

# HERETIC: COPYRIGHT LAW AND DRAMATIC WORKS

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The dispute between the playwright David Williamson and the director and producer Wayne Harrison over the production of the play *Heretic* was fought out in the theatre community, the legal system, and the media.<sup>1</sup> It articulated a number of anxieties about the nature of authorship, collaboration, and appropriation.

Williamson and Harrison decided to collaborate upon a play about the intellectual dispute between the Australian academic Derek Freeman and Margaret Mead, the author of *On The Coming Of Age In Samoa*.<sup>2</sup> The Sydney Theatre Company production, though, was fraught with difficulties. Williamson complained that the production by Harrison and his collaborators took liberties with the script. He was bitter that the character of Margaret Mead was transformed into public icons of the 1960s, such as Marilyn Monroe, Barbara Streisand and Jackie Kennedy. He considered that the addition of words to the text - such as 'Happy Birthday, Mr President' - without his authorisation was a breach of the ethical norms and standards that governed the theatre. For his part, Harrison was distressed that his authority as the director of the play had been compromised. He thought that the interference of playwright in the direction of the cast was a breach of the protocols and conventions of the theatre.

The playwright instructed his agent, Tony Williams, to seek an injunction against the Sydney Theatre Company for the breach of his contract, which stated only lines that he had written or approved could be used.<sup>3</sup> The agent retained David Catterns, a Queen's Counsel specialising in intellectual property.<sup>4</sup> However, Williamson refrained from taking out an injunction in the face of a negative reaction from the theatre community.<sup>5</sup> He argues that he was powerless to change anything substantial once he had retreated from the threat of legal action against the company:

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<sup>1</sup> D Williamson, *Heretic: Based On Life Of Derek Freeman* (1996).

<sup>2</sup> M Mead, *Coming of Age in Samoa* (1928, republished 1973); D Freeman, *Margaret Mead and Samoa: The Unmaking of an Anthropological Myth* (1983); and M Di Leonardo, *Exotics at Home: Anthropologies, Others, American Modernity* (1998).

<sup>3</sup> B Kiernan, 'Whose Play is it Anyway?', *The Sydney Morning Herald* (Sydney), 6 July 1996, 33-37.

<sup>4</sup> B Kiernan, *David Williamson: A Writer's Career* (1996) 306.

<sup>5</sup> D Williamson, 'Some Like It Hot ... But I Don't', *The Sydney Morning Herald* (Sydney), 9 April 1996, 13.

The picture of me as omnipotent and able to order directors such as Wayne [Harrison] around at will, is in fact far from the truth. Writers in theatre and film, even if they have impressive track records, are far less powerful than is often assumed. The critic John McCallum made an important point when he queried how lesser known and starting playwrights could ever make their voices heard, given the nature of this power imbalance.<sup>6</sup>

Paradoxically, the dispute over the interpretation of *Heretic* had the effect of generating and stimulating further public interest in the play. The show took \$1.1 million. Angie Bennie reflected that there was a pattern of behaviour: 'It seems that there cannot be a new Williamson play without a new Williamson brawl'.<sup>7</sup>

The conflict took place on the cusp of the introduction of a new scheme of moral rights, the *Copyright Amendment (Moral Rights) Act 2000* (Cth). It offers an illuminating case study of the operation of moral rights in the context of the performing arts. First, the dispute highlights disparities under the moral rights regime in the treatment of dramatic works and cinematographic films. This double standard undercuts the current push towards the simplification of the *Copyright Act 1968* (Cth), and the consistent application of the law across subject matter.<sup>8</sup> Second the conflict raises important questions of joint authorship under copyright law and dramatic works. It is argued that the current paradigm, in which the playwright is considered the sole author of a dramatic work, is outdated and unjust. There needs to be greater recognition under copyright law of the contributions of other collaborators in a performance - such as the director, the producer, the performers, and the designer. Third, the controversy is relevant to current investigations into the interaction between copyright law and contract law.<sup>9</sup> It provides an insight into the prevailing contractual practices and industry trends in the performing arts. There is a need to explore new models for the effective management of copyright law and dramatic works.

This paper investigates the claims of the various collaborators involved in the dispute over *Heretic*. It considers the dispute over authorship and collaboration against the background of past historical research into copyright law and dramatic works - in relation to William Shakespeare, Bertolt Brecht, Samuel Beckett, and John Barton.<sup>10</sup> Part 1 examines the arguments of the playwright Williamson that his economic and moral rights in the dramatic work were violated by the production of *Heretic*. Part 2 considers the call of Harrison for greater recognition of the roles of the director and the dramaturge. Such claims are considered in the context of legal debate about the meaning of joint authorship. Part 3 focuses upon the question of whether the originating producer should retain rights in respect of a dramatic work. Part 4 reflects upon whether performers should enjoy comprehensive economic and moral rights in respect of their performances. Part 5 relates the point of view of the designer John

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<sup>6</sup> Ibid.

<sup>7</sup> A Bennie, 'Ungodly Row over Heretic', *The Sydney Morning Herald* (Sydney) 2 April 1996, 13.

<sup>8</sup> Copyright Law Review Committee, *Simplification Of The Copyright Act 1968: Part 2. Rights And Subject Matter* (1999).

<sup>9</sup> Copyright Law Review Committee, *Copyright And Contract: Issues Paper* (2001).

<sup>10</sup> J Bates, *The Genius of Shakespeare* (1997); J Fuegi, *Brecht and Company: Sex, Politics, and the Making of the Modern Drama* (1994); S Giles, *Bertolt Brecht and Critical Theory: Marxism, Modernity and the Threepenny Lawsuit* (1997); J Knowlson, *Damned to Fame: The Life of Samuel Beckett* (1996), 691-696; and R Brooks, 'Two-Day Stage Epic Ends Hall's Beautiful Friendship' *The London Times* (London, England), 20 January 2001.

Senzcuk. The Conclusion examines the ramifications of the dispute over *Heretic* in relation to copyright law and the performing arts.

## I FIGHTING WHITE MALES: THE PLAYWRIGHT

An editorial stated that the dispute over *Heretic* raised an important question for public debate: ‘What rights do writers have regarding their texts?’<sup>11</sup> It is worth considering whether the economic and moral rights of Williamson would have been infringed by the theatrical production of the Sydney Theatre Company.

### A *Economic Rights*

Williamson cast the debate over the interpretation of *Heretic* in terms of romantic authorship and individual possession. He maintains that the authority of the writer and the validity of the written text that they produce are paramount.

Williamson thinks that it is his prerogative to stamp his personal interpretation over his work. For instance, he lectured the cast of *Dead White Males* and *Heretic* about the correct meaning of the texts.<sup>12</sup> McKenzie Wark comments that the playwright is anxious to preserve his interpretative authority: ‘Williamson, like many professional writers, is hostile to the view that the reader makes the meaning of the text’.<sup>13</sup> The author is represented in romantic terms as the individual, expressive origin of the play. The relationship of the author to the play is seen as direct and personal, and thus sacrosanct and inviolable. It is assumed that the written play takes priority and precedence over the production of the play. As Jonathan Bates observes: ‘The Romantic idea of authorship locates the essence of genius in *the scene of writing*’.<sup>14</sup> It seems that the role of the performers and the director is to bring about the realisation of the written text. The romantic faith in the authority of the writer and the validity of the text has been reinforced by copyright law.

