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## Once More unto the Breach, Dear Friends: Broadway Dramatists, Hollywood Producers, and the Challenge of Conflicting Copyright Norms

Carol M. Kaplan

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# Once More unto the Breach, Dear Friends: Broadway Dramatists, Hollywood Producers, and the Challenge of Conflicting Copyright Norms

Carol M. Kaplan\*

## ABSTRACT

*In recent decades, studios that own film and television properties have developed business models that exploit the copyrights in those materials in every known market and in all currently conceivable forms of entertainment and merchandising. For the most part, uniform laws and parallel industry cultures permit smooth integration across formats. But theater is different. The work-made-for-hire provisions that allow corporations to function as the authors of the works they contract to create do not easily align with the culture and standard contract provisions of live theater. Conflicts arise when material that begins as a Hollywood property tries to make*

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*the transition to Broadway. This Article explores the origins of these conflicting norms and their ongoing relevance to a relatively new relationship between Hollywood and Broadway characterized by a flow of intellectual property from screen to stage. It acknowledges that while measured accommodations may be necessary to allow the corporate owners of films and television shows to reinvent their properties on Broadway, there is good reason to avoid a wholesale change to industry norms in order to preserve the collaborative creative culture of US theater.*

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### OVERTURE

In her article, "The Invention of Common Law Play Right," Jessica Litman observes the contrast between the typical function of "the American version of copyright law" which, she asserts, "encourages [creators] to assign their copyrights to intermediaries, who are motivated by potential profits to disseminate the works to the public," and the case of the American dramatist<sup>1</sup> who "keeps her copyright, rather than assigning it."<sup>2</sup>

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1. This Article uses the term "playwright" to refer to an author of a dramatic play, a work without song and music as an intrinsic part of the dramatic text. See *Playwright Definition*, Dictionary of Occupational Titles (4th ed. 1991), available at 1991 WL 647050. It uses "authors"

For producers and creative collaborators in the American live-theater<sup>3</sup> industry, this distinction is not controversial for the most part.<sup>4</sup> The theater business operates almost entirely on a freelance, independent-contractor model of employment, where individual

to connote the creators of a so-called “dramatico-musical play,” a text created for performance on the legitimate stage which includes a score and in which music and song are intrinsic to the text and the expression of plot, character, emotion, and narrative. *See Author Definition*, Dictionary of Occupational Titles (4th ed. 1991), available at 1991 WL 645993. Musical authors include the bookwriter, composer, and lyricist. *See Writers Definition*, Dictionary of Occupational Titles (4th ed. 1991), available at 1991 WL 647042. To refer generally to all authors who write for the legitimate theater, this Article uses the term “dramatists.” *See Playwright Definition*, *supra*.

2. Jessica Litman, *The Invention of Common Law Play Right*, 25 BERKELEY TECH. L.J. 1381, 1382 (2010) [hereinafter Litman, *Common Law Play Right*] (noting the “stark contrast” between an American playwright’s ownership of her copyright which vests in the playwright control of all licensing and exploitation of the work, and those of other creators). Litman further distinguishes dramatists from other authors in their ability to assert enforceable rights to attribution and integrity and that third parties contributing “significant creative expression” to productions of plays “have added no authorship and should receive no copyright protection for their additions.” *Id.* at 1382–83 (citing numerous treatises and newspaper articles discussing, and court cases finding, that individuals who collaborate in the creative process of mounting a production of a play script have no claim to copyright in their contributions to the live production).

3. This article uses the customary American spelling of “theater” in text written by the author, but respects the customary Canadian, British, and European spelling of “theatre” where it appears in company names and in quotes from other sources. *Compare Theater*, OXFORD ADVANCED AMERICAN DICTIONARY, <http://oaadonline.oxfordlearnersdictionaries.com/dictionary/theater> (last visited Feb. 18, 2014), with *Theatre*, OXFORD DICTIONARIES, <http://www.oxforddictionaries.com/us/definition/english/theatre?q=theatre> (last visited Feb. 18, 2014).

4. For the most part, the copyright ownership structure in theater is well-settled as a matter of practice, but there have been challenges by certain creative collaborators, including performers, directors, and dramaturgs. *See Litman, Common Law Play Right, supra* note 2, at 1423 (noting that directors and other collaborators have asserted copyright ownership of their contributions, and the fact that some of these disputes have led to litigation, but most have settled); Jesse Green, *Exit, Pursued by a Lawyer*, N.Y. TIMES (Jan. 29, 2006), <http://theater.nytimes.com/2006/01/29/theater/newsandfeatures/29gree.html> (reciting facts of copyright claims by director against author and producer who presented productions of a new play following his dismissal as infringing on his copyright as a director as well as claims by directors against productions that incorporated a substantial part of their work without compensation or attribution, and response of Dramatists Guild); *see also Litman, Common Law Play Right, supra* note 2, at 1383 n.10 (citing numerous articles and papers supportive of playwright’s sole ownership of copyright and citing numerous cases finding for playwrights in challenges by collaborators claiming joint authorship). However, placed in the context of the number of plays produced annually in the United States, these kinds of claims are few and far between. *See, e.g., TODD LONDON & BEN PESNER, OUTRAGEOUS FORTUNE: THE LIFE AND TIMES OF THE NEW AMERICAN PLAY* 145–46 (Theatre Development Fund 2009). In 2008, the National Endowment for the Arts reported approximately 1982 professional theaters in the United States with budgets in excess of \$75,000 per year. *See id.* (noting, however, that it is uncertain how many new plays produced annually are world premiers); *see also ZANNIE GIRAUD VOSS ET AL., THEATER COMMUNICATIONS GROUP, THEATER FACTS 2010: A REPORT ON THE FISCAL STATE OF THE PROFESSIONAL NOT-FOR-PROFIT AMERICAN THEATRE* 5 (2010), available at [http://www.tcg.org/pdfs/tools/TheatreFacts\\_2010.pdf](http://www.tcg.org/pdfs/tools/TheatreFacts_2010.pdf) (estimating that there are 1807 not-for-profit theaters in the United States which produced approximately 16,000 productions that year).

creators, managers, and production personnel contract with independent producers on a per-project basis.<sup>5</sup> Even institutional theaters<sup>6</sup>—which operate as ongoing companies and employ full-time production, management, and artistic staff—contract with playwrights, directors, actors, and designers on a per-production basis.<sup>7</sup>

In contrast, the film and television industries operate with a business model in which the film production company engages all creators and contributors to a work as employees under work-made-for-hire agreements.<sup>8</sup> These two industries coexist, each adhering to their own norms when adapting the other's content. Producers in the film and television industries routinely acquire preexisting works to adapt to their formats, and those acquisitions almost invariably involve a buyout of all of the media rights in those properties.<sup>9</sup> Accordingly, when dramatists sell audiovisual rights in their properties to the film or television industries, they make a perpetual and unrestricted assignment of those rights to the

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5. See generally GILL FOREMAN, A PRACTICAL GUIDE TO WORKING IN THE THEATRE (2009) (describing some of the jobs and positions available in the theater industry, and noting in descriptions that they are, or are usually, freelance positions).

6. For purposes of this paper, the term “institutional theaters” refers to established, ongoing legitimate theater organizations that operate in the not-for-profit sector, such as members of the League of Resident Theatres. See, e.g., *About LORT*, LEAGUE OF RESIDENT THEATRES, [http://www.lort.org/About\\_LORT.html](http://www.lort.org/About_LORT.html) (last visited Nov. 18, 2013).

7. See, e.g., *Agreements & Forms*, LEAGUE OF RESIDENT THEATRES, <http://www.lort.org/Agreements.html> (last visited Nov. 18, 2013) (containing a number of the form agreements developed by LORT for its member theaters to employ artistic personnel on a per-production basis).

8. See *infra* notes 73–75 and accompanying text. See generally Part II.A (comparing the norms of the theater business with those of the film and television industries).

9. See, e.g., *Option and Purchase Agreement—Underlying Rights*, THE AMERICAN BAR ASSOCIATION'S LEGAL GUIDE TO INDEPENDENT FILMMAKING 2, available at [http://www.americanbar.org/content/dam/aba/migrated/2011\\_build/entertainment\\_sports/option\\_and\\_purchase\\_agreement.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/2011_build/entertainment_sports/option_and_purchase_agreement.authcheckdam.pdf) (including this typical grant of rights in a sample agreement to acquire rights to a book, play, magazine article, or other preexisting property: “Effective upon Producer’s exercise of the Option, Writer hereby exclusively sells, grants and assigns to Producer, Producer’s successors, licenses and assigns all rights in and to the Work not reserved by Writer, throughout the universe, in perpetuity, in any and all media and by any means now known or hereafter devised, including, without limitation, all forms of theatrical and non-theatrical distribution and exhibition (including without limitation, free broadcast, pay television, cable, subscription, pay-per-view, video-on-demand, DVD and Internet), including without limitation the following: all motion picture rights, including the right to make remakes, new versions or adaptations of the Work or any part thereof; to make series and serials of the Work or any part thereof; the right, for advertising and publicity purposes only, to prepare, broadcast, exhibit and publish in any form or media, any synopses, excerpts, novelizations, serializations, dramatizations, summaries and stories of the Work, or any part thereof; and all rights of every kind and character whatsoever in and to the Work and all the characters and elements contained therein.”).

purchaser, and retain the rights to exploit the work both in its original form and in other nonaudiovisual formats.<sup>10</sup>

Similarly, when a live-stage producer or author acquires rights to adapt an underlying work for the stage, the grant includes the right of the assignee to own and control the new work, subject to the assignor's right to receive ongoing compensation and other benefits.<sup>11</sup> Even where the content owner is a film or television company, it is generally understood that as a passive licensor or assignor of the rights, the owner will relinquish all controls over the new work and have no claim to the copyright in the new work.<sup>12</sup> This is consistent with the "architecture" of American copyright law.<sup>13</sup>

However, there is a growing trend in the live-theater industry for media companies, studios, and other content owners to enter the theater market as producers of the new derivative works, not merely as passive licensors.<sup>14</sup> In these circumstances, content owners—alone or in partnership with established Broadway producers—engage

10. See, e.g., MARK LITWAK, *CONTRACTS FOR THE FILM & TELEVISION INDUSTRY* 54–56 (3d ed. 2012) (including a sample option/purchase agreement for an underlying literary property that provides for the writer of the original work to reserve the following rights: publication rights, stage rights, radio rights, and sequel or prequel rights).

11. See, e.g., Charles Grippio, *The Stage Producer's Business and Legal Guide* 42–43 (2002).

12. Litman, *Common Law Play Right*, *supra* note 2, at 1382 (commenting on the "utilitarian . . . design" of the copyright system in which "follow-on creators who add even a little creativity to authorized adaptations of copyrighted works are entitled to exclusive rights in their versions of those works."). *But see* discussion *infra* Parts III.1–2 (exploring departures from this typical practice).

13. Litman, *Common Law Play Right*, *supra* note 2, at 1382.

14. See Patrick Healy, *Like the Movie, Only Different: Hollywood's Big Bet on Broadway Adaptations*, N.Y. TIMES (Aug. 1, 2013), <http://www.nytimes.com/2013/08/04/movies/hollywoods-big-bet-on-broadway-adaptations.html> [hereinafter Healy, *Like the Movie*] (reporting on the increasing presence of Hollywood studios, executives, and media companies in the theater industry as investors in and producers or co-producers of content based on their film libraries, and mentioning, in particular, Warner Bros. Theatre Ventures, Disney Theatricals, Sony, and Fox); see also Brooks Barnes & Patrick Healy, *20th Century Fox Enlists Help in Bringing Its Properties to the Stage*, N.Y. TIMES (July 11, 2013), <http://www.nytimes.com/2013/07/12/business/media/20th-century-fox-opening-division-for-live-theater.html> [hereinafter Barnes & Healy, *20th Century Fox Enlists Help*] ("One of the last Hollywood studios without a Broadway division, 20th Century Fox, is diving into the live theater business. . . . Until now, Fox has approached the live theater business as a passive licensor."); Patrick Healy, *Sony Pictures the Latest Studio to Make Broadway Push*, N.Y. TIMES (Aug. 23, 2012, 1:15 PM), <http://artsbeat.blogs.nytimes.com/2012/08/23/sony-pictures-the-latest-studio-to-make-broadway-push> (reporting Sony's five-year deal with Broadway producer to mount stage versions of the studio's films and noting that "[a]mong the film studios involved with Broadway, Disney stands out for having an ambitious, in-house division to develop shows for New York and theater touring markets; [in addition to 'The Lion King'] its other musicals include 'Mary Poppins,' 'The Little Mermaid,' 'Beauty and the Beast' and 'Aladdin.' The Warner Brothers film studio is bringing a musical version of 'Elf to Broadway this November (as it did around the winter holidays in 2010), and Universal has been a producer on the Broadway movie-to-musical adaptations of 'Billy Elliot' and the current 'Bring It On,' both of which were distributed as movies by Universal.").

dramatists to create adaptations of their intellectual property that the owners themselves will exploit on stage and in subsidiary and ancillary uses.<sup>15</sup> For these owners, it is customary to commission a new work as a “work made for hire,” as defined in the Copyright Act,<sup>16</sup> which vests original authorship and ownership of the new work in the commissioner.<sup>17</sup> However, as this Article demonstrates, the US live-theater industry does not embrace or accept work-made-for-hire deals for dramatists.<sup>18</sup> When a film, television, or other mediated entertainment company wants to adapt one of its properties as a derivative live-stage work for Broadway and plans to take a lead role in financing, producing, and presenting the work in the United States and elsewhere, under a standard deal, it does not own the new work.<sup>19</sup> Although the company is commissioning an adaptation based on its own film or television title, paying the dramatists, hiring production personnel, bankrolling development costs through readings and workshops, and contributing to production costs, it obtains only a temporary license to exploit that work, and its rights are subject to lapse and termination.<sup>20</sup> At that point, the dramatists would customarily assume total control of the derivative work and make all decisions about its ongoing exploitation.<sup>21</sup>

15. See Healy, *Like the Movie*, *supra* note 14; see also *infra* note 170 (discussing DreamWorks SKG’s role as both the underlying rights owner and the producer of *Shrek, the Musical*).

16. See 17 U.S.C. § 101 (2012). 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. For the purpose of the foregoing sentence, a “supplementary work” is a work prepared for publication as a secondary adjunct to a work by another author for the purpose of introducing, concluding, illustrating, explaining, revising, commenting upon, or assisting in the use of the other work, such as forewords, afterwords, pictorial illustrations, maps, charts, tables, editorial notes, musical arrangements, answer material for tests, bibliographies, appendixes, and indexes, and an “instructional text” is a literary, pictorial, or graphic work prepared for publication and with the purpose of use in systematic instructional activities.

*Id.*

17. See *id.* § 201(b) (“In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.”).

18. See, e.g., *Bill of Rights*, DRAMATISTS GUILD, <http://www.dramatistsguild.com/billofrights> (last visited Nov. 21, 2013) (addressing its member playwrights and stating, *inter alia*, that “[a]uthors in the theatre business do not assign (i.e., give away or sell in entirety) their copyrights, nor do they ever engage in ‘work-for-hire’”).

19. See *infra* Part II.B.1.

20. See *infra* Part II.B.1.

21. See *infra* Part II.B.3.

In ordinary circumstances—when a dramatist creates an original work or adapts an existing work under a passive license—the dramatist’s control of her copyright can be easily justified.<sup>22</sup> However, instances in which the producer owns the underlying work, commissions the adaptation, produces the new work, but must nevertheless forego future ownership and control, bear special attention. The purpose of this Article is not to consider the legal underpinnings of the broad copyright accorded dramatists in the theater industry. Scholars, in particular Litman, have thoroughly explored the legal and historic premises for this anomaly and concluded that it is primarily based on industry custom and practice and is protected through contractual relationships.<sup>23</sup> Instead, this Article examines how Hollywood corporate media’s foray into the live-theater business might affect long-established theater customs and practices.<sup>24</sup>

Accordingly, Part I provides some historical background for the current custom and practice in the live-stage industry in the United States, drawing heavily on Litman’s work. Part II explores recent economic changes in the Broadway theater market brought about by the increasing presence of large, corporate media companies as active producers of content on Broadway. It further considers ways in which well-established legal norms and business practices in the mediated entertainment industries are challenging customary copyright-ownership practices in the theater industry. Part III posits that, while changes to these norms are appropriate responses to new

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22. See *infra* Part III. Note, however, that some scholars consider the rights enjoyed by dramatists even in these more ordinary circumstances as “exceptional.” See Litman, *Common Law Play Right*, *supra* note 2, at 1425 (noting that as a result of collective action in the 1920s, “[d]ramatists were able to get exceptional authors’ rights . . . and they have retained those rights.”); see also Shane D. Valenzi, Note, *A Rollicking Band of Pirates: Licensing the Exclusive Right of Public Performance in the Theatre Industry*, 14 VAND. J. ENT. & TECH. L. 759, 778 (2012) (“Dramatic authors hold a unique power over their work, respective both to their peers in other industries and their theatrical collaborators.”).

23. See, e.g., Litman, *Common Law Play Right*, *supra* note 2, at 1424–25. Litman reaches this conclusion following exhaustive research and a rich historical account of the evolution of copyright law in the United Kingdom and in the United States and cannot be faulted. See *id.* at 1387–1423. She surmises, however, that dramatists have not been well served financially by the prevailing copyright structure in theater, opining that if playwrights were to assign their copyrights to third parties, they would stand to reap greater rewards. See *id.* at 1424. However, there is a wider marketplace in which dramatists exploit and monetize rights in their plays than live-stage productions. See *supra* note 9 and accompanying text (observing that when a stage author disposes of rights in a play for a motion picture or television production, those rights are sold outright and owned by the purchaser). In addition, there are numerous practical advantages and cultural benefits that are served by the playwright retaining ownership and control of the dramatic rights in and to a play, which this Article seeks to examine. See *infra* Part III (discussing the economics of live-theater productions, risk allocation and the development process).

24. See *infra* Part III.



market realities, they should also be approached with caution and applied in moderation, as current copyright-ownership practices in theater have important practical and cultural benefits.

### I. PLAYERS, PLAYWRIGHTS, AND PLOTS

The history of the copyright norms in US theater begins in Elizabethan England during the rise of the kingdom's market economy and the emergence of independent commercial theaters.<sup>25</sup> In the early sixteenth century, live entertainment was provided mostly by amateur players<sup>26</sup> who created works for private parties and court events and, at the opposite end of the spectrum, offered popular entertainment consisting of "dumbshows, jog-trot verse, mongrel-tragicomedy and primitive stage effects."<sup>27</sup> The mid-to-late fifteen hundreds, however, saw the emergence of independent playhouses<sup>28</sup> and the development and maturation of self-confident and assertive professional players.<sup>29</sup>

During Shakespeare's time and a century-and-a-half thereafter, theater companies in England paid playwrights for their services, and the scripts belonged to the companies that controlled their use and exploitation, not the playwrights.<sup>30</sup> That said, in many cases, prominent and successful writers<sup>31</sup> often became shareholders

25. See Litman, *Common Law Play Right*, *supra* note 2, at 1386; JAMES H. FORSE, ART IMITATES BUSINESS: COMMERCIAL AND POLITICAL INFLUENCES IN ELIZABETHAN THEATRE 231 (1993) (observing that theater at that time "became a popular, commercial theatre, which found a place for itself within the framework of the emerging market economy of Renaissance England" and did not depend solely on religious or courtly patronage).

26. Most theater practitioners of the times performed multiple roles within play companies as actors, playwrights, directors, dancers, singers and more and writers of the period referred to these practitioners as "players." See, e.g., WILLIAM SHAKESPEARE, *HAMLET* act 2, sc. 2; WILLIAM SHAKESPEARE, *AS YOU LIKE IT* act 2, sc. 7.

27. Paul Whitfield White, *Playing Companies and the Drama of the 1580s: A New Direction for Elizabethan Theatre History?*, in 28 SHAKESPEARE STUDIES 265, 265 (Leeds Barroll ed., 2000), available at [http://www.martinsvianna.net/dossies/new\\_direction\\_for\\_eliza\\_theatre\\_history.pdf](http://www.martinsvianna.net/dossies/new_direction_for_eliza_theatre_history.pdf) (providing a survey of contemporaneous academic literature that shifted the focus of Elizabethan theater scholarship away from individual authors and towards the professional player companies and the broader economic, political, and social structures and arrangements that supported and undergirded the operations of the theater business).

28. The first known playhouse, the Red Lion, is thought to have opened in Stepney, a suburb of London, in 1567. *Id.* at 266.

29. See *id.* at 266 & nn.4-5 (noting that in reaction to protests from city politicians and preachers to the playhouses, the players were able to rally in self-defense).

30. See Litman, *Common Law Play Right*, *supra* note 2, at 1390 (citing numerous sources for conclusions reached by theater historians that "playwrights received a salary, or participated as partners in the profits of the company, collecting a share of net receipts, or both" and that "[p]lay scripts were deemed to belong to the company, which decided when to produce them, revive them, or sell them to stationers for printing"). According to Litman, the plays, "once acquired entered a theatre company's repertory, where they could be revived, adapted, rewritten, performed, and printed without any further license from the writer." *Id.* at 1395.

31. Prominent actors were also accorded the opportunity to purchase shares in the theaters themselves and obtain a share of the profits. See JAMES S. SHAPIRO, 1599: A YEAR IN

in the player companies and occasionally purchased shares in the theater houses themselves.<sup>32</sup> In these other roles the playwrights had a “prominent voice in the company’s operations,” and thus could influence when, where, and how a play was to be performed.<sup>33</sup> However, the script could not secure copyright protection unless it was published, and the protection extended only to the printed text.<sup>34</sup> It would appear that this remained the custom in the industry through much of the seventeenth and the early part of the eighteenth centuries.<sup>35</sup> It was not until Parliament enacted the Dramatic Literary Property Act (DLPA) in 1833 that performance rights were recognized as distinct from publication rights.<sup>36</sup> Prior to the DLPA, performance rights were considered to reside in the public domain, which allowed theaters in possession of the published scripts to perform them without compensating the playwrights.<sup>37</sup> In 1842, Parliament enacted a revised copyright statute that deemed the dramatic performance of the text a separable right that could be licensed without assignment of the entire copyright.<sup>38</sup>

In the late eighteenth and early nineteenth centuries, many British actors, faced with limited work opportunities in London, formed companies to tour the United States and brought British

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THE LIFE OF WILLIAM SHAKESPEARE 3–4 (2005) (recounting the construction of The Globe, for which Richard Burbage “approached five of his fellow actor-shareholders in the [Chamberlain’s Men]—William Shakespeare, John Heminges, Augustine Phillips, Thomas Pope, and Will Kemp—with a plan. . . . In exchange [for their assistance with certain construction and operational costs], . . . the five men [would] each receiv[e] ten percent of [The Globe’s] total profits.”).

32. FORSE, *supra* note 25, at 14, 22–31 (offering a detailed analysis of the economics of the theater business in Elizabethan times and recounting that actors and playwrights were often both “sharers” in the profits of the player companies to which they belonged, and that successful actors and playwrights such as William Shakespeare could buy shares in the theater houses themselves which gave them significant power in making business decisions).

33.

*Id.*

34. See Valenzi, *supra* note 22, at 764.

35. See Litman, *Common Law Play Right*, *supra* note 2, at 1395–96. According to Litman, passage of the Statute of Anne in 1710, which established copyright for the first time under British law, did not help the rights of playwrights. *Id.* at 1396. As Valenzi observes, it essentially “granted an exclusive publishing right for a limited time to certain book publishers in England.” Valenzi, *supra* note 22, at 764.

36. See Valenzi, *supra* note 22, at 764; see also Litman, *Common Law Play Right*, *supra* note 2, at 1399 (describing a parliamentary report “calling for the expansion of copyright in dramatic literature to give writers control of public performances of their plays” and asserting that “[a]s of 1833 . . . the Dramatic Literary Property Act enabled authors or their assignees to enjoin unlicensed productions”).

