

# ELVIS KARAOKE SHAKESPEARE AND THE SEARCH FOR A COPYRIGHTABLE STAGE DIRECTION

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“All the world’s a stage, [a]nd all the men and women merely players”—or potential litigants, as the case may be. The typically dramatic world of live theater has taken the show on the road from the playhouse to the courthouse in an, as yet, unsettled dispute over whether stage directors can copyright the stage directions they create when they direct a production of a play or musical.<sup>2</sup>

Until the mid-1990s, the question was seldom if ever raised in public circles. Historically, a playwright’s ownership of all things connected to the script has gone unchallenged. However, recent cases initiated by directors and others involved in the collaborative process of play production,<sup>3</sup> along with an outpouring of public debate and commentary,<sup>4</sup> suggest to this Author that the issue is ripe for an analysis that attempts to offer a practical alternative to partisan debate. Admittedly, the results of this analysis are unlikely to garner a standing

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1. WILLIAM SHAKESPEARE, AS YOU LIKE IT act 2, sc. 7, in WILLIAM SHAKESPEARE, THE COMPLETE WORKS 622 (Dorset Press 1988).

2. The issue applies equally to both musical and non-musical plays. However, in the interest of maintaining simplicity of sentence structure, the Author will simply utilize the word “play” as a reference to both.

3. See *infra* Part III.

4. See, e.g., Susan Etta Keller, Comment, *Collaboration in Theater: Problems and Copyright Solutions*, 33 UCLA L. REV. 891 (1986) (advocating copyright protection for various parties who contribute significantly to the collaborative effort); David Leichtman, Note, *Most Unhappy Collaborators: An Argument Against the Recognition of Property Ownership in Stage Directions*, 20 COLUM.-VLA J.L. & ARTS 683 (1996); *The Director-Dramatist Relationship*, DRAMATIST, May–June 2000, at 14 (published excerpts of a Feb. 10, 2000, public discussion in which participants Ralph Sevush, Jonathan Reynolds, Christopher C. Wilson, and Jeremy Nussbaum argued against copyright protection for directors); Joe Mantello, *Mantello on Directing*, AM. THEATRE, July–Aug. 1999, at 3 (letter to the editor in reaction to criticisms of his own litigation involving Mantello’s claim of copyright on his stage directions for *Love! Valour! Compassion!*); Ted Pappas, *Protecting the Director*, AM. THEATRE, Feb. 1999, at 6 (pro-protection for directors position of the President of the Society of Stage Directors and Choreographers); John Weidman, *No Copyright for Directors*, AM. THEATRE, Sept. 1999, at 6 (anti-protection for directors position of the President of the Dramatists Guild of America).

ovation from either side since case law does not seem to provide a sufficient basis to give unequivocal support to either position. Rather, the research detects the possibility of a middle ground that the courts have carved out of various disputes, and it suggests that the courts might, in fact, be willing in some instances to uphold a director's claim of copyright—but only in *very narrowly defined* instances.

Part I of this Note will provide an overview of recent developments that have brought the issue to light and serve as an introduction to the *dramatis personae* who have a vested stake in the outcome. Part II will review the relevant laws of copyright. Part III will examine analogous case law in the areas of joint authorship, derivative works, and independently copyrightable contributions to determine what, if any, property claims a director might be able to make. Part IV attempts to apply components of copyright infringement tests previously devised by courts to create a three-step test applicable to those limited occasions when a court might conceivably afford copyright protection to a director's stage directions. In conclusion, Part V summarizes the analysis and poses the as yet unanswered questions on which the final outcome of this issue may hinge.

## I. ANOTHER OP'NIN', ANOTHER SHOW: TWO CASES RAISE THE CURTAIN ON THE ISSUE OF COPYRIGHT FOR STAGE DIRECTIONS

### A. The Plot

The story of what might arguably be called Broadway's most contentious, unfinished drama premiered as a short page-2 item in a Chicago newspaper.<sup>5</sup> The headline, *Local Production Called Too Similar to One on Broadway*, barely suggested more than what is sometimes unflatteringly referred to as an artistic snit. However, this was no mere potshot designed simply to brand a colleague a copycat. Rather, stage director Gerald Gutierrez was threatening to sue the Drury Lane Oakbrook Terrace Theatre for having put on a production of Frank Loesser's 1956 musical, *The Most Happy Fella*, that Gutierrez claimed "borrowed too heavily" from his own earlier production<sup>6</sup> of the same show.<sup>7</sup> Following his 1991 opening at the Goodspeed Opera House, Gutierrez took a copy of the script with his stage directions written on it and filed it with the U.S. Copyright Office as a claim for copyright protection of those directions.<sup>8</sup> While the producer of the Illinois production, Tony De Santis, was quoted as saying

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5. See *Local Production Called Too Similar to One on Broadway*, CHI. TRIB., Oct. 19, 1994, § 1, at 2.

6. Gutierrez directed a revival of *The Most Happy Fella* for Connecticut's Goodspeed Opera House in 1991. The show was remounted later that year at the Doolittle Theatre by Center Theatre Group in Los Angeles and then, in 1992, at the Booth Theatre on Broadway. The source of this chronology was the Goodspeed Opera House.

7. See *Local Production Called Too Similar to One on Broadway*, *supra* note 5, §1, at 2.

8. See Copyright Registration No. PAu1520015 (registered June 6, 1991).

Gutierrez "[didn't] have a leg to stand on,"<sup>9</sup> five months later Gutierrez, backed by his union, the Society of Stage Directors and Choreographers (SSDC),<sup>10</sup> filed a lawsuit. Gutierrez named De Santis and director Gary Griffin as defendants and accused them of appropriating Gutierrez's "artistic innovations" without consent, credit, or royalty payments.<sup>11</sup> Griffin admitted to having viewed a videotape of Gutierrez's production at the Lincoln Center Library for the Performing Arts.<sup>12</sup> He further noted that the Illinois production had rented the previous production's sets and hired its star, but Griffin insisted his production contained "huge departures" from the New York show.<sup>13</sup> The question of whether Gutierrez had that proverbial leg to stand on was never explicitly answered because the parties reached settlement before trial.<sup>14</sup>

As Cole Porter would say: "another op'nin', another show."<sup>15</sup> In 1996, the Caldwell Theater Company, in Boca Raton, Fla., mounted a production of Terrence McNally's *Love! Valour! Compassion!* that Broadway director Joe Mantello claimed was too much like another op'nin' of the *very same show* he directed previously at New York's Walter Kerr Theater.<sup>16</sup> He was quoted as saying, "It was a 90 to 95 percent replication of the staging that we had done."<sup>17</sup> Like Gutierrez, Mantello had filed for copyright protection of his stage directions of *Love! Valour! Compassion!*<sup>18</sup> Once again, the SSDC stepped in on behalf of its member, and Ronald Shechtman, lawyer for the SSDC, wrote a letter to the Caldwell's artistic director, Michael Hall, demanding that the theater cease and desist further use of "Mantello's work" until licensing arrangements could be negotiated.<sup>19</sup> The result was a lawsuit in which Mantello sought \$250,000 in damages from the Caldwell Theater and Hall.<sup>20</sup> A federal judge in Miami refused

9. *Local Production Called Too Similar to One on Broadway*, *supra* note 5, § 1, at 2 (quoting De Santis).

10. In 1962, the Society of Stage Directors and Choreographers (SSDC) agreed to make no demand for certain rights, including subsidiary participation, for 20 years in return for being recognized as a labor union by the League of New York Theatres and Producers. See Jessica D. Litman, *Copyright in the Stage Direction of a Broadway Musical*, 7 ART & LAW 309, 335 (1983). For additional history on the SSDC, see *Society of Stage Directors and Choreographers, Inc.*, 4 PERF. ARTS REV. 70 (1973).

11. See Hedy Weiss, *Settlement Near in Lawsuit Over "Most Happy Fella,"* CHI. SUN-TIMES, June 14, 1995, at 51.

12. *See id.*

13. *See Local Production Called Too Similar to One on Broadway*, *supra* note 5, § 1, at 2.

14. *See* William Grimes, *Enter the Directors, Seething*, N.Y. TIMES, Apr. 4, 1997, at C2.

15. Reference to opening song from 1948 musical, *KISS ME, KATE* (music and lyrics by Cole Porter, book by Sam and Bella Spewack).

16. *See* Peter Marks, *Love, Valour, Déjà Vu*, N.Y. TIMES, Mar. 29, 1996, at C2.

17. *Id.*

18. *See* Copyright Registration No. PAu2067763 (registered Mar. 25, 1996).

19. Marks, *supra* note 16, at C2.

20. *See* Christine Dolen, *Suit Charges Boca Theater Copied Play's Direction*, MIAMI HERALD, Apr. 12, 1996, at B1.

to dismiss the claim, making way for the issue to proceed to trial.<sup>21</sup> However, again the suit settled out of court with Mantello receiving \$7,000<sup>22</sup> and a written acknowledgment that the theater had inadvertently used elements of his work without permission.<sup>23</sup> The SSDC hailed it as a victory for directors' rights,<sup>24</sup> while the Dramatists Guild of America<sup>25</sup> was quick to point out that, in the absence of a trial judgment, the case set no precedent.<sup>26</sup>

Equally unhelpful from a strictly precedential standpoint, but perhaps adding a new wrinkle to the debate, was the much publicized litigation surrounding the hit musical, *Rent*.<sup>27</sup> The *Rent* clash is distinguishable in that it involved a dramaturg<sup>28</sup> (rather than a director) making claims regarding her contributions to the text of the script<sup>29</sup> (rather than its stage directions). However, despite the absence of a formal ruling on the issue of stage directions, the *Rent* case conceivably opens a can of worms by suggesting that theater's inherently collaborative process might give rise to copyright claims stemming from independently identifiable contributions.<sup>30</sup>

The lack of judicial precedent extends not only to the question of when a director's intellectual property is infringed upon by a subsequent production but, also, to the question of whether directors even have a legitimate claim to such ownership. The latter is the issue that has consumed the bulk of the public debate.

21. See *Director's Suit Over Rights to Go to Trial*, N.Y. TIMES, Aug. 1, 1997, at C2.

22. Mantello has stated that he donated all of the money to the Stage Directors and Choreographers Foundation for the purpose of funding a beginning director's residency at a regional theater. See Mantello, *supra* note 4, at 64.

23. See Jesse McKinley, *Suit! Anger! Agreement!*, N.Y. TIMES, Mar. 26, 1999, at E2.

24. See *id.*

25. The Dramatists Guild of America is a national organization that promotes and protects the rights of playwrights, composers, and lyricists. Its mission is the focusing and articulating the common interest of all dramatic writers, including representation of those interests. However, unlike the SSDC, the Dramatists Guild is not a labor union.

