

CITATION: Wiseau Studio et al. v. Richard Harper, 2017 ONSC 6535
COURT FILE NO.: CV-17-577020
DATE: 20171101

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:)	
)	
Wiseau Studio, LLC and Tommy Wiseau)	Michael E. Charles, Amrita V. Singh,
d.b.a. Wiseau-Films)	Anastassia Trifonova, for the Plaintiffs
)	
Plaintiffs)	
)	
– and –)	
)	
Richard Harper, Fernando Forero McGrath,)	
Martin Racicot d.b.a. Rockhaven Pictures,)	Matthew Diskin, Meredith Bacal , for the
Roomfull of Spoons Inc., Parktown Studios)	Defendants
Inc., Richard Stewart Towns)	
)	
Defendants)	
)	
)	
)	
)	HEARD: October 10, 2017

KOEHNEN J.

Introduction

[1] The plaintiff, Tommy Wiseau (“Mr. Wiseau”) is a performer, actor, writer, director and producer. His most well-known work is *The Room*, a film he released in 2003. Mr. Wiseau wrote, directed produced and played the lead role in *The Room*. For ease of reference, *The Room* will be referred to in these reasons either by its title or as “the movie.”

[2] The plaintiff, Wiseau Studio LLC, is the copyright owner of *The Room*.

[3] *The Room* was a box office failure when it was released but acquired a cult following shortly thereafter. Since then, it has been shown in revue theatres around the world.

[4] The defendants are the makers of a documentary entitled *Room Full of Spoons*. It chronicles the making of *The Room* and examines what has led to its cult status. For ease of reference, *Room Full of Spoons* will be referred to in these reasons either by its title or as “the documentary.”

[5] *The Room* was also the subject of a book written by a friend of Mr. Wiseau’s, Greg Sestero (“Mr. Sestero”), and which was published in 2013. In his materials, Mr. Wiseau refers to the book’s title as “*The Disaster Artist*.”

[6] That book has been made into a movie, *The Disaster Artist*, which stars a leading American actor, James Franco. *The Disaster Artist* premiered at the Toronto International Film Festival on September 11, 2017 and is scheduled for wide release on December 8, 2017.

[7] The plaintiffs appeared before Diamond J. in Toronto on June 14, 2017 to seek an interim injunction pending argument of the full interlocutory injunction. Before doing so, they gave a couple of hours’ notice to a lawyer in Ottawa who had acted as a corporate solicitor for one or more of the defendants in the past. He indicated that he could not accept service and would not be appearing as solicitor of record. As a result, Justice Diamond expressly noted that the motion on June 14 proceeded as an *ex parte* motion. Justice Diamond granted an injunction restraining the release of *Room Full of Spoons* and ordered that the matter be brought back for a 30 minute hearing on June 23.

[8] On June 23, the matter came on before Justice Akbarali. At that time, some of the defendants appeared in person. They had not, however, had the opportunity to retain counsel. They sought an adjournment to permit them to do so and to file materials. Justice Akbarali set a return date to argue the full motion on October 10, 2017 and extended the interim injunction until then.

[9] I heard the matter on October 10, 2017, reserved and extended the injunction on consent until I could release my decision.

[10] At the October 10 hearing, the defendants submitted that I should dissolve the injunction because:

- (a) The plaintiffs had made material non-disclosure on the two earlier court attendances; and
- (b) The plaintiffs do not meet the three part test to sustain an interlocutory injunction.

[11] The plaintiffs, on the other hand, sought to extend the injunction until trial. They submitted that:

- (a) There has been no material non-disclosure or, in the alternative, if there has been such non-disclosure, it would amount to an injustice to dissolve the injunction.

- (b) The defendants have breached a wide variety of wrongful conduct including breach of copyright, misappropriation of personality, passing off, breach of moral rights, intrusion upon seclusion, fraudulent misrepresentation and breach of contract.
- (c) They have met the three-part to warrant an interlocutory injunction until trial.

[12] For the reasons set out below, I am dissolving the injunction because, in my view, the plaintiffs failed to make proper disclosure on the earlier *ex parte* attendances and because they have failed to persuade me that they should be granted an injunction on the traditional three part test which requires them to demonstrate a serious issue to be tried, that they will suffer irreparable harm if an injunction is not granted and that the balance of convenience favours granting an injunction.

I. Material Non-Disclosure

[13] In my view, the plaintiffs fell seriously short of the sort of disclosure required for an *ex parte* injunction.

[14] There was some argument at the hearing about the extent to which the earlier attendances were *ex parte* hearings. The hearing before Justice Diamond was clearly an *ex parte* hearing. Although the plaintiffs had sent the materials to a lawyer in Ottawa who had acted for some of the defendants in the past, he did not appear. Justice Diamond specifically noted that the matter was proceeding as an *ex parte* motion.

[15] The plaintiffs argued that the hearing before Justice Akbarali was on notice because the defendants appeared; as a result, it could not have been *ex parte*. Whether the hearing before Justice Akbarali was or was not *ex parte* is beside the point. The hearing before Diamond J. clearly was *ex parte*. Disclosure should have been made at that time. As set out below, the information that was not disclosed was information that was relevant to the weighing exercise that Diamond J. engaged in. He was entitled to have full information. He was denied that. Full information may well have led to a different result before Diamond J. which means the attendance before Justice Akbarali would have had a very different flavour, assuming it had proceeded at all.

A. Facts Concerning Material Non-Disclosure

[16] At their first appearance, the plaintiffs did not file a factum but they gave the court a 19 page affidavit from Mr. Wiseau accompanied by 133 pages of exhibits.

[17] In his affidavit, Mr. Wiseau paints a picture of himself as a serious filmmaker, reinforces the credibility of *The Room* by noting that it had become the subject of a non-fiction book published in 2013, *The Disaster Artist*, which book was the subject of the soon to be released movie, starring Academy award nominee and Golden Globe winner, James Franco as Mr.

Wiseau. In addition Mr. Wiseau noted that he travels around the world promoting *The Room* and that “maintaining this reputation and my image is important to my livelihood.”

[18] The affidavit makes three broad complaints about the defendants and *Room Full of Spoons*:

- (i) The documentary mocks, derides and disparages *The Room*.
- (ii) The documentary “casts aspersions on” Mr. Wiseau’s character and invades his privacy.
- (iii) The defendants are in material breach of copyright law.

[19] All three complaints entail material nondisclosure to the court.

(i) Documentary Mocks, Derides and Disparages *The Room*

[20] Although Mr. Wiseau complained in his affidavit that the documentary mocks, derides and disparages him and *The Room*, he did not disclose that *The Room*’s fame rests on its apparently abysmal quality as a movie. People flock to see *The Room* because it is so bad. People see the movie for the very purpose of mocking it; a phenomenon that has won the movie its cult status.

