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Big Shop of Horrors: Ownership in Theatrical Design

Jennifer Womack*

INTRODUCTION

A wealthy producer decides to put on a Broadway show. One of the first and most important things he needs to do is shop for and hire designers. He calls William Ivey Long¹ to design the ornate and festive costumes. Mr. Long then suggests to the producer that he hire Peter Kaczorowski² for the Lighting Design since they worked on *Grey Gardens*³ together. This process

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¹ William Ivey Long is an eight-time Tony Award nominee in the category of Best Costume Design having won for such shows as *The Producers* and *Hairspray*. Internet Broadway Database, <http://www.ibdb.com/awardperson.asp?id=25067> (last visited Sept. 14, 2007).

² Peter Kaczorowski is a two-time Tony Award nominee in the category of Best Lighting Design having won a Tony for *The Producers*. Internet Broadway Database, <http://www.ibdb.com/awardperson.asp?id=25728> (last visited Sept. 14, 2007).

³ *Grey Gardens* is a musical that opened on Broadway at the Walter Kerr Theater on Nov. 2, 2006, and closed July 29, 2007. Internet Broadway Database, <http://www.ibdb.com/production.asp?ID=426592> (last visited Sept. 14, 2007).

continues until a scenic designer, make-up designer and sound designer are hired and sign their contracts with the producer.

Shortly thereafter, designs are made and approved by the director and the producer. During the development of the show, the director tells Mr. Long to add yellow cuffs to the lead actor's zebra-striped suit jacket. The producer then tells Mr. Long to cover the sleeves in silver sequins. Opening night approaches, the reviews come out and the topic of everyone's conversation at Sardi's Restaurant⁴ is this exquisite suit jacket. It is labeled as "the most innovative costume design ever to be seen on the Broadway stage."

Five years later, a copy of the suit jacket is reproduced in regional theater productions across the nation. In addition, the photographs of the suit jacket appear in theatrical costume design books. None of the authors of these subsequent designs have obtained permission to reproduce the work. From whom would they get permission? Is Mr. Long the owner of the work because he was the costume designer? Is the producer the owner because he funded the design? Does the director own a stick of the bundle because the yellow cuffs were his idea? Federal courts and the Copyright Act⁵ provide little guidance in this grey area.

The question of ownership in theatrical design is on the horizon and is best exemplified by the recent dispute over an off-Broadway production of *Urinetown*.⁶ Most designers are independent contractors, guaranteeing themselves the right to own their designs. However, problems arise in the collaboration process, because many brains contribute to the end result and, while Mr. Long is listed in the Playbill⁷ as the Costume Designer, he is far from the sole creator.

⁴ Sardi's Restaurant is a New York City restaurant located in the heart of the theater district. Sardi's Restaurant, <http://www.sardis.com> (last visited Sept. 14, 2007).

⁵ Copyright Act of 1976, 17 U.S.C. §§ 101–801 (2005).

⁶ See Zachary Pincus-Roth, *Hunter Foster Defends Jennifer Cody's Akron Production of Urinetown*, PLAYBILL, Nov. 16, 2006, <http://www.playbill.com/news/article/103609.html> (describing accusations of plagiarism against a producer of an off-Broadway production of *Urinetown*).

⁷ A Playbill is a publication for program services of both Broadway and off-Broadway shows. See Playbill, <http://www.playbill.com> (last visited Sept. 14, 2007).

The process of creation in the theater world is one of the most collaborative practices in all of the arts. The “limited times” provision of the U.S. Constitution⁸ provides authors mini-monopolies for their copyrighted works in order to provide incentives for subsequent authors to create new works.⁹ The only person to whom it is clear that he will enjoy exclusive control of his work in the industry is the playwright.¹⁰ Designers are left to fend for their inventions.

The purpose of this Note is to explore the holes that both the Copyright Act and courts’ decisions have left in the ownership of theatrical designs. Part I of this Note introduces the requirements of joint ownership and the *Childress v. Taylor* two-prong test.¹¹ Subpart A will detail the intent requirement for a joint work and subpart B will discuss the copyrightability of theatrical designs. Part II will offer the precedents that exist for copyrightability in theatrical works. This part will explore the conflicts that arise with joint authorship of theatrical designs due to its collaborative nature. Part III will propose that the theater industry adopt the film industry’s implementation of the work for hire doctrine. Part IV will examine the effect this proposal will have on both the individual theatrical designer as an author and on the commercial theater industry as a whole.

