole career of all the successive King Lears—in the plural— should be judged on its merit and not by its mimetic comparison with the first (entirely inaccessible anyway) presentation of King Lear by the Shakespeare company in such and such a year.'<sup>83</sup>

This situation is not apparent in the case of a play in the first or second stages. Indeed, a play in the first stage seems particularly vulnerable since it goes without saying that if the first performance run is a failure then it is unlikely to have much of a trajectory beyond that initial run. However, a work such as *Waiting for Godot* or *Clybourne Park* seems less vulnerable since the play has already passed through the first stage to the second - it is acknowledged as an exceptional work. Author-playwrights may still make integrity-based objections when the play remains in this second stage, and the authors of *Waiting for Godot* and *Clybourne Park* certainly did so, but it would seem logical that for the author-playwright the first stage would cause the greater anxiety with respect to consideration of the work's originality, integrity and aura. As noted above, dramatic works in the second stage do, of course, pass into the third stage eventually - one day *Waiting for Godot* and *Clybourne Park* will enter the public domain canon, and at that stage innumerable radical productions can be put on, with no need to seek the author's permission.<sup>84</sup> In other words, upon becoming a public domain work the classic play truly reaches the stage where as a work of art it grows in esteem precisely because of 'the abundance of its copies'.<sup>85</sup>

In light of the above discussion, it is clear that copyright law is deeply implicated in the way a play is perceived along its trajectory, something which has consequences for the perception of its

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<sup>82</sup> An example given here is the slew of theatrical productions of James Joyce's *Ulysses* that took place in early 2012 following the expiration of copyright in his works, 70 years after the death of the author - see M. O'Connell, 'Has James Joyce Been Set Free?', (12th January 2012) *The New Yorker*; accessible at <http://www.newyorker.com/online/blogs/books/2012/01/james-joyce-public-domain.html>; see also the webpage for the Dublin production of Patrick Fitzgerald's 'Gibraltar - an adaptation after James Joyce's *Ulysses*' which began on 1st January 2012 -

[http://www.thenewtheatre.com/tnt\\_php/scripts/page/show.php?show\\_id=69&gi\\_sn=4f01b3cfa6ca7%7C0](http://www.thenewtheatre.com/tnt_php/scripts/page/show.php?show_id=69&gi_sn=4f01b3cfa6ca7%7C0)

<sup>83</sup> B. Latour and A. Lowe, n 6, 6.

<sup>84</sup> See case of *Hugo v Plon SA*, n 39.

<sup>85</sup> B. Latour and A. Lowe, n 6, 5.



originality, integrity and aura. These issues are further examined below with regard to the empirical research.

## EMPIRICAL RESEARCH METHODOLOGY

As acknowledged above, although there are a few high profile examples of integrity-based objections which have made it to court, and even into newspaper headlines, it is not known how prevalent such objections are within the wider theatre community. Are such cases merely isolated exceptions or are they symbolic of an ever-present dynamic whereby author-playwrights, directors, actors and other parties vie for creative control over the content of theatrical performances? Furthermore, if author-playwrights make such objections as a matter of course, what is the response of directors, actors and producers to such objections - do they abandon the projects, resulting in a kind of creative loss, or are they able to find ways to work within the remit of the author-playwright's wishes? Finally, does it make a difference at what stage of trajectory the play is at i.e. whether it is a debut play, an exceptional play, or a classic work in the public domain?

Given the scarcity of available case law and existing data on these issues, in order to bring more insight to this discussion the author felt it necessary to conduct new empirical research. A qualitative case study was carried out between November 2011 and February 2013. I undertook interviews with playwrights, theatre directors, actors, producers and others involved in the world of theatre in the UK.<sup>86</sup> Details of the interview participants and a discussion the limitations of the study are given below. Annex I to this article explains the question design and interview process in further detail.

Since this article primarily focuses on the issue of integrity, only the responses to questions concerning the integrity issue are examined here. Regarding the survey, question 5, shown in Annex I, is the relevant one for this article. By posing this question to the participants, and pursuing the conversation further following the initial response, I was able to gather data regarding the prevalence of such objections within the theatre world, what the opinions of the various participants were towards such objections, and how such disputes are typically resolved when they do occur.

Having received ethics approval from my institution, the initial stages of the study design primarily concerned identifying a broad 'universe' of potential participants within the UK theatre sector.<sup>87</sup> This universe was obviously wide-ranging - the UK has a very large theatre sector featuring innumerable theatre companies, ranging from small, regional theatres to London's thriving commercial scene, as well as the major public-funded theatres around the country. When collating the list of possible respondents I was careful to create a representative sample, accommodating this diversity - I made efforts to ensure that I had an equal spread of participants,

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<sup>86</sup> For anthropological insight into the researcher's experience of entering the cultural field see R. Wagner, *The Invention of Culture* (2nd ed: Chicago: University of Chicago Press, 1981), 1-16.

