

An Unaccountable Familiarity: A Dual Solution to the Problem of Theft in Theatrical Productions

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I. SCENE: INTRODUCTION

Imagine you are a theatre stage director.¹ You are one of the lucky ones. You have had success in your career; with fairly regular employment, you make ends meet and have a little left over at the end of the day. Recently, the theatre-going public received one of your shows very well: The production run was extended, and people commented on the concept you and the designers created for this play. That show closed almost a year ago. In the meantime, you have worked on three different shows, and several other companies have staged different versions of the play, two of which had notable designs that won awards in their own right. The last time you saw the playwright, she commented that you should stage her new works more often, and that if other companies continue to license her new plays at this rate, she might finally be able to remodel her kitchen.

One morning, you receive an email from a cast member from that well-received production a year ago. She was cast in a different role in another company's production of the play; indeed, you are surprised to hear from her because you know that they are opening next week. She

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1. The stage director, or stage manager, is the person in charge of creating the concept for the production of the play and leading the creative process of the production team. See Teatrotaller Complete Production Manual, Directing Section, <http://instruct1.cit.cornell.edu/courses/span1301/page6.html> (last visited Mar. 21, 2008).

describes the production to you, and your heart sinks. It is the same as yours, right down to the molding the scenic designer finally settled on after three tries, the staging of the pivotal argument, and the color of the lead actress's wig. You have done enough shows to know that everyone borrows ideas from each other in this industry, but this is not merely the borrowing of an idea or a concept—it is a wholesale replication.

What do you do? What *can* you do? You call the entertainment lawyer who has helped you with a few things in the past and are completely dismayed by the answer: “Well, the law is not settled in this area. No clear precedent prohibits the copying of your work or your designers’ work or requires a production company to give you credit if it does copy that work. A case can be made for protecting your work under copyright law, but there are some issues about who might actually own your work, and, well, no one has actually gotten a decision out of a court in this area because the few prior cases that made it to court were settled or dismissed on other grounds.”²

This story is not make-believe. Theatres large and small have become enmeshed in incidents in which directors, designers, or entire production teams have claimed that their work on a different production was copied without permission, credit, or remuneration.³ Unfortunately, none of these cases have resulted in a ruling establishing whether the direction and design of a staged production of a play is protectable property.⁴ Copyright, a series of protections for the creators of various types of art, including literature, music, and the visual arts,⁵ is the most likely protection, but no specific protection has yet to be extended in this area. Even if copyright protection is found to apply, the director and designers are considered employees of the production company that is producing their work. Thus, the company could own the copyright because the works were created as works for hire,⁶ and the creators of the designs would

2. See, e.g., Leslie Carroll, *Love! Valour! Compensation! Settles Lawsuit*, BACKSTAGE, Apr. 2, 1999, <http://www.allbusiness.com/services/amusement-recreation-services/4591208-1.html>; Press Release, Society of Stage Directors and Choreographers, Joint Press Release Regarding Mullen v. SSSDC, et al. (Dec. 3, 2007).

3. See, e.g., *Einhorn v. Mergatroyd Prods.*, 426 F. Supp. 2d 189 (S.D.N.Y. 2006) (director sues former company for continuing to use his staging after his firing); *Mantello v. Hall*, 947 F. Supp. 92 (S.D.N.Y. 1996) (Broadway director of *Love! Valour! Compassion!* sues a Florida theatre company for copying production design); First Amended Complaint, *Mullen v. Soc’y of Stage Dirs. & Choreographers*, No. 06 C 6818 (N.D. Ill. 2007), 2006 WL 4031657 (Chicago design team of *Urinetown: The Musical* sues for declaratory judgment that its production did not copy Broadway production); Campbell Robertson, *Creative Team of ‘Urinetown’ Complains of Midwest Shows*, N.Y. TIMES, Nov. 15, 2006, at E3, available at 2006 WLNR 19801617.

4. *Einhorn*, 426 F. Supp. 2d at 196; *Mantello*, 947 F. Supp. at 102.

5. ROGER E. SCHECHTER & JOHN R. THOMAS, INTELLECTUAL PROPERTY 2 (2003).

6. 17 U.S.C. § 101 (2000). An employer is considered the author and owner of a copyright of a work created by (1) an employee in the scope of employment or (2) an independent contractor hired

have no right to have that work attributed to them unless they originally contracted for that right.⁷

What solutions could the law provide for this situation and what changes are needed to adequately protect design artists in the theatre industry? This Comment proposes a two-part solution that can both protect the creators of productions from unapproved copying of their work and ensure that significant contributors to that work receive the ongoing credit they deserve.

The production of a play as a whole is a derivative work of joint authorship; thus, copyright law should protect it. As a work of authorship, the sum of the design elements that form a production are protectable by copyright because the production is an original creation; while based on the text of the play, any given production is developed separately from the underlying work and merits its own protection.⁸ Because of the collaborative and interdependent nature of a production of a play, musical, or opera, the resulting combination of all aspects of design and direction should be protected as a whole rather than as individual elements. Although the copyright protection is collective, there is still a need to give credit to the individuals who contributed to the final product; Congress should therefore create a statutory right of attribution for the individual designers, the director, and the choreographer of a production. This right would require anyone who uses or reproduces the work done by these individuals to either give them clear credit for their work or face liability for statutory damages.

This Comment will proceed in several steps. Part II briefly outlines the creative process behind a theatrical production. Part III discusses the current state of copyright law and describes what a right of attribution is and how it functions. Part IV contends that a production is a derivative work of joint authorship protectable by current copyright law. Part V argues that a right of attribution is needed to protect individual contributors to a production. Finally, Part VI describes the effects these changes would have on the theatre industry and explains why they would be beneficial.

to create one of several specific types of work, provided that the contract expressly states that the work is a work for hire. § 201(b).

7. See §§ 106–106A. These sections enumerate the rights enjoyed by copyright holders: the right of reproduction, adaptation, distribution, public performance and display, and for certain works, limited rights of integrity and attribution. *Id.* The right of attribution extends only to pictorial and sculptural works; thus, to create an obligation of attribution, a party must contract for it. *Id.*

8. See *infra* notes 122–133 and accompanying text.

II. SIX CHARACTERS IN SEARCH OF AN AUTHOR: WHAT GOES INTO CREATING A THEATRICAL PRODUCTION

The written text of a play is the foundation for the art that comes together in a final form to produce a theatrical production presented to an audience.⁹ It is the interaction of the words with the environment created for the play by the director and designers that creates the final product, as “[t]here is something to be said in the theatre in terms of form and color and light that can be said in no other way.”¹⁰ Before one can analyze how a production should be protected, one needs some basic background knowledge about how those forms, color, and light come into being and how they interact with the text.

In a professional or semiprofessional production, the core creators of the physical environment are the director and her design team, which includes the scenic, lighting, costume, and sound designers, as well as a choreographer for works that include dance or fights.¹¹ The scenic designer is responsible for the physical environment of the stage, including scenery and props.¹² The lighting designer is responsible for lighting that environment and the action that takes place in it. The costume designer designs the apparel of the performers, often including wigs and makeup, as well as clothing.¹³ The choreographer normally develops the dance movement for a show that includes dance; in a show featuring fighting, combat, or other specialized movement, there will normally be a separate fight choreographer or other specialized choreographer.

What this group creates springs from the text of the play; it is a visual and auditory depiction of the words of the playwright. While designers each have their own individual vision of how to frame the piece, each team member must work both within the concept that the director and designers have developed and collaboratively with the other designers so

9. W. OREN PARKER & R. CRAIG WOLF, *SCENE DESIGN AND STAGE LIGHTING* 3 (7th ed. 1996) (“The significance of drama to the designer is evidenced by the fact that the major portion of a designer’s training for the theatre is spent in learning to interpret and expand the ideas of the playwright.”).

10. ROBERT EDMOND JONES, *THE DRAMATIC IMAGINATION* 73–74 (1941).

11. PARKER & WOLF, *supra* note 9, at 12. The same type of team is often assembled for academic and amateur productions, but variations are frequent, especially for community theatre productions and productions featuring school-age performers. This Comment will focus on professional productions, both because they are the ones most likely to be plagiarized and because of space considerations. The protections it proposes, however, also apply to nonprofessional productions.

12. Properties are designed by a separate individual for some productions, though that person often works under the supervision or approval of the scenic designer.

13. Wigs and makeup may also be designed or selected by a separate individual.

that the final product has a sensible artistic result.¹⁴ While the art as a whole is collaborative, the designers work on the individual aspects of the production in their individual studios and build those designs in separate shops and studios.¹⁵ Thus, while the director and choreographer are in rehearsal developing blocking and dance and working with the actors, the scenic design is often under construction in the scene shop, the lighting design is being developed based on scenery and blocking being constructed, and the costume designs are being built and fitted. The whole is brought together during technical rehearsals, when all of the elements of direction and design are combined on stage with the actors and crew.¹⁶ Depending upon the complexity of the work, these rehearsals may run for hours or months, during which time all the distinct aspects of the work are merged into a production that will be presented for an audience.¹⁷

The director and designers typically contract with an established theatre or production company to work on a specific show or shows. A design team will sometimes come together without a preexisting company to create a show, especially in a low budget or fringe environment; otherwise, the production company hires directors and designers to fill specific roles in a planned production.

In established theatres, a union may represent some members of the design team. The United Scenic Artists (USA) represents designers,¹⁸ while the Society of Stage Directors and Choreographers (SSDC) represents directors and choreographers.¹⁹ Members of USA and SSDC are required to work under either a collective bargaining agreement with the production company or a special project contract if there is no collective agreement in force.²⁰ While under contract to the company, the design

14. TONY DAVIS, *STAGE DESIGN* 128 (2001). According to scenic designer Richard Hudson, “[t]heatre is a collaborative art and you have to work as a team with the director, lighting designer, and costume designer—and all of you have to believe in the concept or it won’t work.” *Id.*

15. PARKER & WOLF, *supra* note 9, at 130.

16. *Id.* at 558.

17. During the author’s tenure in the theatre, she spent as short a period as a few hours to as long as four weeks in technical rehearsals for shows.

18. United Scenic Artists Local USA 829, About Us, http://www.usa829.org/index.php?option=com_content&task=view&id=1&Itemid=8 (last visited Mar. 21, 2008).

19. Society of Stage Directors and Choreographers, Membership, <http://www.ssdcc.org/membership.php> (last visited Mar. 21, 2008).

20. See LORT/USA Agreement 2 (July 1, 2005), http://www.usa829.org/index.php?option=com_content&task=view&id=75&Itemid=267 (follow “LORT Agreement 2005-2009” hyperlink); The League of Resident Theatres and the Society of Stage Directors and Choreographers, Inc. Collective Bargaining Agreement April 15, 2005–April 14, 2009 1 (Apr. 15, 2005) [hereinafter SSDC CBA], http://www.ssdcc.org/LORT_05-09.pdf; see also Society of Stage Directors and Choreographers, *supra* note 19.

team, and the director in particular, often has a great deal of artistic freedom in creating the production.

