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Director's Choice: The Fine Line Between Interpretation and Infringement of an Author's Work

by JON GARON*

> Wanted: Set designer for production of Samuel Beckett's "Endgame." All designs must conform to those of original production. Bring resume and sketches to . . . .

There is a new trend developing in American theatre. As the number of new productions continues to dwindle,[1] there is an ever-increasing emphasis on revivals and transfers from London's West End,[2] both in New York and throughout the country.[3] The theatre industry is being forced to place greater reliance on non-original productions, basing financial solvency on the success of these productions. Two techniques have proven successful to promote this type of theatre. The first method is to create a slavish reproduction of the original. The second is to recast the original production with different types of performers in new settings, and try to overlay a new interpretation on the original text.[4]

Both of these techniques serve their purpose in that they sell tickets, but each brings a unique set of problems. For the authors and creators of the original work, a new interpretation may alter or damage the play they developed. Alternatively, exacting reproductions may result in recreating the work of designers and choreographers

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1. In 1986 there were only three successful new shows which were originally produced on Broadway: Neil Simon's "Broadway Bound," "Social Security," a vehicle for Marlo Thomas, and Lily Tomlin's one-woman show "The Search for Signs of Intelligent Life in the Universe." Furthermore, the 1985-86 season was the lowest grossing season since 1980 and included the fewest number of productions in over 40 years. Year-end Report, Variety, June 4, 1986, at 132-33.

2. The West End is the London analog to Broadway. It is the center of commercial theatre in England.

3. According to Variety's year-end report, the 1985-86 season included four revivals and four transfers from the West End. Year-end Report, supra note 1, at 132-33.

4. See generally S. Langley, Theatre Management in America (2d ed. 1980).

without their receiving any compensation or having the ability to control the production.

This Note shall examine the problems of non-original productions and suggest some techniques which will protect both the original productions and the artists who created them. Part I will analyze the balance between the author's need for protection and the interests of the theatrical community at large. Part II will look at the availability and effectiveness of judicial intervention. Finally, Part III will look at industry practices and discuss whether effective contract drafting will help to alleviate the potential conflict between author and theatrical community.

I. Balancing the Interests

A. *Protection for the First Production*

Under the Copyright Act of 1976, a playwright is guaranteed the right to reproduce and perform his work.[5] This guarantees the artist absolute control over where and when his dramatic work is performed. There are no compulsory licenses for the theatre; no one can perform the playwright's material without first gaining permission from the playwright or his agent.[6] Typically, when a play is first performed, the author is actively involved in the production. The standard agreement for Dramatists Guild members under the Approved Production Contract ("APC") does not require a playwright to be reasonable in refusing to make any changes, and it ensures that no changes can be made without the author's approval.[7] Although the producer or director may wish to make the changes, the APC is explicit that nothing other than reason and patience can be used to make the author modify his work in any way.[8]

The underlying policy for this absolute prohibition is quite clear:

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5. 17 U.S.C. § 106(1), (4) (1982).

6. A compulsory license is a statutory requirement that a work be made available at a set price. Examples include: Id. § 111(d) (compulsory license for secondary transmissions by cable systems); Id. § 115 (compulsory license for phonorecords); and Id. § 116 (compulsory license for juke-boxes).

7. Sections 8.01(b) and 8.01(c) of the APC illustrate the author's absolute power. Under the terms of the contract, the producer can complain to the Dramatists Guild that the author is being unreasonable. If the Guild accepts that the claim is appropriate, it will appoint someone to try to convince the author to make the required changes, but the Guild "shall have no power to compel Author to agree to such change." APC § 8.01(c). The APC is the official, binding agreement which all playwrights who are members of the Dramatists Guild must use. In theory, this is the only contract under which a Dramatists Guild member can work on Broadway.

8. APC § 8.01(c).

the failure of an initial production (particularly in New York City) will often foreclose the possibility of a second production and the opportunity for publication of the script.[9] To protect the author's interest in the subsidiary value of his work, it is important that the initial presentation be as close to the author's intent as any performance can be.[10] Because the producer[11] has contracted away influence over the author's work,[12] there is no interest as compelling as the author's in the initial production. No form of balancing test need be contemplated; protection must be given to the author.

B. *The Policy of Protection: For whose benefit?*

Once a play has been published and is no longer being produced with hopes of a profitable New York City run, the economic incentive of protecting the integrity of an author's work begins to diminish. No longer will a single poor production signal the demise of the play's viability. A poor review in Denver will not effect the market in Dallas. An unreviewed school production cannot change the attitudes of those who did not attend. As the economic need to protect the play diminishes, the reasons for protection and the type of protection may also change. Is it enough to protect the author's artistic vision simply because the play was the author's creation and should not be subject to manipulation without consent?

1. *The Interests of the Author*

When determining the scope of protection for authors, one should understand what protection actually encompasses. The Copyright Act generally protects the "economic" rights of an author in his work.[13] "The copyright laws seek to protect economic, rather than non-economic interests. They focus on the right of the individual to reap the reward of his endeavors and hav[e] little to do with protecting feelings or reputation."[14]

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9. National Educational Theatre Conference, Aug. 17, 1986 (statement of Richard Romagnoli of the New York Theatre Studio) [hereinafter NETC].

10. Id.

11. The producer is the individual with the most immediate financial interest in the success of the production and presumably would want to protect his financial stake in the original production.

12. See supra note 7.

13. Damich, The New York Artists' Authorship Rights Act: A Comparative Critique, 84 Colum. L. Rev. 1733, 1734 (1984).

14. Note, A Constitutional Analysis of Copyrighting Government-Commissioned Work, 84 Colum. L. Rev. 425, 442 (1984) (citing Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 574 (1977)).

In other countries, the doctrine of *droit moral* or "moral rights" protects artistic work as an extension of the author's personality, independent of the author's property interests.[15] Every work is the expression of the author[16] and as such the author has a personal interest in protecting the expression from mutilation, alteration or defacement.[17] To damage or change a work of art would be a form of mutilation, and hence neither legal nor ethical.[18] Because the personal rights are not included in the bundle of rights granted under the 1976 Copyright Act, *droit moral* protection for the performing arts has generally not been accepted in the United States.[19]

Though the doctrine is not law here, the values of *droit moral* should not be ignored when analyzing the amount of leeway other artists should be allowed in interpreting a script. There is a potential disincentive for authors who know that they will one day lose the power to protect their scripts from unauthorized interpretation.[20] The fear that others will add messages contrary to the views of the author or make a play stand for a political view that the author opposes may be enough to keep some gifted writers from utilizing the

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15. Note, The New York Artists' Authorship Rights Act: Increased Protection and Enhanced Status for Visual Artists, 70 Cornell L. Rev. 158, 160 (1984).

16. See Stella v. Mazoh, slip op. No. 07585-82 (N.Y. Sup. Ct. Apr. 1, 1982) (cited in Note, supra note 15, at 166).

17. Note, supra note 15, at 162. These are elements of "the right of integrity." Id. Although moral rights comprise more than just integrity, it is this right which is at issue in disputes over interpretation.

18. See Ladas, International Protection of Literary and Artistic Property (1938). For an excellent overview on the moral right of integrity, see Tackaberry, Look What They've Done to My Song: The Songwriter's Moral Right of Integrity in Canada and the United States, Seminar in Copyright Law, Columbia University (1986) (available through Columbia-VLA Journal of Law & the Arts).

19. Note, supra note 15, at 159. See also Note, supra note 14, at 443. There have been some state statutes which give a degree of protection analogous to *droit moral*. The California Art Preservation Act, Cal. Civ. Code § 987 (West 1982 & Supp. 1984), and the New York Artists' Authorship Act, ch. 994, 1983 N.Y. Laws 1933, codified at N.Y. Arts & Cult. Aff. Law § 314.59 (McKinney 1984) were the first two such statutes. These offer no comfort to the theatrical artists, however, since neither statute offers protection to the performing arts. See Note, supra note 15, at 173.

