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"And if it Wasn't For Me[rrick], Then Where Would You be Ms. Gypsy Rose Lee?" An Argument for Copyright Protection for Theatre Directors Through a Reasonable Definition of Theatrical Stage Directions and an Understanding of the Theatre Company

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**“AND IF IT WASN’T FOR ME [RRICK], THEN WHERE
WOULD YOU BE MS. GYPSY ROSE LEE?”¹ AN
ARGUMENT FOR COPYRIGHT PROTECTION FOR
THEATRE DIRECTORS THROUGH A REASONABLE
DEFINITION OF THEATRICAL STAGE DIRECTIONS AND
AN UNDERSTANDING OF THE THEATRE COMMUNITY**

I. INTRODUCTION

Mounting any theatrical production cannot be accomplished alone. Whether it is a full-scale spectacle with a large cast or a one-man show, there are countless people behind the scenes or on stage working as a team to ensure the audience sees a fluid piece of theatre. In a musical theatre production some of these team members include the playwright, composer, choreographer, designers and director. While undoubtedly all of their contributions are essential to ensure artistic and commercial success of a theatrical production, presently the director does not enjoy copyright protection for his work.

This battle for recognition has been the reason for dispute in the most recent battles for copyright protection for theatre directors. Shortly before its opening on October 2004, Edward Einhorn the director of *Tam Lin*, was fired.² The show went on, this time helmed by an assistant who received credit as director. Shortly thereafter, Mr. Einhorn filed a lawsuit claiming his stage directions were copyrighted works, which the production infringed.³ More recently, the director, choreographer, and many other members of the creative team for the musical *Urinetown* threatened to sue those associated with productions of the musical in the Midwest, claiming significant amounts of their work had been copied

1. The original production of *Gypsy* was directed by David Merrick. The final song of the musical is *Rose’s Turn*, where the betrayed heroine sings to her daughter, “. . . and if it wasn’t for me, then where would you be Ms. Gypsy Rose Lee?”

2. See Jesse Green, *Exit, Pursued by a Lawyer*, N.Y. TIMES, January 29, 2006, §2, at 1 (detailing Einhorn’s dismissal after nearly two months of unpaid rehearsals and at least one heated argument where furniture was allegedly thrown).

3. See *id.* (discussing Einhorn’s decision to pursue a copyright infringement instead of unjust enrichment or contractual options that would have been much easier to prove).

without permission.⁴

Federal courts have yet to decide whether stage directions are copyrightable works, and it is unlikely that the *Tam Lim* lawsuit or the *Urinetown* controversy will bring such a decision. In the past decade, a federal court resolution as to the copyrightability of theatrical stage directions has been delayed by out of court settlements.⁵ Additionally, conflicting views by the legal⁶ and the artistic community's predictions of catastrophic consequences if copyright protection is extended to theatrical directors have blurred the predictability of a resolution.⁷ This article argues that theatrical stage directions should be afforded copyright protection. First, this article gives a basic background of the theatrical community; specifically highlighting the collaborative spirit, overwhelming respect for the director, and a collective desire by all players in this industry for its continued prosperity. This article then discusses the various suggested definitions for theatrical stage directions from reference sources and various members of the stage community and argues that a reasonable definition must take into account the suggested definition from directors. Relying on stage directors' point of view this article defines theatrical stage directions as: a director's interpretation of a written play performed under his control and fixed through a prompt book or a video-recording. Next, this article addresses the required elements for copyrightability: subject matter, original work

4. See Campbell Robertson, *Creative Team of Urinetown Complains of Midwest Shows*, N.Y. TIMES, November 15, 2006, at E3.

5. See Green, *supra* note 2, at 1. (detailing two prominent cases involving directorial plagiarism: *Gutierrez v. Desantis*, No. 95-1949 (S.D.N.Y., filed March 22, 1995) and *Mantello v. Hall*, 947 F. Supp. 92 (S.D.N.Y. 1996), both of which never reached a decision on the copyright issues, but gave hints of what courts will eventually have to face).

6. See, e.g., Douglas M. Nevin, Comment, *No Business Like Show Business: Copyright Law, the Theatre Industry, and The Dilemma of Rewarding Collaboration*, 53 EMORY L.J. 1533 (2004) (arguing that copyright law should recognize the collaboration of a dramatic production team and grant them copyright as joint authors). See also, e.g., Talia Yellin, *New Direction for Copyright: The Property Rights of Stage Directions*, 24 COLUM.-VLA J.L. & ARTS 317 (2001) (arguing that theatrical stage directions may only receive a thin copyright as compilations). But see, e.g., David Leichtman, *Most Unhappy Collaborators: An Argument Against the Recognition of Property Ownership in Stage Directions*, 20 COLUM.-VLA J.L. & ARTS 683 (1996) (arguing that theatrical stage directions cannot be copyrighted).

7. See, e.g., Green, *supra* note 2 (quoting writer John Weidman's grim prediction that copyright to directors would cause staging options to disappear and that cumbersome licensing would make plays impossible to produce). See also e.g., Press Release, Mergatroyd Productions, Former Director Sues Mergatroyd, Claims Violation of His Copyright (Oct. 18, 2005), available at http://www.tamlin-online.com/tamlin-online/presskit/lawsuit_pressrelease.html (quoting the Dramatist Guild of America as stating that copyright claims infringe on the rights of dramatists to own and control their plays, and inhibit the opportunities of other professionals, and audiences, to participate in the re-creation and enjoyment of the play).

of authorship, and fixation; and explains that theatrical stage directions can meet these requirements. Specifically, since copyright law protects the expression of ideas fixed in a tangible form, theatrical stage directions when written or recorded are the expression of the director's interpretation of a play and thus should be copyrightable. This article examines the potential issues of ownership affecting theatrical stage directions such as joint-works, work-for-hire, derivative works, and compilations. Next, this article explains that the limiting copyright doctrines of merger, sweat of the brow, and moral rights do not support arguments denying theatrical stage directions copyright protection. Finally, this article finds that giving copyright protection to theatrical stage directions not only promotes the continued success of the theatre community, but also supports the basic policy behind copyright law.

II. A BASIC UNDERSTANDING OF THE THEATRE COMMUNITY

In 2003, during the well-known Broadway musicians' strike, actors and other theatre unions refused to cross picket lines and did not perform, causing Broadway shows to halt.⁸ This camaraderie led to a speedy and positive resolution to the Broadway musicians' issues and the return of the community as a whole to the stage.⁹ It also underscores the fact that the theatre community needs collaboration among all its players in order to thrive.¹⁰ As a result, the Broadway theatre community recognizes the need for mutual support of each other as the key to collective success.

Another key element in the theatre industry is the need for recognition, as making a living is very difficult and one can only improve his earning potential by improving his reputation. For example Jerry Mitchell, the award winning Broadway choreographer and soon-to-

8. See Tania Padget, *Musicians, Producers Plan More Talks*, NEWSDAY, March 1, 2003 at A14 (explaining the role new technological advancements played in the rise of virtual orchestras, leading Producers to move to change the Union rule requiring that Broadway houses hire a minimum of musicians based on theatre size). See also, Monty Phan and James T. Madore, *Strike Means Music For Nobody's Ears; 18 musicals shut as actors, stagehands honor musicians walkout*, NEWSDAY, March 8, 2004, at A05 (discussing that the actor's and the stage managers' unions instructed its members not to cross the musician's picket lines).

9. See Liz Trotta, *Broadway No Longer Dark as Talks End Musicians' Strike*, WASH. TIMES, March 12, 2003, at A09 (discussing how the fact that actors and stage hands joined the musicians in their strike, caused all but one Broadway musical, in which the actors doubled as the orchestra, to halt performances and thus creating a loss of seven million dollars for New York's tourist economy).

10. See, e.g., Nevin, *supra* note 6, at 1533 (commenting that even if one person could write, direct, produce, design, etc. he would still need an audience).

be Broadway director, started his career in the chorus of various musicals.¹¹ Also, Julie Taymor, the Tony award winning director of the *Lion King*, began her career as a set designer and mask-maker. If these artists had not received the recognition for excellence in their non-directorial work at the beginning of their careers, they might not have had the opportunity to reach the top. With this understanding of the financial situation of the American theatre, where you must pay your dues for many years prior to seeing lucrative success, it is plain to see that many Broadway players do not seek immediate financial gain, but instead want recognition for their work.¹²

Along with collaboration and the need for recognition, a final element inherent in the theatrical community is a general respect for the director.¹³ Since directors had to work from the bottom up to reach the pinnacle, those in supporting positions understand and respect his authority. This respect allows a director to work and lead effectively.¹⁴ Thus all members of the creative team enter into a theatrical production knowing that the director is the driving force of the project. Additionally, since many directors work with the same team in subsequent productions, these team members not only have a respect for the director, but a desire that he succeeds so that he may continue to direct and continue to provide consistent work for them.¹⁵

11. Prior to becoming one of Broadway's most prominent choreographers, Mitchell was seen in the dancing ensemble of such Broadway shows as: *Brigadoon*, *On Your Toes*, and *The Will Rogers Follies*.

12. See, e.g., Yellin, *supra* note 6, at 320-321 (acknowledging that Directors consider recognition of whose work is whose to be more important. For example, in Joe Mantello settled his case against the Caldwell Theatre Co. for recognition and a small damages amount. He did not keep the settlement money). See also, e.g., Press Release, Sweet Charity National Tour Gets New Director, available at http://www.broadway.com/Gen/Buzz_Story.aspx?ci=526282 (illustrating this need for recognition by noting that everywhere touring director, Scott Faris receives billing a special credit reading "2005 Broadway Revival Directed by Walter Bobbie," who directed the original Broadway revival and stepped away from the touring production, will be printed).

13. See, e.g., *Bridging the Gap Between Performers and Directors*, BACKSTAGE, June 4, 2004 at 1 [hereinafter *Bridging the Gap*] (describing a pattern of recognition in the 2004 Drama Desk Awards, where many performers acknowledged the excellence of their directors; most notably Phylicia Rashad's endorsement that working with a good director makes a good actor).