[21] Published reviews of *The Room* are consistent with this view. By way of example:

- (a) The BBC wrote that “it’s not just bad—it’s intoxicatingly awful... [it] is a car crash of incompetence and catastrophic misjudgment.”
- (b) Entertainment weekly reported that the film is the “Citizen Kane of bad movies.”
- (c) The Huffington Post stated: “... Anyone at the premier could see that the film was an unmitigated disaster. Wiseau as he often told his collaborators, had attempted to create a dramatic movie in the vein of Tennessee Williams’ “*A Streetcar Named Desire*.” Instead, he had created a 99 minute train wreck.
- (d) Variety.com, an entertainment industry internet publication described *The Room* as “a movie that prompts most of its viewers to ask for their money back—before even 30 minutes have passed.”

[22] In his affidavit, Mr. Wiseau uses Mr. Sestero’s, book to enhance his and *The Room*’s credibility. Mr. Wiseau refers to the book throughout his affidavit as “*The Disaster Artist*” but never discloses the book’s full title: “*The Disaster Artist: My Life Inside The Room, the Greatest Bad Movie Ever Made*.”

[23] As Mr. Sestero notes in his book, when the film was released at a single theater, the theatre posted a “NO REFUNDS” sign on the ticket booth, below which was an extract from a review that stated: “watching this film is like getting stabbed in the head.”

[24] It is precisely because *The Room* is so bad that it has acquired cult status. People come not to admire but to mock. They dress up in character costumes, they mimic lines from the script, and they throw objects at the screen to highlight its bizarre character.

[25] The documentary's title, *Room Full of Spoons* provides an apt example. The title derives from a scene in *The Room* at which audience members shout "Spoon" and begin throwing plastic spoons at the screen. The audience reaction is prompted by a scene in the movie in which a side table displays a store bought picture frame with its stock photo still in the frame: a photograph of a spoon. A more sophisticated film maker might have replaced the photograph with something having more relevance to the movie.

[26] While Mr. Wiseau might not have been aware of every single comment ever made about *The Room*, he certainly had to be aware of the reasons for which the film has acquired cult status. Indeed, he was specifically interviewed about this by the BBC whose reporter, in an article called "*The Room: Why So Many People Love 'The Worst Film Ever Made,'*" opened its interview of Mr. Wiseau by asking:

"How does it feel to pour your heart and soul into a film, only for it to be ridiculed as history's most atrocious crime against cinema? How does it feel to hear your dialogue being greeted by gales of laughter? Isn't it hurtful to have people all over the world queuing to see your film, just so they can jeer, heckle and throw things at the screen?"

The article continues with Mr. Wiseau's response,

"It doesn't matter," says Tommy Wiseau, the star, writer, director and producer of *The Room*. "You see, you can say what you want and it doesn't matter. But the kick is – you know what the kick is? The kick is you have to be respectful. So I encourage it, I encourage people to express themselves. People are astonished, but I encourage it."

(ii) Aspersions on Character and Invasion of Privacy

[27] The comments in Mr. Wiseau's affidavit about the manner in which *Room Full of Spoons* allegedly casts aspersions on his character or invades his privacy are equally misleading. His complaints here focus on three areas. Mr. Wiseau asserts that *Room Full of Spoons* alleges that he financed *The Room* through drug dealing; that he had a gay relationship with Mr. Sestero and that he was born in Poland.

[28] The assertion that *Room Full of Spoons* alleges Mr. Wiseau was a drug dealer is a material overstatement of what the documentary actually says.

[29] During one segment, the documentary explores the financial aspects of *The Room*. It notes that it earned only \$1900 in revenue when it opened but that Mr. Wiseau incurred significant expenses in marketing the movie by taking out large newspaper advertisements and paying for large billboards. A key contextual component to understanding these allegations is that much mystery surrounds Mr. Wiseau. Mystery that Mr. Wiseau does not clear up but seems to foster as part of his image.

[30] The documentary then contains clips of interviews with a number of actors who comment that there were “rumours all over the place” on the set about how Mr. Wiseau financed the film with some people thinking that he got money from selling drugs. No one is actually quoted as saying he got money by selling drugs, merely that there were rumours and that *some* people thought he got money from drug sales. A crew member is then shown saying that he had “a story that he came up with in his mind” to the effect that Mr. Wiseau was involved in a paramilitary force in Eastern Europe that “may have blown a hole in a bank.” Another comments that Mr. Wiseau might have been the “wild child” of a wealthy Middle Eastern family who gave him a cheque with instructions to go away and never come back. The documentary then seems to resolve any mystery about the financing by revealing a third-party financing source and discussing the fact that Mr. Wiseau owned and operated a number of retail stores before creating *The Room*.

[31] The reference to drug dealing is clearly not an allegation. It is specifically described as one of the rumours that some people circulated. Rumours that are contextualized by statements like “the story I came up with in my mind.”

[32] Mr. Wiseau complains that *Room Full of Spoons* has invaded his privacy by alleging as fact that he had a sexual relationship with Mr. Sestero. Here too, the documentary makes no such allegation. The documentary does contain a portion where various actors and crew members of *The Room* describe the friendship between Mr. Wiseau and Mr. Sestero. One actress then comments that “a couple of others seemed to think they were a gay couple.” She then adds immediately that Mr. Sestero seemed to want to follow Mr. Wiseau along like a younger brother.

[33] In addition to misstating what the documentary says about his friendship with Mr. Sestero, Mr. Wiseau did not disclose that Mr. Sestero’s mother asked Mr. Wiseau not to have sex with her son, that Mr. Sestero described that exchange in his book and that this information has been in the public domain since 2011.

[34] Mr. Wiseau describes himself in his affidavit as a “proud American” and complains that the documentary speculates about his family background and ethnicity. He did not disclose that he has cultivated considerable mystery about his origins. It is clear from the documentary and from *The Room* that Mr. Wiseau speaks with an accent. He has been asked in numerous radio interviews and at numerous fan events where he is from, what sort of accent he has and what languages he speaks. Presumably in an effort to cultivate more mystery, Mr. Wiseau never answers the question directly but always brings his answer back to the fact that he is an

American. At one point a radio interviewer asks him “What part of America are you from Poland, Czechoslovakia or France?”

[35] Complaining that Roomful of Spoons enquires into his ethnic background without disclosing that individual and media followers of *The Room* had been speculating about this for years and without disclosing that mystery about his origins comprises part of Mr. Wiseau’s public personality also, in my view, amounts to material non-disclosure.

(iii) Copyright Complaints

[36] In his affidavit, Mr. Wiseau suggested that, if the documentary were released, he would lose control and exclusivity over copyright in *The Room*.

[37] Mr. Wiseau made this allegation based on the fact that the documentary contains seven minutes of excerpts from *The Room*. If the allegation has any legal merit, it would have been relevant to disclose that *The Room* has been available in its entirety on YouTube for approximately four years and that Mr. Wiseau had not taken any steps to have it removed from YouTube before he obtained the *ex parte* injunction.

