

**CITATION:** Wiseau Studio, LLC et al. v. Harper et al., 2020 ONSC 2504  
**COURT FILE NO.:** CV-17-577020  
**DATE:** 2020-04-22

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** WISEAU STUDIO, LLC and TOMMY WISEAU d.b.a. WISEAU-FILMS,  
Plaintiffs

**AND:**

RICHARD HARPER, FERNANDO FORERO MCGRATH, MARTIN  
RACICOT d.b.a. ROCKAHVEN PICTURES, ROOM FULL OF SPOONS INC.,  
PARKTOWN STUDIOS INC., RICHARD STEWART TOWNS, Defendants

**BEFORE:** Schabas J.

**COUNSEL:** Daniel Brinza, for the Plaintiffs

Matthew Diskin, Meredith Bacal and Douglas Murray, for the Defendants

**HEARD:** January 6-10, 13, 14 and 17, 2020

**REASONS FOR JUDGMENT**

**Introduction**

- [1] In June 2003, the plaintiffs, Tommy Wiseau (“Wiseau”) and Wiseau Studio, LLC, released a feature film called *The Room*. It was a box office flop and received terrible reviews. *Entertainment Media* described the film as “[a] movie that prompts most of its viewers to ask for their money back – before even 30 minutes have passed.” A sign on the ticket booth where the film was playing read “NO REFUNDS” and contained an excerpt from a review that said, “watching this film is like getting stabbed in the head.”
- [2] Despite these reviews, or perhaps because of them, the film developed a cult-like status. Tommy Wiseau, who wrote, produced, directed and starred in *The Room*, has become somewhat of a celebrity, often attending screenings to promote the film, meet with fans, engage in question and answer sessions, and sell merchandise related to the film.
- [3] In 2011, Wiseau’s co-star and friend, Greg Sestero (“Sestero”), wrote a non-fiction book about the making of *The Room* called *The Disaster Artist – My Life Inside The Room, The Greatest Bad Movie Ever Made*. A film adaptation of the book was released in 2017 to broad critical acclaim. Its star, James Franco, who played Tommy Wiseau, received a Golden Globe Award for Best Actor in a Musical or Comedy. Wiseau was supportive of *The Disaster Artist*. He provided on-the-record interviews to the author as well as access to the original script of *The Room*, photographs and behind the scenes production

footage. Wiseau entered into licencing agreements with the filmmakers for use of footage from *The Room*, and appeared in *The Disaster Artist* himself.

- [4] Another film was also made about *The Room*, however, which gives rise to this lawsuit. In 2010, the defendant, Richard Harper (“Harper”) became a fan of the film after attending a screening in Ottawa. In 2011, together with his friends and fellow defendants, Fernando Forero McGrath (“Forero McGrath”) and Martin Racicot (“Racicot”), Harper sponsored a screening of *The Room* in Ottawa, which included an appearance by Wiseau. Harper and his friends hit it off with Wiseau, and after spending time with him in Ottawa and Toronto, and with Wiseau’s encouragement, they decided to create a documentary about *The Room* and its fans. However, not long after, Wiseau said he was no longer interested in participating in it.
- [5] Over the next few years, Harper, Forero McGrath and Racicot worked on the documentary, investing their own money and raising money through a crowdfunding website called Kickstarter. The documentary, entitled *Room Full of Spoons*, was completed in January 2016. It tells Richard Harper’s story of his interest in *The Room* and in Tommy Wiseau, how the film was made and reactions to it. It includes interviews with many members of the cast and crew, fans, film professors, critics, and others. The documentary also addresses questions about how *The Room* was funded and Wiseau’s background – including where he was born and how old he is – questions raised in *The Disaster Artist*, but about which Wiseau is secretive.
- [6] In 2015, Harper had tried to negotiate a licence agreement with Wiseau, as the documentary includes many clips from *The Room*. No agreement was reached, mainly because Wiseau wanted editorial control over *Room Full of Spoons*, and the defendants decided to proceed without an agreement. Wiseau, even before seeing the documentary, then began a campaign to denounce the documentary, accusing the defendants on social media of copyright infringement and illegal downloading, and sending letters to potential exhibitors of *Room Full of Spoons* threatening litigation. This resulted in many cancelled screenings, including a planned North American tour to 25 cities and to cities in Australia, Poland and the United Kingdom.
- [7] Nevertheless, in 2016 and early 2017 the defendants were able to arrange showings of the documentary at some film festivals in North America and Europe, and it received positive reviews. The defendants, who had now been joined in their project by the defendant Richard Towns (“Towns”), entered into negotiations with a California film distributor, Gravitas Ventures LLC, for a distribution agreement. The defendants also sent a copy of *Roomful of Spoons* to Wiseau in February 2016 in the hope that any concerns he had about the documentary would be put to rest.
- [8] Following further correspondence between Wiseau and the defendants in the spring of 2017, and an agreement by the defendants to delay release of the documentary for two weeks in early June 2017, Wiseau commenced this action by bringing an urgent motion, *ex parte*, for an injunction restraining the release and promotion of *Room Full of Spoons*.

The injunction was granted by Diamond J. on June 14, 2017, and was continued by Akbarali J. on June 23, 2017, who adjourned the matter to October 10, 2017, to allow the defendants time to retain counsel and prepare a response.

- [9] In the action, and on the motion for the injunction, Wiseau asserted, and continues to assert, that *Room Full of Spoons* breaches the plaintiffs' copyright in *The Room*, including Wiseau's moral rights, and that the defendants have unlawfully invaded Wiseau's privacy, misappropriated his personality and committed the tort of passing off. Although pleaded and relied on in the injunction proceeding, claims for misrepresentation and breach of contract were not pressed at trial.
- [10] After a hearing on October 10, 2017, the injunction was dissolved on November 11, 2017 by Koehnen J., who found, among other things, that the plaintiffs failed to make full and fair disclosure to the court on the *ex parte* motion, that the court was misled, and that on the evidence before him, the test for an injunction was not satisfied: *Wiseau Studio et al. v Richard Harper*, 2017 ONSC 6535. Following an unsuccessful motion for leave to appeal by the plaintiffs, and after the defendants indicated an intention to bring an anti-SLAPP (Strategic Litigation Against Public Participation) motion pursuant to the *Protection of Public Participation Act, 2015*, S.O. 2015, c. 23, the parties agreed to an early trial date and to filing affidavits which would serve as the direct evidence at trial. I will deal in more detail with many of these steps later in these Reasons.
- [11] In the meantime, because of the injunction and outstanding action, *Room Full of Spoons* has not been released or shown anywhere since the litigation was commenced. No distribution agreement has been concluded, and the defendants lost the opportunity to release the film while *The Disaster Artist* was having its successful run in late 2017, which would have created interest, or "buzz," in *Room Full of Spoons*.
- [12] The case was tried before me over two weeks, commencing January 6, 2020. For the reasons that follow, I dismiss the plaintiffs' action in its entirety. Further, I grant judgment in favour of the defendants on their counterclaim, which arises from the improper obtaining of the injunction, for which the plaintiffs agreed to indemnify the defendants as a term of obtaining the injunction, and other wrongful acts taken in this litigation and to prevent the release of *Room Full of Spoons*. I award the defendants \$550,000 USD in general damages and an additional \$200,000 CDN in punitive damages.

## **Background Facts**

### **Tommy Wiseau and the phenomenon of *The Room***

- [13] *The Room* is a 99 minute long feature film that was written, produced and directed by Wiseau. It tells the story of Johnny, a banker, and his fiancée, Lisa, who no longer loves Johnny and is sleeping with Johnny's best friend, Mark. It is a typical love triangle. Wiseau stars in the production in the leading role of "Johnny." Sestero plays the other

leading role as “Mark.” There is no evidence, and it remains a mystery, how *The Room*, which reportedly cost about \$6 M to produce, was financed.

- [14] The film is described in promotional material, such as on the back of the DVD package, as “an electrifying American black comedy about love, passion, betrayal, and lies. It’s what happens in real life. You could be with your loving woman and all of sudden, BOOM! She’s in bed with your best friend or family member.”
- [15] Following its release in 2003, *The Room* played for two weeks at a Los Angeles cinema, grossing \$1800. Critics panned the film. In addition to the reviews quoted above, the BBC described the film as “not just bad – it’s intoxicatingly awful.” *Entertainment Weekly* described it as the “Citizen Kane of bad movies.” *The Huffington Post* called it a “99 minute train wreck.”
- [16] Over time, however, *The Room* has developed a cult-like following and, as the BBC has reported, “so has its mysterious creator,” Tommy Wiseau. There are monthly viewing parties in at least 60 theatres all over the world. Wiseau often attends these screenings and is treated like a celebrity, signing autographs, posing for photographs, and selling *The Room* and Wiseau-related merchandise, including t-shirts and Tommy Wiseau underwear.
- [17] At screenings, fans often come dressed as characters in the film, and they laugh, heckle and throw things at various times during the film. This is because the film is so bad. Unlike the promotional statement on the DVD that it is a “black comedy,” reviewers have commented that there are very few jokes in the film, its production quality is poor, the script and acting are wanting with plot lines that go nowhere, and there are “punishingly long sex scenes.” As the BBC put it, *The Room* is “a car crash of incompetence and catastrophic misjudgment.”
- [18] Mystery around Wiseau is also part of the attraction to fans of *The Room*. Tommy Wiseau, like his character Johnny, has long hair, wears wraparound sunglasses and speaks English with a strong accent. Again quoting the BBC article, “[w]ith the luxuriant, suspiciously black mane of Kiss’s Gene Simmons and the heavily-accented slur of a drunk Count Dracula, Johnny has to be cinema’s least convincing banker.” However, Wiseau describes himself as a “proud American” who claims to have grown up in Louisiana, but refuses to disclose his age or how he paid for the film.

### **The Defendants and the Making of *Room Full of Spoons***

- [19] The defendant Harper discovered *The Room* in 2010, and has attended at least 25 showings of the film. Wiseau has been present at approximately 12 of these screenings. Harper introduced the film to his childhood friends, Forero McGrath and Racicot, and in April 2011, they sponsored a screening of *The Room*, sharing the cost of Wiseau’s \$1,500 appearance fee with the owner of the Mayfair Theatre in Ottawa, Lee Demarbre. They got along well with Wiseau during his time in Ottawa, and Wiseau invited Harper and his

friends to come to Toronto to help Wiseau with several screenings at the Royal Cinema, where they assisted in selling Wiseau's merchandise. They shared meals with Wiseau who paid for their travel and accommodation, and unexpectedly gave each of the three defendants \$80 in cash as well.

- [20] While in Toronto, on April 23, 2011, Harper raised the idea of making a documentary about *The Room* and its fans. Wiseau was supportive of the project, and agreed to participate in it. He suggested that they begin filming the documentary at the upcoming screening of *The Room* at the Ziegfeld Theatre in New York City.
- [21] Harper, Racicot, and Forero McGrath, with two hired assistants, rented a van and film equipment and drove to New York in June 2011. However, while on their way to New York, Harper received an email from "John," on behalf of Wiseau, withdrawing the invitation and advising that Wiseau was no longer interested in participating in the documentary. "John," who may well be Wiseau using an alias, indicated that Wiseau would not be in New York in any event until the next day.
- [22] The defendants, having made the time and financial commitments to go to New York, continued with their trip. Upon arriving in New York City they went to Times Square to obtain "B-roll footage" of the cityscape for use in the documentary. While doing this near the Ziegfeld Theatre, Forero McGrath noticed Wiseau in a sandwich shop, which was surprising given the email that said he would not be in the city until the next day. However, when the defendants approached Wiseau, he quickly left the sandwich shop, stating that he was very busy. Some of this was caught on camera by Racicot, and was used in the documentary. While it was asserted that the defendants chased Wiseau, there is no evidence from Wiseau on this point, Harper and Racicot strongly denied it in cross-examination, and Forero McGrath was not even asked about the encounter.
- [23] Harper, Racicot, and Forero McGrath attended the screening of *The Room* in New York City. They bought their own tickets, and interviewed fans on camera. Some of this footage was also used in the documentary.
- [24] Over the next 4 and half years, until early 2016, the defendants worked on the documentary, and its scope evolved. They interviewed all the actors who played named characters in the film other than Wiseau and Sestero, who refused to participate, and several members of the crew of *The Room*, including the camera operators, production assistants, the script supervisor, and the composer. The defendants also interviewed fans, including "patient zero" who discovered *The Room* and initiated its cult-like following, film critics, and film professors. They also investigated Wiseau's background, including traveling to Europe and tracking down his origins in Poland, interviewing his family there and determining his age.
- [25] Harper testified that he was unable to interview Sestero, who said he could not because he was under contract to Franco (discussed below), and because he was loyal to Wiseau. However, Sestero did provide Harper with introductions to others he wished to interview.

- [26] Each of the defendants had some experience with filmmaking, but none had ever been involved in making a full-length documentary before. Harper, who led the project, and directed and narrated it, had made short films and music videos. Racicot works in multimedia, where he gained experience with filmmaking, and took on the role of cameraman and cinematographer. Forero McGrath works as a video editor and performed that role for the documentary. In 2015, the defendant Richard Towns, who owns Parktown Studios Inc. (“Parktown”), joined the project and assisted in the completion of the documentary. Towns had experience in post-production and distribution-related work on a number of films. Parktown, which also employs Harper, provided post-production services (editing and sound editing) to support the project.
- [27] The four individual defendants invested approximately \$74,000 of their own money in the film, and raised \$26,000 through Kickstarter, a crowdfunding website, which funds were primarily used to pay for the defendants’ travel to Europe to investigate facts about Wiseau’s origins.
- [28] Rockhaven Pictures is the name that Forero McGrath, Racicot and Harper use for branding purposes for their projects. It is not incorporated. The defendant Room Full of Spoons Inc. was incorporated on December 11, 2015, and the individual defendants assigned all the rights in the documentary to it.
- [29] The name of the documentary, *Room Full of Spoons*, stems from a flaw in the film. There are framed photographs in the living room set where much of the film occurs; however, one of them has a stock photo of a spoon, as it appears no one put an actual photo in the frame. Fans noticed this, and whenever the photo of the spoon appears, fans throw spoons at the screen. Someone mentioned to the defendants that following a showing of *The Room* all you are left with is a “room full of spoons,” and hence the name.

### **Wiseau’s Initial Complaints**

- [30] While making the documentary, the defendants had further interactions with Wiseau. In March 2014, Harper and Forero McGrath attended an event at a bookstore in Toronto where Greg Sestero was signing copies of his book, *The Disaster Artist*. Tommy Wiseau was there and was friendly towards Harper and Forero McGrath. The four of them met up later that evening after a showing of *The Room* and had dinner together. Wiseau asked about the documentary and said he was not against it and hoped it would succeed.
- [31] However, the following year in March 2015, Wiseau began his attack on the defendants and the documentary, even though he had not yet seen it. He would not see *Room Full of Spoons* for another 11 months, in February 2016.
- [32] Just two days after the defendants’ Kickstarter campaign was launched on February 20, 2015, someone called “Raul,” acting for Wiseau but which may also be an alias for him, sent emails to Harper demanding that the defendants stop using material from *The Room*

in the documentary, and that all references to Wiseau be removed from the Kickstarter campaign.

- [33] On March 3, 2015, Wiseau filed a complaint with Kickstarter alleging that the defendants had stolen footage and were making false statements about Wiseau and “his business.” The complaint also asserted that the defendants needed permission to use any footage filmed at screenings. As a result of the complaint, Kickstarter removed the trailer for the documentary from the campaign, which reduced the number of pledges received by the defendants.
- [34] Harper spoke to Wiseau on the phone on March 3, 2015, proposing that they negotiate a license agreement. The parties exchanged email correspondence and a draft licensing agreement the next day. However, Wiseau demanded a large sum for each clip of *The Room* used in the documentary, and the draft agreement prepared by him provided that he would have final approval of the documentary, which required that the film be focused on the fans rather than on *The Room* or Wiseau. These terms were unacceptable to the defendants, and Harper advised Wiseau that while they had no difficulty allowing him to view the film before any public release so that he could raise any concerns with them, they were not willing to agree to give up “Final-Cut Privileges” to him.
- [35] Wiseau reacted, beginning in April 2015, and continuing until February 2016, by posting a three-part series called “Shame on You” on YouTube and his website. He also caused the series to be aired before theatre screenings of *The Room*. Although somewhat difficult to follow from the material before me, the “Shame on You” series was an attack on the defendants and their making of the documentary, and alleged that the defendants were violating copyright laws and committing other wrongs. Terms used in the campaign included “stealing,” “illegal downloading,” and “fraud.” However, the campaign did not appear to name the individual defendants or otherwise identify them other than through the name of the documentary, *Room Full of Spoons*.
- [36] During this period, Wiseau, through “Raul,” continued to demand payment for the use of clips from *The Room* in the documentary. He also demanded that the defendants not use his name and that promotional posters be changed, asserting copyright and trademark infringements. Wiseau complained that Harper and his colleagues were being “very disrespectful” and that their research was going in the “wrong direction.”