20. See Leonide Zorine et VAAP c./ Le Lucernaire et SACD, Nov. 27, 1985, reprinted in *Tribunal De Grande Instance De Paris*, at 166. From December 12, 1983 to February 4, 1984, a play written by the Russian Leonide Zorine was performed in France under the direction of Bogdan Berciu. An injunction was initially sought by VAAP, the Soviet author's rights organization; it was denied on February 2, 1984. The second action alleged total disfiguration of the work, including text, direction, set and costumes. In particular, the elements of the set and direction betrayed the spirit of the comedy and created political overtones not in the original. Although the run of the production was already complete, the court did award the injunction to the playwright and the Soviet organization. There is little real protection for the author, however, when the injunction is granted after the run.

theatrical medium. Changes that do not reverse, but merely dull the pointed view of an author may likewise be sufficient to discourage potential writers from the theatre.

Nevertheless, even if the effect is occasionally sufficient to dissuade an author from writing for the theatre, the author should have to accept this potentially damaging burden because the author's integrity is not the only value at stake. The need for protection of the author's artistic vision must be balanced against the need for the creative work of others in the production of the work and the public's interest in new insights built on the familiar work. These other priorities are embodied in the process of artistic interpretation. In any theatrical production, the creative work of many artists, not only the author, is at stake.

2. *The Interests of the Contributing Artists*

The director's role in bringing the proper elements to a production, staging those elements and creating an artistic view is often the decisive factor in the quality of a production. Directors often receive the credit for a successful production and almost always receive the blame for a poor one. Casting a production, usually completed before the first rehearsal takes place, will often determine the eventual success of a production.[21]

For the choreographer, the 1976 Copyright Act finally established choreography as a separate, protectible work.[22] Section 102(a)(4) specifically includes "pantomimes and choreographic works" as the proper subject of copyright.[23] As a result, the choreographer, unlike the other artists involved in a collaboration, does have an ownership interest in the finished product. What happens to this material will be determined by the contracts under which the choreographer was

21. The model of collaborative excellence can be found in the 1939 production of "Julius Caesar." Director Orson Welles and the Mercury Theatre's staging of Shakespeare's historical drama became a tremendous Broadway success by using modern dress to create a theatrical comment on fascism. See O.G. Brockett, History of the Theatre 629 (4th ed. 1982). Success of the production being generally attributed to the creative genius of Welles, how profound was the input of the costume designer?

22. 17 U.S.C. § 102(a)(4) (1982). See Comment, The Different Art: Choreography & Copyright, 33 UCLA L. Rev. 1442 (1986). While this review of copyright and choreography is very interesting, it bases much of it review of the current law on Horgan v. MacMillan, 621 F. Supp. 1169 (S.D.N.Y 1985), the suit brought on behalf of the Balanchine estate for an alleged copyright infringement of his "Nutcracker" ballet. *Horgan* has since been reversed by the Second Circuit, 789 F.2d 157 (2d Cir. 1986). The full impact of this decision on choreography is not the subject of this Note.

23. 17 U.S.C. § 102(a)(4) (1982).

hired. How fully a choreographer will be protected by the courts has yet to be resolved.[24]

The set designer's role is to create an atmosphere which may profoundly affect the audience. The setting can make an otherwise unworkable play come to life, or cause a perfectly fine piece of writing to flounder out of place. In addition to any artistic control a set designer may command as painter, architect and sculptor, he may add to a story the realism that creates credibility or the vision which allows an unbelievable story of the supernatural suddenly to come alive.

The actor gives to his own character a depth, background and vitality that can turn the most trite stock character into something human or superhuman. The interaction between actors may suddenly create a moment on stage where the audience becomes involved and which never had meaning before. A look, a gesture or a tone of voice can change the meaning of the author's written word, making it seem unimaginative and trite or soar with poetry and beauty. While an au-

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24. *Horgan* will likely be the most influential case on choreography infringement both because of its straightforward, well-reasoned analysis of the problem and because of the lack of other cases on this issue. Reversing the district court, the Second Circuit stated that "the standard for determining copyright infringement is not whether the original could be recreated from the allegedly infringing copy, but whether the latter is 'substantially similar' to the former." 789 F.2d at 162. At issue was an unauthorized book of photographs showing George Balanchine's "Nutcracker Ballet." The book, written by Ellen Switzer, includes sixty color photographs from the New York City Ballet Company production of the Nutcracker as well as black and white photos of Balanchine and the company off-stage. Id. at 158-59.

As now articulated by the Second Circuit, the question is whether the use of the photographs is sufficient in quantity and sequencing to be substantially similar to the original production as copyrighted by Balanchine. Id. at 162-63. Balanchine had satisfied the fixation and deposit requirements for the dance by depositing a videotape of the production in 1981. Id at 158. The court gives no indication of what constitutes enough substantial similarity to prove infringement between the photographs and the underlying dances, however, so the extent to which choreographers may borrow or steal from each other is not clear.

The court strongly discourages any test which includes looking to whether the original could be reproduced from the copy. Speaking about the transition of a story from novel to film, the court states that "[e]ven a small amount of the original, if it is qualitatively significant, may be sufficient to be an infringement, although the full original could not be recreated from the excerpt." Id. at 162. Following this logic it seems that even recreating a small portion of the dance from "Big Spender" originally choreographed by Bob Fosse could be a copyright infringement, as the number is so significant to the overall choreography of "Sweet Charity."

If enforced in this manner, the legion of former dancers who attempt a livelihood by recreating original choreography for revivals and amateur productions may suddenly find themselves working outside of the law. Thus, the 1976 Act and *Horgan* help to diminish, though not eliminate, the practice of dancers and dance captains advertising themselves as able to reproduce the original choreography. There has yet to be a case litigated where a dancer was sued for re-using a dance, though this new statute may help to discourage such abuse. See generally Comment, supra note 22.

thor can never fully control the actors on stage, no matter what his involvement, an author who includes a stage direction in the text assumes that it will be followed. An actor who respects these directions will give a very different performance than one who disregards them. An actor would claim that he needs the artistic flexibility to choose when and how to use these stage directions.

Additionally, depending on the unique mix of personalities and creative talent in any given production, the role of the lighting designer, costume designer, sound designer, properties administrator or stage manager may become the interpretative vision which separates the particular production from every other production of the play. The nature of the theatrical process necessitates the need for creative interaction and some degree of interpretation on all levels.

3. *The Interests of the Audience*

The interests of the audience must also be kept in mind. The purpose of copyright is "to promote the progress of science and useful arts."[25]

> The purpose of federal copyright protection is to benefit the public by encouraging works in which it is interested. To induce individuals to undertake the personal sacrifices necessary to create such works, federal copyright law extends to the authors of such works a limited monopoly to reap the rewards of their endeavors.[26]

This purpose may be lost if protection is overbroad. There is no question that the audience has an interest in seeing a play as the playwright intended it be performed. Productions faithful to the author's vision, however, will not be eliminated by a system which also allows interpretative, deviant productions. The audience has an interest in seeing both accurate reproductions and new interpretations. There is a need to hear the current political or social thought of the director as well as that of the author. A very interesting message might be created if, for example, a production of Arthur Miller's "The Crucible" dressed the witches' accusers in Ku Klux Klan robes. It is arguable that the audience's exposure to new political discourse should not be determined by the wishes of Mr. Miller. Instead the audience has

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25. U.S. Const. art. I, § 8, cl. 8.

26. Baltimore Orioles v. Major League Baseball Players, 805 F.2d 663, 678 (7th Cir. 1986) (citing Sony Corp. of Am. v. Universal City Studios, 464 U.S. 417, 429 (1984)), cert. denied, 107 S. Ct. 1593 (1987). See also Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975); Mazer v. Stein, 347 U.S. 201, 219 (1954); Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932).

the power to decide on the value of the alternative interpretation through their attendance and subsequent comments.[27]

This less restrictive view of protection might better serve the purpose of copyright as embodied in the United States Constitution, but it may also be at odds with any "moral rights" an author may possess in his work.

4. *The Interests of the Theatre*

The need for interpretation may be a result of the type of production and type of theatre performing the play. For example, a play performed in a university setting needs a great deal of artistic flexibility because the interpretative process is an educational experience for the students involved in the production. The sole purpose of the production is not necessarily to present the author's play to the audience. One purpose is to teach students how to use a script. The production is for the student learning to develop a character from a text, for the student learning to add visual meaning to the text or for the student learning to find action in the text. The script is a vehicle to teach communication and the skills necessary to the art of theatre. The audience is involved to rate the result, give feedback to the students and encourage the learning process.