26. See *Caldwell Settles Suit*, DRAMATIST, July–Aug. 1999, at 2.

27. See *Thomson v. Larson*, 147 F.3d 195 (2d Cir. 1998). For further discussion of this case, see *infra* Part III.C.

28. The dramaturg is a relatively recent addition to the theatrical process. Dramaturgs are employed, typically by the producer, to assist in the production of a play by offering suggestions of possible improvement for the script. For additional insights into the field of dramaturgy, see Lenora Inez Brown, *You Can't Tell a Dramaturg by Her Title*, AM. THEATRE, Jan. 2001, at 22.

29. See *Thomson*, 147 F.3d at 197.

30. See *id.* at 206; see also Jesse McKinley, *Family of "Rent" Creator Settles Suit Over Authorship*, N.Y. TIMES, Sept. 10, 1998, at B3. A tongue-in-cheek commentary on the issue of disputed ownership of portions of *Rent* was published in a Tucson, Ariz., monthly theater column. See Rich Amada, *RENTing the Devil's Advocate*, STEPPIN' OUT ENT., Nov. 1998, at 10 (copy on file with Author).

### B. The Players

The Montagues and Capulets<sup>31</sup> of this legal drama tend to break down principally, although not exclusively, into two (at least on this particular issue) feuding camps—writers and directors. At first glance this may seem strange because *director v. playwright* has not been the litigious alignment of the previously referenced cases.<sup>32</sup> However, the most frequently vocalized disagreements on the issue have come from the organizations representing these individuals, respectively.

The Dramatists Guild maintains that “artistic heritage” and long-standing Guild principles dictate that “the dramatist owns and controls the intellectual property, including copyright, of the author’s script and of all changes of any kind whatsoever in the manuscript, title, stage business or performance of the play.”<sup>33</sup> The Guild’s basic argument can be synthesized into two general points. First, it notes that United States copyright law does not extend protection to ideas,<sup>34</sup> and, because it is the director’s job to contribute *ideas* that facilitate the performance of a play, the Guild concludes that the director does not make a copyrightable contribution.<sup>35</sup> Second, the Guild argues that, if every director could copyright each original sequence of stage directions for a particular play, eventually people other than the author would usurp all the potential staging possibilities afforded by the script, and such a situation would vitiate the author’s right to have the play performed beyond the first few productions.<sup>36</sup> The bottom line for the Guild is that a director’s job,<sup>37</sup> collaborative<sup>38</sup> and essential as it is to the production

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31. The reference is to the feuding families of WILLIAM SHAKESPEARE, *ROMEO AND JULIET*.

32. In the cases involving *The Most Happy Fella* and *Love! Valour! Compassion!*, it was directors suing producers or other directors. In the *Rent* case, it was a dramaturg, not a director, who brought the action against the author’s estate.

33. Dramatist Guild public policy statement, reprinted in *DRAMATIST*, May–June 2000, at 17.

34. 17 U.S.C. § 102(b) (1994): “In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.”

35. Telephone Interview with Ralph Sevush, Associate Director, Dramatists Guild (July 24, 2000). See also *The Director-Dramatist Relationship*, *supra* note 4, at 16.

36. Telephone Interview with Sevush, *supra* note 35; see also Weidman, *supra* note 4.

37. For further insights into the art of stage directing, see GEORGE BLACK, *CONTEMPORARY STAGE DIRECTING* (1991); HAROLD CLURMAN, *ON DIRECTING* (1972).

38. For further insights into the collaborative process between playwright and director, see *What Directors Want Playwrights to Know* (Part I), *DRAMATIST*, Nov.–Dec. 1999, at 34 (published excerpts of May 1999 public discussion in which playwright Rich Orloff and directors Jace Alexander, Sue Lawless, Bill Martin, and Evan Yioulanis talked about the dramatist-director relationship when mounting a new play); *What Directors Want Playwrights to Know* (Part II), *DRAMATIST*, Jan.–Feb. 2000, at 14 (additional excerpts of same public discussion).

process, is not that of an author<sup>39</sup> and does not carry with it the rights of authorship.

Meanwhile, the SSDC, while publicly conceding that *ideas* are not protectable under copyright law,<sup>40</sup> maintains that there are occasions when a director can make distinct and separable *additions* to a play, which, if reproduced intentionally and pervasively by another without permission, constitute nothing less than plagiarism.<sup>41</sup> Beyond the mere character entrances, exits, and plot-mandated stage business, the SSDC contends there are times where complex stage directions become a “virtual choreography”<sup>42</sup> and where specific use of props or other devices goes beyond what is in the script to create new interpretations or themes.<sup>43</sup> Typically, the most transforming additions occur when a director is working on the production of a new play,<sup>44</sup> but the SSDC believes a major “reworking” of an established play is no less significant.<sup>45</sup> Deciding what is a *significant* reworking is, of course, a judgment call.<sup>46</sup>

### C. The Scene

Each side, it seems, is ready to act its role as zealous protector of its constituency’s claims. In addition to the public debate, both the Guild and the SSDC have issued statements trying to shore up their positions in the eyes of the law.

The Dramatists Guild has warned authors to be extremely careful when contracting with a producer—to be leery of vague words such as “other rights” and to insist that the contract state explicitly that “all changes, omissions and additions, including dialogue and stage directions, will belong to [the author], free of any obligations to make any payments to any person who makes or suggests

39. For further insights into the art of playwriting, see PLAYWRIGHTS ON PLAYWRITING (Toby Cole ed., 1960); SAM SMILEY, PLAYWRITING: THE STRUCTURE OF ACTION (1971).

40. See Pappas, *supra* note 4.

41. See *id.*

42. Choreography is explicitly granted copyright protection under 17 U.S.C. § 102(a)(4) (1994).

43. See Pappas, *supra* note 4. But see Jon Jory, *Mine, All Mine*, AM. THEATRE, Apr. 1999, at 3 (letter to the editor by artistic director of Actors Theatre of Louisville expressing a contrary, albeit tongue-in-cheek, viewpoint regarding such claims of ownership).

44. See *What Directors Want Playwrights to Know* (Parts I and II), *supra* note 38.

45. Telephone Interview with Kathryn Haapala, Deputy Executive Director, Society of Stage Directors and Choreographers (July 25, 2000).

46. For example, it has been noted that, while Gerald Gutierrez did file for copyright protection of his stage directions for *The Most Happy Fella*, he did not seek the same for his later direction of *The Heiress*. Reportedly, Gutierrez did not believe the latter production’s stage directions were extensive or unique enough to merit copyright. See Pappas, *supra* note 4; see also Telephone Interview with Haapala, *supra* note 45.

any changes in the [p]lay."<sup>47</sup> To further protect against claims of fixation,<sup>48</sup> the Guild also urges its members to insist on contractual limits to any videotaping of the play's production.<sup>49</sup>

In 1997, the SSDC took things a step further when its lawyer, Shechtman, issued an ultimatum to publishing companies and demanded that printed versions of plays not include stage directions, choreography, ground plans, use of props, or specific instructions regarding sound and lighting.<sup>50</sup> Shechtman's letter read, in part: "Although the practice of using the 'production' script rather than the play script for publication and license may long have been the norm, we are hereby asserting our property rights and demand that this practice be discontinued immediately."<sup>51</sup>

Although there have been "productive discussions" between the Guild and the SSDC,<sup>52</sup> as of this writing there has been no joint resolution. Thus, our stage is set for an analysis that hopes, through examination of statutes and case law, to provide a basis for more clearly determining when and *if* stage directions might be copyrightable.

## II. THE MOUSETRAP: A BRIEF OVERVIEW OF APPLICABLE LAW AND THE POTENTIAL PITFALLS

Stated bluntly, stage directors are in the unenviable position of trying to negotiate the maze of federal copyright law in search of a statutory reward that might not exist. Because stage directions are not expressly mentioned in the list of copyrightable subject matter,<sup>53</sup> directors are left to make a case that stage directions are encompassed within the definition of one of those express categories.<sup>54</sup> However, the risk in snatching at tempting morsels of liberal

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47. Excerpt from "Directors at the Gates [Part II]", DRAMATIST, May-June 2000, at 21.

48. Fixation is an essential ingredient to copyright. See discussion *infra* Part II.A.2.

49. See Excerpt from "Directors at the Gates [Part II]", *supra* note 47.

50. See Grimes, *supra* note 14.

51. *Id.* (quoting Shechtman's letter).

52. Telephone Interview with Haapala, *supra* note 45.

53. See 17 U.S.C. § 102(a) (1994). The eight enumerated subject matter categories are: (1) literary works, (2) musical works, including any accompanying words, (3) dramatic works, including any accompanying music, (4) pantomimes and choreographic works, (5) pictorial, graphic, and sculptural works, (6) motion pictures and other audiovisual works, (7) sound recordings, and (8) architectural works. See *id.*

54. The most obvious § 102(a) categories in which to attempt the inclusion of stage directions would be: literary works, which are defined in 17 U.S.C. § 101 (1994 & Supp. IV 1998) as "works, other than audiovisual works, expressed in words, numbers, or other verbal or numerical symbols or indicia, regardless of the nature of the material objects, such as books, periodicals, manuscripts, phonorecords, film, tapes, disks, or cards, in which they are embodied," and which have been held to include other works not specified in that definition, such as computer programs, see *Computer Assocs. Int'l, Inc. v. Altai, Inc.*, 982 F.2d 693, 702 (2d Cir. 1992); and dramatic works, which are not defined in § 101.

interpretation is that they may lie within a fatal trap of contradictory case law. Nevertheless, the first stop will be an examination of definitions in their broadest sense.

*A. The Matchmaker: Pairing Up What Can Be Copyrighted Under the Law with Who Can Copyright It*

The U.S. Constitution grants Congress the authority to provide copyright to "Authors" for their "Writings."<sup>55</sup> Thus, the initial hurdle facing directors is the question of whether they can be classified as authors in connection with their stage directions and whether those directions constitute a writing under contemporary, practical usage of the terms.

*1. What Constitutes an Author?*

The U.S. Supreme Court has long defined an author, in the sense that the word appears in the Constitution, as a person to whom anything owes its origin—a definition not limited to a person who has literally written something.<sup>56</sup> This interpretation was necessary to extend copyright protection to such works as would seem logically to merit the protection but the existence of which the framers of the Constitution might not have predicted in their day.<sup>57</sup> Thus, it has been noted that American copyright law has had a history of gradual expansion.<sup>58</sup> But that does not explicitly answer whether that expansion has yet enveloped the stage director whose art, like that of the choreographer, was in existence during the framers' time but whose specific contribution, *unlike choreography*, has not been written explicitly into the Copyright Act.

Professor Russ Versteeg's analysis of case law leads him to the conclusion that a majority of courts employ a two-part test when deciding the question of authorship: (1) Did the putative author create an original expression that is, in itself, copyrightable? and (2) Did the putative author fix that expression in a tangible form?<sup>59</sup> Putting aside for the moment the fixation part of the test, let us adopt the first part of the test as that which we presume to be the most likely

55. See U.S. CONST. art. I, § 8, cl. 8.

56. See *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 737 (1989); *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 57–58 (1884).