### **Room Full of Spoons**

- [37] The documentary was completed in January 2016. *Room Full of Spoons* is 109 minutes long. It contains a total of about 7 minutes of clips from *The Room*, all of which are short and used in conjunction with commentary or are the subject of commentary afterwards, often introduced by an interviewee or the narrator.
- [38] One of the plaintiffs’ witnesses, documentary filmmaker Synthian Sharp (“Sharp”), testified that the story arc of the documentary has three themes: (1) the experience and

culture surrounding *The Room* and its fans; (2) the making of *The Room*, as experienced by those involved; and (3) information about the mysterious Tommy Wiseau. Harper summarizes the documentary as “an in-depth commentary about the cult-film phenomenon of [*The Room*] and its creator, Tommy Wiseau.” He continued:

The Documentary criticizes and reviews the Film and reports on the social phenomenon responding to it. The Documentary addresses Mr. Wiseau’s acting style, the inconsistency in the Film’s scenes, the Film’s poor dialogue, ineffective character development, and unusual reliance on classically characterized “American” motifs (such as an excessive use of footballs). The Documentary reports on the Film’s cult-like following, despite the fact that it is widely renowned as being terrible.

- [39] Having watched the documentary, and *The Room*, I find the descriptions of it by Sharp and Harper, above, to be apt. Further, rather than seeking to replace the experience of *The Room*, *Room Full of Spoons* studies and celebrates the phenomenon and the community that has grown up around it. The documentary complements the original work, which would explain why several theatres and film festivals have sought to host double feature screenings.

#### **Wiseau’s Complaints about *Room Full of Spoons***

- [40] On February 23, 2016, Harper provided Wiseau with a “courtesy copy” of *Room Full of Spoons*. Wiseau, through “Raul,” had numerous objections to the documentary. These included the references to his origins, original name and birthdate (which he did not dispute as inaccurate), the amount of time devoted to his family in Poland, reference to a California civil court action against him for fraud, and claims by Sandy Schklair, credited as script supervisor of *The Room*, that he actually directed 90% of the film.
- [41] Wiseau complained that the documentary was “too negative” and said it “could be framed with more positivity by at least 60 percent.” He asked that at the end it say “something upbeat and positive.” In addition, he noted that there were “over 65 clips from *The Room* and Wiseau-Films original material including over 24 pictures.” Wiseau suggested that if they addressed his objections, he “might approve other clips.”
- [42] The defendants rejected Wiseau’s criticisms and objections, noting that he had not identified anything that was inaccurate in the documentary, and that the facts were obtained from interviews and public sources, including the California court files. They were not willing to change the content or tone of the film. As to the number of clips, the defendants reminded “Raul” that they had sought to have a licensing agreement, but in any event took the position that the clips “are covered under fair use.” They attempted to persuade Wiseau, apparently without success, that use of the clips in the documentary would “reignite past fans and spark curiosity from the next generation of *The Room* fans.”

- [43] Harper’s evidence at trial was that the defendants had left out many other more private details about Wiseau’s life, which they had learned in their research. Harper described some of these personal facts as “highly sensitive” and “potentially devastating” and said they did not include them “because they did not advance the narrative of the Documentary.”

### **Screenings of the Documentary and Reactions to it**

- [44] Even before the documentary was completed, theatres in the United Kingdom and Canada asked to screen it. In 2016 and early 2017, *Room Full of Spoons* was screened at 10 film festivals in Europe and North America. This was intended to promote the film in order to obtain a distributor. It was well received. *The Huffington Post*, in an article that provides an good summary of *The Room*, the phenomenon it has created, and the documentary, described *Room Full of Spoons* as follows:

Along with capturing the excitement and joy the movie has brought to those fans all over the world, Harper’s documentary solves a long list of mysteries fans have wondered about “The Room” for years. It is a very impressive feat of reporting.

- [45] *Ottawa Life Magazine* referred to the documentary, as “an encyclopaedic reference guide to everything a fan of the film would want to know.” The lead actress in *The Room*, Juliette Danielle, who plays “Lisa,” described the purpose of the documentary as “a love letter to *The Room*,” saying the team had “done their homework and talked to everyone involved in the project.”
- [46] Nevertheless, Wiseau (or “Raul” on his behalf) escalated his attack on the defendants after the festival screenings. Even before obtaining a copy of *Room Full of Spoons*, Wiseau sent emails to exhibitors and potential exhibitors of the film, alleging copyright infringement and illegal downloading of *The Room*, demanding that the film not be shown, and demanding that Wiseau’s image or references to *The Room* not be used in promoting *Room Full of Spoons*. In cross-examination, Harper confirmed much of this campaign by Wiseau, as he saw many of these emails and was told by several programmers that if they screened the documentary Wiseau would not let them screen *The Room* at their theatres. Indeed, the record contains an excerpt from *The Guardian* reporting that Wiseau had threatened legal action in Australia, stating: “World’s worst filmmaker’ forces Sydney Underground film festival to cancel its screening of documentary about cult film.”
- [47] Although Harper made further efforts to negotiate a resolution, Wiseau escalated matters, retaining counsel in California and in Ontario, sending cease and desist letters and making additional demands to change the documentary. The defendants accepted many of his demands for changes in an attempt to avoid a dispute, but Wiseau continued to make additional demands. As subsequent events confirmed, Wiseau did whatever he could to stop the release of the documentary.

- [48] As a result of Wiseau's threats to potential exhibitors, a planned tour of twenty-five North American cities and screenings scheduled in Australia, Poland and the United Kingdom in 2016 and 2017 were cancelled. Several cinemas in Canada and the U.K. had proposed doing double features of *The Room* and *Room Full of Spoons*, but these did not go ahead either. The defendants incurred significant expenses and effort in arranging these screenings, and accompanying media opportunities, all of which were lost.

### **Distribution Agreement with Gravitass**

- [49] In 2017, the defendants were in discussions with Gravitass Ventures, LLC ("Gravitass"), to complete a distribution agreement. As witnesses for the plaintiffs agreed, Gravitass is a respected independent film distributor in California, which had offered the defendants a distribution agreement for a term of 15 years, covering the United States and Canada. Gravitass was one of a number of distributors to reach out to the defendants, and expressed excitement at the prospect of releasing it around the time of *The Disaster Artist* in late 2017.
- [50] The uncontradicted evidence of the defendants is that the agreement was not concluded with Gravitass due to the legal steps taken by Wiseau in June 2017, discussed below. Harper and Forero McGrath were both cross-examined on this issue and confirmed that a deal with Gravitass would have been signed if Wiseau had not sued them. Although the plaintiffs' witness Shari Grewal suggested that the defendants would have needed errors and omissions insurance, which would have been an obstacle to distribution, Harper, testified in response that the defendants had been told that Gravitass would obtain the necessary insurance, or assist the defendants in doing so.
- [51] Grewal also suggested that there might need to be more edits, suggested by the distributor, but Harper said they had the resources ready to do that quickly. Similarly, while the draft agreement with Gravitass contained other deliverables that might need to be provided by the defendants, such as releases, cues, closed captions in various languages, mixing and final editing, the draft agreement gave them 120 days to address them, which Harper said was "lots of time."

### **Wiseau Obtains an Injunction**

- [52] In April and May 2017, the defendants engaged in further discussions with Wiseau's lawyers at Bereskin & Parr LLP, a well-known intellectual property law firm in Toronto. The defendants made a number of additional changes to the film in response to Wiseau's demands. Also at Wiseau's request, the defendants removed images and videos of Wiseau on social media and advertisements for *Room Full of Spoons* in an effort to reach a resolution. Although Wiseau complained that the promotional material suggested that he endorsed the documentary, in fact the defendants' materials made it clear that this was not the case. They described the film in the trailer, as "the documentary Mr. Wiseau does not want you to see."

- [53] *Room Full of Spoons* was to be released on June 1, 2017. However, on May 19 Wiseau's Ontario lawyers threatened to bring an injunction application unless the release was postponed by two weeks, which was agreed to by the defendants as "a gesture of good faith" in order to continue to pursue a settlement of Wiseau's complaints. The defendants' social media platforms promoting the documentary, developed at considerable expense on Facebook, Twitter, Instagram and YouTube, confirmed that the release date was pushed back to June 15, 2017.
- [54] Rather than negotiating, however, the plaintiffs used the delay to prepare a surprise injunction application. On June 14, 2017, Wiseau's lawyers brought a motion to this court, without notice, in Toronto, seeking an injunction to prevent the release of *Room Full of Spoons*. As Koehnen J. explained in his subsequent decision lifting the injunction, at para. 7, although Bereskin & Parr LLP "gave a couple of hours' notice to a lawyer in Ottawa who had acted as a corporate solicitor for ... the defendants in the past," that lawyer could not accept service and the motion on June 14 "proceeded as an *ex parte* motion." Justice Diamond granted the injunction and directed that the matter be addressed in court again on June 23. On that date, some of the defendants appeared, but they had not had the opportunity to retain counsel and sought an adjournment to do so and to file materials. Justice Akbarali therefore set a return date of October 10, 2017, to argue the matter, and the interim injunction continued until then.

### **The Disaster Artist**

- [55] While the injunction was in effect, another film about *The Room* was released, called *The Disaster Artist*. The film, a \$10M Hollywood production produced by and starring, among others, James Franco ("Franco"), Zac Efron and Seth Rogen, was based on Sestero's successful 2013 book, *The Disaster Artist: My Life Inside the Room, the Greatest Bad Movie Ever Made*.
- [56] *The Disaster Artist* premiered at the Toronto International Film Festival ("TIFF") in September 2017, and was released commercially in theatres on December 8, 2017. It garnered box office revenue of approximately \$30M, and received numerous awards and nominations in early 2018, including receiving the award for Best Actor in a Musical or Comedy at the Golden Globes, and an Oscar nomination for Best Adapted Screenplay.
- [57] *The Disaster Artist* is a dramatized version of the making of *The Room*. It chronicles the friendship between Wiseau and Sestero, their unsuccessful efforts to make it as actors in Hollywood, Wiseau's decision to make *The Room*, the making of the film, and its disastrous premiere. In the film, Wiseau's character, played by Franco, refuses to divulge where he is from despite speaking English with a thick accent, his age, or how he was able to fund the making of the film. Indeed, at the end of *The Disaster Artist*, a caption is displayed before the credits, stating that "[t]o this day no one knows... Where Tommy is from. Or where he made his money. Or how old he is."

- [58] Wiseau himself has cultivated these mysteries, refusing to answer questions on these topics, simply saying he is a “proud American.”
- [59] However, as Harper testified, by the time *The Disaster Artist* was released, some of these questions, and others, had already been answered. Wiseau’s origins and his age were apparently known to Franco, as one member of Franco’s team, Brandon Trost, had contacted Harper in 2015 asking about the documentary. Franco’s team wished to use it as reference material to help with their production. It was suggested that Franco might participate in the documentary, which was exciting for Harper and the other defendants who were “junior filmmakers.” Harper sent Franco and Trost an early “rough cut.” It was a password-protected screener such that Harper is aware that Franco and Trost viewed it; however, they never heard from Franco or Trost again.
- [60] Wiseau supported the *The Disaster Artist* film. At TIFF he participated in a question and answer session with Franco. At that session, which Harper attended, Wiseau stated that he had made an agreement assigning his “life rights” to Franco. While Wiseau produced the first half of the first page of a letter agreement dated January 21, 2014, that appears to relate to an assignment of Wiseau’s life story to S/Z Books, an entity owned by Franco, Wiseau has provided no other details about the agreement. However, in a *Vanity Fair* article reporting on the TIFF premiere, Franco was quoted as saying:
- “It cost \$6 million to make ... and it looks like it cost about \$6,” he laughed. “There was an insane billboard in L.A. for like five years that [Wiseau] must have paid hundreds of thousands of dollars alone [for], and it is the scariest thing you’ve ever seen, with his lazy eye, like, staring at you. It looks like an ad for a cult. I saw that billboard and was like, ‘No thanks; whatever they’re selling, it’s not for me.’ But [the advertising] paid off, because [*The Room*] plays in almost every major city at least once a year. I think we worked it out that he must make half a million or a million dollars a year, or something like that.”
- [61] Wiseau’s involvement with *The Disaster Artist* continued. He attended the Golden Globes with Franco, and came onstage when Franco accepted the Best Actor in a Musical or Comedy award, during which Wiseau unsuccessfully attempted to grab the microphone from Franco.

### **The Impact of the Injunction**

- [62] As a result of the injunction and litigation by Wiseau, the defendants were unable to complete the distribution agreement with Gravitass, which advised that it was not prepared to move forward with an agreement until the claim was resolved. The defendants have not been able to show the documentary or obtain other offers for distribution. The defendants were also unable to distribute DVDs or otherwise release copies of the documentary while the litigation continued. This created problems for them with people who had provided money supporting the project on Kickstarter, who had expected to

receive copies of the documentary in return for their investment. Some contributors asked for their money back.

- [63] Social media platforms promoting the documentary were made substantially bare and the defendants' investments in marketing and promoting the film were lost. Several interview requests could not be accepted, depriving the defendants of free publicity and the opportunity to spur interest in the documentary. Even once the injunction was lifted, Wiseau threatened Harper and others with further lawsuits wherever *Room Full of Spoons* may be shown, creating a cloud over the film and preventing its release anywhere.
- [64] Due to the timing of the injunction and the continuing lawsuit, *Room Full of Spoons* lost the opportunity to be released around the same time as *The Disaster Artist*. At trial, the defendants led uncontradicted evidence from an expert in calculating intellectual property damages, Doug Bania. His view was that, had *Room Full of Spoons* been released, as planned, prior to *The Disaster Artist*, it would have benefitted considerably from the marketing and media "buzz" from *The Disaster Artist*. Based on his analysis of other documentaries linked to feature films, *Room Full of Spoons* would likely have earned revenues of approximately US\$1.1 million, of which the defendants would have received about US\$660,000.

### **The Lifting of the Injunction**

- [65] On October 10, 2017, the continuance of the injunction was heard before Koehnen J. Prior to the hearing, Wiseau failed to attend for cross-examination on the affidavit he had filed in support of the injunction. This prevented the defendants from obtaining any financial or other disclosure from Wiseau as to his income from *The Room* and *The Disaster Artist*, and how, if at all, that may have been impacted by the release of *Room Full of Spoons*. To this day, Wiseau has not provided any financial disclosure or information about his agreements regarding his "life rights" or about any income he derives from *The Room*, *The Disaster Artist*, or anything else.
- [66] In detailed Reasons released on November 1, 2017, Koehnen J. dissolved the injunction because, in his view, "the plaintiffs failed to make proper disclosure on the earlier *ex parte* attendances and because they ... failed to persuade [him] 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."
- [67] Justice Koehnen found that "the plaintiffs fell seriously short of the sort of disclosure required for an *ex parte* injunction." He noted that Wiseau painted "a picture of himself as a serious filmmaker," complaining that the documentary "mocks, derides and disparages *The Room*," "casts aspersions on" Wiseau and invades his privacy, and breaches copyright law. However, Koehnen J. found material non-disclosure on each point.