[38] In addition, Mr. Wiseau did not draw the court’s attention to the fact that he would not lose exclusivity of copyright if the defendants use of excerpts from *The Room* amounted to “fair dealing” under the *Copyright Act* RSC 1985, c. C-42. Mr. Wiseau was well aware that the defendants were relying on the concept of fair dealing. They had raised it with Mr. Wiseau’s lawyers as early as April 2016.

B. The Legal Test For Disclosure

[39] Rule 39.01 (6) of the Rules of Civil Procedure states that, on a motion without notice, the moving party “shall make full and fair disclosure of all material facts, and failure to do so is in itself sufficient ground for setting aside any order obtained on the motion or application.”

[40] In *Chitel et al. v Rothbart et al.*, [1982] O.J. No. 3540, 141 DLR (3d) 268, the Court of Appeal noted that the duty on an *ex parte* motion included the obligation to disclose relevant facts which may explain the defendants’ position, if known to the plaintiff. If disclosure falls short of that, or if the court is misled, the court will not exercise its discretion in favour of the plaintiff when asked to continue the injunction (at para. 18).

[41] In *United States v. Friedland* [1996] O.J. No. 4399 (Ont. Gen. Div.) Sharpe J. (as he then was) explained the rationale for the requirement at para. 26:

“The Judge hearing an *ex parte* motion and the absent party are literally at the mercy of the party seeking injunctive relief. The ordinary checks and balances of the adversary system are not

operative. The opposite party is deprived of the opportunity to challenge the factual and legal contentions advanced by the moving party in support of the injunction. The situation is rife with the danger that an injustice will be done to the absent party.”

[42] A fact is material and should be disclosed if it is relevant to the balancing of interests involved in granting an injunction. It is not necessary that the fact affect the outcome of the motion: *United States v. Friedland* at para. 36; *Fox v Fox*, 2012 ONSC 3842, [2012] O.J. No. 2959 at para. 32.

[43] The plaintiffs advance several submissions in response to allegations of material nondisclosure.

[44] First, they submit that the matters at issue would have required Mr. Wiseau to denigrate his own work. That, say the plaintiffs, would be unreasonable.

[45] I disagree. The nature of the disclosure required turns on the nature of the complaint made. Here, the complaint is that the documentary denigrates the work of Mr. Wiseau. However, Mr. Wiseau’s public persona is based on the denigration of his work. That should have been disclosed. If that is a sensitive subject for the plaintiffs, they should consider whether they really want to base their complaint on that allegation. The plaintiffs were represented by a highly regarded law firm that specializes in intellectual property rights. I would expect counsel at such a firm to be able to craft a message that both discloses matters to the court and protects the plaintiffs’ sensibilities.

[46] Second, the plaintiffs argue that they made proper disclosure. They point out that a copy of the documentary was available to Justice Diamond on the first hearing (but not to Justice Akbarali on the second hearing), that one of the exhibits to Mr. Wiseau’s affidavit contains the comment that *The Room* is the “Citizen Kane of bad movies,” that the defendants’ statement of defence refers to fair dealing and is attached to Mr. Wiseau’s affidavit and that the plaintiffs’ factum before Justice Akbarali refers to fair dealing.

[47] I do not accept that these disclosures meet the test required on an *ex parte* injunction. The statement of defence is appended as an exhibit to the affidavit. The “Citizen Kane” comment is found in the middle of another exhibit to the affidavit. The exhibits are part of a 179 page motion record. There is nothing in Mr. Wiseau’s affidavit that draws attention to these points. Nor is there anything in the factum before Justice Akbarali that draws attention to them. It is insufficient for a plaintiff to simply append a document as an exhibit to an affidavit without highlighting in the text of the affidavit, the important portions of the exhibit: *Euro United Corp. (Interim Receiver of) v Rehani*, [2003] O.J. No. 2426, (ONSC) at para. 11.

[48] Although the documentary may have been made available to Justice Diamond on the initial attendance, it is one hour and 48 minutes long. Making the documentary available and expecting a judge to watch it in its entirety, to check if the plaintiffs are making proper disclosure

is both unrealistic and defeats the purpose of the full and fair disclosure rule. It is unrealistic because judges hearing *ex parte* matters are unlikely to have an extra hour and 48 minutes to watch a documentary. It defeats the purpose of the rule because it is the plaintiffs who are required to draw the judge's attention to contrary facts and arguments. The judge is not required to conduct a forensic audit of the plaintiffs' materials to ensure that they make full and fair disclosure.

[49] With respect to the alleged disclosure in the factum before Justice Akbarali, the plaintiffs filed a 25 page factum on the attendance before her. The reference at issue is found in paragraph 58 of that factum and reads: "It is anticipated that the defendants may attempt to argue their infringement of the plaintiffs' copyright is permitted by fair dealing. There is therefore a serious issue to be tried regarding copyright infringement." Nowhere does the factum explain the concept of fair dealing and nowhere does the factum suggest that the concept of fair dealing gives parties like the defendants the express right to use the plaintiffs' work for the purposes of review, critique or news.

[50] Finally, the plaintiffs argue that a finding of material nondisclosure is not necessarily fatal to the continuation of the injunction. The court does have discretion to continue the injunction even where there has been material nondisclosure, if it is in the interests of justice to do so: *Univalor Trust v Link Resource Partners*, 42 C.P.C. (7th) 149; [2012] O.J. No 5021, at paras. 4-5.

[51] I accept that as a correct proposition of law. As the plaintiffs pointed out, however, a principal reason for retaining such discretion is to ensure that unscrupulous parties cannot take advantage of a strict standard of nondisclosure because they have no case on the merits. That is not the situation here. In my view, the defendants are not unscrupulous parties trying to take advantage of a technical rule. They are small-scale filmmakers, who appear to be acting in good faith and, in my view, have a legitimate right to have their documentary distributed. This will become clearer in my discussion of the issues to be tried, the balance of convenience and irreparable harm.

[52] In my view it would have been material to the weighing of interests on the *ex parte* hearing to provide the court with a fair summary of the statements in the documentary to which Mr. Wiseau objected, if not to provide a verbatim transcript of the statements. In addition, it would have been equally material to disclose to the court: that Mr. Wiseau's and *The Room*'s cult status were based on what people perceived as the poor quality of the movie, that the allegations about a relationship with Mr. Sestero were at least suggested at in Mr. Sestero's book, that the concept of fair dealing may entitle the defendants to use 7 minutes of excerpts from the movie in the documentary and that the entire movie had been available on YouTube for years without the plaintiffs taking any steps to remove it. The plaintiffs failed in each of these obligations. The injunction should be lifted for that reason alone.

[53] In the event I am wrong in this, I go on below to apply the test for granting an interlocutory injunction to the facts of this case.