57. *Burrow-Giles Lithographic Co.*, for example, extended copyright protection to photography—an unknown art form in the 18th Century—and, in so doing, granted authorship status to photographers. See *Burrow-Giles Lithographic Co.*, 111 U.S. at 57–58.

58. See H.R. REP. No. 94–1476, at 51 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5664.

59. See Russ Versteeg, *Defining "Author" for Purposes of Copyright*, 45 AM. U. L. REV. 1323, 1326–27 (1996) (citing various cases as supporting authority). Versteeg also offers what he perceives as the minority opinion (based on Melville Nimmer's view that a more than de minimis contribution to a work should be looked upon as authorship), see *id.* at 1333, and his own opinion, grounded in the theory that the sine quo non of copyright authorship is the act of communicating expression either directly or indirectly to the eventual state of fixation. See *id.* at 1339.



criterion used for determining authorship. It is a more stringent test than the alternatives Versteeg offers,<sup>60</sup> and, so, if the director's claim of authorship passes muster under it, logic dictates that the claim will not fail the other tests. Under the majority test, the issue of a director's authorship is wholly dependent on the question of whether the director's contribution is, by itself, copyrightable.<sup>61</sup> Therefore, an analysis of whether stage directions are proper subject matter for copyright<sup>62</sup> should also provide an answer to that element of the authorship question.

Further complicating the matter is the question: Presuming author status is a possibility, what *kind* of author is a director? A director is, surely, not an author in the same sense that a playwright is an author. The playwright begins with a blank page and, word by word, invests it with characters, dialogue, and situations all of original creation.<sup>63</sup> The director's work typically begins well after a fully copyrightable script has already been written.

That is not to say that one cannot get in on the action for authorship purposes just because one was not there at the very beginning. The Copyright Act defines a joint work as "a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole."<sup>64</sup> It makes no mention of when the two authors need join forces.<sup>65</sup> Thus, a director could become a joint author if the playwright and director choose to collaborate on a revised draft of the script. However, for a director to succeed in a claim that stage direction additions were intended to be merged with what the playwright had previously written, the director would have to prove that the two individuals did, indeed, act as collaborators.<sup>66</sup> In the absence of evidence of collaboration, the director is left to seek copyright protection only on those contributions that are separable from the original work.<sup>67</sup>

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60. See *id.* at 1339.

61. See *id.* at 1326–27.

62. See *infra* Part II.A.2.

63. Even where a play is a derivative of a preexisting work, the selection and arrangement of elements—where no such selection and arrangement formerly existed for the purpose of dramatization—can constitute sufficient originality of authorship to justify the claim that the playwright is the unqualified author of the play. *Cf.* *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 348–49 (1991) (noting the significance of selection and arrangement in determining the copyrightability of a telephone directory).

64. 17 U.S.C. § 101 (1994 & Supp. IV 1998).

65. See *MOSS HART, ACT ONE* (1959), for an account of how a producer, interested in an early play by Hart, teamed him with collaborator George S. Kaufman to rework the play into something more suitable for Broadway.

66. See *infra* Part III.A (discussing a director's claim of copyright through collaboration).

67. See *infra* Parts III.B–C (discussing independent claims of copyright).

## 2. What Can Be Copyrighted?

"Copyright protection subsists...in original works of authorship fixed in any tangible medium of expression...."<sup>68</sup> In adopting the phrase "original works of authorship" in the Copyright Act of 1976, Congress purposely selected wording intended to incorporate the traditional standard of originality established by the courts under the Copyright Act of 1909.<sup>69</sup> The Supreme Court has held that the originality standard is extremely low, requiring only a minimal degree of creativity to be satisfied.<sup>70</sup> Even where elements may not qualify individually for copyright protection, that protection can still be afforded to the selection and arrangement of those elements.<sup>71</sup> Thus, originality might seem to present the least imposing obstacle to copyrighting stage directions.

However, the other side of the copyright cornerstone—*fixation*— may prove a bit stickier. Under the Copyright Act, "[a] work is 'fixed' in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration."<sup>72</sup> While at least one court has held that personal fixation is not a prerequisite to authorship,<sup>73</sup> Congress deemed fixation an important prerequisite to statutory copyright protection.<sup>74</sup> This raises a question regarding the degree of specificity necessary for fixation. The House Report takes pains to emphasize that the form of fixation is inconsequential,<sup>75</sup> but there is a dearth of explanation as to how detailed that fixation must be.

Unlike choreography, which can be duplicated with reasonable precision through a written system known as Labanotation,<sup>76</sup> stage directions tend to be more general and often lend themselves to physical variations.<sup>77</sup> If a stage direction leaves open too many possible ways of accomplishing the same goal, has it truly been fixed? If it has not been fixed, a stage direction might still be

68. 17 U.S.C. § 102(a) (1994).

69. See H.R. REP. No. 94-1476, at 51 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5664.

70. See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991) (citing MELVILLE B. NIMMER & DAVID NIMMER, 1 NIMMER ON COPYRIGHT §§ 1.08[C][1], 2.01[A], [B] (Matthew Bender & Co, 1990)).

71. See *id.* at 349.

72. 17 U.S.C. § 101 (1994 & Supp. IV 1998).

73. See *Andrien v. Southern Ocean County Chamber of Commerce*, 927 F.2d 132, 134-35 (3d Cir. 1991) (holding that a party was the author of a map even though he, himself, had not personally fixed the map features to the page; the fact that he had directed that the features be fixed according to his instructions was sufficient).

74. See H.R. REP. No. 94-1476, at 52, *reprinted in* 1976 U.S.C.C.A.N. 5659, 5665.

75. See *id.*

76. See ANN HUTCHINSON GUEST, *LABANOTATION* (3d ed. 1977).

77. Consider, for example, how many different ways one might carry out the stage direction: "She busies herself."

protected under common law,<sup>78</sup> but, with no decided cases on point, those are truly murky waters.

Such issues may be moot, though, if stage directions fail to meet the most basic requirement of copyright—that they be original *expressions* of ideas and not *ideas* themselves. The Copyright Act expressly denies copyright protection to, among other things, any idea, procedure, process, method of operation, or concept,<sup>79</sup> and the Supreme Court has consistently reiterated that rule.<sup>80</sup> Thus, it can be concluded that the *idea* of creating a spooky atmosphere for a scene cannot be copyrighted, but the specific elements expressing such an atmosphere might.

Yet, even original expression has its limitations. There are, after all, a limited number of ways to carry out certain things dictated by the basic plot of a play. If the script calls for Hamlet to kill Polonius with his sword, one cannot be faulted for the unavoidable similarity to Romeo's stabbing of Tybalt. Nor would it be in anyone's best interest to require that all subsequent performances find some other method of disposing of a character so as not to infringe the previously utilized method.<sup>81</sup>

The doctrine of *scenes a faire* addresses this concern. *Scenes a faire* is defined as incidents, characters or settings that are, for all practical matters, either indispensable or so routinely standard that they cannot be protected by copyright, even in an otherwise copyrightable work, because they would naturally be included in works of a similar nature.<sup>82</sup> The *scenes a faire* doctrine makes the logical allowance that, for example, when sword-bearing enemies come upon each other, a sword fight is the likely, unoriginal, and inevitable next happening.

*Scenes a faire* may seem like a rather obvious doctrine of necessity, but courts have ruled much less obvious production choices to be beyond the scope of copyright. Examples include a case in which copyright was denied the directorial choice of having the actors dressed exclusively in black-and-white<sup>83</sup> and a case in which the inclusion on stage of an elaborately constructed mechanical river was not extended copyright protection.<sup>84</sup> Additionally, it has long been held that mere

78. See H.R. REP. No. 94-1476, at 52, *reprinted in* 1976 U.S.C.C.A.N. 5659, 5665.

79. See 17 U.S.C. § 102(b) (1994).

80. See, e.g., *Mazer v. Stein*, 347 U.S. 201, 217-18 (1954); *Baker v. Selden*, 101 U.S. 99, 102-03 (1880).

81. Taken to the extreme, Hamlet, deprived of his sword, might resort to choking Polonius—except that he would then be infringing Othello. That option denied, he might opt to drown Polonius in a barrel—except then he would infringe Richard III. Eventually, with the realization that a totally unique method of homicide is simply *not to be*, Hamlet would have no choice but to let Polonius live to bore his children with further speeches about the evils of lending and borrowing money.

82. See BLACK'S LAW DICTIONARY 1344 (6th ed. 1990); see also *Zambito v. Paramount*, 613 F. Supp. 1107, 1110-11 (E.D.N.Y. 1985); *Schwarz v. Universal Pictures Co.*, 85 F. Supp. 270, 278 (S.D. Cal. 1945); *Cain v. Universal Pictures Co.*, 47 F. Supp. 1013, 1017 (S.D. Cal. 1942).

83. See *Obrien v. Chappel*, 159 F. Supp. 58 (S.D.N.Y. 1958).

84. See *Serrana v. Jefferson*, 33 F. 347 (S.D.N.Y. 1888).

motions, voices and postures of actors, as well as (what is generally termed) "mere stage business" is not copyrightable.<sup>85</sup>

Succinctly stated, courts are reluctant to allow copyright where there are a limited number of expressions possible and where a monopoly over them threatens to exhaust all possibilities of future use.<sup>86</sup> It is difficult to imagine a single element or device that has not been used on stage sometime before or would not, by necessity, be used sometime in the future. Hence, if the possibility of copyrightability exists for stage directions, it may not be in any individual component of a play's staging but, rather, lurking within a greater conglomeration of directorial choices for the production as a whole.

*B. You Can't Take It With You: Directors and Playwrights Attempt to Run Off Competing Claims Through Contract*

Despite the unsettled arguments over the copyrightability of stage directions, both directors and playwrights have attempted to chalk off their respective claims through contract.

It has long been expressly stipulated in the model contracts that the Dramatists Guild makes available to its members that the producer must recognize the play to be the exclusive artistic creation of the author, that no additions, omissions, or alterations—including stage directions—can be made without the author's prior written consent, and that no one under the producer's control or employ will represent, explicitly or otherwise, that the authorship of the play is held by anyone other than the author.<sup>87</sup> The broad sweep of property rights claimed within that contract provision runs right into a seemingly contradictory one when you compare it to the director's basic contract as negotiated by the Society of Stage Directors and Choreographers in its collective bargaining agreement with the League of American Theatres and Producers. The SSDC contract states that the producer and director agree that all rights to the direction created by the director remain the sole and exclusive property of the director and that the director reserves the right to copyright those stage directions.<sup>88</sup>

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85. *Universal Pictures Co. v. Harold Lloyd Corp.*, 162 F.2d 354, 363 (9th Cir. 1947); *Harold Lloyd Corp. v. Witwer*, 65 F.2d 1, 22 (9th Cir. 1933); *Chappell & Co. v. Fields*, 210 F. 864, 865 (2d Cir. 1914); see also MILTON C. JACOBS, *OUTLINE OF THEATRE LAW* 32 (1949).