As the author of the literary and dramatic work, *Heretic*, Williamson enjoys a number of economic rights under the *Copyright Act 1968* (Cth). He holds the right to reproduce the work in material form, and the rights to communicate that work to the public.<sup>15</sup> Williamson can exploit the work, *Heretic*, through assignment of ownership and licensing. He can also bring legal action in respect of any infringement of his bundle of economic rights. Effectively the *Copyright Act 1968* (Cth) rewards the playwright for producing original creative work in a tangible and material form. However, it fails to acknowledge the labour of any other collaborators in the theatre.

The economic rights of the playwright may be modified or supplemented by private arrangements. Individual contracts negotiated by creative artists can secure rights and privileges in advance of those provided by copyright law. Local practice can outstrip copyright law reform. Harrison comments:

<sup>11</sup> Editorial, ‘Heretic and Players’, *The Sydney Morning Herald* (Sydney), 10 April 1996.

<sup>12</sup> M Wark, *The Virtual Republic: Australia’s Cultural Wars of the ‘90s* (1998) 200.

<sup>13</sup> Ibid.

<sup>14</sup> J Bates, *The Genius of Shakespeare* (1997) 82.

<sup>15</sup> Section 31 (1)(a) of the *Copyright Act 1968* (Cth).

At present, the theatre company signs a contract with the playwright guaranteeing that everything created in the rehearsal room becomes the property of the playwright. This is despite the fact that the theatre company has no right to assign the creative rights of the actors in its employ. In the *Heretic* example this contractual arrangement became most ironic. For while David Williamson was prepared to criticise elements of the production in public he was busy including those same elements in the published version of the text.<sup>16</sup>

The case of Williamson is illuminating. His contract provided that no textual alterations to the play could be made without the permission of the author. This clause is in effect a miniature version of the moral right of integrity. However, the clause is much more specific and focused in the sense that it is restricted to textual alterations, and does not deal with other forms of derogatory treatment. It is debatable that the changes to the script would have breached the clause in the contract that no textual alterations could be made without the permission of the author.

Williamson is in a strong legal position because of a combination of his economic rights and his contractual rights. There are a number of precedents dealing with copyright law and television which support his position.

In *Frisby v BBC*, Mr Frisby sold a play to the British Broadcasting Corporation with an understanding that a particular line of the play gave form to the entire play, and was crucial to the work as a whole.<sup>17</sup> He sued for copyright infringement after the line was removed. The judge decided that the crucial nature of the line, and the clear direction the author had given to the purchaser, meant that a single line of that particular play constituted a 'substantial' part of the work, even though the BBC had paid for the use of the play, and the part in question was small.

In *Gilliam v ABC*, the creators of 'Monty Python's Flying Circus' took legal action against the American Broadcasting Corporation because they had drastically edited their programs and edited out all profanities.<sup>18</sup> The group had a contract which provided for strict creative control, much like the one held by David Williamson. The court of appeal recognised that American copyright law did not recognise a cause of action for the violation of artist's moral rights. Nonetheless, the court enjoined the ABC from broadcasting the severely edited television programs, because the editing constituted copyright infringement in the writer's scripts and because the Lanham Act protected against mutilation of artistic works as a false designation of origin of goods.

In the face of such precedents, the Sydney Theatre Company could mount a rearguard defence that Williamson consented to the alterations. Harrison maintained: 'But it isn't true that I created these personae without David's permission'.<sup>19</sup> He asserted that there are a number of facts which would support this interpretation of events.<sup>20</sup> First, Harrison argued that Williamson was included in the design process before *Heretic*

<sup>16</sup> Correspondence with Wayne Harrison, Director and Producer (London, 24 February 1999).

<sup>17</sup> *Frisby v BBC* [1967], 2 All England Law Reports 106.

<sup>18</sup> *Gilliam and others v American Broadcasting Corporation* (1976) 538 F.2d 14.

<sup>19</sup> A Bennie, 'Question of Belief as Writer, Director Split over Heretic', *The Sydney Morning Herald* (Sydney), 2 April 1996, 3.

<sup>20</sup> W Harrison, 'From the Director', *The Sydney Morning Herald, The Good Weekend* (Sydney), Saturday, 27 July 1996, 8.

went into rehearsal. He observed that the playwright had the power to approve or veto any ideas for the production. Second, Harrison reflects that Williamson went on holidays and gave him permission to workshop the play and take the initiative in solving problems encountered by the cast and uncovered in the text. He communicated any changes to the play by telephone and fax. Third, Williamson saw a complete run through of the play in the rehearsal room on three occasions. He also praised the efforts of the director and the cast in public. It is debatable whether such facts, if accepted in a court, could establish explicit or implicit approval for the changes. In any case, Harrison also argued that he could not change the nature of the production for various reasons, because 'you reach a point of no return in a production week where you can't unravel major elements of a production without doing enormous damage to what you are trying to do'.<sup>21</sup>

Harrison comments that the dispute over *Heretic* prompted the Sydney Theatre Company to reconsider its contractual arrangements over copyright:

What *Heretic* has done is force the Sydney Theatre Company to revise all its contracts, to determine what exactly are our legal rights, our legal obligations, something that has not been attended to in any detail over the last decade and a half.<sup>22</sup>

If a flagship company like the Sydney Theatre Company has been so lax, it is likely that many other companies have not given the subject much thought. There needs to be a greater consciousness of copyright law in the field of the performing arts.

### B *Moral Rights*

In his biography of Williamson, Brian Kiernan comments: 'The larger issue (still to be legislated on) is that of author's moral rights, central to which is their right to protect their reputation by being able to ensure not only that their work is attributed to them but also that the work so attributed is theirs in its entirety'.<sup>23</sup>

At the time of the crisis, there was no law expressly requiring recognition of attribution of authorship, or preservation of the integrity of a work. Aggrieved artists had to rely upon an eclectic range of law - such as contract law, passing off, the *Trade Practices Act 1974* (Cth), and defamation.<sup>24</sup>

The Federal Government has sought to remedy this situation with the introduction of a new scheme of moral rights, the *Copyright Amendment (Moral Rights) Act 2000* (Cth). In the main, the legislative debate over the introduction of moral rights was focused upon the film industry to the exclusion of other interests. The Australian Writer's Guild pushed for the legal recognition of screenwriters as authors of films. Williamson was

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<sup>21</sup> A Bennie, 'Question of Belief as Writer, Director Split over Heretic', above n 19, 3.

<sup>22</sup> P Cochrane, 'Wayne's Expanding World', *The Sydney Morning Herald* (Sydney), 8 May 1996, 18.