This exceptionally brief overview of the theatrical production process may serve to illuminate how a play comes into being. In sum, a play is a carefully designed and crafted work that begins with the playwright's text, subsequently expressed through the collaborative artistic efforts of several different individuals.

III. THE CHERRY ORCHARD: CURRENT COPYRIGHT LAW

Turning from the production process to the law, this Part will briefly discuss the basic features of copyright protection, including who is considered an author, what is required for a work to be considered fixed, what types of works are covered by copyright, and who owns the copyright when a work can be protected. U.S. copyright law derives from Article I, Section 8 of the Constitution, which grants Congress the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings"²¹ Congress first established copyright laws under this grant in 1790.²² Holders of copyrights use these laws to protect the "fruits of intellectual labor,"²³ including literature, works of art, and motion pictures.²⁴

Currently, the Copyright Act protects "original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated"²⁵ The protection applies to entirely new works, compilations, and works derived from works already in existence.²⁶ Therefore, in determining if Copyright Act protections apply to a work, one must determine not only whether the work is sufficiently original to be considered an original work of authorship,²⁷ but also whether it is sufficiently fixed to be granted statutory protection.²⁸

21. U.S. CONST. art. I, § 8, cl. 8.

22. H.R. REP. NO. 94-1476, at 47 (1976), as reprinted in 1976 U.S.C.C.A.N. 5659, 5660.

23. *In re Trade-Mark Cases*, 100 U.S. 82, 94 (1879).

24. 17 U.S.C. § 102(a)(1)-(8) (2000).

25. § 102(a).

26. § 103(a).

27. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991); *Southco Inc. v. Kanebridge Corp.*, 390 F.3d 276, 281 (3d Cir. 2004).

28. §§ 101, 102 (a) (2000); H.R. REP. NO. 94-1476, at 52 (1976), as reprinted in 1976 U.S.C.C.A.N. 5659, 5665.

A. Original Works of Authorship

What, then, is originality, and how much of it is required for protection under the federal copyright statute? In *Feist Publications, Inc. v. Rural Telephone Service Co.*, the Supreme Court determined that originality requires an author or authors to independently create a work, rather than copying it from another work.²⁹ The result may closely resemble another work as long as that resemblance is not the result of copying.³⁰ While the degree of creativity or originality required is fairly low, the work cannot be completely unoriginal.³¹ Therefore, in *Feist*, a directory which was composed of unprotectable facts would be eligible for copyright protection to protect the selection and arrangement of the information had the publisher arranged that information in a somewhat creative way.³² The phone book in *Feist*, however, was not copyrightable because its arrangement, which merely alphabetized the names and numbers in a phone book, lacked the originality needed for protection.³³

Despite being original and having a bit of creativity, a work still may lack protection under federal copyright law. In protecting an original work of authorship, the United States protects only the expression of ideas or concepts, not the ideas or concepts themselves.³⁴ The Copyright Act specifically excludes “any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.”³⁵ Courts have developed the doctrines of merger and *scènes à faire* to prevent authors from monopolizing ideas through copyright protection.

These doctrines are similar; the primary distinction lies in their application. The merger doctrine is primarily applied to utilitarian works that embody factual or technical ideas, while the doctrine of *scènes à faire* is typically applied to narrative or fictional works.³⁶ Under the merger doctrine, if there are so few ways of expressing an idea that the idea and its expression are essentially the same, the idea and expression are considered to be merged and copyright protection is not available.³⁷

29. 499 U.S. at 345.

30. *Id.*; see also *Southco*, 390 F.3d at 282.

31. *Feist Publ'ns*, 499 U.S. at 345. According to the Court, “even a slight amount” of creativity is sufficient for copyright protection of independently created works. *Id.*

32. *Id.* at 363.

33. *Id.*

34. 17 U.S.C. § 102(b) (2000); *Feist Publ'ns*, 499 U.S. at 344–45; *Mazer v. Stein*, 347 U.S. 201, 217 (1954).

35. § 102(b).

36. PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT § 2.3.2 (3d ed. 2005).

37. *Kregos v. Associated Press*, 937 F.2d 700, 705–06 (2d Cir. 1991). In one case applying the merger doctrine, the court held that, because there were only a limited number of practical ways to arrange information about the outcome in medical malpractice cases, charts containing that informa-

Similarly, under the doctrine of *scènes à faire*, copyright protection is not available for an expression that is necessarily dictated by a concept or plot point,³⁸ the doctrine thus precludes expressions that are standard, commonplace, or required as a result of the use of an idea from creating the basis for an enforceable copyright.³⁹ Both doctrines are applications of the basic concept that copyright protection extends only to expression, not to the ideas underlying that expression.⁴⁰ They act to prevent the monopolization of concepts, ideas, or facts under a law meant to protect expressions, not ideas.⁴¹

The expressions protected by copyright must be original to their author, but the author need not necessarily start from scratch in order for his or her creation to be afforded protection.⁴² Collective works and compilations, as well as derivative works, receive protection.⁴³ A collective work is a work “in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole,” while a compilation “is a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship.”⁴⁴ In other words, a collective work is a form of compilation whose contents can stand on their own as independent works of authorship, while compilations that are not collective works comprise elements that may not be protectable.⁴⁵ The

tion were not copyrightable under that doctrine. *Matthew Bender & Co. v. Kluwer Law Book Publishers*, 672 F. Supp. 107, 110 (S.D.N.Y. 1987). The court stated that “[w]hile in theory there are numerous ways to place this information in chart form, from a practical point of view the number of ways to organize this information in a useful and accessible manner is limited.” *Id.* The court’s disallowance of copyright protection for the charts prevented the publisher from prohibiting the use of the underlying data by others. *Cf. Ets-Hokin v. Skyy Spirits, Inc.*, 323 F.3d 763, 766 (9th Cir. 2003) (treating photography of a Skyy bottle as a “shared concept” that merits only “thin” copyright protection against virtually identical copying).

38. SCHECHTER & THOMAS, *supra* note 5, at 53.

39. *Gaiman v. McFarlane*, 360 F.3d 644, 659 (7th Cir. 2004); *Ets-Hokin*, 323 F.3d at 765. An example of the *scènes à faire* doctrine can be found in *See v. Durang*, 711 F.2d 141 (9th Cir. 1983) (*per curiam*), where playwright Christopher Durang was sued for copyright infringement based on similarities between Durang’s one-act play *An Actor’s Nightmare* and the plaintiff’s play *Fear of Acting*. The Ninth Circuit held that ten of the twenty-two alleged similarities between the plays were unprotected under that doctrine, because they “follow[ed] obviously from the unprotected idea of a surprised understudy.” *Id.* at 143.

40. *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 979 (2d Cir. 1980); SCHECHTER & THOMAS, *supra* note 5, at 53.

41. GOLDSTEIN, *supra* note 36, § 2.3.2.

42. *See Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 348 (1991); *Gilliam v. ABC, Inc.*, 538 F.2d 14, 19–20 (2d Cir. 1976).

43. 17 U.S.C. § 103(a) (2000); *Feist Publ’ns*, 499 U.S. at 345; *Gilliam*, 538 F.2d at 19–20.

44. § 101.

45. *Id.* Encyclopedias, anthologies, and periodicals are good examples of collective works, because they are groupings of independently copyrightable works. MELVILLE B. NIMMER & DAVID

protection afforded to compilations and collective works is limited to the selection and arrangement of those works; protection is not gained on unprotectable or otherwise protectable contents by simply copyrighting a compilation containing those contents.⁴⁶

Derivative works are also protectable despite their origins in already existing works,⁴⁷ provided that the underlying work was legally used.⁴⁸ The derivative work's author's ability to use the underlying work and benefit from the derivation is limited by the scope of the license granted by the owner of the underlying work.⁴⁹ The copyright in a derivative work extends only to the material contributed by the new author; the rights to the original work remain with the author of the original work.⁵⁰ Derivative works therefore must meet a higher level of originality than nonderivative works in order to qualify for copyright protection.⁵¹ Protection in the derivative work does not give the author any rights in the original work, nor does it change "the scope, duration, ownership, or subsistence of, any copyright protection in the preexisting material."⁵²

As the foregoing discussion demonstrates, there are many different permutations of authorship that can create an original work of authorship that qualifies for copyright protection. An original work of authorship can consist of entirely new expression, can be a collection of other works or of unprotectable data, or can be derived from an underlying original work. The level of originality required is low, though it increases somewhat for works derived from a work already in existence.⁵³ As described above, expressions of ideas or concepts that are so narrow that protection of the expression would equate to copyright protection over the idea cannot be protected as original works of authorship, nor can expressions whose depiction is dictated by the underlying idea.⁵⁴ This broad concept

NIMMER, NIMMER ON COPYRIGHT § 3.02 (2000). Compilations, however, can be made up of non-copyrightable works. *Id.* A possible example would be a "found poem" of advertising slogans too short for copyright protection. See Dictionary.com, <http://dictionary.reference.com/browse/found-poem> (last visited Mar. 21, 2008) (defining the term "found poem").

46. *Feist Publ'ns*, 499 U.S. at 348.

47. § 103.

48. *Id.*

49. See *Gilliam v. ABC, Inc.*, 538 F.2d 14, 19–20 (2d Cir. 1976).

50. § 103(b); *Stewart v. Abend*, 495 U.S. 207, 223 (1990).

51. See *Stewart*, 495 U.S. at 223; *L. Batlin & Son, Inc. v. Snyder*, 536 F.2d 486, 491 (2d Cir. 1976) (works based on a work already in the public domain must substantially vary from the original to be copyrightable).

52. § 103(b).

53. *Gaiman v. McFarlane*, 360 F.3d 644, 661 (7th Cir. 2004); NIMMER & NIMMER, *supra* note 45, §3.03.

54. See *supra* notes 36–41 and accompanying text.

of an original work of authorship means that a wide variety of types of intellectual creations are potentially protectable under the Copyright Act.

B. Fixed in a Tangible Medium of Expression

To be protected under federal copyright law, a work must not only be an original work of authorship, but must also be sufficiently fixed in a tangible form so that it may be reproduced or perceived by another person.⁵⁵ A work is considered “fixed” when it is embodied “in a copy or phonorecord, by or under the authority of the author, [such that it] is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.”⁵⁶ This includes expressions recorded that can be perceived by people unaided and those that must be perceived with the aid of a device, such as a computer hard drive, other forms of digital media, or film.⁵⁷ This broad definition is sufficiently flexible to allow the many copyrightable forms and types of work to be considered fixed in their typical medium of creation.⁵⁸

Improvisations, unrecorded performances or broadcasts, and similar transitory creations are not considered to be fixed and were not intended to be protected under the federal copyright statute.⁵⁹ While some kind of enduring record of the work is required for protection, the author need not be the individual who creates that final embodiment; the work need only be fixed under the authority of the original author for the author to be granted protection under the statute.⁶⁰ Therefore, a writer may dictate his or her work to an assistant who transcribes what the writer has said; the spoken words are fixed by a third party, but the writer is still considered the author.

55. § 102(a).