- [68] Justice Koehnen noted that Wiseau did not disclose to the court that *The Room*'s fame is not because it is a serious film, but because its fame "rests on its apparently abysmal quality as a movie," and that people attend the film to mock it, not to admire it.
- [69] Wiseau also misled the court, Koehnen J. held, because of his assertion that the documentary said he was a drug dealer, which is not what was said, just that it was one of the rumours as to how the film had been financed. Wiseau also did not tell the court that there is mystery around the financing of *The Room* – a "mystery that Mr. Wiseau does not clear up but seems to foster as part of his image."
- [70] With respect to the invasion of privacy claim, Wiseau had complained that the documentary alleged he had a sexual relationship with Sestero. Justice Koehnen noted, "the documentary makes no such allegation." Rather, it notes that one actress commented, "a couple of others seemed to think they were a gay couple," but then adds that Sestero "seemed to want to follow Mr. Wiseau along like a younger brother." Further, Wiseau did not disclose to the court that Sestero's mother asked him not to have sex with her son, a conversation described in Sestero's book published in 2011.
- [71] Also on the invasion of privacy claim, Wiseau complained about the inquiries into his background in the documentary without disclosing that he has cultivated much mystery about his origins and that this is something his fans have been speculating about for years. As Koehnen J. noted, "[p]resumably 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?'"
- [72] As to the breach of copyright claim, Koehnen J. noted that Wiseau told the court that the documentary contains seven minutes of excerpts from *The Room*, but failed to disclose the relevant fact that "*The Room* has been available in its entirety on YouTube for approximately four years and ... Mr. Wiseau had not taken any steps to have it removed from YouTube before he obtained the *ex parte* injunction." Further, as Koehnen J. noted, 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."
- [73] Justice Koehnen then went on to consider the legal issues raised on the injunction motion, including the merits of the case relevant to the test for issuing an injunction. While the low test of raising a serious issue to be tried was met for several of the causes of action pleaded, Koehnen J. identified significant weaknesses in the plaintiffs' case, weaknesses that have been confirmed at this trial.

- [74] Due to the material non-disclosure by the plaintiffs, Koehnen J. awarded costs to the defendants on a substantial indemnity basis in the amount of \$97,034.68, inclusive of disbursements and taxes.
- [75] Wiseau unsuccessfully sought leave to appeal the setting aside of the injunction. The Divisional Court dismissed his motion for leave to appeal on June 15, 2018. However, prior to that motion the parties attempted to reach a settlement, and the defendants moved, unsuccessfully, to enforce what they believed to be a settlement on March 6, 2018.

### **Pre-trial Steps**

- [76] Justice Koehnen was appointed case management judge on March 13, 2018.
- [77] In early 2019 the defendants proposed to bring a motion to dismiss the action pursuant to Ontario's anti-SLAPP law, the *Protection of Public Participation Act*. However, following a case conference in February 2019, the defendants agreed not to bring that motion if the matter could be tried quickly. Justice Koehnen, with the agreement of the parties, then set a schedule for discoveries and the exchange of affidavit evidence, which would constitute the parties' evidence in chief at trial, with a view to having the entire matter heard in the fall of 2019. The trial date of January 6, 2020 was set on June 3, 2019.
- [78] The plaintiffs have had several counsel act on their behalf, and there were periods leading up to trial when the plaintiffs appeared to be without counsel. All of this is documented in several rulings and case management directions issued by Koehnen J. which were provided to me as the trial judge. However, evidence was exchanged in accordance with the schedule in the summer and fall of 2019.
- [79] Wiseau sought on several occasions to delay the schedule and adjourn the trial, including bringing a motion on December 10, 2019, which also included a request by Wiseau to have all witnesses testify in chief, even though both sides had filed affidavits from their witnesses. Also, as the endorsement records, Wiseau asked Koehnen J. to direct the Crown to prosecute the defendants for perjury based on their affidavits, in an attempt to adjourn the trial.
- [80] On December 10, 2019, Koehnen J. directed that the trial would proceed on January 6, 2020, and set out a schedule for the progress of the trial. On December 30, 2019, Wiseau brought a last-minute motion to adjourn the trial on the basis that he did not have counsel. This too was refused by Koehnen J., who noted in an endorsement dated December 31, 2019, that the position the plaintiffs found themselves was "a situation entirely of their own making and one about which I have warned Mr. Wiseau on many occasions." Justice Koehnen noted that since February 2019 he had dealt with 3 different motions by 3 sets of counsel to be removed from the record. In dismissing the motion to adjourn, Koehnen J. stated: "To use Mr. Wiseau's language it would be a 'major disservice to justice' to

allow him to delay access to justice to the defendants and others in the litigation system simply because he refuses to deal with lawyers on ordinary commercial terms.”

- [81] However, Wiseau was represented at his motion to adjourn on December 31, 2019, by Daniel Brinza, who appeared on a limited retainer to seek the adjournment. Justice Koehnen noted that Mr. Brinza was the 6<sup>th</sup> counsel to be retained by the plaintiffs. Mr. Brinza stated that he did not have sufficient time to prepare for a trial commencing a week later.
- [82] Following the release of Koehnen J.’s ruling on December 31, 2019, Wiseau sent counsel for the defendants, and Koehnen J., a document entitled “Total Withdraw” purporting to discontinue his claims. On Wednesday, January 1, 2020, Mr. Brinza asked that a motion to discontinue the claim be heard on Friday, January 3, 2020.
- [83] At the motion on January 3, 2020, Mr. Brinza argued again before Koehnen J. that Wiseau would be prejudiced by being forced on to trial without counsel. In addition, the “Total Withdraw” document, in which Mr. Brinza had no involvement, was reviewed. It attacked the Ontario justice system for, among other things, being “stacked against foreigners and self-represented litigants.” Justice Koehnen again reviewed the history of the proceeding in rejecting the plaintiffs’ submissions.
- [84] Of particular note was that in seeking to withdraw this action, the plaintiffs disclosed that they intended to bring a new action in another jurisdiction, presumably in the United States, for the same relief. Justice Koehnen noted that the result of this would be that, after having initially obtained an injunction and then pursuing the action for over two years, which has prevented the defendants from releasing the film, “the plaintiffs would deprive the defendants of an adjudication and would force them to wait another undetermined period of time until the plaintiffs’ new action is resolved.” Although it was suggested by the plaintiffs that the counterclaim could still proceed, Koehnen J. found that to be inappropriate, as the issues in the counterclaim are “intricately bound up with the main action,” and “require the issues in the main action to be determined.”
- [85] Finally, at the motion on January 3, 2020 (the Friday before the trial was to commence the following Monday), a request was made for Wiseau to testify by videoconference. While in the ordinary course the court would attempt to accommodate such a request, the request here was brought on the day before trial, long after the schedule had been set in which Wiseau’s availability during the week of January 6 was confirmed (as it was again on December 10, 2019 when Wiseau advised Koehnen J. that he would be attending the trial in person). In dismissing the request, Koehnen J. also noted that video conferencing raises logistical challenges when counsel are, not unexpectedly, focussing on other things. As well, he observed that this is a document-intensive case and “also a credibility case,” and it would not be in Wiseau’s interest “to expose himself to circumstances which could lead a trier of fact to draw adverse inferences about his credibility when the real issue is not credibility but confusion or miscommunication.” Justice Koehnen refused to allow Wiseau to testify via videoconferencing.

## **The Trial Process**

### **Preliminary Issues**

#### ***Wiseau's Attendance at the Trial***

- [86] The trial commenced on January 6, 2020. Mr. Brinza appeared on behalf of the plaintiffs and advised that he was retained for the trial. However, Wiseau, who was expected to be the first witness, was not present. I was advised that he did not intend to come until the second week of the trial. Mr. Brinza said that Wiseau had some concerns for his safety, asserting that he had received threats and that some of the defendants have “an unhealthy obsession” with Wiseau, which apparently made him feel insecure. No evidence was led to support these assertions, nor was it explained how this prevented Wiseau from coming in the first week of trial but not the second week. Wiseau’s unavailability in the first week, and now apparent availability to attend in the second week, was also inconsistent with what Wiseau had told Koehnen J. about his availability when the trial date was set in June 2019.
- [87] In any event, following a number of motions by Mr. Brinza for, among other things, an adjournment, to have Wiseau’s witnesses who are from the United States (including Wiseau) testify by video conference, and to have Wiseau’s testimony delayed until the second week of trial, all of which I dismissed, the trial proceeded. After further efforts to delay Wiseau’s attendance, Wiseau arrived suddenly and unexpectedly on Wednesday morning, January 8. He testified on that day and his evidence concluded on Thursday morning, January 9.

#### ***References to The Disaster Artist***

- [88] One of the motions brought by the plaintiffs at the outset of the trial was to exclude any reference to *The Disaster Artist*, essentially on the basis that it is irrelevant and that, somehow, mention of Sestero’s book and Franco’s film would have a “prejudicial effect on the fair adjudication of this action, because such mentions simply try to elicit unwarranted conflation and favourable comparisons between the successful Hollywood feature movie and the Defendants’ amateurish project.” The plaintiffs claimed that reference to *The Disaster Artist* would “constitute just a publicity stunt and a transparent attempt by Defendants at capitalizing on the fame and success of such book/movie.”
- [89] I dismissed that motion. *The Disaster Artist* is highly relevant to the counterclaim for damages arising from the obtaining of the injunction. Indeed, the reference to “capitalizing on the fame and success of it” is precisely what the defendants argue they missed being able to do due to the impact of the injunction and lawsuit. Further, the defendants noted that the agreement that assigned Tommy Wiseau’s “life rights” to the producers of *The Disaster Artist* was highly relevant to the plaintiffs’ standing to assert some of the claims raised in the statement of claim. The making of *The Disaster Artist*,

and the questions it raised, are also an important part of the narrative and context in which this dispute must be assessed.

### ***The California Court Documents***

- [90] During Wiseau's cross-examination, reference was made to documents in an action brought against Wiseau in the Superior Court of the State of California by Frederick R. Lietzke, whose wife, Chloe Lietzke, is identified as an Executive Producer of the *The Room*. The claim alleges, among other things, fraud against Wiseau. Wiseau's counsel objected to this evidence. Wiseau himself also took issue with references to the court pleading when testifying, arguing that the case was "closed." One of the court documents, a sworn declaration by Wiseau, had been previously produced and was included as an exhibit to Harper's affidavit provided to Wiseau months before the trial, without objection by Wiseau at the time.
- [91] Wiseau's cross-examination concluded on Wednesday afternoon, January 8. The following morning, before re-examination commenced, Mr. Brinza presented me with a motion for a mistrial and an affidavit which Wiseau had prepared himself in his hotel room overnight, informing me that the website for the California Superior Court had blocked access to the file and the only search result for the case returned the message "Case Restricted Pursuant To Court Order." Wiseau went on to state in his affidavit his belief that it is "a crime for anyone to publish anywhere [a] document related to that case." As well, the two documents from the case marked as exhibits appeared to have been obtained from a website called "plainsite.org" which, Wiseau's research showed, is a privately-operated website that collects and posts documents, including court documents, that might not otherwise be accessible and seeks money to remove such documents.
- [92] I deferred a final decision on the use of the court documents until Monday, January 13. At that time, I received a formal motion to expunge all references to the California action, and a second affidavit from Wiseau, dated January 12, 2020 prepared after he returned to California after testifying. That affidavit confirmed that Wiseau had been aware of the defendants' access to the California court record since he first saw the documentary in February 2016, as it contains a shot of one of the court documents; however, Wiseau asserts that he advised Harper of the order sealing the court file and that any publication of it would be a "contempt of court." Nevertheless, Wiseau took no steps to enjoin the release of the film on that basis or any other steps to enforce any sealing order.
- [93] Wiseau's January 12, 2020 affidavit also included a copy of a Judge's Order that the "entire record in this matter be sealed." It also stated that Wiseau had been informed by his "California legal counsel" that it is an offence to publish any content from a sealed file and that the sealing means "the case contents are legally considered never to have occurred and are not acknowledged by the state of California." Wiseau also stated that he had been advised, "once a Superior Court of California case record is sealed by court

order, a person listed as Defendant (on such sealed case record) gains the right to deny or not acknowledge anything to do with the legal proceedings...”

- [94] I dismissed the plaintiffs’ motion. I had no evidence that the defendants had improperly obtained or reproduced the court documents, or copies of them, which may be obtained from many sources. Nor did I have admissible expert evidence of California law on which to reach any conclusion that admitting the documents in evidence was contrary to California law. Further, later in the trial when Harper was cross-examined he denied knowing that the California case was sealed. As well, as noted, Wiseau had known of their use in the documentary for several years without taking any steps to object to their use in the lawsuit. In the end, however, these documents were of little, if any, relevance or value.

## **The Evidence at Trial**

### ***The Plaintiffs’ Case***

- [95] Wiseau filed evidence from 8 people in advance of the trial, including 2 affidavits from himself. At the outset of the trial I was advised that one of Wiseau’s witnesses, Chloe Sosa-Sims, did not wish to testify and her affidavit was not admitted as evidence. Two other affidavits were extremely short and of no real significance, and the defendants did not seek to cross-examine on them. Much of Wiseau’s written evidence was in an unusual or unsworn format. This is likely because of the revolving door, or lack, of counsel in the months leading up to the trial and the fact, as described below, that one of Wiseau’s witnesses, Jeanne Marie Spicuzza (“Spicuzza”), seemed to play the lead role in obtaining and preparing the evidence. While there are formal deficiencies in the evidence, I accepted all of it as one might from a self-represented litigant and treated it all as properly sworn and filed.

### ***Jeanne Marie Spicuzza***

- [96] Wiseau’s first witness was Jeanne Marie Spicuzza, from Los Angeles, who described herself as a “producer, writer, director, actor, performer, fine artist, market researcher, product developer, consultant and Chief Executive Officer at Seasons & a Muse, a seven-division entertainment company and corporate conglomerate established in 1993.” Her affidavit says that she has worked with Wiseau and has experience in producing “one documentary short, three narrative shorts and two narrative feature films.” In cross-examination she acknowledged that she met Wiseau in July 2018, and her affidavit stated, “since November of 2018, I have observed the present litigation and its effects on Tommy Wiseau.”
- [97] Spicuzza provided a two-page “expert witness statement” which discusses why *The Room* is appealing to its audience. It also states her opinions that the defendants have somehow attempted to “erroneously exploit the gains” of *The Room* and *The Disaster Artist*, that they have wrongly “outed” Tommy Wiseau, that *Room Full of Spoons* fails to

“contain production values that are competitive in the present motion picture industry,” and that she does not regard *Room Full of Spoons* as a proper documentary “but rather a tabloid or ‘hit’ piece, a category that would not qualify it for fair use.”

- [98] As became clear in the cross-examination of her, and others, Spicuzza has effectively run the trial for Wiseau, sourcing the other “expert” witnesses and obtaining their statements. With respect to her own report, Spicuzza says she “instructed herself” as to its scope and content. She attended the entire two-week trial, and assisted Mr. Brinza frequently, eventually taking a seat at the counsel table (with my permission) to avoid having to come forward to pass Mr. Brinza notes and to provide him with information that might be helpful in his prosecution of the case. In making this observation I am not being critical of Mr. Brinza. He took on this challenging case on short notice and I am sure Spicuzza’s assistance was valuable to him. In my view, Mr. Brinza handled himself very professionally, competently and with integrity.
- [99] Despite concerns about bias and her interest in the action, the failure to provide a formal expert report, and the limited relevance of her evidence, over the defendants’ objections I admitted Spicuzza’s evidence. This was largely due to concerns about trial fairness and I made clear that what weight, if any, I should give her evidence, could be addressed at the end of the trial.
- [100] Spicuzza’s evidence was not helpful. She was an advocate for Wiseau. After asserting that clips from *The Room* were used without commentary, she acknowledged she was stating this only regarding voiceover commentary. She could not identify a single clip, which was not accompanied by commentary in some fashion, before, after or during the clip. She took the view that a documentary is meant to enlighten, to uplift, to procure or promote a cause, and since in her view *Room Full of Spoons* was negative towards Wiseau and was “a tabloid or a hit piece” it did not qualify as a true documentary. While she agreed that a documentary could have a point of view, it was her view that it should be balanced and “respectful” of its subject.