86. See *Morrissey v. Procter & Gamble Co.*, 379 F.2d 675, 678-79 (1st Cir. 1967). See also *infra* Part IV for a further discussion of what is known as the merger doctrine.

87. See *Dramatists Guild Form of Dramatic Production Contract (99 seats or less)*, Part VII (1995). The Dramatists Guild has various forms for production contracts with various types of theaters, but the wording for ownership and artistic approvals is identical in all of them. Information confirmed in Telephone Interview with Sevush, *supra* note 35.

88. See *Collective Bargaining Agreement of The League of American Theatres and Producers and the Society of Stage Directors and Choreographers, Inc.*, Part XVII

It has been argued that a basic tenet of property law is that one can convey to another—through contract or in any other manner—only what one *actually possesses*.<sup>89</sup> Since the playwright does not sell the producer the play but, rather, only sells the right to do performances of it, the producer does not possess the right to grant anyone else copyright privileges stemming from the script owned exclusively by the author.<sup>90</sup> However, a similar argument might be made in the other direction if the director is perceived to be an independent contractor whose artistic creations do not belong to the producer and on whose behalf the producer can make no contractual promises to the playwright. If a director is deemed to be an independent artist who has authored original stage directions for a particular production, is it not logical that the producer would not have a legal basis to transfer ownership of the director's artistic product to the playwright? So, at least part of the issue hinges on whether a stage director is an independent contractor who maintains full control of all directorial creations or an employee creating a work-made-for-hire that is bound by the contract restrictions of the employer/producer. Whether a producer considers a director to be an employee depends on which producer you ask.

Hanging in the office of Seattle Repertory Theatre's Managing Director, Benjamin Moore, is a framed copyright certificate for the company's manual for stage directions of Herb Gardner's play, *I'm Not Rappaport*.<sup>91</sup> Seattle Repertory Theatre is listed as "application author" and as the "employer for hire" of the production's director, Daniel J. Sullivan.<sup>92</sup> Sullivan was, at the time, the Seattle Rep's artistic director<sup>93</sup> and, so, had a significantly stronger employment tie to the company than those who are brought in to direct only one show and who are not routinely on the company payroll. Moore says, ideally, the company would like to consider all its stage directors employees (which would make all stage directions works-for-hire) but admits to being in a quandary over making such a blanket

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(1996) (incorporated into the SSDC's basic form contract). The agreement also reserves the same rights for choreographers.

89. See, e.g., *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823) (holding that full title to land could not be acquired from American Indians who, themselves, did not possess full title in the eyes of the law); see also *Gilliam v. Am. Broad. Cos., Inc.*, 538 F.2d 14, 20–21 (2d Cir. 1976) (holding that when the BBC granted ABC broadcasting rights for *Monty Python's Flying Circus*, that grant could not have included the right for ABC to abridge the episodes because such abridgement exceeded the scope of what the show's owners had originally granted to the BBC).

90. See *Leichtman*, *supra* note 4, at 693.

91. Telephone Interview with Benjamin Moore, Managing Director, Seattle Repertory Theatre (Oct. 6, 2000). Moore said he framed the certificate because of the unique nature of the registration. To his knowledge, no other theater company has registered copyright ownership of stage directions in the company's name. An on-line search of the U.S. Copyright Office records revealed five registrations claiming copyright for stage directions of plays. Except for the registration in the name of Seattle Repertory Theatre, all of the others were registered to individuals.

92. Copyright Registration No. PAU1138285 (registered Aug. 10, 1988).

93. Telephone Interview with Moore, *supra* note 91.

statement because of the SSDC collective bargaining agreement that assigns ownership of stage directions to the directors.<sup>94</sup>

Meanwhile, Arizona Theatre Company's Managing Director, Jessica L. Andrews, while viewing the *actors* as workers for hire, considers an outside director (brought in for a specific directing project) *not her company's employee*. Rather, she considers that director to be an independent contractor with a significant amount of autonomy to set rehearsal schedules and carry out the production process with relatively little intrusion from theater management.<sup>95</sup>

The treatise of Paul Goldstein, Stanford Law Professor and noted copyright expert, suggests that the short-term nature of a director's work on any given play leans in favor of an independent contractor status.<sup>96</sup> Goldstein says that, while a long-term employment arrangement ordinarily implies the employer's right to supervise and control the employee, that right is not ordinarily implied with short-term agreements contemplating specific projects; and, so, he concludes that the right to supervise and control might have to be expressly stated in the employment agreement for a short-term worker to be considered an employee.<sup>97</sup> He further notes that courts are divided as to whether an employer need exercise control and supervision or simply retain that right in order to qualify a job as a work-made-for-hire.<sup>98</sup>

However, the Supreme Court explicitly rejected the supervision and control test as the determinative factor in *Community for Creative Non-Violence v. Reid (CCNV)*.<sup>99</sup> Instead, the Court looked for guidance from the Restatement of Agency.<sup>100</sup> Although the Restatement's comments acknowledge that control is an important element and can be determinative in many situations,<sup>101</sup> it also notes that there are other factors to be considered, including the custom of the community.<sup>102</sup> In *CCNV*, the Supreme Court determined that Reid, a sculptor hired to create a work of art, was an independent contractor and not an employee of CCNV based on such factors as: he provided a special skill; he supplied his own tools; he worked in his own studio; he was retained less than two months; CCNV had no right to assign him additional projects; apart from a deadline for completion, he was free to work at his own pace; and, finally, CCNV did not pay payroll or Social Security taxes, provide employee benefits, or contribute to unemployment insurance or workers' compensation funds.<sup>103</sup> The Court further noted that the language and structure of the Copyright Act provide clearly defined criteria for

94. *Id.*

95. Telephone Interview with Jessica L. Andrews, Managing Director, Arizona Theatre Co. (Aug. 16, 2000).

96. See 1 PAUL GOLDSTEIN, COPYRIGHT § 4.3.2.1(a), at 4:37 (2d ed. Supp. 1999).

97. See *id.*

98. See *id.* at 4:37-4:38.

99. 490 U.S. 730, 750 (1989).

100. See *id.* at 752, n.31; see also RESTATEMENT (SECOND) OF AGENCY § 220 (1958) (defining "servant" in the context of employment).

101. See RESTATEMENT (SECOND) OF AGENCY § 220, *supra* note 100, cmt. d.

102. See *id.* cmts. h, i.

103. See *Community for Creative Non-Violence*, 490 U.S. at 752-53.

determining a work-for-hire.<sup>104</sup> The Act defines a work-made-for-hire as either a work prepared by an employee within the scope of employment or a specially ordered or commissioned work that falls into one of nine delineated categories<sup>105</sup> if the parties expressly agree in writing that it will be considered a work-made-for-hire.<sup>106</sup> Play directing falls into none of the delineated categories for commissioned works. So, unless the director's contract with the producer expressly states that the directing will be a work-made-for-hire by an employee, that designation might be subject to interpretation based on the way the director's job is treated by the producer.

### III. THE IMPORTANCE OF BEING EARNEST: TAKING A HARD LOOK AT WHAT MIGHT BE COPYRIGHTABLE FOR A DIRECTOR AND WHAT PROBABLY IS NOT

Now comes the hard part—at least, for those who have a vested interest in the resolution of this issue. As was insinuated among the introductory paragraphs, the application of law to the situation at hand is unlikely to be fully pleasing to either side because it appears not to vindicate either position as unequivocally as one might desire if one is zealously advocating a partisan viewpoint. However, the goal of this Note is not *advocacy* but *credibility* (ambitious though it may be to attempt a fully *credible* conclusion for potential case law where no such published case law currently exists on point); and the Author invites both playwright and director to approach the following analysis with an earnest regard for what is probable rather than what is preferred.

Let us assume that, based on the *CCNV* holding, there are some courts that will find at least some directors to be independent contractors,<sup>107</sup> thereby, eliminating the work-for-hire obstacle for those individuals. We now turn to the problem of determining how and when a director might clear the various hurdles necessary to claim copyright on stage directions.

#### *A. The Odd Couple: Can a Director Be Considered a Joint Author with the Playwright?*

A director hoping to lay claim to copyright by arguing that the contribution of stage directions constitutes a form of joint authorship faces a

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104. See *id.* at 742–43.

105. The categories are: (1) a contribution to a collective work, (2) a part of a motion picture or other audiovisual work, (3) a translation, (4) a supplementary work, (5) a compilation, (6) an instructional text, (7) a test, (8) answer material for a test, and (9) an atlas. See 17 U.S.C. § 101 (1994 & Supp. IV 1998).

106. See *id.*

107. This proposition is easily substantiated when one is reminded that Broadway and its closest progeny do not constitute the entirety of the theater world, and that the landscape is peppered with numerous community theaters, schools, and other small organizations offering theater opportunities where directors would not only not be considered employees under the *CCNV* standard but where they are not even paid for their services. See BLACK, *supra* note 37, at 324–27.

difficult if not insurmountable obstacle. Specifically, the Copyright Act of 1976 defines a joint work as “a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.”<sup>108</sup> The key term in this definition is the word “intention.” The House Report refers to it as the “touchstone” and notes that such intention must exist “at the time the writing is done.”<sup>109</sup> No one, to this Author’s knowledge, has had the *chutzpah* to suggest that Frank Loesser, as he was polishing up *The Most Happy Fella* for its 1956 Broadway premiere, intended a decades-later joint authorship with the then six-year-old Gerald Gutierrez. Therefore, it would be pointless to argue that Gutierrez or other directors in similar situations are joint authors.

However, the intention requirement, as a bar to a director’s claim of joint authorship, is not restricted only to play scripts completed by the writer before anyone else came into the picture. The standard was also applied to contemporaneous efforts in *Childress v. Taylor*.<sup>110</sup> In *Childress*, actor Clarice Taylor became interested in creating a play based on the life of comedienne Jackie “Moms” Mabley. On her own, Taylor assembled material, interviewed Mabley’s friends and family, collected her jokes, and reviewed library resources.<sup>111</sup> Later, Taylor convinced playwright Alice Childress to write a script based on Taylor’s research, and Taylor continued to provide information and make specific suggestions to Childress as the writing took place.<sup>112</sup> Following the play’s initial production, the working relationship between Taylor and Childress deteriorated<sup>113</sup> eventually resulting in a lawsuit in which Taylor claimed to be a joint author with equal rights in the play.<sup>114</sup> The Second Circuit Court of Appeals affirmed a lower court ruling that Taylor was not a joint author because—regardless of what notions Taylor might have had about the writing arrangement—there was no evidence to suggest that Childress ever contemplated or would have accepted crediting the play as having been jointly authored.<sup>115</sup> The court held that collaboration alone is insufficient to establish joint authorship.<sup>116</sup> The two-pronged standard propounded for joint author status is: (1) the contribution of each party must be something that is, itself, copyrightable under the law, and (2) the parties must have entertained the concept of joint authorship during creation.<sup>117</sup>

The Seventh Circuit Court of Appeals applied the *Childress* standard three years later in *Erickson v. Trinity Theatre, Inc.*<sup>118</sup> *Erickson* involved a claim

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108. 17 U.S.C. § 101.