<sup>23</sup> B Kiernan, *David Williamson: A Writer's Career*, (1996).

<sup>24</sup> David Williamson has considered taking defamation action against Bob Ellis who claimed that the playwright had plagiarised a line from rival Alex Buzo, in his film, *Gallipoli*, and based *The Removalists* on some improvised work by a collective of actors: B Kiernan, *David Williamson: A Writer's Career* (1996) 215; and B Hallett, 'Now the Carlton Crucible Circus Is Over, On With The Play', *The Sydney Morning Herald* (Sydney), 29 April 1998, 5.

an active supporter of this campaign, saying: ‘Although I would not deny that the script is a blueprint for a future production, and other skilled inputs are necessary to make it work, to be acknowledged as the creator of the blueprint is a matter of fundamental justice’.<sup>25</sup> The Attorney-General, Daryl Williams, observed in the second reading speech in Parliament:

As has been noted in the debate, films by their nature need different treatment compared with other works. In fact, the bill already recognises the different nature of films compared with literary, dramatic, musical and artistic works and is consistent with the treatment of such subject matter under the existing *Copyright Act 1968* (Cth).<sup>26</sup>

The Federal Government accepted that screenwriters could be considered to be authors of a film or a television program, along with the director and the producer.<sup>27</sup> They also recognised co-authorship agreements,<sup>28</sup> industry standards,<sup>29</sup> alternative dispute resolution procedures,<sup>30</sup> and special rules about consent<sup>31</sup> and duration.<sup>32</sup>

In the process of law reform, there does not seem to have been a lot of thought given to the relationship between moral rights and other kinds of works - in particular dramatic works. The *Discussion Paper on the Proposed Moral Rights Legislation For Copyright Creators* does not mention any examples of reported moral rights abuses in the context of theatre, dance or performance.<sup>33</sup> However, the Arts Law Centre of Australia and other key arts organisations made a joint submission to the Federal Government:

The organisations representing the arts and not party to the film and television industry negotiations and agreement wish to state up front that their... overriding concern is that the proposed legislation fails to take into account the interests outside the film and television industry.<sup>34</sup>

In particular, there is a pressing need to consider the implications of moral rights for dramatic works - such as theatre, dance, musicals, and live performance.

Williamson had no reason to complain about attribution or false attribution in relation to the production of *Heretic*. He received due credit for his authorship from the Sydney Theatre Company. However, Williamson could argue that the production directed by Harrison harmed the integrity of the play, *Heretic*, to the detriment of his reputation. In an article, the playwright recalled:

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<sup>25</sup> D Williamson, ‘The Australian Writer’s Guild Submission On The Copyright Amendment Bill 1997’, 8 August 1997.

<sup>26</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, Hansard, 31 October 2000, 21714 (Daryl Williams, Attorney-General).

<sup>27</sup> Section 191 of the *Copyright Amendment (Moral Rights) Act 2000* (Cth).

<sup>28</sup> Section 195AN (4) of the *Copyright Amendment (Moral Rights) Act 2000* (Cth).

<sup>29</sup> Section 195AR (3)(g) and s 195AS (3)(g) of the *Copyright Amendment (Moral Rights) Act 2000* (Cth).

<sup>30</sup> Section 195AZA (3) of the *Copyright Amendment (Moral Rights) Act 2000* (Cth).

<sup>31</sup> Section 195AW of the *Copyright Amendment (Moral Rights) Act 2000* (Cth).

<sup>32</sup> Section 195AM (1) of the *Copyright Amendment (Moral Rights) Act 2000* (Cth).

<sup>33</sup> Attorney-General’s Department, *Proposed Moral Rights Legislation for Copyright Creators: Discussion Paper* (1994).

<sup>34</sup> Arts Law Centre of Australia, ‘Letter to the Federal Government’, 18 February 2000.

I gave both Wayne [Harrison] and Liz [Alexander] a firm but polite opinion that, after sitting in the audience, I was sure the impersonations were damaging the integrity and likeability of the Mead character, and that I would prefer that Mead be simply Mead, and that the extraneous lines I had written such as 'Happy birthday, Mr President' go.<sup>35</sup>

Williamson was criticised for a lack of intellectual rigour in *Dead White Males* on the grounds that he reduced his antagonists to mere caricatures. He was concerned that his reputation would be harmed if the production of *Heretic* was crude and glib in its representation of Margaret Mead. However, it is arguable whether the distortion of one character amounts to derogatory treatment of the whole play.

Harrison disputes the presumption that the playwright is the only one who can exercise moral rights. He contends that it is a dangerous act to give moral rights to just one collaborator in a collaborative art form such as theatre because it has the potential to disadvantage other collaborators. Harrison comments:

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>36</sup>

Harrison claims that the interpretation of *Heretic* was reasonable in the context of the collaborative art form of the theatre. First, he claims that the device of Margaret Mead assuming various roles is dictated by the dream-like writing in the script. Second, he wanted to show that Margaret Mead was capable of using a culture's iconography as she saw fit. In any case, Harrison insists that Williamson gave his consent to the changes that were made to the production.<sup>37</sup>

It would be a difficult task for any court to resolve such aesthetic disputes, especially where mediation proves to be impossible, as was the case between Harrison and Williamson.<sup>38</sup> As Jeremy Eccles comments: 'The concept of a playwright's moral right to having the intentions be his or her words honoured is virtually unenforceable ... a lawyer's paradise'.<sup>39</sup>

## II RENT: THE DIRECTOR

The dispute over the play *Heretic* raised the question of whether the director should be considered to be a joint author of a dramatic work, along with the principal playwright.

There is a marked difference in the legal position of the director in the fields of film and theatre. The *Copyright Amendment (Moral Rights) Act 2000* (Cth) provides that the director is one of the joint authors of a cinematographic film, along with the

<sup>35</sup> D Williamson, 'Some Like It Hot... But I Don't', above n 5.

<sup>36</sup> Correspondence with Wayne Harrison, above n 16.

<sup>37</sup> Section 195AWA of the *Copyright Amendment (Moral Rights) Act 2000* (Cth).

<sup>38</sup> Section 195AZA (3) of the *Copyright Amendment (Moral Rights) Act 2000* (Cth).

<sup>39</sup> J Eccles, 'Heretic Preceded by a Clash of Orthodoxies', *The Sunday Age* (Melbourne), 14 July 1996, 7.

screenwriter and the producer.<sup>40</sup> It represents the director as the author or the 'auteur', bringing together and uniting all the elements of the cinematic production in a single creative enterprise.<sup>41</sup> Michelle Cooper notes the appeal of 'auteur theory':

The auteur theory became the most dominant model for film criticism, principally because of its convenience. Film is a complex collaborative artform with many different people providing creative contributions to the complete version. The auteur theory artificially simplifies this process.<sup>42</sup>

However, under the legislation, there is no equivalent recognition that the director should be considered to be an author of a dramatic work. The problem is that the director does not command the same respect in the performing arts, as 'auteur theory' in the film community.