### ***Shari Hamrick Grewal***

- [101] Shari Hamrick Grewal (“Grewal”) has been in the film production and distribution business in Los Angeles for about 30 years. She is familiar with production issues involving financing, insurance, completion bonds and clearance issues. Grewal noted that she deals with “fair use” issues and brings in lawyers to provide advice whenever that arises. She testified that while she has not produced any documentaries, she has sold many to distributors and broadcasters. Grewal has worked with Spicuzza on a film. Grewal signed two affidavits, prepared at Spicuzza’s request, the first addressing her reaction to and concerns with the documentary, and the second one elaborating on issues relating to errors and omissions insurance. Although the affidavits do not say so, Grewal said she was asked what would be required to distribute *Room Full of Spoons* or, put another way, could she sell it?

- [102] Following a brief cross-examination on her qualifications, in light of my earlier ruling on the admissibility of Spicuzza's evidence, counsel for the defendants agreed she could provide expert opinion evidence on the questions she articulated on the same basis.
- [103] Grewal's evidence was confusing. She made assumptions, which were not backed up by the evidence. In her cross-examination on the insurance issues, when she was unable to identify facts that suggested the defendants were corrupt, or lied, or made any misrepresentations or breached any licenses in making the documentary which would prevent them from obtaining insurance, she stated that she "wrote things that were possibly facts."
- [104] Grewal's concerns with the use of material from *The Room* or other sources in the documentary were inconsistent. She stated that "[a]ll materials and appearance of everyone on camera especially the main subjects would have to provide releases," but in cross-examination she acknowledged that if you are using other peoples' material you need to be sure it is "fair dealing," or get permission. In her second affidavit she stated that "[a]ny portion of this project deemed fair use could be included as long as the reason for the fair use is legal and standard and not be[ing] secured under false or fraudulent ways of misrepresentations by the filmmakers to those rightsholders." Of course, these are legal conclusions, which are for the court to make, as was her statement in her second affidavit that "common law, statutory and constitutional rights of privacy may have been violated." She made many other statements of law in her affidavits, which were inadmissible, and, in some circumstances, absurd, as came out in the cross-examination. To give just one example, she was asked about her assertion that the injunction was "lawful," but then admitted that she had not read Koehnen J.'s decision overturning it – she had only read sections of it, or a summary of it.
- [105] Much of Grewal's evidence seemed to simply assert a bias against *Room Full of Spoons* and the defendants. She stated that in her view the documentary is too long and that she found portions of it "very uncomfortable to watch." She asserted that it is not a documentary but more like a feature film because, she said, it is a "fan film," with Harper "boasting," and that at certain points she said it seemed to be "acted" and involved "on-camera stalking of a celebrity-type personality." When confronted on where there was stalking in the film, as she had asserted, Grewal could only say that was what she "felt," claiming that the defendants kept trying to film Wiseau when he did not want to be talked to or filmed, and that it "looked uncomfortable." As to her reference to "factual inaccuracies," Grewal simply said that there were parts of the film she "couldn't support."
- [106] When given a 2-hour adjournment to view the film again and identify passages that would identify her various criticisms, Grewal referred to the scene in the documentary where the defendants came across Wiseau by chance in Times Square, when Wiseau apparently did not want to be filmed. However, there is no chasing or stalking shown because, as the defendants testified, that did not occur. Like Spicuzza, Grewal stated that Harper should have been more "respectful," and she disliked the fact that the

documentary goes from being about *The Room* to being about Tommy Wiseau – but she could not explain why that made it any less of a documentary.

- [107] It was never explained why a documentary could not have the components and biases that Grewal described, nor did she define what a documentary is, other than to agree, in cross-examination, that the Academy of Motion Pictures defines a documentary as a non-fiction film, with the emphasis on fact and not fiction.
- [108] On the other hand, Grewal agreed that the comments on *The Room* were interesting and that portions of the documentary were investigative. When she was asked whether the documentary criticizes *The Room* she said, “Doesn’t everybody?” Assuming all the licensing and copyright issues and “factual inaccuracies” could be cleared up, Grewal conceded that she could market the film. Curiously, when asked if the documentary might have benefitted from being released before *The Disaster Artist* she said she did not know if that would have been allowed. She stated that the makers of *The Disaster Artist* would likely do “anything” to stop the release of *Room Full of Spoons* in advance of the release of *The Disaster Artist*.
- [109] Grewal acknowledged that she was familiar with Gravitass, and that while it is “not Sony” it is a film distribution company that includes documentaries, and that it could cover a film like *Room Full of Spoons* on its own errors and omissions insurance. She suggested that Gravitass might have required a number of revisions as well as other finalizing touches before it would be ready for distribution in 2017; however, she agreed that such work could be done relatively quickly.

### ***Ian Berry***

- [110] Ian Berry (“Berry”) is an American filmmaker who, in 2011 with Tommy Wiseau, produced a web-series called *Tommy Explains It All* and a short film entitled *Rico The Destructor*. His affidavit describes his dealings with Harper in 2014 when, at Harper’s request, he granted permission for Harper to use material from *Tommy Explains It All*. He said he did this after Harper explained that his documentary would be “a love letter to *The Room* and Tommy Wiseau.” Berry sent Harper a USB drive containing both *Tommy Explains It All* and *Rico The Destructor*.
- [111] In 2017, Berry said he “became aware that *Room Full of Spoons* wasn’t the ‘love letter’ Mr. Harper had led me to believe” but instead “seemed to me to be disparaging with regards to Mr. Wiseau and *The Room*.” He also became aware that the documentary included some clips from *Rico The Destructor*. Although he had not seen *Room Full of Spoons* (he saw it for the first time the night before he testified at the trial), Berry corresponded with Harper about it. Berry requested that his material be removed from the documentary and he sought to “void” his contract with Harper. He briefly retained a lawyer in Toronto, Mark Hayes, to pursue this. But he has taken no legal steps against Harper or the other defendants. It is not clear how many clips from Berry’s work are in *Room Full of Spoons*, but Berry said it was somewhere between 4 and 10.

- [112] In cross-examination, Berry agreed that his permission to use clips from *Tommy Explains It All* did not include retaining any editorial rights, nor any right of termination. He also acknowledged that he found out about these things from Wiseau who called him about it. He also agreed that he hired Mr. Hayes at Wiseau's suggestion, as Hayes was, at the time, representing Wiseau.
- [113] Berry was also questioned on whether *Room Full of Spoons* was a documentary, and said that a documentary can be many things as it is a wide category, and can have speculation, innuendo and even fiction in it.

### ***Tommy Wiseau***

- [114] Tommy Wiseau filed two affidavits, a Declaration and lengthy statements. Although not formally sworn, Wiseau asserted that the statements filed were sworn, and I have treated them that way.
- [115] Wiseau's evidence was difficult to follow. His first "Statement of Facts" includes a proposed licence agreement with the defendants' entity, Rockhaven Pictures, some correspondence with Harper, and many still photos from *The Room* reflecting clips and still photos said to be owned by the plaintiffs used in the documentary. He made assertions of illegal use of copyrighted material, unlawful downloading, malicious representation of the original materials and the inclusion of "unauthorized biographical data" against the defendants, among other things. In his second "Statement of Facts" prepared just a month before the trial, Wiseau asserted, among other things, that the defendants had violated copyright and "tampered" with the plaintiffs' property. He complained that "the information presented in *Room Full of Spoons* gives a negative impression of him and *The Room*," and asserted that the defendants "pursued" him "against his will, mocked his ethnic heritage and used expletives to refer to him."
- [116] Wiseau's first affidavit describes the making of *The Room* and tells us that it has become a "global phenomenon with millions of fans worldwide and thousands of screenings internationally." Wiseau himself has attended over 250 screenings. In cross-examination Wiseau said that he thinks he is "famous."
- [117] Wiseau disagreed with the description of *Room Full of Spoons* as a documentary, despite the fact that it is pleaded to be one in the statement of claim. He said it is a movie, not a documentary, though he did not explain why.
- [118] Although he pleaded in his statement of claim that there is a written assignment of the copyright in his works to Wiseau Studio LLC, he agreed he has never produced that document. He agreed that he had only produced a portion of the first page of the agreement assigning his life story rights to S/Z Books. He refused to say how much he was paid for his "life rights" or for *The Disaster Artist*, stating that this information was covered by a confidentiality clause.

- [119] Much of Wiseau's testimony was simply assertions without more. He avoided answering many questions and complained about the process.
- [120] Wiseau gave lengthy self-serving answers in re-examination. He claimed, as he did in his written evidence, that the defendants had "ripped" the clips of *The Room* from a Blu-ray disc and tried to tamper with it. He asserted that "ripping" the film from a Blu-ray disc was hurting his product, that the clips were not presented at the highest quality, and that what he thought was going to be clips used for one minute and a trailer turned out to be 7 minutes, for which he feels he should have been paid.
- [121] When questioned on the personal information about his birthplace, birthdate, and his original name in Poland, Wiseau's lawyer objected. However, on confirming that the plaintiffs' complaint was not that the information was incorrect but simply that it was included, I did not require Wiseau to confirm that information.
- [122] Wiseau confirmed that he has worked with Spicuzza, that they met socially, and that she had volunteered to help him with the case.

### ***Synthian Sharp***

- [123] Synthian Sharp is a self-described documentarian that has made many documentaries, some of which are feature length, and speaks on the subject at the University of California – Irvine twice a year. Sharp provided a six and a half page letter presenting his views on what constitutes a documentary. He confirmed that he wrote his letter at Spicuzza's request. He knew her from working on a film together. Sharp knew nothing about the proceedings and has not met Wiseau. He said he watched the documentary and was asked for his reaction, although he agreed that he might have assumed that the dispute had something to do with the rights of an artist. Counsel for the defendants did not object to his evidence, on the same basis as was done with Grewal's evidence.
- [124] Sharp's letter concludes that *Room Full of Spoons* is "entertainment reporting...an 'exposé' with a declared effort toward character assassination." However, in cross-examination his evidence was more nuanced.
- [125] Sharp stated that documentarians might have a bias, unlike journalists who are, in Sharp's view, supposed to remain unbiased. Documentarians are trying to compel you to a point of view, he said. With respect to "fair use," Sharp stated that in the film industry one's presentation must not be "reselling the original product in a slightly altered form" but rather must "fundamentally change the presentation."
- [126] Sharp's letter criticized *Room Full of Spoons* for being about the creator, Harper, and his journey in exploring the making of *The Room* and investigating Tommy Wiseau, which he described as "malicious." However, in cross-examination Sharp described *Room Full of Spoons* as a "compelling documentary" that was "well done." He said that watching *Room Full of Spoons* raised in him deep suspicions about Tommy Wiseau. Although he still seemed to be critical of Harper for telling the story from his own perspective, Sharp

acknowledged that this has become a documentary technique in which the narrator becomes the main character. He cited the well-known documentaries by Michael Moore as examples. Sharp said that watching *Room Full of Spoons* made him want to watch *The Room*, which he had not seen when he testified. Sharp stated that while some people will not want to see *The Room* after viewing the documentary, many others will want to see it. He also agreed that a documentary commenting on another work is unlikely to be as popular as the original work.

- [127] On the other hand, some of Sharp's evidence contained unhelpful attacks on the defendants' conduct, describing some of the script as "invasive commentary" and taking issue with whether the defendants were "invited" to New York by Wiseau.
- [128] In response to questions about the amount of material from *The Room* used in the documentary, Sharp said he might have used more than the approximately 7 minutes used by the defendants if he had been making the documentary.
- [129] Overall, Sharp provided information about the industry view of documentary films, of which he clearly has much experience, and in that regard his opinions on *Room Full of Spoons* and its place in that genre were helpful to the court.

### ***The Defendants' Evidence***

#### ***Towns, Forero McGrath and Racicot***

- [130] All of the defendants submitted affidavits and were cross-examined at the trial. Harper submitted a lengthy affidavit describing, among other things, the making of *Room Full of Spoons*, the defendants' interactions with Wiseau, his lawyers, and others, their investigation of Wiseau's background, and the impact of the injunction. Much of this has not been contested in any way by the plaintiffs and is summarized above.
- [131] The defendants Towns, Racicot and Forero McGrath submitted very brief affidavits essentially agreeing with Harper's evidence. The cross-examination of these witnesses focused on their role in producing *Room Full of Spoons*. Towns, for example, stated that he became involved in 2015, investing \$5,000 initially and bringing his lengthy background in film production to the project. He confirmed that the defendants did not seek legal advice on the issue of using clips from *The Room*, and they went ahead without an agreement from Wiseau because they believed the use of the clips was covered by fair dealing.
- [132] Forero McGrath was questioned on his role as an editor and on using images of Tommy Wiseau, including on tickets for a screening of *Room Full of Spoons* in Ottawa and on the Kickstarter campaign. The defendants did this without seeking legal advice. They did their own research on copyright and fair dealing. Forero McGrath confirmed that the only impediment to signing the distribution agreement was the injunction and the continuing lawsuit. He stated that the project was complete and ready to hit the theatres by January 2016, although he agreed that a distributor might suggest additional edits.

[133] Racicot was the cinematographer, or cameraman. He agreed the project evolved from its original objective of documenting the phenomenon of *The Room* and its fans to also include Tommy Wiseau, who he described as being synonymous with *The Room* and part of the phenomenon. The expanded scope was the result of a group decision as the project progressed over several years. Racicot was cross-examined specifically on the encounter with Wiseau in New York City and the filming of him there – which did not show Wiseau moving away or being chased. As Racicot said, they were surprised to see Wiseau there and just said a brief hello to him before they walked away. When Wiseau was spotted Racicot simply turned the camera on him – for perhaps a total of 15 seconds. Wiseau may not have even been aware that he had been filmed, Racicot said.

### ***Richard Harper***

[134] Harper was cross-examined at length. This included questioning on his discovery of, and “obsession” with, *The Room*, and his interactions with Wiseau and Sestero. He said they were unable to interview Sestero because he said he was under contract with Franco and because, “as a friend of Tommy’s” he was loyal to him. Harper agreed that he was disappointed that Wiseau chose not to participate in the documentary when they were in New York City. He was challenged on whether they had chased Wiseau when he was in Times Square, which Harper denied.

[135] When questioned on the evolution of the documentary, Harper agreed that the film had to change because Wiseau did not wish to participate. He denied that the purpose of making the film was to make money; he said they hoped not to lose money, and that the primary focus was to make a “fantastic movie.”

[136] Harper confirmed that the defendants were of the view that they did not need Wiseau’s permission to use clips of *The Room*. They did some research on fair dealing and fair use, spoke to some lawyer friends and felt they had a decent understanding of the law. Harper said they could not afford lawyers. Nevertheless, he agreed that they tried to reach an agreement with Wiseau because it is “always better” to have an agreement.

[137] Harper stated that in one of his first discussions with Wiseau he had said he would charge \$500 for use of 3 minutes of *The Room*, but then sent an invoice for \$5,000. Later, Wiseau said he would give the defendants a “student discount,” all of which was confusing. Harper said he was willing to entertain Wiseau’s ideas, and wanted to respect his wishes, but that he kept coming up with new demands. For example, Wiseau demanded that it be edited to have “more positivity by at least 60 percent,” or to make it shorter, and that he simply wanted it to be an advertisement for *The Room*. Harper and the defendants felt Wiseau was deliberately making unreasonable demands to drag things out, making it impossible to continue to negotiate with him.

[138] Harper agreed that they obtained the clips from *The Room* from a Blue-ray disc, and that this would have been done by Forero McGrath. Harper disagreed that they had to break digital locks and disagreed with Wiseau’s assertion that the clips used were of a “lesser

quality” that did not reflect Wiseau’s work. Harper did not agree with the suggestion that “7 minutes is a lot,” nor did he agree that they had used “iconic scenes” as in Harper’s view “every scene is iconic.” Although Harper agreed that he could have made the film without using clips, it would have been “a different movie,” and not as good a movie. In Harper’s view, the use of images from *The Room* and photos of Wiseau on Kickstarter – such as a picture of the billboard promoting *The Room* that Wiseau paid to have up in Hollywood for years – or on tickets for a screening, simply reflected what the project was about.