37. See Litman, *Common Law Play Right*, *supra* note 2, at 1398–99 (describing in some detail the efforts of Edward Bulwer-Lytton to secure additional protections for dramatists including compensation for dramatists from performances of their plays).

38. See *id.* at 1400 (noting that the statute achieved this by equating the first public performance of a play with publication of the play, thus according a playwright protection of the text without the need for publication in print).

theater works with them.<sup>39</sup> What they discovered was the theatrical-rights equivalent of the Wild West: European plays were unprotected by copyright in the United States and were “free for the taking.”<sup>40</sup> In addition, not unlike the situation in England, the 1790 Copyright Act in the United States protected published written works but did not recognize a dramatic performance right.<sup>41</sup> Accordingly, British acting companies that imported their customs and practices could operate under the assumption that once they paid a playwright for a script, they owned it outright.<sup>42</sup>

US Law recognized performance rights in plays in 1856,<sup>43</sup> and, as in the United Kingdom, tied those rights to the registration of a published copy of the work.<sup>44</sup> This left unpublished dramatists vulnerable to unauthorized exploitation of their works.<sup>45</sup> However, even when a dramatist had successfully perfected the copyright in a play by following the rigorous formalities of registration,<sup>46</sup> the

39. See *id.* at 1397; see also TICE L. MILLER, ENTERTAINING THE NATION: AMERICAN DRAMA IN THE EIGHTEENTH AND NINETEENTH CENTURIES 4 (2007). As is clear from the citations throughout Part I, this Article relies heavily on research and discussions by Litman, Valenzi, and Zvi Rosen, who have conducted exhaustive research on the history of copyright law as it applies to, and impacted upon, theater in the United Kingdom and the United States. See, e.g., Litman, *supra* note 2; Rosen, *infra* note 45; Valenzi, *supra* note 22. I would encourage a first-hand review of each article for a far more detailed and, in some cases, entertaining, account of the struggles of dramatists to obtain legal recognition of their entitlement to enjoy the fruits of their creative labors.

40. Litman, *Common Law Play Right*, *supra* note 2, at 1401 (noting that once it gained its independence, the United States had “no international copyright relations with any European Nation”).

41. See *id.* at 1400–01.

42. See *id.* at 1401–02 (“Actors and managers claimed that their payment to a playwright for a script purchased all rights in the script unless a written contract reserved some printing or performance rights to the dramatist.”). Compensation structures were also similar to early practices in the United Kingdom, with playwrights receiving a flat fee, as well as the opportunity to receive net profits from benefit performances. *Id.* at 1402.

43. Act of Aug. 18, 1856, ch. 169, 11 Stat. 138 (codified as amended at 17 U.S.C. § 106(4)).

44. See Valenzi, *supra* note 22, at 766 (citing the language of the 1856 Act); see also Act of Aug. 18, 1856, ch. 169, 11 Stat. 138 (codified as amended at 17 U.S.C. § 106(4)) (“[A]ny copyright hereafter granted under the laws of the United States to the author or proprietor of any dramatic composition, designed or suited for public representation, shall be deemed and taken to confer upon the said author or proprietor, his heirs or assigns, along with the sole right to print and publish the said composition, the sole right also to act, perform, or represent the same, or cause it to be acted, performed, or represented, on any stage or public place during the whole period for which the copyright is obtained . . .”).

45. See Valenzi, *supra* note 22, at 766 (citing Zvi S. Rosen, *The Twilight of the Opera Pirates: A Prehistory of the Exclusive Right of Public Performance for Musical Compositions*, 24 CARDOZO ARTS & ENT. L.J. 1157, 1208 (2007)). While there were claims against unauthorized uses premised on the theory of a common law copyright, the common law right was state-based, so unauthorized productions could occur across state lines, unless a playwright had perfected his or her statutory copyright which accorded the play federal protection. See Rosen, *supra*, at 1167–68.

46. The formalities of registration were extensive, and no doubt extremely confusing, given the remarkably high number of works for which the initial step of filing a title page of the

protection accorded the work was porous at best<sup>47</sup> and subject to a “deeply unsettled” body of caselaw.<sup>48</sup>

Theatrical enterprise was burgeoning in the United States in the eighteen hundreds, with audiences clamoring for product in thousands of theaters and opera houses, creating tens of thousands of

play with the Copyright Office was undertaken, but the subsequent steps that were required to perfect registration were not. See Litman, *Common Law Play Right*, *supra* note 2, at 1408–09 (citing a preface to a Copyright Office publication stating that, between July 8, 1870 to July 1, 1909, “in more than 20,000 cases, while the title has been recorded, no copies [of the published play] have been received”); see also *id.* at 1405–06 (citing Judge Hunt’s opinion in a ruling that registration of a play was invalid by noting that the playwright had failed to publish the work within a reasonable time after filing the title page with the Copyright Office, with two copies deposited with the librarian); *id.* at 1404 n.146 (setting forth the requirements of the 1831 Copyright Act, many of which remained intact in subsequent amendments of the Act, protecting “authors who were U.S. citizens or residents, or the authors’ assigns, upon recording of the title of the work, deposit of the title page before publication, publication, payment of a fifty-cent recording fee, notice inserted on the title page of all published copies, and deposit within three months of publication of a copy of the work with the clerk of the court”). See generally *id.* at 1403–10 (discussing the articulation of a common law copyright in nineteenth century legal treatises and surveying related caselaw).

47. Rosen, *supra* note 45, at 1168 (citing the example of a court holding that a performance could not be transcribed at the time of performance and reconstructed—that would constitute an infringement of the performance right—but a performance could be memorized and transcribed later based on recollection, without infringing the performance right). To add to the confusion, the case law at the time held that as soon as the proprietor of a work did obtain statutory copyright protection, she immediately lost whatever protection may have been available to her under common law copyright. See *id.* at 1167–68 (citing *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 658 (1834), in which the court opined that there is “no common law of the United States” and that each of the twenty-four independent states has its “local usages, customs and common law”).

48. See Rosen, *supra* note 45, at 1168; see also Litman, *Common Law Play Right*, *supra* note 2, at 1406 (describing the court’s determination of a common law cause of action for infringement in *Keene v. Wheatley*, 14 F. Cas. 180 (C.C.E.D. Pa. 1861) (No. 7,644), as “peculiarly cramped”). In short, the court determined that an unlicensed performance of a published script that had *not* perfected its statutory copyright was not actionable and likewise, an unlicensed production based on a performance of that play was not actionable, as the published play was entitled to protection only under federal statutory copyright and had no protection under common law. See Litman, *Common Law Play Right*, *supra* note 2, at 1406–07. However, the proprietor of an *unpublished* manuscript that was performed in an unlicensed production (not enabled by a prior production) did have recourse to literary property rights under common law, and accordingly, had an actionable claim. See *id.* at 1407 (quoting the Massachusetts’ court’s reasoning in *Keene v. Kimball*, 82 Mass. (16 Gray) 545 (1860), that the producer “has employed actors to commit the various parts to memory; and unless they are restrained by some contract, express or implied, we can perceive no legal reason why they might not repeat what they have learned, before different audiences, and in various places”). Compounding the difficulty of dramatists to protect their works, US copyright protection extended to US citizens and their assignees only, and the United States did not recognize foreign copyright statutory protections until 1891. See *id.* at 1417; see also Rosen, *supra* note 45, at 1176–77 (citing the court’s reasoning in the *Mikado* case brought by Gilbert & Sullivan to enjoin pirated performances of their hit musical in the United States, which espouses a common law right of stage authors to exclusive ownership of the “right to multiply copies of their work and control its production” but opining that as the work had been performed in the United Kingdom (where performance was equivalent to publication), they had lost the common law right, as the right to control “representation on the stage . . . is abandoned to the public” and any rights “as are saved by statute are not recognized extraterritorially”).

jobs in the theater industry.<sup>49</sup> Just as in Shakespeare's time, theater offered a pathway to wealth and status for those without the automatic pedigree of privileged birth.<sup>50</sup> This created strong incentives to produce unlicensed productions of plays without providing any compensation to the dramatist, especially when it was not overtly illegal to do so.<sup>51</sup> As a result, a major illicit trade emerged in the sale of stolen manuscripts and pirated productions reconstructed from memory, which led to frequent accusations of fraud, bribery, and corruption.<sup>52</sup>

Predictably, playwrights and their supporters did not sit idly by. They formed the American Dramatists Club, a lobbying

49. See Rosen, *supra* note 45, at 1207 (quoting a petition that described the size and scope of the American theater industry as including about "three thousand theatres and opera houses . . . giv[ing] employment to at least forty thousand people, exclusive of actors and actresses").

50. According to Forse, Elizabethan theater "offered men a means to make large amounts of money quickly. . . . For those with less capital to invest, becoming a [shareholder] in a successful London-based acting company offered a means to bypass the restrictions on income imposed by the traditional economic system, and achieve, and surpass, the income of members of the country Gentry and liveried Masters within the traditional guilds." Forse, *supra* note 25, at 231. This account is very similar to that found in studies of nineteenth-century American theater. See, e.g., *Essay: 19th Century American Theater*, UNIV. OF WASH., <http://content.lib.washington.edu/19thcenturyactorsweb/essay.html> (last visited Nov. 11, 2013) ("[L]ead actors were paid anywhere from \$35 to \$100 per week. Traveling stars could command \$150 to \$500 per 7- to 10-day engagement, plus one or more benefits. Except for the lowest ranks of actors, these salaries were good for this period, especially for women . . . .") Actors who were successful gained entry into middle-class society, and the most successful actors were often entertained by prominent figures in politics, society, and literature. See *id.*

51. See Valenzi, *supra* note 22, at 771 (noting that due to insufficiencies of federal copyright protection, "[p]lay pirates could simply factor in the statutory fine as a cost of doing business, and touring productions moved so frequently that even an expedited injunction hearing proved toothless" as the producer could simply move the production out of the circuit court's jurisdiction).

52. See *id.* at 768–69 (providing a colorful account of reputable producers undertaking transatlantic voyages to secretly observe productions of new plays in the United Kingdom, in particular operettas by Gilbert and Sullivan, and hastening back to the United States to mount the first production in the country); see also Rosen, *supra* note 45, at 1208 (citing The American Dramatists Club, Petition to the Senate and House of Representatives of the United States for the Amendment of the Copyright Law, Relating to the Fraudulent Production of Plays, from the Dramatists, Theatrical Managers and Other Members of the Dramatic Profession of the United States (1895) (editorial copy on file with the Rutherford B. Hayes Presidential Library)). The petition, cited at length by Rosen, describes in florid terms the unhappy state of the theatrical profession:

A man who steals a valuable play can sell a copy for a few dollars, or perform it every night for months in practical immunity from arrest, fine, or imprisonment. . . . The theft of successful new plays and the sale of stolen copies of the manuscripts has become a regularly organized business. . . . An injunction obtained in one Federal District is inoperative in any other, and by crossing an imaginary line the person conducting the unlawful performance may defy the United States law and continue to perform the play until its commercial value is completely destroyed. . . . The local managers and owners of theatres are nowhere in sympathy with these unlawful producers of plays, but it has now become almost impossible for them to detect a fraudulent production when contracting for performances in their houses.

Rosen, *supra* note 45, at 1208.

organization, and joined with other authors' societies, managers and operators of legitimate theaters, theater lawyers, members of Congress, and many others to advocate their interests.<sup>53</sup> Their efforts succeeded, resulting in the passage of two important bills in 1891<sup>54</sup> and 1897<sup>55</sup> as well as the passage of a revised Copyright Act in 1909.<sup>56</sup> The net effect of these bills was to secure for proprietors of dramatic works considerably greater legal recourse to enjoin unauthorized productions, as well as significantly increased financial and legal penalties levied upon infringers.<sup>57</sup>

It may seem that dramatists had fought their battles and won, and this was indeed a major legislative and legal triumph. However, the beneficiaries of the more robust laws were proprietors of copyrights, who, in many cases, were not the playwrights themselves.<sup>58</sup> As a result, producers and theater owners were able to take advantage of these new laws, but playwrights were as disempowered as before.<sup>59</sup> A number of prominent theater producers formed a syndicate of New York and regional theaters to ensure bookings for their plays and productions, creating an effective monopoly that inflated their power over talent, rights owners, and booking agents and severely impacted working conditions for actors as well as dramatists.<sup>60</sup>

53. See *id.* at 1201. Rosen's article provides an in-depth account of the legal battles, first fought and lost in the courts, and then redirected to the legislative process. See generally *id.* 1158–1216. His focus is on the emergence of a public performance right in musical compositions, but the close ties between musical performance and live theater allows for a thorough analysis of the many forces that played a role in shaping and honing copyright protections for dramatic works in the second half of the nineteenth century.

54. International Copyright (Chace) Act, ch. 565, §§ 10, 13, 26 Stat. 1106 (1891), extended copyright protection to foreign nationals. See Valenzi, *supra* note 22, at 770 n.66.

55. See Act of Jan. 6, 1897, ch. 4, 29 Stat. 481, 481–82; Valenzi, *supra* note 22, at 771 (discussing the effect of the Cummings Copyright Bill, which “strengthen[ed] protection for dramatists by increasing statutory fines, expanding the reach of the federal courts to issue binding injunctions across districts, and making willful infringement a criminal offense”).

56. Copyright Act of Mar. 4, 1909, ch. 320, §2, 35 Stat. 1075, 1075. According to Litman, with passage of the 1909 Act, “Congress finally enacted a provision enabling the author or proprietor of a dramatic composition *not* reproduced for sale to secure federal copyright protection.” Litman, *Common Law Play Right*, *supra* note 2, at 1416 (emphasis added).

57. See Rosen, *supra* note 45, at 1215–18; see also Valenzi, *supra* note 22, at 771.

58. Litman, *Common Law Play Right*, *supra* note 2, at 1416 (“[V]ery few of the complainants in the cases” she cites to illustrate her arguments “were actual playwrights. Both common law and statutory claims were pressed on behalf of proprietors who bought all rights from authors, typically for a flat fee.”).

59. See KEN BLOOM, *BROADWAY: ITS HISTORY, PEOPLE AND PLACES* 136 (2d ed. 2004) (noting that in 1917, producers had complete power over the theater and were very much against sharing that power).

60. See Litman, *Common Law Play Right*, *supra* note 2, at 1417. As goes the universal story, oppression engenders activism, which first came in the form of an effective strike by actors in 1919, which led to the founding of Actors' Equity Association from which they won negotiation of minimum contractual terms for their members. *Id.* at 1418; see BLOOM, *supra* note 59, at 136 (noting that the actors' strike of 1919 resulted in the creation of Actors' Equity and that the

A sea change was about to occur, however, precipitated by the arrival of a new, rapidly expanding, technology-driven form of entertainment: the motion picture industry. Hungry for content and talent, movie producers looked east to Broadway and to the national touring circuit.<sup>61</sup> The decision by a group of prominent Broadway producers to make a deal with Twentieth Century Fox Film Corporation finally precipitated an organized response by playwrights.<sup>62</sup> The producers had agreed to pre-sell to the studio the rights in the plays they produced on stage in return for the studio's financial backing for their productions.<sup>63</sup> A certain group of playwrights from the Authors Guild formed an autonomous committee to defend the rights of playwrights.<sup>64</sup> This led to a groundswell of activism proposing that authors of plays and musicals retain ownership and control of their plays rather than sell those rights in advance to the producer, which resulted in the first Minimum Basic Agreement (MBA)—a document playwrights and their lawyers created and presented to theater producers in 1927.<sup>65</sup>

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success of their collective action did not go unnoticed by playwrights). While playwrights attempted to organize and win concessions, instead of having powerful producers on their side (as was the case when the theater industry lobbied congress for change), now the powerful stage producers, who were also their employers, were their adversaries, and efforts to organize playwrights were unsuccessful for the most part. See Litman, *Common Law Play Right*, *supra* note 2, at 1418.

61. See *infra* notes 62 and 63.

62. See T. J. Walsh, *Playwrights and Power: The Dramatists Guild's Struggle for the 1926 Minimum Basic Agreement*, in ART, GLITTER, AND GLITZ: MAINSTREAM PLAYWRIGHTS AND POPULAR THEATRE IN 1920S AMERICA 107, 107–26 (Arthur Gerwitz & James Kolb eds., 2004), for a detailed account of the personalities, issues, and chronology surrounding the organization and formation of what would become the Dramatists Guild, based on contemporary newspaper and journal reports and biographical and autobiographical accounts.

63. See BLOOM, *supra* note 59, at 136 (recounting that Fox Film Corporation had an agreement with seven producers whereby they would back the plays in return for film rights and would receive half the receipts).

64. See *id.* at 135 (describing the organizing activities of playwrights who were members of the Authors League).

65. See Walsh, *supra* note 62, at 113–15. The key features of the contract included a reservation to the playwright of the copyright in her play and the right to control all dispositions of the work, including the motion picture rights. See *id.* at 116–19. In the event of a sale of motion picture rights, the playwrights' MBA provided that the sale must be subject to competitive bidding, and that the theater producer and the playwright would split the proceeds 50/50. See *id.* at 109. In addition, the playwrights' MBA included numerous safeguards in circumstances where the producer of the live-stage production is also a film producer. See *id.* at 115; see also BLOOM, *supra* note 59, at 136 (recounting that 121 dramatists agreed that they would refuse to sign any other agreement with producers other than the playwrights' MBA, and that if producers wouldn't sign that deal, they would not allow them to produce their plays); Walsh, *supra* note 62, at 108 (citing a *New York Times* article describing issues that brought the dramatists together). According to Bloom, there was little resistance from the producers. BLOOM, *supra* note 59, at 136. However, Walsh provides a detailed account of significant resistance from Broadway producers, and their eventual capitulation, over time, to the demands of the playwrights. Walsh, *supra* note 62 at 115–17.

This collective action by the playwrights, led by the dramatists committee of the Author's League, resulted in the founding of a separate organization, the Dramatists Guild (Guild).<sup>66</sup> To this day, the Guild declares that its *raison d'être* is the protection of dramatists' ownership of their copyrights and the continuation of customs and practices that have prevailed since 1927.<sup>67</sup>

The story, as told to this point, makes for a rattling good tale. Not only did the little guys win the protection of the law, but they secured a robust set of customary rights.<sup>68</sup> Looking back over this 400-year narrative, it is clear that business and market forces drove the evolution of copyright law as it applied to live theater, as well as the customs and practices of rights ownership in the theater industry.<sup>69</sup> Current custom and practice in American theater is not yet 100 years old, but it is solidly entrenched.<sup>70</sup> For dramatists, their victory has translated into the potential to earn handsomely from works that succeed in their initial productions, to steer the future course of those works, and to monetize their rights in those works for the life of their copyright.<sup>71</sup>

However, new pressures and stresses are being brought to bear on these norms and customary practices, attributable once again to the attention that Hollywood is paying to Broadway and the live-theater industry.

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66. See generally BLOOM, *supra* note 59, at 136; Walsh, *supra* note 62, at 107–26. Litman touches briefly on the unusual status of the Guild which, although it acts on behalf of its members and sets certain policies and requirements for agreements, including promulgating minimum terms, has not been officially constituted as a labor union, and thus it is not conclusive as to whether it is entitled to exemption from antitrust laws. Litman, *Common Law Play Right*, *supra* note 2, at 1421; see also Clayton Act, 15 U.S.C. § 17 (stating that the antitrust laws are not applicable to labor organizations). One way the Guild has gotten around this is to merely “recommend[]” its uniform agreements to its members, and not mandate that they sign it. Litman, *Common Law Play Right*, *supra* note 2, at 1421 n.257.

67. See *infra* Part II.B.

68. Litman, *Common Law Play Right*, *supra* note 2, at 1425 (“Today, the strong attribution and integrity rights that playwrights claim, and their insistence on denying that their collaborators author contributions, have everything to do with customs and contracts, and very little to do to [sic] with copyright law.”).

69. See *supra* Part I.

70. See *infra* Part II.B.

71. Playwrights are not the sole beneficiaries of these ongoing revenues, however. Numerous third parties who have contributed to the development of the play also receive contractual rights to share in those revenues, some for a limited period of time, and some for the life of copyright. See *infra* notes 144–146, 194–195 and accompanying text.



II. HOLLYWOOD ON THE RIALTO<sup>72</sup>

## A. Enter, Roaring

US content owners in the mediated entertainment industry are accustomed to commissioning works from writers, directors, designers, composers, and every other individual or entity that contributes creative content to the final work on a work-made-for-hire basis.<sup>73</sup> Indeed, the Copyright Act of 1976 (1976 Act) specifically defines one of the work-made-for-hire categories as “a work specially ordered or commissioned for use . . . as a part of a motion picture or other audiovisual work,” provided that “the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.”<sup>74</sup> The written instrument eliminates the automatic protection that a creator of a work normally obtains at the time it is created in fixed form and instead deems the commissioner of the work the author, granting full rights of ownership and control of the copyright to the commissioner.<sup>75</sup>

Live-stage dramatic works are not included in the enumerated work-made-for-hire categories in the 1976 Act, which may factor into why dramatists have managed to preserve their particular copyright practices.<sup>76</sup> After all, if the federal statute does not contemplate that

72. See BLOOM, *supra* note 59, at xv (noting the origin of use of “the Rialto” to refer to Broadway in popular reference, and that “[i]n the 1950s and 1960s Sam Zolotow wrote a popular theater column in the *New York Times* called ‘News of the Rialto’”).

73. See, e.g., *Creative Rights for Writers of Theatrical and Long-Form Television Motion Pictures*, WRITERS GUILD OF AMERICA, [http://www.wga.org/subpage\\_writersresources.aspx?id=81](http://www.wga.org/subpage_writersresources.aspx?id=81) (last visited Nov. 23, 2013) (“Ownership of the script copyright, whether by acquisition or under the work-for-hire doctrine, is the practical means by which the companies preserve their rights to exploit the scripts they pay for. The transfer of copyright from the writer to the production company is a custom in the United States entertainment industry; it is not common worldwide.”). The Director’s Guild Basic Agreement is between the producer who is deemed the “Employer” and the director who is the “Employee.” See *Basic Agreement*, DIRECTORS GUILD OF AMERICA, <http://www.dga.org/Contracts/Agreements/Basic2011.aspx> (last visited Nov. 23, 2013). Accordingly all work performed by the director is by definition a “work-for-hire” under the Copyright Act. See 17 U.S.C. § 101 (2012). The same holds true for the United Scenic Artists’ Motion Picture Production Agreement with Major Producers. See *United Scenic Artists – Local USA-829, MOTION PICTURE PRODUCTION AGREEMENT WITH MAJOR PRODUCERS* (2012), available at <http://www.usa829.org/Portals/0/Documents/Contracts/TV-Film-Commercials/USA-829-Majors-Agreement-2012-2015.pdf>.

74. 17 U.S.C. § 101 (2012).

75. See U.S. COPYRIGHT OFFICE, CIRCULAR 9: WORKS MADE FOR HIRE 1–3 (2012), available at <http://www.copyright.gov/circs/circ09.pdf> (explaining the effect of work-made-for-hire arrangements).