The typical community theatre has as its primary mission bringing well known works into the community, and therefore may have little need for great artistic license. It is less concerned about interpretation than access.[28] As a result, artistic decisions may be based on practical necessity, rather than artistic integrity. The availability of resources, performers and appropriate technical ability may determine artistic decisions.[29] If modifications are not allowed, the result may be a production which serves neither the artist nor the community.

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27. The popular productions may be the only ones which survive in a competitive marketplace for the audience. It is equally possible, however, that a poorly attended production will be the one creating the greatest critical interest or controversy. Theatre important to history and political development need not be highly prized. So long as it encourages further discussion and development, it has served some purpose.

28. For a typical explanation of these goals, see Drama League of America, Work with Amateurs (Mar. 1914) (available at the Lincoln Center Branch of the New York Public Library).

29. The Drama League of America analyzed the problems for amateur organizations as follows:

> Or to take the problems of staging: scenery, lighting, costumes, make-up, properties. For all these essential matters the conditions of the amateur are altogether different from those of the professional stage. . . . The only guiding principle which most amateur experimenters can have is to imitate, in a cheap and makeshift fashion, the elaborate effects of the professional stage. But the old hand learns,

Touring companies of professional productions face this problem daily. The inappropriate decision to conform the touring production to the Broadway production may result in financially untenable behemoths which act an injustice upon producers, artists and audiences alike. Alternatively, an inappropriate decision to limit the touring production by reducing the number of sets, costume changes or production numbers may result in a sub-standard production that is equally unpleasant to producers, audiences and artists. Under the APC, the only acceptable contract for authors who are members of the Dramatists Guild, the author must approve any decision to maintain the original production or modify the touring company production.[30] So long as the author is still actively involved with a production, he may ensure that the developmental process follows an appropriate path.

The decisions which may mean success or failure to a production are closely controlled in the professional world by the author. As a practical matter, authors cannot easily control amateur productions of their work. While the professional touring company benefits from the author's oversight, the financial base of amateur or professional regional theatres is often not sufficient to include the necessary salary for the author, assuming he wished to become involved. The artistic decisions which are made in such a production often go unnoticed by the author. For example, a high school drama coach may know it is wrong to delete material from a script, but he also knows that the audience cannot sit for three hours. He directs accordingly, cutting the script to a manageable length, ignoring the warning on the cover of his rented script and violating the copyright. The director believes that this transgression is a necessary evil in school productions.

Beyond the typical infringement of the author's right to prevent alteration of the text, there are many artistic decisions that occur daily which are often not considered to violate the author's copyright. Both amateur and professional directors feel completely free to add the interpretive style of their own artistic staff to each production. Because any interpretative act is a deviation from the original work, however, it may be a violation of the author's rights. It can be

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after painful experience, that this is neither wise nor necessary. Many plays, of course, which demand elaborate setting, are quite impossible for amateur use, no matter how simple their problems or interpretation. But on the other hand, plays which on the professional stage are presented elaborately can often be done by amateurs in a simpler way, inexpensively, with excellent effect.

Id. at 7.

30. See APC § 11.3.

argued that the playwright, not the lawmakers or trade associations, should have the final authority on just which modifications can be made. The courts have yet to decide this question, however, because no playwright has brought a case to trial alleging improper interpretation of his script.[31] The production of Samuel Beckett's "Endgame" by the American Repertory Theatre ("ART") in Cambridge, Massachusetts, involved the first production dispute to come close to litigation.[32]

II. Bringing an Action: Which Claims May Succeed

A. *Background: The War over Interpretation*

In December 1984, ART purchased rights to produce Beckett's "Endgame." There was no dispute over the dialogue in the script because ART made few changes. The problems arose when ART chose to add an overture written by Philip Glass,[33] to have two characters performed by black rather than white actors,[34] and to change the setting from Beckett's gray room with two windows to an abandoned subway tunnel after the holocaust.[35] Beckett asserted that these changes constituted a violation of his rights as author and sought an injunction to prevent the production from being staged.[36]

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31. This author has not been able to find a single case litigated. No such case is reported on either Westlaw or Lexis.

32. Gussow, Enter Fearless Director, Pursued by Playwright, N.Y. Times, Jan. 3, 1985, at C14. The article also discusses a similar battle over the Wooster Group's production of "L.S.D.," a new play which originally included a twenty minute segment of Arthur Miller's "The Crucible." While a similar debate has emerged on the rights of the director to adapt an author's play, the Wooster Group situation is distinguishable because they were specifically denied the use of Miller's work. The arguments in favor of granting the Wooster Group access therefore do not hinge on the proper role of interpretation, but on the scope of the fair use doctrine as codified at 17 U.S.C. § 107 (1982).

33. Freedman, Associates of Beckett Seek to Halt Production, N.Y. Times, Dec. 8, 1984, at A14: "Representatives of the playwright Samuel Beckett are seeking to halt the production of 'Endgame' . . . contend[ing] that the theater is distorting Mr. Beckett's play by changing its setting from a bare cell-like room to a subway tunnel and by using an overture by the composer Philip Glass."

34. Freedman, Actor's Equity Protests Beckett Cast Criticism, N.Y. Times, Jan. 9, 1985, at C17. Barney Rosset, the agent and publisher for Beckett, sent a letter dated Dec. 10, 1984 to ART delineating his client's problems with the production. According to the article, " '[t]wo of the actors are purposefully black,' Mr. Rosset wrote in a list of complaints about the production. He went on to contend that the production 'wants us to know about miscegenation . . . .' " Actors' Equity Association responded to a grievance filed against Mr. Rosset for the letter with a non-binding resolution stating that the union "strongly abhors any suggestion that nontraditional casting is inappropriate in Mr. Beckett's 'Endgame.' " Id.

35. Freedman, Playwrights Debate Staging, N.Y. Times, Mar. 14, 1985, at C21.

36. Id.

Ultimately, ART and Beckett settled the dispute; Beckett was allowed space in the program to disavow the production and explain his position on the changes.[37]

. While the settlement was satisfactory for Beckett and ART, the rest of the theatre industry still has no definitive answer as to where the judicial line will be drawn and what degree of interpretation will be deemed legal. The filing of a suit would be enough to force many small theatre companies to abandon hopes of an innovative production due to the prohibitive cost of litigation.[38] Small theatre producers often see their choice as either making no artistic modifications, thereby letting the production become a flawed, stagnant Broadway reproduction, or making modifications and possibly incurring civil liability which could destroy the theatre company.[39] For the author the choice is whether to allow numerous productions which may be flawed, and thus ruin the value of the play in that area, or to maintain control over subsidiary production rights and severely limit the exposure and income generated by the work. Further, if an author chooses to bring suit against an offensive production, he faces a shortage of legal doctrines to support his claim.

B. *The Search for the Appropriate Theory*

1. *The Copyright Act: The Extent of Protection*

The standard claim against an offensive production would be a claim of copyright infringement. If the Grand Rapids Theatre Ensemble attempted to produce "Nebraska!," a thinly veiled perform-

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37. Freedman, "Endgame" Opens in Wake of Pact, N.Y. Times, Dec. 12, 1984, at C14.

38. Martin Garbus, the attorney representing Beckett in the action against ART, commented "that he felt the out-of-court settlement would dissuade other theaters from veering from Mr. Beckett's text and stage directions for 'Endgame.'" Id. There is no reason to assume the effect of the settlement will be limited to "Endgame" or the works of Mr. Beckett. The effect will be felt throughout the theatrical community.

39. This should not imply that every interpretation succeeds. The critique of the ART's "Endgame" in Theatre, the journal of the Yale School of Drama, had this to say of Douglas Stein's interpretive setting:

> As a visual composition, this stage picture is breathtaking. Theatricality, however, is not the main issue and cannot suffice as an evaluative standard. The real question is whether the design serves the play. The problem with specific interpretations of Beckett is that they become reductive, cutting off differing approaches in meaning to the text . . . .
>
> If the script of "Endgame" is performed intact, as it is at ART, this indeterminacy is not affected by simply changing the setting. Beckett's words preserve the essential ambiguity, and the action still occurs simultaneously in both a metaphorical present and a hypothetical future, just as it does when the stage directions are followed to the letter.