- [139] Harper was also cross-examined on the dealings with Gravitas, errors and omissions insurance and the potential for making additional edits to the film and meeting other deliverables in the agreement before its release. With respect to what might have been done after the injunction was lifted, Harper said they still had the pending civil claim and there were “threats everywhere” which would have made it extremely difficult to release or even to show it at film festivals. The defendants continue to be in touch with Gravitas, but Harper said the company is not interested in the film until the legal issues are resolved. This action by Wiseau, Harper said, has therefore made it impossible to successfully release *Room Full of Spoons* while the suit continues.
- [140] Harper disagreed that the documentary is disrespectful of Wiseau, noting that it celebrates his movie, and says a lot of very nice things about him. Harper also said that he learned things during the course of his research that could be very hurtful and damaging to Wiseau that he intentionally left out of the documentary. Harper said that he tried to be very balanced, noting that only about 6 minutes of the film is on Tommy’s personal life. Harper took offence to the suggestion that he was angry and wanted to hurt Wiseau, saying that he did not spend 5 years making a film to hurt Wiseau, and that if he had wanted to do so there is much more that he could have reported.
- [141] Harper was an impressive witness. He answered questions forthrightly and directly. He was cross-examined at length and his evidence was consistent with his affidavit and the written record. I had the same impression of each of the defendants.

### ***Doug Bania***

- [142] The defendants called an expert in calculating intellectual property damages, Doug Bania (“Bania”). Bania is an intellectual property consultant in California. He has been qualified as an expert witness in 65 cases in the United States dealing with intellectual property issues including damages. He has a background as an independent film producer between 2000 and 2003, and has published widely on the topic of valuation, damages and licensing of intellectual property damages. He was retained to provide an opinion on the damages claimed by the plaintiffs, and on the revenue the defendants lost as a result of their inability to exploit *Room Full of Spoons* as alleged in the counterclaim.
- [143] Bania was unable to provide any opinion on the plaintiffs’ alleged damages due to their failure to produce relevant documents. I accept this conclusion. In addition to the

plaintiffs' failure to produce the assignment of copyright in *The Room* to Wiseau Studio LLC (which is pleaded in the statement of claim), they have also failed to provide any information about revenues from *The Room* or its related merchandise, and they have failed to provide the full agreement involving Wiseau's sale of his "life rights" to S/Z Books relating to Franco's production of *The Disaster Artist*. The only mention of any financial benefits to the plaintiffs in the record is the comment by Franco at TIFF as to what he thinks the film makes each year, quoted earlier in these Reasons. That is hardly reliable evidence on which to base a damage claim.

- [144] The plaintiffs have, therefore, not produced any financial information whatsoever on which to conclude that they have suffered, or will suffer, any damages from the release of *Room Full of Spoons*. Indeed, it is quite possible, as suggested by the plaintiffs' expert Synthian Sharp, that *Room Full of Spoons* might create more interest in *The Room* and, should it be released in the future, the plaintiffs may well benefit from it.
- [145] Turning to the defendants' damages, Bania reviewed Google Trends online data relating to the interest or "buzz" in *The Disaster Artist* and *The Room* from January 2017 to December 2017, as well as available data for *The Room* since 2004. (It was released in June 2003 but Google Trends data only goes back to January 2004). Bania concluded that *The Room* benefited considerably from the release of *The Disaster Artist*, especially following the release of *The Disaster Artist* in December 2017. *Room Full of Spoons*, on the other hand, attracted no meaningful interest, or "buzz," on line between January 17, 2017 and March 8, 2018 (when *The Disaster Artist* ceased being in theatres). But, as Bania notes, the injunction had forced the defendants to take down their social media promoting *Room Full of Spoons*, which explains why it had no "buzz." In cross-examination Bania commented on the "cloud on title" from this action, and confirmed that this would explain why the documentary has still not been released.
- [146] In order to consider whether, and to what extent, *Room Full of Spoons* would have benefitted from *The Disaster Artist* had it been released in 2017 prior to the release of *The Disaster Artist*, Bania considered three comparable situations in which documentaries had been made about feature films: (1) *Best Worst Movie* and *Troll 2*; (2) *Jodorowsky's Dune* and *Dune*; and (3) *American Movie* and *Coven*. *American Movie* grossed over \$1.165M, and ranks 183<sup>rd</sup> on a list of all films with the documentary genre label. *Jodorowsky's Dune* grossed over \$647,000 and *Best Worst Movie* grossed almost \$110,000. These figures are all in United States dollars.
- [147] Due to the success of *The Disaster Artist*, including its Golden Globe Award and nomination for an Academy Award, Bania believes that the range of comparables is a conservative indication of the revenue *Room Full of Spoons* might have achieved. In his view "*Room Full of Spoons* would likely be at the high end of the range of revenues achieved by the comparable documentary films, or an amount around US\$1.1 million" (using this conservative estimate).

- [148] Bania also considered the draft agreement with Gravitass, and its fees totaling approximately 40% when distribution and marketing expenses are included, and concludes that Room Full of Spoons Inc. would have achieved earnings of US\$660,000 from its production of *Room Full of Spoons*.
- [149] Bania’s analysis was not seriously challenged on cross-examination. Indeed, some of it focused on the ongoing success or “buzz” associated with *The Room*, but this only adds to the “buzz” that *Room Full of Spoons* might have experienced since, as Bania also stated, “watching one makes you want to watch the other.”

### **Issues**

- [150] The statement of claim raises many causes of action; however, some have either been abandoned or not pressed at trial. These include claims by the plaintiffs for breach of contract, fraudulent misrepresentation and trademark violations. Consequently, the issues that need to be addressed are as follows:
- (a) Breach of copyright, including whether the fair dealing exception applies;
  - (b) Breach of Wiseau’s moral rights under the *Copyright Act*;
  - (c) Misappropriation of personality;
  - (d) Passing off;
  - (e) Intrusion upon seclusion;
  - (f) The defendants’ counterclaim; and
  - (g) Damages.

### **Analysis**

#### **Standing: Who owns the Copyright?**

- [151] The starting point of a copyright case is to determine who owns the copyright. Section 13(1) of the *Copyright Act* provides that “the author of a work shall be the first owner of the copyright therein.” Copyright may be assigned to another, but s. 13(4) requires an assignment, whether wholly or partially, to be in writing.
- [152] In this case, the statement of claim states that the plaintiff Wiseau Studio LLC is “the copyright owner in the plaintiffs’ works at issue.” It also states that Tommy Wiseau “assigned his rights, title and interest in *The Room* and in all related works...to Wiseau Studio LLC.” However, the defendants have denied this assignment to Wiseau Studio

LLC in their statement of defence, putting a burden on the plaintiffs to prove the assignment.

[153] The statement of claim attaches, at Appendix “A”, copyright registration certificates, which state that the owner of the copyright is “Wiseau-Films.” These certificates have not been made exhibits or otherwise proven at the trial, but they do not establish that Wiseau Studio LLC has been assigned the copyright, as that entity is not mentioned. “Wiseau-Films,” on the other hand, seems to be a name under which Tommy Wiseau does business, at least according to the title of proceedings on the front of the statement of claim.

[154] Accordingly, there is no evidence of an assignment of copyright to the plaintiff Wiseau Studio LLC, and I agree that the corporation’s claim for copyright infringement should fail on that basis. Further, given Wiseau’s admission that he assigned copyright to another entity (Wiseau Studio LLC), his claim, on its face, should also fail on this basis. This seems an odd result, that the claim should fail because the creator of the work – and Tommy Wiseau is identified as the author of the work on the registration – has pleaded he has assigned the copyright to the other plaintiff but has failed to prove it. However, s. 34.1 of the *Copyright Act* may come to the plaintiffs’ aid. It provides:

In any civil proceedings taken under this Act in which the defendant puts in issue either the existence of the copyright or the title of the plaintiff to it,

(a) copyright shall be presumed, unless the contrary is proved, to subsist in the work, performer’s performance, sound recording or communication signal, as the case may be; and

(b) the author, performer, maker or broadcaster, as the case may be, shall, unless the contrary is proved, be presumed to be the owner of the copyright.

[155] In this case, the defendants have put the existence of the copyright, and title to it, in issue. They argue that the evidence shows that there are multiple authors of the film, as demonstrated in the documentary in which, for example, Sandy Schklair claims to be the director, and it is asserted that many scenes were essentially improvised. There is also an absence of any evidence of assignments from actors, the composer, film editor or the crew who provided services in creating *The Room*.

[156] Statements in the documentary are not proof, however, of authorship, and it seems to me overly technical and to put too high a burden on a plaintiff if he or she must provide the degree of evidence asserted by the defendants. It would appear that this is what s. 34.1 is meant to avoid. Indeed, where the defendant has put copyright in issue, and in the absence of an assignment, subsection 34.1(2)(c) provides that “if, on a cinematographic work, a name purporting to be that of the maker of the cinematographic work appears in the usual manner, the person so named shall, unless the contrary is proved, be presumed to be the maker of the cinematographic work.” This places a burden on the defendants to

rebut the presumption: *Robinson c. Films Cinar inc.*, 2013 SCC 73, [2013] 3 S.C.R. 1168 (“*Cinar*”), at para. 21.

[157] Although the pleading confuses the issue and raises doubts as to who owns copyright in *The Room* and related works, *The Room* is presented as a work by Wiseau-Films and Tommy Wiseau. Wiseau wrote, acted in and produced *The Room*, and is inseparably linked to it as its creator and “author” – a term used many times in the *Copyright Act* but not defined in it and which, in my view, must be given a generous interpretation. Tommy Wiseau is the creator of *The Room*, and it is his interests that the *Copyright Act* is meant to protect, absent an assignment. Thus, while the plaintiffs themselves have raised doubts about the ownership of the copyright, having regard to the *Copyright Act*, the way in which this case was presented, and the absence of evidence rebutting the presumption in s. 34.1, it seems to me that the prudent course is to accept that the plaintiffs have standing and address whether that copyright is infringed. In light of my conclusions below, however, that the plaintiffs’ case fails on other grounds, in the end little turns on this issue.

[158] It is appropriate here to also address the defendants’ argument that Wiseau lacks standing to assert any of the causes of action because he appears to have sold his “life rights” to James Franco, as he stated publicly at TIFF in September 2017 following the screening of *The Disaster Artist*. Wiseau has produced a portion of a letter agreement with an entity called S/Z Books, which appears to deal with such a sale, although he has refused to produce the entire document. While it would not be unreasonable to infer that production of the full document would not help Wiseau’s case, the evidence on this issue is very limited and I am not prepared to find on this basis that Wiseau does not have standing to assert claims on his own behalf, as he has done in this case.

### **Has Copyright been Infringed?**

#### ***Substantial Taking***

[159] Section 3 of the *Copyright Act* grants an owner “the sole right to produce or reproduce the work or any substantial part thereof.” Not every copying of a portion of a work, therefore, constitutes an infringement. To make out a claim of copyright infringement, the plaintiff must first demonstrate that the defendant’s use of copyrighted material constitutes a “substantial” taking from the copyrighted work. The taking must be substantial because the purpose of the *Copyright Act* is to strike a balance between “promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator:” *Galerie d’Art du Petit Champlain inc. c. Theberge*, 2002 SCC 34, [2002] 2 S.C.R. 336 (“*Theberge*”), at para. 30. In *Cinar*, the Supreme Court offered this guidance on substantial taking, at paras. 26 and 36:

[26] A substantial part of a work is a flexible notion. It is a matter of fact and degree. “Whether a part is substantial must be decided by its quality rather than its

quantity": *Ladbroke (Football), Ltd. v. William Hill (Football), Ltd.*, [1964] 1 All E.R. 465 (H.L.), at p. 481, per Lord Pearce. What constitutes a substantial part is determined in relation to the originality of the work that warrants the protection of the *Copyright Act*. As a general proposition, a substantial part of a work is a part of the work that represents a substantial portion of the author's skill and judgment expressed therein.

....

[36] As a general matter, it is important to not conduct the substantiality analysis by dealing with the copied features piecemeal: *Designers Guild*, at p. 705, per Lord Hoffman. ... Rather, the cumulative effect of the features copied from the work must be considered, to determine whether those features amount to a substantial part of Robinson's skill and judgment expressed in his work as a whole.

[160] The Supreme Court noted that while copyright seeks to ensure that the creator reaps the benefits of her artistic efforts, it does not protect every “particle” of an original work, or “any little piece the taking of which cannot affect the value of [the] work as a whole:” *Cinar*, at para. 25, quoting D. Vaver, *Intellectual Property Law: Copyright, Patents, Trade-marks*, 2<sup>nd</sup> ed. (Toronto: Irwin Law, 2011) at p. 182. This is consistent with s. 27(2) of the *Copyright Act*, which provides that it is an infringement to “distribute to such an extent as to affect prejudicially the owner of the copyright.”

[161] The goal, therefore, of the requirement that there be a “substantial” infringement is to ensure that a balance is maintained between protecting the skill and judgment exercised by authors in the expression of their ideas, and “leaving ideas and elements from the public domain free for all to draw upon:” *Cinar*, at para. 28. In *Maltz v. Witterick*, 2016 FC 524, F.C.J. No. 484 (“*Maltz*”), Boswell J. stated, at para. 38:

In determining whether a substantial part of the Applicants’ work has been taken, the quality and quantity of material taken should be considered along with the importance and originality of that material. The extent to which the infringement has adversely affected the Applicants’ activities and diminished the value of their copyright should also be considered. Whether the material taken is properly the subject of copyright, whether the Respondents intentionally took the material to save time and effort, and whether the material was used in the same or similar fashion as it was in the copyrighted work, are also questions to address in a substantiality analysis.

[162] Similarly, in *U & R Tax Services Ltd. v. H & R Block Canada Inc.*, [1995] F.C.J. No. 962 (Fed. Ct.), Richard J. stated, at para. 35 (internal citations omitted):

In order to find copyright infringement, a plaintiff must prove copying of the work or a substantial part thereof and access to the copyright protected work. In

this instance, the defendant has admitted to copying a portion of U&R's form and the enquiry is therefore directed to whether the copying was "substantial" within the meaning given to that the term by the courts: "[w] hat constitutes a "substantial part" is a question of fact and, in this respect, the courts have given more emphasis on the quality of what was taken from the original work rather than the quantity." Some of the matters that have been considered by Courts in the past include:

- (a) the quality and quantity of the material taken;
- (b) the extent to which the defendant's use adversely affects the plaintiff's activities and diminishes the value of the plaintiff's copyright;
- (c) whether the material taken is the proper subject matter of a copyright;
- (d) whether the defendant intentionally appropriated the plaintiff's work to save time and effort; and
- (e) whether the material taken is used in the same or a similar fashion as the plaintiff's.

- [163] *Cinar* and *Maltz* involved fictional works and the extent to which they may have been, or were, based on previous works but copied and effectively presented as the work of the alleged copier. *U & R Tax Services* dealt with a business competitor copying a form. This case is quite different. Wiseau's ideas are not copied and passed off as the defendants' work. But there is no question that clips from *The Room* are used in *Room Full of Spoons* – in fact, that is what much of the documentary is about. Seven minutes of content from *The Room*, which is 99 minutes long, was used in the 109 minute long documentary. There are 69 separate clips used, and the longest clip is 21 seconds. This is not a trivial amount of *The Room*.
- [164] In my view, *Room Full of Spoons* does reproduce a "substantial part" of *The Room* within the meaning and intent of s. 3 of the *Copyright Act*. While the amount is not large compared to the length of the film, the documentary would not be the same without the number of clips used, and this amount of use cannot be regarded as "trivial:" *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 S.C.R. 339 ("CCH"), at para. 56.
- [165] I reach this conclusion with some reluctance because *Room Full of Spoons* does not seek to replace or copy *The Room*, nor does it purport to copy Wiseau's skill or judgment, or diminish the value of his work, or to pass his work off as the defendants' product. Rather, the clips are used to talk about Wiseau's work, with all its flaws. However, the issue of whether the use of the plaintiffs' material infringes copyright is best addressed in the context of fair dealing, which I address below.