109. H.R. REP. No. 94-1476, at 58 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5736.

110. 945 F.2d 500 (2d Cir. 1991).

111. *See id.* at 502.

112. *See id.*

113. *See id.* at 503.

114. *See id.* at 504.

115. *See id.* at 509.

116. *See id.* at 507-08.

117. *See id.*

118. 13 F.3d 1061 (7th Cir. 1994).



of joint authorship stemming from various editorial suggestions made by the actors and incorporated into the script by the playwright. Citing *Childress*, the court held that the statutory language for joint authorship clearly requires that each and every putative author intend her contributions to be merged into a unitary whole.<sup>119</sup> In *Erickson*, as in *Childress*, collaboration did not automatically bestow joint author status.

More recently, the Second Circuit dredged up the *Childress* standard again to reject the joint authorship claim of the dramaturg of the musical, *Rent*.<sup>120</sup> That case did raise the potentially volatile question of whether a dramaturg, director, or other person involved in the collaborative process could have an independent copyright claim on individual contributions.<sup>121</sup> However, putting that issue aside for the moment, it seems clear that, absent an explicit agreement with the playwright, the director will not qualify as a joint author.

*B. Do You Believe in Fairies?: Can Directors Put Their Faith in Claims that They Are Creating Copyrightable Derivative Works?*

The next question a director might consider asking is whether the addition of stage directions—and, particularly, those that are not spelled out in the original script—constitutes a copyrightable derivative work.<sup>122</sup> This seems a far stronger argument because, although one may be working with a script that has been performed many times before, it can be argued that each new production—with its own various choices of performance and mood—constitutes a distinctly new thing.<sup>123</sup> There is even a case in which a motion picture was explicitly held to be a derivative of its own screenplay.<sup>124</sup>

However, it is not an argument without contradictions. The directors' union has specifically declined to embrace the suggestion that its members are creating derivative works.<sup>125</sup> The rationale for this reluctance may seem apparent when one considers the heightened standard a derivative work must meet to qualify for copyright.

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119. See *id.* at 1068–69.

120. See *Thomson v. Larson*, 147 F.3d 195, 201 (2d Cir. 1998).

121. See *Copyright—Joint Authorship—Second Circuit Holds That Dramaturg's Contributions to the Musical Rent Did Not Establish Joint Authorship with Playwright-Composer*.—*Thomson v. Larson*, 147 F.3d 195 (2d Cir. 1998), 112 HARV. L. REV. 964, 967 (1999) [hereinafter *Joint Authorship*] (“By discussing the possibility that a nonauthor could retain independent copyright interests, the court left the door open for a slew of litigation.”). For further discussion, see Section C, *infra*.

122. See 17 U.S.C. § 103 (1994) (“The subject matter of copyright as specified by section 102 includes compilations and derivative works....”).

123. See CLURMAN, *supra* note 37, at 6–7.

124. See *Shoptalk, Ltd. v. Concorde-New Horizons Corp.*, 897 F. Supp. 144, 146 (S.D.N.Y. 1995) (holding that the script for *The Little Shop of Horrors* was not so similar to the film as to have been incorporated into it), *vacated in part on other grounds*, 168 F.3d 586 (2d Cir. 1999).

125. Telephone Interview with Haapala, *supra* note 45.

The changes made to an original work must be more than merely trivial for the author of those changes to claim it is a derivative.<sup>126</sup> A derivative's newly added material must "recast, transform or adapt the pre-existing work" in such a way that the variation "render[s] the derivative work distinguishable from its prior work in any meaningful manner...."<sup>127</sup> That is clearly a much higher standard than the minimal degree of originality necessary for non-derivative works.<sup>128</sup> As such, a director does not have the luxury of proving only *some* contribution of creativity as the basis for copyright.

An even stickier point involves the question of consent needed to create a derivative. Among the rights held by the owner of a copyrighted work is the exclusive right to do or authorize derivative works.<sup>129</sup> The Copyright Act of 1976 does not define what constitutes authorization in this respect. However, Judge Posner's language in *Gracen v. Bradford Exchange*<sup>130</sup> has been interpreted to mean that one cannot claim copyright in a derivative work unless specifically licensed to do so by the copyright holder of the underlying work.<sup>131</sup> This bright line interpretation is not without critics, though. The oft-cited Nimmer treatise takes issue with *Gracen*, noting that 17 U.S.C. § 103(a) conditions copyright in a derivative not upon consent but only upon the pre-existing material not having been appropriated "unlawfully."<sup>132</sup> Nimmer further propounds that, except where the Copyright Act makes explicit reference to the need for express consent,<sup>133</sup> copyright in a non-infringing derivative work arises by operation of law even where the right to claim that copyright is not affirmatively asserted in a license.<sup>134</sup>

126. See *L. Batlin & Son, Inc. v. Snyder*, 536 F.2d 486, 490 (2d Cir. 1976).

127. MELVILLE B. NIMMER & DAVID NIMMER, 1 NIMMER ON COPYRIGHT § 3.03, at 3-9 (Matthew Bender & Co. 2000).

128. See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 348-49 (1991); see also *supra* Part II.A.2.

129. See 17 U.S.C. § 106(2) (1994).

130. 698 F.2d 300 (7th Cir. 1983).

131. See *Fred Riley Home Bldg. Corp. v. Cosgrove*, 864 F. Supp. 1034, 1037 (D. Kan. 1994); *Gallery House, Inc. v. Yi*, 582 F. Supp. 1294, 1297 (D.C. Ill. 1984).

132. See 1 NIMMER, *supra* note 127, § 3.06, at 3-34.25.

133. See, e.g., 17 U.S.C. § 112(f) (1994 & Supp. IV 1998) ("The transmission program embodied in a copy or phonorecord made under this section is not subject to protection as a derivative work under this title except with the express consent of the owners of copyright in the preexisting works employed in the program."); 17 U.S.C. § 115(a)(2) (1994) ("A compulsory license includes the privilege of making a musical arrangement of the work to the extent necessary to conform it to the style or manner of interpretation of the performance involved, but the arrangement...shall not be subject to protection as a derivative work under this title, except with the express consent of the copyright owner.").

134. See 1 NIMMER, *supra* note 127, § 3.06 & n.22, at 3-34.25 to 3-34.26. *Accord Kennedy v. Nat'l Juvenile Detention Ass'n*, 187 F.3d 690, 694-95 (7th Cir. 1999); *Liu v. Price Waterhouse*, No. 97 C 3093, 1999 WL 47025, at \*4 (N.D. Ill. Jan. 25, 1999). However, Nimmer also notes that, where the parties have an agreement affirmatively barring a licensee from obtaining a copyright in a licensed derivative work, "that contractual provision would appear to govern." See 1 NIMMER, *supra* note 127, § 3.06, at 3-34.26.

Therefore, there appears to be some justification for believing that at least some courts might hold in favor of a director's claim of copyrightable stage directions if—and, based on the heightened originality standard, this is a big *if*—a case can be made that a director's interpretive production constitutes a legally authorized derivative of the playwright's script. Analogous case law may provide a better sense of whether such a belief is grounded in judicial reality or is as ethereal as Tinkerbell.

### 1. Television as a Derivative

The aforementioned diminutive fairy, Peter Pan, Captain Hook, and all the other fanciful characters of J.M. Barrie's 1904 play were plucked from their original Never-Never Land and whisked into a derivative musical version that opened on Broadway in 1954.<sup>135</sup> NBC later transported the derivative musical from the live stage to the television screen by creating a videotaped production of the stage work.<sup>136</sup> It could be said that the taped version's similarity to the stage production was enhanced through NBC's contracting with various performers and artists who were connected with the Broadway production.<sup>137</sup> More than two decades later, in a copyright infringement suit involving unauthorized copying of the *Peter Pan* tape, the defendant argued *inter alia* that NBC had no interest that was capable of being copyrighted because it made only trivial additions to the underlying theatrical work.<sup>138</sup> However, the court held that NBC's choice of camera angles, stage direction, and editing of camera views were sufficient to constitute a copyrightable derivative work.<sup>139</sup> The court said: "NBC did not have to change the content of the theatrical production of 'Peter Pan' in order to author an audiovisual work worthy of copyright protection. Rather, the television production itself was a modification of the original work."<sup>140</sup>

The suggestion that copyrightability can spring from editorial choices that extend beyond the scripted text of an underlying work seems to be echoed in the House Report. The Report notes that a television director and camera operators covering a football game are engaged in "authorship" when selecting what images to transmit to the viewers and in what order.<sup>141</sup>

Naturally, a stage performance before a live audience does not involve camera angles or video editing, thus, providing a clear distinction between a television and stage production. Still, one might ponder how we should apply the rules for derivative works where, despite the fact that there is no camera, a

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135. See J.M. BARRIE, *PETER PAN* (lyrics by Carolyn Leigh, Betty Comden and Adolph Green; music by Mark Charlap and Jule Styne).

136. See *Nat'l Broad. Co. v. Sonneborne*, 630 F. Supp. 524, 528 (D. Conn. 1985).

137. See *id.* at 529.

138. See *id.* at 531.

139. See *id.* at 532.

140. *Id.*

141. H.R. REP. No. 94-1476, at 52 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5665.

director's choices manipulate an audience's overall perception of the underlying work.

## 2. Musical Arrangements

If we compare what a director does when inserting original stage directions into an underlying script with what a musical arranger does when inserting original notes into an underlying melody, we may be able to draw some analogies from case law involving musical arrangements as derivative works. Unlike dramatic works, musical arrangements are subject to the rules of compulsory licensing.<sup>142</sup> However, those rules are not pertinent to the present discussion because compulsory license requirements do not hinge on the question of whether or not a work is a derivative.

To qualify as a derivative, a musical work must be more than a merely stylized version of an original song—qualifying alterations possibly including such additions as unusual vocal treatment, additional and not trivial lyrics, unusual alterations of harmony, or novel sequential uses of themes.<sup>143</sup> In keeping with the spirit of a heightened requirement of originality, one court held that the addition of an alto section to a pre-existing song did not constitute a derivative,<sup>144</sup> and another held that an arrangement consisting of an introduction, a repetition of theme in the breaks, several bars of harmony, and an ending were not copyrightable contributions because they involved no more than inconsequential embellishments that any competent musician might improvise.<sup>145</sup>

However, despite the above examples, we cannot write off musical arrangements in the context of derivative works. In *Tempo Music, Inc. v. Famous Music Corp.*<sup>146</sup> the estate of Duke Ellington was embroiled in a battle with the estate of Billy Strayhorn over copyright claims to a particular version of the song, *Satin Doll*. At issue was whether Strayhorn's arrangement of the Ellington melody, including the addition of an original harmony, constituted a copyrightable

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142. See 17 U.S.C. § 115 (1994 & Supp. IV 1998); see also *supra* note 133.