56. § 101. Copies and phonorecords are material objects in which works are fixed such that they can be perceived at a later time; “phonorecords” is the generic term for such objects on which sound is recorded, while “copies” are objects on which any other type of expression is recorded. *Id.*

57. §§ 101–102.

58. *See* H.R. REP. NO. 94-1476, at 52 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 5659, 5665 (“[T]he list sets out the general area of copyrightable subject matter, but with sufficient flexibility to free the courts from rigid or outmoded concepts of the scope of particular categories.”).

59. *Id.* (“[A]n unfixated work of authorship, such as an improvisation or an unrecorded choreographic work, performance, or broadcast, would continue to be subject to protection under State common law or statute, but would not be eligible for Federal statutory protection under section 102.”).

60. § 101; *see* *Carell v. Shubert Org., Inc.*, 104 F. Supp. 2d 236, 247 (S.D.N.Y. 2000) (makeup applied to the face of performers by artists other than the original designer considered fixed under the statute).

C. Enumerated Categories

While a work need only qualify as an original work of authorship fixed in a tangible form to be protected under the Copyright Act, the statute provides further guidance about what types of works are currently considered protectable. It specifically enumerates eight categories of protected works: literary works; musical works; dramatic works; pantomime and choreographic works; pictorial, graphic, and sculptural works; motion pictures and audiovisual works; sound recordings; and architectural works.⁶¹

While these categories provide a helpful shortcut and framework in determining if a work is protected by copyright, they were not intended to limit the types of works protectable under the Copyright Act. According to the House Report on the 1976 Copyright Act, the list was intended to be flexible, so that courts could expand the scope of the enumerated categories.⁶² In the 200-plus years of federal copyright protection, copyright has expanded to include both new forms of expression and those that only gradually came to be recognized as meriting protection.⁶³ Two such examples are photography and choreography. In *Burrow-Giles Lithographic Co. v. Sarony*, the new art of photography was recognized as being sufficiently creative and original so as to produce a work that merited copyright protection, despite not being specifically enumerated in the types of works protected by copyright; the Court reasoned that the photograph was the means “by which the ideas in the mind of the author are given visible expression.”⁶⁴ Similarly, in 1976, Congress amended the Copyright Act to specifically include choreographic works.⁶⁵ While choreography predates copyright protection, this type of work gradually came to be considered worthy of protection, just as existing law has also embraced new forms such as photography.

Of special interest in this Comment is the inclusion of the category of dramatic works in the Copyright Act. The scope of this category has never been specifically defined; the House Report on the 1976 Copyright Act declared it one of the categories not requiring a definition because these works “have fairly settled meanings.”⁶⁶ Despite this

61. § 102(a)(1)–(8).

62. H.R. REP. NO. 94-1476, at 53.

63. *Id.* at 51.

64. 111 U.S. 53, 58 (1884).

65. *Martha Graham School & Dance Found., Inc. v. Martha Graham Ctr. of Contemporary Dance, Inc.*, 380 F.3d 624, 632 (2d Cir. 2004); H.R. REP. NO. 94-1476, at 52; NIMMER & NIMMER, *supra* note 45, § 2.07(B).

66. H.R. REP. NO. 94-1476, at 53. House Report 1476 does not give any examples of this “settled definition” for a dramatic work. However, one of the earliest copyright cases dealing with a play, *Daly v. Palmer*, 6 F. Cas. 1132, 1136 (C.C.S.D.N.Y. 1868) (No. 3552), includes in its defini-

characterization, no ruling has definitively settled whether the category includes only the text of a written play, or if it also includes the works of design and direction that are created to bring that text to life on stage. If intended only to protect the text of a play and, in the case of a musical, any accompanying music, the category is redundant, since the text is protected as a literary work, and the music is protected as a musical work. If, however, the category is meant to be broader, a strong argument can be made for an individual production being a dramatic work.

D. Ownership of Copyright

The copyright of a work that is protectable under the Copyright Act initially vests in the author of the work.⁶⁷ "Author," however, does not always mean the person who actually either physically created or prepared the work.⁶⁸ An employer or a person who had a work prepared under specific circumstances can be considered the author of that work, with the initial ownership of the copyright vesting in the employer or hiring party.⁶⁹ Such a work is called a "work for hire."⁷⁰ A work is considered to have been made for hire if it was either prepared by an employee within the scope of his or her employment⁷¹ or specially ordered or commissioned for inclusion in one of several statutorily described types of works.⁷² When a work is specially ordered or commissioned, it is considered to be a work for hire only if the parties agree to characterize the work as such in writing.⁷³

U.S. copyright law also allows for the joint authorship of original works. Coauthors of a joint work co-own the copyright,⁷⁴ and each has the right to use the work subject to an accounting to the other owners.⁷⁵ For two or more creators to be considered coauthors of a joint work, each author must have intended that each contribution be combined into a

tion of a copyrightable dramatic composition the actions of performers, provided that they constitute performance of a written work.

67. 17 U.S.C. § 201(a) (2000).

68. § 201(a)-(b); *Cmt. for Creative Non-Violence v. Reid*, 490 U.S. 730, 737 (1989).

69. § 201(b).

70. § 101.

71. Courts generally use federal agency law to determine if someone is working as an employee. *Reid*, 490 U.S. at 740. Agency law establishes a multifactor balancing test that considers the hiring party's authority over the work and the manner of its creation, the skill and independence of the creator, and the nature of the business relationship between the parties. *Id.* at 751-52.

72. § 101. Specially ordered works may be classified as works for hire when created as a contribution to a collective work; part of a motion picture or audio visual work; translation; supplementary work prepared as an adjunct to a work by another author to assist in the understanding of that work; compilation; instructional text; test or test answers; or atlas. *Id.*

73. *Id.*; *Aymes v. Bonelli*, 980 F.2d 857, 860 (2d Cir. 1992).

74. § 201(a).

75. *Ashton-Tate Corp. v. Ross*, 916 F.2d 516, 522 (9th Cir. 1990).

single joint work.⁷⁶ The coauthors' contributions may be either inseparable or interdependent parts of the final completed work.⁷⁷ Inseparable parts only have meaning within the context of the completed project, while interdependent parts have some independent meaning but achieve their full significance only within the context of the completed work.⁷⁸ Whether those contributions must themselves be individually copyrightable is currently the subject of a circuit split.

The Second and the Ninth Circuits require each author to have individually copyrightable contributions to a work in order to be considered a coauthor.⁷⁹ The Seventh Circuit, however, recently ruled that in situations where the final product is copyrightable but the individual contributions that went into that product were not, the authors who made those nonprotectable contributions should be considered coauthors.⁸⁰ The Fourth Circuit has since followed the approach of the Second and Ninth Circuits in an unpublished case involving sound recordings.⁸¹ The argument for requiring an independently copyrightable contribution usually emphasizes the use of the term "author" in the statute's description of a joint work,⁸² implying that, while unprotectable concepts and works are created by someone, to be considered an author under the Copyright Act requires the individual production of a copyrightable work, even if the final product is the result of collaboration.⁸³ In taking an alternative approach, the Seventh Circuit argued that where two or more people intended to create a copyrightable work, "it would be paradoxical if though the result of their joint labors had more than enough originality and creativity to be copyrightable, no one could claim copyright."⁸⁴ Thus, in works where the nature of the creative process requires different individuals to contribute elements that are not in themselves copyrightable, the final work should not be deprived of copyright protection, and the contributors to that work should have joint authorship.⁸⁵

The Seventh Circuit's approach is also similar to that followed in the oft-cited treatise *Nimmer on Copyright*, which posits that individuals

76. *Aalmuhammed v. Lee*, 202 F.3d 1227, 1231 (9th Cir. 2000); *Childress v. Taylor*, 945 F.2d 500, 505 (2d Cir. 1991).

77. § 101; *Childress*, 945 F.2d at 505.

78. *Childress*, 945 F.2d at 505.

79. *Aalmuhammed*, 202 F.3d at 1231; *Thomson v. Larson*, 147 F.3d 195, 200 (2d Cir. 1998); *Childress*, 945 F.2d at 505; *Ross*, 916 F.2d at 521.

80. *Gaiman v. McFarlane*, 360 F.3d 644, 658–59 (7th Cir. 2004).

81. *Brown v. Flowers*, 196 F. App'x. 178, 188 (4th Cir. 2006).

82. § 101.

83. *Aalmuhammed*, 202 F.3d at 1233; *Erickson v. Trinity Theatre, Inc.*, 13 F.3d 1061, 1070 (7th Cir. 1994).

84. *Gaiman*, 360 F.3d at 658–59.

85. *Id.*

who make more than a *de minimus* contribution to a protectable work should be considered joint authors, provided that they were acting with the intent that the contributions be merged.⁸⁶ While the Seventh Circuit's decision in *Gaiman* was limited to the unusual situation where none of the contributors to the final work had made independently copyrightable contributions, the case also makes clear that there should be an exception to the requirement for independently copyrightable contributions for ownership when the contributor's work could be protected "because of the nature of the particular creative process that had produced it."⁸⁷

The Copyright Act states the basic rule on who owns the copyright of a work in deceptively simple terms: The author of a work owns a copyright. If the work is considered a work for hire, however, the author is the employer of the person who creates the work. Also, a work may have more than one creator, and every person that contributed to the creation of a work may not have made a sufficiently significant contribution to be considered an author. Thus, while most cases of joint authorship require individually copyrightable contributions for the contributor to be considered a joint author, where the final work is protectable but the contributions of the individual authors are not, authority exists that supports finding those contributors to be joint authors in order to provide protection for the resulting work.

E. Right of Attribution

While copyright law exists primarily to protect the economic rights of the copyright owner,⁸⁸ the law as it currently stands does not necessarily offer any protection to the creator of a work. While copyright initially vests in the creator⁸⁹ (or in the case of a work for hire, the employer),⁹⁰ the ownership of the copyright can be transferred to someone not involved in the creation of the work.⁹¹ Put simply, the original author can sell his or her various interests in his creation, and under U.S. law, a careless, ill-informed, or powerless author can lose all of his or her rights

86. NIMMER & NIMMER, *supra* note 45, § 6.07.

87. *Gaiman*, 360 F.3d at 659.

88. Roberta Rosenthal Kwall, *Copyright and the Moral Right: Is an American Marriage Possible?*, 38 VAND. L. REV. 1, 2 (1985).

89. 17 U.S.C. § 201(a) (2000).

90. § 201(b).

91. § 201(d).

to his or her work, including the right to be credited with the creation of the piece.⁹²

In Europe and many other regions around the world, the author of a creative work has certain “moral rights” over and above those protected by copyright.⁹³ These rights include the right to be properly credited with the creation of a work (the right of attribution or paternity), the right to prevent changes to or the improper display of the work (the right of integrity), and the right to prevent the publication of the work (the right of disclosure).⁹⁴ These rights are often inalienable.⁹⁵

The Berne Convention for the Protection of Literary and Artistic Works (Berne) embraced and codified the concept of moral rights.⁹⁶ Section 6bis of Berne gives authors the right to claim both their authorship of the work and to object to any infringements on the integrity of that work, stating that “the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.”⁹⁷ When the United States joined Berne in 1988 in order to strengthen protection of U.S. works abroad,⁹⁸ it had to make several changes to its copyright laws in order to comply with Berne’s provisions.⁹⁹ The statutory enactment of moral rights was not, however, among those changes. Instead, Congress determined that existing U.S. statutory and common law protections, including those available under the Lanham Act,¹⁰⁰ protected the rights

92. See Kwall, *supra* note 88, at 2–3 (stating that the 1976 Copyright Act protects only copyright owners and creators, and that to protect their personality interests, creators mainly must rely on contract, competition, defamation, and privacy laws).