### ***Technological Protection Measures***

- [166] In his closing submissions, counsel for the plaintiffs made an additional argument for infringement. He submitted that the defendants, in “ripping” clips from *The Room* from a Blu-ray disc, had circumvented a “technological protection measure” contrary to s. 41.1(1) of the *Copyright Act* and had thereby also infringed the plaintiffs’ copyright as provided in s. 41.1(2). This was not pleaded in the statement of claim and is, in my view, a distinct cause of action from copyright infringement. Although s. 41.1(2) provides that “[t]he owner of the copyright in a work” in respect of which a technological protection measure has been contravened is “entitled to all remedies...that are or may be conferred by law for the infringement of copyright,” this is a statutory measure introduced to address the use of digital locks, and is not simply another form of copyright infringement. It should have been pleaded so that the defendants could have had an opportunity to address it in the evidence, including whether a technological protection measure was circumvented, and to raise any defences to circumvention.
- [167] There was, in any event, little evidence on this point. Wiseau simply asserted that the defendants had “ripped” clips from a Blu-ray, without more. In cross-examination, Harper confirmed that they obtained the clips from a Blu-ray disc, and that Forero McGrath would have done that. Forero McGrath was not questioned about this at all, and it was only put to Harper that a Blu-ray disc has a digital lock, which Harper denied. He said he did not even know what a digital lock was, that it was quite easy to copy from a Blu-ray disc, and that even he could do it with his limited editing skills. Accordingly, there is no evidentiary bases for this claim as there is no evidence of any technological protection measure existing, or being circumvented, and I dismiss this argument.

### ***Fair Dealing***

- [168] Fair dealing is often described as a defence to copyright infringement as the onus lies on the defendant to establish that the use of the material constitutes fair dealing. However, the Supreme Court has noted that it is better described as an exception to infringement and a “user’s right” rather than a defence. It is intended to balance the rights of creators and innovators to disseminate and profit from their work with the public interest in receiving, debating and benefitting from creativity and innovation: *Theberge*, at paras. 30-32. It must therefore be given a generous scope. As McLachlin C.J.C. stated in *CCH* at para. 48:

Before reviewing the scope of the fair dealing exception under the *Copyright Act*, it is important to clarify some general considerations about exceptions to copyright infringement. Procedurally, a defendant is required to prove that his or her dealing with a work has been fair; however, the fair dealing exception is perhaps more properly understood as an integral part of the *Copyright Act* than simply a defence. Any act falling within the fair dealing exception will not be an infringement of copyright. The fair dealing exception, like other exceptions in the *Copyright Act*, is a user’s right. In order to maintain the proper balance

between the rights of a copyright owner and users' interests, it must not be interpreted restrictively. As Professor Vaver, *supra*, has explained, 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 befits remedial legislation."

[169] The fair dealing exception is contained in sections 29, 29.1 and 29.2 of the *Copyright Act*:

29 Fair dealing for the purpose of research, private study, education, parody or satire does not infringe copyright.

29.1 Fair dealing for the purpose of criticism or review does not infringe copyright if the following are mentioned:

- (a) the source; and
- (b) if given in the source, the name of the
  - (i) author, in the case of a work,
  - (ii) performer, in the case of a performer's performance,
  - (iii) maker, in the case of a sound recording, or
  - (iv) broadcaster, in the case of a communication signal.

29.2 Fair dealing for the purpose of news reporting does not infringe copyright if the following are mentioned:

- (a) the source; and
- (b) if given in the source, the name of the
  - (i) author, in the case of a work,
  - (ii) performer, in the case of a performer's performance,
  - (iii) maker, in the case of a sound recording, or
  - (iv) broadcaster, in the case of a communication signal.

[170] The attribution requirements of s. 29 are clearly met in this case. It is clear throughout, and at the end, of *Room Full of Spoons*, what aspects of the documentary are drawn from *The Room*. To the extent that still photos are used, these are either clear to the viewer as Wiseau's work or, further to Koehnen J.'s decision at paras. 95-99 can be adequately attributed in the end credits. The plaintiffs did not make an issue of this at trial.

[171] Aside from those attribution obligations, the test for fair dealing requires the defendant to prove that (a) the dealing was for one of the allowable purposes listed in *Copyright Act*,

and (b) the dealing was fair: *CCH*, at para. 50. In considering the purposes, the court must give them “a large and liberal interpretation in order to ensure that users’ rights are not unduly constrained,” and even “research is not limited to non-commercial or private contexts.” *CCH*, at para. 51. Whether the dealing is “fair” is a fact-specific inquiry which may be considered having regard to the following factors, although they may or may not all apply to a specific case: (1) the purpose of the dealing; (2) the character of the dealing; (3) the amount of the dealing; (4) alternatives to the dealing; (5) the nature of the work; and (6) the effect of the dealing on the work: *CCH*, at para. 53. See also: *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*, 2012 SCC 36, [2012] 2 S.C.R. 326 (“*SOCAN 2012*”), at paras. 14, 15 and 27.

***Was the Use for an Allowable Purpose under the Copyright Act?***

- [172] The defendants rely on both s. 29.1 and s. 29.2 of the *Copyright Act*, submitting that the purpose of *Room Full of Spoons* is to critique and review *The Room*. The defendants also submit that the documentary constitutes news reporting as it informs viewers of facts about the film and Wiseau. The dealing is therefore for an allowable purpose under s. 29.1. In *SOCAN 2012*, at para. 27, the Supreme Court observed, “*CCH* created a relatively low threshold for the first step so that the analytical heavy-hitting is done in determining whether the dealing was fair.” The first step is easily met in this case.
- [173] The documentary reports on and discusses the social phenomenon of *The Room* and its creator. *Room Full of Spoons* reviews the making of *The Room*, including discussing specific aspects and scenes within the film. It contains interviews with fans, actors and others involved in the making of the film. It includes comments from critics, professors and others about their reaction to the film and its attraction to people. It discusses scenes, dialogue, acting, plot development, direction, improvisation, editing, and motifs used in the film. *Room Full of Spoons* also investigates and reports on how *The Room* became a cult classic. For example, it interviews the fan who identified the photograph of a spoon in explaining why people throw spoons at the screen, which is accompanied by shots of fans doing just that. The documentary is also about Tommy Wiseau, who is inseparable from *The Room*, and who acknowledges he is somewhat famous because of it. The defendants investigate and report on Wiseau’s background in *Room Full of Spoons*, which may account, in part, for why the *Huffington Post* described the documentary as “a very impressive piece of reporting.”
- [174] The plaintiffs take issue with the purpose of *Room Full of Spoons*, asserting that it not a “proper” documentary but rather a “tabloid-style exposé” or “hit piece” intended to “prejudice the honour and reputation of Tommy Wiseau.” Ms. Spicuzza testified that the purpose of documentaries is to “enlighten, educate, procure or promote a cause” and must be “balanced” and “respectful” of their subjects. I am not sure where this definition comes from, and in any event I must reject it. As noted earlier, the Academy of Motion Pictures defines a documentary as a non-fiction film, with the emphasis on fact and not fiction. The Academy’s definition does not require a documentary to enlighten and educate, though it is to be expected that most will do so given their emphasis on facts.

Nor does it require that such film “procure or promote a cause,” although many undoubtedly will – indeed Spicuzza conceded that documentaries might have a point of view.

- [175] In discussing the phenomenon of *The Room* and in reporting on information the defendants uncovered about Wiseau, including his birthplace, age and birth name, and in conducting interviews with Wiseau’s relatives in Poland where he was born and spent his childhood, the film engages in news reporting on matters of interest to fans of *The Room*, and to others who may be interested in understanding why “the Citizen Kane of bad movies,” and Tommy Wiseau himself, have attracted such a following.
- [176] Whether or not the plaintiffs regard *Room Full of Spoons* as a “tabloid-style exposé” or a “hit piece,” or contains facts Wiseau would prefer not be disseminated, has little to do with whether the first step of fair dealing has been met. Leaving aside the fact that such a requirement would raise concerns about limits on freedom of expression protected by s. 2(b) of the *Canadian Charter of Rights and Freedoms*, s. 7, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c. 11 (“*Charter*”), even if the documentary is not “respectful” of Wiseau in that it denigrates his skills as an actor and filmmaker, that constitutes criticism and review. There is nothing new about such criticism of Wiseau and his movie; as Ms. Grewal testified, everybody criticizes *The Room*.
- [177] If Wiseau does not like how he is portrayed in *Room Full of Spoons*, his claim may be for defamation. As the English Court of Appeal stated in *Pro Sieben Media AG v. Carlton UK Television Ltd*, [1998] All E.R. (D) 751, “[i]f the fair dealing is for the purpose of criticism that criticism may be strongly expressed and unbalanced without forfeiting the fair dealing defence; an author’s remedy for malicious and unjustified criticism lies (if it lies anywhere) in the law of defamation, not copyright.” However, Wiseau has not sued for defamation, perhaps because the documentary is on a matter of “public interest,” as that term is used in defamation law, and he cannot point to any factual errors in the film, or identify any comment that is not based on fact, making the success of a defamation claim rather unlikely: see, e.g., *WIC Radio Ltd. v. Simpson*, 2008 SCC 40, [2008] 2 S.C.R. 420, at paras. 28-34. In my view, like the term “fair comment” in defamation law, “fair dealing” is a misleading term, as it is not determined by the plaintiff’s, or the court’s, sense that something is “unfair,” but rather is based on a range of factors that respects the rights of speakers and users to communicate information and views to the public without undue restrictions.
- [178] The plaintiffs also assert that the scenes depicted are the film’s “best, most popular and most iconic and most recognizable scenes,” suggesting, it seems, that this was not for purpose of review and criticism, but for some other, perhaps commercial, purpose. While scenes from *The Room* used in *Room Full of Spoons* may well be popular and recognizable, and even perhaps “iconic,” when asked about this Harper said that “every scene” in *The Room* is iconic. Whether or not the documentary reproduced clips from what the plaintiffs describe as iconic scenes, some parts of the film seem to cry out for

attention, such as Wiseau’s poor acting in the “Oh, Hi Mark” scene on the roof, or when Wiseau yells “Lisa, you’re tearing me apart,” doing his best imitation of James Dean in the 1955 film classic, *Rebel Without a Cause*.

- [179] The issue of selective use of scenes also arose in the English case of *Time Warner Entertainments Co LP v. Channel Four Television Corporation Plc*, [1994] E.M.L.R. 1 (“*Time Warner*”), in which the English Court of Appeal considered the use of some 12 and a half minutes of the film *A Clockwork Orange* in a 30 minute programme about the film which was intended to draw attention to the fact that *A Clockwork Orange* could not be shown in the United Kingdom. In addressing the argument that the fair dealing “defence” (as the Court of Appeal called it) should be defeated because “the infringing excerpts were not fairly representative,” Henry L.J. stated at p. 14:

In my judgment as a matter of law it would not. As Lord Atkin said in a different context ‘The path of criticism is a public way: The wrongheaded are permitted to err therein...’ (*Ambard v A.-G. for Trinidad and Tobago* [1936] AC 322 at 355). ‘Fair dealing’ in its statutory context refers to the true purpose (that is, the good faith, the intention and the genuineness) of the critical work – is the programme incorporating the infringing material a genuine piece of criticism or review, or is it something else, such as an attempt to dress up the infringement of another’s copyright in the guise of criticism, and so profit unfairly from another’s work?

- [180] Accordingly, the plaintiffs’ complaints about the selection of clips does not assist their position given my finding that *Room Full of Spoons*, and the use of the plaintiffs’ material in it, had as its purpose review, criticism and news reporting.
- [181] In any event, *Room Full of Spoons* is not as negative as Wiseau asserts, nor would I call it “incendiary” as Sharp did in his testimony. Even Wiseau seemed to accept at least 40% of it, based on his rather unusual request to make it “be framed with more positivity by at least 60 percent.” Many people in the documentary express admiration and gratitude towards Wiseau, who managed to make a feature film against all odds. Some expressed affection for him and have no regrets about participating in it. It is acknowledged that the film has brought people enjoyment and laughter, and that it has touched many who have watched it. Harper himself concludes the documentary with a message of gratitude towards *The Room*.
- [182] Harper, the narrator, tells us of his journey as a fan of *The Room* – an accepted documentary technique, as Sharp testified – and that had he wished to impugn Wiseau’s character, he could have included much more “scathing and damaging” personal information in the documentary, but that was not his objective. Further, if the documentary were so negative, it would not likely have caused both Sharp and Bania to become interested in watching *The Room*.
- [183] In short, a documentary can be many things, and can be positive or negative about its subject. To the extent that a documentary uses copyrighted material for the purposes of

criticism, review or news reporting, then such use is for an allowable purpose under the fair dealing provisions of the *Copyright Act*. *Room Full of Spoons* meets each of those purposes.

***Was the Dealing “Fair”?***

[184] Having found that the use of the plaintiffs’ material falls into one of the allowable purposes for fair dealing, I consider below the six factors set out in *CCH* to determine whether that use was “fair,” following the approach of the Supreme Court at paras. 54-60 of *CCH*.

(i) *Purpose of the dealing*

[185] As discussed above, the purpose of the documentary and its use of the plaintiffs’ material are to provide review, critique and information about *The Room*, the phenomenon it has created, and the maker of the film, Tommy Wiseau. This is a permitted purpose. The copying was not for a commercial purpose but simply to make a documentary; the defendants had no expectation when making the documentary that they would profit from it, nor did they appropriate *The Room* to their benefit. Further, as Sharp said, a documentary commenting on another work is unlikely to be as popular as the original work.

(ii) *Character of the dealing*

[186] This factor addresses how the copyrighted material is dealt with by the user. In doing so it may be relevant to consider the “custom or practice” in the particular trade or industry to determine whether the character of dealing is fair: *CCH*, at para. 50. In this case, the copyrighted material was almost invariably accompanied by commentary illustrating or supporting points made by the narrator or interviewees. This is a common technique in documentaries and in providing review and criticism, as confirmed by the defendants’ evidence as well as that of Synthian Sharp. As in *Time Warner*, use of the clips for the purpose of commentary is a character of dealing that is appropriate and supports a conclusion that the dealing was “fair.”

(iii) *Amount of the dealing*

[187] In considering this factor the court must look at both “the amount of the dealing and the importance of the work allegedly infringed:” *CCH*, at para. 56. As McLachlin C.J.C explained, also at para. 56, “the quantity of the work taken will not be determinative of fairness, but it can help in the determination. It may be possible to deal fairly with a whole work [because] there may be no other way to criticize or review certain types of works such as photographs.” See *e.g.*, *Allen v. Toronto Star Newspapers Ltd.* (1997), 36 O.R. (3d) 201 (Div. Ct.).

[188] While the documentary’s use of footage from *The Room* is not trivial, it is also not excessive. *Room Full of Spoons*, which is 109 minutes long, uses 7 minutes of footage in

69 short clips from *The Room*, which is itself 99 minutes in length. This is less than 7% of the source work and an even smaller percentage of the documentary. The longest clip is 21 seconds. In *Time Warner* the use of over 12 minutes of excerpts from *A Clockwork Orange* constituted fair dealing in a 30-minute program, even though the excerpts constituted over 40% of the new work.

[189] Further, *Room Full of Spoons* has a number of components and is not just about *The Room* or copyrighted material. Rather it informs viewers about the experience and culture surrounding *The Room* and its fans, and the making of the film by those involved. It also provides information about the mysterious Tommy Wiseau. While use of excerpts from *The Room* and some other material belonging to the plaintiffs is important to conveying the messages in the documentary, such use is limited and linked to the objectives of the documentary. The purpose of the copying was not to replace *The Room*. To repeat the evidence of the plaintiffs' witness, documentary filmmaker Synthian Sharp said he might have used more clips if he had been making the film. In my view, therefore, the amount of the plaintiffs' work is not excessive and does not support a conclusion that the fair dealing exception does not apply.

(iv) *Alternatives to the dealing*

[190] This factor considers whether there is a non-copyrighted equivalent of the work that could have been used instead of the copyrighted work to achieve the objectives of the user. In this case, this factor has little application. *Room Full of Spoons* is about *The Room* and Wiseau. There is no alternative to the copyrighted material to make the points that are made. As Harper stated, without the clips it would have been a different film.