II. The Test For An Injunction

[54] To obtain an interlocutory injunction, the plaintiffs must establish that:

- (a) There is a serious issue to be tried, in the sense that the underlying claim is not frivolous or vexatious;
- (b) They will suffer irreparable harm if the injunction is not granted, which cannot be adequately compensated for in damages; and
- (c) The balance of convenience favours granting an injunction.: *RJR-MacDonald Inc. v Canada (Attorney General)*, [1994] 1 S.C.R. 311 at 334 to 343

[55] In my view, the materials the plaintiffs filed on this motion fail to meet any of these three tests in a manner sufficient to enjoin the release and distribution of *Room Full of Spoons*. I say in a manner sufficient to enjoin the documentary's release because, with respect to some issues, the plaintiffs have established a serious issue to be tried but even on those issues, the concepts of irreparable harm and balance of convenience militate against the plaintiffs.

A. Serious Issue to be Tried

[56] The plaintiffs raise six legal issues which they submit raise serious issues for trial:

- (i) Infringement of copyright;
- (ii) Misappropriation of personality;
- (iii) Breach of moral rights;
- (iv) Passing off;
- (v) Intrusion upon seclusion; and
- (vi) Fraudulent misrepresentation and breach of contract.

[57] My analysis of whether there is or is not a serious issue to be tried on any of these questions is conducted solely for the purpose of determining whether an interlocutory injunction should issue and is obviously based solely on the record before me. I am not intending to bind any other judge before whom the issue may come for a different purpose and with a different record.

(i) Infringement of Copyright

[58] The plaintiffs allege that the defendants have breached the *Copyright Act* by using approximately seven minutes of excerpts from *The Room* in their documentary and by using

other photographic images in which they claim to have copyright. The plaintiffs' real concern appears to be use of the excerpts from the movie. As a result, the bulk of the analysis in this section will be devoted to that issue. I will deal with the use of photographic images more briefly at the end of this section.

[59] In response to the allegations of copyright infringement, the defendants rely on the concept of fair dealing under the *Copyright Act* and submit that their use of copyrighted material is sanctioned by the act.

[60] To gain the protection of the fair dealing provisions, the defendants must establish:

- (a) That the dealing was for a sanctioned purpose; and
- (b) That the dealing was fair.

CCH Canadian Ltd. v Law Society of Upper Canada, 2004 SCC 13, [2004] S.C.J. No. 12

(a) Sanctioned Purpose

[61] Section 29.1 of the Copyright Act provides that fair dealing for the purpose of “criticism or review” does not infringe copyright if the source from which the material is taken is “mentioned”. Section 29.2 contains a similar exception for the purpose of “news reporting”.

[62] In *CCH*, the Supreme Court of Canada noted at para. 48 that fair dealing is not an infringement of copyright. As a result, fair dealing is not so much a defence as it is a user's right. The goal in the *Act* is to maintain a proper balance between the rights of a copyright owner and copyright user. To maintain that balance, the concept of fair dealing should not be interpreted restrictively. The court concluded by quoting favourably from Professor David Vaver's *Copyright Law*, (Toronto: Irwin Law, 2000) at p. 171:

“User rights are not just loopholes. Both owner rights and user rights should therefore be given the fair and balanced reading that benefits remedial legislation.”

[63] In *CCH*, the Supreme Court was dealing with the research aspect of fair dealing under s. 29 of the *Copyright Act* and held that research should be given a large and liberal interpretation to ensure that users' rights are not unduly constrained (at para. 51). A similar large and liberal interpretation should be applied to the criticism, review and news reporting provisions of the fair dealing exception.

[64] As the English Court of Appeal noted in *Time Warner Entertainments Co. LP v. Channel Four Television Corporation PLC* [1994] E.M.L.R. 1, once a film has been put into the public domain it must be susceptible to criticism or review, provided the criticism or review constitutes fair dealing with the work (at 14).

[65] To determine whether a particular use amounts to fair dealing, the court should attempt to make an objective assessment of the defendants' real purpose or motive in using the copyrighted work: *United Airlines Inc. v. Jeremy Cooperstock* 2017 F.C. 616 (CanLII) at para. 122. This should include an assessment of whether there is some sort of ulterior motive behind the dealing: *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 SCC 37 at para. 23, [2012] 2 S.C.R. 345.

[66] The Supreme Court of the United States put it slightly differently in *Campbell v. Acuff-Rose Music, Inc.* 510 US 569 (1994) at 579 :

“The central purpose of the inquiry at this stage is to determine whether the user of the copyright has simply copied for the sake of copying or whether the user has added something new “with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words whether and to what extent the new work is “transformative” although such transformative use is not absolutely necessary for a finding of fair use the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works. Such works lie at the heart of the fair use doctrine’s guarantee of breathing space within the confines of copyright and the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.”

[67] While that test is phrased slightly differently than the test in *CCH* and *United Airlines*, its underlying purpose is similar: to determine if the copying has been done so the copier can appropriate for themselves the benefits associated with the original or whether the copying is done for some more socially constructive purpose.

[68] At the request of both parties I have viewed the entirety of *Room Full of Spoons* and am satisfied that its use of any copyrighted materials is for the purpose of criticism, review or news. While the defendants no doubt have a commercial purpose behind the creation and marketing of their documentary, that does not detract from its character as criticism, review or news.

[69] It is clear from watching *Room Full of Spoons* that the purpose of showing brief excerpts from *The Room* is not to reproduce the movie but to provide a base for commentary that the documentary provides on the clip in question. *Room Full of Spoons* follows a fairly consistent pattern in this regard. It introduces the excerpt through an interview with an actor, crewmember

or fan of the movie who provides some sort of commentary. The clip is then shown to validate or amplify on the commentary. In some cases the order is reversed. In other cases, the clip is framed by both an introductory and conclusory comment. What is clear is that the clip is reproduced to provide analysis, not to reproduce the movie.

[70] The scene in which the audience throws spoons at the screen provides a useful example. The excerpt is accompanied by an explanation from one of the cameramen about how the photograph of the spoon got to be in the shot. That is followed by shots of fans explaining why they throw spoons at the screen and shows clips of fans doing so.

[71] The plaintiffs submit that the main purpose of the documentary is to be an expose of *The Room* through personal, derogatory and salacious attacks on Mr. Wiseau and Mr. Sestero, not criticism, review, or news. Having watched *Room Full of Spoons* in its entirety, I do not accept the plaintiffs' submission.

[72] *Room Full of Spoons* examines how *The Room* was made and how it became a cult classic. While there is some review and critique of Mr. Wiseau's talent as an actor or director, the comments are balanced and well within the bounds of reasonableness.