93. Berne Convention for the Protection of Literary and Artistic Works, art. 6bis, *adopted* Sept. 9, 1886, 102 Stat. 2853, 828 U.N.T.S. 221 [hereinafter *Berne*]; Michael B. Gunlicks, *A Balance of Interests: The Concordance of Copyright Law and Moral Rights in the Worldwide Economy*, 11 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 601, 607–08 (2001); Jean-Luc Piotraut, *An Authors’ Rights-Based Copyright Law: The Fairness and Morality of French and American Law Compared*, 24 CARDOZO ARTS & ENT. L.J. 549, 595 (2006).

94. Kwall, *supra* note 88, at 5–9.

95. *Id.* at 12.

96. Berne, *supra* note 93, art. 1. Berne is an international agreement initially established to protect authors’ rights in their literary and artistic works. *Id.*

97. *Id.* at art. 6bis(1).

98. S. REP. NO. 100-352, at 2 (1988), as reprinted in 1988 U.S.C.C.A.N. 3706, 3707.

99. *Id.* at 8. The changes related to the protection of architectural works and the formalities required for copyright protection. *Id.* at 11.

100. 15 U.S.C. §§ 1051–1072, 1091–1096, 1111–1127, 1141–1141n (2000). The Lanham Act is a federal statute primarily concerned with the use of trademarks. It also prohibits producers from passing off their own goods as someone else’s and other forms of unfair competition relating to the origin of a product. *Id.*

of integrity and attribution to an extent sufficient to comply with Berne.¹⁰¹

While limited protection of proper attribution under the Lanham Act was available at the time the United States adopted Berne, the reach of the Lanham Act has since been limited.¹⁰² Prior to 2003, artists claiming a right of attribution or that a work had been inappropriately credited to him or her would often include a claim of misrepresentation under section 43(a) of the Lanham Act.¹⁰³ In *Dastar Corp. v. 20th Century Fox Film Corp.*, however, the Court held that in the case of communicative works (in that case particularly, a VHS version of a documentary), the Lanham Act's requirement that a good not be misleading about its origin did not refer to the communicative content contained in the physical item, but rather to who produced the tangible product being sold.¹⁰⁴ The Lanham Act's definition of "origin of goods" was declared "incapable" of indicating the source of the expressions or ideas that composed a communicative work.¹⁰⁵ While the Court hinted that such claims could potentially be brought under the false advertising portions of the Lanham Act,¹⁰⁶ the decision drastically limited the federal statutory options for the protection of rights of attribution for artists who create nonmaterial works.¹⁰⁷ They must once again rely primarily on common law theories such as unfair competition, misappropriation, or unjust enrichment when copyright law does not adequately protect their interests.

Unfair competition, including misappropriation and unjust enrichment, is a potential claim that could be brought against a party that has failed to properly attribute design or directorial work.¹⁰⁸ In the few cases where theatre directors and designers have attempted to use common law claims to protect their work, they have seen poor results, due both to difficulties acquiring jurisdiction over defendants, whose failure to properly attribute a design typically takes place in a distant state,¹⁰⁹ and courts that

101. S. REP. NO. 100-352, at 9-10.

102. See NIMMER & NIMMER, *supra* note 45, § 8D.03.

103. See, e.g., *King v. Innovation Books*, 976 F.2d 824, 828 (2d Cir. 1992); *Mantello v. Hall*, 947 F. Supp. 92, 100 (S.D.N.Y. 1996).

104. 539 U.S. 23, 31 (2003).

105. *Id.* at 32.

106. *Id.* at 38.

107. *Id.*

108. *Erickson v. Trinity Theatre, Inc.*, 13 F.3d 1061, 1065 (7th Cir. 1994) (claim of unfair competition and other tort claims in case involving authorship of a dramaturg); *Einhorn v. Mergatroyd Prods.*, 426 F. Supp. 2d 189, 193 (S.D.N.Y. 2006) (claims included common law misappropriation in case involving ownership of direction); *Carell v. Shubert Org., Inc.*, 104 F. Supp. 2d 236, 241 (S.D.N.Y. 2000) (claims included false designation of origin in case involving use of makeup designs); *Mantello*, 947 F. Supp. at 95 (claims included reverse passing off and unjust enrichment in suit alleging copying of significant aspects of overall production).

109. *Mantello*, 947 F. Supp. at 102.

have failed to recognize a cognizable injury on the part of plaintiff artists.¹¹⁰

Visual artists have a special federal statute that protects their ability to take credit for their works. The Visual Artists' Rights Act of 1990 (VARA)¹¹¹ grants an author of a work of visual art¹¹² the right to claim ownership over his or her works; the right to prevent others from asserting that the artist created works that he or she did not create; and, subject to certain limitations, the ability to prevent the destruction of the work or its distortion or modification if the changes would be prejudicial to the artist's reputation.¹¹³ VARA does not permit the transfer of these rights, and they are separate from the rights granted by copyright protection.¹¹⁴ VARA's protections, however, do not extend beyond works of visual art. For any other work of authorship, the rights protected by VARA must be either reserved by contract when an author transfers his or her copyright or protected under other causes of action, such as unfair competition or defamation.¹¹⁵

IV. THE TAMING OF THE SHREW: A PRODUCTION AS A COPYRIGHTABLE DERIVATIVE WORK

In this collaborative art, then, what is the best way to protect the finished product? Is a production protectable at all, or is it an unfixed version of the written text? If the purpose of federal copyright law is to "promote the Progress of Science and useful Arts," as required by the Constitution, what, if any, protection should be given to a staged production of a play in order to best promote the art form?¹¹⁶ There is plainly a call for some kind of protection from the theatre industry. Cases like *Mantello v. Hall*¹¹⁷ and *Einhorn v. Mergatroyd Productions*,¹¹⁸ the recent controversy over *Urinetown: The Musical*,¹¹⁹ and the ongoing debate in trade publications¹²⁰ all reveal a need for protection and a clearly articulated rule to guide the industry. The current debate demonstrates a perception in some parts of the industry that what is put onstage deserves

110. *Einhorn*, 426 F. Supp. 2d at 195.

111. 17 U.S.C. § 106A (2000).

112. § 101. A work of visual art is defined as "a painting, drawing, print, or sculpture" that exists either in a single copy or a signed limited edition numbered less than 200. *Id.*

113. § 106A.

114. § 106A(c).

115. *See Carter v. Helmsley-Spear*, 71 F.3d 77, 83 (2d Cir. 1995).

116. U.S. CONST. art. I, § 8, cl. 8.

117. 947 F. Supp. 92 (S.D.N.Y. 1996).

118. 426 F. Supp. 2d 189 (S.D.N.Y. 2006).

119. Robertson, *supra* note 3.

120. *Compare* Joan Channick, *Author! Author?*, AM. THEATRE, Apr. 2006, at 6, available at <http://www.tcg.org/publications/at/apr06/exec.cfm>, with Carroll, *supra* note 2.

copyright protection. But what form should that protection take? This Part applies copyright law to the theatrical production context and concludes that productions are an original, derivative work of the underlying text; the work is actually fixed in a tangible form; productions already fit within a reasonable reading of the categories enumerated in the Copyright Act; and directors and designers of productions should be considered joint authors of the works they produce.

A. Originality

The performed version of a play fits the requirements of an original work of authorship as created by the design team and director.¹²¹ While their work is derivative of the important work done by the playwright, it nonetheless satisfies the requirements for originality established by statute and current case law. Except in cases where the design team and director choose to copy an already existing production, the choices as to staging and design are made for the individual production in question. While certain needs are often expressed in the text of the play itself, how those needs are met is determined by the design team.¹²² Moreover, even in a production attempting to evoke an established or traditional concept, designers and directors must select and arrange the chosen elements in order to produce the final effect of the performance.¹²³

With rare exceptions, a production would be considered to be derivative of the underlying work of the play, musical, or opera, as it is based and builds on that underlying work.¹²⁴ Indeed, staging a play without the permission of the author would violate the exclusive rights held by the copyright owner of the underlying work.¹²⁵ The copyright statute defines a derivative work as one in which that underlying work is “recast, transformed, or adapted.”¹²⁶ Transforming a work from words is a sufficient recasting of the written work for the end product to be considered a derivative, especially when one considers the additional artistry that must be contributed by the directors and designers to make the transformation successful.¹²⁷ Even when a playwright gives very specific

121. See discussion *supra* Part III.A.

122. See PARKER & WOLF, *supra* note 9, at 30–31.

123. See *id.* While the director’s concept may be a traditional rendering of a play, the specific choices made by that director and design team to fulfill that concept are new and different for each production.

124. 17 U.S.C. § 101 (2000).

125. § 106(4); see *Gilliam v. ABC, Inc.*, 538 F.2d 14, 20 (2d Cir. 1976).

126. § 101.

127. Renowned scenic designer and Yale School of Drama Professor Ming Cho Lee has described the work of a designer as “transform[ing] words into pictures, visual imagery, the physical work within which the events take place.” DAVIS, *supra* note 14, at 44.

directions as to staging and design choices, it would be nearly impossible (and artistically undesirable) for her to dictate every choice, from the setting of the work inside a house to the type of carpet on the floor to the precise manner of scorn with which the wife treats her adulterous husband.

The degree of originality in a theatrical production is sufficient to qualify for copyright protection, even under the heightened standard applied to a derivative work.¹²⁸ The choices that are made are sufficiently transformative to meet the heightened standards of originality required for such a work. A derivative work needs to significantly differ from the underlying work,¹²⁹ while the text of a play or musical often indicates, sometimes in detail, what the physical environment of the production should be, those directions can rarely fully articulate the choices that must be made by the director and designers in order to bring the play to life.

For example, take Ibsen's description of the Helmer residence at the beginning of Act I of *A Doll's House*.¹³⁰ It is described as a "comfortable room," with doors to the left and right on the back wall, a piano between those doors, doors on the left and right walls, a window, a round table, armchairs, a small sofa, a rocking chair, china figures, a bookcase with bound books; and Ibsen gives the placement of these and other items.¹³¹ It is a winter day, indicating a certain kind of light and some costume requirements.¹³² Even if the director and design team choose to follow this detailed description, choices and adaptations must be made, in order to accommodate the physical space in which the play will be performed, adapt the costumes to the performers, conform to the budget of the show, and reflect the aesthetic of the production. This description tells us nothing of what the furniture looks like, the color choices, and other choices that make the production distinctive. Ibsen also provides instructions to the director for the blocking, but that blocking must also reflect the arrangement of the stage, the character choices for the performers, and the lighting choices.¹³³ The choices that must be made are more than sufficient to provide the originality required for copyright.