I. OWNERSHIP: TAKE ME OR LEAVE ME

The Copyright Act provides that ownership “vests initially in the author or authors of the work.”¹² An author of a work is the person who crafts or designs the work and expresses his original idea in a “fixed, tangible” medium.¹³ One would assume that this is a simple concept: the person who writes the book is the author,

⁸ U.S. CONST. art. I, § 8, cl. 8.

⁹ See *Eldred v. Ashcroft*, 537 U.S. 186, 260 (2003).

¹⁰ But see Roberta R. Kwall, “*Author-Stories: Narrative’s Implications for Moral Rights and Copyright’s Joint Authorship Doctrine*,” 75 S. CAL. L. REV. 1 (2001) (describing the dispute over the authorship of *Rent*).

¹¹ 945 F.2d 500, 507 (2d Cir. 1991).

¹² 17 U.S.C. § 201(a) (2005).

¹³ *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 737 (1989) (citing 17 U.S.C. § 102).

the person who designed the blueprints is the author. There is, however, controversy over whether a person has to physically fix the work himself.

In *Lakedreams v. Taylor*,¹⁴ the defendant was hired to silkscreen the plaintiff's designs onto cotton t-shirts.¹⁵ The defendant subsequently created and sold identical t-shirts and obtained copyright protection.¹⁶ The court, affirming a preliminary injunction in favor of the plaintiff, noted that a person can be recognized as the author of a work and receive the protections of the Copyright Act even if he did not "perform with [his] own hands the mechanical task of putting the material into the form distributed to the public."¹⁷ What is required of an author, as interpreted by federal court decisions, is that he contribute copyrightable material.¹⁸

This interpretation of an author and owner of a work could potentially cause problems for the theater industry for two important reasons. First, it is not feasible to determine whether an author has made a noteworthy copyrightable contribution because it is uncertain which theatrical works are copyrightable. Second, since more than one person contributes to the end design of the set, lighting plot or costumes, such as the producer, director, actors, or other designers of the show, each one of these persons could be considered an author and own a piece of the design. The theater industry did not intend this effect because the widely accepted practice is that designers are treated as independent contractors so that they can be recognized as the sole owner of their work.¹⁹

¹⁴ 932 F.2d 1103 (5th Cir. 1991).

¹⁵ *Id.* at 1105–1106.

¹⁶ *Id.* at 1106.

¹⁷ *Id.* at 1108 (citing *Andrien v. S. Ocean County Chamber of Commerce*, 927 F.2d 132, 135 (3d Cir. 1991) (holding that the plaintiff had authorship in a map despite not having personally fixed the features of the map in a tangible form)).

¹⁸ See *Childress v. Taylor*, 945 F.2d 500, 507 (2d Cir. 1991); *Ashton-Tate Corp. v. Ross*, 916 F.2d 516, 521 (9th Cir. 1990); *M.G.B. Homes, Inc. v. Ameron Homes, Inc.*, 903 F.2d 1486, 1493 (11th Cir. 1990); *Cabrera v. Teatro Del Sesenta, Inc.*, 914 F. Supp. 743, 765 (D.P.R. 1995); *but see Gaiman v. McFarlane*, 360 F.3d 644, 658–62 (7th Cir. 2004) (rejecting the notion that a copyrightable contribution is necessary for creation of a joint work).

¹⁹ See David J. Dawsey, *Copy This!*, LIVE DESIGN, Jan. 1, 2007, <http://livedesignonline.com/mag/copy>.

Because more than one author contributes to an end design, the hotly contested issue is what qualifies as joint ownership of theater. 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.”²⁰ In *Childress v. Taylor*,²¹ the Second Circuit set forth a two-prong test to determine joint ownership of a work.²² In order for an alleged co-author to gain ownership in a work, all collaborators must have (1) fully intended at the time of creation to be a co-author, and (2) contributed independently copyrightable portions to the work.²³ In *Childress*, the court found that the defendant was not a joint author of the plaintiff’s work because she merely researched material for the play and among other things, structured the plot and dialogue.²⁴