[73] By way of example, while a love scene early on in *The Room* has been subject to ridicule in various reviews and commentaries, *Room Full of Spoons* shows the actress involved in the scene describing Mr. Wiseau as being very respectful of her as an actress and a person. Others are quoted as saying that:

- (a) Whatever critics may say of *The Room*, it was something Mr. Wiseau wanted to create and managed to do against all odds. Not many people have the ability to turn their ambitions into reality. Mr. Wiseau did.
- (b) They have great respect for Mr. Wiseau and don't regret any involvement with *The Room*.
- (c) Mr. Wiseau has brought people enjoyment and laughter through *The Room*.
- (d) Mr. Wiseau wanted to touch people and he has done that.
- (e) Although *The Room* is known as the worst movie ever made, if that is so, why does it have 40 million fans?

[74] One of the defendants who narrates the documentary concludes with a message of gratitude that *The Room* has taken him all over the world and introduced him to one of the most interesting people in Hollywood.

[75] While *Room Full of Spoons* is not necessarily an apotheosis of Mr. Wiseau, it is respectful of his achievement and recognizes that it is easier to heap scorn on the accomplishments of others than to create something yourself.

(b) Is it Fair Use?

[76] The fact that the use to which *Room Full of Spoons* puts copyrighted materials is for the purpose of review, critique or news does not end the inquiry. The court must still determine whether the use is fair.

[77] The copyright act does not define fair use.

[78] Whether something is fair is a question of fact and depends on the circumstances of each case: *CCH* at para. 52. In *CCH* the Supreme Court of Canada set out the following list of factors to consider when determining fair use:

- (i) The purpose of the dealing.
- (ii) The character of the dealing.
- (iii) The amount of the dealing.
- (iv) Alternatives to the dealing.
- (v) The nature of the work.
- (vi) Effect of the dealing on the work.

[79] **The Purpose of the Dealing** has already been dealt with above. I find that the copyrighted material was used for the purpose of review, critique and news.

[80] **The character of the dealing:** It may, depending on the circumstances, be relevant to consider the custom and practice in a particular field to determine whether the dealing is fair: *CCH* at para. 55. The relevant practice to consider here is that of documentary filmmaking for the purposes of review, critique or news. It is common practice in documentary films to show a film clip of another event and then have people comment on the content of the clip. That is precisely the character of the dealing in *Room Full of Spoons*. Incorporating passages from published works or films for the purposes of commenting on them is a type of dealing that is fair: *Time Warner Entertainments Co. LP* at 14. In *Room Full of Spoons*, the use of selected clips from *The Room* was consistent with this practice. The clips are used to support commentary about how the film was made, its artistic choices, the experience of actors and crew members and to explain how the movie became a cult phenomenon.

[81] **Amount of the dealing:** The documentary uses seven minutes of clips from the movie. The plaintiffs argue that the defendants have introduced no evidence of practice in the industry to show that this is a reasonable amount of dealing. While I acknowledge that the onus is on the defendants to establish fair dealing, I also note that the plaintiffs have not introduced any evidence to suggest that using seven minutes of excerpts is an unreasonable amount of dealing.

[82] The amount copied may be more or less fair depending on the purpose. In *CCH*, the Supreme Court noted at para. 56 that, for purposes of research or study, it may be essential to copy an entire academic article or an entire judicial decision but that such degree of use would not likely be fair for purposes of criticism.

[83] A serious film critique does, however, require that you spend sufficient time showing excerpts of the film itself: *Time Warner* at 12. Here, the defendants used seven minutes of clips from *The Room* which is 99 minutes long. *Room Full of Spoons* is 108 minutes long. As a result, 6.48% of *Room Full of Spoons* consists of clips from the movie. In *Time Warner*, the use of 12 minutes of excerpts from the movie *Clockwork Orange* constituted fair dealing in a 30 minute program commenting on that film.

[84] It is worth underscoring that the amount of dealing in the documentary in no way replaces the movie. The longest clip from *The Room* is 21 seconds with most excerpts being only a few seconds long. Having viewed *Room Full of Spoons* I find that the amount of dealing from *The Room* is consistent with the purpose of critique, review and news.

[85] **Alternatives to the dealing:** The plaintiffs submit that as an alternative to the dealing, the defendants could have used a more limited number of clips rather than the 69 clips they used. As noted, those 69 clips come to approximately 7 minutes, with each excerpt lasting only seconds. While the plaintiffs attack the use of excerpts generally, they have not pointed to a single specific use that they say is unnecessary.

[86] The defendants point out that there is no non-copyrighted equivalent of the movie that they could have used to report and comment on it. I find that, as a practical matter, there were no alternatives to the dealing.

[87] **The nature of the work:** There is nothing confidential about *The Room* or the excerpts the documentary uses. *The Room* has been widely disseminated and has been widely available in its entirety and in portions on YouTube.

[88] **Effect of the dealing on the work:** The plaintiffs submit that *Room Full of Spoons* essentially duplicates *The Room* so that people do not need to see it. The Supreme Court of Canada recognized in *CCH* that, if the reproduced work is likely to compete with the original, this may suggest that the dealing is not fair (at para. 59).

[89] I do not accept the plaintiffs' characterization that *Room Full of Spoons* duplicates *The Room*. *The Room* is a 99 minute movie. Seven minutes of isolated clips of a few seconds each do not reproduce the original movie. Particularly not here, where the movie's cult status comes not from people simply wanting to know "Who did it" as might be the case with a mystery where knowing the ending might ruin the movie. Its cult status derives from the social experience of seeing a movie where viewers dress as characters, mock the dialogue and throw objects at the screen. That type of social engagement presupposes familiarity with the movie.

[90] Moreover, the documentary is no substitute for the social experience of seeing the movie. If anything, the documentary may whet the appetite of the uninitiated to see *The Room* and share the social experience.

Attribution

[91] Sections 29.1 and 29.2 of the *Copyright Act* allow fair dealing for the purpose of criticism, review or news reporting provided the source of the copyrighted material is “mentioned”.

[92] The plaintiffs concede that the excerpts from the movie are attributed in the documentary. However, they complain that the documentary reproduces 18 still photos without attribution, in which photos the plaintiffs assert copyright. There is a serious issue to be tried with respect to the attribution of these photographs. That does not, however, warrant an injunction.

[93] The defendants underscored that, if attribution of the still photos is the issue, they could address that.

[94] It is clear that the real issue in this case is the use of excerpts from *The Room*, not the failure to attribute to the plaintiffs copyright in certain still photos. That said, if the plaintiffs hold copyright in the photographs, they are entitled to have them attributed.

[95] While I am ordering that the injunction be dissolved, I also order the defendants to attribute to Wiseau Films, those photographs used in *Roomful of Spoons* in which Wiseau Films has copyright.

[96] During the hearing neither party referred me to any authority concerning the standard of attribution required by section 29.1 or section 29.2. At the hearing I invited both parties to send me authorities in this regard.