<sup>87</sup> For discussion of the way the 'field' is constructed in relation to empirical research see S. Dalsgaard, 'The field as a temporal entity and the challenges of the contemporary,' (2013) 20 *Social Anthropology* 213. This must be contrasted with Bourdieu's notion of 'field' as discussed in this article.

from the experienced to the newcomers, and from the established names to the fringe players.<sup>88</sup> As a result, the participants who were interviewed during the period between November 2011 and February 2013 were varied in terms of careers and their perspectives - some had worked exclusively in London and the South-East, while others had worked all around the UK as well as abroad.<sup>89</sup>

I made contact with the participants using two main methods. Firstly, 14 interviewees agreed to participate after I initially made direct contact with each of them, inviting them to participate. I chose these interviewees based on their characteristics in light of the need to form a representative sample, examining factors such as the level of establishment a participant had within the field, his or her level of experience, and where relevant, the size of the theatre company the participant typically worked at/with. I contacted them one by one via email accessed from their personal or professional websites, or via their agents. The second method I used was the 'snowball' method. I used this method where participants were willing to provide me with contact details for other potential participants. In this respect, two participants informed me of others who might be interested in participating. Six participants were contacted in this way and agreed to participate. Overall, I conducted interviews with 20 participants. These participants fell into an array of diverse categories:

4 playwrights  
2 producers  
2 actors  
1 director-artistic director  
1 director-artistic director- playwright  
1 director-associate director  
1 associate literary director  
1 actor-deviser  
1 actor-dramaturge  
1 actor-director-playwright  
1 actor-producer-deviser  
1 playwright-artistic director  
1 playwright-performance artist  
1 deviser-choreographer  
1 academic working in the field of drama

It is clear from the different descriptions given here that it is not uncommon in the theatre world for the same person to hold a number of different roles. For example, the actor-director-playwright that I interviewed was, at the time of interview, engaged in a purely acting role, but he was due to move on to a purely directing role shortly afterwards. Similarly, the actor-dramaturge was at the time of interview engaged in an acting role, but she had recently worked as a dramaturge. The director-artistic director-playwright was currently performing the artistic director role at his fringe theatre company, though over the course of his career he had gained experience at directing, and occasionally at devising and playwriting. This diversity of roles ultimately proved useful to the study as many participants had experience of performing in different

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<sup>88</sup> Regarding analysis of what the appropriate length of research projects is, see G. Marcus, 'How short can fieldwork be?' (2007) 15 *Social Anthropology* 353.

<sup>89</sup> The interviewees agreed to participate voluntarily under the condition of anonymity. They gave up their time generously, for which I am most grateful. All data is held and used anonymously in accordance with the Data Protection Act 1998.

capacities within the theatre world and could reflect on the different perspectives gained from each role.

It is crucial to note the limitations of the empirical research methodology and data.<sup>90</sup> The issue of integrity-based objections examined here is but one issue within a broader research project, the overall hypothesis for which is 'What effect, if any, does copyright law have on creative practices in the realm of theatre?' It must also be noted that the overall research project does not attempt to address all issues relating to copyright and theatre. Other intellectual property (IP) issues such as performers' rights, trademarks, rights over set design etc. also do not form part of the study. Moreover, given both the relatively small size of the study, and the diversity of views on the issue of copyright and theatre uncovered by this study, it is clear that no qualitative study can claim to produce a definitive statement on the subject. Nonetheless, this study represents the first serious attempt to engage empirically with the question of how copyright actually relates to the creative practices of artists in the realm of theatre in the UK. In this regard, it works alongside other recent empirical studies which have attempted to illuminate the realities of how copyright works in creative or 'negative' spaces - spaces where the normal assumptions and practices of copyright law must be called into question.<sup>91</sup>

## USING BOURDIEU TO FRAME THE ANALYSIS OF THE INTERVIEW DATA

It is generally acknowledged that creativity in theatre is a social practice which occurs between playwrights, directors, actors, producers, and other creative participants such as dramaturges.<sup>92</sup> Because creativity in theatre is primarily social, the sociologist Pierre Bourdieu's work provides a useful intellectual framework for examining the interview data. For Bourdieu, society exists as 'as an array of fields with specific forms of capital that are objects of struggle'.<sup>93</sup> These capitals include economic (money and property), cultural (information, knowledge, education etc.), social (acquaintances and networks) and symbolic (legitimacy and prestige).<sup>94</sup> Capitals can also transform from one form into another e.g. cultural capital can be transformed into symbolic capital, something which can give an agent a great deal of leverage when power struggles take place.<sup>95</sup> Meanwhile, the concept of 'habitus' refers to an agent's social knowledge - framed by

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<sup>90</sup> For commentary on the limitations of empirical research more generally see J. Faubion and G. Marcus (ed.), *Fieldwork Is Not What It Used to Be: Learning Anthropology's Method in a Time of Transition* (Ithaca NY: Cornell University Press, 2008).