A. *Intent in the Spotlight*

Intent of co-authorship is the sine qua non of a joint work.²⁵ Despite a clear written agreement between the various contributors of a work, the intent requirement has been viewed to be an insuperable prerequisite to fulfill. One of the biggest theatrical disputes over the intent requirement was *Thompson v. Larson*,²⁶ in which a dramaturg claimed that she was a joint author to the musical *Rent*.²⁷ Author Jonathan Larson’s musical *Rent* was being produced by the New York Theatre Workshop (“NYTW”) and Lynn Thompson was hired to help shape and form the plot.²⁸ The agreement between NYTW and Thompson stated that she was to be billed as the “Dramaturg.”²⁹ Shortly after the dress rehearsal, Larson died and Thompson, along with three others, completed the

²⁰ 17 U.S.C. § 101 (2005).

²¹ 945 F.2d 500 (2d Cir. 1991).

²² *Id.* at 507–508.

²³ *Id.* at 505, 507.

²⁴ *Id.* at 502, 509.

²⁵ *Id.* at 509.

²⁶ 147 F.3d 195 (2d Cir. 1998).

²⁷ *Id.* at 196.

²⁸ *Id.* at 197.

²⁹ *Id.*

book of the musical.³⁰ Furthermore, all the contributors except Thompson signed a waiver stating that they would not claim an ownership interest in the work.³¹ The court found that Thompson contributed significant copyrightable portions to the end result.³² Nonetheless, the court held that *Rent* was not a joint work because there was no indication that Larson ever intended Thompson to be his co-author, but merely his editor.³³ The court stressed the significance of the intent requirement, reaffirmed *Childress*, and rejected Thompson's argument that the intent requirement need only be met when an author has made minimal contributions.³⁴

However, it is interesting to note that at least one court prior to the *Childress* and *Thompson* decisions held that intent is not dispositive of determining whether a work is joint.³⁵ In *Strauss v. Heart Corp.*, the court held that despite the absence of the photographer-author's intent to be a co-author with the defendant, it was nonetheless a joint work because both contributors were aware that their contributions were to be combined into a single work.³⁶ It is more persuasive however, that the Southern District of New York³⁷ has frequently upheld the seriousness of the intent prong laid down by the Second Circuit, particularly in cases in which the subject matter is theater.³⁸

B. Copyrightability: *Center Stage*

In most suits for joint authorship the plaintiff's toughest obstacle is jumping through the intent hoop. However, the second prong of the *Childress* test may be equally as tricky to satisfy. In order to decipher whether a creator has made his own

³⁰ *Id.* at 198.

³¹ *Id.* at 198 n.7.

³² *Id.* at 200-01.

³³ *Id.* at 205.

³⁴ *Id.* at 202 & n.19.

³⁵ *See Strauss v. Hearst Corp.*, 8 U.S.P.Q.2d (BNA) 1832 (S.D.N.Y. 1988).

³⁶ *Id.* at 1837-38 & n.5.

³⁷ When theater is the subject matter of litigation, most claims are brought in New York district courts because Broadway shows are only located in New York City. *See, e.g.*, *Caffey v. Cook*, 409 F. Supp. 2d 484 (S.D.N.Y. 2006); *Carell v. Shubert Org., Inc.*, 104 F. Supp. 2d 236 (S.D.N.Y. 2000).

³⁸ *See, e.g.*, *Caffey*, 409 F. Supp. 2d at 499; *Carell*, 104 F. Supp. 2d at 256 (affirming that the intent prong needs to be satisfied in order for a work to be labeled as joint).

copyrightable contributions to a final design it must be clear what aspects of theatrical designs properly fall within the subject matter of copyright. This, however, is far from clear.

When theatrical designs are executed and presented in their final form they constitute some of the most exquisite and elaborate works of art. Several examples are most memorable: the ingenious puppet/costume designs made by Julie Taymor for *The Lion King*, John Napier's innovatory revolving stage and barricade design for *Les Miserables*, and Tharon Musser's ground-breaking lighting design for *A Chorus Line* which became an essential part of the show's plot as each dancer was bathed in a unique spotlight.³⁹

There is an obvious tension between patent and copyright protections for costumes.⁴⁰ Patent law provides protections for inventors of "new, original and ornamental design[s]" by allowing for design patents.⁴¹ It is possible that theatrical costume designers may be able to slip an application in under the radar at the United States Patent and Trademark Office for their ornamentations. Nevertheless, this note will adopt the model that theatrical designs are most suitable for copyright protection.⁴² This is grounded in

³⁹ This lighting design was groundbreaking for its time in 1975 and opened the door for computerized lighting on the Broadway stage. See Susan Keller, Comment, *Collaboration in Theater: Problems and Copyright Solutions*, 33 UCLA L. REV. 891, 926 (1986).