14. See Beth Freemal, Comment, *Theatre, Stage Directions & Copyright Law*, 71 CHI.-KENT L. REV. 1017, 1017-1018 (noting that the partnership between a director and his creative team is essential for a successful production since he must freely take and discard from that team those ideas that will further his concept).

15. Compare creative team of: Dirty Rotten Scoundrels, INTERNET BROADWAY DATABASE (available at <http://www.ibdb.com/production.asp?ID=383315>), with creative team for Hairspray (available at <http://hairspraythemusical.com/>), with creative team of The Full Monty, INTERNET BROADWAY DATABASE (available at <http://www.ibdb.com/production.asp?ID=12548>).

III. A REASONABLE DEFINITION OF THEATRICAL STAGE DIRECTIONS SHOULD HEAVILY RELY ON THE POINT OF VIEW OF STAGE DIRECTORS, AND LESS ON OTHER PARTIES

Before embarking on the journey in search of copyright protection for theatrical stage directions, a clear definition of this term is needed. In short, what are we seeking to protect? Indeed, it is difficult to argue for the copyrightability of something which has a different meaning to different people. In discussing theatrical stage directions and copyright, various definitions from various sources have furthered added to this difficulty.

A. The Copyright Act and the Views of Others in the Theatre Industry Provide Little Guidance of a Reasonable Definition of Theatrical Stage Direction

The obvious first place to look for guidance is section 101 of the Copyright Act, which defines the terms used in the Act. Moreover, since the Copyright Act lists dramatic works, pantomimes, and choreographic works as copyrightable categories, looking at their definitions would be helpful.¹⁶ However, of the seven categories listed, “[only] four are defined in section 101.”¹⁷ Both “dramatic works” and “pantomimes and choreographic works” were left undefined because Congress believed they had a “fairly settled meaning.”¹⁸

With a lack of statutory definitions, we turn to reference material. *The Oxford Companion to the Theatre*, relied upon by many in discussing theatre and the law, defines ‘stage directions’ as:

[N]otes added to the script of a play to convey information about its performance not already explicit in the dialogue. Generally speaking they are concerned with the actor’s movements and the scenery or stage effects . . . Stage directions concerning the actors’ movements . . . are based on two important peculiarities: they are relative to the position of an actor facing the audience—right and left are therefore reversed from the spectator’s point of view.¹⁹

This narrow definition is in direct conflict with the *Companion’s* own definition of a ‘director’ as:

16. 17 U.S.C. §102(a) (2006).

17. H.R. REP. No. 94-1476, at 53 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5666.

18. *Id.* at 5667.

19. THE OXFORD COMPANION TO THE THEATRE 787-788 (Phyllis Hartnoll ed., 4th ed. 1983).

[T]he person responsible for the general *interpretation* of the play . . . the style of each director is nowadays so personal that it may be immediately recognized, and in some cases plays are referred to as being not by the author but by the director . . . and it has been said that the ideal director should be an actor, and artist, an architect, an electrician, and expert in geography, history, costume, accessories, and scenery . . .²⁰

If a director is one who interprets, it follows that his ‘direction’ is an ‘interpretation’ of a play and not the narrow orientation-based definition of direction. Therefore reliance on reference sources for an appropriate definition must take into account the discrepancy between a director and direction.

Dictionary meanings aside, many in the theatre industry disagree as to the proper definition of theatrical stage directions. Producers, who provide the financial backing for theatrical productions see directors as a hired hand and therefore see theatrical stage directions as the mere work product of their employee.²¹ Some playwrights consider stage directors as those who simply take their words, and at times their own written directions from text to stage without much added creativity.²² Some refer to it as a director’s way of “shaping the new works of young writers,”²³ implying that the director’s interpretation depends on the experience of the playwright.

Finally, some legal theorists argue that the Copyright Act implicitly defines “dramatic works” and “choreography and pantomime works” (the copyrightable subject matter categories where theatrical stage directions could most easily fit) by their fairly settled meaning and therefore we should look to cases *prior* to the enactment the Act for guidance.²⁴ For example in *Harold Lloyd Corp v. Witwer*,²⁵ the court stated that ‘stage business’ is not copyrightable.²⁶ Thus, these legal theorists argue that stage directions are not dramatic works but instead are nothing more than ‘stage business,’ without a claim to copyright

20. *Id.* at 221-22 (emphasis added).

21. See Yellin, *supra* note 6, at 335-336 (declaring that it seems logical to consider stage directors hired hands of the producers or employed by the theatre due to their seemingly ultimate decision making authority).

22. *Id.* at 330 (arguing that much of theatrical stage direction is made up of stage orientation, such as upstage or downstage, which cannot be copyrightable).

23. Nevin, *supra* note 6, at 1548.

24. Leichtman, *supra* note 6, at 697.

25. 65 F.2d 1 (9th Cir. 1933).

26. *Id.* at 24

protection.²⁷

In sorting through these varying and at times conflicting definitions of theatrical stage directions, we must recognize that each comes from parties with a financial interest in the outcome. First, the producer, who funds the theatrical production and hires the different components of a production team, directly benefits from a successful show.²⁸ “Traditionally, Broadway producers have sold licensing rights to merchandisers . . . [and] there’s a growing savvy among [them] that there are [more] revenue possibilities out there.”²⁹ If theatrical directions are deemed the mere work product of an employee working for the producer, then it is likely that the producer could turn his ownership of stage directions into a lucrative money-making venture. Thus a director gaining copyright protection for their works translates into a loss of income for a producer.

Next, the playwright is paid for the rights to bring his written dramatic work to different mediums including the stage.³⁰ Undoubtedly, it is easier and more appealing for a television executive wishing to purchase the rights to broadcast a Broadway show to deal solely with the playwright.³¹ However, since this broadcast would be relying on the actual performance, copyright protection for theatrical stage directions would make directors an interested party in the negotiations. Consequently, the playwright would have to share some control and profits with the director. Because of this potential power shift, a playwright’s suggestions as to the copyrightability of theatrical stage directions should be viewed with skepticism.³²

27. See Leichtman, *supra* note 6, at 697 (arguing that the lack of a story-telling characteristic in stage directions separates it from the copyrightable ‘dramatic work’ category and places it instead in the list of ‘uncopyrightable parts of a dramatic work,’ one of which is stage business).

28. See, e.g., *Real Producers Are Nothing Like Bialystock. Right?*, N.Y. TIMES, June 3, 2001, at 9 (commenting that besides cardinal rule of producing of never putting your own money into the show, as mentioned in the Broadway show *The Producers*, many still do and thus have a personal stake in the show’s success).

29. Carol Diuguid, *B’Way Buys Into the Good Life*, VARIETY, Dec. 22, 1997, at 69.

30. See, e.g., Susan Heller Anderson, *Elizabeth Ashley Buys Broadcast Rights to ‘Cat’*, N.Y. TIMES, July 21, 1982, at C15 (announcing the acquired television rights of Tennessee Williams’s “*Cat on a Hot Tin Roof*” and highlighting the extent of this lucrative stage to television deal).

31. An example of this is PBS which has an annual “Live from Lincoln Center” program, which has broadcasted Broadway’s Tony Award winning “*Contact*” in 2002, and “*The Light at the Piazza*” in July, 2006.

32. One of most vocal opponents of granting copyright protection to theatrical stage directions is John Weidman, a playwright, who has written the book for many Broadway musicals including: *Assassin*, *Contact*, *Big*, and *Pacific Overtures* among others. He argues that if each director’s staging is given copyright, soon there would be no staging options left. He further reasons that production of new plays would cease due to risk of lawsuits and even works in the

Finally, the legal theorists' definition suggesting that stage directions are nothing more than uncopyrightable 'stage business' also lacks credibility. If we are to look back to pre-1976 case law for a hint at Congress's intent, we must recognize that theatrical stage directions were in existence at that time.³³ Thus, if Congress meant to omit theatrical stage directions from the 1976 Act, it would have said so.

While an argument could be made that Congress, by not including theatrical stage directions as a copyrightable subject matter was signaling its uncopyrightability, we must note that it took Congress over fifty years to add dramatic works and choreography as copyrightable subject matter. In addition, through its changes in 1912 and 1952, Congress has shown the expansive characteristic and flexibility of the Copyright Act.³⁴ Thus, silence can only imply an open door to possible copyright protection. Finally, given the mixed views in the theatrical community toward granting rights to stage directors, it is unlikely that advocacy for copyright protection of theatrical stage directions would have attracted the same amount of industry support as choreography, which successfully obtained copyrightable status.³⁵

A more convincing argument is that Congress meant to exclude the spontaneous and improvised vaudevillian acts such as fast-paced collage of music, comedy, dance, novelty numbers, and skits' that were very popular at from 1880 through the early 1900s.³⁶ There is a clear distinction between these improvisations and theatrical stage directions.

The term 'stage business' is still present today and it is clearly distinct from current theatrical stage directions. One needs to look no further than a typical rider in a contract between actors and producers to

public domain would not be produced for lack of incentives for creativity. See Biography of John Weidman, INTERNET BROADWAY DATABASE (available at <http://www.ibdb.com/person.asp?ID=6914>). See also, Green, *supra* note 2 and text accompanying note 7.

33. See, e.g., *Palmer v. Dewitt*, 1872 WL 9759 (N.Y. 1872) (dealing with the alleged copyright infringement of the direction of a dramatic scene).

34. In 1912, Congress added motion pictures as a subject matter category (Act of Aug. 24, 1912, Pub. L. No. 62-303, 37 Stat. 488); then in 1952, Congress added a right to authorize performance for profit for non-dramatic literary works (Act of Jul. 17, 1952, Pub. L. No. 82-575, 66 Stat. 752).

35. See Joi Michelle Lakes, *A Pas De Deux For Choreography and Copyright*, 80 N.Y.U. L. REV. 1829, 1842 (2005) (describing the commission by Congress of a report, the Copyright Revision Studies, which explored copyright protection for choreography and included comments by Agnes DeMille, Hanya Holm, and Lucile B. Nathanson supporting a separate copyright category for choreography).

36. See Hartnoll, *supra* note 19, at 860 (defining Vaudeville as that which replaced Variety, originally presented as eight contrasting acts which at first began with excessive slapstick and a specific punch formula).

see 'stage business' defined as, "any material [not given by the director] performed by Actor in rehearsals or in any performance of the Play . . ." ³⁷ Thus the contractual definition of 'stage business' includes an improvisational element.