The process of creating the performed production of a play can be roughly analogized to that of composing the photograph in question in

128. *Gaiman v. McFarlane*, 360 F.3d 644, 661 (7th Cir. 2004); see also *supra* notes 47–52 and accompanying text.

129. *Gaiman*, 360 F.3d at 661.

130. Henrik Ibsen, *A DOLL HOUSE* 43 (Rolf Fjelde trans., Signet Classic 4th ed. 1992) (1879).

131. *Id.*

132. *Id.*

133. *Id.*

Burrow-Giles Lithographic Corp. v. Sarony.¹³⁴ While a unique person, Oscar Wilde, served as the existing impetus of the photo, the photographer's work in selecting Wilde's costume, selecting and arranging the draperies and accessories staging the shoot, arranging the light and shade, and evoking the subject's desired expression transformed the resulting photo into a protectable work of art.¹³⁵ The designers and director of a production fulfill a similar role as the photographer in *Burrow-Giles*, except that instead of creating a particular vision of an individual, they are creating a unique presentation of a written work.

The scènes à faire and merger doctrines¹³⁶ would function as they do when applied to other copyrightable works. They would serve to prevent the stifling of art by preventing the protection of similar choices that are dictated by the text of the play. If all the choices that must be made to put the text on stage are made in the text, the scènes à faire doctrine would prevent the direction and designs from qualifying for copyright protection.¹³⁷ Yet while some people see the traditional interpretations of even well-known plays as a limitation,¹³⁸ many directors and designers see those traditional interpretations as a challenge to do something different. Juliet may be required to be overheard by Romeo in the famous balcony scene, and while it is traditionally done with her leaning out over the balustrade of her bedroom balcony, the only actual requirement dictated by the text is that she be unaware of the presence of her lover.¹³⁹ While coming up with an alternative may be difficult, it can be done effectively.¹⁴⁰ If a work is still under copyright and the author does not desire an experimental approach, the author still holds all rights in the underlying work and can limit the production through the licensing agreement.¹⁴¹

134. 111 U.S. 54 (1884).

135. *Id.* at 60.

136. See *supra* notes 36–41 and accompanying text.

137. See *Ets-Hokin v. Skyy Spirits, Inc.*, 323 F.3d 763, 766 (9th Cir. 2003).

138. See David Leichtman, Comment, *Most Unhappy Collaborators: An Argument Against the Recognition of Property Ownership in Stage Directions*, 20 COLUM. J.L. & ARTS 683, 712 (1996) (discussing the historical use of so-called "mandatory" scenes in well-known plays).

139. WILLIAM SHAKESPEARE, *THE MOST EXCELLENT AND LAMENTABLE TRAGEDIE OF ROMEO AND JULIET* act 2, sc. 2.

140. For an example of a fresh take on an oft-produced work in the opera world, see Julie Taymor's version of Mozart's *The Magic Flute* that was widely broadcast in early 2007. Ms. Taymor's production was highly stylized and primarily aimed at family audiences, a rarity in opera. Anthony Tommasini, *An Opera at the Met That's Real and 'Loud'*, N.Y. TIMES, Jan. 1, 2007, at E1, available at http://www.nytimes.com/2007/01/01/arts/music/01flut.html?_r=1&oref=slogin.

141. The control over productions exercised by Samuel Beckett, and by his estate after his death, exemplifies an author's ability to control a production through licensing. Productions that do not comply with the specific instructions given in the text for the gender of the characters, the movement of the performers, or the scenic design lose their performance licenses. Mel Gussow,

Nor would the traditional concept of a moonlit Juliet on her bedroom balcony be locked up by the first production to employ that staging. While the specific manner of portraying that idea may be protectable, the idea of a traditional balcony love scene is not, because copyright can only protect the unique expression of the idea, not the idea itself.¹⁴² If the performance options for the scene are so limited by the text that protecting the expression would protect the idea, merger would prevent the protection of that expression,¹⁴³ but again, the idea itself is never protectable. Copyright protection is not structured to prevent another company from using a similar concept in a production, but rather to prevent copying how that concept is expressed.

A production of a play or musical has sufficient originality to merit copyright protection as a derivative work based on the underlying text, because of the significant choices, selections, and original design and director work that go into the production. If the playwright has made all such choices in the text, the *scènes à faire* doctrine would prevent the copyrighting of those choices; moreover, the playwright always retains the option of limiting a production's artistic choices through his licensing agreement for the performance of his text.

B. Fixation

A theatrical production is also sufficiently fixed so as to be entitled to copyright protection. At least one critic has argued that productions are not sufficiently fixed to qualify for copyright protection,¹⁴⁴ and indeed, to the audience member, each performance of a play appears to be an almost spontaneous affair. In reality, that appearance of spontaneity is fixed in such a manner that it may be reproduced, with minimal variation for each performance. The physical aspects of the production are physically constructed from plans and sketches, while the direction and choreography are recorded in notation specifically created to allow different performers to recreate the same movement. The Copyright Act requires only that the work be fixed in a manner that allows for perception, reproduction, or any other form of communication of the work; while the notation used to record choreography and movement may not be easily readable to a lay person, the record can be read, perceived, and

Modify Beckett? Enter, Outrage, N.Y. TIMES, Mar. 26, 1994, § 1, at 19, available at 1994 WLNR 3528236; Jeanne Whalen, *Directors, Take Note: Samuel Beckett Was a Micromanager*, WALL ST. J., June 29, 2006, at A1.

142. 17 U.S.C. § 102(b) (2000). See *supra* notes 34–41 and accompanying text.

143. See *Ets-Hokin v. Skyy Spirits, Inc.*, 323 F.3d 763, 765 (9th Cir. 2003).

144. Beth Freemal, Note, *Theatre, Stage Directions & Copyright Law*, 71 CHI.-KENT L. REV. 1017, 1028–29 (1996).

reproduced by someone who works in the industry. Because the author need not be the party to fix a work in order for the work to qualify for copyright protection, the collaborative effort to fix the production does not impact the work's copyright protection.

The scenery, props, and costumes are fixed: They are created from plans and sketches created by the designers and then constructed in a tangible, three-dimensional form for the production.¹⁴⁵ The lighting, while of a less tangible nature, is similarly fixed by way of lighting plots, renderings, and the use of a computerized lighting system that records the instruments used, the level of brightness, and the speed of the changes in those choices for every moment in the play.¹⁴⁶ Sound effects can be similarly programmed into a computer, where a program plays back the needed sound, at the proper volume, through the correct speakers, with a single keystroke.¹⁴⁷ In less technologically advanced venues, the sound cues are recorded onto CD or minidisk and played back through a mixing board under the direction of a cue sheet created by the designer.¹⁴⁸ Choreography can be recorded by any kind of notation that allows other performers to study and reproduce the movements.¹⁴⁹

Stage direction poses the most significant fixation problem. The movements of actors, and their interactions with each other and their environment, appear to many to be entirely unset; the actors apparently possess discretion to change their movements, and reproduction seems impossible, unless someone is videotaping the performance.¹⁵⁰ While any given performance has subtle variations, a director's work is set at the end of the rehearsal process, at which point it is recorded in a prompt book or similar script or score in shorthand notation by either the stage manager or an assistant director; it is not to be changed without a compelling reason during the run of the particular production.¹⁵¹ The record of the director's choices made in the blocking script or stage manager's

145. PARKER & WOLF, *supra* note 9, at 96.

146. *Id.* at 450–51, 535–37.

147. *Id.* at 365.

148. *Id.* at 343–44.

149. The most well-known dance notation is Labanotation, which uses a vertical score to record which part of the body is doing what movement in what direction and how quickly the movement is done. Dance Notation Bureau, Read a Good Dance Lately?, <http://dancenotation.org/DNB/> (follow "Notation Basics" hyperlink) (last visited Mar. 22, 2008).

150. See Freemal, *supra* note 144, at 1027.

151. While one commentator has suggested that creation of a prompt book recording stage direction is beyond the scope of the license granted by the playwright, Leichtman, *supra* note 138, at 693, the industry norm is that such a record be created. Because of the intricacy of the interaction between the stage movement, lighting, scenic and sound cues, costume changes, and other events that must be managed and maintained, a prompt book is a virtual necessity for a show to run effectively.

prompt book must be sufficiently concrete to allow an understudy who has never seen that particular production to be rehearsed and inserted into the show. The blocking notes must also be sufficient for a new stage manager, unfamiliar with the show, to be able to call light, sound, and scenery cues, as well as some performer entrances. The design team creates all of this information; the stage manager records and implements the creation.¹⁵² Her job is similar to that of the artisan physically creating the works authored by another, in that the prompt book is compiled under the authority of the director and designers (who frequently correct and supplement what the stage manager initially recorded). The prompt book then becomes a record of the stage direction and the placement of the various show cues that enable that work to be reproduced. Because the author need not be the one to physically fix his or her work in its final form to qualify for copyright protection,¹⁵³ her arrangement for the future reproduction of the theatrical production constitutes a fixation that satisfies the requirements of the Copyright Act.

C. Enumerated Categories

While a theatrical production is sufficiently original and fixed to qualify for copyright protection, statutory protection for a production would be a more certain result if a production was considered to be within one of the enumerated categories established by the 1976 Copyright Act.¹⁵⁴ The most obvious placement for a production would be in the dramatic works category,¹⁵⁵ but aspects of the production could also be viewed as pictorial or sculptural works,¹⁵⁶ works of pantomime or choreography,¹⁵⁷ or sound recordings.¹⁵⁸ There is no requirement that a work fit neatly into one category; in the House Report on the 1976 Act, it was noted that a work in one category may also contain aspects of works in other categories.¹⁵⁹ While Congress did not intend that these categories delineate the scope of protected works¹⁶⁰ or prevent courts from recognizing the protectability of new or different forms,¹⁶¹ recognition that a

152. See PARKER & WOLF, *supra* note 9, at 258.

153. 17 U.S.C. § 101 (2000); *Carell v. Shubert Org., Inc.*, 104 F. Supp. 2d 236, 247 (S.D.N.Y. 2000) (creator of makeup designs need not be the one to fix them on the faces of performers in order for the works to be considered fixed in a tangible form).

154. § 102(a).

155. § 102(a)(3).

156. § 102(a)(5).

157. § 102(a)(4).

158. § 102(a)(7).

159. H.R. REP. NO. 94-1476, at 53 (1976), as reprinted in 1976 U.S.C.C.A.N. 5659, 5666.

160. *Id.*

161. *Id.* at 51–52.

theatrical production fits into one or more of these categories would help ensure Copyright Act protection for this type of work.

While the scope of the dramatic works category in the enumerated categories of the Copyright Act can be interpreted as including only the text of such a work, such a reading renders a separate category for such works superfluous, because, depending on their content, they could already be protected as literary works,¹⁶² musical works,¹⁶³ or pantomimes.¹⁶⁴ Additionally, when one looks at cases involving the motion picture and television industries, the final motion picture work is often viewed as a dramatic work that is a derivative work of the underlying script.¹⁶⁵ Construing the dramatic works category broadly not only acknowledges these similarities and eliminates redundancy in the enumerated categories, but also better protects a valuable, long-standing art form.