143. See *Woods v. Bourne Co.*, 841 F. Supp. 118, 121 (S.D.N.Y. 1994) (taking issue with the district court's examples of qualifying alterations, and saying that the district court, in its particulars, probably overstated the standard for originality in derivative works; but holding that the district court did express generally the appropriate standard—that is, something of substance must be added making the work to some extent a new work with the old work embedded in it), *aff'd in part, rev'd in part on other grounds*, 60 F.3d 978, 991 (2d Cir. 1995); see also *Supreme Records v. Deca Records*, 90 F. Supp. 904, 908 (S.D. Cal. 1950) (holding that “before a musical arrangement may be protected as a right against a competitor, it must have a distinctive characteristic, aside from the composition itself, of such character that any person hearing it played would become aware of the distinctiveness of the arrangement”). *Accord* 1 NIMMER, *supra* note 127, § 2.05[C], at 2–56 to 2–57 (“[T]here appears to be a tendency to require a somewhat greater degree of originality in order to accord copyright to a musical arrangement.”).

144. See *Cooper v. James*, 213 F. 871, 873 (N.D. Ga. 1914).

145. See *McIntyre v. Double-A Music Corp.*, 166 F. Supp. 681, 683 (S.D. Cal. 1958).

146. 838 F. Supp. 162 (S.D.N.Y. 1993).

derivative work in which Strayhorn's estate had an interest.<sup>147</sup> Although the court recognized that harmony is typically limited by the melody it is meant to accompany, it also noted that harmony is not always a mechanical by-product of melody, and that a composer may exercise creativity in selecting among the available chords to influence "the mood, feel and sound of a piece."<sup>148</sup> In so noting, the court refused to pronounce a per se rule removing harmony entirely from the scope of copyright protection.<sup>149</sup>

Along these lines, another court held that there can be copyrightability even in common guitar riffs<sup>150</sup> contained within a song when the musician has contributed something recognizably his own that is more than a trivial variation on the riffs.<sup>151</sup> So, it would seem that, while the standard of originality is quite high in musical derivatives, it is not insurmountable.

### 3. *Choreography and Movement*

Mere motions, postures, and stage business are not subject to copyright.<sup>152</sup> The same holds true for what has been termed social dance steps and simple routines.<sup>153</sup> Yet, pantomimes and choreographic works are explicitly included in the statutory language of federal copyright law.<sup>154</sup> It was not always so. Prior to the Copyright Act of 1976, choreographers had to register their works under the classification "[d]ramatic or dramatico-musical compositions"<sup>155</sup> and could qualify for registration only if the dance, itself, depicted some story.<sup>155</sup> Thus, it would seem that an analogy to the history of copyright in choreography

147. *See id.* at 164.

148. *Id.* at 168.

149. *See id.* at 169.

150. A "riff" is defined as "a constantly repeated musical phrase used esp[ecially] as background for a soloist or as the basic theme of a final chorus." WEBSTER'S NEW WORLD DICTIONARY 1224 (2d ed. 1978).

151. *See ZZ Top v. Chrysler Corp.*, 54 F. Supp. 2d 983, 986 (W.D. Wash. 1999).

152. *See Universal Pictures Co. v. Harold Lloyd Corp.*, 162 F.2d 354, 363 (9th Cir. 1947). *But see id.* at 363; *Dymow v. Bolton*, 11 F.2d 690, 692 (2d Cir. 1926); *Chappell & Co. v. Fields*, 210 F. 864, 865 (2d Cir. 1914). The courts in all three cases held that a sequence of movements may be protectable if the combination contains a story and is deemed a dramatic composition of literary quality.

153. *See H.R. REP. No. 94-1476*, at 54 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5667.

154. *See* 17 U.S.C. § 102(a)(4) (1994). The 1976 Copyright Act was the first federal copyright statute expressly to include choreographic works.

155. Such was the only possible classification in which choreography could fit under Section 5(d) of the Copyright Act of 1909.

156. *See Kalem Co. v. Harper Bros.*, 222 U.S. 55, 61 (1911); *Fuller v. Bemis*, 50 F. 926, 929 (C.C.S.D.N.Y. 1892); *Daly v. Palmer*, 6 F. Cas. 1132, 1136 (C.C.S.D.N.Y. 1868) (No. 3552). *Accord* GOLDSTEIN § 2.10, *supra* note 96, at 2:115; Barbara A. Singer, *In Search of Adequate Protection for Choreographic Works: Legislative and Judicial Alternatives v. The Custom of the Dance Community*, 38 U. MIAMI L. REV. 287, 298 (1984); Joseph Taubman, *Choreography Under Copyright Revision: The Square Peg in the Round Hole Unpegged*, 10 PERF. ARTS REV. 219, 231 (1980).

might be among the strongest arguments against copyrightability of stage directions. In the absence of explicit statutory inclusion, courts might require stage directions to tell a story of their own before they could qualify for copyright,<sup>157</sup> and, stripped of the underlying script's plot and dialogue, most stage directions become unintelligible as a story-telling device.<sup>158</sup>

However, within the context of derivative works, at least one commentator posits that contributions to a derivative work, even if rendered incoherent by the deletion of the pre-existing work, are not barred from copyright protection.<sup>159</sup> The argument may not be without justification. Among the Copyright Act's definitions of a derivative work are "abridgement[s]" and "condensation[s]."<sup>160</sup> If an abridged or condensed work is suitable for copyright, surely that protection does not rest on the independent story-telling ability of the parts that have been omitted—in this case, the omissions being the actual contribution of the derivative author.<sup>161</sup>

*C. A Doll's House: Can Independent Ownership Be Claimed for Those Elements that a Director Furnishes to a Play?*

"Bare stage."<sup>162</sup>

Those two words constitute the entirety of the first paragraph of *Love! Valour! Compassion!*<sup>163</sup> The playwright's concept for the setting of the play could hardly be misconstrued. Yet, when Joe Mantello directed a production of it, he

157. In *Daly v. Webster*, 56 F. 483, 486–87 (2d Cir. 1892), the court discussed the nature of copyright in dramatic compositions where common literary properties are grouped and sequenced to form a particular story—in this case, an extended scene with little dialogue in which a stage villain tied a victim to the railroad tracks. The court held that, in such compositions, the copyright claim is tied closely to the story and that another who materially changes the story by materially varying the incidents is not guilty of infringement.

158. Try piecing together the story line from these parenthetical directions plucked sequentially from their play's script: "He stops, confused; then tries to recover himself." "Struggling for an explanation." "Breathless." "Very low." "He kisses wildly the end of a drooping spray of jasmine." Taken from the famous balcony scene in EDMOND ROSTAND, *CYRANO DE BERGERAC* act 3, at 177–181 (Brian Hooker trans., Henry Holt & Co. 1923).

159. See Litman, *supra* note 10, at 316–17.

160. 17 U.S.C. § 101 (1994 & Supp. IV 1998).

161. *Cf.* *Mister B Textiles, Inc. v. Woodcrest Fabrics, Inc.*, 523 F. Supp. 21 (S.D.N.Y. 1981). The defendant argued that copyright protection extended only to those portions of a derivative fabric design that were the plaintiff's original contributions. *See id.* at 25–26. The court declined the opportunity to disassemble the components of the derivative, focusing instead on what it termed "a unified artistic conception." *Id.* at 26. Still, the court acknowledged that a derivative design was unlike a book or song where preexisting material may be confidently separated from new material. *See id.*

162. TERRENCE McNALLY, *LOVE! VALOUR! COMPASSION!*, in *LOVE! VALOUR! COMPASSION!; AND A PERFECT GANESH: TWO PLAYS* 9, 9 (1995).

163. *See id.*

placed on stage a large doll house positioned on a green mound.<sup>164</sup> That doll house was one of the elements Mantello claimed was his copyrightable contribution and which he claimed was copied and infringed by a later production.<sup>165</sup> This raises the question: Aside from all arguments concerning joint or derivative authorship, can a director lay independent claim to ownership of specific contributions to a play?

Although a director was not a party, it can be argued that *Thomson v. Larson*<sup>166</sup> opens the door to such claims whenever any participant in the collaborative process of theater contributes something that is, itself, copyrightable.<sup>167</sup> This was an alternative argument raised by dramaturg Lynn Thomson in her lawsuit against the estate of Jonathan Larson, author of the Broadway musical, *Rent*.<sup>168</sup> Prior to Larson's death (shortly before the New York opening), Thomson, who had been hired by the theater company specifically to help revamp the musical, worked with Larson and made several suggestions that were incorporated into the final script.<sup>169</sup> Because the issue was not raised at trial, the Second Circuit Court of Appeals declined to express an opinion on whether Thomson had a copyright interest in the material she contributed to *Rent*.<sup>170</sup> However, the court's opinion addressed and did not rule out the possibility that a collaborator might enjoin the use of her independently copyrightable contributions.<sup>171</sup> The ramification of recognizing such an independent copyright would be that it would grant a collaborator the right to demand payment for the use of her contributed material or demand its deletion from the play. As one commentary put it, "a plaintiff who failed to meet Childress's mutual intent requirement yet showed a 'non-de minimis copyrightable contribution' could hold a collaborative work hostage, or demand its dismemberment."<sup>172</sup>

Therefore, a strong argument for copyrightability of stage directions might hinge on the director's ability to prove—based on the various criteria previously discussed—that those stage directions are *independently copyrightable contributions* to the play.

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164. See Marks, *supra* note 16.

165. See *id.* Although the director is not routinely credited with set design, there is precedent for claims of copyright by set designers. See, e.g., HERB GARDNER, *Author's Note: Setting and Carousel Music*, in I'M NOT RAPPAPORT 4 (Samuel French 1986) (cautioning prospective producers of the play that arrangements for the use of the recommended set design must be made with the representative of designer Tony Walton).

166. 147 F.3d 195 (2d Cir. 1998).

167. See *Joint Authorship*, *supra* note 121, at 967.

168. See *Thomson*, 147 F.3d at 205–06.

169. See *id.* at 197–98.

170. See *id.* at 206.

171. See *id.* & n.30. Thomson later filed a second lawsuit in which she sought to enjoin the use of material that the first trial court had validated as copyrightable. However, the second suit was settled prior to trial for an undisclosed amount of money and program title page credit for Thomson. See McKinley, *supra* note 30.

172. *Joint Authorship*, *supra* note 121, at 967.

*D. The King and I: How Elvis Fits into All This and Provides an Example of Potentially Copyrightable Director's Contributions*

In 1997, this Author acted in a community theater production of Shakespeare's *The Merry Wives of Windsor*.<sup>173</sup> Setting aside all pretensions as to gauging the quality of the production or the quality of my own personal contribution to it, the Author offers this particular production as an example of what might arguably be the copyrightable work of a director.