Whether we define 'stage business' through a historical view or its current use in performance contracts, two points are clear: 'stage business' is not copyrightable, and 'stage business' is not theatrical stage directions. Thus, it is incorrect to close the door to copyright for theatrical stage directions by labeling it 'stage business.'

B. Establishing a Reasonable Definition for Theatrical Stage Directions Must Take Into Account the Point of View of Directors

Not surprisingly, theatrical stage directors have a much broader definition for their work, however many aspects of this broad definition make sense. Undoubtedly the text of the play sets the framework of their work, but it is what they create within that framework, their interpretation of the text, that makes up stage directions. "A director gives physical and visual life to a text." ³⁸ To create visual work, they must lead and guide a team of designers, choreographers, electricians, and countless others in creating effects that fit their vision. ³⁹ A director often plays a key role in casting the actors, and doing so selects not only the best, but the ones he feels will do justice to his vision. ⁴⁰ To be able to do so effectively, a director, particularly at the Broadway level, is often experienced in many of these areas. ⁴¹ Additionally, a director also brings his own personal feelings of the time, and what relevant themes,

37. See Robert C. Harris, *Intersection of Entertainment Law and Copyright*, PRACTICING LAW INSTITUTE, 787 PLI/Pat 413, 475 (providing clause 21: Interpolations & Stage Business of a sample Collective Bargaining Agreement between Actor's Equity Association and the League of American Theatre and Producers, Inc.).

38. Green, *supra* note 2 (quoting Edward Einhorn, former director of Tam Lin).

39. See, e.g., Interview by Christopher Rawson with Kathleen Marshall, Director, *The Pajama Game* (Jan. 31, 2006) available at <http://www.post-gazette.com/pg/06031/646848-325.stm> (last visited May 10, 2006) (describing a usual day in the production process of the *Pajama Game*, where the director had a meeting with the stage managers, set builders and script revisers).

40. See, e.g., Interview by Carol de Giere with Joe Mantello, Director, *Wicked* (Sept. 30, 2004) available at <http://www.wickedwestend.co.uk/articles-reviews/joe-mantello.htm> (last visited May 10, 2006) (describing how when he casts a show, he often looks for the 'real thing,' rather than a good actor who can fake it). *But see Bridging the Gap*, *supra* note 13 (explaining that in casting a musical, the main concern is finding if the person is right for the part in terms of vocal demands).

41. See, e.g., Interview by Laurie Brown with Julie Taymor, Director, *The Lion King* (April 3, 2000) available at http://www.uv.es/~fores/programa/taymor_interview.html (discussing Taymor's training in set design and mask building) (link inaccessible by direct entry, but accessible via Google search).

if any he would like to explore with the production.⁴² Taking all these considerations into account, we arrive at the following definition for theatrical stage directions: a director's interpretation of a written play performed under his control and fixed through a prompt book or a video-recording.

Because of the financial implications driving the suggested definition of stage directions by producers, the artistic fears and financial interests influencing playwrights, and the outdated and speculative approach of the legal theorists who suggest we look to pre-1976 case law; the most reasonable definition is that which takes into account the point of view of directors. Also, this definition is supported by the *Oxford Dictionary's* own definition for directors, as 'one who interprets.'⁴³ After clearly identifying what it is meant by theatrical stage directions, an analysis is needed to determine whether stage directions can be protected under the current Copyright Act.

IV. REASONABLY DEFINED THEATRICAL STAGE DIRECTIONS MEET THE REQUIREMENTS OF COPYRIGHT PROTECTION: SUBJECT MATTER, ORIGINAL WORKS OF AUTHORSHIP AND FIXATION IN TANGIBLE FORM

"Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression, now known or later developed from which they can be perceived, reproduced, or otherwise communicated."⁴⁴ This means the stage directions must first qualify as a work, which occurs by fitting into one of the statutory categories of copyrightable subject matter. Next, theatrical stage directions must meet the requirements authorship and fixation. As discussed below, stage directions as original interpretations of a playwright's script expressed through a performance and either video-taped or recorded in a prompt book satisfies the requirements for copyrightability.

A. Copyright Statutory Subject Matter Generally

Before discussing if the theatrical stage directions meet the requirements for copyrightable work, we must ask if they qualify as a 'work.' Section 102(a) of the Copyright Act states a list of categories of

42. See, e.g., Interview by Stephen Crittenden with Hal Prince, Director, *Evita* (1998) available at <http://www.abc.net.au/express/stories/prince.htm> (last visited May 10, 2006) (describing Prince's personal feelings toward the media as an element of his interpretation of *Evita*).

43. See Hartmoll, *supra* note 19, at 221-222 (defining "director").

44. 17 U.S.C. §102(a) (2006).

works that can be copyrighted.⁴⁵ Additionally, subsection (b) explicitly states uncopyrightable subject matter. “In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.”⁴⁶

Also, a ‘second generation’ copyrightable work based on preexisting subject matter must fit as a compilation or derivative work under section 103 to gain copyright protection.⁴⁷ Undoubtedly, theatrical stage directions use the underlying play as a major source of their interpretation. As a result, in order to receive copyright protection, they must fall within one of the categories in section 102(a) and meet the requirements of section 103, but not fall within one of the categories of section 102(b).

B. Theatrical Stage Directions Fall Within the Copyrightable Subject Matter of Section 102(a)

Arguments have been advanced that theatrical stage directions fit within two 102(a) categories: “dramatic works” and “pantomimes and choreographic works.” As mentioned above, both were left purposely undefined by Congress in the Copyright Act, and the Congressional history states that they are defined by their settled meaning.⁴⁸ Dramatic is defined as: “of or relating to the drama, such as a dramatic actor.”⁴⁹ Clearly theatrical stage directions are closely related to the drama, and thus easily fit within the dramatic works category. Additionally, stage directions could fall within the pantomimes and choreographic works because they “tell an actor how and when to move throughout the course of a play . . . on a specific line.”⁵⁰ Similar to “dance, stage directions

45. See *Id.* (listing the categories of works of authorship: (1) literary works; (2) musical works, including any accompanying words; (3) *dramatic works*, including any accompanying music; (4) *pantomimes and choreographic works*; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works) (emphasis added).

46. 17 U.S.C. §102(b) (2006).

47. See, e.g., Craig Joyce, et. al, COPYRIGHT LAW 230 (6th ed. 2005) (illustrating a second generation work by using the Lerner and Loewe’s musical comedy *My Fair Lady*, which is based on Bernard Shaw’s play *Pygmalion* and discussing that although the musical was an original creation, the key elements of the plot, characters, and dialogue were Shaw’s creations).

48. See *supra* note 18 and accompanying text.

49. See Webster Online Dictionary, available at <http://www.webster.com/dictionary/Dramatic> (last visited on November 21, 2006).

50. Freemal, *supra* note 14, at 1023.

consist of the movement people through space,”⁵¹ and logically fit as a choreography work.

Additionally, Congress has clearly stated that a work will not fail to qualify for copyright protection for want of an enumerated section 102(a) category. “The use of the word ‘include,’ as defined in section 101, makes clear that the listing is ‘illustrative and not limitative,’ and that the seven categories do not necessarily exhaust the scope of ‘original works of authorship’ that the bill is intended to protect.”⁵² This congressional provision signals that Congress preferred a flexible subject matter standard, which would not deny copyright protection to a work that meets the original work of authorship and fixation requirement, but that would “free the courts from rigid or outmoded concepts of the scope of particular categories.”⁵³ Since, as discussed below, theatrical stage directions meet these two requirements, this flexibility should be applied to it as well.⁵⁴

An argument against stage directions as dramatic works is that “when [theatrical stage directions are] considered separately from the text of the play . . . [they do] not tell a connected story or a series of events.”⁵⁵ In *Daly v. Palmer*,⁵⁶ the court recognized that direction of the dramatic railroad scene was copyrightable as a dramatic composition (under the Act of 1856) and a substantially similar railroad scene in another play infringed the copyright.⁵⁷ Additionally, in *Chappel & Co., Ltd. v. Fields*,⁵⁸ the court held that a single scene with a single “literary quality” could be subject to copyright.⁵⁹ One could argue these cases stand for the proposition that stage directions could be copyrightable only if they possess a story telling quality; and thus if the director is not the owner of the underlying book of the play, his directions fail as dramatic works. However, this argument is unpersuasive.

First, it must be noted that both cases were decided before the Copyright Act of 1976. Consequently, we must take into account the flexible standard Congress mentioned in the Act’s legislative history.⁶⁰

51. *Id.*

52. H.R. REP No. 94-1476 at 53 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5666.

53. *Id.*

54. *See infra* Parts IV (E)-(F).

55. Leichtman, *supra* note 6, at 699.

56. 6 F. Cas. 1132 (S.D.N.Y. 1868).

57. *See id.* at 1133-1135 (comparing “Under The Gaslight” railroad scene with the “After Dark” railroad scene, both depicting the now standard dramatic effect of a victim tied to the railroad track, while an incoming train approaches and the hero attempting the often successful rescue).

58. 210 F. 864 (2nd Cir. 1914).

59. *Id.* at 865.

60. *See supra* notes 52-53.

It is worth noting, however, that both cases shed some light as to various courts' historic view that stage directions *could be* copyrightable.

Additionally, there are many arguments raised against stage directions as choreographic works. Although the Copyright Act did not define choreography, the House Report stated that "it [is not] necessary to specify that 'choreographic works' do not include social dance steps and simple routines."⁶¹ Thus the argument is made that since stage direction "consist of the most simple movement possible, for example, walking from point X to point Y,"⁶² it falls within the simple routines uncopyrightable category. This precaution by Congress not to give an individual monopoly over the building blocks of many choreographic works⁶³ should not be extended to prohibit copyrightability of uncomplicated steps. Although there is a clear distinction between the traditional form of choreography and stage directions, the Copyright Office defines choreography as: "[T]he composition and arrangement of dance movements and patterns . . . usually intended to be accompanied by music."⁶⁴ Thus, while it is customary for choreography to be a 'dance to music,' it is not a requirement by the Copyright Office.