D. Joint Authorship of the Production

If a production is a work of authorship that receives copyright protection, then who owns the copyright? To begin with, a theatrical production is a work of joint authorship because of the collective nature of the work's creation. The key consideration in deciding whether a work is a work of joint authorship is the intent of the collaborators: They must intend that their work be merged into a single whole.¹⁶⁶ In a collaborative art such as the theatre, where the intent is to create a unified end product for an audience, the intent to create a single work that is the sum of the merged parts is evident. While some of the parts may be separable, the intent is to create a single final work in the whole of the production.¹⁶⁷ Although multiple authors may do a great deal of their work independently, they intend that each of their separate pieces will eventually come together to form a whole. Therefore, each of these authors should jointly own the work on which they collaborated. The situation is analogous to that of lyrics and music for a song; the fact that each was created independently and are separable does not negate the intention of the composers that the independent parts be joined and enjoyed by others as a unitary whole.¹⁶⁸

162. § 102(a)(1).

163. § 102(a)(2).

164. § 102(a)(4).

165. *Gilliam v. ABC, Inc.*, 538 F.2d 14, 19–20 (2d Cir. 1976).

166. *Erickson v. Trinity Theatre, Inc.*, 13 F.3d 1061, 1068–69 (7th Cir. 1994).

167. DAVIS, *supra* note 14.

168. *Edward B. Marks Music Corp. v. Jerry Vogel Music Co.*, 140 F.2d 266, 267 (2d Cir. 1944) (song and lyrics created at different times by different authors working entirely independently)

The problem then becomes whether each designer's and director's contributions to a production must be individually copyrightable in order for that individual to be considered a joint author. While most circuits that have published opinions on this subject have required such a contribution,¹⁶⁹ the Seventh Circuit recently confronted the problems raised by such a requirement in the context of collaborative arts.¹⁷⁰ Although the court dealt with comic books rather than the performing arts,¹⁷¹ its analysis proves equally apt in the context of theatre productions. Many aspects of a production are potentially copyrightable individually (scenic and lighting design, choreography, and sound design, for example),¹⁷² but the blocking and characterizations produced by the stage director might not be if the other aspects of the production were removed.¹⁷³ Also, costumes are currently not individually protectable, because the Copyright Office considers them clothing that cannot be protected due to its utility.¹⁷⁴ While the individual protectability of the components of a play is in some cases questionable, the particular creative process that creates the finished product in theatre results in these parts being interdependent; while there may be problems in copyrighting the individual contributions on their own, protection of the whole is merited.¹⁷⁵ The final product is an expression of both the ideas planted by the underlying play and the interpretations of those ideas created by the director and designers. Denying copyright protection to productions would retard, rather than promote, progress in the art, because there would be no penalty for copying another's work without compensation.

This result is something of an expansion of Judge Richard Posner's argument against the irrational outcome that would have resulted from requiring all contributors to make individually copyrightable contributions in order to be authors in *Gaiman*. There, a protectable work would have been left without protection because there would have been no author who could claim infringement; none of the authors in that case had

created a work of joint authorship because intent of parties was that the independent pieces would merge into a single work).

169. *Erickson v. Trinity Theatre, Inc.*, 13 F.3d 1061 (7th Cir. 1994); *Childress v. Taylor*, 945 F.2d 500 (2d Cir. 1991); *Ashton-Tate Corp. v. Ross*, 916 F.2d 516 (9th Cir. 1990).

170. *Gaiman v. McFarlane*, 360 F.3d 644 (7th Cir. 2004).

171. *Id.* at 648.

172. Copyrights have been registered for scenery, U.S. Copyright No. VAu342689 (registered Sept. 26, 1995) (technical drawings for scenery registered as works of visual art), and lighting designs, U.S. Copyright No. TX6382351 (registered June 30, 2006) (computer text of lighting design for musical drama registered as textual work).

173. See Richard Amada, Note, *Elvis Karaoke Shakespeare and the Search for a Copyrightable Stage Direction*, 43 ARIZ. L. REV. 677, 683–84 (2001).

174. Policy Decision Notice, 56 Fed. Reg. 56,530 (Nov. 5, 1991).

175. *Gaiman*, 360 F.3d at 659.

made an individual contribution that would entitle them to ownership.¹⁷⁶ In the case of a production, where some of the design team may have an individually copyrightable contribution that is part of the collective work, requiring such a contribution could leave some members of the team with ownership of the whole while other members are left not just unprotected, but with less future compensation if the production is licensed. Recognizing the collective nature of the art and allowing the director and design team to be joint owners of the work, regardless of the individual copyrightability of their contribution, would better promote the art than either not protecting those aspects, or cutting the noncopyrightable contributors out of copyright ownership in the whole.

A holistic approach to copyright protection, treating a production as a single work, best balances the need for the creators of the production to protect their work from unauthorized copying with the need to support the collaborative nature of the art. Such an approach also protects the aspects of the production that, standing alone, might not be protectable under current copyright law. Such an acknowledgement would also create the potential for the designs and direction as a whole to be licensed and reproduced, allowing production companies a means to legally reproduce the famous version of the production.¹⁷⁷ The impact of such a change on the theatre industry will be examined in Part VI. Next, however, Part V discusses the need for a right of attribution for contributors to theatre productions.

V. TOPDOG/UNDERDOG: A RIGHT OF ATTRIBUTION

While granting copyright protection to a play's production as a whole provides important legal protections for the design team's artistic work and the owners of the production, the individual artists whose contributions created the copyrightable work also require protection. They deserve proper credit for their work. A right of attribution would help secure that credit and provide a cause of action to reacquire that credit, with damages, if those rights are not properly respected. This Part discusses why such a right is needed, what the right would require, and what remedies an artist could seek if the right was infringed.

A. *The Case for a Right of Attribution*

The basic argument for a right of attribution is simple: Under current law, theatre artists have no right to have their work properly

176. *Id.* at 658–59.

177. Indeed, both the *Mullen* and *Mantello* settlements resulted in the payment of the equivalent of licensing fees to the creators of the work. Carroll, *supra* note 2; Press Release, Society of Stage Directors and Choreographers, *supra* note 2.

attributed to them unless they contracted for attribution. The *Dastar* Court curtailed an artist's ability to use the Lanham Act to secure proper attribution.¹⁷⁸ Acquiring proper attribution via common law tort claims is problematic.¹⁷⁹ Leaving the matter to private contracting assumes a certain amount of legal savvy and leverage that a director and designer may not have.¹⁸⁰ The establishment of an affirmative right to attribution can overcome these difficulties.

1. Attribution and Current Law

The common law, while providing a remedy in cases of copying, is insufficient to protect the interests of theatre artists. The theories of unfair competition,¹⁸¹ misappropriation,¹⁸² and unjust enrichment¹⁸³ have all been utilized in court cases involving theatre or other forms of fine art. While common law remedies can provide a certain amount of protection for theatre artists, they present practical problems that make them inadequate to protect artists' interests in proper attribution.

Misappropriation, unjust enrichment, defamation, and unfair competition claims face practical problems with preemption and jurisdiction. Section 301 of the Copyright Act expressly preempts any common law or state statutory protections that provide rights considered "equivalent" to those provided in the federal statute.¹⁸⁴ In practice, courts have interpreted this requirement as creating a two-prong test for potentially preempted common law theories and state statutes. First, if the common law or state statute would be violated by an act that would otherwise violate one of the exclusive rights granted to copyright holders by the Copyright Act, the common law or state statute is likely preempted.¹⁸⁵ Second, the subject matter protected by the provision must be within the subject matter protected by the Copyright Act.¹⁸⁶

178. *Dastar Corp. v. 20th Century Fox Film Co.*, 539 U.S. 23, 31 (2003). See also NIMMER & NIMMER, *supra* note 45, § 8D.03.

179. See *infra* Part V.A.1.

180. See *infra* Part V.A.2.

181. See, e.g., *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 980 (2d Cir. 1980). A common law claim of unfair competition may stem from any business practice that goes against honest practice. 87 C.J.S. *Trademark* § 98 (2000).

182. See, e.g., *Int'l News Serv. v. Associated Press*, 248 U.S. 215, 240–41 (1918) (defining misappropriation as taking the work of another and selling that product as one's own, thereby benefiting from the work of another).

183. See, e.g., *Briarpatch Ltd., L.P. v. Phoenix Pictures, Inc.*, 373 F.3d 296, 306–07 (2d Cir. 2004) (holding that state law unjust enrichment claim was preempted by Copyright Act).

184. 17 U.S.C. § 301(a) (2000).

185. SCHECHTER & THOMAS, *supra* note 5, at 269–70.

186. *Id.*

This test puts common law protection of attribution into a grey zone of validity. While the federal statute does not explicitly protect a right of attribution in most cases,¹⁸⁷ if the parties with a right of attribution were also copyright holders, the performance of a production without permission or attribution could be seen as a single violation of the author's public performance rights. Additionally, as previously discussed, the subject matter is likely, but not assuredly, protected by the Copyright Act.¹⁸⁸ Any attribution case brought under common law protection faces a significant likelihood of dismissal on the basis that the cause of action will be considered preempted by the federal statute.

Dismissal on jurisdictional grounds is far less speculative and illustrates a more practical problem. These common law claims are state tort claims.¹⁸⁹ A plaintiff pursuing state common law claims for a lack of attribution must choose one of several rough roads. The plaintiff could attempt to bring the state law claims along with copyright infringement claims as ancillary claims in federal court.¹⁹⁰ Such an action, however, is not possible unless there are federal claims to attach the state law claims to,¹⁹¹ and the plaintiff would need to establish personal jurisdiction over the defendant.¹⁹² The plaintiff could attempt to proceed in federal court under diversity jurisdiction, so long as the alleged damages exceeded \$75,000 for the failure to attribute;¹⁹³ moreover, he would need to establish that a substantial part of the actions that gave rise to the claim occurred in the judicial district where the claim was brought, in order for venue to be appropriate.¹⁹⁴ Alternatively, the plaintiff could proceed in state court. Again, the plaintiff would have to establish personal jurisdiction over the defendant and might possibly be forced to proceed in the state where the questionable production took place, unless his home state's long arm statute applied.¹⁹⁵ As Joe Mantello discovered when he sued a Florida theatre company for common law violations under New York law in federal district court, establishing jurisdiction when the production in question is presented out of state is extremely difficult—his suit was initially dismissed for lack of personal jurisdiction over the

187. S. REP. NO. 100-352, at 9–10 (1988), as reprinted at 1988 U.S.C.C.A.N. 3706, 3714–15.

188. See *supra* Part IV.

189. SCHECHTER & THOMAS, *supra* note 5, at 261.

190. 28 U.S.C. § 1367(a) (2000).

191. *Id.*

192. See *Mantello v. Hall*, 947 F. Supp. 92, 96–102 (S.D.N.Y. 1996); NIMMER & NIMMER, *supra* note 45, § 12.01.

193. § 1332(a).