The director and the dramaturge Harrison denied that the playwright, Williamson, was the sole author of the play, *Heretic*. He emphasised that there were several authors. Although he did not assert that he was the co-author, Harrison claimed that he should be seen as one of the joint authors of the production:

There is the author of the text and the author of the production. Take *Heretic*, for example. I believe what took place in the rehearsal room to be as important as David's words were. What takes place in the rehearsal room, especially with a new play, is as much part of the authorship of a play as what is there written on the page.<sup>43</sup>

Prior to the rehearsals Harrison collaborated with Williamson in reworking the first draft of *Heretic* and transforming the work into a piece suitable for production by the Sydney Theatre Company. He was responsible for a number of changes to the play, including actual plot elements, dramatic structure, character details, themes, and even specific language. During rehearsals, Harrison and the cast of the play further workshopped and developed the play *Heretic*. They even added lines to accommodate the various personae of the main character Margaret Mead.

Harrison was incensed by the accusations that the Sydney Theatre Company had hijacked the play. He complained about 'just how ignorant the public, the media and even some of my own staff are about how new work is actually created', because of a confusion over the difference between a play and a production.<sup>44</sup> Harrison reflected:

Most casual observers believe that David Williamson delivered *Heretic* to us as a finished product and our job therefore was simply to put that finished product on the stage. Nothing could be further from the truth. The script was an adventurous mess when it was finally delivered and subsequent drafts, which I worked on with David, only went a

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<sup>40</sup> Section 191 of the *Copyright Amendment (Moral Rights) Act 2000* (Cth).

<sup>41</sup> S Maras, 'The Film Script As Blueprint: Collaboration And Moral Rights', (1999) 93 *Media International Australia Incorporating Culture And Policy* 145.

<sup>42</sup> M Cooper, 'Moral Rights And The Australian Film And Television Industries', (1997) 15 (4) *Copyright Reporter* 166 at 175.

<sup>43</sup> A Bennie, 'Exit Stage Writers, Pursued by Smoke', *The Sydney Morning Herald* (Sydney) 28 January 1998.

<sup>44</sup> P Cochrane, 'Wayne's Expanding World', above n 22.



certain way towards solving the textual problems. The real solutions came in the rehearsal room.<sup>45</sup>

Harrison warded off accusations that he was an advocate of 'director's theatre'.<sup>46</sup> He instead embraced a collaborative form of theatre: 'I've never really gone to bat for the primacy of the director. Indeed the decade-long Elizabethan Experiment series I conducted with Dr Philip Parsons was intended to be a major corrective to directors' theatre'.<sup>47</sup> Harrison envisioned that the playwright, the director and the dramaturg should be considered to be the joint authors of a dramatic work.

Section 10 (1) of the *Copyright Act 1968* (Cth) defines 'a work of joint authorship' as the product of the collaboration of two or more authors and 'in which the contribution of each author is not separate from the contribution of the other author or the contributions of the other authors'. This statutory recognition provides the possibility that there may be several authors of a work. However, the courts have narrowly interpreted the provisions regarding joint authorship. Lionel Bently comments:

Copyright law denies authorship to the contributor of ideas and, in cases of collaborative works, frequently refuses to recognise contributors as authors in an attempt to simplify ownership. Because a single property owner means that assignments and licences of copyright are easier and cheaper to effect, copyright law prefers to minimise the number of authorial contributions it is prepared to acknowledge rather than reflect the 'realities' of collaborative authorship. To simplify ownership in this way may privilege certain contributions over others, but it provides a property nexus around which contractual arrangements can be made recognising the value of those other contributions.<sup>48</sup>

Judges have rigidly applied the requirement of material form.<sup>49</sup> They emphasise that a joint author must do more than contribute ideas; they must participate in the writing and share responsibility for the form of expression of the work. Moreover, judges have applied the criteria of originality in a stringent fashion. They have stressed that joint authorship envisages the contribution of skill and labour to the production of the work itself.<sup>50</sup> Such doctrines have been used to minimise the number of authorial contributions and concentrate copyright ownership.

In his discussion of joint authorship, Harrison refers to the celebrated lawsuit over the authorship of the Broadway musical *Rent*. The dramaturge Lynn Thomson brought a suit against the estate of Jonathan Larson, claiming that she was the co-author of the Broadway musical, *Rent*, along with the principal playwright. She argued that in her work as a dramaturge she developed the plot and theme, contributed much of the story, created many character elements, and wrote a significant portion of the dialogue and

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<sup>45</sup> Correspondence with Wayne Harrison, above n 16.

<sup>46</sup> Ibid.

<sup>47</sup> Ibid.

<sup>48</sup> L Bently, 'Copyright and the Death of the Author in Literature and Law' (1994) 57 *Modern Law Review* 973.

<sup>49</sup> *Kenrick & Co v Lawrence & Co* (1890) 25 QBD 99; *Tate v Thomas* [1921] 1 Ch 503; and *Evans v F Hulton & Co Ltd* [1923-1928] MCC 51.

<sup>50</sup> *Cala Homes (South) Ltd v Alfred McAlpine Homes (East) Ltd* [1995] FSR 818; *Fylde Microsystems Ltd v Key Radio Systems Ltd* (1998) 39 IPR 481; and *Ray v Classic FM* (1998) 41 IPR 235.

song lyrics. Lynn Thomson demanded that the court grant her 16 per cent of the author's share of the royalties.

In *Thomson v Larson*,<sup>51</sup> the Court of Appeals in the Second Circuit upheld a lower court's finding that Lynn Thomson was not a co-author of a joint work. Applying the test of co-authorship from *Childress v Taylor*,<sup>52</sup> Justice Calabresi agreed with the lower court that there were many signs of Jonathan Larson's view that he was the sole author of the musical *Rent*. Those included: his retention of sole decision-making authority over changes to the play, his listing of himself as the author on *Rent* scripts, and his statement in a press interview that in the theatre, 'the writer is king'. However, Justice Calabresi declined to rule on the copyright issues. He had no occasion to rule whether Lynn Thomson had copyright interests in the material she contributed or, alternatively whether Lynn Thomson had granted Jonathan Larson a licence to use the material that she contributed to *Rent* and, if so, on what terms. Such matters had not been raised in the lower court.

In the end, Lynn Thomson and the Larson Estate settled out of court on the 26th of August 1998. Although the settlement was a confidential agreement, there were media reports that the terms were favourable to the dramaturge.<sup>53</sup>

In response to such legal decisions, creative artists have sought to reform and modify the operation of copyright law through their own practices and agreements. Harrison supports the adoption of contracts that recognise the contribution of directors and dramaturges, along the lines of Tony Kushner in *Angels in America*:

Several playwrights have pre-empted this dissolution by cutting their collaborators, usually dramaturgs, into the royalty package. Most notably Tony Kushner agreed to pay his dramaturgs 15% of his royalties for their input into *Angels in America*.<sup>54</sup>

The American playwright Tony Kushner debunks the myth of creation that a play is the product of individual genius and inspiration.<sup>55</sup> He agreed to pay 15 per cent of the royalties to the two dramaturges who worked on *Angels in America*. He also gives generous credit to his collaborators on *Angels in America* in an afterword entitled 'With a Little Help from my Friends'. Tony Kushner testified as a witness in the *Rent* case that 'the awarding of compensation and credit to dramaturgs far from disrupting the collaborative process, enhances and honours it'.<sup>56</sup> He believed that the collaborators in the theatre should be equitably remunerated for their labour contributions. In an interview, Tony Kushner said that such practices were informed by a history of disputes over authorship of dramatic works: 'I have been instructed through ten years and more of pitched battles over intellectual ownership and giving people credit'.<sup>57</sup> His philosophy stands in stark contrast to most other playwrights like Williamson.