76. Cf. *id.* Litman opines that nothing in the copyright statute singles out dramatic works as worthy of treatment as “unique legal beasts.” Litman, *Common Law Play Right*, *supra* note 2, at 1383. However it could be argued that dramatic works are singled out by omission, rather than by reference. Cf. Jessica D. Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857, 858–61 (1987) (hereinafter Litman, *Copyright Compromise*); David Nimmer et al., *Preexisting Confusion in Copyright’s Work-for-Hire Doctrine*, 50 J. COPYRIGHT

dramatists give up their automatic protections and entitlements of copyright as a matter of law, why would dramatists voluntarily surrender those rights under contract? In hindsight, it might seem curious that dramatic works were excluded.<sup>77</sup> One explanation might be that the playwrights and producers had fought their battles over ownership relatively recently and were actively engaged in negotiations over their standardized production contract.<sup>78</sup> Another

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SOC'Y U.S.A. 399, 416–17 (2002). These articles describe the reasons for, and process by which, the Copyright Act was revised and reformed in 1976. See Litman, *Copyright Compromise*, *supra*, at 858–78; Nimmer, *supra*, at 423. One of the main issues that the new Act was designed to address was the interface between the works-made-for-hire doctrine, that vested ownership in the party hiring the creator, and the reversionary aspect of copyright under the 1909 Act. See Litman, *Copyright Compromise*, *supra*, at 888–93. While the right of an employer to own the copyright and all renewals in a work created by an employee was clear, for any producer or exploiter who obtained rights in a work via assignment, only the first twenty eight years of copyright was assuredly theirs. *Id.* at 891. The renewal term was owned by the original creator. *Id.* (discussing various proposals made in negotiating the 1976 Act by the Registrar which were rejected by studios). Needless to say, the issue of defining what, specifically, would qualify as a work for hire, was of enormous interest to publishers, motion picture and TV producers, music publishers, and all other stakeholders who typically hire freelance creators to prepare works. As described by Litman, *Copyright Compromise*, *supra*, and Nimmer, *supra*, the 1976 Act was essentially negotiated by private interests outside of Congress, including all of the stakeholders, with film producers, publishers, music publishers, record labels, studios, and other commissioners of work, on the one hand, and authors, composers, songwriters, and other freelance creators, on the other. See Litman, *Copyright Compromise*, *supra*, at 870–80; Nimmer, *supra*, at 408 (“Insofar as it worked a major revision of copyright law, the 1976 Act was the product of two decades of discussions and negotiations by representatives of interested parties and the Copyright Office.”); see also Nimmer, *supra*, at 413–17 (discussing concessions made by various stakeholders in formulating the work-for-hire provisions in the bill).

77. Materials reviewed for this Article make no specific mention of whether playwrights and theater producers, specifically, were engaged in hard fought battles concerning commissioned plays. See Litman, *Copyright Compromise*, *supra* note 76, at 860–61. Freelancers wanted to preserve the right of reversion in a commissioned work, once the first term of copyright had passed. *Id.* at 891. Those commissioning works cited the problems that would arise for the continued exploitation of a commissioned work if rights reverted, and the economic detriment to them, and cited certain specific categories of works, such as motion pictures or audiovisual works, collaborative works, compilations, and the like. See Nimmer, *supra* note 76, at 415–17 (discussing the specific problems of negotiating the work-for-hire provision and identifying the basic problem of “how to draw a statutory line between those works written on special order or commission that should be considered as ‘works made for hire’ and those that should not” (citing H.R. REP. NO. 94-1476, at 121 (1976))). Ultimately, the compromise reached by all the stakeholders was that certain types of works could be enumerated that would fall within the category of “works made for hire” which would vest ownership of the copyright in the work in the party ordering the work, that those rights would not be subject to termination or reversion and that the examples that had been cited would be included in the status. See Litman, *Copyright Compromise*, *supra* note 76, at 890–91 (“The groups compromised by limiting commissioned works for hire to the specific classes of works, typically created by multiple authors, that publishers and motion picture studios had cited in objecting to earlier proposals to limit works made for hire to works created by employees.”).

78. See Library of Cong. Copyright Office, Catalog of Copyright Entries 4159 (3d ed. 1972) (including a Copyright Office entry for the MBPC in the Title Index for 1972); Litman, *Common Law Play Right*, *supra* note 2, at 1420 (noting that parts of the playwrights’ MBA were renegotiated 1931, 1936, 1941, 1946, 1955, 1961, and 1985); see also BLOOM, *supra* note 59, at 136 (noting that a new agreement (the Minimum Basic Production Contract or “MBPC”) was signed in 1955, updating it to accommodate “advances in technology” including television).

possible explanation is that at the time, the overwhelming flow of product between Broadway and Hollywood ran from stage to screen.<sup>79</sup> Accordingly, stakeholders in the mediated entertainment industries may not have been overly concerned with rights ownership in live-stage adaptations of a motion picture or television show.<sup>80</sup>

But then something changed. In 1997, a phenomenon arrived on Broadway that altered the economic landscape of the business: Walt Disney Theatrical Productions brought *The Lion King* to

Meetings about, and negotiations over, the terms of a new copyright act had been ongoing for many decades prior to being passed in 1976. See Litman, *Copyright Compromise*, *supra* note 76, at 862.

79. A Wikipedia search of “films based on plays or musicals” returns 2014 pages based on titles of works. The list includes films in various languages, based on stage works in various languages, however the great majority of titles are of British and American films based on English language plays and musicals, including works that were in the public domain at the time that they were adapted. See *Category: Films Based on Plays*, WIKIPEDIA, [http://en.wikipedia.org/w/index.php?title=Category:Films\\_based\\_on\\_plays&from=0\\_9](http://en.wikipedia.org/w/index.php?title=Category:Films_based_on_plays&from=0_9) (last visited Feb. 3, 2014). A Wikipedia search of “musicals based on films” returns pages for 143 titles which are mostly English-language titles. See *Category: Musicals Based on Films*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Category:Musicals\\_based\\_on\\_films](http://en.wikipedia.org/wiki/Category:Musicals_based_on_films) (last visited on Feb. 14, 2014). The number of pages for titles of nonmusical plays based on films is fourteen. See *Category: Plays Based on Films*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Category:Plays\\_based\\_on\\_films](http://en.wikipedia.org/wiki/Category:Plays_based_on_films) (last visited on Feb. 14, 2014). These results are not intended to offer empirical evidence, but instead are offered for purposes of anecdotal comparison only.

80. The Writers Guild of America Minimum Basic Agreement (WGA MBA, which is not to be confused with the playwrights’ MBA discussed in note 65, *supra* and accompanying text) distinguishes between the ownership of live-stage rights in properties that are entitled to “separated rights” (where the story is original to the screenwriter or TV writer) (writer) from those properties that are commissioned by a television network or company, film studio, or independent producer (all of which, for convenience, will be referred to hereinafter as a “studio”). See *Theatrical Separated Rights*, WRITERS GUILD OF AMERICA, [http://www.wga.org/subpage\\_writersresources.aspx?id=119](http://www.wga.org/subpage_writersresources.aspx?id=119) (last visited Nov. 11, 2013) [hereinafter *Theatrical Separated Rights*]; *Television Separated Rights*, WRITERS GUILD OF AMERICA, [http://www.wga.org/subpage\\_writersresources.aspx?id=124](http://www.wga.org/subpage_writersresources.aspx?id=124) (last visited Nov. 11, 2013) [hereinafter *Television Separated Rights*]. As the commissioned script is always prepared as a work for hire for the studio, the studio owns all rights in the product, including live-stage rights. See *Television Separated Rights*, *supra*. However, where a film is based on an original story created by the screenwriter or TV writer, the writer is entitled to “separated rights” and in most cases, the studio does not control the live-stage rights in the original work as these are reserved to the writer. See *Theatrical Separated Rights*, *supra*; *Television Separated Rights*, *supra*; see also WRITERS GUILD OF AM., WGA Minimum Basic Agreement, arts. 16.A.1–3, 16.B.3. The Writers Guild of America West (WGAW) and the Writers Guild of America East (WGAE) are two labor organizations that represent screenwriters, TV writers, news writers, and certain other writers who work within the entertainment industry in collective bargaining. Together, the WGAW and the WGAE are commonly called the Writers Guild of America (WGA). The WGA agreement having the most far-reaching application in the film and television industry is known as The WGA Minimum Basic Agreement (WGA MBA). See WRITERS GUILD OF AM. WEST, GUIDE TO THE GUILD, 15, available at [http://www.wga.org/uploadedFiles/who\\_we\\_are/fyi09.pdf](http://www.wga.org/uploadedFiles/who_we_are/fyi09.pdf) (describing the history of the WGAW and its role in representing writers); *Contracts*, WRITERS GUILD OF AM. EAST, <http://www.wgaeast.org/index.php?id=39> (last visited Mar. 11, 2014) (describing the role of the WGAE and the WGA MBA which the two guilds negotiate with the Alliance of Motion Picture and Television Producers). The WGA MBA is unrelated to the playwrights’ MBA discussed *supra*, and the WGA has no jurisdiction over live stage agreements. See *infra*, note 95.

Broadway.<sup>81</sup> It opened to critical acclaim and was, for an unprecedented period of time, the most sought-after Broadway ticket in town.<sup>82</sup> Within two weeks after it opened, *The Lion King* played consistently to houses in excess of 100-percent capacity, and other than a disruption in performances and box office in the days following the terrorist attacks on New York on September 11, 2001, ticket sales remained near or in excess of 100-percent capacity through till the end of 2003.<sup>83</sup> In 1999, *The Lion King* opened in London at the Lyceum

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81. *Disney's 'The Lion King' Celebrates 10th Anniversary on Broadway Sunday, November 11*, PR Newswire, Nov. 6, 2007, <http://www.prnewswire.com/news-releases/disneys-the-lion-king-celebrates-10th-anniversary-on-broadway-sunday-november-11-58730077.html>.

Disney made a couple of prior forays onto Broadway with *Largely New York*, which opened in 1989 and ran for 144 performances, and its first live-stage adaptation of an animated film, *Beauty and the Beast*, in 1994. See *Largely New York*, INTERNET BROADWAY DATABASE, <http://www.ibdb.com/production.php?id=4545> (last visited Nov. 11, 2013); *Beauty and the Beast*, INTERNET BROADWAY DATABASE, <http://www.ibdb.com/production.php?id=4602> (last visited Nov. 11, 2013) [hereinafter IBD, *Beauty and the Beast*]. *Beauty and the Beast* attracted audiences that filled houses well above 80 percent capacity on average and did sufficiently good business for Disney to continue to run the production for over thirteen years. See IBD, *Beauty and the Beast*, *supra* (listing the date of the opening performance as April 18, 1994 and the closing date as July 29, 2007). Box office grosses for the entire period amount to just under \$500 million. See *NYC Grosses*, BROADWAY LEAGUE, [http://www.broadwayleague.com/index.php?url\\_identifier=nyc-grosses-11](http://www.broadwayleague.com/index.php?url_identifier=nyc-grosses-11) (last visited Nov. 22, 2013) (calculating box office grosses for *Beauty and the Beast* at \$429,158,458).

82. See, e.g., Ben Brantley, *Cub Comes of Age: A Twice-Told Cosmic Tale*, N.Y. TIMES, Nov. 14, 1997, <http://www.nytimes.com/1997/11/14/movies/theater-review-cub-comes-of-age-a-twice-told-cosmic-tale.html> ("breathtaking beauty and scenic ingenuity"); Greg Evans, *Review: 'The Lion King' (New Amsterdam Theater)*, VARIETY, Nov. 13, 1997, <http://variety.com/1997/legit/reviews/the-lion-king-new-amsterdam-theater> ("stunning physical production and terrific score"); Linda Winer, *'Lion King' Leads a Magical, Rich Jungle Parade*, NEWSDAY (Nov. 14, 1997), [http://www.jasonraize.net/pr\\_tlk\\_nd111497.html](http://www.jasonraize.net/pr_tlk_nd111497.html); Richard Zoglin, *Theater: Stand Up and Roar*, TIME MAG., Nov. 24, 1997, <http://content.time.com/time/magazine/article/0,9171,987421,00.html>; Chris Willman, *The Lion King: Original Broadway Cast Recording*, ENT. WEEKLY, Dec. 19, 1997, <http://www.ew.com/ew/article/0,,290761,00.html> ("breathtakingly staged").

83. See *NYC Grosses*, BROADWAY LEAGUE, [http://www.broadwayleague.com/index.php?url\\_identifier=nyc-grosses-11](http://www.broadwayleague.com/index.php?url_identifier=nyc-grosses-11) (last visited Nov. 11, 2013). Comparing box office grosses among and between shows is an inexact science for determining the relative success or failure of a show for many reasons, including different ticket prices, theater seating capacity and weekly running expenses. See, e.g., Patrick Healy, *Summer Attendance Falls on Broadway, but High Prices Lift Sales Totals*, N.Y. TIMES (Sept. 3, 2013, 5:56 PM), <http://artsbeat.blogs.nytimes.com/2013/09/03/summer-attendance-falls-on-broadway-but-high-prices-lift-sales-totals> (describing higher box office sales, despite flagging attendance, due to high ticket prices). A show with box office grosses consistently under \$1,000,000, and with low weekly running expenses, could be earning more in weekly profits than a show with consistent box office returns above \$1,000,000, and high weekly running costs. In addition, the Broadway League changed its reporting format in 2009, and notes on its website that "[b]eginning with week ending 5/31/09, 'Gross' represents Gross Gross . . . and 'Attendance' represents Total Attendance. For every week prior, these numbers represent Net Gross . . . and Paid Attendance respectively." See *NYC Grosses for the Lion King*, BROADWAY LEAGUE, [http://www.broadwayleague.com/index.php?url\\_identifier=nyc-grosses-11&gross=32138](http://www.broadwayleague.com/index.php?url_identifier=nyc-grosses-11&gross=32138) (last visited Jan. 2, 2014). The impact of this change in reporting is that the gross figures after May 2009 reflect the price paid by ticket buyers, whereas pre-May 2009 grosses reflect the gross received by the producer, which is approximately 10 percent less than "Gross Gross."

Theater and has played on the West End ever since.<sup>84</sup> It has also opened in successive live-stage productions worldwide becoming a global entertainment juggernaut with total returns from all exploitations of the title of around \$5 billion.<sup>85</sup>

Other long-running Broadway musicals—such as *Phantom of the Opera*, which had run for fifteen years by 2003, and *Mamma Mia!*, which became an instant hit upon its opening in 1999<sup>86</sup>—were earning unprecedented returns from all worldwide exploitations of their live-show titles.<sup>87</sup> Following Disney's *The Lion King*, Universal Studios

84. See *About the Show*, *The Lion King*, <http://www.thelionking.co.uk/about-the-show> (last visited Nov. 11, 2013).

85. A 2007 press release announcing the ten-year anniversary of *The Lion King* on Broadway includes the following information: As of that date, it had welcomed forty-five million audience members worldwide; played in eleven different countries; visited sixty-three cities around the world, has been translated into five languages (including Japanese, German, Korean, French and Dutch) and “has grossed over \$3 Billion worldwide.” See *Disney's 'The Lion King' Celebrates 10th Anniversary on Broadway Sunday*, *supra* note 78. An official Disney press release, announcing the show's fifteenth anniversary on Broadway on November 12, 2012, puts the cumulative worldwide gross at \$5 billion for the title (that is the film and the live show), noting that:

As it enters its 16th year, *The Lion King* is in a position unprecedented in the history of Broadway. Already the highest-grossing and fifth longest-running show in Broadway history, the show is routinely the #1 Broadway show in a given week, a feat previously unimaginable for a show at this stage in its life. As it celebrates 15 years, the show, far from slowing, has actually strengthened recently; to take but one representative bit of data, 25,000 more tickets were sold in its 15th year than in the 14th and 50,000 more tickets were sold than in the 10th.

Among the most successful titles in entertainment history, its worldwide footprint is more remarkable still. With a cumulative gross in excess of \$5 billion, the title has already earned more than the biggest hit films in movie history: more than the *Lord of the Rings* trilogy combined, more than the six *Star Wars* films combined, and more than *Avatar* and *Titanic*, the #1 and #2 highest-grossing films in movie history, combined.

With eight productions currently playing around the world, it will make its South American and Portuguese language debut when it begins performances in Sao Paulo, Brazil in February 2013. With that production, *The Lion King's* 21 productions will have played in 98 cities in 16 countries on every continent except Antarctica.

Press Release, Walt Disney Studios, *Disney's The Lion King Celebrates 15 Years on Broadway Tuesday*, November 13, 2012, (Nov. 13, 2012), available at <http://waltdisneystudios.com/corp/news/1203>.

86. See Alun Palmer, *Mamma Mia: How Abba Musical Made Money Money Money for Everyone*, *MIRROR* (Jan. 2, 2009), <http://www.mirror.co.uk/news/uk-news/mamma-mia-how-abba-musical-368889> (reporting that the live musical has been seen by an estimated thirty-two million people, and has made one billion pounds sterling at the box office); BWW News Desk, *Photo Flash: First Look at THE PHANTOM OF THE OPERA's New 'Christine' Alternate- Mary Michael Patterson*, *BROADWAY WORLD.COM* (July 26, 2013, 10:07 AM), <http://www.broadwayworld.com/article/Photo-Flash-First-Look-at-THE-PHANTOM-OF-THE-OPERAS-New-Christine-Alternate--Mary-Michael-Patterson-20130726> (describing *Phantom of the Opera's* debut on January 26, 1988).

87. *Phantom of the Opera*, which has been running on Broadway for almost twenty-five years, has an accumulated gross from the Broadway run alone of over \$900 million. See *Photo Flash*, *supra* note 86. According to the official website, it “is the most successful piece of entertainment of all time, produced in any media,” and “[i]t is estimated that [it] has been seen by more than 130 million people, and the total worldwide gross is now in excess of \$5.6 billion.”

entered the fray as a co-producer of the musical *Wicked*.<sup>88</sup> *Wicked* has been the highest-grossing musical on Broadway for nine consecutive years; it set the record for the highest one-week gross during the 2012 holiday season,<sup>89</sup> and it is estimated to have grossed around \$3 billion in returns worldwide, joining the musical “billionaire’s club.”<sup>90</sup> When musicals earn returns at this level, the rewards for all of the participants—from the creative personnel who are paid weekly royalties, to the producers and investors who receive a share of the show’s adjusted net profits, to the general manager who earns a percentage of net profits from the show—can be astronomical.<sup>91</sup>

With show receipts climbing into the billions, it is not surprising that major entertainment corporations would look to exploit their libraries on Broadway, despite the well-known risks of commercial theater production and investment.<sup>92</sup> In addition to film

*The Show: Facts & Figures*, THE BRILLIANT ORIGINAL PHANTOM OF THE OPERA, <http://www.thephantomoftheopera.com/the-show/facts-figures> (last visited Nov. 22, 2013).

88. See David Ng, ‘*Wicked*’ Celebrating 10 Years on Broadway with Special Appearances, L.A. TIMES (Oct. 30, 2013, 9:25 AM), <http://www.latimes.com/entertainment/arts/culture/la-et-cm-wicked-ten-years-broadway-20131030,0,7930730.story>.

89. See Andrew Gans, *Wicked Breaks Box-Office Record and Remains Broadway’s Highest-Grossing Production*, PLAYBILL.COM (Jan. 03, 2013), <http://www.playbill.com/news/article/173629-Wicked-Breaks-Box-Office-Record-and-Remains-Broadways-Highest-Grossing-Production>.

90. See *The Tills Are Alive*, ECONOMIST, May 4, 2013, <http://www.economist.com/news/business/21577062-musicals-business-bigger-more-global-and-more-fabulous-ever-tills-are-alive> (citing worldwide grosses for high-grossing musicals worldwide, including *Phantom of the Opera*, *The Lion King*, *Wicked*, *Cats*, *Les Misérables*, *Mama Mia!*, *Miss Saigon*, *Beauty and the Beast*, *Jersey Boys* and *Starlight Express*); see also *The History of Wicked*, WICKED THE BROADWAY MUSICAL, <http://www.wickedthemusical.com.au/about/history.html> (last visited Nov. 23, 2013) (reporting that *Wicked* has earned \$3.1 billion from its US and international productions). Note that world-wide earnings include earnings from merchandise, cast albums and other exploitations, and are not included in the gross box office receipts reported by the Broadway League. See *NYC Grosses*, BROADWAY LEAGUE, [http://www.broadwayleague.com/index.php?url\\_identifier=nyc-grosses-11](http://www.broadwayleague.com/index.php?url_identifier=nyc-grosses-11) (last visited Nov. 11, 2013).

91. A Bloomberg article estimates that the writers of *Wicked*, including the owners of the underlying rights in the book that was adapted, had earned, in the aggregate, about \$95 million in royalties. Philip Boroff, ‘*Wicked*’ Writers Pay Top \$95 Million for Global Smash, BLOOMBERG (Apr. 11, 2012, 11:37 AM), <http://www.bloomberg.com/news/2012-04-11-wicked-team-got-95-million-of-show-s-300-million-pie.html>.

92. It is well known that producing on Broadway is extremely risky. See *Daily Chart: Money, Money, Money*, ECONOMIST (May 3, 2013, 2:11 PM), <http://www.economist.com/blogs/graphicdetail/2013/05/daily-chart-1?fsrc=scn/gp/wl/dc/moneymoney> (comparing odds of success in musicals to venture capital, stating “only one in ten makes money, and two out of ten lose it all”). The vast majority of productions that open on Broadway close without recouping their investments. See Campbell Robertson, *Stagehands Bracing for Broadway Showdown*, N.Y. TIMES (July 26, 2007), <http://theater.nytimes.com/2007/07/26/theater/26hand.html> (noting that in a record breaking season for Broadway, nineteen out of thirty shows that opened in the 2005–2006 season closed without recouping). Indeed, a number of studios have ventured into Broadway as producers, but with unsuccessful outcomes. *L’Estat*, developed and produced by Warner Bros Theatre Ventures, Inc., opened on April 25, 2006 and closed about four weeks later, on May 28, 2006. See *L’Estat*, INTERNET BROADWAY DATABASE, <http://www.ibdb.com/production.php?id=402876> (last visited Nov. 22, 2013). Disney’s *The Little Mermaid* opened in January 2008 and ran through August 2009, see Andrew Gans & Kenneth Jones, *Sail Away: Disney’s Little*

studios, television studios and networks are considering, or are actively developing, versions of long-running television shows for Broadway.<sup>93</sup>

### *B. Battle of the Norms: Broadway, Hollywood, and the Franchise Property*

Owners of franchise properties in the mediated entertainment industry who want to adapt their intellectual property for the live stage are most likely to find the norms of a customary Broadway production agreement disconcerting, presenting a challenge to their own legal precedents and business practices.<sup>94</sup> To understand which issues are likely to be of greatest concern to these owners, it helpful to contrast the terms of the Dramatists Guild's Approved Production Contract (APC),<sup>95</sup> which governs a theater producer's acquisition of

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*Mermaid Ends Broadway Run Aug. 30*, PLAYBILL.COM (Aug. 30, 2009), <http://www.playbill.com/news/article/132338-Sail-Away-Disneys-Little-Mermaid-Ends>, but apparently closed without recouping its investment. See Eric Schwartz, *Is the Out-of-Town Tryout Irrelevant?*, ERICSWARTZ11 (Sept. 14, 2011), <http://ericswartz11.wordpress.com/tag/jerry-frankel>. While the musical adaptation of *Catch Me If You Can* ran for six months (from March 11, 2011 until September 4, 2011), and closed without recouping, see *id.*, DreamWorks, the owner of the underlying film, was merely a licensor and did not produce the stage musical. See Adam Hetrick, *Catch Me If You Can Books Broadway's Neil Simon Theatre*, PLAYBILL.COM (Sept. 29, 2010), <http://www.playbill.com/news/article/143453-Catch-Me-If-You-Can-Books-Broadways-Neil-Simon-Theatre> (naming Margo Lion and Hal Luftig as producers). However, DreamWorks did produce *Shrek* which ran for just over a year on Broadway. *Shrek the Musical*, INTERNET BROADWAY DATABASE, <http://www.ibdb.com/production.php?id=477427> (last visited Nov. 22, 2013). The Broadway run of *Shrek* generated a US national touring production and a sit-down production in the West End that ran for 715 performances. See *Shrek the Musical UK Tour*, FACEBOOK (Feb. 25, 2013), <https://www.facebook.com/ShrekTheMusicalLondon>. The production has also been licensed widely in other territories as local productions only, with their own local producers, presenters, and design teams, without involvement of the original producers. See Alistair Smith, *Shrek the Musical to Close at Drury Lane*, THE STAGE (Aug. 31, 2012, 9:08 AM), <http://www.thestage.co.uk/news/2012/08/shrek-the-musical-to-close-at-drury-lane> (naming countries where *Shrek* has been produced).

