

ARTS Law Memo

Whose play is it anyway?

Few readers would expect to see *Waiting for Godot*, *Porgy and Bess* and *Grease* in the same sentence. But Samuel Beckett's existentialist tragicomedy, George Gershwin's classic American opera and the smash hit 1950s musical by Jim Jacobs and Warren Casey are being mentioned together because their creators have asserted their right to protect the integrity of their works.

When does a director's concept overstep the playwright's intentions? How long should a playwright (or his stern ghost) maintain control? This issue of *Arts Law Memo* examines the disputes surrounding productions of the three works and the questions those controversies raised about copyright law, moral rights, licensing agreements, non-traditional casting and the creative interpretation of plays, operas and musicals.

GREASE AND DESIST

Grease, which opened on Broadway in 1972 and ran for eight years, continues to attract contemporary audiences who find its nostalgic rock n' roll energy irresistible.

In May 2005, just days before Brat Productions and Tapestry Theatre, two small companies in Philadelphia, were about to open their co-production of the show, Samuel French made a "cease and desist" call. Samuel French is the New York-based company that licenses the rights to thousands of plays and musicals. According to the company's representative, Jim Jacobs (Warren Casey died in 1988.) objected to the director's choices of casting an all-female cast and setting the show in a high school.

Partly driven by mission — Brat Productions creates theatre that "breaks the rules" and Tapestry Theatre is Philadelphia's first company dedicated to women theatre artists — and partly by budgetary restraints — setting *Grease* in a high school means less expensive sets and costumes — the production was cast with adult actresses playing teenage girls portraying male characters in a high school

production. You may wonder how *Grease* could get so complicated.

This director's concept was just one more chapter in the convoluted history of gender in casting. As *Shakespeare in Love* reminded us, there were no women actors in Shakespeare's company; boys and young men played the female characters.

Of course, women have also played men: French stage star Sarah Bernhardt, the most famous actress of the 19th century, performed the title role in *Hamlet* in London and Paris. More recently, Pat Carroll drew rave reviews for her Sir John Falstaff in the Folger Theatre's production of *The Merry Wives of Windsor*.

Shakespeare's work, like other plays that are in the public domain, can be cut, adapted or otherwise changed by the producing company. In fact, the public domain produces an extraordinary incentive for theatre artists to be innovative. But for works that are still protected by copyright, those desiring to build upon that work must get the permission of the copyright holder, which means creative control ultimately lies with the playwright or his agent.

The term copyright refers to a "bundle" of exclusive rights given to the copyright owner, including the right to control public performances of the work, make derivative works, reproduce the work and distribute the work. Each "stick" in the bundle may be assigned (sold) or licensed.

In the case of *Grease*, Samuel French said the production would violate its standard licensing agreement, which stipulates, "No changes, interpolations, or deletions in the text, lyrics, music, title or gender of the characters shall be made for the purpose of production...In reference to changing the gender of characters, men will play male roles and women will play female roles."

Not wanting to jeopardize their long-term relationship with Samuel French, the producers reluctantly cancelled the show and quickly mounted an original satirical production entitled, *Grease and Desist*.

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IT AIN'T NECESSARILY SO

Licensing agreements are legally binding contracts that not only give producers the right to perform the work but also impose obligations. Directors or producers who are not willing to honor the terms are acting in bad faith and should resist the temptation to hide behind the freedom of expression banner.

While playwrights generally evoke copyright law to control their artistic intentions, they also can use licensing agreements to further their social agendas. For example, during the Civil Rights era, Edward Albee would not grant the rights to his plays unless the company played to integrated audiences.

Today, race becomes an issue for companies that want to produce George Gershwin's *Porgy and Bess*, arguably the greatest American opera ever composed. Onerous licensing terms — all roles must be played by black singers — imposed by the Gershwin estate remain the subject of heated debate among artists and legal scholars.

First staged on Broadway in 1935, the *Porgy and Bess* fuses classical and jazz idioms to tell the love story of poor, crippled Porgy and beautiful Bess, who runs away from the fast life to find sanctuary with Porgy and the denizens of Catfish Row. The opera features the famous aria "Summertime," in addition to standards such as "I Got Plenty of Nothin'" and "It Ain't Necessarily So."