Kalb, The Underground Endgame, Theatre, Apr. 1985, at 89-90.

ance of Rogers and Hammerstein's "Oklahoma!," the theatre certainly would be liable for copyright infringement.[40] Because the performance would be unauthorized, the current copyright holders of "Oklahoma!" could enjoin the production, sue for damages (statutory or actual, depending on the value of the claim), and seek reasonable attorneys' fees.[41] The Copyright Act defines an infringer as "[a]nyone who violates any of the exclusive rights of the copyright owner as provided by sections 106 through 118."[42] Section 106(4) guarantees the right "to perform the copyrighted work publicly." In the hypothetical, the theatre company clearly violated the copyright owner's right to perform the work and is liable for damages.

In the Beckett situation, the questions change slightly. Is the description of the set protected by copyright? If it is, has the license for use of the description been paid? Or can the play be performed without the specified staging (and does this reduce the licensing fee)? While these are basically contractual questions, they hinge on whether the stage directions and character descriptions are covered by the copyright in the play.[43]

The issue is discussed by the late Melville Nimmer in a section covering the copyrightability of "Jokes, 'Gags,' and other 'Stage Business.' "

> Although there is very little authority on the question, it would seem that jokes, "gags" and other forms of "stage business" may claim copyright protection. . . . Such protection is, of course, limited to the "expression" and not the mere "idea." . . . Moreover, a mere imitation of an actor portraying a role will not constitute copyright infringement if no substantial literary material is copied, even, perhaps, if particular "business" of actions are copied.[44]

Legislative support for this position can be found in the 1966 House Report on an earlier version of the current Copyright Act.[45]

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40. See Chagares, Parody or Piracy: The Protective Scope of the Fair Use Defense to Copyright Infringement Actions Regarding Parodies, 12 Colum.-VLA J.L. & Arts 229 (1988).

41. 17 U.S.C. §§ 502, 504, 505 (1982).

42. 17 U.S.C. § 501 (1982).

43. Protection for stage directions and character descriptions is by no means presumed within the industry. See infra notes 94 and 118 and accompanying text.

44. 1 M. Nimmer & D. Nimmer, Nimmer on Copyright § 2.13, at 2-178.2(1) (1987) (footnotes omitted) [hereinafter Nimmer on Copyright].

45. Copyright Law Revision, H.R. Rep. No. 2237, 89th Cong., 2d Sess. (1966) [hereinafter House Report].

Under the heading "*Categories of copyrightable works*"[46] it was reported that

> [s]everal witnesses at the hearings recommended the specific enumeration of additional categories of works in section 102, including . . . works of stage directors. . . . The committee concluded, however, that to the extent these works constitute "original works of authorship" under the statute, they are already included in section 102's list.[47]

Although the case law is quite thin in this area, there may be copyright protection available for original stage business and direction brought to an existing work. The most poetic judicial statement in support of the committee's conclusion can be found in the opinion of *Sheldon v. Metro-Goldwyn Pictures Corp.*[48] by Judge Learned Hand:

> We have often decided that a play may be pirated without using the dialogue. Were it not so, there could be no piracy of a pantomime, where there cannot be any dialogue; yet nobody would deny to pantomime the name of drama. Speech is only a small part of a dramatist's means of expression; he draws on all the arts and compounds his play from words and gestures and scenery and costume and from the very looks of the actors themselves. Again and again a play may lapse into pantomime at its most poignant and significant moments; a nod, a movement of the hand, a pause, may tell the audience more than words could tell. To be sure, not all this is always copy-righted, though there is no reason why it may not be . . . .[49]

In *Universal Pictures Co. v. Harold Lloyd Corp.*,[50] the court similarly rejected the copyright infringer's argument that the sequence in dispute "is merely 'comic accretion' or consists merely of isolated 'gags' and 'stage business,' and that material of that nature is not copyrightable."[51] The court insisted "that such material may be so combined with events as to become subject to copyright protection."[52] Further, the court offered the argument that the "*means* of expressing an idea is subject to copyright protection, and where one uses his own method or way of expressing his idea, such adornment constitutes a protectible work."[53]

Although the court seemed to favor the creator of movement, the court undermined both its own and Learned Hand's position. "It is

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46. Id. at 45.
47. Id. at 46.
48. 81 F.2d 49 (2d Cir.), cert. denied, 298 U.S. 669 (1936).
49. Id. at 55 (citations omitted).
50. 162 F.2d 354 (9th Cir. 1947).
51. Id. at 363.
52. Id.
53. Id. (emphasis in original).

true that the mere motions, voice and postures of actors and mere stage business is not subject of [sic] copyright protection."[54] This judicial aside may explain the court's previous comment that such material "so combined with events" may be copyrightable. Similar reasoning may also explain the basis of the general caveat in the House Report that stage directions are protectible "to the extent these works constitute 'original works of authorship.' "[55] These qualifications may loom large indeed for any copyright claimant whose work may not transcend mere motions, postures and stage business.

Perhaps the only assumption that should be drawn from these cases is that there are copyrightable elements within a production that belong to the individual artists.[56] Precisely what these elements are and how well-defined they must be remain unclear, but this assumption should make copyright the preeminent legal doctrine for protection of the directions and movement embodied in a production.

The existence of some copyright protection should ensure that when the initial set designer describes his set for the published script, he is entitled to a royalty payment for each copy of the script sold and for each stock production which is licensed. A choreographer's work, since it often could stand as a performance without the original work, should also be considered a separately copyrightable work. Similarly, where an actor has contributed *sufficiently* to the interpretation of his character such that there is original material added to the final production of the script, he should be able to expect a small percentage of the royalties and license fees, though not directly from a claim of copyright ownership.[57]

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54. Id.

55. House Report, supra note 45, at 46.

56. Copyrightability does not mean protection. Section 102 of the 1976 Act states that "[c]opyright protection subsists, in accordance with this title, in original works of authorship *fixed in any tangible medium of expression* . . . ." 17 U.S.C. § 102 (1982) (emphasis added). The fixation requirement may be met through the stage manager's "book" of the production, an annotated script with every stage direction and lighting cue. It could also be met through videotaping or filming the production. See Horgan v. Macmillan, 789 F.2d 157, 158 (2d Cir. 1986). If the original material is not fixed in some manner, there is no federal copyright protection available.

57. In Lugosi v. Universal Pictures Co., 160 Cal. Rptr. 323, 603 P.2d 425 (1979), the widow and son of Bela Lugosi unsuccessfully sued Universal Pictures for the marketing proceeds from Lugosi's character in the 1930 film "Dracula." While the claim was based on the "right of publicity" and the "right of privacy," the court's language was quite informative. The majority wrote that

> Lugosi could have created during his lifetime through the commercial exploitation of his name, face and/or likeness in connection with the operation of any kind of business or the sale of any kind of product or service a general acceptance and good will for such business, product or service among the public, the effect of

2. *The Claim of Unfair Competition*

In addition to the limited protection of copyright, a second cause of action may provide an author some protection from unwanted interpretation. An author could charge that the modified production resulted in unfair competition between the original production and subsequent, changed productions. Unfair competition may be found when a product is sold so as to confuse or deceive the public and make the consumer believe that the product sold is the same as the original.[58]

In the "Endgame" scenario, the logic of an unfair competition action would be similar to the logic of the 1909 Copyright Act's "for profit" distinction.[59] Unauthorized performance of a nondramatic work was an infringement if it was for profit. Dramatic works, however, did not receive this exemption, so that any unauthorized performance of a dramatic work was an infringement. "It was reasoned that if a dramatic work was performed . . . those who viewed such performance were not likely to thereafter attend a performance . . . of the same work."[60] If the performance were modified to the detriment of the author, not only would he lose the audience that attended the improper performance, but any negative responses to that performance may result in diminished interest in the author's work. The marketability of proper productions of the same work or entirely different works by the same author could be damaged by the renegade adaptation. It can be argued that by advertising the production as Samuel Beckett's "Endgame," but instead presenting a production that is not precisely what Beckett considers to be "Endgame" due to the added music and the changes in the setting, this

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which would have been to impress such business, product or service with a secondary meaning, protectable under the law of unfair competition.