<sup>91</sup> See recent research in the fields of musicians, magicians, stand-up comedians, theatre directors and other types of artist see - C. Waelde. and P. Schlesinger, n 10, J. Leach, 'Constituting aesthetics and utility: Copyright, patent and the purification of knowledge objects in an art and science collaboration,' (2012) 2 *Journal of Ethnographic Theory* 247, J. Yoshin, 'Secrets Revealed: Protecting Magicians Intellectual Property without Law' in C. A. Corcos (ed.), *Law and Magic: A Collection of Essays* (Durham NC: Carolina Academic Press, 2010), 123-142, D. Olliar and C. Sprigman, 'There's No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-Up Comedy,' (2008) 94 *Virginia Law Review* 1789, and B. Salter and A. Hui, n 42.

<sup>92</sup> J. Lennard and M. Luckhurst, *The Drama Handbook* (Oxford: OUP, 2002), 155-237.

<sup>93</sup> D. L. Swartz, *Symbolic Power, Politics and Intellectuals - The Political Sociology of Pierre Bourdieu* (Chicago IL: University of Chicago Press, 2013), 47.

<sup>94</sup> P. Bourdieu, 'The Forms of Capital' in J. G. Richardson (ed.), *Handbook of Theory and Research for the Sociology of Education* (New York: Greenwood Press, 1986), 241-258, 243.

<sup>95</sup> D. Swartz, n 93, 50.

internalised past experiences - something that allows the agent to know which behaviours to select in order to achieve a desired result.<sup>96</sup>

Within this prism, it can be said that in the field of theatre there are various agents occupying an assortment of roles such as playwright, director, actor, producer, dramaturge, performance artist etc., with each agent possessing different capitals within the field.<sup>97</sup> Sometimes agents perform multiple roles simultaneously, meaning they possess a multiplicity of capitals.

Regarding the various capitals and habitus each particular agent possesses within the field of theatre, experience is a key factor. A track record of success as a director, actor, playwright, producer etc. gives that person a high level of cultural capital in the form of acquired knowledge, as well as social capital, in the form of acquired networks. These forms of cultural and social capital can often be transformed into symbolic capital - in the form of prestige. Symbolic capital might then be used to negotiate a higher level of compensation - economic capital - in the form of a payment fee or royalties. The interview data given below also illustrate that symbolic capital can be used to gain leverage during a power struggle over the creative direction of the project - such as when an integrity-based objection is made by a playwright. On the other hand, the interview data demonstrate that an inexperienced agent will find it much more difficult to exert leverage within a power struggle since that person will likely lack the necessary economic, cultural, and social capitals, as well as the necessary habitus, to obtain the desired result.

The specific role the agent plays will also affect the types of capitals that agent possesses. For instance, a director may possess a relatively stable level of economic capital if he or she is a salaried member of staff within a theatre company. However, in some cases a director will not be in a salaried position as he or she may merely be brought in by a theatre company to stage a single production - a much more unstable situation to be in. Nonetheless, the directors is typically perceived as the primary individual 'in charge' of the production. Moreover, as the interview data given below demonstrate, once the production process begins, directors are required to make careful use of their habitus in order to maintain creative control over the project while also keeping other agents, such as playwrights and actors, on board.

Artistic directors typically oversee and approve a theatre company's entire set of productions. This is a relatively powerful position to be in, and one which involves the use of economic, cultural and social capitals. Producers, by contrast, often deal primarily at the level of economic capital, but they may also avail of social capital with respect to the networks they have access to. Like directors, producers often work in-house within theatre companies, though at the high-end of the market e.g. London's 'West End', producers may work independently from theatre companies in order to provide the finance and business arrangements for the staging of particular productions. Actors tend to be freelance, and thus in an unstable position. Actors will generally be paid a union fee, per day of work, unless they are able to make use of their symbolic capital - reputation, prestige, popularity - to negotiate an increased fee. Playwrights tend to also be freelance, and they are often paid just a one-off fee for their work - effectively a copyright licence fee - to cover the entire initial run of the production. Depending on how the negotiation process goes, they may also receive a royalty based on ticket-sales. Moreover, playwrights also tend to retain copyright in the resulting play, something which gives them a potentially powerful economic capital. Indeed, a number of playwrights I spoke to stated that because the writer's fee tends to be quite low at the

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<sup>96</sup> P. Bourdieu, *Distinction - A Social Critique of the Judgment of Taste* (Cambridge MA: Harvard University Press, 1984), 471.