When Gershwin and his collaborators, DuBose Heyward, who wrote the libretto, and Ira Gershwin, who wrote the lyrics with Heyward, were working on *Porgy and Bess*, the nation's prestigious opera houses were closed to black artists. The color barrier was not broken until 1955, when Marian Anderson appeared as Ulrica, the Gypsy fortune-teller, in Verdi's *The Masked Ball* at New York's Metropolitan Opera.

George Gershwin, who died in 1937 at age 38, insisted on an all-black cast because he wanted to give his depiction of South Carolina's Catfish Row during the 1920s authenticity. And he was correct when he predicted that *Porgy and Bess* would become an important

training ground for young black opera singers. Still, change has been slow: today, few African-American men are singing in leading roles with major American opera companies.

Gershwin's estate continues to honor his stipulation even though proponents of non-traditional casting argue that the time has come to end the restriction. The phrase non-traditional casting refers to the use of actors of any race, sex, ethnicity or degree of disabilities in roles for which such factors are not germane to the development of the characters or the play.

Non-traditional casting has been widely embraced by the opera producers, who say they cast based on vocal talent and dramatic presence rather than appearance.

Some African-American artists, like bass-baritone Simon Estes, have been particularly outspoken about how the Gershwin casting stipulation is a disservice to color-blind casting. "Music knows no color," he told the *New York Times* in 2002. "This may sound extreme," he said, "but I think it's almost unconstitutional for *Porgy and Bess* to be performed only by black artists."

FOR A FERTILE PUBLIC DOMAIN

Some legal scholars also refer to *Porgy and Bess* when they discuss the duration and scope of copyright protection.

It is a principle of American law — as articulated in the Constitution — that artists and inventors should reap the economic benefits of their creative endeavors. Copyright law enables creators, producers, publishers, and distributors of artistic works to control whether, how and when their works are used.

But copyright law also strikes a "cultural bargain" between creators and the public interest by limiting the scope of the copyright holder's monopoly through the fair use doctrine and the copyright's eventual expiration.

When the Founding Fathers introduced the principle of copyright into Constitution, they were careful to note that it should last "for limited

times." After the protection runs its course, works can be used without permission or payment.

The first copyright law, adopted 1790, guaranteed 14 years of protection with a 14-year renewal. But the period of protection has been extended several times during the last two centuries.

Most recently, the Copyright Term Extension Act of 1998 — also known as the Sonny Bono Copyright Term Extension Act and the Mickey Mouse Protection Act — extended copyright term to the life of the author plus 70 years.

This legislation, which was upheld by the U.S. Supreme Court in *Eldred v. Ashcroft*, also 'froze' the advancement date of the public domain in the United States for works covered by the older fixed term copyright rules. So, no works made in 1923 or after, that were still protected in 1998, will enter the public domain until 2019.

Those who opposed the 1998 extension argue that it compromises the ability to build upon and cultivate our rich past. Paradoxically, Disney, the corporation that led the extension charge, is among the greatest appropriators of folk culture. Similarly, Ira and George Gershwin drew on folklore and African-American musical traditions to create *Porgy and Bess*.

According to Marc G. Gershwin, George and Ira Gershwin's nephew and co-trustee of the Gershwin Family Trust, which also lobbied for the copyright term extension, "The monetary part is important, but if works of art are in the public domain, you can take them and do whatever you want with them... someone could turn *Porgy and Bess* into rap music."

In fact, that is the quandary: When it comes to creative control, how long is too long? Should copyright law be used to stifle artistic innovation — the creation of new works based on the old? If George Gershwin was composing today, would he look at *Rent*, the Broadway rock musical loosely based on Puccini's *La Boheme*, and give a wink and a nod of approval to that rap version of *Porgy and Bess*?

FRENCH TRADITION

In the United States, a creative work is essentially a commodity — a property right — to be exploited freely by the author or the entity that holds the copyright. The French tradition is quite different; authors' rights are seen as personal rights that rise to the level of human rights. So, when a director does not follow the playwright's intentions, more can be at stake than copyright infringement.

Samuel Beckett, who was born in Dublin in 1906, settled permanently in Paris in 1937. He died in 1989. Most of his later works were written originally in French because, according to Beckett, writing in an acquired language makes it easier to write without style.

En attendant Godot (*Waiting for Godot*) is an illusive farce about two tramps awaiting the arrival of the mysterious Godot, who, in some unexplained way, will make everything different, but who never comes.