[191] As to the alternative of obtaining licenses to use the plaintiffs' material, as the facts demonstrate it was impossible for the defendants to obtain licenses without giving up editorial control. This is one of the reasons the fair dealing exception exists, as observed by the Supreme Court of the United States in *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994) at page 592, where Souter J. noted that "the unlikelihood that creators of imaginative works will license critical reviews or lampoons of their own productions removes such uses from the very notion of a potential licensing market. 'People ask...for criticism, but they only want praise:' S. Maugham, *Of Human Bondage* 241 (Penguin ed. 1992)."

(v) *The nature of the work*

[192] This factor considers the nature of the copyrighted work, and the extent to which it has already been disseminated. The Supreme Court stated at para. 58 of *CCH*:

If a work has not been published, the dealing may be more fair in that its reproduction with acknowledgement could lead to a wider public dissemination of the work — one of the goals of copyright law. If, however, the work in question

was confidential, this may tip the scales towards finding that the dealing was unfair.

[193] In *SOCAN 2012*, at para. 47, the Supreme Court elaborated that the fifth factor “examines whether the work is one which should be widely disseminated.” In this case the material is not confidential, nor is it unpublished; quite the contrary. *The Room* has been widely available for close to two decades, plays frequently in cinemas, is available free online (and there is no evidence that Wiseau has attempted to stop such access), and has been viewed online by over one million viewers. In my view, this factor also favours the defendants.

(vi) *Effect of the dealing on the work*

[194] As McLachlin C.J.C. explained at para. 59 of *CCH*, “[i]f the reproduced work is likely to compete with the market of the original work, this may suggest that the dealing is not fair.” However, the Court cautioned, also at para. 59, that while “the effect of the dealing on the market of the original copyright owner is an important factor, it is neither the only factor nor the most important factor that a court must consider in deciding if the dealing is fair.”

[195] The plaintiffs allow that the documentary is a derivative work, but submit that it is nevertheless competitive with *The Room*. Both plaintiff expert Synthian Sharp and defence expert Doug Bania commented that the documentary is a competitive product. Moreover, the documentary covers many of *The Room*’s most iconic scenes. This may lead viewers to conclude that having seen the documentary, there is no need to see the original.

[196] In my view, *Room Full of Spoons* is not an alternative to *The Room* and does not replicate or replace the unique experience of attending a showing of the original work, where people dress up as characters in the film, throw footballs around, throw spoons, and shout at the screen. Watching *Room Full of Spoons* is more likely to create interest in *The Room*, than to compete with it. Although both Sharp and Bania agreed that in some respects the documentary could be a competitive product to *The Room*, as watching *Room Full of Spoons* may cause some people to conclude they do not need to see *The Room*, they also both said that the documentary whet their appetite to see *The Room*.

[197] Further, the fact that festivals and cinemas have been interested in playing double features of *The Room* and *Room Full of Spoons* together suggests that the films complement, rather than compete, with one another. There is no evidence that the limited screenings of the documentary have had any negative impact on the *The Room*. To the extent there may be a negative impact, which is entirely speculative, it would more likely be due to the film’s criticism of *The Room* and Wiseau, and the reporting of facts about him, but that does not make the dealing with his work unfair.

### ***Conclusion on Fair Dealing***

[198] My discussion of the requirements for fair dealing, and of the factors to consider in determining whether specific use can be considered “fair,” leads me to conclude the fair dealing exception to copyright infringement applies in this case.

### **Did the Defendants Breach the Plaintiffs’ Moral Rights?**

[199] Section 14.1 of the *Copyright Act* provides that “the author of a work has...the right to the integrity of the work,” and s. 28.1 provides that “[a]ny act or omission that is contrary to any of the moral rights...is, in the absence of the author’s ...consent, an infringement of those rights.” The integrity of a work will be infringed, according to s. 28.2(1), “if the work ...is, to the prejudice of its author’s ... honour or reputation, (a) distorted, mutilated or otherwise modified; or (b) used in association with a product, service, cause or institution.”

[200] I have concluded earlier in these Reasons that Wiseau is the “author” of *The Room*. He therefore can assert moral rights.

[201] Wiseau claims that *Room Full of Spoons* violates his moral rights in two ways: (1) by using low-quality video clips of *The Room* unlawfully “ripped” from a Blu-ray disc or from YouTube; and (2) by being associated, against his will, with *Room Full of Spoons*, which he finds “reprehensible (both artistically and personally).”

[202] It is common ground that the burden is on the plaintiff to establish a breach of moral rights. In my view Wiseau has failed to meet that burden, for several reasons.

[203] Moral rights involve a consideration of both the subjective views of the plaintiff and objective evidence. Moral rights are not, and cannot be, determined solely on the feelings or opinions of the creator of a work. As Boswell J. noted in *Maltz*, at para. 49:

The courts have acknowledged that the concept of moral rights has not only a highly subjective aspect, which in practice only the author can prove, but an objective one as well. In *Prise de parole Inc. v. Guérin Éditeur ltée* (1995), 66 C.P.R. (3d) 257 (Fed. T.D.) (appeal dismissed (1996), 73 C.P.R. (3d) 557 (Fed. C.A.)), Justice Denault stated (at para. 26) that, in addition to an author's own subjective evidence as to how his or her honour or reputation has been affected: "the assessment of whether a distortion, mutilation or other modification is prejudicial to an author's honour or reputation also requires an objective evaluation of the prejudice based on public or expert opinion."

[204] Other recent decisions have confirmed this approach to moral rights: *Thomson v. Afterlife Network Inc.*, 2019 FC 545, F.C.J. No. 483, at paras. 39-47; *Collett v. Northland Art Company Canada Inc.*, 2018 FC 269, F.C.J. No. 349, at para. 22.

- [205] Wiseau complains about the defendants “ripping” the clips from a Blu-ray disc, rather than obtaining clips from his master recording of *The Room*, but he presented no evidence as to how the clips used in the documentary distorted or modified his work in a way that affected his honour or reputation. Only in re-examination did he assert that the quality was affected, was not to his “high standard” and that he was “very unhappy.” The quality of the clips was not addressed by any other witnesses, some of whom may have had expertise to comment on the issue and address whether the clips had been modified or distorted in any way. In addition, since Wiseau would not license the use of any clips without acquiring full editorial control, it was impossible for the defendants to gain access to the master recording of *The Room*, and so Wiseau might have only himself to blame for his view that his work was somehow not presented in the way he would have liked.
- [206] I turn now to the second branch of Wiseau’s argument on moral rights that he was associated with the documentary, which two of his witnesses, Spicuzza and Grewal, described as a “hit piece” or a “tabloid-style exposé.” Leaving aside the lack of independence of Spicuzza and Grewal, I fail to see how a documentary that is negative in tone, if that is the case, infringes moral rights. Wiseau, Spicuzza and Grewal point to no distortion or modification of Wiseau’s work; rather, they just don’t like the message they think the documentary sends about Wiseau.
- [207] Similarly, although Synthian Sharp expressed reservations about doing business with Wiseau after viewing the documentary, there is no evidence that this is due to any distortion or modification of Wiseau’s work. Indeed, Sharp wanted to watch *The Room* after viewing *Room Full of Spoons*. His reservations would have come from the reporting of facts or comments about Wiseau that are contained in the documentary. In any event, as Sharp implicitly concluded, Wiseau had nothing to do with *Room Full of Spoons*. The documentary makes clear that he did not cooperate, let alone collaborate, with the defendants in the making of it. The defendants had been promoting it in a trailer, as “the documentary Mr. Wiseau does not want you to see.”
- [208] The brief use of Wiseau’s images on some of the defendants’ marketing materials did not suggest any endorsement or association either. For example, the defendants made a poster in which they juxtaposed a picture of the Hollywood billboard promoting *The Room*, which featured a photograph of Wiseau in character as Johnny in *The Room*, with a similar photograph of Harper. However, the poster had the name of the defendants’ company and was, as Harper said, “kind of goofy” and a parody. This is an apt description. In my view this would not confuse consumers into thinking that Wiseau was promoting or endorsing the documentary. In any event, this image was used briefly, at an early stage of their project, and there is very little evidence of when or how it was used. Similarly, the plaintiffs took issue with the use of Wiseau’s image, as Johnny, on tickets to a screening of *Room Full of Spoons* in Ottawa. However, these did not distort Wiseau’s image or deceive anyone as the tickets were only received after they had been purchased. It is not reasonable to conclude that Wiseau is or was associated with the film based on these materials.

[209] Furthermore, even if Wiseau is associated with *Room Full of Spoons*, the documentary does not prejudice his honour and reputation. To the extent the documentary portrays Wiseau as someone who made a terrible movie, there is nothing new about that. *The Room* may be a somewhat popular cult classic, but that is because it is so bad, and made badly by Wiseau – “intoxicatingly awful,” a “car crash of incompetence,” the “Citizen Kane of bad movies,” an “unmitigated disaster,” as stated in mainstream media. Even *The Disaster Artist*, a film authorized by Wiseau, calls *The Room* the “greatest worst movie” in its tagline. In this context, a documentary about *The Room*, which is critical of it and its maker, is just like every other reaction to it, and cannot be said to have harmed the honour and reputation of Tommy Wiseau.

### **Misappropriation of Personality**

[210] Wiseau’s claim for misappropriation of personality arises from the use of his image on the defendants’ social media and on posters, in trailers, on tickets, and on Kickstarter. Most of this occurred briefly and was removed when Wiseau complained about it. The material complained of by Wiseau seems to range from images taken from the film, to photos of Wiseau, fans, and other promotional material some of which does not have his image at all.

[211] The tort of misappropriation of personality is now well recognized in Canada, but is relatively undeveloped given the few cases in which it has been raised. It was first recognized and applied in three cases in the 1970s and 1980s: *Krouse v. Chrysler Canada Ltd.* (1974), 1 O.R. (2d) 225 (C.A.) (“Krouse”); *Athans v. Canadian Adventure Camps Ltd.* (1977), 17 O.R. (2d) 425 (H.C.J.); and *Joseph v. Daniels* (1986), 4 B.C.L.R. (2d) 239 (B.C.S.C.). The most recent and thorough discussion of the tort is found in *Gould Estate v. Stoddart Publishing Co.* (1996), 30 O.R. (3d) 520 (Gen. Div.) (“Gould Estate”), involving a claim by the estate of the renowned Canadian pianist, Glenn Gould, arising from the publication of interviews and photographs of him in the 1950s in a book entitled *Glenn Gould: Some Portraits of the Artist as a Young Man*.

[212] Although no firm definition has been adopted by the courts, the tort is established where one’s personality has been appropriated, “amounting to an invasion of his right to exploit his personality by the use of his image, voice or otherwise with damage to the plaintiff.” *Krouse*, at para. 43. However, in *Gould Estate*, Lederman J. discussed limits to the tort arising from concerns for the public interest and freedom of expression. He noted that the similar tort of the “right of publicity” in the United States has been limited to commercial activity and the exploitation of personality for commercial benefit, and has not been extended to activity that is newsworthy or is otherwise in the public interest. As Brotman D.J. stated in *Presley v. Russen*, 513 F. Supp. 1339 (U.S. Ct. D.N.J. 1981) (“*Presley*”), at page 1356, quoted by Lederman J. at para. 16 of *Gould Estate*:

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 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.

[213] I agree that similar concerns should limit the application of the tort of misappropriation of personality. It is well established that the common law, including common law torts, should accord with the values in the *Charter*. As McLachlin C.J.C. stated in *Grant v. Torstar Corp.*, 2009 SCC 61, [2009] 3 S.C.R. 640 (“*Grant*”), at para. 44, a case involving the tort of defamation:

The constitutional status of freedom of expression under the *Charter* means that all Canadian laws must conform to it. The common law, though not directly subject to *Charter* scrutiny where disputes between private parties are concerned, may be modified to bring it into harmony with the *Charter*. As Cory J. put it in *Hill v. Church of Scientology of Toronto*, 1995 CanLII 59 (SCC), [1995] 2 S.C.R. 1130, at para. 97, “*Charter* values, framed in general terms, should be weighed against the principles which underlie the common law. The *Charter* values will then provide the guidelines for any modification to the common law which the court feels is necessary.”

[214] The *Charter*, of course, protects freedom of expression in s. 2(b), which includes democratic discourse and participation in community, the pursuit of truth, individual self-fulfilment and human flourishing: *Grant*, at paras. 47-50. These values accord with those discussed by Brotman D.C.J. in *Presley*.

[215] Returning to *Gould Estate*, Lederman J. considered the fact that Gould was a celebrity and held, at para. 19, that a work in which the celebrity is the subject, such as a biography, “would not be within the ambit of the tort.” This is in contrast to an activity in which the celebrity is used to endorse and promote a product for commercial gain.

[216] While Gould – an acknowledged musical genius – and Wiseau may have little in common, they both have fame and are persons of interest to their followers. Wiseau travels the world promoting screenings of *The Room*. He likes being a man of mystery, not disclosing his origins or age, for example. He is active on social media, including attacking the defendants and their documentary. *Room Full of Spoons* is all about this – it is all about Tommy Wiseau and his work, *The Room*. Thus, to the limited extent - and the evidence is that it was very limited - that Wiseau’s image was used in promoting interest in the documentary, it was simply to convey a message to those with an interest in Wiseau and *The Room* that *Room Full of Spoons* addresses those topics. In this regard, like the biography of Gould, the use of Wiseau’s image in connection with the documentary “falls into the protected category and there cannot be said to be any right of personality ...which has been unlawfully appropriated by the defendants.” *Gould Estate*, at para. 20.

[217] In any event, if damages must be shown to make out the tort, as suggested in *Krouse*, Wiseau has not led any evidence of damage to his personality or its value.

### **Passing Off**

[218] The plaintiffs' claim for passing off fails for many of the reasons outlined above. This tort exists to protect a plaintiff from harm arising from unfair use of their identity, such as pretending that a product is that of the plaintiff: *Ciba-Geigy Canada Ltd. v. Apotex*, [1992] 3 S.C.R. 120, at para. 30 ("*Ciba-Geigy*"). It also protects consumers from being misled, and as a result the passing off does not need to be deliberate or intentional. The test is objective.

[219] The Supreme Court has stated a 3-part test for passing off: (a) the existence of goodwill; (b) deception of the public due to a misrepresentation; and (c) actual or potential damage to the plaintiff: *Ciba-Geigy*, at para. 33.

[220] In this case, the plaintiffs clearly meet the first branch of the tort. I have no doubt that there is goodwill associated with Wiseau and *The Room*. He, and the film, have acquired a cult status and fans around the world, from which the plaintiffs profit.

[221] However, I cannot conclude that there is any misrepresentation by the defendants that would mislead the public. It is quite clear that *Room Full of Spoons* is not the work of the plaintiffs, or in any way endorsed by them. To the extent some images are used, as noted earlier, they do not misrepresent or mislead fans of *The Room*, or anyone else, that Wiseau has authorized, approved, or is in any way the maker of *Room Full of Spoons*.

[222] The early poster that juxtaposed the image of Wiseau, as Johnny in *The Room*, used on a billboard in Hollywood with a similar picture of Harper was raised again here. As discussed, Harper aptly described this as "goofy" and a parody, and consumers would not be confused by this into thinking that Wiseau was promoting or endorsing the documentary. Similarly, the use of Wiseau's image, as Johnny, on tickets to a screening of *Room Full of Spoons* in Ottawa did not deceive anyone for a commercial purpose as the tickets were only received after they had been purchased.

[223] Finally, there is no evidence of any actual or potential damage to the plaintiffs arising from the limited use of images of Wiseau or from *The Room*.

### **Intrusion Upon Seclusion**

[224] The final cause of action advanced by the plaintiffs is the recently recognized invasion of privacy tort known as "intrusion upon seclusion." This was recognized by the Court of Appeal for Ontario in *Jones v. Tsige*, 2012 ONCA 32, 108 O.R. (3d) 241. The elements of this tort were summarized by Sharpe J.A. at paras. 70-71 as follows:

[70] I would essentially adopt as the elements of the action for intrusion upon seclusion the *Restatement (Second) of Torts* (2010) formulation, which, for the sake of convenience, I repeat here:

One who intentionally intrudes, physically or otherwise, upon the seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the invasion would be highly offensive to a reasonable person.