<sup>97</sup> P. Bourdieu, n 7.

debut stage of a new play, retaining the copyright is important because it represents a form of ownership which may be of benefit to them if the play reaches the exceptional stage.

The analysis of the empirical research outlined below further evaluates how power struggles over integrity occur in the field of theatre, and how copyright functions as one of the economic capitals used by playwrights in the resolution of these struggles.<sup>98</sup>

## **HOW PREVALENT ARE INTEGRITY-BASED OBJECTIONS WITHIN THE FIELD OF THEATRE?**

Regarding the question of how prevalent integrity-based objections are within the theatrical realm, I received a diverse range of responses. Broadly, it can be said that the issue of integrity-based objections was of some concern to the majority of interviewees, though the level of this concern varied from participant to participant. Looking first to the responses from interviewees who described themselves as playwrights, or who possessed some experience of play-writing, it is clear that the presence or absence of trust is of great significance to them. In this context, the invocation of 'trust' signifies a relationship between the parties, or agents, which is capable of enabling the creative freedom of the performers, while at the same satisfying the playwright's wishes. In this respect, one established author-playwright I interviewed stated that it is, for him, fundamentally a question of trust: he needs to have a good relationship with a director in order for him to allow the director a large amount of freedom to re-interpret the play. Another interviewee, a highly experienced and well-known actor-playwright-director, emphasised that the director and the set of actors require a lot of freedom to interpret or reinvent the source material in the development of a performance.

Some playwrights are more comfortable than others in giving this freedom to the director and actors. One experienced playwright-artistic director I interviewed stated that he was comfortable with someone else re-interpreting his work radically; in fact, he saw this as a necessary part of the theatrical process. Thus, he had a loose conception of 'the original' in mind. He was confident that whatever the original meaning of the play was, it would be re-gained, or re-conjured, in the act of performance – he did not fear the aura would dissipate - even if what was happening on stage was actually a radical interpretation of the text.

The interview data indicate that where power struggles take place concerning the creative direction of the envisaged performance, where there is a relationship of mutual trust between the parties such struggles tend to be resolved harmoniously - to the overall benefit of the project. Moreover, each party necessarily makes use of cultural, social and economic capitals, as well as habitus, in order to maintain an equilibrium of trust throughout the struggle. The level of experience each party has will often be highly influential in this context. An inexperienced playwright may possess economic capital - the economic rights to perform the work - but will still lack cultural, social and, of course, symbolic capitals. This may mean that the playwright is unable to exert any leverage at all over the director within the production process. For instance, one young playwright I interviewed was doubtful as to how effective making an integrity-based objection would be in practice. He stated that for a young playwright making such an objection might be counterproductive - it might lead the theatre company to refuse to perform the work at

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<sup>98</sup> P. Bourdieu, n 7.

all. This would be particularly galling for a young writer because, as he remarked, 'you really need your work to be performed'. With respect to giving creative freedom to the director and actors, the young playwright also expressed the fact that he was open to the input of other agents. Nonetheless, he did have some 'red lines' - aspects of the dramatic work that he did not want to be changed in any circumstances:

'As a creative person I like the idea of someone else going to town and coming up with something different to what I had written, as long as they don't cut out dialogue, and they use the pauses in the right places and so on...'

Another playwright, also at a relatively early stage of his career, acknowledged that the theatrical process was a kind of power struggle. However, he was of the opinion that playwrights were not the ones with the most power. He stated that 'playwrights live in fear of directors' because they know that once the workshop process has begun the director possesses a lot of power. The accepted position of the director within the field - as the one in charge of the production - means that directors are often better able to make use of their cultural, social and symbolic capitals than playwrights are.

Indeed, one of the cultural capitals possessed by directors in this sense relates to the ability to bring the dramatic work to life. The same interviewee playwright remarked that 'you don't know what you've written' until the workshop process begins and someone else 'makes it come alive'. Indeed, 'making it come alive' was something he acknowledged that, as a playwright, he could not do. He said that it was necessary for a playwright to become comfortable with the process because without it the theatrical medium 'simply wouldn't work'. Nonetheless, he lamented:

'As a writer it always feels like once you've handed over the text, you've lost control.'

When pressed for detail, the playwright went on to use an interesting analogy as explanation: he stated that as a playwright he felt 'like the petrol in a car' because 'without him nothing moves', but despite this he was ultimately not the person who decided which direction the car should go in. He acknowledged that the different roles the various agents play during the workshop process often lead to the development of a power struggle 'dynamic'. Like many interviewees, the playwright felt that communication and trust were highly important in this context. He noted that some directors were very good at sitting down with playwrights and 'massaging the changes', whilst others were not so accommodating. In other words, for him a good director should make use of cultural and social capitals, as well as habitus, in order to maintain positive relationships between the various agents and to resolve any power struggles that occur. Personally, the interviewee playwright said that he had never, thus far in his career, been angered by a performance of one of his plays.