<sup>51</sup> *Thomson v Larson* (1998) 147 F 3d 195.

<sup>52</sup> *Childress v Taylor* (1991) 945 F 2d 500.

<sup>53</sup> Staff Writer, 'The Rent Settlement', *Talkin' Broadway*, 26 August 1998.

<sup>54</sup> Correspondence with Wayne Harrison, above n 16.

<sup>55</sup> T Kushner, *Angels in America Part Two: Perestroika* (1994) 150-151; S Jonas, G Proehl and M Lupu (eds) 'Tony Kushner's Angels' in *Dramaturgy in American Theater: A Source Book* (1997) 472; and S Jonas, 'Tony Kushner's Angels' in R Vorlicky (ed), *Tony Kushner in Conversation* (1998) 157.

<sup>56</sup> R Smith, 'The Appeal Brief', Transcripts from the Rent Case, <<http://dramaturgy.net/rent>>.

<sup>57</sup> S Jonas, 'Tony Kushner's Angels' in R Vorlicky (ed), *Tony Kushner In Conversation* (1998) 158.

Arguably, the dispute over *Heretic* demonstrates the need for a more flexible and accommodating notion of joint authorship. At present, copyright law privileges the written contribution of the playwright, and marginalises the voices of other contributors. This result derives from a failure to reflect the multitude of forms of artistic collaboration. As Roberta Kwall observes:

The process of making theatre is increasingly collaborative, yet the law is unresponsive to these present realities. We in theatre are therefore left to address those realities through the ethics of our community. If collaboration is to continue, then must not all key collaborators be assured of equitable reward for their contribution?<sup>58</sup>

There is a need to reshape the doctrine of joint authorship, so that it reflects the realities of artistic collaboration between the playwright, the director, and the dramaturge. This will involve the apportionment of ownership and royalties according to the relative contribution of each collaborator. The benefits of authorship should not be just limited to the playwright, the director, and the dramaturge. It should also embrace the involvement of the producer, the performers, and the artistic designer.

### III MONEY AND FRIENDS: THE PRODUCER

Harrison has campaigned for writers' and performers' agents to acknowledge the importance of the original producer in stage work. He believed that there was an obligation involved in acknowledging the collaborators who helped bring a work into existence, enabling it then to be exploited by future collaborators.

The *Copyright Act 1968* (Cth) provides that, in relation to a dramatic work, the writer shall be considered the author of a play for the purposes of economic rights, in the absence of any agreement to the contrary. It stipulates, in relation to cinematographic films, that the maker of the production will be considered to be the owner of economic rights. Similarly, the *Copyright Amendment (Moral Rights) Act 2000* (Cth) provides that, in regard to a dramatic work, the writer shall be considered the author of a play for the purposes of moral rights. It also controversially provides that, in relation to a cinematographic film, the writer, the director and the producer shall be considered the authors of the film and therefore have the moral rights.<sup>59</sup> Chris Creswell of the Attorney-General's Department commented:

The inclusion of producers reflects the Australian industry position that in relation to films made for television as opposed to films made for cinema release, it is the producer who provides the main creative input rather than the director. This is also the case for some other forms of film within the meaning of the act, such as music video clips and multimedia products.<sup>60</sup>

There is a double standard in the treatment of producers in relation to copyright protection of dramatic works and cinematographic works. The distinction seems to be

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<sup>58</sup> R Kwall, 'Author-Stories: Narrative's Implications For Moral Rights And Copyright's Joint Authorship Doctrine' (2001) 75 *Southern California Law Review* 1, 58.

<sup>59</sup> Section 191 of the *Copyright Amendment (Moral Rights) Act 2000* (Cth).

<sup>60</sup> Senate Legal and Constitutional Legislation Committee, *Copyright Amendment Bill 1997* (1997), 9.

based upon the relative public and private investment in the two forms of cultural production. The producer of a play is denied copyright protection because of a belief that a dramatic work is just concerned with live performance. The producer of a film receives copyright protection in order to facilitate the capital investment that is required to produce and market such a work to mass audience.

Harrison comments that the Sydney Theatre Company was forced to adopt a more commercial position in the marketplace after cuts in funding by the Federal Government and the State Government.<sup>61</sup> He adopted a range of initiatives to address this situation, including changing to a season of more popular repertoire. Harrison comments that the Sydney Theatre Company relied upon the production of Williamson plays for both profile and box office success:

As government subsidy of major organisations such as the Sydney Theatre Company has shrunk, we've allowed another economy to develop, which is the Williamson economy. Many so-called subsidised theatre companies in Australia now rely on David Williamson to give them the profile and box office success they must have. They use that money to subsidise riskier work.<sup>62</sup>

The box-office sales generated by the production of plays written by Williamson allows for cross-subsidisation of riskier artistic and commercial ventures. It is a paradox that the popular appeal of his work allows for the production of avant-garde work. The production of Williamson plays serves to make up the shortfall produced by the shift in public funding to the marketing of the arts. It also protects the major organisations from the competition of alternative theatre<sup>63</sup> and arts festivals.<sup>64</sup>

Harrison introduced a new policy for the Sydney Theatre Company in respect of the production of Australian plays.<sup>65</sup> He was selective in commissioning a number of original productions - including *Furious* and *Sweet Phoebe* by Michael Gow, *Blackrock* and *Chasing The Dragon* by Nick Enright, *Fred* by Bea Christian, as well as *Dead White Males* and *Heretic* by Williamson. Harrison promoted the concept of originating writer's royalties. He sought to obtain one per cent of receipts from any subsequent production as a just reward for taking the original risk on a new work and granting it access to a lucrative subscription season.

Harrison also picked up new Australian plays from companies like the Griffin in the Stable Theatre at King's Cross and the Playbox at the Malthouse in Melbourne, and organisations dedicated to the creation of new Australian work, such as the Australian National Playwrights' Centre. He sought to limit the liability of the Sydney Theatre Company by letting other companies share the risk for producing premieres of Australian plays. If they proved popular, the Sydney Theatre Company would then take them up, negotiate the changes, and make the necessary refinements. This was the case

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<sup>61</sup> Department of Communications, Arts and the Information Economy, *Securing The Future: The Major Performing Arts Discussion Paper* (1999).

<sup>62</sup> P Cochrane, 'Wayne's Expanding World', above n 22.