93. An adaptation of *The Honeymooners* was slated to open at the Old Globe in September 2013, but has been postponed "due to a conflict with artist schedules." See *Press Release: The Old Globe Postpones The Honeymooners*, The Old Globe (Mar. 8, 2013), [http://www.theoldglobe.org/information/press/2013/release\\_Honeymooners\\_Postponed.aspx](http://www.theoldglobe.org/information/press/2013/release_Honeymooners_Postponed.aspx). Variety has reported recently that Disney is contemplating a Broadway production of *The Muppets*, see Gordon Cox, *Disney Theatrical Eyeing Muppets on Stage (Exclusive)*, VARIETY (June 11, 2013, 2:30 PM), <http://variety.com/2013/legit/news/disney-theatrical-eyeing-muppets-on-stage-exclusive-1200495467>, and, in July 2012, that the 1960s TV sitcom, *Green Acres*, was heading to Broadway. See Gordon Cox, *'Green Acres' Heading to Stage*, VARIETY (July 22, 2012, 1:18 PM), <http://variety.com/2012/legit/news/green-acres-heading-to-stage-1118056898>. Most recently, Fox has confirmed that a *Glee* stage musical is in the works. See Josh Ferri, *Rachel Berry on Broadway?! FOX Confirms Glee Stage Musical 'in the Works.'*, BROADWAY.COM (Aug. 9, 2013, 1:05 PM), <http://www.broadway.com/buzz/171090/rachel-berry-on-broadway-fox-confirms-glee-stage-musical-in-the-works>.

94. See *infra* Parts II.B.1–5.

95. *Approved Production Contract for Musical Plays*, The Dramatists Guild (1992) [hereinafter APCMP]. The Guild has promulgated two form agreements known as the "Approved

rights to present a stage work written by a Guild member, with terms that appear in a customary film or television option-purchase agreement by which a film or television producer obtains a buyout of all rights in and to a spec screenplay.<sup>96</sup> With respect to the studios' and dramatists' interests in a franchise-property deal, this Article draws on the Author's experience as a practicing theater attorney. Because all client representations are subject to attorney-client confidentiality, this Article employs a complex hypothetical to aid discussion.

Imagine a major television franchise show—something on the scale of *American Idol*<sup>97</sup> or *CSI*,<sup>98</sup> that has a global presence,

Production Contract,” one for “Musical Plays” and one for “Dramatic Plays.” Other than differences in specific financial deal points, the legal and boilerplate terms of the two agreements are very similar, and it is customary practice in the industry to refer to either of these form agreements as “the APC”. For the purposes of this Article, all references are to the APC for Musical Plays unless otherwise noted. The APC is the latest iteration of standard agreements negotiated by the Guild with the Broadway League of Producers during the Twentieth Century. See Litman, *Common Law Play Right*, *supra* note 2, at 1420 (noting that the playwrights' MBA was renegotiated in 1931, 1936, 1941, 1955, 1961, and 1985, but that the essential terms of ownership and minimum compensation, as well as shared participation in subsequent earnings from the play remained essentially the same).

96. See *infra* Parts II.B.1-3. A “spec” screenplay is a speculative work that a writer undertakes without payment or commission from a producer or studio.

97. See Liu Wenwen, *The Rise of TV Talent Shows*, CCTV.COM (Jan. 8, 2013), <http://english.cntv.cn/program/culturexpress/20130801/101680.shtml> (noting that the show is based on the British series, *Pop Idol*, and aired first on Fox Television in 2002, since then becoming “one of the most successful shows in the history of American television”); Claire Atkinson, *Idol Juggernaut Passes \$2.5 Billion in Value; Keeps Expanding*, AD AGE (Jan. 8, 2007), <http://adage.com/article/media/idol-juggernaut-passes-2-5-billion-expanding/114131> (discussing global worth and merchandising); Fred Bronson, *Ten Years of 'American Idol' Chart Dominance: Clarkson, Underwood, Daughtry, Fantasia, More*, BILLBOARD (June 11, 2012, 1:36 PM), <http://www.billboard.com/biz/articles/news/1093819/ten-years-of-american-idol-chart-dominance-clarkson-underwood-daughtry> (asserting that in its first ten years “[Idol] has spawned 345 Billboard chart-toppers and a platoon of pop idols . . . while remaining [a] TV ratings juggernaut”); Jonathan Coad, *Value of Television Formats Continues to Grow Despite Legal Uncertainty*, INT'L FORMAT LAWS. ASS'N, <http://www.ifla.tv/format.html> (discussing issue of format protection given massive global value of *American Idol* and other reality shows); *What is a Spin-Off?*, WISEGEEK, <http://www.wisegeek.com/what-is-a-spin-off.html> (last visited Jan. 2, 2014) (listing the *American Idol* spin-offs); see also *Afghan Star: Defying the Taliban in an American Idol Spin Off*, BERKLEY CENTER FOR RELIGION, PEACE & WORLD AFFS. (Mar. 22, 2011), <http://berkeleycenter.georgetown.edu/events/afghan-star-defying-the-taliban-in-an-american-idol-spin-off> (covering an *American Idol* spin off in a foreign country); Tony Maglio, *'Pretty Little Liars,' 'American Idol' were the most-tweeted-about TV shows for the first half of 2013*, REUTERS, Aug. 28, 2013, available at <http://www.csmonitor.com/The-Culture/TV/2013/0828/Pretty-Little-Liars-American-Idol-were-the-most-tweeted-about-TV-shows-for-the-first-half-of-2013> (discussing importance of Twitter as a marketing tool and citing *American Idol* as second most tweeted-about show in first half of 2013); Lacey Rose, *TV's Biggest Money-makers*, FORBES (Mar. 9, 2010, 12:00 PM), <http://www.forbes.com/2010/03/08/american-idol-24-v-business-entertainment-tv-money-makers.html> (listing *American Idol* as the most profitable TV show as of March 2010); Dorothy Pomerantz, *TV's Biggest Money-makers*, FORBES (Mar. 16, 2011, 6:08 PM), <http://www.forbes.com/sites/dorothypomerantz/2011/03/16/tvs-biggest-money-makers> (listing *American Idol* as the biggest TV money-maker as of March 2011); Dorothy Pomerantz, *TV's Biggest Money-makers*, FORBES (Apr. 10, 2012, 11:49 AM), <http://www.forbes.com/sites/dorothypomerantz/2012/04/10/tvs-biggest-money-makers-2> (listing *American Idol* as the biggest



numerous brand and sponsorship tie-ins, has run for multiple seasons, and generated revenues for its owners in the billions—called *The Trainer*. It is a reality-television competition for animal trainers and animal wranglers. As with other well-known, televised talent shows, it includes a series of auditions around the country by a panel of judges to find the most interesting or most spectacular animal acts in order to select the finalist trainers. Then, over the remaining weeks of the season, following the judges' ratings of contestants based on their relative success at training and disciplining "problem animals" assigned to them, audience members vote to determine who will be eliminated each week.<sup>99</sup>

The show has been an extraordinary success, and its owner—a major studio called (for purposes of this hypothetical) Major Productions, Inc. (MPI)—has licensed the same format in one-hundred territories in sixteen languages. MPI has developed significant product and services merchandising, including a chain of brand-name pet and animal supply stores. It attracts major pet-product sponsorship and commercial tie-ins; arranges national and international live tours featuring winning trainers and their acts; has an extensive internet presence with sites that aim to increase

TV moneymaker again as of April 2012).

98. See Katie Benner, *Meet Content Partners: The Investors Who Bought CSI*, CNN MONEY (Mar. 11, 2013), <http://finance.fortune.cnn.com/2013/03/11/content-partners-csi> (describing CSI's 724 episodes of the franchise aired as of March 11, 2013, and CSI's 70 million viewers worldwide); Bill Carter, *CBS Renews 'C.S.I.'*, N.Y. TIMES (Mar. 20, 2013, 2:05 PM), <http://artsbeat.blogs.nytimes.com/2013/03/20/cbs-renews-c-s-i> (noting that the show was renewed for its fourteenth season in 2013); see also *CSI: Crime Scene Investigation*, IDW Publishing.com, <http://www.idwpublishing.com/catalog/series/15> (last visited Feb. 14, 2014) (showing page from IDW Publishing's catalogue advertising graphic novel spin-offs of CSI franchise); Michael Cieply & Bill Carter, *Television's 'C.S.I.' Gets New Financial Partner to Replace Goldman*, N.Y. TIMES (Mar. 6, 2013), <http://www.nytimes.com/2013/03/07/business/media/csi-gets-a-new-financial-partner.html> (noting that *CSI* is worth billions and for past decade it has been amongst the most profitable TV properties); Stuart Kemp, *'Two and a Half Men,' 'CSI' Helped Generate \$6 Billion for European Broadcasters in 2010*, HOLLYWOOD REPORTER (Sept. 19, 2011, 2:13 PM), <http://www.hollywoodreporter.com/news/two-a-men-csi-helped-237225> (reporting *CSI* helped European broadcasters generate \$6 billion in 2010); Bill Keveney, *Crime Pays for 'CSI' franchise*, USA TODAY (Sept. 15, 2004, 9:51 PM), [http://usatoday30.usatoday.com/life/television/news/2004-09-15-csi\\_x.htm](http://usatoday30.usatoday.com/life/television/news/2004-09-15-csi_x.htm) (comparing all three *CSI* shows and why the franchise is successful); *U.S. Fare Rules at Monte-Carlo TV Festival Awards*, DEADLINE HOLLYWOOD (June 14, 2012, 12:38 PM), <http://www.deadline.com/2012/06/monte-carlo-television-festival-awards-csi-desperate-housewives> (international broadcasts); *Most Watched TV Show in the World is 'CSI: Crime Scene Investigation'*, HUFFINGTON POST (June 14, 2012), [http://www.huffingtonpost.com/2012/06/14/most-watched-tv-show-in-the-world-csi\\_n\\_1597968.html](http://www.huffingtonpost.com/2012/06/14/most-watched-tv-show-in-the-world-csi_n_1597968.html) (proclaiming *CSI* the most watched show in the world; voted most watched show five times in the past seven years).

99. See, e.g., *Voted Off The Island*, TV TROPES, <http://tvtropes.org/pmwiki/pmwiki.php/Main/VotedOffTheIsland> (last visited Nov. 23, 2013) (describing typical reality-competition show formats and noting that in elimination shows, voting for the person to be eliminated is done by the show's viewing audience, a panel of judges, the show's own participants, or some combination thereof, and identifying the *Idol* series, the *So You Think You Can Dance* series and *Dancing with the Stars* series as following reality-competition conventions).

awareness of animal handling, humane treatment, and species-specific habits and needs; and operates globally on most social networking platforms. It has licensed *The Trainer* board, video, and arcade games, spin-off comic books, a children's book series, and three feature films. In short, *The Trainer* is a franchise juggernaut, exploiting its brand in almost all entertainment and media platforms.<sup>100</sup> Most importantly, it has one of the highest-valued advertising rates for television broadcasts, which ensures its continuing value to its broadcast network.<sup>101</sup>

There is one frontier *The Trainer* has not yet conquered: Broadway. Market analysis shows that the demographics of Broadway audiences have a significant overlap with the demographic of audiences who watch *The Trainer*, namely a majority of female viewers, male viewers with a college education or higher, and overall high net-worth viewers.<sup>102</sup> In addition, as *The Trainer* is a popular family show, it is thought that a Broadway musical adaptation would tap into the lucrative audience that has determined the success of many Disney offerings on Broadway.<sup>103</sup> Accordingly, MPI believes the time is ripe to present to its fans *Trainers: The Musical!*

With this as background, the subsequent sections consider how MPI's business and creative priorities are likely to interface with the conventions of a standard Broadway production contract. This discussion is organized under topics that are most likely to raise red flags for MPI.

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100. See, e.g., Samantha Loveday, *BRAND PROFILE: Dora the Explorer*, LICENSING.BIZ (Mar. 31, 2010), <http://www.licensing.biz/news/read/brand-profile-dora-the-explorer/033351> (reporting that by its tenth anniversary in 2011, *Dora the Explorer* had amassed \$11 billion in global retail sales, was broadcast in 140 markets, was translated into thirty-three languages, had an extensive internet presence, and had also sold twenty-million DVDs and fifty-million books).

101. See, e.g., Lauren Hatch, *Forbes' Top 10 Moneymaking TV Shows*, BUS. INSIDER (Mar. 10, 2010, 12:08 PM), <http://www.businessinsider.com/tvs-biggest-hits-with-advertisers-2010-3> (reporting that as of March 2010 *CSI* generated \$2.07 million for each thirty minutes it aired, ranking tenth on *Forbes'* Top 10 Moneymaking TV Shows list and *American Idol* ranked first, with advertising revenue of \$8.1 million for each thirty minutes it aired).

102. See *The Demographics of the Broadway Audience 2011-2012*, BROADWAY LEAGUE, [http://www.broadwayleague.com/index.php?url\\_identifier=the-demographics-of-the-broadway-audience](http://www.broadwayleague.com/index.php?url_identifier=the-demographics-of-the-broadway-audience) (last visited Jan. 2, 2014) (reporting that 67 percent of Broadway audiences in the 2011-2012 season were female, Broadway theatergoers were "quite affluent compared to the general [US] population, reporting an average annual household income of \$193,800," and that, of theatergoers over twenty-five years old, 75 percent had completed college and 38 percent had earned a graduate degree).

103. See *Press Release: Disney Theatrical Productions to Present "Broadway and Beyond" a Musical Journey into Disney's History on Broadway and Beyond*, Wall St. J., June 11, 2013, [online.wsj.com/article/PR-CO-20130611-905702.html](http://online.wsj.com/article/PR-CO-20130611-905702.html) (announcing a special performance celebrating Disney's success on Broadway, and reporting that "its eight Broadway titles have been seen by over 124 million theatergoers, grossed over \$8.9 billion" and that a "Disney musical is being performed professionally somewhere on the planet virtually every hour of the day").

## 1. Rights and Ownership

Ownership is a key element in the APC and is established in the first article of the agreement: “Author shall retain sole and complete title, both legal and equitable, in and to the Play and all rights and uses of every kind except as otherwise specifically herein provided.”<sup>104</sup> Additionally, this ownership provision applies to “all rights and uses now in existence or which may hereafter come into existence.”<sup>105</sup> Furthermore, the author can exercise her reserved rights at any time, without being considered competitive with the producer.<sup>106</sup>

For MPI, this rights structure would be a challenge. Having invested over ten years of its creative, corporate, and financial resources into *The Trainer* and building its multi-billion dollar franchise in multiple territories, platforms, and markets,<sup>107</sup> a key concern for the studio would be to control the show’s rollout and integrate it into its global brand and franchise business plan.<sup>108</sup> It is important to bear in mind that MPI is a publicly held company accountable to its shareholders. Ceding control over one aspect of the franchise, especially if it turns out to be a successful Broadway musical, may be hard to justify to shareholders and would leave a gap in its annual reporting.<sup>109</sup> As far as MPI is concerned, the best way to approach this deal would be as a work-made-for-hire commission.

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104. See APCMP, *supra* note 95, at art. I, § 1.06 (Reservation of Rights).

105. *Id.*

106. *Id.*

107. See, e.g., Marc Graser, *With Star Wars and Princesses, Disney Now has Six of the Top 10 Licensed Franchises*, VARIETY (June 17, 2013, 6:30 PM), <http://variety.com/2013/biz/news/disney-star-wars-princesses-licensing-1200498040> (reporting on value of licensing franchises owned by Disney, Nickelodeon, Warner Bros. from sales of merchandise in the United States and Canada and increasing value of licensing market year-to-year which are all in the multiple billions).

108. Accounts of failed marketing campaigns about television shows, especially when launching them in new territories, are humorous, but show how easily a campaign can misfire or even backfire. See, e.g., Tucker Cummings, *Failed Examples of TV Show Viral Marketing*, YAHOO TV (Aug. 3, 2012, 9:43 AM), <http://tv.yahoo.com/news/failed-examples-tv-show-viral-marketing-164300193.html> (reporting on failed viral marketing campaigns for TV shows such as *Dexter*, when it was introduced to the UK, and *The Apprentice*, which allowed users to create ads for SUVs, and which resulted in negative publicity for the show’s sponsor, Chevrolet). A producer and network will likely seek to control the marketing campaigns for branded shows so that they can pull the materials and/or stop any offending activities immediately. See, e.g., Brian Conlin, *Five Top Social Media Marketing Campaigns for Fall 2012’s TV Season*, VOCUS BLOG (Oct. 1, 2012), <http://www.vocus.com/blog/tv-social-media-marketing> (discussing the use of social networking sites to drive viewers to TV shows).

109. See, e.g., THE WALT DISNEY CO., FISCAL YEAR 2012 ANNUAL FINANCIAL REPORT AND SHAREHOLDER LETTER 2 (2012), available at <http://cdn.media.ir.thewaltdisneycompany.com/2012/annual/10kwrap-2012.pdf> (reporting its success with Broadway musicals). As Disney self-produces, it has control over all financial information relating to the musical. *Id.* As a passive licensor, it would have to rely on statements from the third-party producer. This is not to suggest that studios are never justified in choosing to license a property and take a passive participation

However, that poses a challenge for the Guild, as the APC requires that any Broadway production contract that is entered into by one of its members must be “certified,”<sup>110</sup> and the Guild cannot certify an agreement that contains an assignment of rights or a work-made-for-hire provision.<sup>111</sup> This puts a Guild member in the position of either resigning her membership to accept a work-made-for-hire offer from MPI<sup>112</sup> or attempting to work out a compromise position that the Guild will certify.<sup>113</sup> From the Guild’s perspective, forcing members to resign in order to accept work-made-for-hire opportunities from Hollywood studios poses an existential problem and an ironic one: the Guild’s *raison d’être* is founded upon its members’ historic resistance to the disproportionate power of Hollywood players.<sup>114</sup> Accordingly, the Guild has demonstrated its openness to working with studios and other major media companies to find appropriate compromises that allow a member to take up what could be a financially and creatively attractive opportunity while retaining certain essential deal parameters.<sup>115</sup>

as a licensor. Given the high risks of and significant costs involved in developing a live musical, in many cases it is a sound business decision for a studio to treat a Broadway musical as merely another licensing opportunity, as has been and continues to be the case in many situations. See *supra* notes 14, 92 and accompanying discussion.

110. APCMP, *supra* note 95, at art. XVI, § 16.02, Standards for Certification, requires the Author to submit a copy of the signed agreement with the producer to the Guild to ensure that “this Contract, as signed, does not modify any of the provisions of the APC” or that, if modified, “it is reasonably equivalent to the APC.”

111. See *id.* at art. XVI, for the conditions under which the Guild may certify a production contract between a Broadway producer and Guild member that does not conform strictly with the form APC. The provision allows for financial terms to be modified under exigent circumstances. See *id.* §16.02(a).

112. See *id.* § 16.03(b)(iii) (providing that if a producer and author choose, mutually, to enter into an agreement that the Guild will not certify, they may notify the Guild of their intention in writing and “[t]he signing of such letter by Author will be considered by the Guild as tendering of the Author’s resignation from the Guild, which the Guild may accept.”).

113. See *id.* § 16.02 for factors the Guild considers when certifying a contract that is different from the APC. While membership in the Guild is not mandatory for Broadway dramatists, the Guild offers numerous benefits to members, including access to a variety of form agreements, legal review of contracts on an individual basis, networking opportunities, business and industry news and updates, advocacy on behalf of members and a locus for collective action. See *generally Info*, DRAMATISTS GUILD, <http://www.dramatistsguild.com/info> (discussing the objectives of the Guild). The Guild’s Constitution includes procedures for censuring dramatists who fail to work with certified agreements, and bars them from re-joining the Guild for at least one year. See CONST. OF THE DRAMATISTS GUILD OF AMERICA, art. IX, *available at* <http://www.dramatistsguild.com/dgconstitution.aspx>.

114. See CONST. OF THE DRAMATISTS GUILD OF AMERICA art. II, *available at* <http://www.dramatistsguild.com/dgconstitution.aspx>; see also *supra* text accompanying notes 65–68.

115. See Kimon Keramidas, *The Pay’s the Thing: Intellectual Property and the Political Economy of Contemporary American Theatrical Production* 310–11 (2008) (Ph.D. dissertation, City University of New York) (discussing the Guild’s role in working with Disney and DreamWorks SKG in negotiating agreements that moved studios away from hiring non-Guild writers to create Broadway musical adaptations under work-made-for-hire agreements, and towards more compromising agreements with Guild authors).

With respect to copyright, for example, MPI may agree that the authors should retain control over all dispositions once the studio is not actively producing its own productions of the musical, as long as it has a veto right over decisions that are contrary to its brand's interests.<sup>116</sup> Alternatively, where the resulting product must fit within as extensive a global franchise as the billion-dollar *The Trainer* series,<sup>117</sup> MPI may look to obtain a significantly extended license from the authors that gives MPI control over all dispositions, provided that the studio makes ongoing payments for every use that it might make of the musical. This requires pre-negotiating deals with the authors for every possible exploitation of the property which is likely to entail a lengthy and costly transaction process because the result veers from the standard form,<sup>118</sup> but one that ultimately secures the controls that MPI seeks.

## 2. Creative Controls and Approvals

The APC requires significant approval rights for the dramatists in connection with rehearsals and productions of the play, including rights to approve all key personnel<sup>119</sup> and makes clear that any changes to the work (including to the title) must be approved by, and will be owned by, the dramatists.<sup>120</sup>

The agreement also establishes that the bookwriter, composer, and lyricist each separately owns the copyright in his or her contribution and has the right to veto changes to that component of the work.<sup>121</sup> Furthermore, the APC requires the producer to warrant

116. See *supra* notes 107–108 and accompanying text (discussing the importance of a franchise and the desire to protect it, especially when it enters new platforms).

117. See *supra* notes 107–108 and accompanying text.

118. See Mark R. Patterson, *Standardization of Standard-Form Contracts: Competition and Contract Implications*, 52 Wm. & Mary L. Rev. 327, 327, 342–45 (2010) (noting the “usual transaction-cost advantages of standard-form contracts”).

119. See APCMP, *supra* note 95, at art. VIII, § 8.01(a) (enumerating the personnel such as cast, director, designers, conductor, choreographer, etc., who must be “mutually agreeable” to producer and author).

120. *Id.* § 8.01(a)–(b) (providing that any changes “acceptable to Author shall be the property of the Bookwriter, Composer or Lyricist, as the case may be”).

121. *Id.* § 8.01(b). It is important to note that changes to the script are subject to the mutual approval of the producer and the author of that component of the script (in the case of a musical), but the producer cannot force the author to make changes. See *id.* § 8.01(c). This is a striking distinction from practices in the film and television industry where rewrites are common practice, and, in the words of John Logan: “[I]t’s the great truism that screenwriters are fungible, that at the end of the day a studio is not going to want to fire a movie star[] . . . [or] a star director . . . . So, . . . because there’s so much money at stake[,] . . . frequently a fallback position is, well, let’s bring in a new writer, let’s bring in a fresh voice.” Editor, *Screenwriter John Logan’s Very Good Year*, NW. PUBLIC RADIO (Jan. 1, 2012, 5:00 AM), <http://nwpr.org/post/screenwriter-john-logans-very-good-year>; see also Gavin Polone, *Polone: Four Star Screenwriters Talk About Rewrite Hell*, VULTURE (Feb. 29, 2012, 1:30 PM), <http://www.vulture.com/2012/02/polone-screenwriters-rewrites-hollywood.html> (noting that “it is common and even pro forma to replace

that any such changes will be the property of the relevant dramatist and to agree to obtain from third parties any documents necessary to transfer rights to the dramatists before the play opens on Broadway.<sup>122</sup> In addition, the dramatist has approval over any additional producers who are brought on to co-produce the play,<sup>123</sup> including any licensees or co-producers in foreign territories.<sup>124</sup> In effect, the dramatist controls every step of the creative process, determining the content, expression, and manifestation of the work on the stage, as well as a good deal of the business process by approving personnel.