194. § 1391(a).

195. See *Mantello*, 947 F. Supp. at 96–102.

defendant.¹⁹⁶ If a working professional is presented with the option of either not pursuing a common law claim or having to go to court on the other side of the country, state common law protection becomes too burdensome to pursue.

2. Contracting for Attribution

A director or designer always has the option to contract to require a theatre or production company to provide proper billing for both the initial production and for any subsequent remounts or transfers. Indeed, this is a common occurrence.¹⁹⁷ The collective bargaining agreements of both the SSDC and USA include detailed sections delineating the requirements for billing for their members work.¹⁹⁸ Nonunion agreements also frequently include clauses with specific requirements for billing, as well as those protecting the intellectual property interests of the directors or designers.¹⁹⁹ While leaving the issue in the hands of the contracting parties allows them complete control over the end result, the lack of a legal right as backup leaves parties lacking either the knowledge or leverage to contractually secure a right to attribution without protection. Moreover, a nonparty contributor is left without an affirmative cause of action if his or her right to attribution is trampled.

First, in order to contract for a right of attribution, the artist must know that these interests require specific protection in the contract and for what, specifically, to contract; in addition, the artist must have sufficient leverage in the negotiations to have the term included in the contract. When working under a union contract, the artist receives protection, but many theatres, even large ones, do not necessarily operate under union agreements for directors and designers.²⁰⁰ In such situations, it is possible that an individual artist will not even be aware that he or she

196. *Id.* The case later settled after Mantello refiled on different grounds. Carroll, *supra* note 2.

197. See, e.g., LORT/USA Agreement, *supra* note 20, at 12 (requiring that “[t]he Designer shall receive billing in the program on the title page, cast page, or with placement substantially comparable to such, and on houseboards”); Seattle Children’s Theatre Contracts for Sound & Set Designers, § 6 (on file with author) [hereinafter SCT Contracts]; SSDC CBA, *supra* note 20, at 30 (requiring that “[w]ith respect to each covered production directed by a Director, he/she shall receive billing in all programs and houseboards”). Also, in the author’s experience, the program commonly given to audience members identifies the performers, directors, and designers of that production.

198. LORT/USA Agreement, *supra* note 20, at 12; SSDC CBA, *supra* note 20, at 30.

199. SCT Contracts, *supra* note 197.

200. See Society of Stage Directors and Choreographers, Signatories List, <http://www.ssdcc.org/signatories.php> (last visited Mar. 22, 2008). While many major theaters have agreements with the SSDC, many do not; in fact, some theatres and producers vehemently refuse to deal with the union. See Society of Stage Directors and Choreographers, Strike & Default Lists, <http://www.ssdcc.org/strike.php> (last visited Mar. 22, 2008).

must be proactive in order to keep his or her name attached to the work produced, let alone have the negotiating power to require the production company to amend the contract.

Second, and perhaps more importantly, while contracting can effectively protect an artist whose work is remounted by the company that originally produced it or whose final work product is rented or even sold (a common practice in opera), it provides no protection for the artist whose work is copied without permission. The recent skirmish over a production of *Urinetown: The Musical* in Chicago is such an example.²⁰¹ The production in question allegedly copied directly most of the design and directorial choices of the Broadway production.²⁰² There was no agreement between the Broadway company or producers and the Chicago production;²⁰³ enforcement of a contractual right of attribution was impossible because the copying party was not a party bound by the contract. The individual members of the design team, had they not retained ownership of the copyright, would have had no recourse.

3. Value of Attribution for Theatre Artists

In the theatre world, artists' inability to require third parties to give them credit when the third parties make use of their work creates a significant problem. While receiving credit for one's work is often more a matter of recognition than an issue about compensation,²⁰⁴ one of the main reasons that receiving that credit is so critical is because of the importance of one's professional reputation in a performance-based industry such as theatre.

Cases dating back to the 1960s have acknowledged that a performer's reputation is a valuable commodity. In *Lahr v. Adell Chemical Co.*, for example, the court acknowledged that using an imitation of the voice of Bert Lahr (better known as the Cowardly Lion in the movie *The Wizard of Oz*) in a commercial could result in damage to Lahr's reputation as a performer and that "[s]uch passing off is the basic offense."²⁰⁵

Similar damage can be done to a director or designer whose works are either copied without credit or who is mistakenly credited with work that is not his or her own. Many directors and designers work freelance, and the success or failure of his or her earlier works can have a direct

201. First Amended Complaint, *supra* note 3; Chris Jones, 'Urinetown' Battle Roils the World of Musicals, CHI. TRIB., Nov. 19, 2006, Arts & Entertainment section, at 1; Robertson, *supra* note 3.

202. Jones, *supra* note 201; Robertson, *supra* note 3.

203. Jones, *supra* note 201.

204. Talia Yellin, *New Directions for Copyright: The Property Rights of Stage Directors*, 24 COLUM.-VLA J.L. & ARTS 317, 321 (2001).

205. 300 F.2d 256, 258-59 (1st Cir. 1962).

impact on that individual's chances for future employment. The professional reputation of a designer or director is damaged when he or she either fails to receive proper credit for a successful rendition of his or her work, or receives undeserved ignominy for a substandard production. In an unpublished case, a district court found that there was a "substantial possibility of destroying the goodwill associated with Gershwin works by mutilating the carefully sculptured works of art so tenaciously preserved by Mr. Gershwin over the years," when a group used those works beyond the scope of its license.²⁰⁶ In an industry built on reputation, both within the industry and with the public, failure to receive proper credit is both personally disheartening and financially damaging.²⁰⁷

What is the proper method to protect a theatre artist's claim to his or her work? Lanham Act claims have been limited by *Dastar*, common law remedies are difficult to pursue, the Copyright Act does not protect attributive interests, and contracting requires knowledge and negotiating power and cannot protect against design theft.²⁰⁸ Theatre artists who do not receive proper attribution for their work lose an important boost to their reputations and future careers. A different approach is needed. A right of attribution must be established for the contributors to the copyrightable work of a production.

B. What the Right Requires

The right of attribution advocated by this Comment would essentially codify the theatre industry's current crediting practice,²⁰⁹ creating a legal right to attribution very similar to that given to the authors of works of visual art under VARA. The First Circuit recently described, in the context of VARA, a right of attribution as being

the right of an artist to be recognized by name as the author of his work or to publish anonymously or pseudonymously, the right to prevent the author's work from being attributed to someone else, and to prevent the use of the author's name on works

206. *Gershwin v. Whole Thing Co.*, No. CV 80-569 TJH (Px), 1980 WL 1182, at *4 (C.D. Cal. Mar. 10, 1980).

207. See *Gershwin*, 1980 WL 1182, at *6. In *Gershwin*, the court ordered a preliminary injunction based on the "substantial possibility" of the goodwill associated with Gershwin works being undermined or destroyed by an unauthorized production incorporating different songs from different Gershwin works. *Id.* at *3-4. Thus, at least one court has acknowledged the importance of reputation to a theatre artist when his works are misused. An absolute failure to credit would be potentially even more damaging.

208. See *supra* Part V.A.1-2.

209. See *supra* note 197.

created by others, including distorted editions of the author's original work.²¹⁰

An attribution would be required to identify each designer and credit that designer for his or her work on the pertinent portion of the production, as is typically done in the program given to the audience attending the play.²¹¹ The attribution would also be required to reasonably identify the copyrightable production the work originated from. For example, in the phrase "The Original Broadway Production of *Urinetown: The Musical*," the portion that reads "Original Broadway Production" denotes the production's origination. The specific form of the attribution should be somewhat flexible so that it can be adapted to best indicate which specific production of a play, musical, or opera is being used, without requiring burdensome detail. Both the public and members of the industry would be spared confusion by requiring this form of attribution if a single designer has worked on multiple versions of the same text. This attributive right would not be alienable, but similar to the right under VARA, it could be waived if an artist does not want to be connected with a particular production.²¹² Misattribution of a work to an author would not be permitted.

If establishing a statutory basis for a right of attribution in the theatre would be straightforward, why not include a right of integrity similar to that provided for in VARA? Such a right would give a theatre designer the right to prevent any intentional modification of his or her work that is potentially prejudicial to the designer's "honor."²¹³ Unlike the right to attribution advocated in this Comment, which only requires that the contributors be given proper credit for their work, a right of integrity would bar any significant changes to the final product created by the design team.²¹⁴ The potential impact of a right of integrity on the industry and art of the theatre is significant, making any modifications that might arise from moving the production from one venue to another a possible source of litigation.²¹⁵ Also, while attribution is already fairly well

210. *Philips v. Pembroke*, 459 F.3d 128, 133 (1st Cir. 2006).

211. Such attribution is also required by most design and direction contracts. *See supra* note 197.

212. 17 U.S.C. § 106A(e)(1) (2000).

213. § 106A(a)(3).

214. *See Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 81 (2d Cir. 1995); *see also* NIMMER & NIMMER, *supra* note 45, § 8D.04.

215. *Carter*, 71 F.3d at 81. The *Carter* court described the right of integrity as the right of an author to prevent "any deforming or mutilating changes to his work, even after title in the work has been transferred." *Id.* Thus, integrity and threats of lawsuits based on a right of integrity could severely restrict how, or even if, a production company would be willing to rent a show or make alterations to adapt design work to a different space.

established and supported in the theatre industry, as discussed below, a right to integrity has yet to gain much support.

Currently in the theatre industry, deference given to original creators is somewhat lower than an absolute right of integrity.²¹⁶ Though granted a great deal of respect, designers are not given the absolute right to control their work after a show opens. For example, under the USA collective bargaining agreement, producers must consult the original designers to the best of their ability when changes are made to a design, and the original designers are given a right of first refusal.²¹⁷ Establishing a right of integrity would impose a foreign requirement on the theatre industry rather than codify typical and expected practices. Thus, a right of integrity would probably receive minimal support from the very artists it is intended to protect.

C. What Happens if the Right of Attribution Is Violated?

A director or designer whose work was used without the proper attribution described above would have a right to sue for injunctive relief as well as actual and statutory damages and attorney's fees. Artists need an injunctive remedy to fulfill the actual purpose of the proposal: to preserve the creative product's identification with the creator. Statutory damages would serve two purposes. First, statutory damages give individuals whose attribution rights are violated an incentive to pursue legal action. Second, statutory damages aid courts in determining an award because actual damages resulting from misattribution could be incredibly difficult to prove. Damages of any sort provide an additional disincentive for companies who are tempted to copy works without giving credit.²¹⁸

Any individual bringing a successful suit under this right would be allowed to request attorney's fees. While VARA does not allow the court to award attorney's fees,²¹⁹ generally speaking, artists whose work is improperly used will only be able to secure representation if the court allows them to recover attorney's fees. As damages in these cases might be fairly low, even with a provision for statutory damages, and pay in the industry is also typically low, contingent or hourly basis fee arrangements become a losing arrangement for attorneys. Thus, fee recovery

216. See LORT/USA Agreement, *supra* note 20, at 12.

217. *Id.*

218. Of course, for a copyrighted production, the primary disincentive would be a potential copyright infringement suit.

219. See 17 U.S.C. § 106A, 113 (2000). Congress did not authorize the recovery of attorney's fees in VARA violation cases. See *id.*

provisions both enable artists to secure representation and make violating artists' rights even less attractive.