The director, Gary Dooley, brought an ambitiously un-Shakespearean concept to the production. Although, undoubtedly, the Bard would have recognized his own characters, plot, and dialogue, he scarcely would have recognized the Elvis karaoke musical numbers or 1950's kitsch liberally slathered over the entire play.

Were it merely the concept at issue, there would be no issue at all. The Copyright Act explicitly excludes "concepts" from copyright protection.<sup>174</sup>

To accommodate his directorial choice of transplanting Shakespeare's 16th Century comedy to 1950's suburbia, Dooley employed such devices as: conversations conducted by telephone;<sup>175</sup> a giant refrigerator that served as an entry and exit for the characters;<sup>176</sup> a toy duck that dropped down to deliver a letter in the manner associated with the "secret word" of Groucho Marx's 1950's television show, *You Bet Your Life*;<sup>177</sup> making one of the characters a psychiatrist, complete with a giant Rorschach test ink blot on his office wall;<sup>178</sup> the substitution of 1950's sci-fi movie "Martians" in place of the forest fairies who bedevil the promiscuous Falstaff;<sup>179</sup> and the inclusion of songs made popular by Elvis Presley, as sung by the actors to karaoke music. Additionally, Dooley cast the actors in multiple roles deliberately for the comic effect such quick-change turnarounds would produce.

If these (and any of the many other elements of Dooley's creation) could pass the *fixation* test by being written down or otherwise recorded with explicit instruction,<sup>180</sup> then the next question is whether they pass the *expression* test.<sup>181</sup> If they qualify as *expressions* of ideas rather than *ideas*, themselves, then one must determine whether those expressions are, standing on their own, *individually copyrightable contributions*<sup>182</sup> not falling within the doctrine of *scenes a faire*.<sup>183</sup>

173. Produced June 12-28, 1997, by Mercury Productions, at the Tucson Center for the Performing Arts, Tucson, Arizona.

174. See 17 U.S.C. § 102(b) (1994).

175. Obviously, Shakespeare's script does not call for telephones.

176. Obviously, Shakespeare's script does not call for refrigerators.

177. Obviously, Shakespeare neither called for nor anticipated Groucho Marx.

178. Oh, surely, you get the idea by now.

179. The referenced action is in act 5, sc. 5.

180. See *supra* Part II.A.2.

181. See *supra* Part II.A.2.

182. See *supra* Part III.C.

183. See *supra* Part II.A.2.



or, from their *selection and arrangement*,<sup>184</sup> sufficiently original to recast, transform or adapt the pre-existing work into a *derivative* that the director has the necessary permission or legal right to create.<sup>185</sup> Since all of Shakespeare's plays are in the public domain, whether Dooley had legal authorization to create a derivative work is not at issue. But, presuming that the play is fair game for derivative treatment, one must still consider whether the director's status within the framework of the theater company permits him, personally, to be the legal *author* of copyrightable contributions.<sup>186</sup> Mercury Productions was community theater with no salaried or supervisory staff, no contract or hiring agreements with participating artists, and no management-dictated restrictions on the artistic process, and it paid Dooley no compensation for his labor.<sup>187</sup> Thus, it seems highly unlikely Dooley would be considered an *employee* under the *CCNY* standard, and his contributions could not then be considered a *work-made-for-hire*.<sup>188</sup>

In summary, it could be argued that Dooley's *ideas* were translated into tangible *expressions* through the particular staging additions he contributed to a public domain play, and that those contributions, if they would qualify as *independently copyrightable contributions*, might then qualify for copyright protection as to their *selection and arrangement* within a wholly *derivative work* created by a *non-employee* of the theater company.

As this example illustrates, it is a significantly treacherous path the director must tread to reach the copyright goal, and it is uncertain whether the courts would qualify the above as copyrightable stage direction. However, if these directorial contributions would not qualify, then it seems unlikely any would.

#### IV. INTO THE WOODS: FINDING A TWIG OF COPYRIGHTABILITY IN A FOREST OF FORBIDDEN FRUIT

Even having picked her way through the bramble bush of prohibitions with her basketful of independently expressive goodies, a director might still arrive at Grandma's House of Copyrightability only to find the Big Bad Wolf waiting in the guise of the *merger doctrine*. Briefly defined, where there are a very limited number of ways an idea can be expressed, idea and expression are said to merge and render otherwise copyrightable contributions *unprotectable*.<sup>189</sup> The justification for guarding against the possibility of having all potential uses of the subject matter monopolized by a few individuals was succinctly phrased by the First Circuit Court of Appeals when it said "[w]e cannot recognize copyright as a game of chess in which the public can be checkmated."<sup>190</sup>

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184. See *supra* Part II.A.2.

185. See *supra* Part III.B.

186. See *supra* Part II.A.1.

187. Telephone Interview with John Sweeney, Producer, Mercury Productions (Oct. 9, 2000).

188. See *supra* Part II.B.

189. See *Toro Co. v. R & R Products Co.*, 787 F.2d 1208, 1212 (8th Cir. 1986).

190. *Morrissey v. Procter & Gamble Co.*, 379 F.2d 675, 679 (1st Cir. 1967).

The notion of copyrightable stage directions runs into this problem head-on. It could be argued that a play script, like a song,<sup>191</sup> offers a limited number of possibilities for stage execution because of the specific requirements dictated in the author's script. If so, a director (or handful of directors) could not lock up the only means of performing the play without trampling the author's exclusive performance rights.<sup>192</sup> Additionally, a director would likely have a difficult time making a copyright infringement case against a director of a subsequent production if that subsequent director could make a credible defense that what was staged was only what the script, itself, requires to be staged.

Therefore, if there are occasions when a director's contributions to a performance are copyrightable and, thus, capable of being infringed, there needs to be a test by which those contributions can be analyzed apart from that which is forbidden protection.

#### *A. Misalliance: The Inappropriateness of Traditional Court-Devised Tests for Copyright Infringement in the Performing Arts*

Suited though they may have been to the particulars of their cases, the traditional analyses courts have used to determine copyright infringement in the performing arts prove an ill-suited marriage when applied to stage directions.

##### *1. Abstractions Test*

In *Nichols v. Universal Pictures Corp.*,<sup>193</sup> Judge Learned Hand established his *abstractions test* for determining the scope of copyright protection for elements of a literary property such as a play.<sup>194</sup> The case involved playwright Anne Nichols' allegation that her play, *Abie's Irish Rose*, was infringed by a motion picture with similar plot and characters.<sup>195</sup> While the court acknowledged that distinctive plot and characters can be infringed by subsequent works,<sup>196</sup> it cautioned that copyright does not cover everything that might be drawn from a play.<sup>197</sup> In an oft-cited passage of the opinion, Judge Hand reasoned that, where the alleged infringement is not a verbatim taking of a whole piece but rather an abstract of the whole, the court must dissect and analyze those abstractions to determine what is protectable and capable of being infringed. "[A] great number

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191. See *supra* Part III.B.2.

192. See 17 U.S.C. § 106(4) (1994 & Supp. IV 1998). Cf. *Durham Indus., Inc. v. Tomy Corp.*, 630 F.2d 905 (2d Cir. 1980) (holding that recognition of copyright in licensee's derivative figurines of Disney characters would require subsequent licensees to deviate from the original design to avoid infringement and, thus, circumscribe Disney's right to authorize copies of its own creations).

193. 45 F.2d 119 (2d Cir. 1930).

194. See *id.* at 121.

195. See *id.* at 120.

196. The Court subsequently reiterated this premise through substantial comparison of plot and character details in *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49 (2d Cir. 1936).

197. See *Nichols*, 45 F.2d at 121-22.

of patterns of increasing generality will fit equally well, as more and more of the incident is left out.... [T]here is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his 'ideas'....<sup>198</sup> By peeling away the protectable (and distinguishably different) incidents of expression from the unprotectable ideas at the heart of the two works, the *Nichols* court concluded that the only real similarities between the play and the motion picture were the main theme and some "stock" characters—both too generalized an abstraction to merit copyright protection.<sup>199</sup>

The problem with applying *Nichols* to claims of copyright infringement in stage directions is that the abstractions test fails to take into account that a director's contributions to a play typically affect more of an *overall feeling* of the production rather than specific incidents of plot or character.<sup>200</sup> So, it is conceivable that a director could duplicate several elements of another director's staging while, through subtlety and nuance, creating a totally different mood in the latter production.<sup>201</sup> Such a scenario raises the question of whether it is fair to label a director a plagiarist if no average observer would come away from the performance thinking it a mere copy of something previously seen on stage.<sup>202</sup>

## 2. Total Concept and Feel

The Ninth Circuit Court of Appeals dealt with the above question in *Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp.*<sup>203</sup> In that case, the creators of the *H.R. Pufnstuf* television show claimed McDonald's had infringed *Pufnstuf* through the production of the visually similar "McDonaldland" commercials.<sup>204</sup> The court rejected the defense, which centered on calling attention to particular differences between the show and the commercials, and, instead, applied an "intrinsic" test, based on the anticipated response of an ordinary reasonable person, to hold that the defendants had captured the "total concept and feel" of the plaintiffs' show.<sup>205</sup> Declining the defendants' invitation to

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198. *Id.* at 121.

199. *See id.* at 122.

200. *See* BLACK, *supra* note 37, at 26 ("Creative direction goes beyond the editorial to form a production that expresses a unique and personal vision or feeling.")

201. Consider, for example, the utilization of clown make-up, costuming, and antics. Nearly identical stagings of such elements could be used to conjure either the lighthearted frivolity of the Marx Brothers' film, *At the Circus*, or the poignant tragedy of Ruggiero Leoncavallo's opera, *Pagliacci*.

202. *Cf.* *Steinberg v. Columbia Pictures Indus., Inc.*, 663 F. Supp. 706, 711 (S.D.N.Y. 1987) (enunciating the "average lay observer" standard for determining substantial similarity in graphic art). The *Steinberg* court also held that the substantial similarity question is answered by whether an average lay observer would recognize the latter work as having been appropriated from the previous one. *See Steinberg*, 663 F. Supp. at 711 (citing *Ideal Toy Corp. v. Fab-Lu Ltd.*, 360 F.2d 1021, 1022 (2d Cir. 1966); *Silverman v. CBS, Inc.*, 632 F. Supp. 1344, 1351-52 (S.D.N.Y. 1986)).

203. 562 F.2d 1157 (9th Cir. 1977).

204. *See id.* at 1160.

205. *See id.* at 1167.

dissect the works into their various components, the court noted "that it is the combination of many different elements which may command copyright protection because of its particular subjective quality."<sup>206</sup>

Applying the Ninth Circuit's intrinsic test to stage directions seems especially troublesome when one considers that, unlike the creators of *Pufnstuf*, a play's director may not be the originator of a show's total concept and feel. Much of the play's "feel" may, in fact, be dictated or, at least, suggested by the author's script.<sup>207</sup> Furthermore, under the doctrine of *scenes a faire*,<sup>208</sup> copyright will not protect thematic elements that must follow from necessity in similar plot situations.<sup>209</sup> It would, therefore, seem wholly unjust to award property rights to a director who neither originated the total concept and feel of the play nor employed any device other than that which all directors of subsequent productions of that play would be required to duplicate.