<sup>63</sup> W Harrison, 'The Theatre of War', *The Sydney Morning Herald* (Sydney), 19 December 1994, 14.

<sup>64</sup> W Harrison, 'STC Boss Laments Leo's Show', *The Sydney Morning Herald* (Sydney), 16 January 1999, 7; and W Harrison, 'Cost of Festivals Higher than You Think', *The Sydney Morning Herald* (Sydney), 16 January 1999, 47.

<sup>65</sup> B Evans, 'Low-Risk Policy Pays For STC', *The Sydney Theatre Company*, 22 July 1994, 20.

for brilliant works like *Kafka Dances* and *Sixteen Words For Water*. The Sydney Theatre Company would pay the originating producers a royalty of one per cent for the privilege, or let them be co-producers. A consensus is forming about the originating producers' royalty within state theatre companies, and agents acting for writers and performers.

Harrison was inspired to fight for recognition of the originating producer after *Strictly Ballroom* was turned from a stage-play into a film.<sup>66</sup> In correspondence, he recalls that the Sydney Theatre Company received nothing, even though it had premiered the first professional stage production of the work:

My spur was the fact that Sydney Theatre Company as the originating producer of the stage version of *Strictly Ballroom* should have shared in the proceeds from the film version of the piece. It is only by deriving funds from these subsidiary uses that companies such as Sydney Theatre Company can afford to produce the next *Strictly Ballroom*. But Sydney Theatre Company received nothing from Baz Luhrmann's film success.<sup>67</sup>

The show *Strictly Ballroom* was developed at the National Institute of the Dramatic Arts by a group of theatre students lead by Baz Luhrmann.<sup>68</sup> The class signed over the rights to produce the dramatic work on stage to Baz Luhrmann in return for a percentage of the box office profits. The group of actors were unhappy that they were excluded from discussions about adapting *Strictly Ballroom* into a film. They finally agreed to assign away the film rights for \$24,000 and a small percentage of the producer's net profit. The Sydney Theatre Company was not as fortunate as the cast from the National Institute of the Dramatic Arts.<sup>69</sup> They did not receive any royalties because they did not have any claim to ownership under copyright law and contract.

In response to the sobering experience of the film adaptation of *Strictly Ballroom*, Harrison sought to protect the investment of the Sydney Theatre Company in the play *Blackrock*. He drafted the production contract to cover any film or television adaptation. Originally the playwright Nick Enright wrote *A Property of the Clan* for Newcastle's Freewheels theatre-in-education company.<sup>70</sup> Nick Enright then reworked the material into a new play called *Blackrock* for the Australian Peoples' Theatre and for a production at the Wharf Theatre. He developed the piece through six drafts and four workshops at the Sydney Theatre Company, with assistance from the dramaturge Harrison and the director David Berthold. The contract for the creation of *Blackrock* specified rewards to the Sydney Theatre Company for any on-sale to film or television.<sup>71</sup> However, the producer of the film version of *Blackrock* refused to pay the royalty to the Sydney Theatre Company. Fortunately, the playwright Nick Enright paid the fee out of his writer's royalty. There was no litigation because the ethics of the playwright circumvented the law. This episode suggests that the utility of private contracting is limited - especially, in relation to the privity of contract.

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<sup>66</sup> B Luhrmann, and C Pearce, *Strictly Ballroom* (1992).

<sup>67</sup> Correspondence with Wayne Harrison, above n 16.

<sup>68</sup> T Squires, 'Strictly Baz', *The Sydney Morning Herald* (Sydney), 27 June 1992, 33.

<sup>69</sup> Correspondence with Wayne Harrison, above n 16.

<sup>70</sup> N Enright, *Blackrock* (1996).

<sup>71</sup> Correspondence with Wayne Harrison, above n 16.

Harrison concludes that, if *Heretic* has a future life, the original collaborators should share in future proceeds because they worked so hard in imposing some order on the script.<sup>72</sup> He believes that this is fair and morally correct. Harrison was upset that, while Williamson was prepared to criticise elements of the production in public, he was busy including those same elements in the published version of the text. He was concerned that Williamson profited from the subsidiary rights he enjoyed in the play *Heretic*, both from book sales and the royalties earned when a New Zealand production based on this published text had a season in Wellington. However, the original producer did not share in the profits from the exploitation of the play *Heretic*.

Harrison believed that his model for originating producers' rights has overseas precedents.<sup>73</sup> He cited the practice of the National Theatre of Great Britain. If a play is originally produced at that particular institution, the playwright is compelled to give one third of all royalties to the company for all subsequent productions of dramatic work. This agreement is intended to recompense the producer for showcasing, branding, advertising, and promoting the work to the outside world. In return, the playwright gains the imprimatur of the National Theatre of Great Britain. There are two important qualifications to this agreement. First, there is a threshold in operation. The originating company does not start cutting into the author's royalty until after the author has earned a certain figure through the royalty. This means only the very successful works qualify. Second, the theatre company cannot demand the royalty slice if it itself is the producer or co-producer of a transfer/subsequent season.

Such creative contracts are of course no substitute for secure legislative protection. A strong case can be made that the contribution of the original producer should be acknowledged under copyright law. The general manager of Bangarra Dance Theatre, Jo Dyer, concurred with Harrison that companies should receive recognition for the risks involved in producing a dramatic work:

Often the original producers who scraped and saved to put up the original capital get no returns at all. That is not to say that there aren't creative artists who came up with the creative work. There needs to be some recognition of the huge investment and risks taken by small organisations when they are the originating producers of works.<sup>74</sup>

It is arguable that the producers of dramatic works should receive due credit and reward within the legal system, especially given that the financial and creative contributions of film producers are accommodated under copyright law.

#### IV THE PROPERTY OF THE CLAN: THE PERFORMERS

The role of the performer has been marginalised under copyright law in both theatre and film because of concerns that a performance cannot be fixed in a material form.

It is striking that the performers had few opportunities to participate in the debate over *Heretic*. The actor Liz Alexander said that the row between the playwright and the

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<sup>72</sup> Ibid.

<sup>73</sup> Correspondence with Wayne Harrison, Director and Producer (London, 22 January 2001).

<sup>74</sup> Interview with Jo Dyer, General Manager, Bangarra Dance Theatre (Sydney, 15 September 1998).

director unsettled the cast.<sup>75</sup> She was grateful for the support of Harrison: 'He's a stimulating director, he gives you space to work in and he has a pretty good sense of humour - I think you've got to have that when you're working'.<sup>76</sup> Liz Alexander admitted that she hated the controversy around her role as Margaret Mead:

With the different assertions made in the press by different people who have been involved in it, it's been difficult to continue working in a positive and happy manner ... It just puts a little spanner in the works. A company that was very happy about the production has now, in a way, each night, to deal with the controversy that's surrounded it.<sup>77</sup>

It is worthwhile considering whether the actors deserve performers' rights given their contribution to the production of the dramatic work.