Id. at 326, 603 P.2d at 428.

In his concurring opinion, however, Justice Mosk disagreed. "We are not troubled by the nature of Lugosi's right to control the commercial exploitation of *his* likeness." Id. at 330, 603 P.2d at 432. (Mosk, J., concurring). Instead, Mosk was troubled by the possibility that an actor could control the exploitation of *his character's* likeness. Mosk did "not suggest that an actor can never retain a proprietary interest in a characterization. An original creation of a fictional figure played exclusively by its creator may well be protectable." Id. (citations omitted). Mosk saw a clear distinction between protection for a role originated by an actor (Groucho Marx, Laurel and Hardy, Charlie Chaplin) and a role which is eventually synonymous with the actor (such as Charlton Heston's Moses). Although a court has never explicitly based its decision on this original-character distinction, the language does often appear. Perhaps it would serve as an effective distinction between original, protectible work and unprotectible interpretation of existing work.

58. Fancy Free Mfg. Co. v. Fancy Free Fashions, Inc., 148 F. Supp. 825 (S.D.N.Y. 1957).

59. Copyright Act of Mar. 4, 1909, ch. 320, § 1(c), (e), 35 Stat. 1075.

60. 2 Nimmer on Copyright, supra note 44, § 8.15[A], at 8-144.3.

production would damage Beckett's opportunity to stage a proper version of "Endgame" in Cambridge, and therefore entitle him to judicial relief.

Such an argument is novel in this context. Traditionally, unfair competition has been used as a complement to copyright. It has been frequently used to protect titles or the uncopyrightable subject matter of an author's works. Since the copyright extends to the creative contents of a work, and not the title,[61] a method of protection is necessary to ensure that the good will created in a title by advertising and popularity is not wrongfully appropriated.

A title may be protected through the doctrine of unfair competition, but only when it has acquired a secondary meaning in the public mind such that the public associates the title with the particular product.[62] Alexander Lindey explains the doctrine as follows:

> The doctrine of unfair competition comes into play when a title has acquired a "secondary significance." This occurs when a work or phrase has become so closely associated in the public mind with, say, a story, that whenever the title is mentioned, the man-in-the-street will think it refers to the story. Whether a title has been sufficiently linked in the public mind with a specific work to warrant the law's protection is a question of fact, depending in the main on the popularity the work has enjoyed.[63]

In *Warner Brothers Pictures, Inc. v. Majestic Pictures*[64] for example, a movie studio was enjoined from using the title "Gold Diggers of Paris" because the name "Gold Diggers" had come to mean the play by Avery Hopwood and the film "Gold Diggers of Broadway."[65] No other film producer was allowed to gain the advantage of the title's value, and Warner Brothers' investment was protected.

Even if the original play was not successful, use of the title may be protected. The watchwords are "association" and "confusion," not competition. In *Jackson v. Universal International Pictures, Inc.*[66] a play entitled "Slightly Scandalous" which rehearsed in Los Angeles later opened in Philadelphia to negative reviews. The production persisted, however, and moved to New York City for a run of seven

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61. Becker v. Loew's Inc., 133 F.2d 889 (7th Cir.), cert. denied, 319 U.S. 772 (1943).

62. Becker v. Loew's Inc., 133 F.2d 889 (7th Cir.), cert. denied 319 U.S. 772, (1943); Mastercrafters Clock & Radio Co. v. Vacheron & Constantin-Le Coultre Watches, Inc. 119 F. Supp. 209 (S.D.N.Y.), rev'd on other grounds, 221 F.2d 464 (2d Cir.), cert. denied, 350 U.S. 832 (1954).

63. A. Lindey, Model Forms for the Arts 1058-59 (1987).

64. 70 F.2d 310 (2d Cir. 1934).

65. Id. at 311.

66. 36 Cal. 2d 116, 222 P.2d 433 (1950).

poorly attended performances before finally closing. Two years later, Universal released a film under the title "Slightly Scandalous," but which otherwise had nothing to do with Jackson's play.[67]

Expert witnesses testified for Jackson explaining the role a poor production may ultimately have in the market. Arguing in favor of the old maxim that "any press is good press," one expert explained that "some of the most successful pictures have been made of plays that have been flops."[68] The court found that although the play was not successful, the Broadway run and press coverage incidental to the production were sufficient to protect the author's interest in the title of his work.

> Popularity is not a requirement for secondary meaning because notoriety and adverse discussion may bring about widespread identification of the play by its title and may pique the public interest. Likewise, advertising, even of an unpopular play, may cause the public to identify it as one which has been a "Broadway production."[69]

The result is that a playwright is not constrained by having to prove that he has created a "successful" production, only that he has created a "memorable" play. All the playwright need argue is that as a result of the changes, the new production would diminish the opportunity to market the play as the author intended. Because, if successful, a plaintiff can obtain injunctive relief as well as damages,[70] the action is in many ways as powerful as a copyright infringement.

Titles and subject matter are not the only artistic elements that can be protected by a successful claim of unfair competition. As the court suggested in *Lugosi v. Universal Pictures Co.*,[71] the personality of an actor may be commercially marketable and entitled to protection through an unfair competition action.[72] Additionally, in *Burt Lahr v. Adell Chemical Co.*,[73] the court found that the comic Burt Lahr had a cause of action against the company when it unfairly pirated his unique style of performance.

Whether a court would be willing to extend the doctrine of unfair competition and apply it to cases of improper or changed performances remains to be seen. Such an extension of the doctrine could become problematic. How improper or objectionable must a produc-

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67. Id. at 120, 222 P.2d at 435.
68. Id. at 119, 222 P.2d at 435.
69. Id. at 122, 222 P.2d at 437.
70. A. Lindey, supra note 63, at 1059.
71. 160 Cal. Rptr. 323, 603 P.2d 425 (1979).
72. Id. at 326, 603 P.2d at 428.
73. 300 F.2d 256 (1st Cir. 1962).

tion be before the court feels compelled to award damages? In the Beckett situation, would the casting of a black performer in a role previously requiring a white performer (and "raising the issue of miscegenation")[74] be sufficient in and of itself to warrant judicial relief? Would the use of unauthorized music be a second and self-sufficient offense, or would the nature of the deviation have to be so egregious that only the worst of interpretative manipulation could create a successful cause of action?

The simple extension of such a remedy could lead to an action for damages whenever legitimate artistic decisions (such as casting) were made without sufficient insight such that the resulting production became an artistic failure. One can envisage a new judicial doctrine, the "reasonable critic standard," based on the common law reasonable person standard. Under this standard, damages would only be available when reasonable theatre critics could not disagree that a better artistic decision was available. It seems probable that if the judiciary did become involved at this level, a defense to the unfair competition might develop known as the "director's judgment rule."[75] The standard would be that if a director were to make an informed decision which a reasonably prudent director would make, then he could not be held liable for his mistake of judgment. The combination of the "reasonable critic standard" and the "director's judgment rule" would mean that only decisions which would obviously destroy a production could be precluded. In the "Endgame" scenario, there is a possibility that the cause of action would be available, but the fact pattern does not seem to support it. Then again, it is possible that a judge may feel the decision to include music by Philip Glass is just the type of decision which should entitle the author to a judicial remedy.[76]

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74. Freedman, supra note 34.

75. This rule is based on the familiar "business judgment rule" of the law of corporations. "[One] cannot secure the aid of the court to correct what appears to them to be mistakes of judgment on the part of the officers. . . . This rule applies whether the mistake is due to an error of fact or of law, or merely to bad business judgment." Ashwander v. T.V.A., 297 U.S. 288, 343 (1936) (Brandeis, J., concurring).

"[The business judgment] rule rests on the theory that the board of directors had been elected to make the business judgments of the corporation. These judgments should not be usurped by an individual shareholder or the courts unless the board of directors has not exercised its judgment in good faith." Issner v. Aldrich, 254 F. Supp. 696, 700 (D. Del. 1966).