Even more striking is the producer's very limited power to fire or replace an author. In the case of any original dramatic play or musical that the producer options from the original authors, the producer has no right to replace the dramatists at all.<sup>125</sup> When a producer hires musical authors to prepare an adaptation, the APC accords the authors robust controls over the replacement of any member of the author team by requiring the approval of the remaining authors.<sup>126</sup> Furthermore, a rejected dramatist retains the copyright in all materials that she has created; although if the replacement occurs very late in the process, the APC provides for the author to license her rights back to the producer in return for ongoing compensation from all productions of the musical.<sup>127</sup>

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a screenwriter on a studio project" and that "[o]n a big-budget film, it is not uncommon for six or more writers to have worked on the screenplay, including the director and a friend of the star who is brought in just to work on his character's dialogue," and providing accounts by screenwriters David Koepp (*Jurassic Park*, *Spider-Man*), Brian Koppelman (*Rounders*, *Ocean's Thirteen*), Jeff Nathanson (*Catch Me If You Can*, *The Terminal*), and Andy Walker (*Se7en*, *Sleepy Hollow*) who have been replaced as writers on films).

122. APCMP, *supra* note 95, art. VIII, § 8.01(b). In addition, the provision prohibits the producer from offering any third party a share of the dramatists' compensation, unless the dramatists themselves enter into a written agreement to do so. *Id.*

123. *Id.* § 8.13.

124. *Id.* at art. IX, § 9.06.

125. *Cf.* APCMP, *supra* note 95, art. VIII, § 8.20 (stipulating that the provisions relating to replacement of one or more authors applies "only in the case of a musical adapted from a book, play, motion picture or other underlying copyrighted work written by someone other than Producer and in which Producer, prior to the engagement of the Bookwriter, Composer and Lyricist, acquires an option on or owns the rights to adapt such underlying work for the musical stage"). This does not prevent producers from encouraging dramatists who have created original spec works to consult or collaborate with dramaturgs or script doctors. In most cases dramaturgs and script doctors are not credited for their work, and their compensation is typically paid up front (rather than as an ongoing royalty). See Patrick Healy, *A Doctor in Just About Every Theatrical House*, N.Y. TIMES (Apr. 26, 2011), <http://theater.nytimes.com/2011/04/27/theater/sister-act-wonderland-and-others-call-script-doctors.html> (discussing the work of leading script doctors).

126. APCMP, *supra* note 95, art. VIII, § 8.20(a) ("The rejection of any . . . component is subject to the approval of any remaining authors.").

127. *Id.* § 8.20(a)-(c). However, as discussed below, the Guild has developed an alternative system for allocating consideration to replaced authors of commissioned musicals. See *infra* note 146.

These terms are anathema in the film and television industries which take full advantage of the work-made-for-hire provision in the 1976 Act. In these industries, a standard grant of rights for a commissioned work establishes that the screenwriter has no rights whatsoever in the material she creates nor in any prior or subsequent versions of the work.<sup>128</sup> The broad work-made-for-hire provisions in a typical film or television option-and-purchase agreement allow for the replacement of the writer at any time;<sup>129</sup> provide the writer few creative rights and no moral rights or rights of integrity in her contribution to the audiovisual work;<sup>130</sup> and enable the producer to continue to exploit, change, or modify that author's contributions without restriction.

From MPI's perspective, accepting the standard terms of the APC would divest it of vital controls over the musical—and consequently, the broader property.<sup>131</sup> Given the network of deals that make up its global marketing efforts—such as distribution, sponsorship, advertising, and merchandising agreements—the studio cannot risk a stage version or advertising and promotional efforts that veer from the spirit and character of the television series and that

128. See, for example, LITWAK, *supra* note 10, for sample terms from key film and TV agreements, including the following from a screenplay agreement:

Writer acknowledges and confirms that Writer does not have or claim any right to the Picture and that, as between Writer and Production Company, Production Company shall be the sole and exclusive owner of the copyright in the Picture and throughout the universe and, as such owner, shall have all rights therein and thereto, including, without limitation, the sole and exclusive distribution, exhibition, performance and reproduction rights. Writer further acknowledges and confirms that the Picture shall constitute a "work made for hire" within the meaning of the United States copyright law, as a work specially ordered or commissioned for use as a part of a motion picture and that Production Company shall for copyright purposes under United States law be deemed the author of the Picture and the owner of copyright therein. Writer agrees to execute, acknowledge and deliver to Production Company such further assignment(s), instrument(s) and other document(s) as may be reasonable necessary or appropriate to evidence Production Company's rights in the Picture as hereinabove set forth in this Clause. In the event that any of proceeds of Writer's work are not considered a work for hire, then Contractor's copyright to such work is hereby assigned to Production Company.

LITWAK, *supra* note 10.

129. See *supra*, note 121; see also Keramidas, *supra* note 115, at 308.

130. See *Creative Rights for Writers*, *supra* note 73 (acknowledging the difficulty of negotiating "overscale" creative rights). In addition, it is typical for grant language or certificates of authorship in film and TV contracts to include an express waiver of any moral rights in the work. See BILL SEITER & ELLEN SEITER, *THE CREATIVE ARTIST'S LEGAL GUIDE: COPYRIGHT, TRADEMARK AND CONTRACTS IN FILM AND DIGITAL MEDIA PRODUCTION* 131 (2012). For a general overview of moral rights in the film and television industries, see Peter Decherney, *Auteurism on Trial: Moral Rights and Films on Television*, 2011 WIS. L. REV. 273 (2011).

131. The APCMP provides that the producer cannot make any changes to the text without the dramatist's consent. APCMP, *supra* note 95, at art. VIII, § 8.01(b). It does allow for a grievance procedure by which a producer "may complain to the Guild" that the "Author is unreasonable in refusing to make changes or additions[.]" but notes that the "Guild shall have no power to compel Author to agree to such changes." See *id.* § 8.01(c).

may diminish the goodwill in the original product.<sup>132</sup> To avoid a runaway product and potential negative publicity, MPI wants to apply to the musical the same quality and content controls that it asserts over the television format in other territories.<sup>133</sup> It also seeks to exercise careful control over the quality of merchandise and services sold under the brand.<sup>134</sup>

Even though as a legal matter, a work-made-for-hire arrangement would accord MPI maximum control, the studio has decided not to have its internal employees and staff writers develop the project as there is general acknowledgment that they lack the requisite theater experience and expertise.<sup>135</sup> Instead, MPI has determined that it must partner with experienced Broadway and live-theater creative personnel, and therefore will need to compromise with respect to control over the creative process. Accordingly, the studio is likely to negotiate for certain voting and approval rights that would allow it to have final say over certain essential elements of the content, such as the spirit, look, and feel of the musical. Nevertheless, these are highly subjective quality controls, and MPI may find itself at significant odds with the authors engaged to prepare the musical adaptation.

Accordingly, MPI is likely to seek far more robust controls over its right to replace one or more of the authors given that the APC's customary terms can severely restrict the producer's creative decisions

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132. See *supra* notes 107–108 and accompanying text; see also Sheila Shayon, *Groupon Loses Users' Goodwill for Flatfooted Super Bowl Ads*, BRANDCHANNEL (Feb. 7, 2011, 3:30 PM), <http://www.brandchannel.com/home/post/2011/02/07/Groupon-Loses-Users-Goodwill-for-Flatfooted-Super-Bowl-Ads.aspx> (reporting on backlash to Groupon's Superbowl Ads); Sheila Shayon, *Kenneth Cole Unfairly Pun-ished for #Cairo Tweet?*, BRANDCHANNEL (Feb. 3, 2011, 5:00 PM), <http://www.brandchannel.com/home/post/2011/02/03/Kenneth-Cole-Unfairly-Pun-ished-for-Cairo-Tweet.aspx> (reporting on tweet by Kenneth Cole that created significant negative backlash). In general, the access consumers have to instant communications through new technology has forced companies to be far more proactive in monitoring and responding to customer reactions and criticism. See, e.g., Sally Greenberg, *Power of Social Media: New Wave of Consumer Activism Rising Out of Rana Plaza Tragedy*, HUFFINGTON POST (June 3, 2013, 11:49 AM), [http://www.huffingtonpost.com/sally-greenberg/power-of-social-media-con\\_b\\_3378737.html](http://www.huffingtonpost.com/sally-greenberg/power-of-social-media-con_b_3378737.html) (discussing the growing power of consumers to effect change in companies' actions and behavior).

133. See, e.g., Steve Clarke, *India's 'Big Brother' Gets Bigger*, VARIETY (Feb. 28, 2013, 6:37 AM), <http://variety.com/2013/tv/news/indias-big-brother-to-get-bigger-820806> (discussing new *Big Brother* formats in India and quoting local Endemol executive Deepak Dhar on adapting the successful format to varying regional tastes within India).

134. See *infra* notes 171–174 and accompanying text.

135. See Healy, *Like the Movie*, *supra* note 14 (reporting on significant risks for Hollywood studios in bringing fare to Broadway and suggesting that the recent deal by Twentieth Century Fox with Broadway veteran producers is “a recognition by the studio – and you hear this all across Hollywood – that most filmmakers don't really know how to make great stage musicals on their own” and noting that “relying on a brand-name movie has [never] been a guarantee” and that “many beloved popular movies that were turned into musicals” did not succeed on Broadway, citing as examples, *Ghost* and *9 to 5*).



and impose a costly burden on the production going forward.<sup>136</sup> To ameliorate the effect of these provisions, the Guild has promulgated an alternative structure for allocating revenues that arise from exploitations of a musical in which more than one dramatist has contributed to the creation of any particular component of a musical.<sup>137</sup> While the revenue allocation is not as controversial as it once was because of the Guild's efforts, MPI will need to negotiate the circumstances under which replacement is permissible, how it will be handled, whether any of the nonreplaced dramatists will have approval, and any other concessions that may apply if a studio terminates an author's role on the project.

### 3. Ongoing Production Rights

As established above, a customary theater deal provides that a producer is neither the employer of a dramatist nor a commissioner on a work-made-for-hire basis. The producer does not have sole control or discretion to develop, produce, and exploit the new work.<sup>138</sup> To the contrary, the APC is structured to create a collaborative partnership between the producer and the dramatists in which each plays an equally important role in business and creative decisions—albeit with different responsibilities and foci.<sup>139</sup>

Under the APC, a producer receives a limited initial grant to “the Play for one or more First Class Performances,”<sup>140</sup> which are specifically defined as “live stage productions of the Play on the speaking stage” within North America.<sup>141</sup> In order to obtain additional rights, including foreign territory rights and the right to participate financially in all exploitations of the musical, the producer

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136. See APCMP, *supra* note 95, at art. VIII, § 8.20 (establishing the rights and limitations of the producer and the replaced author depending upon when the producer decides to enter into an APC with a replacement author).

137. The Guild has developed a system that is not unlike the Writer's Guild of America's credit arbitration process. See generally WRITERS GUILD OF AMERICA, CREDITS SURVIVAL GUIDE (2013), available at [http://www.wga.org/subpage\\_writersresources.aspx?id=153#6](http://www.wga.org/subpage_writersresources.aspx?id=153#6) (noting that the purpose of outlining the credit arbitration process is to provide writers with a “plain language guide to the credits determination process and practical tips writers should know to help protect their interests in credits”). The purpose of the Guild's procedures is to assist their members in determining their respective percentage contributions to the book, music or lyrics of a musical, and to allocate among multiple creators an appropriate percentage of the revenues due for each component. See *Bill of Rights*, *supra* note 18. Information about the procedure can be obtained from the Dramatists Guild. *Id.*

138. See *supra* Part II.B.1.

139. See *supra* Parts II.B.1–2.

140. APCMP, *supra* note 95, at art. I, § 1.01.

141. *Id.* (defining the territory in which these initial rights are granted to the producer as “the United States, its territories and possessions, including Puerto Rico, and Canada”).

must first produce the play and achieve minimum milestones to vest<sup>142</sup> in subsequent options and rights.<sup>143</sup> Of equal importance, if the producer becomes vested she is entitled to a significant share of the dramatists' future revenues from dispositions of subsidiary rights in the musical; that is, exploitations of the musical that are not under the control, lease, or license of the original producer.<sup>144</sup> The dramatists retain and control all of these other dispositions in their sole discretion, negotiate all of the agreements related to their exploitation<sup>145</sup> (other than merchandising rights), and allocate a share of revenues from these exploitations in recognition of the value a producer has contributed to the work by mounting her production.<sup>146</sup>

This arrangement is diametrically opposite to the ongoing participation allocated to a screenwriter in connection with subsequent exploitations of a film or television program. The studio controls every aspect of the film or program's subsequent exploitation in any and all media, and screenwriters typically receive subsequent revenues—if any—in the form of residual payments under

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142. *Id.* at art. XI, § 11.02 (setting forth the minimum benchmarks that the Producer must achieve in order to become "Vested"). For example, under one of the provisions, if the producer presents "10 Preview Performances plus the Official Press Opening of the Play in New York City" in consecutive, paid public First Class Performances, the producer will "become Vested." *Id.* § 11.02(a)(i).

143. Upon vesting, the producer acquires additional production rights within North America and in other foreign territories. *See id.* at art. IX (defining "Additional Production Rights" and according the producer rights to produce other classes of productions of the play in North America, as well as the right to present the play in the British Isles, Australia and New Zealand). Customarily, Producers also obtain rights to present the musical worldwide, but on a territory-by-territory basis, and those terms are typically set forth in Article XXII of the APC which contains the individually negotiated, bespoke terms of the agreement. *Id.* at art. XXII. Article XXII also typically includes the terms on which the dramatist grants the producer the right to make cast recordings of the musical. *Id.*

144. *Id.* at art. XI, § 11.01 (containing detailed definitions of the rights in the play subject to methods of exploitation that are not granted to the producer under § 1.01 of the APCMP, including "Media Productions," Stock, Amateur and Ancillary Performances, "Revival Performances," "Remakes, Prequels, Sequels and Spin-Offs"). Also included in subsidiary rights are merchandising rights which the dramatist licenses to the producer to exploit for so long as she retains the production rights in the musical. *Id.* § 11.01(c).

145. The APC does grant the producer a right of consultation in connection with the disposition of subsidiary rights during periods in which the producer is entitled to receive a share of subsidiary-rights income. *Id.* § 11.06.

146. *Id.* at § 11.03 ("Although Producer is acquiring rights in the Play and Author's services solely in connection with the production of the Play, Author recognizes that by a successful production Producer makes a contribution to the value of other rights in the Play. Therefore, although the relationship between the parties is limited to play production as herein provided, and Author alone owns and controls the Play with respect to all other uses, nevertheless, if Producer has Vested in the Territory and Producer is not in breach of any provision of this Contract, Author hereby agrees [to the terms of the producer's participation set forth in the paragraphs that follow.]). There are three alternative financial models included in the APCMP for the Producer to choose among (and four in the APC for Dramatic Plays), each of which offers different combinations of participations in different types of revenue streams. *Id.* § 11.03(c).

Guild- or union-negotiated collective-bargaining agreements.<sup>147</sup> Some screenwriters secure so-called “back-end” deals that entitle them to a share of the net profits or adjusted gross revenues from certain exploitations. These exploitations include revenues earned from box office receipts (in the case of a theatrical film) as well as from derivative uses of the property, such as merchandising and DVD sales.<sup>148</sup> However, there is considerable debate in the industry as to whether these back-end deals produce revenues for participants.<sup>149</sup>

As discussed, MPI is likely to require a far greater say over future dispositions of the musical.<sup>150</sup> However, it will need to work out with the authors a fair allocation of compensation for those uses. As the next section considers, that allocation will necessarily balance the extent of the studio’s controls (and ability to prevent future exploitations) against fair compensation to the authors for their contributions in light of the global visibility of the preexisting show which is likely to drive sales.<sup>151</sup>

147. See WRITERS GUILD OF AM., RESIDUALS SURVIVAL GUIDE 2 (2013), available at [http://www.wga.org/uploadedFiles/writers\\_resources/residuals/residualssurvival05.pdf](http://www.wga.org/uploadedFiles/writers_resources/residuals/residualssurvival05.pdf) (explaining that residuals are paid for reuse of credited writer’s work (not the original use), which includes reruns in the same or other markets).

148. STEPHEN BREIMER, THE SCREENWRITER’S LEGAL GUIDE 59 (3d ed. 2004).

149. There is a raft of literature in the form of books, articles, personal accounts, and scholarly overviews, of so-called “Hollywood accounting” practices by film studios and its effect on “net profits” participations. See, for example, Mike Masnick, *Hollywood Accounting: How A \$19 Million Movie Makes \$150 Million . . . And Still Isn’t Profitable*, TECH DIRT (Oct. 19, 2012, 8:44 AM), <http://www.techdirt.com/articles/20121018/01054720744/hollywood-accounting-how-19-million-movie-makes-150-million-still-isnt-profitable.shtml> and Mike Masnick, *‘Hollywood Accounting’ Losing in the Courts*, TECH DIRT (July 8, 2010, 10:07 AM), <http://www.techdirt.com/articles/20100708/02510310122.shtml> for an overview of the impact of Hollywood accounting. For a lengthy discussion of studio “net profits” and other back-end deals, see JOHN W. CONES, THE FEATURE FILM DISTRIBUTION DEAL (1997) and BILL DANIELS, DAVID LEEDY & STEVEN D. SILLS, MOVIE MONEY: UNDERSTANDING HOLLYWOOD’S (CREATIVE) ACCOUNTING PRACTICES (2d ed. 2006). There are numerous articles and blogs concerning specific films for which gross earnings have been in excess of \$500 million, but studio accounting still shows them as “in the red.” See, e.g., Reed Abelson, *The Shell Game of Hollywood ‘Net Profits’; DreamWorks May Be Shaking Up Some Time-Honored Accounting Habits*, N.Y. TIMES (Mar. 4, 1996), <http://www.nytimes.com/1996/03/04/business/shell-game-hollywood-net-profits-dreamworks-may-be-shaking-up-some-time-honored.html> (reporting on the accounting of profits for “blockbusters” such as *War Games*, *Batman* and *J.F.K.* in which “profits . . . have vanished into the bank accounts of the studios”); Robert W. Welkos, *‘Gump’ a Smash but Still in the Red, Paramount Says: Movies: Writer, Who is Due to Get 3% of Net Profits, Hires Lawyer to Question the Studio’s Accounting Practices.*, L.A. TIMES (May 24, 1995), [http://articles.latimes.com/1995-05-24/news/mn-5473\\_1\\_net-profit](http://articles.latimes.com/1995-05-24/news/mn-5473_1_net-profit) (reporting on *Forrest Gump* writer hiring an attorney to question studio’s accounting practices after film grossed \$661,000,000 worldwide); see also Adam J. Marcus, Comment, Buchwald v. Paramount Pictures, Corp. and the Future of Net Profit, 9 CARDOZO ARTS & ENT. L.J. 545 (1991) (providing an in-depth analysis of the screenwriters’ claims and Paramount’s net profits accounting).

150. See *supra* Parts II.B.1–2.

151. See APCMP, *supra* note 95, at art. XI, § 11.03(c)(ii) (setting forth three alternative participation structures for the producer’s participation in subsidiary-rights revenues). The compensation structure restricts the percentage share and the duration of the producer’s participation in all types of exploitations, except media productions (i.e., film and TV adaptations

#### 4. Dramatists' Compensation

The customary structure of dramatists' compensation in live theater is payment of a modest, nonrefundable advance that the producer may deduct from royalties payable to the dramatist once the production opens to paying audiences.<sup>152</sup> During the preproduction period, the producer obtains an option for which she makes payments in installments. All but the first payment count toward the advance and are recoupable from royalties.<sup>153</sup> This structure allows the producer to spread her risk over a period of time so that if the producer abandons her plans to proceed to opening night, she can minimize her losses by electing not to renew an option.<sup>154</sup> If the producer succeeds in shepherding the play to production, then royalties based on a percentage of box office returns are due the authors for every week of performance of the play, starting from the first paid public performance.<sup>155</sup> A similar compensation structure applies for all subsequent productions of the work produced by the original producer.<sup>156</sup> Under this customary model, the greater portion of the dramatist's financial compensation is deferred until such time as the play is ready for production and actually opens.<sup>157</sup>

By contrast, when a studio negotiates a modified APC, in which it gains effective control over the new work and expands its interests in that work, the upfront risks to the dramatists are increased as opportunities to realize their deferred compensation may be limited or

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of the musical) in which the producer participates regardless of when those rights are granted. *See id.* The extent and duration of the studio's participation in subsidiary-rights revenues will typically depend on how much control the studio seeks to assert over those dispositions. *See id.*

152. The maximum advances allowed under the APCMP, which are nonrefundable and are recoupable from royalties, amount to \$60,000. *See id.* at art. III, §§ 3.01–.02, 3.04.

153. *See id.* § 3.04.

154. *See id.* at art. II for a discussion on Option Periods and Payments.

155. *See id.* at art. IV. While the royalty deal generally remains constant for all musical deals, production economics have led to innovative ways to calculate the amounts actually due royalty participants. Jason Baruch, *Exit Stage Left, Enter Stage Right: Theatre Trends Over the Past 25 Years*, SENDROFF & BARUCH, <http://www.sendroffbaruch.com/article-10.html> (last visited Nov. 23, 2013). In all cases, these adjustments to the customary gross weekly box-office royalty structure seek to reduce risks for investors as much as possible by accelerating the pace of recoupment. *Id.* These modifications do not appear in the form APC, but the Guild has developed guidelines and requirements for "royalty pools" and for so-called "amortization" deals which are generally known to practitioners. *See id.* (describing royalty pools and amortization developments). Further information about these can be obtained from the Guild. *See Bill of Rights, supra* note 18.

156. *See* APCMP, *supra* note 95, at art. IX, §§ 9.04–.05 (establishing option extension payments and royalty payments due in connection with rights to produce in the United Kingdom, Australia and New Zealand).

157. *See id.* at art. IV, § 4.02 (establishing the royalties payable to the authors for every week of performances presented by the producer). The terms that appear in the APCMP have been revised through custom and practice and information about alternative royalty structures can be obtained from the Guild. *See supra* note 155 and accompanying text.

even cut off.<sup>158</sup> As a result, it is likely that the dramatists will seek to front-load their compensation in the form of higher option payments and advances to reduce their risk. They may also require some payments to be made as nonrecoupable fees.

Accordingly, under a modified APC, a studio is likely to incur higher threshold risk in the early phases of development, as well as increases in overall production costs,<sup>159</sup> all of which create additional financial risk for the enterprise. Should a studio determine that negotiating a modified APC is the best way to protect and enhance its creative and business controls, it will likely weigh these advantages against the loss of certain protections that are baked into a customary APC deal.<sup>160</sup>

Importantly, in a customary APC deal everyone's interests align: the more successful the production, the more lucrative the rewards for all the royalty participants from the initial production and all subsequent exploitations.<sup>161</sup> In a modified APC, the royalty structure and the allocation of revenues between the author and producer that flow from subsidiary rights exploitations are generally preserved, ensuring that the interests of the authors, other creative collaborators, and the studio remain aligned once the show has proved itself and is successful. However, when up-front guarantees are

158. For example, if the studio has the right to veto future exploitations of the derivative work, the authors will lose the opportunity to derive the full benefit of subsidiary rights in a work, which are often a source of significant revenues for the authors. See Victoria Bailey, Exec. Dir., Theatre Dev. Fund, Keynote Address at the National Alliance for Musical Theater Fall Conference: Outrageous Fortune – The Musical! (Oct. 23, 2010), available at <http://wp.tdf.org/index.php/2010/10/namt>. In her keynote address at the National Alliance of Musical Theater's fall conference in 2010, Victoria Bailey, Executive Director of Theatre Development Fund (TDF)—commissioner of a seven-year study of the creative work and financial lives of American playwrights—commented that: “[W]hen a commercial production opened on Broadway, it would generate lots of activity after the Broadway run. The writers would make much more money than they would have if the show never happened on Broadway.” *Id.* Her comment is made in the context of explaining how, historically, not-for-profit theaters came to require a share of subsidiary-rights revenue from dramatists whose plays they premiered. *Id.* However, as revealed by the TDF study, the average earnings of playwrights in America whose plays do not make it all the way to Broadway, are around “\$25,000 to \$39,999 annually from all income sources, with about 62 percent making less than \$40,000 and nearly a third pulling in less than \$25,000.” See Patrick Healy, *Policy Change to Benefit Playwrights*, N.Y. TIMES (Mar. 24, 2010), <http://theater.nytimes.com/2010/03/25/theater/25rights.html> (citing the findings of the TDF study).