However, he went on to recall what happened when a friend of his - a fellow playwright - recently went to see the first performance of his new play. Upon seeing it performed his friend became furious and stormed out, shouting at the director. In this case, his friend was particularly angry that something he'd liked in the play's text had been edited out by the director without his knowledge. Here, communication between the director and playwright had clearly been difficult, and eventually, the director asserted creative control over the project. In this example, it could be said that the director was able to make use of his capitals and habitus to resolve the power struggle in line with his own creative vision - but he did so in a disharmonious way. Future collaboration between these specific agents seems unlikely.

Regarding the making of specific performance points or objections, another playwright argued that if he had given specific instructions in the text of the play, then he felt these should be followed. As an example, he noted that if he has written within the play's text 'there is no music throughout this' then this direction should clearly be followed. However, he further remarked:

'If I haven't written anything then I think it is much more difficult for the writer to argue.'

The same playwright also emphasised that the writer may take a different view depending on the theatrical tradition within which the production is taking place. He stated that in the German-speaking world (Germany, Austria, and Switzerland) the playwright occupies 'a different position within the cultural firmament'. Within the Germanic tradition, for instance, he noted that the director and dramaturge are institutionally mandated to take the written text of the dramatic work as a stimulus in order 'to create a performance text'. He opined:

'There is no sanctity of the written text like there is the UK.'

The interviewee gave an example of a German production of a play by a playwright acquaintance of his whereby the German director had 'lopped off the last three pages' of the text. He remarked:

'If you lop off the last three pages, how can that be anything possibly like what the author intended the meaning to be?'

Yet, he noted that the playwright in that case did not make an integrity-based objection because of the new possibilities that particular production opened for him within continental Europe. In other words, from the point of view of the playwright, it was worthwhile, certainly economically, and potentially creatively as well, to allow the German production. In this respect, the interviewee acknowledged that the terms 'to protect' and 'to enable' come into conflict, whereby playwrights have a choice: 'do I protect my work or do I enable my work?' In the case of the German production with the altered ending, he noted that there was a clear incentive to not be overly 'precious' about the text - to 'enable' it rather than to 'protect' it. The interviewee went on to say that with respect to the German-speaking world, the writer has to 'make a trade as an artist'. As a playwright he said that he had to accept that there is a different theatrical culture in Germany, one which is less respectful of the text. Thus, in different theatrical traditions the power struggle dynamic make take different forms. Indeed, the interviewee's use of Germany as an example of a country featuring a different theatrical tradition is an interesting one in light of the Clybourne Park example highlighted above. In that case, a power struggle arose between the theatre company and the playwright, Clive Norris, who was unwilling to make the kind of 'trade-off' suggested by the interviewee here. As a result, Norris made use of his economic capital by withdrawing the rights to perform the play.

Regarding the other agents active within the field of theatre, such as directors and actors, there was a palpable sense of frustration concerning integrity-based objections among several interviewees. One actor, at the early stage of her career, remarked that 'it is a shame that writers can block creativity'. She argued that unless actors are very well-known they typically lack leverage when power struggles occur, noting that the role of the actor is such that (in comparison with directors and playwrights) actors tend to lack the cultural capital required to exert influence over the re-shaping a play. They may also lack economic and social capitals if they are in their early career.



One highly experienced director, currently working at a small regional theatre company, stated that it was quite common for a power struggle to occur between the playwright and the other 'creatives' during the workshop process. He remarked:

'We deal with this all the time.'

The same director went on to say that while some playwrights were very resistant to the making of changes, other playwrights were entirely relaxed about the process. Again the issue of trust came up - he felt that outcome of the power struggle was very much determined by the director's relationship with the writer and the 'terms of agreement' discussed beforehand. In particular, he stated that it is very important for him as a director to discover early on whether the playwright will be protective over the work, and consequently, whether he will need to 'fight' the writer to get 'his' edits. However, he also noted that while he was aware such tensions are commonly felt, in his case the power struggle dynamic had always led to an outcome which both parties respected - he had never been prevented from doing what he wanted to with the play.

One well-known and highly experienced artistic-director, working at a large theatre, stated that it was very important to have a discussion with the playwright, or his or her representatives, at the earliest stage possible about the processes of production of the play. Meanwhile, the idea, put forward by one playwright above, that the director has the greatest sway within the power struggles that occur, was rejected by one experienced actor I interviewed. In this respect, she recalled a specific case where she had witnessed a playwright objecting to, and eventually preventing, an actor's change of dialogue. She stated: 'Most of the time, writers get their way.'