76. This may be an unfair comment to the named composer, but under such a standard precisely this issue would be litigated. To prove his case, Beckett would have to attack every questionable decision the director made. The quality and applicability of the Glass music would become a triable issue in the case.

If the legal doctrines were to mirror those of corporate law as suggested, the prophylactic requirements of informed judgments and other procedural requirements would not be helpful in the search for effective standards. They could only serve to handicap the director's ability to make his often intuitive decisions, and would force him to seek the opinions of "experts," further diluting his artistic autonomy.

This solution is problematic not only because the hypothetical legal doctrines border on the ridiculous, but because the role of judge is elevated to that of art critic. A judge is no longer asked to decide the legal rights to the piece of material. Instead he is asked to weigh the aesthetic merits of the artistic work and decide what decisions sufficiently change the original work or affect an audience. There are no legal precedents detailing the legal ramifications of a casting decision on the ownership of the production rights. Such a result would force the judicial system to make decisions it has long sought to avoid.

> It would be a dangerous undertaking for persons trained only to the the law to constitute themselves final judges of the worth of pictoral illustrations, outside the narrowest and most obvious limits. At the one extreme, some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which the author spoke.[77]

Such a solution would inevitably create far more problems than it solved. The judiciary is not the appropriate forum to decide the merit of artistic decisions, no matter what legal doctrines are used to insulate the artist.

3. *The Effectiveness of Section 43(a)*

Another potential cause of action can be created under section 43(a) of the Lanham Act, which provides that

> any person who shall . . . use in connection with any goods or services . . . a false designation of origin, or any false description or representation, including words or other symbols tending falsely to describe or represent the same . . . shall be liable to . . . any person who believes that he is or is likely to be damaged by the use of any such false description or representation.[78]

This federal statute may have sufficient breadth to reach non-conforming productions, but any plaintiff will face the same problem as with an unfair competition claim. Once a judge or jury is called in to determine if there has been an infringement, any decision will be

77. Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903).
78. 15 U.S.C. § 1125(a) (1982).

based on an analysis of the production's merit, rather than the ownership of production rights. Further, section 43(a) has some hurdles which may make it even less effective as a tool to protect the author than the state law claim of unfair competition discussed above.

At its core, section 43(a) is designed to protect against selling goods through misrepresentation or false implication. The falsehood need not be explicitly stated, only inferred.[79] Further, it requires establishment of likelihood of confusion or actual confusion.[80] A claim would then fail where the theatre in fact told the whole truth about its production. If in a production of "Sweet Charity," Bob Fosse's choreography was not used, there is no injury when the program says "Choreographed by Jan Meredith." It may even be appropriate for the program to say "Originally Choreographed by Bob Fosse." Both statements are true and neither should mislead the audience. For the dancers who professionally recreate former shows, a prominent note in the program such as "Original Choreography by Bob Fosse reproduced by Jan Meredith" may be enough to defeat any claims of false description. It can be argued that such a note would falsely imply that Fosse had something to do with the production, but Fosse's choreography is in the show. The language of section 43(a) calls for false designation or false description.[81] An honest, forthright taking of the choreography seems beyond the scope of the act.

The Second Circuit, however, in *Perfect Fit Industries v. Acme Quilting Co.*[82] looked differently at the intent of the defendant.

> In assessing the likelihood of confusion to the public, an important factor is whether or not the second comer created the similar [item] intentionally. If there was intentional copying the second comer will be presumed to have intended to create a confusing similarity of appearance and will be presumed to have succeeded.[83]

In the case of reproducing a choreographer's work, however, it should not be an automatic assumption that the copier intended to create confusion. This assumption may make intuitive sense in marketing, but as stated above, the goal of the copier may be to make perfectly clear that copying has occurred. If this assumption were maintained in a choreography suit, the choreographer may be able to establish that the reproduction was intended to be confusingly simi-

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79. See Co-Rect Prods. v. Marvy! Advertising Photography, Inc., 780 F.2d 1324 (8th Cir. 1986).

80. Id. at 1329-30.

81. 15 U.S.C. § 1125(a) (1982).

82. 618 F.2d 950 (2d Cir. 1980), cert. denied, 459 U.S. 832 (1982).

83. Id. at 954.

lar. The assumption does not fit the business practice, however, and it will be hard to find a Des Moines audience member who read the notice and thought Fosse was in town choreographing the production.

For the author fighting modification of his play, section 43(a) provides little statutory support. If the producer's or director's name is equally prominent on the billing and advertising, the combination of names will create an inference fundamentally different than that of the author's name alone. Knowing nothing else, seeing an advertisement for The New World Vision Theatre production of "Broadway Bound" would probably tell the potential audience that this production is not going to be the same as the Neil Simon Theatre production of the same show. A claim that the novel production created a false impression that the play was like the production on Broadway, when in fact the productions were quite dissimilar, will be very hard to substantiate. Unless the theatre truly makes such a false statement or actively misrepresents itself, such a claim is better left not brought. Section 43(a) cannot be extended into this area without some more traditional misrepresentation being alleged.

Section 43(a) has become a source of protection for titles under the theory that the same title would tend to confuse the public and lead it to believe an advertisement is for one story when in reality it is for another.[84] In fact, if the concept of interpretation is accepted as a trade practice, (and it seems to be)[85] then there can be no potential confusion when a play is presented in a slightly different form than it was produced on Broadway. It should not confuse the public when they receive what they have come to expect. A presentation of Meredith Wilson's "The Music Man" using the title "Death of a Salesman" would give rise to a section 43(a) action. If the setting were changed from 1912 rural Iowa to 1987 Des Moines, no action would lie.

Rather than looking to protection through the trade and business practice notions of section 43(a), more traditional protection can be found under the Copyright Act. Unfair competition and section 43(a) provide some additional protection, but they do not address the underlying balance of interests among artists. It is copyright that gives protection to the original expression of all the artists involved in a play's production. Once the parties know what elements they can claim as their own, they can attempt to negotiate a contract which

84. See J. McCarthy, Trademarks & Unfair Competition § 10:5, at 339 (2d ed. 1984).
85. See Gussow, supra note 32.

balances the economics and the artistic necessities of their relationship.

III. Solving the Problem: Contracting a Compromise

A. *Professional Contracts*

For Samuel Beckett, the existence of copyright protection may have been sufficient authority to win his suit. Beckett's writing style is unique, however, in a manner which separates him from normal theatrical practice. All of the violations charged by Beckett in ART's production of "Endgame" were to his own work. Beckett is meticulous in *his* description of staging, characters and movement, but this is not standard practice. Mel Gussow, critic for the New York Times wrote that "[w]hile dialogue might be considered sacrosanct, directions are usually treated as suggestions rather than commands from the author."[86] The process of shaping a production calls for many changes in what becomes a very collaborative process.[87] Remuneration for the vast majority of individuals who contribute to the final product comes from their weekly salaries. They own no future rights[88] and receive only what the original creators deem to give them, usually a far smaller figure than would be required under a royalty agreement.[89]

The standard theatrical practice is to have a stage manager write down the stage directions as they develop throughout the rehearsal stages of a production. The stage manager does not create the directions alone. They evolve through the interaction of actors and director.[90] The involvement of the author may range from very active to

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86. Id.

87. NETC, supra note 9 (statement of Jack Lee). See also Gussow, supra note 32:
> The playwright may see the stage in his mind's eye and may even describe it in his script, but when the play goes into production a stage designer is employed to set the scene. Where there is a door, he may prefer a window. Walls may become transparent and, for the sake of a quick scene change, a park bench may appear in a parlor.

88. The most notable exception is that of Jerome Robbins' involvement in "Fiddler on the Roof." The result of that collaboration is a warning on the rented copies of the libretto which allows for no changes in the choreography. All theatres must therefore attempt to recreate precisely the original work. In this way, the creator is being rewarded for his efforts.