⁴⁰ See *Masquerade Novelty, Inc. v. Unique Indus., Inc.*, 912 F.2d 663, 671 (3d Cir. 1990) (holding that costume masks are not useful articles and are protected by copyright law as sculptural works); *Keiselstein-Cord v. Accessories by Pearl, Inc.*, 632 F.2d 989, 993 (2d Cir. 1980) (holding that a belt buckle design was copyrightable); *Fashion Originators Guild v. FTC*, 114 F.2d 80, 84 (2d Cir. 1940) (holding that ladies' dresses are not covered by the Copyright Act).

⁴¹ 35 U.S.C. § 171 (2006). A "design patent" is differentiated from a "utility patent." A "utility patent" has a requirement of functionality and protects the way an article is used and how it works. 35 U.S.C. § 101 (2005). A "design patent" protects the appearance of an article, the way it looks and has no requirement of functionality. 35 U.S.C. § 171. Both of these patents may be obtained for one article if the invention is both functional and ornate. The term of a utility patent is twenty years from the date of filing, or, if the application contains a specific reference to an earlier application under 35 U.S.C. §§ 120, 121 or 365(c), twenty years from the earliest filing date. 35 U.S.C. § 154 (2002). The term of a design patent is fourteen years. 35 U.S.C. § 173 (1994).

⁴² Theater designs would seem to fall under the subject matter of copyright because the Copyright Act defines "pictorial, graphic, and sculptural works" to "include two-dimensional and three-dimensional works of fine, graphic, and applied art, photographs, prints and art reproductions, maps, globes, charts, diagrams, models, and technical

the notion that designs made for theatrical performance are not functional,⁴³ are similar to other works protected by copyright law⁴⁴ and are based on an already copyrighted work, the play or musical.⁴⁵

A set designer constructs sketches, 3D models and renderings that are used as the foundation for the building and painting of the scenery.⁴⁶ The set designer provides the other members of the creative team with a floor plan, similar to an architect's blueprint, which shows not only the physical relationship of the scenic elements such as platforms, doors, and tables, but also how the set fits on the particular dimensions of the stage.⁴⁷ This way, the director knows where to stage the actors before the set is constructed. On opening night, the end result of the set designer's skill contains sculptural and architectural works. What makes the design worthy of being labeled a "scenic design" is the grouping of all the individual parts into a unified whole. For example, what likely made David Gallo's design for *The Drowsy Chaperone* a Tony Award-winning scenic design⁴⁸ is the combination of each

drawings, including architectural plans. Such works shall include works of artistic craftsmanship insofar as their form but not their mechanical or utilitarian aspects are concerned; the design of a useful article, as defined in this section, shall be considered a pictorial, graphic, or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article." 17 U.S.C. § 101 (2005).

⁴³ *But see* Chosun Int'l, Inc. v. Chricha Creations, Ltd., 413 F.3d 324 (2d Cir. 2005) (considering that costumes may be "useful articles" and thus not proper for copyright protection).

⁴⁴ Theatrical scenic designs are comparable to "architectural works" under the Copyright Act because they both involve "building, architectural plans, or drawings." 17 U.S.C. § 101.

⁴⁵ Plays and musicals are both protected by the Copyright Act as "dramatic works." 17 U.S.C. § 102(a)(3).

⁴⁶ Section IV of the United Scenic Artists Local 829 Broadway Agreement provides descriptions of the responsibilities of set, costume and lighting designers. United Scenic Artists Local USA-829, I.A.T.S.E. Standard Designers Agreement Theatre 2007-2008 (hereinafter United Scenic Artists Designers Agreement) *available at* <http://www.usa829.org/USA/pdf/Contracts/0708SDA/sda-theatre-2007.pdf> (last visited Sept. 14, 2007).

⁴⁷ *See* Artswork Lessons for Students, http://artswork.asu.edu/arts/students/tb/06_03_floorplan.htm (last visited Sept. 14, 2007).