159. In a customary deal, once the production has recouped the costs of developing and mounting the show out of net box office proceeds, the producer is able to recoup all advances paid prior to opening. See APCMP, *supra* note 95, at art. VI, § 6.02 (providing that option and advance payments received by the author may be deducted from the authors royalties at the rate of up to 50 percent of those royalties following recoupment of production costs). Accordingly, if upfront payments are significantly higher than in a customary APC deal, the producer has more monies at risk for a longer period following the point at which the production has otherwise broken even.

160. See *infra* Part III.3.

161. See *supra* notes 155–156 and accompanying text; *infra* notes 194–197 and accompanying text.

increased, they place more stress on a production's economics and the likelihood that it will recoup.<sup>162</sup> Faced with what appear to be more challenging financial outcomes, MPI may be less willing to take on the risks of the Broadway marketplace.<sup>163</sup> Accordingly, it behooves all of the stakeholders—including MPI, the dramatists, and their representatives—to find an appropriate balance between alleviating the dramatists' risks of lost revenues in the future, on the one hand, and, on the other, mitigating against MPI's risk of mounting a financially burdened production that struggles to recoup.<sup>164</sup>

### 5. Other Terms and Conditions

In underlying rights deals where a film or television studio licenses a property for live-stage adaptation, it is customary for the studio to hold back all audiovisual rights in the resulting stage work.<sup>165</sup> In addition, studios that have their own merchandising and record-label affiliates will typically retain the right to manufacture

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162. See *infra* Part III.3.

163. See *infra* Part III.3.

164. See *infra* Part III.3.

165. It is very typical in any deal for a musical or play based on an underlying film, for a studio that owns the underlying rights to hold back the audiovisual rights, and not license those in connection with the live-stage adaptation. See, e.g., AM. BAR ASS'N, UNDERLYING RIGHTS AGREEMENT § 8(c)–(d) [hereinafter ABA UNDERLYING RIGHTS AGREEMENT], available at [http://www.americanbar.org/content/dam/aba/administrative/entertainment\\_sports/underlying\\_rights\\_agreement.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/entertainment_sports/underlying_rights_agreement.authcheckdam.pdf). In short, this freezes those rights, and neither the studio nor the authors can enter into agreements without the involvement of the other party. See *id.* § 8(a), (c). It is not surprising that a film studio would want to make sure its name is on the marquee of any film of a musical based on one of its own film properties. See, e.g., *id.* § 9(a) (requiring information on all programs, billboards, and advertisements that the play is based on the owner's film). For example, *Hairspray*, the Broadway musical, is an adaptation of the 1988 John Waters' film of the same name. *New Line Cinema's 'Hairspray' Continues to Hit All the Right Notes at the Box Office*, PR NEWSWIRE, July 26, 2004, <http://www.prnewswire.com/news-releases/new-line-cinemas-hairspray-continues-to-hit-all-the-right-notes-at-the-box-office-52776957.html>. The Broadway musical premiered in the 2002–2003 season and won eight Tony Awards. See Kenneth Jones, *Take Me Out, Hairspray are Top Winners in 2003 Tony Awards; Long Day's Journey, Nine Also Hot*, PLAYBILL.COM (June 9, 2003), <http://www.playbill.com/news/article/80022-Take-Me-Out-Hairspray-Are-Top-Winners-in-2003-Tony-Awards>; *Hairspray*, Broadway League, <http://ibdb.com/production.php?id=13371> (last visited Nov. 23, 2013) (listing opening day as August 15, 2002). In 2004, New Line Cinema, which owned the rights to the 1988 John Waters Film, commenced production on a film version of the musical. *New Line Cinema's 'Hairspray' Continues to Hit All the Right Notes*, *supra*. By way of contrast, in a customary APC deal, the authors of a new musical own all of the rights in the musical including any and all audiovisual rights. Cf. 17 U.S.C. § 106 (2012) (enumerating the exclusive rights of owner of a copyright). When the authors dispose of their film rights in the musical, they enter into a customary option/purchase agreement which requires that they sell the script outright if the purchaser exercises her option. See *Deals – Standards & Expectations*, TV FILMRIGHTS.COM, <http://www.tvfilmrights.com/deals-standards-expectations> (last visited Nov. 22, 2013). This can be a very lucrative source of additional income to the dramatists (as well as all other participants in subsidiary-rights revenues, including the producer and her investors). See *id.* Accordingly, when film rights are held back, authors can potentially suffer a loss in revenues. Cf. *id.*

and produce the merchandise and cast albums for the show.<sup>166</sup> Studios may pre-negotiate the terms of those deals in the underlying rights agreements, or they may require at least the right to match any third-party cast album or merchandise deal.<sup>167</sup> In all cases, the studios are particular in requiring that any logos and merchandising for the live-theater work be significantly distinguishable from that of the original television show or motion picture, and preclude the stage producer from using any of the artwork or advertising materials associated with the film or television show.<sup>168</sup> The purpose is to differentiate clearly between the stage work and the original media property.<sup>169</sup>

However, in the case of *The Trainer*, MPI is both the underlying rights owner and the producer. In that case it is more likely to employ similar branding for the musical and exploit the TV show's artwork, logos, and trademarks in connection with the stage production.<sup>170</sup> Accordingly, regardless of whether MPI has merchandising or record-label affiliates, it will likely seek to retain all of its controls over the exploitation of these rights in connection with the live-stage show.

Furthermore, improper licensing or assignment of proprietary marks can result in the registrant losing ownership of the mark, and accordingly, any license of a mark must be subject to adequate quality control and supervision by the trademark owner.<sup>171</sup> To protect its

166. The APCMP sets forth terms under which the producer is authorized to cause "commercial use products" to be manufactured for sale in connection with the musical. See APCMP, *supra* note 95, at art. XI, § 11.05. It also grants to the producer the right to create one or more cast albums of the musical. See *id.* at art. VIII, § 8.17.

167. See ABA UNDERLYING RIGHTS AGREEMENT, *supra* note 165, § 11(a) (giving an example of a merchandise deal).

168. See *id.* § 8(e) (forbidding producer to use or jeopardize logo or trademark of the owner of the film or story).

169. See *id.* (discussing limits on the use of brand).

170. See, e.g., DREAMWORKS ANIMATION LLC, *Shrek*, SHREK, <http://www.shrek.com>, (last visited 2/8/2014) (showing that the same artwork for the title, "Shrek," is used in connection with all exploitations of the franchise, including theatrical motion picture, television and the Broadway musical). *Shrek, the Musical*, was produced on Broadway by DreamWorks Theatricals, a subsidiary of DreamWorks SKG which, along with DreamWorks Animation, produced and owns the original motion picture, *Shrek*, as well as *Shrek 2*, *Shrek the Third*, and various TV episodes based on the *Shrek* franchise. See The Broadway League, *Shrek The Musical*, INTERNET BROADWAY DATABASE, <http://www.ibdb.com/production.php?id=477427> (listing DreamWorks Theatricals as a producer of the musical "[b]ased on the motion picture by DreamWorks Animation"); *Results for "Shrek"*, IMDB.COM, <http://www.imdb.com/find?q=Shrek&s=all> (last visited Feb. 14, 2014) (showing entries for all *Shrek* film and television properties, and listing DreamWorks SKG and DreamWorks Animation as producers).

171. See *Global Trademark Research Fact Sheets: Assignments, Licenses and Valuation*, INT'L TRADEMARK ASS'N, <http://www.inta.org/TrademarkBasics/FactSheets/Pages/TrademarkLicensing.aspx> (last visited Nov. 23, 2012) (instructing that a trademark licensor is required to exercise quality control of a licensee's goods and services because a "trademark represents the trademark owner's reputation for goods and services of a certain level of quality,

trademarks, the MPI will want to assert quality controls over any show merchandising<sup>172</sup> and any use of its marks, logos, or artwork in connection with other productions of the musical if it consents to have these handled by a stock and amateur licensing agent.<sup>173</sup> These needs will impact its negotiations and will require deviations from a customary APC.

Negotiating modified APCs can be time consuming and expensive for the parties, and one might question whether the Guild, in adopting its adamant position to preserve the dramatists' copyright ownership and extensive creative control, is serving its members' interests. Part III of this Article explores that question, examining whether there are benefits for dramatists or other stakeholders in the Broadway community in continuing to preserve customary-rights norms and business practices in the theater industry.

### III. THE SHOW MUST GO ON

#### A. *Development: A Rocky Road*

The customary APC takes into consideration the multiple exigencies of production that arise in the theater business during the development, preproduction, and production phases of a new musical or play, as well as in connection with continuing exploitations of a play following its initial opening on Broadway.<sup>174</sup> The producer typically

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and consumers tend to rely on this reputation in making purchasing decisions"). "If a licensor does not exercise sufficient control over the quality of the goods and services offered by the licensee, the trademark may [in the United States] . . . be deemed abandoned." *Id.*

172. Phillip Barenholts, *Trademark Owners Must Exercise Sufficient Control over the Quality of Licensed Merchandise or Risk Losing Rights in Their Valuable Brands*, PATTISHALL IP BLOG (Oct. 18, 2010, 4:39 PM), <http://blog.pattishall.com/2010/10/18/trademark-owners-must-exercise-sufficient-control-over-the-quality-of-licensed-merchandise-or-risk-losing-rights-in-their-valuable-brands> ("Under [US] law, the licensor of a brand must maintain real control over the quality of the products licensed for sale under the brand. Without such control, the brand owner could lose its rights forever.").

173. For example, stock and amateur productions of *Shrek the Musical* utilize the original costume and makeup designs of the Broadway musical, as well as the same props and poster artwork, and Musical Theater International, the stock and amateur licensing agent, facilitates a costume and props exchange so that smaller theaters and community groups can rent out predesigned and constructed sets, costumes, and props (such as the dragon puppet). See *Shrek the Musical*, MTI SHOWSPACE, <http://www.mtishowspace.com/mod/shows/mtishow.php?showid=000372> (last visited Nov. 23, 2013) (listing links to "Related Community Rentals" that offer *Shrek* costumes and props). Stock and amateur licensing agents typically manage the licensing of performance rights for amateur productions at colleges and community theaters, as well as professional productions presented by regional or stock theaters, and in some cases, they may also license foreign productions to third party producers. For definitions of what are considered to be stock and amateur licenses, see Valenzi, *supra* note 22, at 760–61 and accompanying footnotes.

174. See APCMP, *supra* note 95, at art. II, § 2.01 (separating production process into stages, so that parties may call off the project at certain times without incurring greater losses).



obtains a three-year option to mount a first-class production of the play<sup>175</sup> that commences with the dramatist's delivery of a first draft of the play. When the work includes an adaptation, the producer effectively engages the dramatists to create the script and simultaneously options the rights to that new script from the dramatists.<sup>176</sup> Between signing the agreement and delivering the initial draft of a work, and between delivery and an opening on Broadway (if that ever occurs), plays go through what has been described as a "torturous, random and unpredictable" development process that includes numerous readings, workshops, and, often, small-scale productions of the work.<sup>177</sup>

Because the development timetable is protracted and heavily dependent on the availability of key creative personnel, cast, and theaters, it is not unusual for directors, actors, and even producers to change between one step of the development process and the next.<sup>178</sup> Even in circumstances in which a director or producer is tied to the project and expects to continue in that role all the way to Broadway, intervening commitments and events may thwart those plans.<sup>179</sup>

175. *See id.*

176. *See* APCMP, *supra* note 95, at art. II, § 2.03 (providing that if the play being optioned by the producer is not completed on the date that the agreement is signed, then all of the option periods and due dates "shall be extended and measured from the date on which the Completed Play is delivered to Producer" and providing that the producer has the sole and exclusive rights and option to present the play while awaiting its completion).

177. London & Pesner, *supra* note 4, at 97.

178. *See, infra* note 178.

179. The progress and pitfalls of the musical, *Spring Awakening*, which premiered on Broadway in 2006 after a seven-year development process and won eight Tony Awards, is illustrative. *See* Nicole Estvanik, *The Outside Man*, Theater Comms. Group, <http://www.tcg.org/publications/at/mayjune06/sheik.cfm> (last visited Nov. 23, 2013) (recounting an interview with Duncan Sheik, composer of *Spring Awakening*, in New York, NY). The interview offers the following account:

[Steven] Sater started to adapt the work from his own translation; [Duncan] Sheik set some lyrics to melodies. It was enough to snag a commission from California's La Jolla Playhouse and development time at the Sundance Theatre Program in 2000. But a shift in La Jolla's leadership cast uncertainty on the production's future. New York City's Roundabout Theatre Company brought it to the East Coast for a workshop performance, and by intermission had promised the team another workshop (which happened six months later), plus a full production (which, after two postponements, never did). First schedules intervened—director Michael Mayer, who'd been attached to the project from the beginning, was wrapped up in his Broadway production of *Thoroughly Modern Millie*—then world events. Following Sept. 11, 2001, cutbacks at the Roundabout—and Connecticut's Long Wharf Theatre, which had planned to co-produce—set the show loose yet again. For two years it seemed no producer would touch what was, admittedly, a commercially daring project to begin with.

The show sprang back to life when actor/producer Tom Hulce took it under his wing. In February 2005, Lincoln Center presented a concert staging as part of its American Songbook series, which generated a rave in *Variety* ("a beguilingly dark musical tragedy begging to be produced") and a solid commitment from the Atlantic [Theatre Company].

*Id.* The Atlantic's off-Broadway production of the musical which opened in June 2006, attracted interest from other Broadway producers, who, together with Tom Hulce, transferred the

In the film and television industries, when a producer loses interest or abandons a work in development, the project dies or, if the writer has secured the appropriate terms in her agreement, the project may “go into turnaround.”<sup>180</sup> This status permits the writer to solicit the interest of another producer, but the work will only be free for exploitation if that producer pays back all of the costs sunk into the project thus far, plus interest, which can disincentivize other producers.<sup>181</sup> A turnaround provision can also place a project in limbo, creating uncertainty as to the ownership of the acquired rights.<sup>182</sup> Additionally, under certain conditions and for a limited period of time, the Writers Guild of America Minimum Basic Agreement (WGA MBA)<sup>183</sup> provides that a writer may reacquire an original screenplay from a producer who has abandoned a project, but the writer must repay the purchaser any compensation the writer received for the work, and pass other financial obligations onto a subsequent producer.<sup>184</sup>

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production to the Eugene O’Neil Theatre where it opened in December 2006. *See id.*; Adam Hetrick, *Spring Awakening Celebrates Second Broadway Anniversary Dec. 10*, PLAYBILL.COM (Dec. 10, 2008), <http://www.playbill.com/news/article/124133-Spring-Awakening-Celebrates-Second-Broadway-Anniversary-Dec-10>.

180. A turnaround provision is more likely to be found in an agreement between a studio and a producer or a director, and is less commonly found in writer’s agreements. *See* Michael R. Fuller, *Turnaround for Writers – Not Quite, but Close: The Writer’s Right to Reacquire Theatrical Literary Materials under the WGA Basic Agreement*, 18 LOY. L.A. ENT. L. REV. 241, 242 (1998), available at <http://digitalcommons.lmu.edu/elr/vol18/iss2/1> (“Turnaround is an option negotiated for by producers and sometimes directors, but typically not writers, to reacquire a dormant or abandoned project.”); *see also* CATHERINE KELLISON, DUSTIN MORROW & KACEY MORROW, PRODUCING FOR TV AND NEW MEDIA: A REAL-WORLD APPROACH FOR PRODUCERS 331 (3d ed. 2013) (defining turnaround as “when a studio or network has abandoned a project and removed its support for further development” and the producer who brought that project to the studio can take it elsewhere); GAIL RESNIK & SCOTT TROST, ALL YOU NEED TO KNOW ABOUT THE MOVIE AND TV BUSINESS 232 (1996) (explaining turnaround).

181. *See* Michael Cieply, *The Murky Side of Movie Rights*, N.Y. TIMES (Aug. 23, 2008), <http://www.nytimes.com/2008/08/24/business/media/24steal.html> (reporting on Fox’s claim against Warner Brothers, seeking to enjoin Warner from releasing the film *Watchmen* and noting that “[c]entral to Fox’s complaint is the mysterious matter of what is called turnaround. On its face, turnaround is a contractual mechanism that allows a studio to release its interest in a dormant film project, while recovering costs, plus interest, from any rival that eventually adopts the project.”); *see also* KELLY CHARLES CRABB, THE MOVIE BUSINESS: THE DEFINITIVE GUIDE TO THE LEGAL AND FINANCIAL SECRETS OF GETTING YOUR MOVIE MADE 80 (2005).

182. Cieply, *supra* note 181 (noting that certain turnaround provisions include “changed elements” provisions, that require “[a] producer of a movie acquired in turnaround who comes up with a new director, or star, or story line, or even a reduction in budget, must give the original studio another shot at making the movie because of changed elements, even if a new backer has entered the picture”).

183. *See supra* note 80 (distinguishing WGA MBA from playwrights’ MBA).

184. *See* Fuller, *supra* note 180, at 245–46 (discussing the criteria for reacquisition as set forth in the WGA MBA, including requirements that literary material must be “original and not previously exploited,” that reacquisition is available “during a two-year period commencing five years from the original purchase of the material or completion of the writer’s services rendered in connection with such material,” and that in addition to notifying the purchaser of the intended reacquisition and refunding compensation paid to the writer, the writer must “obligat[e] any

By contrast, in the theater industry, the play is owned at all times by the dramatist and is merely licensed to the producer. If the producer abandons the production for any reason, rights customarily revert to the author without encumbrance.<sup>185</sup> The fact that a dramatist can continue to refine her work and submit to other theaters and producers is not only of obvious benefit to the authors of the work, but also has an important cultural benefit. It has enabled certain works in the canon to survive rejection and abandonment and achieve greatness.<sup>186</sup> Perhaps even more importantly, it has made it possible for works that were failures in their initial outings to be rediscovered by subsequent producers and directors.<sup>187</sup> These new

subsequent third-party purchaser to reimburse the original purchaser, when principal photography of the picture is commenced, the direct costs incurred by the original purchaser in connection with such literary material”).

185. APCMP, *supra* note 95, at art. I, § 1.03 (“Although nothing herein shall be deemed to obligate Producer to produce the Play” unless the producer timely produces the first paid performance of the play as provided in the agreement, “Producer’s rights to produce the Play and to the services of Author shall then automatically and without notice terminate.”). Note, however, that the author may inherit certain contractual obligations to Actors Equity Association and to a director. See *infra* notes 194–195 and accompanying text.

186. See London & Pesner, *supra* note 4, at 120–21. Spec scripts are often rejected multiple times prior to catching the eye of an astute literary manager at a theater. See *id.* at 108, 121–22 (“Nearly everyone has a story about a play that was rejected by numerous theatres over many years and then, after a successful production—usually in New York—was suddenly in demand, including at theatres that original rejected it (think Margaret Edson’s *Wit*).”); see also Estvanik, *supra* note 177 (recounting the experiences of the authors of *Spring Awakening* in its journey to Broadway, in which potential producers signed onto, and then withdrew from, commitments to produce the musical). Despite these setbacks, *Spring Awakening* went on to be nominated for eleven Tony Awards, winning eight of them, ran for three years on Broadway, recouped its investment in eight months, was presented in a national touring production, as well as in the United Kingdom, numerous North European countries and in New Zealand. See, e.g., Hannah Bisewski & Michael Meigs, *Spring Awakening, Zach Theatre, September 20 – November 13*, Cent. Tex. Live Theatre, [http://www.austinlivetheatre.com/index.php?option=com\\_content&view=article&id=2532:spring-awakening-zach-theatre-september-20-november-13](http://www.austinlivetheatre.com/index.php?option=com_content&view=article&id=2532:spring-awakening-zach-theatre-september-20-november-13) (last visited Nov. 23, 2013) (noting a European tour); Larry Getlen, *Fame & Fortune: Rocker Duncan Sheik*, Bankrate, <http://www.bankrate.com/finance/fame-fortune/fame-fortune-rocker-duncan-sheik-1.aspx> (last visited Nov. 23, 2013) (describing the show’s awards and background); Adam Hetrick, *Epstein Joins Cast of Spring Awakening National Tour July 7*, Playbill.com (July 7, 2009), <http://www.playbill.com/news/article/130859-Epstein-Joins-Cast-of-Spring-Awakening-National-Tour-July-7> (describing national tour); *Spring Awakening: Recoups \$6 Million Investment*, N.Y. Theater Guide (Aug. 29, 2007), <http://www.newyorktheatreguide.com/news/aug07/springawakening29aug07.htm> (describing how the show recouped its investment eight months after opening).

187. A similar tale can be told about Stephen Sondheim’s iconic *Follies*, which has received much critical and academic attention. See, e.g., Ben Brantley, *Darkness Around the Spotlight*, N.Y. Times (Sept. 12, 2011), <http://www.nytimes.com/2011/09/13/theater/reviews/follies-on-broadway-review.html> (critical review of *Follies*). During development, the show lost its original producers and production plans but was able to get back on track, be produced, and enter the canon of major American theatrical works. See TED CHAPIN, EVERYTHING WAS POSSIBLE: THE BIRTH OF THE MUSICAL FOLLIES, xxi–xxiii (2003) (recounting in the introduction how “The Girls Upstairs,” as *Follies* was originally known, took several years to find a producer and was slated to open in the 1968–69 Broadway season directed by John Dexter and produced by David Merrick and Leland Hayward, which fell through; as did a plan for Stuart Ostrow to produce it in the subsequent 1969–70 season, directed by Joseph Hardy; but, the musical finally

interpretations of failed texts often reveal ground-breaking works of complexity, illuminating them for audiences who were unable to perceive their value the first time around.<sup>188</sup>

### B. Collaborators

The APC is exacting about who may be considered an “Author” for the purposes of receiving the benefits of the agreement. By definition, it excludes anyone who may contribute incidental or temporary material that is created in connection with a specific production of a play, such as direction or performance interpretation.<sup>189</sup> Of course, clarifying ownership rights and definitions as between the dramatist and her producer does not

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found its berth on Broadway when Hal Prince stepped in as both producer and director, following his collaboration with Sondheim on *Company*).

188. Chapin, *supra* note 187, at 311 (quoting a review by Stefan Kanfer in *TIME* urging audiences in 1971 not to see *Follies* but to wait until it is revived in the 1980s when it would be recognized as “the show that turned the American musical theater around and pointed it forward” and Chapin’s own observation that, when it was revived as a concert performance with the New York Philharmonic in 1985 “it was received with great enthusiasm, its two performances completely sold out, . . . [b]ut more important, the show had finally come of age [and] was acknowledged by the press as a work of major consequence”). Even more legendary are accounts of audience reactions to Samuel Beckett’s *Waiting for Godot* when it first played in London in 1964. See JAMES KNOWLSON, *DAMNED TO FAME: THE LIFE OF SAMUEL BECKETT* 373 (1996) (quoting actor Peter Bull’s account of “waves of hostility” from audiences and “the mass exodus, which was to form such a feature of the run of the piece, started quite soon after the curtain had risen[ and t]he audible groans were also fairly disconcerting”). While there have been numerous films that started out life as flops, and later were recognized as classics (or cult phenomena), see, e.g., Alonso Duralde, *Popular Movies that Started as Box-Office Disappointments*, MOVIEFONE (Aug. 31, 2010, 4:55 PM), <http://news.moviefone.com/2010/08/31/popular-movies-box-office-bombs>, the difference is that the original film work is indelible (in the normal course of things), and can continue to be shown via other media or on secondary markets without the producers needing to sink further production funds into the work. In theater, by contrast, if the initial production is a flop, someone has to be willing to risk starting over—recapitalizing the show and incurring the same costs of the original production once again. See Terry Berliner, *The Hit Makers: Commercial Producing*, Theatre Comms. Group, <http://www.tcg.org/publications/at/apr06/music2.cfm> (last visited Nov. 23, 2013) (describing various developmental scenarios for shows that had numerous productions prior to Broadway to refine content; including certain shows that flopped in their pre-Broadway runs and whose original producers did not subsequently transfer to Broadway). As a practical reality, there is a low likelihood that the same producer who lost his shirt the first time around would sink additional funds into another production. Accordingly, if the rights were to vest in the first production and producer in perpetuity, it is likely that works that have become important additions to our canon might never have been restaged following an initial failed outing.