[97] The plaintiffs provided me a copy of *Michelin v. Caw*, [1997] 2 F.C.R. 306, 1996 CanLII 11755 (F.C.) which notes at paragraph 74 that, “mentioned” is defined as meaning “to refer to briefly, to specify by name or to reveal or disclose...”.

[98] The defendants referred me to the *Copyright and Fair Dealing Guidelines for Documentary Filmmakers prepared by the Documentary Organization of Canada* (Toronto: Centre of Social Innovation, 2010) which suggests that brief acknowledgement in the end credits should satisfy the attribution requirement.

[99] On the authorities I was presented, including a credit at the end of *Room Full of Spoons* should satisfy the attribution requirement. To the extent there is any ambiguity about the length of the credit or the subject of the copyright registration, it goes without saying that erring on the side of caution can avoid expensive litigation. In the event the parties require assistance with this issue, I will remain seized of the matter.

(ii) Misappropriation of Personality

[100] Mr. Wiseau claims that the defendants have misappropriated his personality for their own commercial purposes.

[101] The law recognizes an individual’s right to control the commercial value and exploitation of his or her own name and likeness to prevent others from unfairly appropriating their personality for commercial benefit: *Krouse v. Chrysler Canada Ltd.* (1974), 40 D.L.R. (3d) 15 (Ont. C. A.) at p. 30-31; *Athans v. Canadian Adventure Camps Ltd.* (1977), 17 O.R. (2d) 425 (H.C.) at p. 434; *Gould Estate v. Stoddart publishing Co.* (1996) 30 O.R. (3d) 520 at para.8-13.¹

[102] The general concern underlying the tort is that the misappropriation of another’s personality implies that the person whose personality is being misappropriated (usually a celebrity of some sort) is endorsing the activity of the defendant: *Gould* at para. 14. This commercial benefit belongs to the celebrity, not to the defendant.

[103] In *Krouse*, the Ontario Court of Appeal recognized that, when developing the tort, courts must be mindful of the public interest. At page 30, the Court of Appeal noted:

“Progress in the law is not served by the recognition of a right which, while helpful to some persons or classes of persons, turns out to be unreasonable disruption to the community at large and to the conduct of its commerce.

...

The danger of extending the law of torts to cover every such exposure in public not expressly authorized is obvious.”

[104] In *Gould*, Lederman J. examined the potential dangers of the tort on freedom of speech, in part by quoting from *Estate of Presley v. Russen*, 513 F. Supp. 1339 (U.S. Dist. Ct. D.N.J. 1981) where the United States District court noted at page 1356:

“Thus, the purpose of the portrayal in question must be examined to determine if it predominantly serves a social function valued by the protection of free speech. If the portrayal merely serves the purpose of contributing information, which is not false or defamatory, to the public debate of political or social issues or of providing the free expression of creative talent which contributes

¹ Appeal dismissed at (1998) 80 C.P.R. (3d) 161 deciding the case on conventional copyright principles rather than on the tort of appropriation of personality.

to society's cultural enrichment, then the portrayal generally will be immune from liability. If, however, the portrayal functions primarily as a means of commercial exploitation, then such immunity will not be granted.”

[105] Lederman J. noted that, although Canada does not have a constitutional right to freedom of speech as between private actors, no principled argument had been advanced before him to suggest that considerations about freedom of expression should not animate courts when determining what limits to place on the tort of appropriation of personality. No such argument was raised before me either. The Court of Appeal in *Krouse* implicitly recognized this concern by referring to the obvious need for limits on the tort.

[106] In *Gould*, Justice Lederman reconciled the competing interests between the tort and freedom of speech by distinguishing between sales and subject. In the sales category of cases, the celebrity’s identity was being used merely to sell a product. In the subject category of cases, the celebrity’s personality is being used because it is the subject of the work as in the case of a biography. The subject category of cases would not fall within misappropriation of personality.

[107] This distinction requires the court to determine whether Mr. Wiseau’s personality is being used in *Room Full of Spoons* to help the defendants sell something, in which case the tort would apply, or whether the documentary is contributing information to public debate or is contributing to the free expression of creative talent which promotes society's cultural enrichment, in which case the tort would not apply.

[108] In my view the use of Mr. Wiseau’s personality in *Room Full of Spoons* is precisely the sort of artistic expression that courts have been concerned to protect.

[109] Mr. Wiseau is clearly a chief subject of *Room Full of Spoons*. His image is not being used to sell something but to educate the public about Mr. Wiseau’s contribution to one aspect of popular culture.

[110] In his affidavit, Mr. Wiseau presents himself as a public celebrity. He travels around the world to promote screenings of *The Room* and to engage with fans. In doing so, he has deliberately cultivated an aura of mystery. A celebrity who cultivates mystery must reasonably expect that his public will be curious and will want to explore the mystery, all subject to restrictions placed on freedom of expression by concepts such as defamation and intrusion upon seclusion. Mr. Wiseau is not claiming defamation. Intrusion upon seclusion will be examined later in these reasons.

[111] I do not believe there is any danger that the use of excerpts from *The Room* or of still photos of Mr. Wiseau would lead anyone to conclude that Mr. Wiseau was endorsing *Room Full of Spoons*. The documentary begins with a voiceover by Mr. Wiseau objecting to those who criticize *The Room* without understanding it. In addition it details Mr. Wiseau’s efforts to stop its screening and distribution.

[112] Mr. Wiseau also objects to the trailer associated with the documentary. It is unlikely that the trailer would lead anyone to believe that Mr. Wiseau was endorsing the documentary. The trailer makes clear that this is “the documentary Mr. Wiseau does not want you to see.” The trailer makes equally clear that Mr. Wiseau has tried to shut down screenings of the documentary.

[113] Mr. Wiseau submits that disclaimers like these create confusion in the public mind and actually suggest that the documentary is affiliated with Mr. Wiseau. While there has been some limited case law suggesting that this might be the case, it is limited to very peculiar factual circumstances: *National Hockey League v. Pepsi-Cola Canada Ltd.* [1992] 6 W.W.R. 216 at para 48 – 55; affirmed at [1995] 5 W.W.R. 403 at para. 2, 24. Mr. Wiseau has not explained how the disclaimers above would lead people to conclude that he was endorsing the documentary.

(iii) Passing Off

[114] Section 7(b) of the *Trademarks Act*, R.S.C., 1985, C. T-13 prohibits a person from directing attention to his goods, services or business in such a way as to cause or be likely to cause confusion between his goods, services and business and those of another.

[115] The plaintiffs allege that the defendants are passing off themselves and *Room Full of Spoons* as having an affiliation with *The Room* and Mr. Wiseau. For the reasons set out in the discussion of misappropriation of personality above, it is highly unlikely that anyone would confuse the documentary or the trailer for the documentary for the movie.