### *B. Three Sisters: A Trio of Related Processes Combine to Create a New Test*

When confronted with a new situation for which the old tests do not work, the obvious solution would seem to be to devise a new test—preferably one evolved from firmly rooted judicial processes of the past. That is what courts have done when attempting to apply copyright law to the new technology of computer programs.<sup>210</sup> In that spirit, this Author offers the following three-step, hybrid test for analyzing potential copyright infringement in stage directions.

For the purpose of this discussion, this Note assumes that circumstantial, if not direct, evidence exists to prove the alleged infringer had access for viewing or otherwise learning of the prior production's staging choices, thus, allowing the opportunity for copying. Access is a necessary ingredient for a copyright infringement claim.<sup>211</sup>

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206. *Id.* at 1169.

207. *See* CLURMAN, *supra* note 37, at 5–6 ("The direction of a play is to a certain extent implicit in its script.")

208. *See supra* Part II.A.2.

209. *See* *Reyher v. Children's Television Workshop*, 533 F.2d 87, 91 (2d Cir. 1976).

210. *See, e.g.,* *Computer Assocs. Int'l, Inc. v. Altai, Inc.*, 982 F.2d 693, 706 (2d Cir. 1992) (adapting Judge Hand's abstractions test to create a three-step test of abstraction, filtration, and comparison); *Whelan Assoc., Inc. v. Jaslow Dental Lab., Inc.*, 797 F.2d 1222 (3d Cir. 1986) (holding that the intrinsic test, based upon the reaction of an ordinary observer, would not be useful in assessing the complexities of computer programs and adopting a "single substantial similarity inquiry" in which both lay and expert testimony would be admissible); *E.F. Johnson Co. v. Uniden Corp. of Am.*, 623 F. Supp. 1485 (D.C. Minn. 1985) (shifting from a "total concept and feel" test to an analysis of quantitative and qualitative evidence of similarities based on expert testimony).

211. *See Reyher*, 533 F.2d at 90.

### 1. Step One: Total Concept and Feel

The first step is to determine which of the various conceptual alternatives (whether inherently suggested within the text of the script or not) has been chosen by the directors. If it cannot be said that the allegedly infringing production embraces the same concept and feel as that of the allegedly infringed production, then it would seem incongruous for a director to claim that his artistic vision of the play has been stolen.<sup>212</sup> However, if there is a marked similarity in the total concept and feel such that an ordinary person could reasonably be expected to notice what is similar,<sup>213</sup> then there is a basis on which to proceed to the second step.

### 2. Step Two: Abstraction-Filtration

Once having determined that the total concept and feel of the productions is similar, the next step is to examine those director contributions that help create that overall feel and apply Judge Hand's abstractions test to filter out the uncopyrightable from the copyrightable.<sup>214</sup> When we separate from the basic concept (e.g. 1950s' Elvis karaoke Shakespeare) the specific expressions of that idea (e.g. giant refrigerator, Groucho duck, Martians, etc.) that do not fall into the forbidden categories (e.g. merger material, *scenes a faire*, public domain material, etc.),<sup>215</sup> we are left with the essence of what might be a director's only defensible claim to copyrightability, and we are ready to proceed to the final step.

### 3. Step Three: Comparison

At this point, the analysis becomes a numbers game—counting the number of independently protectable director's contributions in the prior production that have been copied by the latter and assessing the value of those contributions to the production as a whole to determine whether there has been sufficient appropriation to justify a director's infringement claim. This type of quantitative/qualitative comparison was utilized in *E.F. Johnson Co. v. Uniden*

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212. For an example of a variety of thematic concepts or moods available within the same scene of the same play, see BLACK, *supra* note 37, at 4–5.

213. This is the intrinsic test outlined in *Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp.*, 562 F.2d 1157 (9th Cir. 1977).

214. In creating its test for copyright infringement of computer programs, the Second Circuit in *Computer Assocs. Int'l, Inc.*, 982 F.2d at 707, determined that "filtration" was an independent step separate from "abstraction." However, in this Author's opinion, the two go hand-in-hand as an inseparable, double-pronged step when analyzing elements of a play. As detailed in *Nichols v. Universal Pictures Corp.*, 45 F.2d 119 (2d Cir. 1930), the abstractions test served to identify and separate the protectable elements from the unprotectable by peeling away copyrightable expressions from basic ideas beneath them.

215. See *Gates Rubber Co. v. Bando Chem. Indus., Ltd.*, 9 F.3d 823, 834 (10th Cir. 1993) ("Filtration should eliminate from comparison the unprotectable elements of ideas, processes, facts, public domain information, merger material, *scenes a faire* material, and other unprotectable elements suggested by the particular facts of the [material] under examination.").

*Corp. of America*<sup>216</sup> in connection with an alleged infringement of a computer program. There, because of the complexity of the material, the court suggested that such an analysis should be based on an evaluation of expert testimony.<sup>217</sup> Expert testimony seems equally appropriate to this phase of the three-part test for stage directions.

What is arguably less helpful to the comparison phase of this test is a copyright element given emphasis by yet another computer case, *Whelan Associates, Inc. v. Jaslow Dental Laboratory, Inc.*<sup>218</sup> In *Whelan*, the Third Circuit Court of Appeals noted that the sequencing and ordering of things can be copyrighted as a compilation or derivative work, and the arrangement of elements in a computer program figured prominently in the assessment of its copyrightability.<sup>219</sup> In the case of stage directions, though, the sequencing and ordering is, to a great degree, limited by the sequential requirements of the script.<sup>220</sup> Therefore, the order of stage directions, alone, would appear to offer little help in assessing their copyrightability or in gauging whether another production has infringed them.

#### V. ALL'S WELL THAT ENDS WELL: A FEW CONCLUDING REMARKS

At this point it should be obvious—if not painfully so for directors—that, if copyright protection does exist for stage directions, it exists only in those very limited situations where the many legal hurdles have been cleared. It might be equally painful for writers to admit that there are *any* occasions where a director could lay claim to property rights in a particular staging of the author's play. However, the preceding analysis seems to indicate that the notion of copyrightable stage direction, significantly constrained though it is, is not so remote from analogous case law as to make it dismissible as an impossibility. Although it might still require some subjective decision-making, adopting the three-step test detailed above<sup>221</sup> would provide a reasonably objective standard for making such judgments. The director's burden remains one of overcoming a presumption that the staging is simply an incorporation of "mere stage business" or other unprotectable elements.<sup>222</sup>

Having come this far, we cannot conclude this discussion without first returning to a monumentally important question raised in an earlier passage.<sup>223</sup>

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216. 623 F. Supp. 1485, 1493 (D.C. Minn. 1985).

217. *See id.*

218. 797 F.2d 1222 (3d Cir. 1986).

219. *See id.* at 1239–40.

220. For example, no matter how artistically done, a director of Joseph Kesselring's *Arsenic and Old Lace* could hardly stage the carrying of the dead bodies down to the cellar in the *second scene* of act three when the audience has already been told they were buried in the *first scene* of the act.

221. *See supra* Part IV.B.

222. *See supra* Part II.A.2.

223. *See supra* Part II.

That is the question of whether stage directions can even fit within the definitions of any of the eight subject matter categories explicitly and exclusively granted protection under federal copyright law.<sup>224</sup> If stage directions do not qualify under any of those enumerated categories, then they would not be covered by the federal statutory protections.<sup>225</sup> That does not preclude any protections that may be available under the common law or statutes of any state for subject matter not included in the federal Copyright Act.<sup>226</sup> But this Author is unaware of any case law or state statutes on point. Therefore, in the absence of an alternative protection, all hinges on the answer to the categorization question.<sup>227</sup>

Although it cannot be considered an official ruling, the U.S. Copyright Office has expressed what seems to be a definite opinion, at least as regards the category issue. The opinion came as a result of the Estate of Frank Loesser making inquiries into Gerald Gutierrez's copyright application for his staging of *The Most Happy Fella*.<sup>228</sup> In a letter sent by the Copyright Office to the Loesser estate, Supervisory Examiner Joseph Miranda referred to stage directions as an "expression [that] will generally be in the form of *literary authorship*."<sup>229</sup> The letter further stated that the Copyright Office understood the Gutierrez application to represent a "claim in the text" of the stage directions only and that such a registration of stage directions "does not imply any protection for a manner, style or method of directing, or for the actions dictated by them."<sup>230</sup> This would seem to suggest that the Copyright Office considers the director's property rights to be limited to the particular words of stage direction (a literary work) written in the margins of the script and not to the actual performance of what is contained in those words.<sup>231</sup> However, it could be difficult to reconcile the Copyright Office's

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224. See 17 U.S.C. § 102(a) (1994).

225. See 17 U.S.C. § 106 (1994 & Supp. IV 1998) (granting exclusive rights to those who own copyright under this title).

226. See 17 U.S.C. § 301(b)(1) (1994).

227. If copyright law does not hold protections for directors, then perhaps there are protective alternatives that can be explored. Section 43(a) of the Lanham Trademark Act (codified at 15 U.S.C. § 1125(a) (1994)) forbids the passing off of one person's work as that of another and might have an application in this context. For a discussion on the Lanham Act's applicability to stage direction, see Leichtman, *supra* note 4, at 718–19. Another author deemed contract law to be better suited to protecting directors than copyright law. See Beth Freemal, Note, *Theatre, Stage Directions & Copyright Law*, 71 CHI.-KENT L. REV. 1017, 1037–39 (1996).

228. See *supra* Part I.A.

229. Letter from Joseph Miranda, Supervisory Examiner, Performing Arts Section, Library of Congress, to Mr. Orenstein (June 22, 1995) (emphasis added), reprinted in Richard Garmise, *Directors at the Gate: Locking the Gate*, NEWSLETTER (Dramatists Guild of America, New York, N.Y.), Sept. 1995, at 3.

230. *Id.*

231. See Richard Garmise, *Directors at the Gate: Locking the Gate*, NEWSLETTER (Dramatists Guild of America, New York, N.Y.), Sept. 1995, at 1.

view in this case with the law that grants the holder of a copyright in a *literary work* the exclusive right to *perform* that work publicly.<sup>232</sup>

Thus, we are mired in a quandary of questions—left merely to speculate as to probabilities in the absence of definitive answers. Perhaps those answers will eventually come from the courts or Congress. But, until those actors make their entrances and speak their lines plainly for all to hear, this drama plays on, and we cannot yet bring down the final curtain.

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232. See 17 U.S.C. § 106(4) (1994 & Supp. IV 1998); see also *Computer Assocs. Int'l, Inc. v. Altai, Inc.*, 982 F.2d 693, 701 (2d Cir. 1992) (“As a general matter, and to varying degrees, copyright protection extends beyond a literary work’s strictly textual form to its non-literal components.”).