89. See Note, Collaboration in Theater: Problems and Copyright Solutions, 33 UCLA L. Rev. 891 (1986).

90. Once the production is on the stage, the stage manager becomes its field commander. The responsibility of the performance is in his hands. He starts each performance, gives all cues, calls the actors, and posts all daily calls. He is charged with maintaining production standards set by the director and company discipline onstage.

non-existent. The APC allows for the author's presence throughout the rehearsal period.[91] If anyone were to have rights to these changes, the Dramatists Guild assumes it would be the author. In the APC it is agreed that "Producer warrants that any change of any kind whatsoever in the manuscript, title, stage business or performance of the Play made by Producer or any third party and which is acceptable to Author shall be the property of Author."[92] Therefore, it is the author who owns the rights to these artistic endeavors of the theatre company. The Dramatists Guild is concerned with protection of authors. As a result, the contract they have promulgated ensures that their members retain all authority over productions.

The position of the Society of Stage Directors and Choreographers is somewhat different. In section 10 of the Society contract with the League of New York Theatres and Producers, Inc., "the Society agrees that this contract . . . [does] not vest in any Director or Choreographer the right to participate in any of the subsidiary rights of the dramatist or Producer."[93] This clause, with the non-exclusive list

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W. Parker & H. Smith, Scene Design and Stage Lighting 289 (4th ed. 1979).

91. APC § 8.02(a): "Author shall have the right to attend all rehearsals and performances of the Play prior to the Official Press Opening in New York City."

92. APC § 8.01(b).

93. Contract between the Society of Stage Directors and Choreographers and the League of New York Theaters and Producers, Inc., at 12 [hereinafter Society-League Contract]. This contract incorporates a letter agreement of Mar. 16, 1962, written by Erwin Feldman, counsel for the Society. The letter reads as follows:

> Dear Martin [Shumlin];
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> This will confirm the action which was unanimously ratified at the general membership meeting of the Society last Wednesday evening. The Society accepted the proposals on the points which we discussed, which were as follows:
>
> 1. That the Society will not in any contract which may result from negotiations between the League and the Society and any renewal of such contract for a period of no less than twenty years, demand as a condition be included [sic] in any such negotiated minimum basic agreement.
>
> (a) Any provision which would give to any director or choreographer participation in any of the subsidiary rights of the dramatists and/or producers.
>
> (b) Any condition which would change the present relations between producer, director and dramatist as practiced in the New York legitimate theatre in connection with the duty, authority and control of any production.
>
> 2. That for membership in the Society, the Constitution and By-Laws will provide that no initiation fee will exceed $100.
>
> It is, of course, understood that the provisions of par. 1. shall in no way be construed to prevent any director or choreographer from negotiating with and obtaining from any producer, better terms without limitation, than are contained in any minimum form agreement between the Society and the League.
>
> Very truly yours,
> SOCIETY OF STAGE DIRECTORS AND
> CHOREOGRAPHERS, INC.
> (signed) ERWIN FELDMAN, Counsel

of subsidiary rights included in section 10(d) of the agreement[94] should act to prevent the Society from negotiating subsidiary-rights agreements, allowing the producer to fulfill the promise made in the APC that all changes are the property of the author.

There is one problem, however, with this contractual solution. Section 6(c), under the heading "conditions of employment," explains that while this agreement precludes the Society from further negotiation, "[a]nything contained in this Agreement or the schedule attached hereto shall not be construed to prevent any Director or Choreographer from negotiating with and obtaining from any Producer any better terms and conditions."[95] Even under the existing documents, a director can try to opt out of the no-subsidiary-rights section of the contract. If a producer is not careful, he could give both the director and author the same authority over the new, copyrightable material.[96]

The producer may still be protected, however, even if the contracts did not have actual agreements on the subsidiary rights issue. The producer could argue that a director creating copyrightable material through his stage work was acting in the normal course of employment and that the work-for-hire doctrine is applicable.[97] The

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94. Id.

95. Id. at 6.

96. Careful contracting can be used to protect either side. In negotiating the subsidiary rights elements of a contract, a producer can protect himself by requiring the parties to agree that the director's original material is a work made for hire. Section 101 of the 1976 Act defines a work made for hire as:

> a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation,. . . if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire. For the purpose of the forgoing sentence, a "supplementary work" is a work prepared for publication as a secondary adjunct to a work by another author for the purpose of introducing, concluding, illustration, explaining, revising, commenting upon, or assisting in the use of the other works, such as forewords, afterwords, pictorial illustrations, maps, charts, tables, editorial notes, musical arrangements . . . .

17 U.S.C. § 101 (1982).

If the material is a work made for hire, copyright vests in the employer. Id. § 201(b). Assuming that stage direction will fall within this definition, a fairly negotiated agreement between director and producer can give the producer copyright ownership.

97. Under the 1976 Act, "the employer or other person for whom the work as prepared is considered the author . . . and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright." Id. § 201(b). In interpreting this section, however, courts have looked to the substance of the hiring agreements to protect authors who have created independently from signing away their copyright ownership through work-for-hire agreements.

court will look to whether the work was within the regular scope of employment,[98] to the pay arrangement and to the level of supervision the employer actually demonstrated.[99]

If the director or an actor claims that what he has brought to a playwright's character is sufficiently original to be copyrighted, he may be able to overcome a work-for-hire presumption and "own" his characterization of the performance. If such characterization is not copyrightable, there is, of course, no issue. If instead, the playwright has the control as Beckett contends, then he must be very careful that the producer maintains a legitimate work-for-hire relationship with all other creators throughout the process.

Taking Nimmer's analysis to be correct as to the legitimacy of copyrighting stage business,[100] as a result of the current contractual development, it is apparent that a Dramatists Guild author or an author who uses a similar contractual provision has legal title to all the modifications that resulted from the rehearsal process. As exclusive owner of those rights, it seems probable that an author can make any contractual arrangement which arms-length bargaining will allow. For Samuel Beckett, this means that his suit would have been won or lost, not because of the copyright statute, but because of his negotiations with Samuel French (the play distributor) and ART.[101]

B. *Contracts Outside the Guild, League and Society Arrangements*

In the pre-Broadway situation, a play will often be presented by a not-for-profit theatre for the artistic interest in promoting new playwrights. In such situations there may be no pay involved, and often the contracting, if existent, is quite uninclusive. Assuming again that the Nimmer analysis is accurate and that copyright will serve to protect the stage directions, there is still a great risk that the use of contracts may not prove a viable solution.[102]

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98. Murray v. Gelderman, 566 F.2d 1307 (5th Cir. 1978) (withdrawing previous opinion and granting rehearing).

99. Evans Newton Inc., v. Chicago Sys. Software, 793 F.2d 889 (7th Cir. 1986); Aldon Accessories Ltd. v. Spiegel Inc. 738 F.2d 548 (2d Cir.), cert. denied, 469 U.S. 982 (1984).

100. See supra note 44 and accompanying text.

101. Samuel French, the theatrical publishing company and licensing agent, licensed the play to ART. It was not Samuel French that sought to enjoin the production, however, but Barney Rosset, the president of Grove Press. Rosset is the theatrical agent of Mr. Beckett, and Grove Press is the American publisher of Beckett's works. See supra note 34. It is therefore possible that Samuel French had no contractual objection to ART's interpretation of the play because the agreement between the two publishers did not clarify the issue.

102. A director or performer may claim copyright of his collaborative elements in the production, and by his early association ensure himself a percentage of future finances from

As a first step, a playwright should be sure to include in any agreement between the playwright and producer, a clause similar to the clause quoted from the APC that in exchange for the rights to perform the script, the producer agrees that any interest he receives as a result of the production in new copyrightable material is exclusively granted to the author. A clause such as this should accompany any agreement which gives the theatre company a financial interest in the future of the play. The exchange is a hope for future revenue in return for belief in the author's ability and respect for the author's right to create his own final product.

Similarly, the playwright should have an agreement with the actor that in exchange for the value of being cast in the new production and the possible exposure that will result from taking such a role, the actor agrees that any interest he receives in new copyrightable material as a result of the production is exclusively granted to the author. Such contracts will help to ensure that the author will at least have an initial opportunity to protect his work and maintain artistic control while he is involved.

Contract agreements employing such language should be enforceable. If the agreements include an interest in future earnings or productions, there is clearly sufficient consideration to show the contracts are fair and equitable. Even absent a financial agreement, consideration of a valuable opportunity in exchange for intellectual property should be valid.[103]

Individual contracts are necessary between each actor and the author because it is likely that the actors will not be covered by the work-for-hire doctrine as either creators of commissioned work or as employees of the theatre or the author. To be a commissioned work, there would have to be a contract to that effect.[104] To prove that the actors were employees, there must be evidence of that relationship.[105] Any proof of employment would indicate that the director was the employer, not the theater or the author.