After establishing the theatrical stage directions can comfortably fit within the dramatic works, or chorographic and pantomimes categories; or in the alternative fall within Congress's flexible standard, we next discuss whether they can meet the requirements of section 103 as derivative works and/or compilations.

C. Reasonably Defined Theatrical Stage Directions Satisfy the Requirements of Derivative Works and Compilations

Although theatrical stage directions fit within one of the categories set forth in section 102 of the copyright act, their substantial reliance on a preexisting work (the underlying dramatic work) means they must qualify as either a compilation or derivative work under section 103.

Section 103 [of the Copyright Act] complements section 102: a compilation or derivative work is copyrightable if it represents an 'original work of authorship' and falls within one or more of the categories listed in section 102 . . . [and the] copyright in a 'new version'

61. H.R. REP. NO. 94-1476 at 53-54 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5667.

62. *Freemal, supra* note 14, at 1025.

63. *See Hogan v. McMillan, Inc.*, 789 F.2d 157, 161 (2d Cir. 1986) ("basic waltz step, the hustle step, and the second position of classical ballet") (quoting *The Compendium of Copyright Office Practices, Compendium II* (1984) § 450.03(a)).

64. *See United States Copyright Office Website, Dramatic Works: Scripts, Pantomimes, and Choreography, available at* <http://www.copyright.gov/fls/fl1119.html> (emphasis added).

covers only the material added by the later author, and has no effect one way or the other on the copyright or public domain status of the preexisting material.⁶⁵

As discussed below, these works also meet the requirements for both derivative works and compilations.

1. Derivative Work: Reasonably Defined Theatrical Stage Directions Meet the Requirements of a Derivative Work

“A ‘derivative work’ is a work based upon one or more preexisting works, such as a translation, musical arrangement, *dramatization*, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted.”⁶⁶

In *Alfred Bell & Co. v. Catalda Fine Arts*,⁶⁷ the Second Circuit held that a derivative work is created when it changes from one medium to another.⁶⁸ This broad standard was somewhat limited by *L. Batlin & Son v. Snyder*,⁶⁹ which stated that there must be a “genuine difference” between the underlying work and the prospective derivative work.⁷⁰ Although theatrical stage directions are based entirely on the play, they are expressed in a different medium (a performance) than the play (a book). Furthermore, theatrical stage directions differ from the play, particularly if the director has extracted an interpretation of the text which drives all his dramatic choices. Thus, it follows that theatrical stage directions constitutes a derivative work.

2. Theatrical Stage Directions May Also Qualify as Compilations

Finally, theatrical stage directions also qualify as a compilation. “A compilation is a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship.”⁷¹

An example of this limited protection was enunciated by the

65. H.R. REP. NO. 95-1476 at 57 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5670.

66. 17 U.S.C. §101 (2006) (emphasis added).

67. 191 F.2d 99 (2nd Cir. 1951).

68. *Id.* at 103

69. 536 F.2d 486 (2nd Cir. 1976) (denying derivative work copyright to a new version of an Uncle Sam bank).

70. *Id.* at 492.

71. 17 U.S.C. §101.

Supreme Court in *Feist v. Rural Telephone*.⁷² In that case, the defendant, a publisher of an area-wide telephone directory, was found to meet the compilation requirement because an “author typically chooses . . . in what order to place . . . and how to arrange the collected data so that they may be used effectively.”⁷³ Since a director puts together several copyrightable and uncopyrightable elements⁷⁴ (script, costume, set design, etc.) to further enhance his interpretation of the play, this arrangement meets the requirement of a compilation.

One argument against theatrical stage directions as compilations is that none of the elements arranged by the director are preexisting, as required by the Act.⁷⁵ While this strict reading of the Copyright Act is correct, the House Report’s relevant discussion on compilations signals that the focus should be placed not on the pre-existing material, but on the “process of selecting, bringing together, organizing, and arranging.”⁷⁶ In fact, the material to be arranged includes “all kinds, regardless of whether the individual items in the material have been or ever could have been subject to copyright.”⁷⁷

D. Theatrical Stage Directions Do Not Fall Within One of the Uncopyrightable Categories in Section 102(b)

Once we establish that theatrical stage directions fall within one of section 102(a)’s categories, as well as meeting the requirements of section 103, we must determine that they do not fall within the uncopyrightable categories of section 102(b).

As discussed above, stage directors must deal and coordinate with many members of his team to bring his interpretation of the play to the stage.⁷⁸ Through many interactions with these members the director might have developed a system; however, this is not what the director is seeking to copyright.

Additionally, while polishing their interpretation of a play, directors might come up with artistic, yet uncopyrightable ideas. For example, while directing *The Lion King*, director Julie Taymor had the idea of

72. 499 U.S. 340 (1991).

73. *Id.* at 348.

74. *See id.* at 348.

75. *See, e.g.,* Leichtman, *supra* note 6, at 706-707 (arguing that a dramatic production is not an assembly of preexisting works, but merely the molding of *one* preexisting work, the script, for which all other elements are created).

76. H.R. REP. NO. 95-1476 at 57 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5670.

77. *Id.*

78. *See supra* text accompanying note 39.

making the puppeteers visible to the audience.⁷⁹ Another example comes from the Tony winning mind of Harold Prince, whom while directing *Evita*, had the idea of using the media's involvement in politics and his personal search for the truth as a theme.⁸⁰ While these ideas are highly theatrical and creative, they simply assist a director to arrive at his interpretation and are not within themselves theatrical stage directions.

Finally, some directors develop artistic techniques to represent their interpretation. Most notably, the material of playwright Bertolt Brecht demands of any director interpreting his work to create techniques to ensure the audience is an active member of the performance.⁸¹ Some of these Brecht-friendly techniques include irrelevant set pieces, painted signs, and most notably, spoken asides. Once again, although a director staging a Brecht play might use all these techniques as relevant factors in their interpretation, they are not in themselves theatrical stage directions.⁸²

E. Theatrical Stage Directions Meet the Requirements of Original Works of Authorship

The originality requirement in copyright has two components. In the landmark case *Feist v. Rural Telephone*,⁸³ Justice O'Connor enunciated this two-part test as:

The sine qua non of copyright is originality. To qualify for copyright protection, a work must be original to the author . . . [this] means only that the work was independently created by the author, and that it possesses at least *some minimal* degree of creativity. To be sure, the requisite level of creativity is extremely low; even a slight amount [or some creative spark] will suffice.⁸⁴

79. See Brown, *supra* note 41 (commenting on Taymor's concern with 'talking down' to the audience by trying to hide the puppeteers from view and her decision to fully show the basic elements of animating an object).

80. See Crittenden, *supra* note 42; see also *supra* text accompanying note 42.

81. Brecht was concerned with encouraging audiences to think rather than becoming too involved in the story and to identify with the characters. See Robert Kendt, *The Threepenny Opera*, BROADWAY.COM, http://www.broadway.com/gen/Buzz_Story.aspx?ci=527874 (discussing Brecht's distancing techniques).

82. A revival of Bertolt Brecht's and Kurt Weil's *Three Penny Opera* opened on April 21, 2006 utilizing such distancing techniques as cross-gendered characters, glow-in-the-dark undergarments, and lavish customs by Isaac Mizrahi. See Ben Brantley, Review, *Macheath Is Back in Town, And Lucy Brown Has a Surprise*, N.Y. TIMES, April 21, 2006, at E1.

83. 499 U.S. 340 (1991).

84. *Id.* at 345 (emphasis added).

It is also worth noting that the originality “standard does not include requirements of novelty, ingenuity, or esthetic merit, and there is no intention to enlarge the standard of copyright protection [by including these elements].”⁸⁵ Consequently, while “if by some magic a man who had never known [of the original work] were to compose [a work identical to the original] . . . he would be an ‘author’.”⁸⁶

One argument against copyright protection for theatrical stage directions is that their work does not originate with the director, but with the underlying play, which is the copyrighted work of the playwright.⁸⁷ However, this argument fails to recognize a reasonable definition of theatrical stage directions and, in turn, what directors are seeking to protect. While theatrical stage directions rely on the underlying play, the interpretation of the script is original to the director not the playwright. To be sure there are instances where a playwright will explicitly state in the text where he wants actors to move for certain lines.⁸⁸ However, there is a difference between ‘direction,’ as exclusively telling an actor where to go, and ‘direction’ as defined in this article as interpreting the play and having this interpretation of the text compel movement. In fact, there are situations when the play’s suggested movement presents presentational problems.⁸⁹ It is the director, acting independently of the text that finds a solution.

F. Theatrical Stage Directions Can be Fixed in a Tangible Form

“A work is ‘fixed’ in a tangible medium of expression when its embodiment in a copy . . . by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.”⁹⁰ This definition “would exclude from the concept purely evanescent or transient reproductions such as those projected briefly on a

85. H.R. REP. NO. 95-1476 at 51(1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5664.

86. *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 54 (2nd Cir. 1936).

87. *See, e.g., Richard Amanda, Elvis Karaoke Shakespeare and the Search for Copyrightable Stage Direction*, 43 ARIZ. L. REV. 677, 685 (2001) (arguing that since the playwright begins with a blank page he possesses the main characteristic of authorship and that the director’s work does not begin until the playwright has completed his work). *See also* Freemal, *supra* note 14, at 1028 (arguing that stage directions express an idea only when the text is present).

88. Freemal, *supra* note 14, at 1030-31 (noting that Eugene O’Neil describes the stage directions of his play with great detail, whereas Shakespeare did not).

89. *See* Yellin, *supra* note 6, at 330 (describing how Joe Mantello, director of Terrance McNally’s “Love!, Valour!, Compassion!” confronted the problem of representing “individual rooms” when the playwright demanded a “bare stage” by using planes of light at different levels).