VI. THE GRAPES OF WRATH: INDUSTRY IMPACT AND THE REPERCUSSIONS OF CHANGE

The changes advocated in this Comment are neither radical nor revolutionary; rather, they are an overdue codification of traditional industry practice and custom. The concerns likely to arise in the industry over the transformation of custom into law merit discussion. Yet none of the likely arguments present negative impacts that outweigh the benefits of providing established legal protection to directors and designers. While playwrights are concerned that they will lose creative control over their works, a proper understanding of how copyright protects derivative works shows that this concern arises from a misinterpretation of current law. Joint copyright ownership also presents manageability issues that warrant discussion, but similar complications present no bar to joint ownership of other types of property. This Part addresses these likely concerns.

A. Impact of Recognizing Copyright Protection for the Production

While allowing the protection of a whole production would clarify which protections are available for the works created by the theatre directors and designers working today, simply examining the legal doctrines and applying them to the situation results in too shallow of a look into the matter. Theatre artists worry about how copyright or other protections would affect the industry, including the possible impact on the rights of the playwright and the difficulties of managing a jointly owned production. The impact of any changes must be weighed in light of these concerns, and the benefits of enactment must outweigh any negative impact. Additionally, we should consider whether simply allowing copyright protection will be an adequate or appropriate remedy to address the growing concern about plagiarism.

A key concern in the industry about protecting any aspects of a play beyond the text is the potential impact of such protection on the rights of the playwright.²²⁰ In a policy statement, the Dramatists Guild²²¹ claims that allowing directors and other theatrical collaborators to protect their

220. Channick, *supra* note 120.

221. The Dramatists Guild of America is a professional organization working to "advance the interests of playwrights, composers, lyricists and librettists writing for the living stage." Dramatists Guild of America, About the Dramatists Guild of America, <http://www.dramatistsguild.com/about.aspx> (last visited Mar. 22, 2008).

work in staging a production would limit the playwright's ability to control his or her play.²²² The Guild also claims that any use of the text of the play to establish such rights infringes on the copyright of the playwright.²²³ While the Guild is right to be proactive in protecting its members' right to control their works, its fears of loss of control and infringement are legally groundless, because current copyright law balances the protection of original and derivative works.

A derivative work can only be protected by copyright if the underlying work is used with permission *and* any copying or performance of the derivative work also requires permission for use of the underlying work.²²⁴ The rights in the derivative work do not subsume those in the original work.²²⁵ Thus, protection for the derivative work created by the director and designers of an individual production of a playwright's work leaves the underlying work's copyright intact; any further use of that derivative work would require licensing the underlying work as well as the derivative production.²²⁶ A playwright would be able to maintain control of his or her work, even to the point of refusing to grant rights to the script or later withdrawing those rights should the playwright dislike the chosen production.²²⁷ The playwright would also be able to control his or her work through more restrictive licensing, as the use of the play in the derivative work is limited by the scope of the license granted by the original copyright holder.²²⁸ A production company that is granted the right to make a derivative work in the form of a production has no power to grant any rights to other parties that the playwright did not originally grant to it.²²⁹ Granting a production copyright protection only protects those who have made the derivative work from unauthorized copying; it does not limit the control of the playwright over his or her work.

An additional, albeit unenforceable, check on any potential risks to the playwright in granting protection to a production is the theatre industry's traditional deference to the playwright's role and work.²³⁰ Fealty to the playwright's work is a core value in the theatre community. While intrinsic core values can be compromised, especially when money and

222. Dramatists Guild of America, Guild Statements - Dramatists' Copyright & Intellectual Property Rights, http://www.dramatistsguild.com/about_statements_copyright.aspx (last visited Mar. 22, 2008).

223. *Id.*

224. *See supra* notes 47–52 and accompanying text.

225. *See supra* notes 48–53 and accompanying text.

226. *Stewart v. Abend*, 495 U.S. 207, 223 (1990); *Gilliam v. ABC, Inc.*, 538 F.2d 14, 20 (2d Cir. 1976).

227. *See supra* note 141.

228. *Gilliam*, 538 F.2d at 20.

229. *Id.*

230. *DAVIS, supra* note 14, at 52.

property rights come into play, artistic deference gives a playwright a great deal of practical control, especially when the playwright must give permission for the copyrighted work to be performed.²³¹

A different concern in allowing the protection of a production as a whole is the difficulty of managing the ownership of the derivative work. If the work for hire doctrine applies, the production company or hiring party is the author of the work or of the aspects of the work created by directors and designers acting as employees within the scope of their employment.²³² In this case, managing the work will be relatively simple, because a single default owner allows any further uses and pursues any infringement claims. Contracting parties will also have legal default rules to rely on when negotiating compensation for both the initial work and for any licensed reproductions.²³³

But if a design team was to come together to create a work without creating a formal production company, or if the work for hire doctrine was inapplicable, manageability problems could arise. In the current SSDC and USA contracts, collaborators specifically note that they are maintaining their individual ownership of any intellectual property rights they have in the production, and they typically reserve the right to claim copyright.²³⁴ If the result is a group of five or six individuals, each with the right as a joint author to license further use of the work as a whole subject to accounting to the other joint authors, any of them might use or abuse their rights in the production in ways that result in animosity between the authors. On the other hand, despite possible complexity, multiple parties jointly own other forms of property despite potential management problems. Also, most companies producing plays are more interested in creating a new production of a play rather than simply reproducing what another company has developed. Licensing will only be appealing for very popular shows that are often produced by those in the industry and for astute business people who are more than capable of handling a potentially complicated ownership structure.

It is questionable whether theatre industry participants will be sufficiently protected by copyright protection alone when one considers the effect of the work for hire doctrine and the ongoing rental industry for sets and costumes. If a production's copyright vests in the production company that hired the design team, the production itself receives

231. 17 U.S.C. § 106(4) (2000). The owner of the copyright for a literary or dramatic work has the exclusive right of public performance, so any legal production must have the playwright's permission. *Id.*

232. § 101.

233. *Comty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 749–50 (1989).

234. LORT/USA Agreement, *supra* note 20, at 12; SSDC CBA, *supra* note 20, at 27–28.

protection from copying, but only an additional right of attribution would protect the designers' interest in being given credit for their work. If the designer enters into an undesirable contract, that individual's work could be rented, sold, licensed, or copied by the copyright-owning production company without the director or designer receiving any additional credit or compensation. Given the thriving rental business for opera sets, musical costumes, and props,²³⁵ copyright protection provides only the minimum protection needed to sufficiently promote the art form; attribution rights are also needed.

One must weigh the potential problems against the potential benefit of affording these works copyright protection. While the individual designers and directors involved in the collaborative process may require the additional protection of a right of attribution, as advocated in this Comment, some kind of clear protection for theatrical productions is both desirable and necessary. In some cases, the management of the intellectual property rights involved may be difficult, but any challenges are not insurmountable and the protection provided outweighs the potential difficulties.

B. Impact of Creating a Right of Attribution

Codifying a right of attribution would likely have little impact on the theatre industry. Requiring attribution represents a minimal change from the traditional practices of the industry and codifies the practices typically required in well-negotiated contracts.²³⁶ Acknowledging these moral rights in a statute would serve to protect those individuals whose work either is created outside a union environment or has been sold or stolen.²³⁷ It would also protect the public from the false attribution of a work to a well-known and respected artist who played no part in the work's creation.

As this right closely resembles the rights of attribution established for visual artists under VARA, it would produce no greater strain on the courts than the strain already produced by attribution rights in the visual arts. While there was significant concern about granting moral rights to works beyond those of visual art when VARA was passed, those concerns were primarily focused on the motion picture and audiovisual

235. See, e.g., American Conservatory Theater, Costume and Prop Rentals, http://www.act-sf.org/site/PageServer?pagename=about_rentals_costume_prop (last visited Mar. 22, 2008); Prop City, <http://www.propcity.com/default.asp> (last visited Mar. 22, 2008); Scenic Arts Studios, <http://scenicarts.com/> (last visited Mar. 22, 2008); Seattle Opera, Rental Index, <http://www.seattleopera.org/rentals/intro/index.asp> (last visited Mar. 22, 2008).

236. See, e.g., LORT/USA agreement, *supra* note 20, at 12–14; SSDC CBA, *supra* note 20, at 30.

237. See discussion *supra* Parts III.E, V.A.2.

industries, not on live performance theatre.²³⁸ When considering the impact of a right of attribution, live theatre more closely resembles visual art than a motion picture. A production is generally performed a limited number of times, similar to a limited edition piece of art. The end of the performance run or the destruction of the designs can effectively destroy the production, as it is highly unusual for multiple copies of the same production to exist.²³⁹ Also, while motion pictures and audiovisual works are typically made for hire and thus owned by the production company,²⁴⁰ the theatre industry specifically attempts to prevent ownership of a designer's or director's work from vesting in the production or theatre company through clear clauses in their design and directing contracts.²⁴¹ A single federal statute on the subject would simplify the matter for the courts and everyone involved in such disputes by both eliminating the need to rely on the various applications of state common law and providing a single federal cause of action for any misattributions.

VII. CURTAIN: CONCLUSION

Let us revisit our director. Under the analysis suggested in this Comment, instead of being given vague answers when she called her attorney, she would receive a clear answer and two potential courses of action. If she and her design team had retained joint ownership of the copyright of their work, they could pursue a copyright infringement action against the copying theatre, because the resulting production would qualify for copyright protection. While copyright infringement is rarely a simple matter to prove,²⁴² an infringement suit is a possible course of action that provides a more straightforward answer to the director. With a clear legal doctrine on her side, she and her team could also attempt to negotiate a licensing agreement with the infringing theatre.

Alternatively, the director could attempt, as an individual, to assert her right of attribution and receive credit for her work. Because a right of attribution is inalienable, this claim could succeed even if the director had not retained ownership of her copyright or if that ownership had vested in her production company under the work for hire doctrine.

What is perhaps most important in applying and changing current copyright laws to address the needs of the theatre industry is legal doctrine that takes into account the unique character of the art. If the form is

238. H.R. REP. NO. 101-514, at 5 (1990), as reprinted in 1990 U.S.C.C.A.N. 6915, 6919.

239. PARKER & WOLF, *supra* note 9, at 176.

240. H.R. REP. NO. 101-514, at 5.

241. See, e.g., LORT/USA agreement, *supra* note 20, at 12; SSDC CBA, *supra* note 20, at 27-28.

242. See generally NIMMER & NIMMER, *supra* note 45, at chs. 12-14.

to be promoted instead of deadened by legal protection, then it is vital to balance the protection of both the collaborative nature and product of the art with the need for the individual artists to receive their due credit. Providing for moral rights and a holistic approach to copyright protection balances the needs and interests of directors and designers in such a way that supports and furthers the art form as required by the Constitution.