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the script. This may be an equitable solution in some situations, such as that described in the UCLA note detailing the development of A Chorus Line, but should only be allowed to develop through the full understanding of all the parties and not because of the innocence of the author or subtlety of a director. See Note, supra note 89.

103. As an example of a non-financial enforceable contract see Schumm v. Berg, 37 Cal. 2d 174, 231 P.2d 39 (1959). Here, actor Wallace Beery was found to have been given consideration for his promise of child support because the mother promised in exchange to name the child Wallace if a boy or Wally if a girl. See generally E.A. Farnsworth, Contracts § 2.5 (4th ed. 1982).

104. See supra notes 96-97.

105. "[I]f an employer supervised and directed the work, an employer-employee relation-

A contractual solution to decide who owns the rights to the different elements in the initial production is still problematic on the pragmatic level. The nature of not-for-profit theatre, workshops and the other forms of play development militate against any solution which increases the need for documentation and paper work. Careful contracting may be effective, but until a court squarely decides the copyrightability of stage directions, it will be difficult to put into practice. The authors and producers who are most in need of these agreements are often the very people who are without the resources to utilize them. Were the court to find that more than mere stage directions, movement, timing and casting need be involved to give an independent copyright, then the beginning author could feel fairly safe that his work will not become entangled with anyone he does not wish to become involved.

IV. The Industry Standard: In Search of Interpretation

Until a court decides the minimum level of originality and input necessary to create a separate copyright action, there will be no satisfactory solution to the conflict. The only way to stop the "Endgame" situation from recurring is for the author to contract around the problem. Because of the standardization with which most plays are distributed to amateur companies, there should be a single position which is considered the industry norm, and any deviation from this standard should be clearly marked in the agreement and on the individual copies of the scripts.

What the standard industry position should be is a question of hot debate. At the New York University panel discussion entitled "Authors versus Directors"[106] arguments for both author's absolute control and for liberal license to interpret were adamantly propounded. Speaking on behalf of the playwright, John Guare[107] suggested that

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ship could be found even though the employee was not a regular or formal employee." Aldon Accessories Ltd. v. Spiegel Inc., 738 F.2d 548, 552 (2d Cir.), cert. denied, 469 U.S. 982 (1984. In *Aldon Accessories*, the Second Circuit held that the Japanese and Taiwanese sculptors of porcelain and brass statuettes were employees because the company which contracted with them had an individual who "actively supervised and directed the creation of both the porcelain and brass statuettes. While he did not physically wield the sketching pen and sculpting tools, he stood over the artisans at critical stages of the process, telling them exactly what to do." Id. at 553. Under such a standard, the director may well be the "employer" and therefore claim rights in the performances of the actors. It is far more difficult to allow the theater to take the credit, unless the director is the employee of the theater as well.

106. Sponsored by the Tisch School of the Arts Undergraduate Drama Dept. (Mar. 12, 1985).

107. Author of "Landscape of the Body."

"[t]heater is a collaborative art . . . but the playwright can choose who he or he wants to collaborate with."[108] Disagreeing, the set designer of "Endgame," Douglas Stein, said a "process of creative thinking begins when the rights to a play are given to a theatre. And it is wrong to censor that."[109]

The argument for greater interpretation and access is not a new one. The Drama League of America espoused the need for greater availability for amateur productions as follows: "Our civilization is suffering from over-specialization in art, from too much professionalism. In spite of the general increase in culture, the actual practice of any of the arts seems to be rather less general, in our own time, than in former days."[110] This commentary on the need for amateur theater, written in 1914, remains valid today as a reason to favor greater access for amateur companies. The Drama League recognized the value of what has grown to be community theater. "There must be, first, a nucleus of amateur actors—young people, or old, or both—willing to work and to experiment seriously . . . ."[111] This argument for interpretation, however, is not without its detractors. Jerry Herman, in an unpublished article, asks: "[W]hy doesn't everyone else connected with the theatre demand equal rights with Composers and Lyricists?"[112] He concludes that the only artists who do not suffer from the dilution of artistic integrity are the lyricist and

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108. Quoted in Freedman, supra note 35.

109. Id.

110. Drama League of America, supra note 28.

111. Id.

112. Jerry Herman, "Golly Gee Fellas" (unpublished comments written in late 1963) (available at the Lincoln Center Branch of the New York Public Library, clippings file, Copyright—Theatre—U.S.).

> For a clear picture of how marvelously unfair it all is, take a look at Bobby Bookwriter. His scenes served as the inspiration, the starting place, yes sometimes even the title for a musical number. But guess who rakes in the income on all those records of all those songs inspired by all his scenes? . . .
>
> When we go out of town and a new scene is needed, the choreographer, the set and costume designer are all naked, helpless, and must start from scratch. Bit [sic] the sneaky songwriter flips open his trunk pulls out that ballad that was cut from the last trip to Philadelphia, or that piece of patter he wrote for his college varsity show, and he's in business . . . .
>
> Let's examine what happens to a musical a decade after its final Broadway curtain. The Walla-Walla Music Tent opens its summer season with a big Met star in the title role. Of course, she's never acted before, so the book is cut to ribbons. the only things resembling choreography she is able to face is a Gavotte she once did in "Marriage of Figaro" so . . . she does the Gavotte. Those award winning sets, once the talk of Broadway, have been replaced by canvas, rigging and an audience in the round and the costumes have been salvaged from the afore-mentioned production of Figaro . . . .

the composer. All other elements (script, scenery and direction) are all equally maimed by post-Broadway productions.[113] To the extent Mr. Herman accurately portrays the problem, however, his argument does not support the author over the director and other artists. Interpretation may sometimes help non-Broadway productions. According to Mr. Herman, everything else hurts them.[114]

More than just the philosophical question of artistic license or artistic integrity is at issue. The licensing house Tams-Whitmark, well-known for its collection of Broadway musicals, suggests that there is not a need to offer playwrights better protection. They have no productions which require the theatre to use the suggested setting or stage directions and have no authors who request this be changed. Additionally, if there is not a great demand, there will not be a great enforcement of any rule limiting the creative efforts of amateur performances. An established rule rarely enforced may be more damaging than no rule except for the occasional special contract.

Finally, it must be remembered that although the problem is real and can be troublesome, most artists are pragmatic. If the Duluth Playhouse pays the royalties, the income will allow the author to keep writing for the next Broadway attempt. The Duluth designer receives his chance at a new artistic challenge and the adoration of the city while the Arizona playwright (unsure which state Duluth is in) receives his payment, and self-sufficient because of the amateur-rights income, he has the opportunity to write the next winner of the Outer Circle Award. If he is successful enough that the amateur-rights income no longer affects his opportunity to continue writing, he can probably find a publisher who will exercise the necessary authority over his play so that it is only done in accordance with his wishes. By having the industry standard favor interpretation, audience, author, performer, director and designer are all given room to exercise their art.

CONCLUSION

The problem of artistic interpretation is a real one. Without a clear legal determination regarding the degree to which a play can be interpreted by amateur, regional and touring productions, small companies will continue to be discouraged from experimentation. The law must be clear so that the threat of litigation is not a tool used to stop new, interpretative theater. The need for interpretation, how-

113. Id.
114. Id.

ever, should not be used as the excuse for altering the work of the author and changing his play into something with which he would not want his name associated. The only way to create a balance between these conflicting needs is to begin with some generally accepted principle on what a playwright licenses when the performance rights are given. Dialogue is to be considered sacrosanct, but stage directions should be treated as suggestions, not commands. From this basic formulation, authors can contract with the various theaters and directors for greater control. In this way, a playwright will be involved in the more tightly controlled productions from the beginning, the rest of the theatrical community will not be constrained from the fear of litigation, and the needs of all the artists will be protected. As a result, playwrights, directors and everyone else involved in the collective process of drama will benefit from the tension created by interpretation.

Samuel Beckett, however, may not agree.