90. 17 U.S.C. §101 (2006).

screen, shown electronically . . . or captured momentarily in the 'memory' of a computer."⁹¹ This requirement was purposely defined broadly so as to avoid confusion that copyrightability "depend[s on] the form or medium in which the work is fixed."⁹² This broad approach was further clarified in *Midway Manufacturing v. Artic International*,⁹³ where the defendant argued that because the shapes that appeared on the screen were recorded in code form on a CD-ROM and could not be perceived by looking at the CD-ROM, fixation was not satisfied. The Seventh Circuit upheld the lower court opinion which explained that:

[T]he fixation requirement, as is clear from the statute does not require that the work be written down or recorded somewhere *exactly as it is perceived by the human eye*. Rather, all that is necessary for the requirement to be satisfied is that the work is capable of being reproduced with the aid of a machine or device.⁹⁴

Midway stands for the proposition that a video game can be fixed on a computer chip despite the fact that one cannot see the actual shapes on the chip. This applies in a theatrical setting where, while one cannot see the full scale production on a piece of paper or a videotape, the fixation requirement could still be met, if through the use of these mediums the full scale production could be reproduced.

Currently, there are two ways to fix theatrical productions: prompt books and video recordings. A prompt book is defined as: "a copy of the play, generally interleaved, and carrying the full directions and warnings necessary to the management of the production."⁹⁵ Prompt books are often used by stage managers to give technical cues during performances, as well as, to rehearse replacement players.⁹⁶ Thus, prompt books have enough specific and important details about the production to serve as a reproduction instrument and thus could meet the *Midway* fixation standard.

Additionally, a theatrical director could meet the fixation requirement by videotaping the stage production. For this purpose, it is helpful to compare directors with choreographers, who also have the option of recording their work through complicated note taking or

91. H.R. REP. NO. 95-1476 at 53(1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5666.

92. *Id.* at 52, *reprinted id.* at 5655; *See also* White-Smith Publishing Co. v. Apollo Co., 209 U.S. 1, 17-18 (1908).

93. 704 F.2d 1009 (7th Cir. 1983).

94. *Midway Mfg. Co. v. Artic Intern., Inc.* 547 F.Supp 999, 1007-8 (D.C. Ill. 1982), *aff'd*, 704 F.2d 1009 (7th Cir. 1983) (emphasis added).

95. Hartnoll, *supra* note 19, at 665.

96. Yellin, *supra* note 6, at 328.

through video recording.⁹⁷ Clearly, perception and reproduction of theatrical directions are simpler through a video recording, and it is also cost-effective for a director to arrange for a recording of a performance.⁹⁸ In fact, many Broadway theatrical productions are currently video-recorded for archival purposes⁹⁹ and some are recorded for commercial purposes once the Broadway-run ends.¹⁰⁰ Finally, a study commissioned by the Society of Stage Directors and Choreographers (SSDC) entitled, *The Rights of Stage Directors and Choreographers*¹⁰¹ recommends that both “a prompt book and a videotape of the performance may be necessary to sufficiently and completely fix the work of the stage director . . .”¹⁰² Thus, the theatre community supports the use of these two methods for fixation.

There are various arguments against prompt books and video recordings as appropriate ways of fixing theatrical stage directions.¹⁰³ First, some contend that while directions might be recorded in a prompt book in specific detail, “stage directions tend to be more general [than choreography,] and often lend themselves to physical variations,”¹⁰⁴ thus the multiplicity of accomplishing the same goal through many possible ways hinders its fixation. This argument, however fails to recognize the training and work ethic of professional actors who, although bring their own spin on a role, must stay “inside the confines of what the show is.”¹⁰⁵ It is the director who determines what ‘the show is’ through his

97. See, e.g., Lakes, *supra* note 35, at 1855 (stating that according to the Copyright office, fixation using film is acceptable).

98. See, e.g., *Id.* (discussing how the declining cost of video recording has resulted in choreographers using film to fix their work because is less expensive than writing notation).

99. Many Broadway productions are maintained at the Billy Rose Theatre Collection of The New York Public Library. See The New York Public Library : The Billy Rose Theater Collection : About the Theater Collection, available at <http://www.nypl.org/research/lpa/the/about.html> (last visiting Dec. 3, 2006).

100. For example, the Broadway musicals *Cats* and *Victor, Victoria* were recorded shortly after their closing and rereleased.

101. See Yellin, *supra* note 6, at 329 (discussing this two-fold approach in an interview with Barbara Hauptman and Kathryn Haapala, Executive Director and Deputy Director of the SSDC, in New York, N.Y. (Aug. 20, 2000)).

102. *Id.*

103. See, e.g., Freemal, *supra* note 14, at 1029 (arguing that the prompt book may not be used to fix theatrical stage directions because it is so intertwined with the underlying play, thus unable to stand on its own).

104. Amanda, *supra* note 87, at 686.

105. See, e.g., American Theatre Wing, *Working in the Theatre, Performance* (Transcript unavailable. The video of the cited seminar can be found at: http://www.americanteatrewing.org/seminars/detail/performance_05_05). See also, e.g., Interview by Thomas Cott with Patty Lupone, Broadway actress, (Nov. 15, 2000), available at http://www.lct.org/calendar/platform_detail.cfm?id_event=23918230 (last visited May 10, 2006)

interpretation, thus the actor by staying within these borders is in turn respecting the director's interpretation. Finally, it is common practice to 'freeze' the show at a certain time prior to opening night thus further supporting the element of permanence.¹⁰⁶

To accomplish this control, a prompt book contains light, music, scenery cues, entrance and exits of actors and a multitude of other cues which depend on the actor's movement as staged by the director.¹⁰⁷ With all the money invested in Broadway productions, it is safe to assume that despite slight performance changes, the precision by which the director's interpretation can be duplicated from a prompt book is reasonable.¹⁰⁸

In *Gutierrez v. Desantis*,¹⁰⁹ a case involving an alleged infringement of the stage directions to the musical, *The Most Happy Fella*, the Copyright Office issued a letter addressing the role of prompt books as a way to 'fix' stage directions. This letter stated that "reference to stage directions in an application [for copyright protection], however does not imply any protection . . . for the actions dictated by them. The authorship on the application in this case is the text of stage directions. We understand this to represent a claim in the text."¹¹⁰ Although this seems to disqualify prompt books as a mode of fixation for theatrical stage directions, it must be mentioned that this is a single letter for one single case involving one 'version' of a prompt book. This letter addressed only the merits of Gutierrez's prompt book for *The Most Happy Fella*, the details of which are unknown. If anything, this letter stands for the proposition that although quite limited, if detailed enough, prompt books could aid in addressing the fixation requirement.¹¹¹ There could be many reasons for the Copyright's Office's reasoning behind this letter. Above all is the latent misunderstanding that granting a copyright to theatrical stage directions will give a director a monopoly

(illustrating that despite Ms. Lupone's reluctance to sing show tunes at one of her concerts, her director had the final say).

106. See, e.g., Chris Jones, *Aida Team Preps March To Broadway*, VARIETY, December 20, 1999, at 63 (commenting that after many changes, cast members of the musical Aida had been told that the show was now 'frozen', meaning no more major changes would happen).

107. See *supra* notes 95-96 and accompanying text.

108. See, e.g., Ben Brantley, *Tarzan Arrives on Broadway, Airborne*, N.Y. TIMES, May 11, 2006, Theatre Review (commenting on the approximately fifteen million dollar price tag of the Disney production).

109. No. 95-1949 (S.D.N.Y., filed March 22, 1995).

110. See Freemal, *supra* note 14, at 1022 (quoting a letter possessed by Harold Orenstein, attorney for Frank Loser's [composer of *The Most Happy Fella*] estate).

111. See Yellin, *supra* note 6, at 328 (commenting on the Copyright Office's letter referencing Gutierrez's prompt book as protecting the text).

over limited staging options.¹¹²

The use of video recordings as a mode of fixation has also been criticized. The main argument is that recording cannot be done without utilizing the script, which in turn violates the right of the playwright.¹¹³ This argument could be logically expanded further to suggest that if choreographers, costume designers, lighting designers, and others obtain copyright protection for their individual works, their rights would also be violated through a video recording, since their work is also part of the final production.¹¹⁴ However, it is reasonable to assume that many of these creative team members and even the playwright would consent to this recording for copyright purposes.

As mentioned above, “the [stage] director exerts complete artistic control . . . envisions a concept for the production and communicates it to their designers and cast”¹¹⁵ who create their own, often copyrightable work, guided by the director’s interpretation. Additionally, a director has the respect of many in the industry, because without an effective director, the theatrical production that provides employment for all the previously mentioned players would not get off the ground.¹¹⁶

Given the collective respect for directors, and their essential role in the progress of American theatre, it is reasonable to assume that many members of a theatrical production will agree to have their contributions be part of a video recording and, thereby, assist a director in obtaining copyright.

Likewise, a playwright who might not hold a stage director in high artistic regard depends on his play being performed to reap the profits of his work.¹¹⁷ Thus, given the choice between working with an effective director who requests a recording to obtain copyright, and working with an ineffective director, or worse yet, not having his work produced at all for lack of a director, a playwright is likely to agree to a recording.

The assumption of allowing video recordings is further supported when we note that the Copyright Office would most likely hold these tapes or discs in a similar archival, non-circulating fashion as the New York Public Library.¹¹⁸ In other words, these recordings would be for

112. See *supra* text accompanying note 32.

113. See *Freemal, supra* note 14, at 1029.

114. See, e.g., *Nevin, supra* note 6, at 1562, 1567 (concluding that a theatrical production is the result of collaboration of many members of the production team).

115. See *Freemal, supra* note 14, at 1018.

116. See *supra* text accompanying notes 13-15.

117. A playwright has a valuable financial interest in the performance right of his play, as discussed throughout this paper. Without a director such performance would not occur.

118. The Billy Rose Theatre Collection of The New York Public Library is one of the largest

fixation purposes only and not for mass marketing.

V. VARIOUS OWNERSHIP ISSUES MUST BE RESOLVED ONCE THE COPYRIGHTABILITY OF THEATRICAL STAGE DIRECTIONS IS RECOGNIZED

Although theatrical stage directions could achieve copyrightability, the question of who owns the copyright remains unanswered. Accordingly, the doctrines of joint authorship, work for hire, and derivative works must be addressed and resolved to ensure a stage director is afforded the appropriate protection.

A. If Theatrical Stage Directions are Granted Copyright Protection, Intent Between the Playwright and Director in Creating a Joint-Work of Authorship For First Run Productions Would Be Reasonable.