[116] The defendants have, however, used some images on social media sites in the past that would tend to cause confusion between *Room Full of Spoons* and *The Room* or Mr. Wiseau. By way of example, page 134 of the plaintiffs’ motion record is a photograph showing three of the defendants and Mr. Wiseau together, striking a pose. It suggests an association between the defendants and Mr. Wiseau. The defendants used the photograph at some point to promote pre-production sales of the documentary. Similarly page 136 of the motion record contains a social media advertisement for *Room Full of Spoons* using a photograph of Mr. Wiseau in a social situation. That photograph also tends to suggest an association between Mr. Wiseau and the documentary. It was unclear from the plaintiffs’ materials whether the defendants continued to use such photographs. Post-hearing communications with me suggest that all such materials have now been removed from social media sites.

[117] The use of these images does create an issue for trial but does not warrant an injunction. The defendants appear to have acted responsibly when issues were brought to their attention and appear to have stopped using these images. I will make myself available to the parties should they have any difficulties in this regard but I would urge both parties to exercise a degree of self-restraint in both how they market *Room Full of Spoons* and how they react to such marketing.

(iv) Moral Rights

[118] Section 14.1(1) of the *Copyright Act* provides that the author of the work has the right to the integrity of the work. Section 28.2 of the *Copyright Act* provides:

28.2 (1) The author's or performer's right to the integrity of a work or performer's performance is infringed only if the work or the performance is, to the prejudice of its author's or performer's honour or reputation,

(a) distorted, mutilated or otherwise modified; or

(b) used in association with a product, service, cause or institution.

[119] The plaintiffs claim that *Room Full of Spoons* breaches their moral rights. I do not accept that submission. In my view, there is no serious issue to be tried in this regard.

[120] The concept of moral rights is also subject to the user right of fair dealing enshrined in the *Copyright Act*. As I have already found, *Room Full of Spoons* constitutes fair dealing with *The Room*.

[121] Moreover, the instances of prejudice to Mr. Wiseau's honour or reputation that the plaintiffs allege are, in my view, unfounded. As an example of such prejudice, they allege that the documentary suggests that a former crew member was the director of *The Room* rather than Mr. Wiseau. That is not actually what the documentary says. The documentary contains clips of interviews with the person in question who claims that he was, in effect, the director because he framed camera shots and told people how to say lines. The documentary does not indicate that it supports those assertions. Those assertions have been in the public domain since at least 2011 when the same individual made those statements in an article published in *Entertainment Weekly*.

[122] Finally, as noted earlier, the overall message in *Room Full of Spoons* is not one that is prejudicial to Mr. Wiseau's reputation. It recognizes the sense of occasion, social engagement and positive social energy surrounding the screenings of *The Room*. It acknowledges that Mr. Wiseau has in fact touched a large number of people in a positive way, even if not in the way he originally intended.

(v) Intrusion upon Seclusion

[123] Mr. Wiseau submits that the defendants have committed the tort of intrusion upon seclusion by alleging that Mr. Wiseau financed the movie through the sale of illegal drugs, that he was in a sexual relationship with Mr. Sestero, and that he was born in Poland.

[124] The tort of intrusion upon seclusion consists of three elements: (1) intentional or reckless conduct by the defendants; (2) invasion, without lawful justification of the plaintiffs' private

affairs or concerns; and, (3) an invasion of a sort that a reasonable person would regard as highly offensive causing, distress, humiliation or anguish: *Jones v Tsige*, 2012 ONCA 32, at para 71.

[125] The manner in which *Room Full of Spoons* comments on the alleged drug dealing, the alleged relationship between Messrs. Wiseau and Sestero and Mr. Wiseau's ethnic origin do not, on the record before me, create a serious issue to be tried in relation to intrusion upon seclusion.

[126] First, as noted earlier, the documentary does not make the allegations Mr. Wiseau asserts in relation to drug dealing or Mr. Sestero. The references to those issues in the documentary are significantly more nuanced.

[127] Second, the essence of the tort lies in an *invasion* of the plaintiff's privacy usually by accessing private information about the plaintiff, spying on the plaintiff or engaging in some form of similarly offensive conduct.

[128] The comments in the documentary to which Mr. Wiseau objects are not based on any conduct of that nature. They are based on interviews with other actors and crew members from the movie. With respect to the comments about his relationship with Mr. Sestero, those comments were similar to those already in the public domain since the publication of *The Disaster Artist*, a publication of which Mr. Wiseau approved.

[129] The documentary does state as a fact that Mr. Wiseau was born in Poznan, Poland. The documentary also contains interviews with relatives of Mr. Wiseau who live in Poland. There is no suggestion that Mr. Wiseau's relatives were coerced into their interviews, that they were spied on or that they were somehow misled into being interviewed under false pretenses.

[130] A critical element of the tort is that the invasion be viewed as "highly offensive" to a reasonable person. The question we must therefore ask ourselves is whether a reasonable person would be highly offended by a documentary:

- (a) Showing voluntary interviews of actors and crew members recounting conversations that occurred openly on a film set.
- (b) Showing voluntary interviews with Mr. Wiseau's relatives.

[131] In my view, a reasonable person would not be highly offended by that conduct. The conclusion might be quite different if the conversations being recounted were themselves based on information obtained by stalking Mr. Wiseau or following him into places where he had an expectation of privacy. Those considerations do not arise in this case.

(vi) Fraudulent Misrepresentation and Breach of Contract

[132] The plaintiffs' final claim is for fraudulent misrepresentation and breach of contract.

[133] Mr. Wiseau claims that the defendants told him they were making a documentary about *The Room* which would cast Mr. Wiseau in a positive light and would respect his privacy. In view of that representation, Mr. Wiseau says he was “willing to *potentially* work with” (emphasis added) the defendants. Mr. Wiseau says that it was “always stipulated” that the plaintiffs would approve of how *The Room* and Mr. Wiseau were presented in the documentary, that he was to have final approval of the documentary and that a licensing fee agreement had to be agreed on before the documentary was finalized. As a result of this alleged agreement, Mr. Wiseau says he allowed the defendants to film him during “various promotional events, including those [he] attended in Toronto and New York City in 2011.”

[134] The defendants deny any such agreement.

[135] The allegations the plaintiffs have made in this regard do meet the test for a serious issue to be tried. Unlike some of the other issues the plaintiffs have raised, this one cannot be assessed as a question of law based on the record but will turn on credibility assessments.

[136] That said, the test for a serious issue is a low bar and the plaintiffs barely pass the threshold. There is nothing in writing to support this alleged agreement. Mr. Wiseau says that Mr. Sestero was present during the conversations in which the agreement was reached with the defendants. Mr. Sestero has not filed an affidavit supporting Mr. Wiseau’s assertions. Mr. Wiseau does not indicate what portions of the documentary are captured by this alleged agreement. Nor does Mr. Wiseau explain how he would have or could have prevented anyone from filming the promotional events to which he allegedly gave the defendants access. My impression after watching the documentary in its entirety is that none of the promotional events surrounding *The Room* are exclusive, by invitation only type events. They appear to be screenings at revue cinemas at which Mr. Wiseau makes an appearance on the street to engage with fans and in which he and different actors from *The Room* appear on stage in the movie theatre. Mr. Wiseau appears to make himself readily available for photographs with fans during these appearances.