189. See APCMP, *supra* note 95, at art. I, § 1.05 (“[T]he term ‘Author’ shall mean each bookwriter, composer and lyricist whose literary material is used in the Play. The term ‘Author’ shall include any person who is involved in the initial stages of a collaborative process and who is deserving of billing credit as an Author and whose literary or musical contribution will be an integral part of the Play as presented in subsequent productions by other producers.”).

insulate the dramatist from claims by third parties such as directors and performers.<sup>190</sup>

Litman takes issue with the playwright's "exceptional authors' rights," which, she suggests, may trample on the rights of other collaborators who help bring the written work to life.<sup>191</sup> However, if one accepts that new theater works require and benefit immeasurably from a creative development process, it is difficult to imagine how a different rights structure could work as a practical matter. By definition, a development process includes multiple readings and performances of a work-in-progress to afford the authors the opportunity to judge the effectiveness of their storytelling and make changes to hone and improve the various elements of the script.<sup>192</sup> If one imagines a copyright arrangement in which every individual who contributes to a performed version of the play is entitled to negotiate for authorship of the play and a claim to the play's copyright, it is hard to comprehend how the play could progress through successive development stages, and end up as a coherent, unified work.<sup>193</sup> From

190. See Litman, *Common Law Play Right*, *supra* note 2, at 1383 n.10 (citing holdings of separate cases finding, variously, that dramaturgs and actors did not share authorship with the respective playwrights of contested works, as well as articles discussing and refuting the notion of a director's copyright, as well as other articles to the contrary that support the notion of a director's copyright); *id.* at 1423 n.263 (citing the text of a Guild statement asserting that claims by dramaturgs, directors, and other theatrical collaborators to copyright ownership of plays "infringe on the rights of dramatists to own and control their plays"); *id.* at 1423 n.264 (noting contradictory positions taken by the Dramatists Guild and the Stage Directors & Choreographers Society concerning the copyrights of directors).

191. See *id.* at 1425.

192. See David Finkle, *Get Out of Town!*, THEATERMANIA (Nov. 21, 2006), [http://www.theatermania.com/new-york-city-theater/news/11-2006/get-out-of-town\\_9516.html](http://www.theatermania.com/new-york-city-theater/news/11-2006/get-out-of-town_9516.html) (explaining that musicals rarely open untested on Broadway, and offering accounts by creators of musicals of the changes made to shows during pre-Broadway out of town productions). During this process, innumerable individuals contribute to the play's life, from the actors who give three-dimensional shape and form to characters, to directors who coordinate all of the visual, aural, and emotional elements of a production into a coherent whole, to the musicians who interpret the score, and the choreographer who adds dance and movement. See generally David Binder, *The Developmental Process of Producing Plays and Musicals*, in THE COMMERCIAL THEATRE INSTITUTE GUIDE TO PRODUCING PLAYS AND MUSICALS 33-43 (Frederic B. Vogel & Ben Hodges eds., 2006) (describing the creative process for *Hedwig and the Angry Itch*). The importance of these contributions has led at least one scholar to advocate for modifying US copyright laws to confer on interpretive performers an equal say over and control of artistic choices and decisions about an authors' text. See Michael W. Carroll, *Copyright's Creative Hierarchy in the Performing Arts*, 14 VAND. J. ENT. & TECH. L. 797, 800-01 (2012) (advocating the adoption of a statutory license scheme in dramatic licensing, to overturn dramatists' rights to disapprove licenses of their plays to licensees who wish to make content-based changes to the integrity of the work). As a purely academic argument, the article is interesting, but in order to shoehorn its analysis of dramatic licensing to fit its narrow premise, it strains in its efforts to draw corollaries with other artistic endeavors. *Cf. id.*

193. See generally THE COMMERCIAL THEATRE INSTITUTE GUIDE TO PRODUCING PLAYS AND MUSICALS, *supra* note 192, for numerous first-hand accounts by producers, general managers, artistic directors, and others in the commercial and not-for-profit theater industries of the vital importance of the play development process, and the need for numerous readings, workshops, developmental, and other productions to hone the script and incorporate feedback. If

its first enacted iteration, whether it be a workshop or performance, the author would be required to share copyright ownership with other creative participants whose role is to interpret and personalize the author's words and to embody them vocally and physically. Under that structure, each participant could then assert control over future changes to their respective contributions, and thus impact upon subsequent dispositions of the work. Nevertheless, the industry recognizes the important contributions that these collaborators make to the creative process, and in lieu of a copyright structure that would be unworkable from a creative, business, and practical perspective, the theater industry has developed certain contractual practices with respect to actors<sup>194</sup> and directors.<sup>195</sup> Even when a show is not

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this process were to be constantly encumbered by disputes over rights and ownership of contributions, or by the need to settle, ahead of time, who would own what on a per-contribution basis, the results would scupper the entire process. See, e.g., Green, *supra* note 4 (describing a fight over copyright ownership that threatened to derail *Tam Lin*, the off-Broadway show). If any suggestion that a dramatist accepts from a participant threatens her authorship, her inclination would be to reject that input, which would inhibit the play's success. See Joan Channick, *Author! Author?*, THEATRE COMMS. GROUP, <http://www.tcg.org/publications/at/apr06/exec.cfm> (last visited Nov. 23, 2013) (describing copyright battle for portions of *Rent* that contributor wrote). At the same time, a system that doles out ownership to all creative contributors might create incentives for actors and directors to imprint a new work with an abundance of their ideas, inviting creative chaos. Similarly, if performers in and the director of the initial Broadway production were entitled to some ownership in the script's copyright, future producers, directors, and performers may not be able to bring new interpretations to the work without getting permission from all the original participants. See, e.g., APCMP, *supra* note 95, at art. VIII, § 8.01 (requiring author approval for a number of changes). Under current copyright norms, because the author owns *only* the fixed expression of the words on the page, directors, and performers of subsequent productions have the freedom to lay new interpretations over the dramatist's original work, keeping texts fresh and vital. See Copyright Act, 17 U.S.C. § 102 (2012). That said, as Professor Carroll notes in his article, living playwrights are able to veto a production that would diverge so seriously from the original text as to subvert its meaning or eviscerate its message. See Carroll, *supra* note 192, at 798 n.5 (recounting story of high school students' production of *Adventures of Huckleberry Finn* that sought to reverse cast the roles of Huck and Jim being disapproved by dramatists because it "distorted the play's essential message"). This is a particularly sensitive issue around casting choices of plays where the race, ethnicity, or gender of character conveys the essence of the plays' story. *Id.* These sorts of issues embody a complex intertwining of social consciousness, history, identity, community sensitivity, and other factors, and it is reductive to approach the choices that dramatists make in connection with these difficult decisions as mere acts of fiat.

194. See ACTORS' EQUITY ASS'N, WORKSHOP AGREEMENT OVERVIEW (2013), available at [http://www.actorsequity.org/docs/rulebooks/Workshop\\_Overview.pdf](http://www.actorsequity.org/docs/rulebooks/Workshop_Overview.pdf) ("The Workshop Contract provides for the development of a new play or musical by professional Actors."). The Contract provides, *inter alia*, that in addition to their salaries paid for their participation in workshop sessions, actors "earn a share in the future success of the show." *Id.* This includes a share of a weekly royalty from the Broadway production of the musical, as well as a share of the "subsidiary rights income which is generated by the play" from "foreign productions, stock and amateur rights, or from the sale of motion picture rights." See *id.*

195. See, e.g., Terry Berliner, *What Directors Need to Know*, THEATRE COMMS. GROUP, <http://www.tcg.org/publications/at/apr06/music7.cfm> (last visited Nov. 23, 2013) (describing modified agreements with directors). These agreements are typically work for hire agreements that fall outside of the jurisdiction of the Society of Stage Directors and Choreographers Society (SSDC). See *id.* They typically provide a director with some percentage of the authors' and

successful on Broadway, the subsidiary-rights revenues that flow from secondary markets can be significant for the dramatist, and can enhance—sometimes quite considerably—the compensation paid to developmental directors and actors who are entitled to this participation.<sup>196</sup> For a successful Broadway production, this income stream can continue paying generous returns for decades.<sup>197</sup>

### C. *The Business of Show Business*

As discussed above, developing a live-stage show is a difficult, complex, and multi-layered process. In particular, developing a live-stage musical requires a constant balance between creative imperatives—getting the story, the songs, the choreography, and all of the stage business to work seamlessly—and business considerations, the most important of which is to control costs.<sup>198</sup> A brief overview of the economics of Broadway producing is helpful.

In a typical Broadway production, independent Broadway producers raise funds from third parties to assist in financing the production of the stage work.<sup>199</sup> This applies to both straight plays and to musicals; however, with musicals, the costs of production are typically three-to-five times the costs of a straight play.<sup>200</sup> As the

producers' subsidiary-rights participation. For discussion of directors' agreements, see Berliner, *supra* (quoting Barbara Hauptman, when she was executive director of the union: "Some directors create an agreement between themselves and the writer. . . . There are no hard-and-fast rules. SSDC can only protect the work that actually happens on stage in terms of stage pictures, as well as directorial solutions to the production, but not anything that has to do with script or structure. Those issues often get mixed up.")

196. See Robert Hofler, *Life After Death on Broadway*, VARIETY (Nov. 20, 2009, 10:52 AM), <http://variety.com/2009/legit/news/life-after-death-on-broadway-1118011669> (quoting a bookwriter whose modest earnings from an unsuccessful six-month run on Broadway were dwarfed by the "tens of thousands of dollars" he earned in his "first quarterly royalty check for the stock and amateur rights").

197. See *id.* (reporting that "the [aggregate] royalties paid to creatives, producers and investors" from stock and amateur licenses of a highly successful Broadway musical "can bring in \$1 million to \$3 million a year for decades").

198. See Binder, *The Developmental Process of Producing*, *supra* note 192, at 33–43 (describing the need to keep costs low at the development stage).

199. See John Kenrick, *Making a Broadway Musical*, MUSICALS 101, <http://www.musicals101.com/make3.htm> (last visited Nov. 23, 2013). See generally Steven Baruch, *Financing Commercial Theatre*, in THE COMMERCIAL THEATRE INSTITUTE GUIDE TO PRODUCING PLAYS AND MUSICALS, *supra* note 192, at 180–86 (discussing raising funds from small investors); Rodger Hess, *Disposing of Disposable Income*, in THE COMMERCIAL THEATRE INSTITUTE GUIDE TO PRODUCING PLAYS AND MUSICALS, *supra* note 192, at 188–97 (discussing a process for raising funds in private offerings and typical deal terms).

200. The following press releases announcing that certain straight plays and musicals have recouped their production costs are illustrative of the differences between the costs of mounting a straight play versus a musical. Straight plays include: *Vanya and Sonia and Masha and Spike*, total investment of \$2.75 million, see *Vanya and Sonia...Recoup its Investment*, NEWYORKTHEATREGUIDE.COM (July 1, 2013), <http://www.newyorktheatreguide.com/news/j113/vanyaandsoniaandmashaandspike558047.htm>; *Death of a Salesman*, \$3.1 million, see Mark

hypothetical assumes that the owners of *The Trainer* are adapting the television series as a musical, this Article uses that model. For the most part, the bulk of the production costs for a musical arise six-to-twelve months prior to the Broadway opening, so producers must raise a large portion of their funds well before the show starts rehearsals for the Broadway production.<sup>201</sup> An important step in the fundraising process is usually the “backer’s audition,”<sup>202</sup> where the producer presents a rehearsed reading of a version of the musical book and score that is as close as possible to “Broadway ready” in order to attract funding that will cover the preproduction cash flow.<sup>203</sup>

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Kennedy, *Broadway's 'Death of a Salesman' with Philip Seymour Hoffman Recoups its Investment*, ASSOCIATED PRESS, May 16, 2012, available at <http://www.winnipegfreepress.com/arts-and-life/entertainment/arts/broadways-death-of-a-salesman-with-philip-seymour-hoffman-recoups-its-investment-151772945.html>; *I'll East You Last*, \$2.4 million, see Mark Kennedy, Bette Midler's 1-Woman Show Recoups Investment, ASSOCIATED PRESS, May 30, 2013, available at <http://omg.yahoo.com/news/bette-midlers-1-woman-show-recoups-investment-164535095.html>. Musicals include: *Book of Mormon*, \$11.4 million, see David Rooney, *'Book of Mormon' Recoups Cost After Just Eight Months*, HOLLYWOOD REPORTER (Nov. 29, 2011), <http://www.hollywoodreporter.com/news/book-of-mormon-recoup-267128>; *Memphis*, \$12 million, see Adam Hetrick, *Tony-Winning Musical Memphis to Recoup \$12 Million Broadway Investment*, PLAYBILL.COM (July 30, 2012), <http://www.playbill.com/news/article/168538-Tony-Winning-Musical-Memphis-to-Recoup-12-Million-Broadway-Investment>. That said, Broadway musicals typically have costs ranging from \$5 million (such as *Once* and *Newsies*) to as high as \$25 million, although in a significant departure from the norm, *Spider Man: Turn Off the Dark* holds the record at \$75 million. See Joe Dziemianowicz, *Best Musical "Once" Recoups Its Investment and Does So on the Double*, SHOW & TELL (Aug. 13, 2012, 4:10 PM), <http://www.nydailynews.com/blogs/showandtell/2012/08/best-musical-once-recoups-its-investment-and-does-so-on-the-double> (*Once* recoups investment); Mark Kennedy, *Broadway's 'Newsies' Recoups Its Investment*, ASSOCIATED PRESS, Dec. 20, 2012, <http://www.bigstory.ap.org/article/broadways-newsies-recoups-its-investment> (*Newsies* in the black); Charles Passy, *Is Broadway a 'Wicked' Good Investment?*, WALL ST. J. (June 7, 2013, 6:23 PM), <http://online.wsj.com/article/SB1000142412788732406910457852049201978.html> (noting that costs of a musical range from \$5 million to \$25 million, and noting high production costs for *Spiderman*).

201. See generally, Steven Baruch, *Financing Commercial Theatre*, in THE COMMERCIAL THEATRE INSTITUTE GUIDE TO PRODUCING PLAYS AND MUSICALS, *supra* note 192, at 180–86; Rodger Hess, *Disposing of Disposable Income*, in THE COMMERCIAL THEATRE INSTITUTE GUIDE TO PRODUCING PLAYS AND MUSICALS, *supra* note 192, at 188–97 (discussing process of raising funds and need to have access to funding prior to full capitalization of the Broadway company to cover preproduction costs). Note that certain productions start out at a not-for-profit and commercial producers will contribute funds to assist with those productions as enhancement monies. See Jason Baruch, *The Arranged Marriage Between Not-For Profit Theatre Companies and Commercial Producers*, THE COMMERCIAL THEATRE INSTITUTE GUIDE TO PRODUCING PLAYS AND MUSICALS, *supra* note 192, at 275–87. Enhancement funding is typically between 10 percent to 25 percent of the total costs of developing and mounting the full musical on Broadway. See *id.* (discussing typical arrangements between commercial producers and not for profit theaters who produce developmental productions of plays and musicals that subsequently transfer to commercial productions on Broadway).

202. The Commercial Theater Institute defines a backer’s audition as “[t]he presentation of all or selected parts of a play or musical for potential investors.” THE COMMERCIAL THEATRE INSTITUTE GUIDE TO PRODUCING PLAYS AND MUSICALS, *supra* note 192, at 372.

203. See Patrick Healy, *On Their Way To Broadway, Eventually. Maybe.*, N.Y. TIMES (Jan. 6, 2013), <http://theater.nytimes.com/2013/01/07/theater/for-some-shows-path-to-broadway-is-pockmarked.html> [hereinafter Healy, *On Their Way to Broadway*] (discussing shows that did



Until that point, the independent producer either fronts the costs personally if she has the resources, or she relies on a small number of risk-tolerant angel investors to provide seed money.<sup>204</sup> These people are essentially the venture capitalists of theater, and they know the odds.<sup>205</sup> As a result, whether using her own funds or drawing on the largess of angel investors, the producer is under tremendous pressure to keep these initial costs as low as possible.<sup>206</sup>

Customary deals in the theater support both the creative process and the business trajectory of a new show by enabling the producer to keep hard costs low and manageable at a time when the creative outlook of the new work is most uncertain and the financial risks are at their highest.<sup>207</sup> The great advantage of this customary structure is that it allows the producer to adjust the dial and to defer taking on greater costs until the creative team is ready for the next step. Keeping these initial costs low is fundamental to the producer's ability to produce a show that will ultimately be economically viable and have a chance to recoup its costs within a reasonable period of time.<sup>208</sup> While a studio may not be daunted by the higher start-up

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not make their Broadway opening dates as they were unable to raise funds due to the scripts not being fully developed enough to attract investors).

204. See *Angel Financing*, Stan. Graduate Sch. of Bus., [http://www.gsb.stanford.edu/ces/resources/angel\\_financing.html](http://www.gsb.stanford.edu/ces/resources/angel_financing.html) (last visited Nov. 23, 2013) (defining Angel Investors and explaining their history in Broadway investing).

205. See *Money, Money, Money*, *supra* note 92 (claiming that “musicals have odds like venture capital: only one in ten makes money, and two of out ten lose it all”).

206. See Healy, *On Their Way to Broadway*, *supra* note 203 (describing investors as weary of backing shows because costs are often too high to be repaid in ticket sales).

207. Accordingly, during development, physical production costs are minimal to nonexistent, as the early steps in development include table readings and staged readings, which involve no sets, costumes, lighting, or other design elements. For a general overview of costs of development and the need to keep budgets lean, see George Allison Elmer, *Developing A Theatrical Property*, in THE COMMERCIAL THEATRE INSTITUTE GUIDE TO PRODUCING PLAYS AND MUSICALS, *supra* note 192, at 203–265.

208. See, e.g., Catherine Rampell, ‘Spider-Man’ Economics: Recouping that Initial Investment, *ECONOMIX BLOG* (Dec 14, 2010, 9:22 AM), <http://economix.blogs.nytimes.com/2010/12/14/spider-man-economics-recouping-that-initial-investment>. *Spiderman: Turn off the Dark* serves as a cautionary tale, earning the dubious fame of being the most expensive musical ever produced on Broadway, with the potential to recoup its costs only if it runs for at least four years. See *id.* (breaking down the financials of the production, using estimated production costs of \$65,000,000 and estimated weekly running costs of \$1,000,000). Rather than go through a developmental process out of town, as most musicals do, the complicated flying effects in the show, and the need to custom build certain features into the theater's architecture, led to a decision to develop and hone the production and the script in the Broadway theater where the show would open and run. See generally Jay Lustig, ‘Spider-Man: Turn Off the Dark’—A Review, *NJ.COM* (Jan. 18, 2011, 8:09 AM), [http://www.nj.com/entertainment/music/index.ssf/do11/01/spider-man\\_turn\\_off\\_the\\_dark\\_.html](http://www.nj.com/entertainment/music/index.ssf/do11/01/spider-man_turn_off_the_dark_.html) (commenting on the pushed back preview dates for the show and describing its technical requirements). The protracted development period—one that included six postponed openings, numerous technical difficulties, cast injuries, replacing the co-writer and director, Julie Taymor, various law suits, and other obstacles—kept costs mounting. See, e.g., Wonbo Boo & Lauren Efron, ‘Spider-Man: Turn Off the Dark’: U2’s Bono Says He Agreed with Bad Reviews, But the Troubled Musical Has Revived, *ABCNEWS.COM* (May 20,

costs necessitated by a modified APC,<sup>209</sup> for an independent producer, preserving customary rights and business norms may be imperative.<sup>210</sup>

Indeed, corporate producers also have an interest in seeing traditional models preserved as not every property that a corporate producer may wish to adapt necessarily calls for a modified APC. Some musicals based on films have been small, intimate stories originating in not-for-profit theaters.<sup>211</sup> While in many cases the studio chooses not to be an active producer of these smaller stories, it is possible their approach may change.<sup>212</sup> In that case, a corporate

2011), <http://abcnews.go.com/Entertainment/spider-man-turn-off-the-dark-u2s-bono-critics/story?id=13643149> (discussing criticism of the show in the press, creative difficulties, and quoting an actor's account of serious injuries he sustained as a stunt double during one of the many preview performances); Eriq Gardner, 'Spider-Man: Turn Off the Dark' Investor Sues for Theater Fee, HOLLYWOOD REPORTER (Nov. 4, 2011, 9:44 AM), <http://www.hollywoodreporter.com/thresq/spider-man-turn-off-the-dark-investor-sues-257699> (reporting on investor filing suit to claim payment of monies allegedly due her for putting up collateral for theater rental); Patrick Healy, *Judge Said to be Frustrated Over Lack of Settlement in 'Spider-Man' Battle*, N.Y. TIMES (Mar. 12, 2013, 1:16 PM), <http://artsbeat.blogs.nytimes.com/2013/03/12/judge-said-to-be-frustrated-over-lack-of-settlement-in-spider-man-battle/> (reporting on protracted settlement negotiations between producers and fired director). See Patrick Healy, *Precipitous Fall for 'Spider-Man' Director*, N.Y. TIMES (Mar. 10, 2011), <http://theater.nytimes.com/2011/03/10/theater/julie-taymor-spider-man.html> [hereinafter Healy, *Precipitous Fall*] (reporting that the show was shut down for major changes to be made by a new director and author). With the show fully cast and costumed, a full complement of musicians in the orchestra each night, sets fully built and installed, and all set changes, sound and lighting cues operational, the cost of making significant changes to the script following Taymor's likely contributed to what have been estimated to be production costs of \$75 million. Ultimately, the production ran on Broadway for only three years, closing in January, 2014. See Patrick Healy, *'Spider-Man' to Close on Broadway*, N.Y. TIMES (Nov. 18, 2013) <http://www.nytimes.com/2013/11/19/nyregion/spider-man-to-shut-on-broadway.html> (reporting that although the show grossed \$203 million in revenues from Broadway performances, "the musical is still a long way from paying back investors" as the show's weekly ticket sales "sometimes barely covered the show's weekly running costs, . . . so there was relatively little profit to share with investors.").

209. See *supra* Part II.4 (discussing changes to compensation structure in a modified APC).

210. See Keramidas, *supra* note 115, at 306 (noting that because corporations are horizontally and vertically integrated, they are better able to offset losses than independent producers). In addition, corporate producers typically produce a slate of projects and can cross-collateralize profits and losses which further ameliorates the risks of one particular show incurring higher upfront costs. See, e.g., Barnes & Healy, *20th Century Fox Enlists Help* (reporting that the joint venture between Broadway veteran, Kevin McCollum, and 20th Century Fox will develop a slate of between nine and twelve musicals based on Fox's library properties); *Live Theater*, WARNERBROS.COM, <http://www.warnerbros.com/studio/divisions/live-theater.html> (last visited Nov. 23, 2013) (describing Warner Bros. Theatre Ventures' current and upcoming productions based on properties in their library, and a "roster of upcoming projects includ[ing] dramas, comedies and musicals").

211. See, e.g., Chris Jones, *At New York Theatre Workshop, 'Once,' Falling Slowly into a Musical*, CHI. TRIB. (Dec. 13, 2011), [http://articles.chicagotribune.com/2011-12-13/entertainment/sc-ent-1213-once-broadway-review-20111213-6\\_1\\_john-tiffany-dublin-steven-hoggett](http://articles.chicagotribune.com/2011-12-13/entertainment/sc-ent-1213-once-broadway-review-20111213-6_1_john-tiffany-dublin-steven-hoggett) (describing the musical *Once* which originated at an off-Broadway nonprofit theater, the New York Theatre Workshop, and then transferred to Broadway).