The critics of the playwright claim that the pre-eminence of the writer and the text is subverted by the act of performance. The director, Harrison, debunked the view that performers do not make a creative contribution, which is comparable to the work of the playwright. He argued that actors play a significant role both in the creation of a written script and in the production of the play:

The perception is that the playwright brings the script along on the first day of rehearsal and all we do is faithfully put life into what's written on the page. Nothing could be further from the truth - it is a continuing, evolving process where the actors become the major dramaturgs questioning, every line: 'My character wouldn't say that - do you realise the consequences of this?' They have a major role to play in the evolution of the work ... but when it does dissolve into a bunfight, the people involved in the process ask 'why are we doing all this work when we're being abused at the other end of it. Why are we doing this when the good ideas we had in rehearsal becomes part of the published text, which earns the author more money'.<sup>78</sup>

The performance is not something ancillary, accidental, or superfluous that can be distinguished from the play proper.<sup>79</sup> The dramatic work is incomplete and unfinished in its script version. The individual performance of the script is required to bring the play into existence. The creativity of the writer is dependent upon the improvisation and group authorship of the cast. The meaning of the text is open to interpretation by the voice, the gestures, and the bodies of the actors. The performers are thus creative partners and collaborators who deserve respect.

The dispute over the interpretation of *Heretic* also raised issues of performers' rights. The artistic director, Harrison, reflects upon the controversy:

The other legacy of the *Heretic* experience has to do with intellectual rights. Actors and directors and dramaturgs are starting to question the nature of the work they do. The convention is that all the work done in the rehearsal room becomes the copyright property

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<sup>75</sup> S Browne, 'Liz Seeks Peace From The Storms Of The Stage', *The Sydney Morning Herald* (Sydney), *Northern Herald*, 23 May 1996, 31.

<sup>76</sup> Ibid.

<sup>77</sup> Ibid.

<sup>78</sup> P Cochrane, 'Wayne's Expanding World', above n 22.

<sup>79</sup> S Connor, 'Postmodern Performance' in *Postmodernist Culture: An Introduction to Theories of the Contemporary* (1989) 134.

of the playwright. But ownership of copyright doesn't necessarily mean that everything was written by the playwright - it becomes a very dicey legal area, especially if it blows into a media circus when people are being accused of hijacking the play, of doing unauthorised work on it.<sup>80</sup>

It is worth considering whether the contribution of the performers to the creation and development of a dramatic work is deserving of copyright protection.

Harrison recognises that limited copyright protection has been granted in respect of performances such as circus and variety acts.<sup>81</sup> He accepts that such performers enjoy the right to prohibit the recording of their live performance, and the right to control an unauthorised recording and transmission of their live performances under Part XIA of the *Copyright Act 1968* (Cth). Harrison recognises that performers make a great creative and economic contribution in the collaborative process of theatre. He doubts, though, that actors and performers would want to reduce their work to material form. He believes that they would prefer a performance to be fluid and ephemeral, rather than fixed in an archive of a sound recording or video: 'Many actors actually resist the notion of archivally recording their stage work - they like to think that what they create is fluid, evolving and ultimately 'of the moment', something re-created on a nightly basis with the most important collaborators, the audience'.<sup>82</sup>

The courts have been reluctant to grant full copyright protection to performers. In the United Kingdom, there has been debate over the meaning of a 'dramatic work' in relation to a short film called *Joy*, which inspired a commercial advertising the Irish beer Guinness.<sup>83</sup> There was doubt as to whether a performance recorded on film amounted to a 'dramatic work'.

The Federal Government has released a Discussion Paper on whether it should implement full copyright protection for performers, at least in relation to sound recordings.<sup>84</sup> Harrison only champions the cause of actors and performers so far. He refuses to take his argument in relation to the authorship of plays to its logical conclusion, and to acknowledge that actors deserve a full share of copyright protection.<sup>85</sup> His artistic commitment to collaborative theatre is overridden by administrative concerns about the practicality and viability of such reforms. Harrison foresees that playwrights in this country would be resistant to sharing the royalties of a play with performers:

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<sup>80</sup> P Cochrane, 'Wayne's Expanding World', above n 22.

<sup>81</sup> Section 248A (1) of the *Copyright Act 1968* (Cth) defines 'performance' as broadly meaning a performance or an improvisation of a work, and includes the use of puppets, dances, circus acts, variety acts, and similar presentations and shows. However, s 248A (2) excludes sport, news-reading and crowd participation in performances from the definition of a performance.

<sup>82</sup> Correspondence with Wayne Harrison, above n 16.

<sup>83</sup> T Sowden, 'Limits to Film Copyright' (1998) 3 *Media and Arts Law Review* 223; M James, 'Some Joy at Last for Cinematographers' (2000) 22 *European Intellectual Property Review* 131; and T Rivers, 'Norowzian Revisited' (2000) 22 *European Intellectual Property Review* 389.

<sup>84</sup> Attorney General's Department, *Performers' Intellectual Property Rights: Scope of Extended Rights for Performers under the Copyright Act 1968* (1997).

<sup>85</sup> M Leiboff, 'Actors, Directors and Others and Writers: Copyright Protection for Non-Writer Contributors in Group-Devised Theatre' (1993) *Arts And Entertainment Law Review* 13.



It's a minefield. The minute you start to determine who was responsible for this line, or who edited or restructured that section, the people involved feel they deserve a share of the royalty payments ... and as playwrights have shown in this country they are loath to allow anyone to cut into their royalty packages, which are quite substantial - more so than overseas.<sup>86</sup>

Similarly, the actor and festival director Robyn Archer doubts whether performers will ever receive comprehensive copyright protection in relation to their performances. She observes that 'certainly no actor – for instance in an interpretation of a David Williamson – will ever be paid copyright in that'.<sup>87</sup>

However, there is greater support for comprehensive performers' rights beyond the confines of mainstream theatre. For instance, the Melbourne performance troupe Not Yet It's Difficult (NYID) operates as a radical collective.<sup>88</sup> Using the stakeholder structure as a base, NYID divides revenue through a system of shares. The members of the company are paid the same base rate and additional remuneration based on time and input. This model of theatrical production demonstrates that it is possible to respect the contributions of performers. There is a need to reconsider the recognition of performers' rights in light of the practices of collective theatre.

## V INTELLECTUAL CABARET: THE DESIGNER

The controversy over *Heretic* concerned the artistic design of the production. It is worth considering what rights, if any, are held by the artistic designer.

The designer John Senczuk was a long-time collaborator of the director Harrison. They had worked on over 20 productions together. The production of the play *Heretic* was a difficult task because of its peculiarities in content and form. The theatrical concept of the production was a response to textual elements of the play that emphasised that Margaret Mead was the 'intellectual godmother' of the 'permissive society' of the 1960s. It took its cue from stage directions, which called for a montage of icons and images of the Sixties against the backdrop of psychedelic lighting and the music of the times. In the theatrical production of *Heretic*, Harrison sought to explore the iconic status of Margaret Mead. The character assumes the personae of public icons of the 1960s, such as Marilyn Monroe, Barbara Streisand and Jackie Kennedy. Lines were inserted to accommodate these personae, such as 'Happy Birthday, Mr President'. In the visual design, Senczuk was inspired by M.C. Esher's woodcut *Metamorphose*. The set and the costume design were psychedelic, hallucinogenic in feel and 1960s in style, but heightened and distorted because of its dream-like state.