This actor did, however, acknowledge that from the playwright's perspective maintaining the integrity of the dramatic work was obviously very important. She also made a distinction between dealing with a playwright and dealing with an estate - she said that in her work she was generally more accommodating to requests made by playwrights themselves, rather than their estates. Similarly, one experienced director I interviewed, at the time working at a mid-size theatre in London, acknowledged that integrity-based objections did lead to power struggles, and that such objections tended to restrict his own creativity as a director. Despite this, he said that he had always complied with such requests due to his respect for the role of the playwright within theatre. Thus, the role of the playwright may in some circumstances carry with it a certain amount of symbolic capital.

With respect to the idea that theatre may suffer a creative loss if the power struggle cannot be resolved, and a project has to be abandoned, one producer stated that she knew of many examples where theatre companies had given up on mounting a particular production due to an inability to resolve such disputes. In particular, she noted that if estates demanded the right to veto certain creative decisions - regarding how the performance would be mounted, how characters would be portrayed, and which time period the play would be set - this often caused licensing negotiations to break down. When asked how often such projects are abandoned, she simply remarked:

'It happens all the time.'

However, the view that the existence of power struggles between the various agents often leads to the abandonment of projects was not shared by every participant. One established actor-deviser-producer I interviewed stated that he had never been blocked from doing anything except for one minor incident involving a piece of music. It is also the case that some interviewees had never experienced such tensions at all. One director I interviewed, who had worked at a small theatre for many years, stated categorically that he had never been blocked by a playwright from making

changes to a play. Nonetheless, he added that since his company rarely performed established works it was perhaps less likely to come up in his working environment than in a situation involving the re-working of an existing play. The actor-deviser I interviewed made a very similar point based on his own experience. Meanwhile, the playwright-performance artist, who was at an early stage of her career, said that she had never encountered any issues; but she also acknowledged that in her case she almost universally performed her own work, in a solo capacity. Similarly, the playwright-artistic director I interviewed also said that he had undertaken multiple adaptations of plays, some of which were in the public domain, and some of which were in copyright, and that he had never had experienced any power struggles concerning the work's integrity - though he admitted all of these adaptations were intended to be quite faithful to the source material. He also stated that he had dealt once with a playwright's estate and no conflict had arisen.

Regarding the notion of integrity itself, interestingly one experienced director saw his role as a positive one. He gave one recent example where stated that he had made a lot of changes to a play 'without taking away from the integrity' and 'with the aim of sharpening' the work and 'adding to its integrity'. In this case, the playwright was included within the sharpening process - the director ran ideas by the writer as the play was being re-shaped. This demonstrates that while a director's suggestions can potentially detract from the integrity of the work, they can also greatly add to it. Indeed, following Latour and Lowe, to say that 'the original' of the play could be merely 'regained', rather than lost, as a result of this process doesn't go far enough; the original may perhaps even be brought into sharper view due to the efforts of the director or actors.

The above discussion demonstrates that the performance on stage which results from the theatrical process is to a great extent constitutive of the power struggles which occur. It can be said, therefore, that the power struggle dynamic is a necessary and integral part of theatrical creativity, even if on some occasions projects are abandoned due to an inability to resolve the power struggle in a positive way. Overall, the above interview data show that author-playwrights do tend to fear that 'the original' of their play will be lost – and the aura of the work consequently diminished – if the performance is misconceived in some way. With regard to the directors, actors and producers, it is clear that there is some frustration within the theatre world concerning rights restrictions, especially where author-playwrights, or their estates, hold a tight grip on the kinds of interpretations that are permitted. In line with this, the interviewees' views on the famous example of Samuel Beckett's estate are discussed in detail below.

## **WHAT TO DO ABOUT BECKETT? VIEWS FROM THE FIELD**

Regarding the specific, and somewhat notorious, example of Beckett and his estate, one experienced playwright I interviewed stated:

'If you're Beckett, and you have an estate that's worthy of the name, and you have an idea around that estate to, and I will use the word 'protect' here, protect the authenticity and the integrity of the work, then you may say 'I don't want an all female cast of my work in an all male play' or 'I don't want you to change those three words to fit your rationale or context of the play - I want it played as it is written and I have the power to say that is what I want you to do.'

In this example, the clarity of the author-playwright's stated wishes was clearly seen as important. Similarly, the experienced actor-dramaturge I interviewed noted that if, as in the case of Beckett, the playwright's wishes are very specified, then she believed that those wishes should be followed, notwithstanding the fact that this might be frustrating to her from a creative point of view. Similarly, while the artistic-director acknowledged that 'you can try and argue forcibly, and creatively, how brilliant it would be to do the all women production' of *Waiting for Godot*, ultimately he accepted that it was up to the playwright to allow this, or not. Furthermore, he generally didn't have a problem with this:

'I think writers should be allowed to say I don't want my play contrary to the way I have indicated clearly, and therefore I don't want you to do it - that seems to be entirely the writer's prerogative, or any copyright owner's prerogative. I mean that is the point of copyright.'