[137] I note these frailties in the record because the strength or weakness of a party’s case on one of the three balancing factors is relevant to the balancing exercise on the injunction.

B. Irreparable Harm

[138] Irreparable harm refers to the nature of the harm rather than its magnitude. It is harm which either cannot be quantified or which cannot be cured. *RJR-MacDonald* at 405-406. It commonly includes damage to reputation and interference with property rights, such as copyright.

[139] The plaintiffs allege that the release of *Room Full of Spoons* will create irreparable harm because it interferes with the plaintiffs’ copyright in *The Room* and harms Mr. Wiseau’s reputation by virtue of the false and disparaging information it contains.

[140] As noted earlier, *The Room* does not present the allegedly disparaging information about Mr. Wiseau as fact but as part of the chatter on the set of the movie. Even the suggestion of drug dealing is presented in a more light hearted context. It is one of a series of imaginative stories that circulated on the set, not as fact, but as breezy chatter about where Mr. Wiseau got his money. It is presented in the context of other explanations such as being the “wild child” of a wealthy family or being part of an eastern European military organization that blew a hole in a bank. In other cases, such as the friendship with Mr. Sestero, the information was already in the public domain. It is difficult to discern how such information could cause irreparable harm.

[141] With respect to irreparable harm from the alleged breach of copyright, the plaintiffs allege that the documentary is a substitute for viewing *The Room*. If accurate, that might amount to irreparable harm. However, apart from making the bald allegation, the plaintiffs have not explained how that is so. As I have explained earlier, I do not find that allegation to have any merit.

[142] I am prepared to accept that loss of exclusivity of copyright would constitute irreparable harm but the plaintiffs have produced no authority to suggest that the use of excerpts from *The Room* in the manner in which the defendants have done would lead to their loss of exclusivity of copyright in *The Room*. Particularly not in light of my finding that the defendants’ use of the excerpts amounts to fair dealing.

[143] Where, as here, the plaintiffs seek a *quia timet* injunction, the evidence must be capable of supporting the inference that irreparable harm will occur if the alleged wrongful acts are carried out. The plaintiff need not show evidence that harm has actually occurred: *Operation Dismantle Inc. v Canada*, [1985] 1 SCR 441 at 457-58. At the same time, proof of irreparable harm must be more than speculative. The plaintiffs must establish a meaningful risk of harm.

[144] *Room Full of Spoons* has already been shown around the world. Between January 31, 2016 and April 20, 2017, the documentary was screened in Madrid, Poznan, Copenhagen, Sheffield, Winnipeg, Ottawa, Toronto, Montréal, Philadelphia, and Mexico City. The plaintiffs have not been able to point to a single instance of harm, confusion or damage being done to them because of any of those screenings.

[145] While the absence of alleged harm from these screenings is not determinative, the inability to point to any harm from them is a factor to take into account.

C. Balance of Convenience

[146] The balance of convenience requires the court to determine which of the two parties will suffer the greater harm if the interlocutory injunction is refused or granted: *RJR- MacDonald Inc.* at para. 62 – 63.

[147] The harm alleged by Mr. Wiseau is tenuous at best. It is important to note that Mr. Wiseau does not complain about damages for defamation. His damages are for breach of copyright and for breach of privacy. Even though damages for a *quia timet* injunction need not be established with precision in advance, it would have been possible for Mr. Wiseau to at least give the court a sense of how the alleged breach of copyright arising from the use of still photos in the defendants' efforts to market *Room Full of Spoons* would cause him damage. He has not done so.

[148] The defendants have introduced evidence of distribution agreements that they have been unable to enter into because of the injunctions issued to date and of their inability to fill orders for DVDs that they owe to people who donated funds to finance the documentary.

[149] A further factor in balancing the interests of the parties is that of timing. In 2015 Mr. Wiseau saw a description of *Room Full of Spoons* on an internet financing page which led him to conclude that the documentary was “negatively critiquing *The Room* and attacking [him] personally.” In addition, as the documentary began to be screened around the world, Mr. Wiseau wrote letters to various film festivals asking them not to screen it. Despite this knowledge, he did not move for an injunction until June of 2017.

[150] That timing is also relevant to potential damage to the defendants. The defendants understandably want to release the documentary more broadly in light of the soon to be released film, *The Disaster Artist*. The release of that film is likely to spur interest in *The Room* and in the documentary. Enjoining release of the documentary at this time is particularly harmful to the defendants.

[151] The final and perhaps most important factor in assessing the balance of convenience here is that of the public interest in freedom of expression. As Swinton J. Noted in *Aldelo Systems Inc. v Sinclair*, 2010 ONSC 5229, at para 19:

“Moreover, the balance of convenience weighs against the granting of the wide-ranging injunction sought. One of the considerations in the balance of convenience is the right of the defendants to freedom of expression and the public interest in the free exchange of ideas and information.”

[152] Justice Molloy expressed similar sentiments in the *Beidas v. Pichler*, [2008] CanLII 26255 stating at para. 74: “there can be no justification for restraining speech that is not defamatory, particularly at an interlocutory stage of the proceedings.” As noted earlier, there is no allegation of defamation here.

[153] In light of the foregoing, the balance of convenience strongly favours the defendants.

Conclusion

[154] For the reasons set out above I: (i) decline to continue and dissolve the injunction restraining the distribution of *Room Full of Spoons*; and (ii) order the defendants to attribute the use of still photographs in *Room Full of Spoons* in which the plaintiffs have copyright to the plaintiffs by adding an end credit to that effect. I will remain seized of the matter to deal with any issues that arise in implementing this order and to deal with any issues that might arise in advertising relating to *Room Full of Spoons*.

[155] If costs cannot be agreed, I will entertain written submissions. The defendants are to file written submissions within 21 days of the release of these reasons. The plaintiffs will have 10 days to respond, the defendants will have 5 days to reply.

Koehnen J.

Released: November 1, 2017.

CITATION: Wiseau Studio et al. v. Richard Harper, 2017 ONSC 6535
COURT FILE NO.: CV-17-577020
DATE: 20171031

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Wiseau Studio, LLC and Tommy Wiseau d.b.a. Wiseau
- Films

Plaintiffs

– and –

Richard Harper, Fernando Forero McGrath, Martin
Racicot d.b.a. Rockhaven Pictures, Roomfull of Spoons
Inc., Parktown Studios Inc., Richard Stewart Towns

Defendants

Reasons for Judgment

Koehnen J.

Released: November 1, 2017