[71] The key features of this cause of action are, first, that the defendant's conduct must be intentional, within which I would include reckless; second, that the defendant must have invaded, without lawful justification, the plaintiff's private affairs or concerns; and third, that a reasonable person would regard the invasion as highly offensive causing distress, humiliation or anguish. However, proof of harm to a recognized economic interest is not an element of the cause of action. I return below to the question of damages, but state here that I believe it important to emphasize that given the intangible nature of the interest protected, damages for intrusion upon seclusion will ordinarily be measured by a modest conventional sum.

- [225] In recognizing this cause of action, however, Sharpe J.A. was careful, at para. 72, to limit it to “deliberate and significant invasions of personal privacy” such as “intrusions into...one’s financial or health records, sexual practices and orientation, employment, diary or private correspondence that, viewed objectively on the reasonable person standard, can be described as highly offensive.” As well, at para. 73 Sharpe J.A. recognized that privacy claims “may give rise to competing claims for the protection of freedom of expression and freedom of the press” and that “many claims for the protection of privacy will have to be reconciled with, and even yield to, such competing claims.” He drew an analogy at para. 73 to defamation law, citing *Grant* at para. 65, that “[w]hen proper weight is given to the constitutional value of free expression on matters of public interest, the balance tips in favour of broadening the defences available to those who communicate facts it is in the public's interest to know.”
- [226] Wiseau has failed to make out the elements of the tort in this case. No personal details of the kind referred to in *Jones v. Tsige* were disclosed by the defendants. Rather, what was disclosed was Wiseau’s birthplace, his birthdate, and the name he was given at birth and had as a child in Poland. This information was available from public sources, which is how the defendants obtained and confirmed it. Wiseau may be sensitive about this information because he has cultivated an aura of mystery around it, but disclosure of these facts is not, objectively speaking, something which can be described as “highly offensive.”
- [227] Wiseau made other assertions of invasion of privacy at trial, all of which are without merit. These included the complaint that he was stalked or chased in New York, an assertion that I have rejected earlier in these Reasons. He also complained that the film

should be edited to have “more positivity by at least 60 percent” as otherwise it caused him distress, but this has no link to the invasion of privacy tort. Wiseau also cited the disclosure of the sealed California court case in which he was alleged to have acted fraudulently. Again, I have addressed that issue above, but even if the defendants obtained the court information in some improper way, on which there is no evidence, it is still not disclosing intimate personal facts the disclosure of which would be “highly offensive” to reasonable people.

- [228] Finally, there is the public interest. Even if some intimate personal or private facts about Wiseau had been disclosed in *Room Full of Spoons*, that disclosure would need to be weighed against protecting freedom of expression in reporting facts about a well-known person which are of interest to people interested in, or are fans of, *The Room* and Tommy Wiseau.

### **Counterclaim and Damages**

- [229] It follows from my findings above that the plaintiffs’ action must be dismissed, and I now turn to the defendants’ counterclaim.

### **Damages from the Injunction**

- [230] The counterclaim arises from the plaintiffs’ conduct in bringing this action and in seeking and obtaining the *ex parte* injunction in June 2017. The defendants also plead that the plaintiffs defamed them in the “Shame on You” campaign in 2015 and following.
- [231] In order to obtain an injunction in June 2017, in accordance with court requirements, the plaintiffs provided an undertaking to compensate the defendants for damages arising from the injunction should it be determined that the injunction should not have been issued. Justice Koehnen, in lifting the injunction in November 2017, found that it should not have been issued and that it was wrongly granted as a result of the plaintiffs misleading the court. It now falls to me to consider the damages, which flow from the wrongful issuance of the injunction caused by the plaintiffs.
- [232] The approach to determining damages in this context was helpfully summarized by Belobaba J. in *United States of America v. Yemec*, 2013 ONSC 50, O.J. No. 1473, at paras. 14 -15:

The undertaking under Rule 40.03 is given to the court—not the defendant—to cover damage caused by a wrongly granted injunction. It is the court that exacts the undertaking and conducts the damages inquiry for the defendant’s benefit.

The legal principles that apply to the damages inquiry are well established. Damages for a wrongly granted injunction are assessed on the same basis as damages for breach of contract. Causation, foreseeability and mitigation provide the legal framework for the damages analysis. As the Court of Appeal observed when they agreed that this inquiry should proceed:

It will be up to the damages inquiry judge to determine...whether the defendants have sustained any compensable damages, taking into account the principles of causation, remoteness, foreseeability and mitigation, and the general rule of public policy that precludes a person from benefitting from his or her own crime. [footnotes deleted]

- [233] As Koehnen J. stated, the injunction was issued at a “commercially critical time.” This is because the injunction prevented the documentary from being released prior to, or around the same time as, *The Disaster Artist*. Indeed, given the strong representation of Wiseau on the injunction motion, in contrast to his later revolving door of lawyers that he was unwilling to pay, one might reasonably infer that *The Disaster Artist* was behind the injunction application. Regardless, the uncontradicted evidence was that there was much interest at the time among fans of *The Room* and from cinemas which screen *The Room* in *Room Full of Spoons*, interest Wiseau did his best to frustrate through threats of legal action and, in June 2017, by obtaining the injunction.
- [234] The defendants’ also led uncontradicted evidence that they were on the verge of finalizing a distribution deal with Gravitass, which was also prevented by the injunction due to the cloud it placed over the documentary. Although there were assertions by witnesses for the plaintiff, particularly Spicuzza and Grewal, that *Room Full of Spoons* would still need additional editing and may have challenges obtaining insurance, this evidence was speculative, biased, and effectively challenged on cross-examination. It was also rebutted by the defendants, who confirmed that any further changes for the release could have been made quickly and that Gravitass itself would have provided insurance.
- [235] Most documentaries are not commercial successes. Few are expected to make money, and the defendants worked on the project without such an expectation. They were old friends who were fans of *The Room* who worked on the project for several years. None of them had made a feature documentary before. However, the making of *The Disaster Artist* changed those expectations. The defendants led expert evidence from Doug Bania that had the documentary been released in 2017, around the time of the release of *The Disaster Artist*, it had the potential to be one of those rare documentaries that attracts widespread attention and significant box office revenue.
- [236] Bania’s evidence, and his conclusion that the defendant corporation Room Full of Spoons Inc. would have earned, conservatively, US\$660,000 had the documentary been released in 2017 is reviewed earlier in these Reasons. This evidence is compelling, it is uncontradicted, and I accept it.
- [237] In coming to this conclusion I have considered that the injunction was lifted in November 2017, that *The Disaster Artist* was released commercially in December 2017, and that the defendants have not yet released *Room Full of Spoons*. These facts are highlighted by the plaintiffs who argue that any losses from not releasing the documentary with *The Disaster Artist* are of the defendants’ own making. I disagree. The injunction, which

launched this lawsuit, had the effect of blocking the release of the documentary in 2017. Although lifted in November, the defendants could not complete the distribution deal while the lawsuit was outstanding and, in any event, it would have been impossible to finalize, market and distribute *Room Full of Spoons* widely within just a few weeks in late 2017, which is when the “buzz” for *The Disaster Artist* peaked.

- [238] Nevertheless, interest in *The Room* apparently continues, and there will be a market for *Room Full of Spoons* when it is finally released. To some limited extent, therefore, I would reduce Bania’s estimate of losses to take account of the revenue that may still be earned by the documentary. There is no clear formula for determining this, but I am willing to assume that, absent “buzz” from *The Disaster Artist*, but having a ready audience among fans of *The Room* and *The Disaster Artist*, *Room Full of Spoons* will likely earn something similar to *Best Worst Movie*, the documentary at the low end of Bania’s comparables, or about US\$110,000 which reduces the defendants’ damages to US\$550,000.
- [239] I acknowledge that this assessment of damages involves some guesswork, but it is at least guessing within a framework and is what I must do in such circumstances: *Walsh v. Buchanan*, 1994 CarswellOnt 5676 (Ont. Sup. Ct.), at paras. 227-228.
- [240] I also conclude that the damages should be awarded to the defendants’ corporate entity, Room Full of Spoons Inc., which owns the documentary and is the appropriate vehicle to receive the funds.

### **Defamation**

- [241] The defendants’ counterclaim also seeks damages for defamation resulting from Wiseau’s “Shame on You” campaign. However, the defendants did not press defamation as a separate finding I should make at trial, submitting that Wiseau’s conduct in attacking them should be considered in support of an award of punitive damages. I agree that Wiseau’s campaign stated falsehoods about the defendants on social media and in correspondence to many people in the film industry. Wiseau accused the defendants of acting illegally, which is clearly defamatory, and the defamatory statements were part of a broader campaign to prevent the defendants’ project from advancing. This campaign also included preventing the Kickstarter campaign from continuing and, later, preventing the release and screenings of the film for which the defendants will be compensated by the damages I have already concluded should be awarded to them. Further, there is little evidence as to the scope of publication of Wiseau’s defamatory statements, and none of the individual defendants were singled out. In my view, Wiseau’s conduct in this regard is, as the defendants have suggested, best addressed under punitive damages.

### **Punitive Damages**

- [242] Punitive damages are exceptional and must be awarded with restraint. They are limited to cases where a litigant’s conduct is “malicious, oppressive and high-handed” or

“offends the court’s sense of decency:” *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, [2002] 1 S.C.R. 595, at para. 36 (“*Whiten*”). Awards of punitive damages may be made where the misconduct is “a marked departure from ordinary standards of decent behavior.” The object of awarding punitive damages is to punish the guilty party rather than compensate the innocent one: *Whiten*, at para. 36 and paras. 66-76. The misconduct giving rise to punitive damages can arise from the causes of action, and/or from a litigant’s conduct of the litigation itself: *McCabe v. Roman Catholic Episcopal Corporation for the Diocese of Toronto, in Canada*, 2019 ONCA 213, 146 O.R. (3d) 607, at paras. 43-48.

[243] At para. 94 of *Whiten*, Binnie J. summarized the factors to be considered in deciding whether punitive damages should be awarded:

(1) Punitive damages are very much the exception rather than the rule, (2) imposed *only* if there has been high-handed, malicious, arbitrary or highly reprehensible misconduct that departs to a marked degree from ordinary standards of decent behaviour. (3) Where they are awarded, punitive damages should be assessed in an amount reasonably proportionate to such factors as the harm caused, the degree of the misconduct, the relative vulnerability of the plaintiff and any advantage or profit gained by the defendant, (4) having regard to any other fines or penalties suffered by the defendant for the misconduct in question. (5) Punitive damages are generally given only where the misconduct would otherwise be unpunished or where other penalties are or are likely to be inadequate to achieve the objectives of retribution, deterrence and denunciation. (6) Their purpose is not to compensate the plaintiff, but (7) to give a defendant his or her just desert (retribution), to deter the defendant and others from similar misconduct in the future (deterrence), and to mark the community’s collective condemnation (denunciation) of what has happened. (8) Punitive damages are awarded *only* where compensatory damages, which to some extent are punitive, are insufficient to accomplish these objectives, and (9) they are given in an amount that is no greater than necessary to rationally accomplish their purpose. (10) While normally the state would be the recipient of any fine or penalty for misconduct, the plaintiff will keep punitive damages as a “windfall” in addition to compensatory damages. (11) Judges and juries in our system have usually found that moderate awards of punitive damages, which inevitably carry a stigma in the broader community, are generally sufficient.

[244] In my view an award of punitive damages is justified in this case. The plaintiffs’ conduct has been oppressive and outrageous towards the defendants over many years and in this lawsuit. The plaintiffs engaged in bad faith negotiations with the defendants in order to delay or prevent the release of the documentary when it likely would have received much attention and accolades. In doing so, the plaintiffs were concerned with protecting and maximizing the value of *The Disaster Artist*, in which the plaintiffs have a financial interest. This effort even continued at trial when the plaintiffs sought to have consideration of *The Disaster Artist* excluded. Most notably, however, in purporting to

continue negotiations, the plaintiffs requested that the defendants delay the documentary's release, which they did so that the plaintiffs could use that delay to prepare for and obtain an injunction – an injunction obtained *ex parte* and based on misleading and incomplete material – which prevented *Room Full of Spoons* from being released around the same time as *The Disaster Artist*. Wiseau then refused to attend for cross-examination on his affidavit, and has not produced any financial information relating to *The Disaster Artist*.

- [245] The plaintiffs did their best to keep the cloud on title over the documentary caused by the injunction for as long as they could by attempting to delay the litigation whenever possible. Wiseau's conduct in attempting to delay the trial has been reviewed above. As the case management judge Koehnen J. noted in his Direction of December 31, 2019, the plaintiffs "created roadblocks to scheduling at almost every attendance before [him]". Wiseau also forced his lawyers to bring motions to remove themselves as counsel of record and then attempted to rely on the lack of counsel as a basis for delay, even though the situation was of Wiseau's own making. Wiseau's motivation was made crystal clear when, on the last business day before trial, he sought to discontinue the proceeding with the intention of starting a new claim somewhere else.
- [246] The plaintiffs also made misrepresentations to third parties about the legality of screening the documentary, and conducted the "Shame on You" campaign which wrongly accused the defendants of illegal conduct, including "stealing" material from Wiseau. This conduct prevented the defendants from raising money on Kickstarter and the injunction and ongoing litigation effectively destroyed the defendants' years of work developing a profile for the *Room Full of Spoons* project on social media.
- [247] Wiseau also accused the defendants of filing "perjurious" affidavits, though he never identified what was allegedly false. Despite this, he asked the case management judge to direct the Crown Attorney to prosecute the defendants for perjury less than a month before trial was to commence. Wiseau also made misrepresentations to the court regarding his availability for trial.
- [248] Further, in considering an award of punitive damages, I am mindful that the defendants intended in early 2019 to bring an anti-SLAPP motion. Had they done so and been successful, and had the judge found that the action was brought in bad faith, the defendants would be entitled to damages: *Courts of Justice Act*, R.S.O. 1990, c. C. 43, s. 137.1(9). While this is not an anti-SLAPP motion, the ability to obtain damages in such circumstances is recognition of the wrong caused by actions, which have the effect of infringing a defendant's freedom of speech. In my view this action was brought for the improper purpose of preventing the release of a documentary disliked by Tommy Wiseau. None of his causes of action had any merit, as I have found above and which, I note, is not inconsistent with the findings of Koehnen J. when he reviewed the strengths or, more aptly, the weaknesses in the plaintiffs' case made on a more limited record when the injunction was lifted. In my view, the deliberate infringement on the defendants'

freedom of speech caused by the plaintiffs' actions also supports an award of punitive damages.

- [249] The defendants/plaintiffs by counterclaim seek an award of \$500,000 in punitive damages, citing the recent award of \$1,000,000 in *Nintendo of America Inc. v. King*, 2017 FC 246, 146 C.P.R. (4th) 369, involving the circumvention of technological prevention measures, and the award of \$200,000 in *Hilltop Group Ltd. v. Katana*, [2002] O.J. No. 4136 (Ont. Sup. Ct.), which arose from misconduct throughout the proceedings, including false affidavits and fraudulent conduct as well as obfuscation and delay in the proceedings.
- [250] This case lies closer to *Hilltop* than *Nintendo*. Indeed, the description of the litigation conduct in *Hilltop* is worse than this case. However, the conduct in obtaining the injunction and continuing to pursue the case had a serious impact on the defendants' right to freedom of expression, and was done in order to maximize the plaintiffs' assets. The plaintiffs' conduct should therefore be condemned. Having regard to the factors set out in *Whiten*, quoted above, I conclude that an award of CDN\$200,000 is appropriate to punish the plaintiffs for their egregious conduct. As with the compensatory damages, the punitive damages are awarded to the corporate defendant/plaintiff by counterclaim, Room Full of Spoons, Inc.

### **Conclusion**

- [251] The plaintiffs' claim is dismissed. The counterclaim of the defendants is granted and the plaintiffs shall pay to the defendant Room Full of Spoons Inc. US\$550,000 in compensatory damages, plus CDN\$200,000 in punitive damages. The defendants are entitled to their costs. The defendants shall provide me with brief written submissions on costs within 30 days of the release of these Reasons, and the plaintiffs shall provide a response within 30 days of the receipt of the defendants' submissions.



**Schabas J.**

**Date:** 2020-04-22