On this issue, the actor-playwright-director put the crucial question in these terms:

'Will Beckett's work live on better if it is kept the same, or will it live on better if it is liberalised and women can play it, or will that mean that the productions will get so warped and changed that people will go off Beckett?'

While acknowledging that there was no clear answer to the question, the actor-playwright-director nonetheless remarked that he didn't mind 'serving Beckett' in this formal way. He stated that it is clear with Beckett that in order to 'play his game' you must play it 'strictly by the rules'. He also said that, as the playwright it was Beckett's right to 'demand' this of performers, and as an actor he felt this demand forced him to be 'loyal' to the words and to the stage directions. The same actor-playwright-director further remarked that he found it difficult to grasp the meaning of Beckett's plays, which made it particularly hard to edit them. While he found individual lines comprehensible, he felt that as whole works they remained somewhat elusive, and this made it particularly difficult to 'tinker' with them.

## **EXAMINING THE PLAY'S TRAJECTORY - WHAT MAKES KING LEAR DIFFERENT FROM WAITING FOR GODOT?**

With regard to the three stages of a play's trajectory put forward in this article, one experienced playwright I interviewed acknowledged that there is a 'journey' from the beginning of the playwright's first sentence to the eventual public performance. The same playwright also gave a cogent explanation for why the initial workshop process is so crucial to the play's future life:

'...on the whole, drama publishing in this country is a sub-set - publishing follows production...'

The same playwright said that since he was aware that the vast majority of new plays have no life beyond their initial run, any consideration of how the play might be perceived with regard to subsequent performances, along with the copyright consequences that would occur upon reaching that level of success, was largely not worthwhile. Nonetheless, he acknowledged that it did, on occasion, unexpectedly happen, noting that some very popular plays were performed first by a small fringe theatre. With regard to the possible trajectory of a new play he remarked:

'How do you plan in all conscience for something that has that kind of life when actually its first manifestation is so tiny?'

One established playwright I interviewed stated that he felt the first production of a play ought to be in accordance with the strict intentions of the playwright – but subsequent productions ought to be allowed more flexibility with respect to radical interpretations of the text. In other words, the playwright accepted that his anxiety concerning the work tended to be at its highest level during the debut stage of a play's trajectory. He relaxed somewhat thereafter.

Another playwright I interviewed remarked that if one of his plays was subjected to a 'shocking production' this was likely to leave the play marooned at the first stage of its trajectory. He further noted that it would probably also have the effect of harming his reputation as a playwright - an especially acute fear at the early stages of his career.

With regard to the distinction between dramatic works in the second and third stages, one producer I interviewed acknowledged that public domain works, such as Shakespeare's plays, were sometimes a more popular choice for companies because there was no possibility of interference from the playwright or his/her estate (as well as no need to pay for the rights). Similarly, another producer I interviewed stated that her mid-size company was wary of attempting to do radical versions of plays that are still in copyright, due to problems they had experienced in the past in trying to get the rights to such works. The deviser-artistic director I interviewed also echoed this point. Another interviewee, an actor, noted that because works eventually fall into the public domain this 'gave hope', since public domain works can be radically reinterpreted.

In light of the above comments, the notion put forward in this article that a new play has three broad potential stages within its trajectory appears to be an accurate one. In addition, it does appear that author-playwrights are most anxious about the interpretation of the play during its earliest debut stage, and are more relaxed once it passes into the exceptional stage (though some writers, like Beckett, do not seem to share this sense of relaxation). Finally, there is an acknowledgement within the theatre world that there is a distinction between works that are in copyright and works that are in the public domain; indeed, classic public domain works are sometime more popular because they can be performed without a licence, and without the possibility of an integrity-based objection being put forward.

## CONCLUSION

From the above analysis, it is clear that power struggles between the author-playwright and other agents - directors, actors, producers - commonly occur in the field of theatre. Furthermore, copyright law is deeply implicated in the way these power struggles are conceived and resolved. Ownership of the economic and moral rights to the dramatic work provides economic capital to the author-playwright, which can be used to make integrity-based objections during such power struggles. Nevertheless, it is clear that other agents, such as directors and producers also possess economic, cultural, social and symbolic capitals within this field, and they draw upon these to try to resolve the power struggles in line with their own creative vision.