“A joint work is a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.”¹¹⁹ In *Childress v. Taylor*,¹²⁰ an actress claimed she was the co-author of the play “Moms: A Praise Play for a Black Comedienne,” because she made suggestions to the playwright throughout the writing process.¹²¹ In holding that the playwright was the sole author, the Second Circuit further clarified the statutory definition of joint authorship by stating the following two-part test: (1) the contribution of each joint author must be copyrightable, and (2) in the absence of contractual agreements concerning listed authorship, each participant must intend that all would be identified as co-authors.¹²²

An additional element to joint authorship is that the intent to merge must exist at the time of the creation. This necessarily limits the availability of joint authorship to first run productions where directors and playwrights often collaborate in shaping the final version of the play.¹²³ However, given the creativity of interpreting a play for the first

and most comprehensive archives devoted to the theatrical arts. Encompassing dramatic performance in all its diversity, the Collection is an indispensable resource for artists, writers, researchers, scholars, students, and the general public. See *The New York Public Library: The Billy Rose Theater Collection: About the Theater Collection*, available at <http://www.nypl.org/research/lpa/the/theabout.html> (last visiting Dec. 3, 2006).

119. 17 U.S.C. §101 (2006).

120. 945 F.2d 500 (2nd Cir. 1991).

121. See *id.* at 502.

122. See *id.* at 507-508.

123. See, e.g., Yellin, *supra* note 6, at 333 (discussing how the playwright and director often

time, and the close interaction between the director and the author, this is the stage where the option of joint-authorship is most needed.

An argument against joint authorship has been made by referencing *Erickson v. Trinity Theatre, Inc.*,¹²⁴ where several actors claimed they had assisted a playwright create his play through their artistic collaboration.¹²⁵ The court held that since the playwright had the final decision making authority in the final version of his play, there was no joint-authorship.¹²⁶ Some have read this holding as implying that the 'final say' element of a playwright-actor relationship also applies to the relationship between a theatrical director and a playwright. While in some instances a prominent playwright might have a contractual agreement as to final say in decisions regarding the theatrical production of his work,¹²⁷ the usual circumstance is for the playwright and director to collaborate in the production.¹²⁸ Just as there exist prominent playwrights, there also exist very prominent directors who would leave a show before being told how they should stage their interpretation of a play.¹²⁹ Overall, the balance of power between the director and the playwright is inconsistent. Thus, extending the *Erickson* director-to-actors specific holding to a director-playwright relationship is incorrect.

B. The Work For Hire Doctrine: Current Contractual Provisions Would Allow Directors to Retain Ownership of Their Work Despite Their Status as Employees of the Producer

Some view stage directors as employees of a producer. Consequently, theatrical stage directions are simply a product of that

work together during the developmental process, trying out the show Off-Broadway and out of town, collectively making changes based on these pre-Broadway reactions to ensure a successful opening). See also, Jessica Litman, *Copyright in the Stage Direction of a Broadway Musical*, 7 ART & THE LAW 309, 317 (1983) (arguing that even during the rehearsal process the director contributes revisions and suggestions which are incorporated in the script).

124. 13 F.3d 1061 (7th Cir. 1994).

125. *Id.* at 1063-1064 (detailing Michael Osborn's testimony that several parts of the copyrighted script resulted from his and other actors' suggestions and even consensus).

126. *Id.* at 1072.

127. See, e.g., *Judge Authorizes All-Female 'Godot'*, N.Y. TIMES, July 6, 1991, §1, at 12 (commenting on a French court ruling that although an all female production of Samuel Beckett's *Waiting For Godot* could be performed, a letter of objection from the playwright's estate must be read before each performance).

128. See, e.g., Rawson, *supra* note 39 (detailing the collaborative effort between director Marshall and all of her production team, including the person who revised the original script).

129. See, e.g., Rick Lyman, *After 'Capeman,' A Chill in a Thriving Broadway Season*, N.Y. TIMES, Mar. 7, 1998, at B9 (discussing the Paul Simon composed Broadway show, *The Capeman* as going through a string of directors due in part of Simon's unwillingness to collaborate).

work, and belong to the producer. The Copyright Act defines a work-for-hire in two ways:

A ‘work made for hire’ is (1) a work prepared by an employee within the scope of his or her employment; or (2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.¹³⁰

In a theatrical context, the court in *Julien v. Society of Stage Directors and Choreographers, Inc.*,¹³¹ held that a director is an employee of the producer who “exercise[s] control over all facets of a production and of the director’s work.”¹³²

The court in *Julien* based its determination of directors as employees of the producer in large part “[to] the producer’s pervasive control over the artistic direction of the play.”¹³³ Given the current financial realities of bringing a major Broadway production from script to stage,¹³⁴ it seems as though the ‘control’ that was present in 1975 when *Julien* was decided is still alive today, with some limited exceptions.¹³⁵ Consequently, it could be argued that the producer would own any potential copyright protection given to theatrical stage directions.¹³⁶ However, since the producer hires all the members of the production team, this would also mean that the producer owns the copyright, if any, in lighting design, choreography, costume designs, and any other potentially copyrightable works.

Perhaps in response to the *Julien* decision and since directors are in the best contractual position to ensure ownership for their work,¹³⁷ the

130. 17 U.S.C. §101 (2006).

131. 1975 WL 957 (S.D.N.Y.)

132. *Id.* at 3.

133. *Id.*

134. See, e.g., Jesse McKinley, *The Call of the Jungle*, N.Y. TIMES, April 16, 2006, §2, at 1 (discussing producer Thomas Shumacher’s responsibility of making the right decisions to ensure the success of this multi-million dollar investment).

135. See Litman, *supra* note 123, at 322 (arguing that if a director makes suggestions outside of the contractually allowed ten week period, these do not fall within his scope of employment).

136. See Yellin, *supra* note 6, at 337 (arguing that non-union directors would be employees for hire of the producers who would retain ownership, if any, in the stage direction).

137. See *Id.* (citing Jane C. Ginsburg and Alan Latman, *The Right of Stage Directors and Choreographers*, OPINION PREPARED FOR THE SOCIETY OF STAGE DIRECTORS AND CHOREOGRAPHERS 17, 18 (1984)).

Society of Stage Directors and Choreographers¹³⁸ (SSDC) has inserted a property rights clause into their collective bargaining agreement.¹³⁹ This clause provides:

In order to facilitate the Director's ability to prevent the unauthorized re-creation of direction, the Producer and the Direction agree that, as between themselves, all rights in and to the Direction created by the Director shall be, upon its creation, and will remain *the sole and exclusive property of the Director*.¹⁴⁰

Thus, if theatrical stage directions are given copyright protection, there is already a standard contractual tool to facilitate ownership of this right to the director. Further, it must be noted that both the director and producer sign and thus agree to these terms on a routine basis, and that a similar agreement is routine when a director works with a regional theatre.¹⁴¹ This agreement's intent to clarify the ownership of theatrical stage directions signals a commitment and perhaps a welcoming atmosphere for copyright protection for theatrical stage directions.

C. Ownership Issues with Derivative Works Is Resolved Through Existing Contractual Provisions

The right to make derivative works is one of the exclusive rights granted to a copyright owner.¹⁴² Without the playwright's authorization, they would infringe on the playwright's exclusive rights.

In providing that protection does not extend to 'any party of the work in which such material has been used unlawfully,' the bill prevents an infringer from benefiting, through copyright protection, from committing an unlawful act, but preserves protection for those parts of the work that do not employ the preexisting work . . . copyright could be obtained as long as the use of the preexisting work was not 'unlawful' [through a fair use defense], even though the consent of the

138. The Society of Stage Directors and Choreographers is an independent labor union for Stage Directors and Choreographers. Member representatives of the organization collectively bargain contracts with producer organizations, thus creating the national standards for professional stage direction and choreography. For more information visit www.ssdcc.org.

139. See Yellin, *supra* note 6, at 336 (commenting on the added rights gained by theatrical stage directors through this clause).

140. See *e.g.*, Leichtman *supra* note 6, at 687 (emphasis added).

141. The League of Resident Theaters (LORT), which produces exclusive productions and where many Broadway-bound shows have try-out engagements recognizes the bargaining agreement by the SSDC, including the director's ownership of his work; for more information visit www.lort.org (last visited April 9, 2006).

142. See 17 U.S.C. §106(2) (2006) (granting author the right to prepare derivative works based upon the copyrighted work).

copyright owner had not been obtained.¹⁴³

However, as is the case with all the ‘sticks’ in the bundle of rights found in section 106, the right to adapt can be transferred to another party.¹⁴⁴

This would seem to limit the copyrightability of theatrical stage directions unless otherwise authorized by the playwright. As discussed above, the playwright only sees profits from the play through licensing the play for performance.¹⁴⁵ While “it can be argued that a playwright, by allowing her play to be licensed, has implicitly given permission for the director to create any derivative works needed to produce and perform the play,”¹⁴⁶ an implied license to adapt the performance does not necessarily allow fixation, and thus cannot be copyrighted.

This dilemma is resolved in part though the SSDC’s “Ownership” clause. This contract, which is present in all major theatrical productions, ensures that the director retains ownership of only his work, thus separating the direction from the underlying play. This separation also ensures that the playwright’s exclusive right to create other derivative works, for example with other directors, remains intact. Thus, since the copyright in theatrical stage directions would not affect the playwright’s own copyright, there is very little incentive for the playwright to withhold permission.¹⁴⁷

D. While The Ownership for Theatrical Work as Compilations is Clear, the Protection Might be Too Thin to Adequately Protect Stage Directors

As discussed above, stage directors meet the requirement for compilation for theatrical stage directions by selecting and arranging other materials to further enhance his interpretation. As the person who makes these choices, the director would own the copyright in this compilation. While this might be a positive resolution to the issue of copyrightability for theatrical stage directions, the copyright protection would be minimal.

“Notwithstanding a valid copyright, a subsequent compiler remains free to use the facts contained in another’s publication to aid in preparing

143. H.R. REP. No. 94-1476, at 57-58, 61 (1976) *reprinted in* 1976 U.S.C.C.A.N. 5659, 5671-72, 74).

144. *Id.* at 62 (declaring that each of the enumerated rights may be subdivided indefinitely and owned and enforced separately).