However, Williamson was unhappy with this production of *Heretic*, because he thought that it was unfaithful to the intentions of his script. He endorsed the criticisms of the production as being 'intellectual cabaret' and a 'new genre'.<sup>89</sup>

<sup>86</sup> P Cochrane, 'Wayne's Expanding World', above n 22.

<sup>87</sup> Correspondence with Robyn Archer, Actor and Festival Director (Adelaide, 11 October 1998).

<sup>88</sup> Interview with H Simondson (Melbourne, 2 September 1998); and H Simondson, *Performing Arts Media Library: From Live Performance To The Digital Stage* (1999), <<http://www.acmi.net.au/PAML>>.

<sup>89</sup> D Williamson, 'Some Like It Hot ... But I Don't', above n 5.

Senczuk defended the design against the attacks of the playwright. He believed that the work was a good marriage between the script of Williamson, the dramaturgy of Harrison, and his own theatrical and visual philosophy:

It is a nonsense to believe, as is often the case, that the director/designer team spend their time deliberately trying to sabotage a production. I have to remain confident with the decisions made in the design development period. These decisions are not made flippantly and risks are taken. Other times, other places, the process may be different. I, like any other theatre worker in this country, live and work in a theatrical system shackled by economic rationalism. Yet there is still a determined and conscious decision to entertain and stimulate audiences with high quality work. At the same time there is a need to provoke and educate audiences theatrically, to take them into dangerous territory.<sup>90</sup>

The task of Senczuk was complicated by the evolution of the script for *Heretic*. He based his decisions about the design upon an early draft of the play. The set was already being built by the time that later drafts of the script sought to alter the tone and look of the play.

It is also worth reflecting that Senczuk enjoys copyright in the artistic work of the design. It is arguable that his economic rights and moral rights might be violated if the playwright Williamson sought to break down the integrity of the design without his consent or permission.

Harrison observes that there have been several interesting copyright disputes in respect of artistic design in the performing arts.<sup>91</sup> The Tony award-winning designer Brian Thomson had a much reported run-in with the opera director Elijah Moshinsky.<sup>92</sup> He claimed that the design for Moshinsky's 1996 Met production of the *Makropoulos Affair* – which featured a large black sphinx – was similar to his own design for the same opera in a 1982 Adelaide Festival production, which was also directed by Moshinsky. An exchange of letters followed. Moshinsky informed the Met that no part of Thomson's design had been used, utilised, or copied. However, Thomson vows that he will never work with the director again: 'He does crowd-pleasing operas... I have no desire to work with him again'.<sup>93</sup>

There has been a French case dealing with the moral rights of artistic designers in a dramatic production.<sup>94</sup> In *Leger v Reunion des Theatres Lyriques Nationaux*,<sup>95</sup> the artistic designer brought an action against a theatre, arguing that the excision of a scene from part of an opera impaired his moral rights. He asked for damages and an order that the defendant re-establish the opera's stage setting in its entirety. The court agreed that the stage design constituted an artistic work in which there were moral rights but said that the composer of the opera and its producer had rights to control the production.

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<sup>90</sup> J Senczuk, 'Heretic Row: Designer Chips In', *The Sydney Morning Herald* (Sydney), 4 April 1996, 15.

<sup>91</sup> Correspondence with Wayne Harrison, above n 16.

<sup>92</sup> J Morgan, 'What the Critics Say', *The Sydney Morning Herald* (Sydney), 13 June 1998, 8.

<sup>93</sup> Ibid.

<sup>94</sup> J H Merryman, 'The Refrigerator of Bernard Buffet' (1976) 27 *The Hastings Law Journal* 1023.

<sup>95</sup> *Leger v Reunion des Theatres Lyriques Nationaux* [1955] 6 RIDA 146.

However, it still found that the producer had no right to make a cut without the permission of the artist and without informing the public.

## VI CONCLUSION

The dispute over *Heretic* highlights how the operation of the *Copyright Amendment (Moral Rights) Act 2000* (Cth) is specific, contextual, and contested. Comparisons between the treatment of dramatic works and cinematographic films are enlightening. The art forms are treated in a radically different fashion, even though they are both collaborative ventures, which require a substantial investment of money. The film industry receives special treatment under the legislation, with unique rules regarding co-authorship agreements, industry standards, consent and duration. In the future, the Federal Government would be well advised to commission reports into the impact of copyright law reform on artistic communities. The Performing Arts and Multimedia Library pilot project was a promising idea.<sup>96</sup> The project sought to investigate the impact of digital rights and moral rights on performing arts companies. Such initiatives seem to be the way forward to ensure that copyright legislation does not unduly hamper or harm artistic communities and cultural production.

The conflict over *Heretic* presented a number of competing visions of authorship and collaboration in dramatic works. First, Williamson maintained that the role of the playwright was paramount. Although he was willing to acknowledge the contributions of other collaborators, the writer did not believe that these interpreters deserved copyright protection. Second, Harrison believed that the role of the director and the position of the producer deserved greater legal recognition. He was also willing to countenance limited rights for the performer. A third, more radical view is that recognition should be accorded to all of the collaborators in the performing arts, because of their respective creative contributions. It is arguable that the authorship of dramatic works should not be limited to just the playwright, but extended to all of the collaborators and the performers. However, it remains to be seen whether this model will be accepted in the performing arts, and prove viable in the marketplace.<sup>97</sup>

The controversy is also relevant to the current inquiry of the Copyright Law Review Committee into the interaction between copyright law and contract law.<sup>98</sup> It provides plentiful examples of progressive agreements, which seek to overcome deficiencies and inadequacies in copyright law through contract law. The Williamson agreement is a good example of private recognition of moral rights. Aspects of such agreements could be included in the encyclopaedia of contractual terms being developed by the Performing Arts and Multi-Media Library.<sup>99</sup> However, the dispute also highlights the limitations of the privity of contract, and industry practices. For instance, Harrison found it difficult to protect the investment of the Sydney Theatre Company in film adaptations, such as *Blackrock*. There needs to be greater legislative guidance about the proper interaction between copyright law and contract law.

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<sup>96</sup> Interview with H Simondson, above n 88; and H Simondson, *Performing Arts Media Library: From Live Performance To The Digital Stage* (1999), <<http://www.acmi.net.au/PAML>>.

<sup>97</sup> Ibid.

<sup>98</sup> Copyright Law Review Committee, *Copyright And Contract: Issues Paper* (2001).

<sup>99</sup> Interview with H Simondson, above n 88; and H Simondson, *Performing Arts Media Library: From Live Performance To The Digital Stage* (1999), <<http://www.acmi.net.au/PAML>>.