The existence of such power struggles is not, in many instances, a negative thing. Indeed, in many cases the eventual performance is to some extent constitutive of these struggles. However, where a power struggle cannot be resolved harmoniously this can lead to a creative loss since the project is typically abandoned. It appears that agents in the field of theatre tend to not spend a great

deal of time dwelling on these creative losses; instead, they move on to new projects. Thus, any creative loss is not devastating to the field of theatre as a whole, even though the creative participants - and the audience - are left wondering what might have been..

Furthermore, from the point of view of copyright law, the above analysis provides much food for thought. There is clear interplay between the concepts of originality, integrity and aura. If copyright protects originality on the basis of the author's intellectual creativity, then it seems important in the theatrical context that this notion of originality is interpreted broadly so that it encompasses not only the author's intended meaning, protected via the integrity right, but also the author's 'unintended meanings' - the aspects of the text that other parties may choose to reinterpret, and perhaps even subvert, via performance, in order to uncover new creative layers within the text. Such interpretations may move away from the author's intended meaning, yet nonetheless enhance the aura of the play. This should be taken into account when courts are forced to determine whether a particular performance truly threatens the play's integrity. Such concerns were insufficiently considered by the French courts in *Godot*, but they were taken into account by the Italian courts in a subsequent case concerning the same play, where the performance was allowed to go ahead.<sup>99</sup>

In addition, it is clear that the duration of copyright has a significant effect on denoting the trajectory of a dramatic work, whereby a new play may pass through three stages - debut, exceptional and classic. The author-playwright will tend to be most concerned over the dramatic work's integrity and aura during the debut phase, but he or she may retain some concerns throughout the exceptional phase. However, once copyright expires, and the work reaches the classic stage, the issue of the author's intended meaning - protected by the integrity right - fades away. In fact, upon reaching the classic stage the aura of the work appears to stabilise at a relatively consistent level - the play tends to remain in high esteem regardless of how well or how poorly it is reinterpreted on stage. Not for the first time it is necessary to question whether the long period of copyright - life plus 70 years - is really justifiable given that it keeps works such as *Waiting for Godot* under the cloak of integrity (as defined by the writer's estate) for far longer than is truly necessary for the work's aura to stabilise.<sup>100</sup>

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<sup>99</sup> B. MacMahon, n 50.

<sup>100</sup> I. Hargreaves, *Digital opportunity. A review of Intellectual Property and Growth* (Intellectual Property Office, May 2011), 93; accessible at <http://www.ipso.gov.uk/ipreview-finalreport.pdf>

## **Annex I - Interview Questions**

In designing the interview questions I was careful to use language that would be comprehensible to the non-lawyer. Where necessary I elaborated on the issues during the interviews in order to make sure the participant understood what I was saying. The questions were framed in order to be 'jumping-off points' for the conversation - they were intended to stimulate a response from the participant and potentially to prompt follow-up questions depending on the initial response. As a result, although the interviews followed this basic template, the follow-on questions varied slightly for each participant.

The participants were asked questions in four sections. All participants answered each question. First, questions 1-3 (Part A) were asked in relation to copyright authorship, ownership (including questions of revenue-sharing) and attribution and issues. Secondly, question 4 (Part B) was asked with respect to copyright infringement. Thirdly, question 5 (Part C), the key one for the purpose of this article, was asked in relation to the issue of the 'integrity' of the work. The final question 6 (Part D) was a short question about whether the participants thought copyright was important to them in their working lives – it was designed to give the participants a final chance to engage with the issues and to mention any other opinions they had on the subject.

### **Part A**

Q.1 Copyright tends to regard the individual playwright as the author of the play – in your experience does this represent an accurate description of the way plays are actually created?

Q.2 If there is significant input from directors or actors in the creation of a new play e.g. via the workshop process, do you think this ought to be recognised e.g. in the crediting of joint authorship of the play?

Q.3 With regard to question 2, if the completed play does feature significant input from directors or actors, and it goes on to generate licensing revenue, do you think this should be shared among the various parties who contributed e.g. on a proportionate basis?

### **Part B**

Q.4 Under the legal doctrine of copyright infringement, if a substantial part of a copyright work e.g. a portion of dialogue, a detailed plot, is taken from the author's work without authorisation/licence and used in a another work, this is a breach of the author's right. If you discovered that another playwright/theatre director had, without acknowledgement, taken elements of a play you created and used them in a new work, what would your response be, if any?

### **Part C**

Q.5 Authors have a right under copyright law, known as the integrity right, to object to a treatment of their work which could be seen as derogatory or harmful to their reputation. For

instance, Samuel Beckett famously took a court case in France to prevent a production of *Waiting for Godot* with female actors. In your opinion, to what extent should playwrights be able to control the way their plays are performed e.g. should a playwright be able to object to a director editing the play or changing its context?

### **Part D**

Q.6 Does copyright play an important part in your working life in theatre?