145. *See supra* text accompanying note 117.

146. Yellin, *supra* note 6, at 334.

147. *See* 17 U.S.C. § 103(b) (2006) (stating that the copyright in the derivative work “extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material.”)

a competing work, so long as the competing work does not feature the same selection and arrangement.”¹⁴⁸ Thus, as a compilation, theatrical stage directions would only be protected against someone who copied the same exact arrangement of elements. Despite this limited protection, it should be noted that this substantial copying occurred in *Mantello v. Hall*,¹⁴⁹ and *Gutierrezv. Descantis*,¹⁵⁰ the two often cited cases dealing with the very issue of copyright protection for theatrical stage directions. Additionally, in the recent *Urinetown* dispute, the director stated that the mid-west productions had “replicated [the original] in great, phenomenal detail.”¹⁵¹ Thus even a thin copyright would have protected the directors in these cases, and could potentially assist future stage directors.

VI. LIMITING DOCTRINES TO COPYRIGHT DO NOT AFFECT THE POTENTIAL COPYRIGHTABILITY OF THEATRICAL STAGE DIRECTION

Not everything is copyrightable, despite its high level of creativity. As mentioned above, uncopyrightable subject matter is listed in section 102(b) of the Copyright Act.”¹⁵² The doctrines of idea/expression dichotomy and sweat of the brow assist to prevent the monopolization of elements that are necessary to promote the arts. These doctrines have been raised in the debate over copyrightability for theatrical stage directions.¹⁵³

A. The Idea Expression Dichotomy Doctrine Does Not Prohibit Copyright Protection For Theatrical Stage Directions

The idea expression dichotomy or merger enforces section 102 of the Copyright Act which does not allow the protection of ideas. In *Baker v. Selden*,¹⁵⁴ the Court stated that if the work cannot be separated from the method, “such methods . . . are to be considered as necessary incidents to the art, and given therewith to the public.”¹⁵⁵ In that case, the author had invented a system of accounting which could only be expressed through the use of diagrams. Since one had to use these

148. *Feist*, 499 U.S. at 349.

149. 947 F.Supp. 92 (S.D.N.Y 1996).

150. No. 95-1949 (S.D.N.Y., filed March 22, 1995).

151. *Urinetown* Broadway Team Accuses Two Regional Productions of Plagiarism, available at <http://www.playbill.com/news/article/103580.html> (last visited Dec. 3, 2006).

152. See *supra* text accompanying note 46.

153. See, e.g., Yellin, *supra* note 6, at 339 (arguing that the idea expression dichotomy further limits whatever thin protection stage directions would have as a compilation).

154. 101 U.S. 99 (1880).

155. *Id.* at 103.

“blank account books” to make use of the work, the court held that they could not be copyrighted.¹⁵⁶

It is argued that although “stage directions, as a whole, encompass an infinite amount of action by the actors, [w]ithin the infinite amount of movements . . . a limited path exists.”¹⁵⁷ For example, if the play calls for the actor to slip on a banana peel, there are only a few ways that actor can do so. Thus granting a copyright to the limited ‘ways to slip’ would give only a few directors the necessary measure to represent the play. Proponents of this argument claim this would be detrimental to the theatre community. This argument simply shows a misunderstanding of theatre and how a director makes movement decisions. If we take into account that stage directions are driven by the director’s interpretation of the play, we reach the logical conclusion that even if two actors fall in the same fashion, they arrive at that moment through different paths.

Though this leads to the inquiry of what to do when two directors have the same interpretation of the play, it is settled copyright law that if two people arrive at the same idea independent of each other, they both have a copyrightable work.¹⁵⁸ For example, in “The Last Five Years,”¹⁵⁹ a two-person Off-Broadway musical, a married couple goes through five years in their relationship, the man begins at year one moving forward in time while the woman begins at year five and goes backwards in time. The original production, directed by Daisy Price, had each cast member on either side of the stage to show the separation and slowly had them move across the stage so at the end, they had changed places.¹⁶⁰ Undoubtedly, many directors would stage this musical in the same logical way, without having copied any previous work.

Finally, the argument that directors would be afraid of seeing other director’s work for fear of liability further underscores a lack of understanding for the theatrical community.¹⁶¹ For any theatre professional, seeing other’s theatrical work is part of the learning

156. *Id.* at 107.

157. Freemal, *supra* note 14, at 1031.

158. See *Sheldon*, 81 F.2d at 54 (noting that “if a writer who has never known a previous work somehow creates an exact duplicate of that work. . .the second work is nonetheless copyrightable”).

159. Jason Robert Brown (2002). The show opened at the Minetta Lane Theatre on March 3, 2002. It closed on May 5 of the same year. See Wikipedia, *The Last Five Years*, http://en.wikipedia.org/wiki/The_Last_Five_Years.

160. Interestingly, in their cross-stage transition, the actors meet halfway at the middle of the show where they sing their only duet (“The Next Ten Minutes”), before continuing in their cross-stage journey. See review of the Matthew Murray, *The Last Five Years*, TALKIN’ BROADWAY, available at http://www.talkinbroadway.com/ob/03_03_02.html.

161. See, e.g., Leichtman, *supra* note 6, at 709 (commenting on the disastrous, fear generating effect of granting copyright for directors)

process.¹⁶² One cannot learn to be a good director or even an actor by only reading books. Also, the harm to a director's reputation by copying-related gossip would be detrimental to his career.¹⁶³ Thus, given the little incentive for copying other's work by attending a performance, it is unlikely that directors would simply stop attending shows for fear of liability.

B. The Sweat of the Brow Argument is Inapplicable If Stage Directions Meet the Requirements of Copyright Protection

The final argument made against copyright protection for theatrical stage directions is that although their work might be creative and they might put hundreds of hours in leading a production team, "the primary objective of copyright is not to reward the labor of authors, but to promote the Progress of Science and useful Arts."¹⁶⁴ The 'sweat of the brow' argument does not apply when there is expression of the original work. As this article has argued, theatrical stage directions are the expression of the director's original interpretation of the underlying play, and thus deserve protection, not because a director has put in great effort, but simply because he has created a copyrightable work. It is also worth noting, however, that this doctrine could apply to many of the staff members that work with the director, thus resolving any administrative burdens that could arise by granting copyright protection to directors.¹⁶⁵ In addition, as discussed below, granting copyright protection to theatrical stage direction meets the constitutional goal of promoting the arts.

C. Potential Moral Rights Implications of Granting Copyright Protection to Theatrical Stage Directions Are Too Speculative

Finally some argue that if copyright protection were extended to

162. See, e.g., Crittenden, *supra* note 42 (recalling Director Hal Prince's experience of attending the opening of *South Pacific*, where the theatrical technique of dissolves was introduced and explaining that Prince has used such technique in everyone of his productions).

163. For example, the director of the Akron production of *Urinetown*, Jennifer Cody, is one of the most popular chorus players on Broadway, having performed in the original ensemble of *Urinetown*, as well as *Taboo*, *The Pajama Game*, and Actor's Fund Productions of *Hair* and *The Best Little Whorehouse in Texas*. It is yet to be determined how this dispute has affected her career. A full list of Broadway credits for Ms. Cody is Jennifer Doy, INTERNET BROADWAY DATABASE, available at <http://www.ibdb.com/person.asp?ID=76147>.

164. *Feist*, 499 U.S. at 349 (1991) (quoting U.S. CONST. Art. I, § 8, cl. 8).

165. See, e.g., Freemal, *supra* note 14, at 1034 (arguing that if directors are granted copyright protection, all of his collaborators should also be granted copyright protection, thus creating an administrative problem).

theatrical stage directions, these rights would negatively affect the moral rights of playwrights. Moral rights are an attempt to protect the author of the work from unauthorized modifications of his work.¹⁶⁶ Although moral rights are mostly protected through common law,¹⁶⁷ artists often use section 43(a) of the Lanham Act (federal trademark law) arguing that such modifications mislead the public about the source of the work.¹⁶⁸ In other words, the author's name should not be attached to a modified version of his work which he did not approve.

In the context of theatrical stage directors, it is not difficult to imagine a particular director interpreting a play in a manner which is inconsistent with the playwright's vision. An argument could be made that playwrights would be weary of creating new works for fear that directors could distort their vision. However, these concerns seem somewhat unrealistic.

First, moral rights are not widely accepted in much of the subject matter categories in copyright law, yet there has not been a major decline in creation of new works. Second, similar to a lawyer who must rely on existing precedent, it is the job and the challenge of the director to create something with the available text.¹⁶⁹ At times, the director might find the text lacks enough dialogue between actors, but he cannot simply add it, he must find other means of filling that gap.¹⁷⁰

Finally, recent examples of 'highly creative' and accepted interpretations of Broadway revivals¹⁷¹ illustrate that playwrights are

166. See e.g., Sheldon W. Halpern, *Moral Rights and Moral Righteousness*, 1 MARQ. INTELL. PROP. L. REV. 65 (1997) (discussing moral rights as colorization of a black and white film and abbreviations of a program intended to be broadcast without interruption)

167. See, e.g., New York's Artists; Authorship Rights Act, N.Y. Cultural Affairs Law Section 14.03 (McKinney's Supp. 1990) (protecting artist's reputation through limits on the public display of altered versions of the artist's work). See also Wajnarrowicz v. American Family Ass'n, 745 F. Supp. 130, 135 (S.D.N.Y. 1990) (concluding that the New York Act is not preempted by the Copyright Act of 1976).

168. See, e.g., Gilliam v. ABC, Inc., 538 F.2d 14, 24-25 (2nd Cir. 1976) (holding that ABC's a heavily edited version of Monty Python's comedy program was a violation of section 43(a) of the Lanham Act).

169. See, e.g., Interview by Paul Solman with Julie Taymor, Director, *The Lion King* (June 5, 1998) available at http://www.pbs.org/newshour/bb/entertainment/ljan-june98/taymor_6-5.html (showing that despite her reputation for out of the box ideas, Taymor had to stay close to the basic concepts shown in the animated movie version).