212. See, e.g., Patrick Healy, *Limited Broadway Run for Disney's 'Newsies,'* N.Y. TIMES (Nov. 15, 2011), <http://www.nytimes.com/2011/11/16/theater/disney-starts-small-for-newsies-the->

producer may well balk at committing significant initial funds to develop a niche project. In short, a pervasive change to the business and legal structure of the Broadway production agreement could change the type of work that can be produced, with smaller stories and independently originated content precluded from the marketplace entirely.<sup>213</sup>

#### *D. Broadway's Unique Identity*

One of the great attributes of Broadway that has attracted producers and artists as well as audiences over the decades, is its relative independence. Unlike the film and television industries, in which the major companies are owned by publicly held corporations, Broadway has historically been a business driven by individuals and family-owned companies.<sup>214</sup>

Broadway's value as a site for important cultural production has evolved over many decades, driven in major part by the contributions of independent producers who have been its "wizards."<sup>215</sup>

musical.html (describing Disney's original choice to produce *Newsies* as a low-budget production at the Paper Mill Playhouse in New Jersey but, because of its success, transferred the production to Broadway).

213. See Keramidas, *supra* note 115 at 322–23 (noting Elizabeth Wollman's observation that "the financial successes of revivals and screen-to-stage productions make it difficult . . . to assume the risks of putting on new plays and musicals and have encouraged [a] trend away from original work") (citing Elizabeth Wollman, *The Economic Development of the "New" Times Square and Its Impact on the Broadway Musical*, 20 AM. MUSIC 445, 457 (2002)). It is also important to note that corporate producers can significantly mitigate their risks because of their ability to cross-market their Broadway product on multiple media platforms, and to employ sophisticated, mass-marketing resources to benefit the musical. See Wollman, *supra*, at 450 (noting that, with respect to Disney's stage productions of *Beauty and the Beast* and *The Lion King*, "the film sells the musical; the musical sells the film; both sell related merchandise; producers profit from all sales"). Independent producers simply cannot compete on this scale. See *id.* at 456 (interviewing a long-time Broadway independent producer who notes that "[independent producers] don't own a theme park in which to give away tickets to our shows, or offer opportunities for people to see the shows at discounted prices. The synergy involved when you own a television network, several cable networks, [and] a half-dozen theme parks . . . is unimaginable from our perspective. So we watch them and we admire them . . . . But we can't really do much of what they do.").

214. See, e.g., John Kenrick, *Theatre in NYC: History – Part IV, Musicals* 101, <http://www.musicals101.com/bwaythhist4.htm> (describing the Shubert Brothers as the most influential figures in commercial theater during the 1920s). The Broadway League, a trade organization serving the interests of the Broadway community, was formed in the 1930s in order to allow independent producers, theater owners, and theater managers a means to protect their common interests. See BEN PESNER, *THE BROADWAY LEAGUE, THE BROADWAY LEAGUE: A HISTORY* 5 (2009), available at [http://broadwayleague.com/editor\\_files/History\\_Nov10\\_2009\\_FINAL-lo\\_res.pdf](http://broadwayleague.com/editor_files/History_Nov10_2009_FINAL-lo_res.pdf).

215. See FELICIA HARDISON LONDRÉ & DANIEL J. WATERMEIER, *THE HISTORY OF NORTH AMERICAN THEATER: THE UNITED STATES, CANADA, AND MEXICO: FROM PRE-COLUMBIAN TIMES TO THE PRESENT* 367 (1998) (recounting the important independent Broadway producers of the 1950s through the 1980s, such as Leland Hayward, David Merrick, Arnold Saint-Subber, Morton Gottlieb, Alexander Cohen, Roger Stevens, Elizabeth McCann, and Nelle Nugent who produced,

For years, industry insiders have expressed concern that the costs of production are driving out independent producers by creating a higher barrier to entry, thus changing the nature of works produced on its stages.<sup>216</sup> Even in the nonprofit sector, artistic directors of institutional theaters who seek to support, nurture, and present new works—which commercial producers may then transfer to Broadway—acknowledge that the economics of theater has pushed them into building more conservative seasons.<sup>217</sup> Of course, the choice of content cannot be attributed to costs alone. It may be the case that even if ingoing production costs were maintained at a low level, the commercial theater industry might still gravitate towards recognizable, high concept adaptations because of the grosses and revenues they generate.<sup>218</sup>

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among them, *South Pacific*, *The Sound of Music*, *Hello Dolly*, as well as plays by Arthur Miller and other leading American playwrights); Peter Marks, *As Giants in Suits Descend on Broadway*, N.Y. TIMES (May 19, 2002), <http://www.nytimes.com/2002/05/19/theater/theater-the-ony-awards-as-giants-in-suits-descend-on-broadway.html> (discussing the historical role of the independent producer who engaged in “artistic partnerships that [led] to consistently thrilling work, as represented by the creative alliances of Harold Prince and Stephen Sondheim or Robert Whitehead and Arthur Miller”). The same article refers to independent producers as the “traditional wizards of the theater district.” *Id.*

216. See William Grimes, *Broadway Tries Analysis and Gets Shock Therapy*, N.Y. TIMES (Sept. 23, 1997), <http://www.nytimes.com/1997/09/23/theater/broadway-tries-analysis-and-gets-shock-therapy.html>. Even in 1997, high costs of production were seen to have affected the choice of content for Broadway’s stages, with a report of a consulting company that analyzes troubled businesses suggesting that “[r]unaway costs have made the economics of mounting and operating a show so forbidding . . . that producers have gravitated to the most risk-free productions, making Broadway a showcase for revivals and large-scale, long-running musicals rather than for innovative new work.” *Id.* Since that article was written, costs have continued to skyrocket. See, e.g., Patrick Healy, *The Staggering Cost of Broadway*, N.Y. TIMES (July 21, 2011, 11:15 AM), <http://artsbeat.blogs.nytimes.com/2011/07/21/the-staggering-cost-of-broadway> (interviewing British producer, Sonia Freedman, on the higher costs of production in the United States, and its impact on the ability to mount straight plays on Broadway); see also Jeff Korbelik, *The Mighty Movical Hits a High Note on Stage*, JOURNALSTAR.COM (Apr. 25, 2008, 7:00 PM), [http://journalstar.com/entertainment/arts-and-theatre/the-mighty-movical-hits-a-high-note-on-stage/article\\_8e3c0a8f-36dd-51ef-a3fc-22981b686f6d.html](http://journalstar.com/entertainment/arts-and-theatre/the-mighty-movical-hits-a-high-note-on-stage/article_8e3c0a8f-36dd-51ef-a3fc-22981b686f6d.html) (discussing the number of “movicals” (musicals based on movies) slated for the 2009–10 season, the fact that increasing costs and risks drive producers to well-known titles; and the scarcity of original musicals); Craig Lambert, *The Future of Theater*, HARV. MAG., Jan.–Feb. 2012, at 37, available at <http://harvardmagazine.com/2012/01/the-future-of-theater> (“Broadway is an expensive business . . . It is mainstream theater—it’s not designed to be experimental, just as movie studios don’t produce the same material as independent filmmakers.” (quoting Tom McGrath, the then chairman of Key Brand Entertainment, a corporate production and financing company)).

217. Patrick Healy, *Playwrights’ Nurturing Is the Focus of a Study*, N.Y. TIMES (Jan. 13, 2010), <http://www.nytimes.com/2010/01/14/theater/14playwrights.html> (quoting Oskar Eustis, Artistic Director of the Public Theater); see also Grimes, *supra* note 216 (citing statistics for the production of new plays on Broadway, noting that the average number of new plays on Broadway per year fell to 10 percent in the 1995–96 season, from nearly two-thirds in 1965–66); London & Pesner, *supra* note 4, at 19–21 (noting that the average number of new plays on Broadway per year fell to fourteen between 1980 and 2000, from twenty-nine between 1960 and 1980).

218. See Healy, *Like the Movie*, *supra* note 14 (“If the Hollywood frenzy raises questions about originality – has theater become just a derivative cog in brand machinery? – the stage adaptations may simply be too financially rewarding for the studios and Broadway to cut back.”).

However, innovation, audacity, and artistry are the engines that drive theater; new forms that challenge old parameters and fresh voices that speak to new generations are part of its life blood.<sup>219</sup> While studio producers have shown themselves to be open to new talent and, indeed, have launched the careers of artists who have emerged to become prominent Broadway figures,<sup>220</sup> they cannot carry that burden alone. It is the independent producer, driven by passion and creative curiosity,<sup>221</sup> often consciously dedicated to increasing diversity,<sup>222</sup> who

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Another force that must be factored into any discussion about content on Broadway is the power Broadway theater owners exert over decisions about which productions will play in their houses. A unique aspect of Broadway's theater real estate is that there are only forty Broadway houses in total, of which a limited number are available in any season due to long-running productions. The process of securing a theater is highly competitive for producers, and there has been a long-held debate about whether theater owners distort the marketplace by skewing choices of productions towards highly commercial, high-revenue generating fare. See, e.g., Patrick Healy, *In Broadway Lights: No Vacancy*, N.Y. TIMES (Apr. 28, 2010), <http://www.nytimes.com/2010/05/02/theater/02stages.html> (discussing the increasing difficulty for smaller shows without major stars or recognizable titles to book theaters as theater owners gravitate to renting their theaters to "blockbusters"). As Broadway theater owners take a percentage of box office revenues as part of their rental charge for the theater, they are incentivized to choose shows that will either generate enormous returns in short runs (such as straight plays with major star casting) or megahits that are likely to have long, lucrative runs. See *id.* (citing an interview with the chair of the Shubert Organization, in which he said he had "shuffled around other shows to secure prime theaters for "Billy" [*Billy Elliot: The Musical*] and "Steady Rain" [starring Hugh Jackman and Daniel Craig] because he sensed they would be huge moneymakers"). That said, theater owner representatives have expressed the importance of balancing commercial priorities against artistic and cultural concerns in making decisions about which shows to champion. See, e.g., STEVEN ADLER, ON BROADWAY: ART AND COMMERCE ON THE GREAT WHITE WAY 49 (2004) (quoting Rocco Landesman, when he was president of Jujamcyn, as saying: "We have to book our theatres, we have to make money. We have a responsibility to fill our theatres . . . but we'll do a certain number of shows simply because they *have* to be done, rather than [out of] some financial necessity. *Angels in America* is a good example of that." (alterations in original)). According to Adler, "Each of the [theater owner] chains maintains a cadre of artistic advisers to guide them in making producing, investing and booking decisions." *Id.* at 48. However, he notes that "[t]he power of the theatre owners is especially strong when all desirable theaters are occupied and there is a backlog of shows waiting for spaces. The owners are then able to exercise greater discretion in their selection of shows and to demand more lucrative rental deals." *Id.*

219. As a result of the concerted efforts of theater industry leaders, such as Todd London of New Dramatists and numerous artistic directors of not for profit theaters, the Mellon Foundation awarded a grant of nearly \$10 million to a number of theater institutions "in the hopes of getting more fresh voices before an audience." See Patricia Cohen, *Mellon Foundation Gives Millions to Help Playwrights*, N.Y. TIMES (Oct. 20, 2008), <http://www.nytimes.com/2008/10/21/theater/21mell.html>.

220. For example, Julie Taymor, considered one of the "geniuses" of Broadway, got her first major break from Disney when she was hired to direct *The Lion King*. See Healy, *Precipitous Fall*, *supra* note 208 (noting that in 1996, "Disney Theatrical Productions took a chance on a little-known director of experimental theater named Julie Taymor . . . [and] handed her a musical based on their hit film, "The Lion King"). Prior to that, she had worked in the regional and not for profit theaters and was known only within a small segment of the theatre community. See *The Stars: Julie Taymor*, PBS.ORG, <http://www.pbs.org/wnet/broadway/stars/julie-taymor> (last visited Nov. 23, 2013) (describing Julie Taymor's early career).

221. See, e.g., David Binder, *Wet and Happy, or How to Hold Onto your Inspiration*, in THE COMMERCIAL THEATRE INSTITUTE GUIDE TO PRODUCING PLAYS AND MUSICALS, *supra* note 192, at 36-43 (discussing the difficulties he encountered getting the 2004 revival of *Raisin in the Sun* to Broadway and his passionate pursuit of the project for more than four years, as well as

has historically brought wider audiences to new works and important voices that might not otherwise have found a stage outside of the nonprofit sphere.<sup>223</sup>

There is no doubt that the marriage of Hollywood content and stars with Broadway's creative talent and audiences has been a terrific boon for the industry, both in terms of reviving the physical district in New York City, and in revitalizing its stages and its profitability.<sup>224</sup> The proliferation of mega-stars from the film and

his discovery of *Hedwig and the Angry Inch* and *De La Guarda*, both of which were innovative off-Broadway shows that started out as unknown, marginal works and went on to become long-running, international hits); Kevin McCollum, *Business as Unusual*, in THE COMMERCIAL THEATRE INSTITUTE GUIDE TO PRODUCING PLAYS AND MUSICALS, *supra* note 192, at 79–82 (discussing his reaction to early readings of the musical *Rent* which started at New York Theatre Workshop and which he transferred with other producers to Broadway where it ran for ten years); Daryl Roth, *For the Love of Theatre*, in THE COMMERCIAL THEATRE INSTITUTE GUIDE TO PRODUCING PLAYS AND MUSICALS, *supra* note 192, at 95, 98–114 (discussing the numerous Broadway and off-Broadway projects Daryl Roth was drawn to because they spoke to her passion, not because she expected them to be commercial successes).

222. See Suzanne Rust, *Bright Light on Broadway: Trailblazing Producer Alia Jones-Harvey is Shaking Up the Great White Way*, GRIO (May 20, 2013, 2:12 PM), <http://thegrio.com/2013/05/20/bright-light-on-broadway-trailblazing-producer-alia-jones-harvey-is-shaking-up-the-great-white-way/#s:alia-jones-harvey> (reporting on impact of African-American independent commercial producers committed to exploring revivals of canonical American plays with black casts, including *Cat on a Hot Tin Roof*, *Streetcar Named Desire*, and *The Trip to Bountiful* and the impact these casting choices have had on increasing audience diversity). In addition to the three productions just mentioned, other shows in recent seasons such as *Fela!*, *Stick Fly*, *The Mountaintop*, *The Color Purple*, *Memphis*, and numerous productions that originated at not-for-profit theaters and were then transferred to Broadway (such as *The Scottsboro Boys*, the revival of *Porgy and Bess*), were produced by independent commercial producers, including the original productions and revivals of all of August Wilson's plays. See INTERNET BROADWAY DATABASE, <http://www.ibdb.com> (last visited Nov. 23, 2013). That said, it is important to note that *The Lion King* has a predominantly African-American cast (and early in its run, employed a largely black South African chorus). See *The Lion King*, EBONY (July 1, 1988), <http://www.highbeam.com/doc/1G1-20847770.html>; *Lion King Delivers a Heartwarming Affirmation of What it is to be Black*, MSR NEWS ONLINE (Jan. 24, 2012), <http://www.spokesman-recorder.com/2012/01/24/lion-king-delivers-a-heartwarming-affirmation-of-what-it-is-to-be-black-2> (relating reviewer's response to seeing *The Lion King* when it was first produced and being struck by its "authenticity" and surprised by the realization that was "a Black musical" in which "the casting was overwhelmingly African American and, for that matter, African").

223. See Lambert, *supra* note 216, at 35 (raising concerns that certain of the problems in American theater that are identified in that article are not attributable to an absence of playwrights, but to the disappearance of a certain type of independent producer).

224. The arrival of corporate producers such as Disney and Clear Channel contributed to the physical revitalization of the Broadway district. See Marks, *supra* note 215 ("[T]he new look of Times Square; the sustained appeal of Broadway to tourists: these can all be traced in some measure to the commitment large companies have made to the theater district."). See also Wollman, *supra* note 213, at 448 (noting the "remarkable transformation of Times Square" in New York City and attributing it to entertainment conglomerates' commitments to the revitalization project as investors, real estate owners, and purchasers of advertising space). Based on statistics published by the Broadway League, gross revenues on Broadway have almost doubled since 2000, with grosses for the 2000–01 season at \$666,000,000 and in the 2012–13 season at \$1,139,000,000. See *Broadway Season Statistics*, BROADWAY LEAGUE, [http://www.broadwayleague.com/index.php?url\\_identifier=season-by-season-stats-1](http://www.broadwayleague.com/index.php?url_identifier=season-by-season-stats-1) (last visited

television industries on Broadway's stages has made it possible for independent producers to mount highly profitable revivals of American and British classic plays (although with ticket prices that possibly put the productions beyond the reach of many potential theatergoers).<sup>225</sup> At the same time, Broadway musicals based on familiar entertainment titles, properties, or personalities<sup>226</sup> have shown themselves to have tremendous appeal for audiences, especially visitors from outside of New York City,<sup>227</sup> and given plans announced by studios,<sup>228</sup> it is likely that Broadway and audiences will welcome more of these works in the foreseeable future.

As more corporate producers vie for opportunities to bring their properties to Broadway, it is also likely that modified deals will become more common. And as they proliferate, it is possible that dramatists as well as producers will look to a modified APC deal as the new standard,<sup>229</sup> for reasons that appear favorable in the short term: For the producer, there is the prospect of greater control and a

Jan. 2, 2014). The increase is attributable to higher average ticket prices, as attendance has remained somewhat consistent since 1997 (the year that *The Lion King* opened), ranging between 11.48 million and 12.53 million (2010–11). *See id.* (noting that the League changed its reporting practices in 2009, so the figure for 1997 represents paid attendance, whereas the figure for 2009 and later represent all attendance). However, the benefits of these financial improvements often flow to a select number of hit and megahit shows, as the financials of producing on Broadway have not declined. *See, e.g.,* Patrick Healy, *Summertime, and Broadway Living Is Hard: Attendance Drops 8 Percent*, N.Y. TIMES (Sept. 5, 2013), <http://www.nytimes.com/2013/09/05/theater/summertime-and-broadway-living-is-hard-attendance-drops-8-percent.html> (noting that in the 2013–14 season, “[t]he shows with the best attendance, like “The Book of Mormon,” “The Lion King” and “Wicked,” also had the priciest seats, capitalizing on the enduring buzz”); Rebecca Sun, *‘Lion King’ is Broadway’s First \$1 Billion Show*, HOLLYWOOD REPORTER (Oct. 16, 2013, 6:00 AM), <http://www.hollywoodreporter.com/news/lion-king-is-broadways-first-648455> (reporting that *The Lion King* “that kicked off Broadway’s obsession with movies is on pace to become . . . the first show to reach \$1 billion in cumulative gross”). *Cf. Money, Money, Money*, *supra* note 92 (discussing risks of Broadway investing).

225. Editorial Board, *The High Cost of ‘Betrayal,’* N.Y. TIMES (Oct. 18, 2013), <http://www.nytimes.com/2013/10/19/opinion/the-high-cost-of-betrayal.html> (noting extraordinary returns for straight plays in 2013–2014 season, attributable to the high price of tickets).

226. For example, *Wicked* (4,179 performances as of Nov. 17, 2013), *The Lion King* (6,653 performances as of Nov. 17, 2013), *Jersey Boys* (3,324 performances as of Nov. 17, 2013); *Spamalot* (1,575), *Hairspray* (2,642), *Beauty and the Beast* (5,461) and *Billy Elliot* (1,312), all of which played for longer than three years. *See* INTERNET BROADWAY DATABASE, <http://www.ibdb.com/index.php> (last visited Nov. 23, 2013).

227. *See The Demographics of the Broadway Audience 2011–2012*, BROADWAY LEAGUE, [http://www.broadwayleague.com/index.php?url\\_identifier=the-demographics-of-the-broadway-audience](http://www.broadwayleague.com/index.php?url_identifier=the-demographics-of-the-broadway-audience) (last visited Jan. 2, 2014) (calculating that, during the 2011–2012 season, 63.4 percent of Broadway tickets were purchased by tourists).

228. *See* Barnes & Healy, *20th Century Fox Enlists Help*, *supra* note 14.

229. Notwithstanding the fact that corporate producers may also prefer to use a customary APC in some instances, *see supra* notes 211–213 and accompanying text, if modified terms are more frequently cited by dramatists and their representatives and more often accepted by producers regardless of the nature of the project, as a matter of definition the parameters of “custom and practice” will shift and the norms will become pervasive.

longer relationship with the new work; for the dramatist, there is security in high up-front payments and nonrefundable guarantees.<sup>230</sup>

But in the long term, a pervasive shift away from customary business terms and the legal structure that undergirds them could result in the irreversible loss of Broadway's cultural identity in New York City and nationally.<sup>231</sup> Accordingly, for all of Broadway's stakeholders—whether independent or corporate, creative or managerial, commercial or nonprofit—preserving customary business models and legal norms and employing them under appropriate circumstances is as important as exploring new models that accommodate the priorities of corporate producers seeking to safeguard their intellectual property.

#### IV. CONCLUSION

The hard-fought victory won by playwrights in the late 1920s that conferred enhanced creative controls on playwrights also resulted in the codification of contractual terms that established a practical and mutually beneficial structure for planning and financing the development, preproduction, and production of Broadway shows. This structure allows creative work and innovation to thrive alongside deliberate and careful management of business decisions and their costs.

Disturbing this careful balance is justified in certain instances, in particular where a public corporation that has obligations to shareholders wishes to adapt, develop, and produce a new stage production whose value will rest heavily on the goodwill already created in the company's own underlying property. Because of a studio's obligations to protect its intellectual property, ceding control of the live-stage rights to independent dramatists and taking a passive

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230. See TDF's "Outrageous Fortune: The Life and Times of the New American Play" Examines the "Collaboration in Crisis" between Playwrights and Those Who Produce their Work, THEATRE DEV. FUND (Dec. 22, 2009), [http://www.tdf.org/TDF\\_NewsDetailsPage.aspx?id=88](http://www.tdf.org/TDF_NewsDetailsPage.aspx?id=88) (discussing earnings trends among American playwrights, as reported in TDF's 2009 published study).

231. See Wollman, *supra* note 213, at 459 (opining that the proliferation of corporate-produced musical adaptations on Broadway which are often also presented in national touring productions across the country may change "national standards of what is expected from all theatrical productions"). Some artists and commentators believe that Broadway's identity as an originator of unique cultural material has already been irretrievably lost. See, e.g., Frank Rich, *Conversations with Sondheim*, N.Y. TIMES MAG., March 12, 2000 (quoting Stephen Sondheim reflecting on a time when the theater district offered diversity in genre and content and "[y]ou'd go and see . . . shows that would stimulate you, that would make you want to write. Now it makes you *not* want to write because you think the audience isn't there anymore . . . I don't think the theater will die, per se, but it's never going to be what it was. You can't bring it back. It's gone. It's a tourist attraction.") available at <http://partners.nytimes.com/library/magazine/home/20000312mag-sondheim.html>.



position in connection with subsequent exploitations may be an unworkable proposition. The Guild's willingness to work with its members when necessary to navigate compromises and accommodations that shift the legal norms and change the business terms of an APC has had a financially beneficial impact on Broadway creators' revenues while permitting corporate producers to maximize the live-stage value of their franchise properties. Furthermore, studios have demonstrated that they can produce work that is innovative and exciting, and filled with the kind of visual spectacle that excites and energizes audiences. They have also been willing to take risks with new, unknown talent and have launched careers.

However, if modifications to the legal and business norms were to become pervasive, the changes would impact on the type of material that corporate and independent producers select, and may create such high financial barriers to entry so as to exclude most independent commercial producers from initiating and pursuing projects at all. Excluding independent voices from Broadway's stages and disincentivizing corporate producers from taking on riskier, less mainstream projects would be a loss for Broadway that would impact its unique cultural identity. In order for Broadway to continue to thrive creatively and financially, it behooves stakeholders to keep the stage doors open to maximize opportunities for diversity, audacity, and artistry on our commercial stages.