First performed in Paris in 1937, the play was quickly produced all over the world and became, rather unexpectedly, a great popular success. It remains one of the most influential plays of the 20th century.

More than once Beckett (and later his estate) took producers to court to defend the integrity of his masterpiece. Most of the cases involved casting decisions — staging the all-male *Godot* with female performers. “Had I wished those characters to be female, I would have said so,” Beckett said.

As biographer James Knowlson notes in *The Life of Samuel Beckett*, the playwright was so well known for protecting his plays from any kind of transformation that “he was often represented as a tyrannical figure, an arch-controller of his work, ready to unleash fiery thunderbolts onto the head of any bold, innovative director, unwilling to follow his text and stage directions to the last counted dot and precisely timed pause.”

The ongoing conflict between the playwright's estate and artistic directors even became the subject of a satirical

show with the full title, *The Complete Lost Works of Samuel Beckett As Found in An Envelope (partially burned) In a Dustbin in Paris Labeled “Never to be performed, Never. Ever. EVER! Or I'll Sue! I'LL SUE FROM THE GRAVE!*

The six “recently unearthed” short plays, which are interspersed with three producers discussing threatened litigation, premiered in 2000 at the New York Fringe Festival.

The most notorious confrontation in the United States involved JoAnne Akalaitis's 1984 production of *Endgame* at the American Repertory Theatre (ART) in Boston. Akalaitis set the play in a subway station rather than in the empty room described in the stage directions. She added incidental music by Philip Glass, and hired a racially mixed cast. Beckett thought these choices would distract the audience from the text.

A last minute out-of-court-settlement resulted in a compromise. The play opened on schedule. But ART was required to include a letter from the playwright in the program explaining his objections: the play as staged was no longer his play, he said.

Also included in the program was a statement from the theatre's artistic director, Robert Brustein. He noted that, “Normal rights of interpretation are essential in order to free the full energy and meaning of the play.”

A few years later, a French court sided with the playwright when a director staged *Waiting for Godot* with the two lead roles played by women.

That Beckett's estate prevailed in France, where moral rights date back to the 19th century, is not surprising. Moral rights arise from the French concept that a creative work contains the personality of its creator or author. These non-economic rights, which are given only minimal recognition in the United States, are based on the premise that an artist's honor and livelihood are dependent upon the presentation of his work as created and that alteration can damage his reputation.

Moral rights fall into four categories: 1) Attribution: the right

of an author to receive credit as the author, to prevent others from falsely being named author and to prevent use of his name for works he did not create; 2) Integrity: the right of an author to prevent mutilation of a work; 3) Withdrawal: the right of an author to withdraw a work from distribution if it no longer represents his views; and 4) Disclosure: the right of the author to determine when and how to make his work public.

In France, a fifth moral right gives the author a right to reply to a critic and to have the reply published in the same place as the critic's piece. An author may not transfer the moral rights to their work during his lifetime, and the rights are perpetual, so they pass to his heirs.

In the French *Godot* case, the court reasoned that the director's role is like that of a symphony conductor, who leads the musicians according to the composer's instructions.

No doubt this narrow view would not be endorsed by most directors, actors or designers, who see theatre as a collaborative art based on a complex relationship between what is written on the page and what is seen on the stage. As British director Jonathan Miller argues, fundamentally, a play exists only in performance.

So how will Beckett's plays hold the stage in the 21st century? According to critic Fintan O'Toole, “Plays survive not by being carefully preserved, not by being exhibited from time to time in theatrical museums, but by being tried and tested, taken apart and reassembled. The living playwright may have the right to insist that the play be presented with as much faithfulness to the original intention as the conditions of a collaborative art will allow. But if a dead dramatist continues to claim these writes from beyond the grave, then the play, too, will die.”

Or as Miller wisely notes, vandalizing the Pieta does permanent damage, while mounting a show that does not fully honor the playwright's intentions simply vandalizes an evening.

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Books

The Copyright Handbook: How to Protect & Use Written Works by Stephen Fishman

Published by Nolo Press, this book provides all the information and forms you'll need to protect all types of creative expression under U.S. copyright law. Written in plain English, this is our favorite general copyright guide.

This book, and many others on arts law and business practices, are available at the St. Louis Volunteer Lawyers and Accountants for the Arts library, located within the Regional Arts Commission office, 6128 Delmar. The collection's catalogue is searchable on the Web, www.vlaa.org.