170. See, e.g., Alvin Klein, *Three Hotels On State At Croton Falls*, N.Y. TIMES, July 18, 1999, §14WC, at 1 (discussing how the director of *Three Hotels* had to reach for dramatic weight during the monologues to compensate for the lack of character interaction not allowed by the playwright's text).

171. See, e.g., Peter Marks, *Rewrite a Classic Musical, Whatever Works Goes*, The N.Y. TIMES, January 24, 1999, § 2, at 1 (detailing an experimental and well received production of Rodger's and Hammerstein's classic *South Pacific*, which was set in a veteran mental ward, with the

more concerned with the recognition and potential licensing fees they stand to collect from a successful production or revival.¹⁷² Finally, the playwright still has the trademark option available to him in order to protect his artistic integrity.

VII. GRANTING COPYRIGHT PROTECTION FOR THEATRICAL STAGE DIRECTIONS PROMOTES THE ARTS

To promote the arts copyright law balances the artist's rights in having a monopoly for his work with society's access to that work.¹⁷³ In order for this balance to be effective, the author's monopoly on the ownership of the copyrighted work cannot outweigh the benefit the public receives by having access to these works.¹⁷⁴ By granting copyright protection to theatrical stage directions, directors would be free to explore creative and art-forward interpretations of plays. The benefit society would receive from these imaginative works outweighs any administrative consequences these new rights might create. More importantly, there could be severe negative consequences if we continue to deny copyright protection to directors, which would go against promotion of the arts.

A. The Feared Consequences of Granting Copyright Protection to Theatrical Stage Directors Lack Credibility

One of the key policy fears concerning granting copyright protection to stage directions is the decrease in "the free flow of ideas in an art that borrows heavily from all available sources."¹⁷⁵ As mentioned and discredited above, it is feared that directors would be reluctant to view other works for fear of being held liable should they direct another production of the same play in a similar way.¹⁷⁶ Some even argue that copyrights for theatrical stage directions "would clearly operate as liens

patients portraying the characters). Also the recent "the actors play the instruments" concept of director John Doyle, has received wide acclaim on Broadway for mountings of *Sweeney Todd* and *Company*.

172. See, e.g., Freema, *supra* note 14, at 1017 (summarizing the usual process of a successful show from Broadway, to regional theatres, dinner theatres, and commercial producers purchasing the right to reproduce the play ensuring a playwright receives royalty payments).

173. See *id.* at 1033 (discussing Congress's attempt in promoting the arts to balance artists' rights with general public enjoyments of the arts balance).

174. See, 1 Melville B. Nimmer & David Nimmer, NIMMER ON COPYRIGHT § 103[A](1995).

175. Green, *supra* note 2.

176. See *supra* text accompanying notes 161-63.

on a playwright's play" and have "a potentially devastating effect on the facility and vitality of theatrical production."¹⁷⁷ and would cause playwrights to abandon Broadway for more lucrative television or film opportunities.¹⁷⁸

Overall, these predictions are not found in theatrical reality, and in fact are not congruent with the collaborative spirit of the theatrical community. As mentioned above, experiencing others' theatrical work is part of the education of all theatre professionals and they understand that borrowing from one another is an essential component of the industry.¹⁷⁹ Many of these directors have been actors or designers themselves and understand the importance of an open system. These artists do not mind their work being borrowed, so long as they receive proper credit when this borrowing occurs.¹⁸⁰ While this could be accomplished through a contractual means, this is "not really available to any but the most successful directors,"¹⁸¹ and it is simply not the same as copyright. Thus, since the resolution directors seek through copyright is recognition, it is not likely that they will use this right to work against the inherent collaborative characteristic of the theatre industry.¹⁸²

B. The Consequences of Not Granting Copyright Protection to Theatrical Stage Directors Could be Disastrous to the Theatre Community

Instead of focusing on the exaggerated and somewhat unfounded policy concerns of granting copyright protection to stage directors, more

177. Green, *supra* note 2 (quoting John Weidman, the author of the books for many Broadway shows, who opposes granting copyright protection to directors).

178. See Leitchman, *supra* note 6, at 686 (arguing that the popularity in theatre development has resulted in a decline in a playwright's authority and this has led many writers to pursue television opportunities).

179. See *supra* text accompanying note 175.

180. In both of the famous theatrical stage direction cases *Mantello* and *Gutierrez*, their directions had been completely copied without proper recognition. In the former, the case settled and all that Joe Mantello asked for was recognition of his work and a nominal fee which was given to charity. See e.g., *Urinetown* Broadway Team Accuses Two Regional Productions of Plagiarism, available at <http://www.playbill.com/news/article/103580.html> (last visited Dec. 3, 2006) (quoting Barbara Hauptman, executive director of the SSDC, commenting on the *Urinetown* controversy as stating "[t]his is not an issue about money. It is about recognizing the creativity that originated with these members.").

181. Green, *supra* note 2. See also *supra* text accompanying note 11 (illustrating how highly prominent directors can retain recognition for their work, even once they have left the show and someone else has taken over).

182. See, e.g., Green, *supra* note 2 (quoting Joe Mantello as declaring he would not seek copyright protection for straightforward directions, thus signaling that no one wants to abuse the system).

concern should be placed on the consequences of not granting copyright protection for theatrical stage directions.

First, the fear that playwrights would protest copyright protection and move to more lucrative opportunities does not recognize that this opportunity is just as easily available to theatrical stage directors.¹⁸³ Thus, a continuing denial of copyright protection could result in the loss of some of the most valuable and talented members of the theatrical community.

While the negative reaction need not be so extreme, lesser actions by disgruntled directors are possible. It is now more difficult to see recordings of Broadway performances because directors and choreographers have placed various access restrictions. For example, it is rumored that “until [Mr. Gutierrez’s] death, you could not watch the tape of *The Most Happy Fella*” on reserve at the New York Public Library without his permission.¹⁸⁴ Thus, the very result the opponents of copyright protection aim to prevent, limitations to the theatre, would result if we fail to recognize the copyrightability of this expression of original work of authorship.

Additionally, the rise of the internet which has had a strong impact on copyright law in general, has also affected Broadway. Popular sites such as www.broadwayworld.com have chatrooms where users often exchange very specific performance details. Other sites such as www.youtube.com make it easy for bootleg clips and, at times, substantial portions of Broadway shows to be viewed by many. The internet has also made it easier for bootleg recordings of Broadway shows to have a wider market.¹⁸⁵ Thus, it is now easier than ever to learn of a director’s interpretation, stage orientation choices, and any other artistic detail of a show without as much as paying for a ticket.¹⁸⁶

183. In the last five years, with the rise of the movie musical, Broadway directors have been much sought after to direct the film versions of these musicals, and beyond. Most notably, Julie Taymor, director of Broadway’s *The Lion King*, directed *Frida* and *Titus*, while Susan Stroman helmed the movie version of her Broadway smash, *The Producers*. A full list of film credits for each director can be found on the Internet Movie Database: Julie Taymor, INTERNET MOVIE DATABASE, available at <http://www.imdb.com/name/nm0853380/> and Susan Stroman, INTERNET MOVIE DATABASE, available at <http://www.imdb.com/name/nm0834893/>.

184. Green, *supra* note 2.

185. A simple Google search under “Broadway Bootlegs” reveals many sites where copies of these recordings can be purchased. One example is My Bootleg Stuff, available at <http://sixtieslvr.tripod.com/mybootlegstuff/index.html> (last visited Dec. 3, 2006).

186. For example, for research purposes I posted a question in a BroadwayWorld.com chat room regarding the direction of the musical *The Last Five Years*. While some responses were not serious, some did shed some light as to directorial Daisy Price’s interpretation. This posting is available at <http://www.broadwayworld.com/board/readmessage.cfm?thread=897005&dt=11> (last

Finally, since courts have yet to rule if stage directions are copyrightable, individuals may currently take a director's work and use it as their own without fear of copyright infringement. Allowing copying and discouraging artistic interpretation simply does not promote the arts.

VIII. CONCLUSION

The *Urinetown* controversy may not decide the matter about copyright protection for theatrical stage directions, but it will probably inflame passions further. This might bring the much avoided issue of copyright protection for theatrical stage directions to the spotlight. A reasonable definition of theatrical stage direction recognizes that a stage director creates an original theatrical production by interpreting the written script. Undoubtedly, “[i]f Congress had explicitly included stage directions as works of authorship in the Copyright Act, professionals in the theatre industry would probably not be currently debating [this issue].”¹⁸⁷ Congress's silence, however, should not be interpreted as prohibiting copyright protection for stage directions, particularly when they explicitly called their list of enumerated categories non-exhaustive, or when it could also fit under the dramatic works or choreography and pantomime. Additionally, theatrical stage directions, which rely on the underlying play for its interpretation, as well as, arranging various copyrightable objects on the stage, meets the requirements of derivative works and compilations. Reasonably defined theatrical stage directions also meet the original authorship requirement, since the interpretation originates with the director. Finally, the industry standard of utilizing a prompt book or video-recording allows directors to fix his work.

Once the potential for copyrightability is established, ownership needs to be addressed. Since a playwright only benefits if his play is performed, an implied authorization for the director to use the work is reasonable. An express authorization is also available through contractual means, which would allow the playwright to retain the ownership in the underlying play, while permitting the director to hold a copyright for his interpretation. This would allow a director to claim ownership in his work through a joint-author, or as the owner of a derivative work. Additionally, commonly used contractual agreements would allow a director to retain ownership of his work even if he was deemed to be an employee of the producer under the work-for-hire

visited Dec. 3, 2006).

187. Yellin, *supra* note 6, at 318.

doctrine. Finally, although a director could be considered the owner of a compilation, the thin protection afforded to these types of works make it an unattractive option.

Several doctrines that limit copyrightability prove not to negatively affect theatrical stage directions' claims to copyright. The idea/expression dichotomy does not render the director's work uncopyrightable, because although there are a limited amount of stage movements available, the original interpretation driving all of movements means there are many routes to reach the same goal. Also, since directors are creative individuals, it is not unreasonable to assume that many will reach the same interpretations independently of each other.

Finally, while opponents of copyright protection for theatrical stage directors fear these new rights would not promote the arts, these concerns do not recognize the desire by directors to simply obtain recognition for their work, while continuing the collaborative spirit in the theatre industry.

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