⁴⁸ American Theater Wing's Tony Awards, http://www.tonyawards.com/p/tonys_search?start=15&year=2006&award=All (last visited Sept. 14, 2007).

set pieces' dimensions, placement, ornamentation, and construction. Each separate piece of the set such as the antique phonograph, chameleon-type bed, sugarplum trees, detailed staircases, flamboyant backdrops, and mini-airplane are all worthless standing alone.⁴⁹ It is the arrangement of all the individual elements on stage that make it a truly magnificent design in which the audience finds itself drawn into a dingy New York apartment one moment and whisked away to the gloriously garish world of a 1928 stage show the next. Mr. Gallo would be interested in obtaining copyright protection for the whole set as seen by the audience because that is where the designer ultimately expresses his originality and creativity.⁵⁰

A costume designer renders a costume plot, which specifies each costume that should be worn by each character in every scene.⁵¹ A costume designer is a storyteller by way of a thread and needle, who transforms the emotions of a character into visual imagery.⁵² The placement of a button or the addition of a coattail can make a costume design magnificent. It is not just a costume designer's ability to draw sketches or embroider that makes his work truly original. It is the designer's skill that allows him to capture the time period of the script. Also, his talent in meshing with the other designers' concepts makes his costume design a vital part of the theatrical experience. The recognition of costumes as being copyrightable, however, is somewhat patchy and uneven.⁵³

⁴⁹ Production photos of the set are available on the production's website. *See* The Drowsy Chaperone on Broadway, <http://www.drowsychaperone.com/photos.php> (last visited Sept. 14, 2007).

⁵⁰ At least one court has recognized copyright registration for a scenic design. *See* Arcenas v. Hall, No. 97-8388, slip op. at 6-7 (S.D. Fla. Oct. 7, 1997) (holding that possession of a Certificate of Registration from the United States Copyright Office presupposes that the work in question is copyrightable).

⁵¹ *See* United Scenic Artists Designers Agreement, *supra* note 46 and accompanying text.

⁵² *See* Welcome to the Costume Designers Guild, <http://www.costumedesignersguild.com/cdg-home.asp> (last visited Sept. 14, 2007).

⁵³ *See, e.g.,* Galiano v. Harrah's Operating Co., 416 F.3d 411, 421 (5th Cir. 2005) (stating that the United States Copyright Office will treat fanciful costumes "as useful articles, and will be registered only upon a finding of separately identifiable pictorial and/or sculptural authorship"); *but see* National Theme Prod. v. Jerry B. Beck, Inc., 696

In addition, an audience would sit in complete darkness if the lighting designer's role were to go unrecognized. A lighting designer produces a lighting plot, which consists of diagrams that detail the location and type of lighting instrument.⁵⁴ He uses the power of light to keep the audience alert and to "direct their attention to the stage by providing proper visibility, interest and selective focus."⁵⁵ To date, there is not much controversy over the unlawful copying of another's lighting design.⁵⁶ This may be because a lighting design is virtually unpredictable. A lighting design can be breathtaking when a designer uses the correct lighting instruments, gels, and gobos⁵⁷ and places the direction of the lights in such a fashion that it hits an actor's face perfectly or creates a morbid dreary night.⁵⁸ However, no theater house is built alike nor is every actor the same height. A light shining down on Matthew Broderick in *The Producers* at the St. James Theater⁵⁹ will look different if that same light, set at the same intensity, is shined down upon Lee Evans in *The Producers* at Theatre Royal Drury Lane.⁶⁰ It is not viable for one lighting designer to produce an exact copy of another's design, even if he had access to the

F. Supp. 1348 (S.D. Cal. 1988) (holding that masquerade costumes were entitled to copyright protection because they were a collection of accessories).

⁵⁴ See *supra* note 46 and accompanying text.

⁵⁵ BILL WILLIAMS, STAGE LIGHTING DESIGN (1999), available at <http://www.mts.net/~william5/sld/sld-100.htm>.

⁵⁶ But see Zachary Pincus-Roth, *Charged with Plagiarism, Regional Urinetown Teams Fire Back; Lawsuit Filed*, PLAYBILL, Dec. 1, 2006, <http://www.playbill.com/news/article/103961.html> [hereinafter *Charged with Plagiarism*] (acknowledging the Broadway lighting design for *Urinetown: The Musical* has obtained a valid copyright).

⁵⁷ A gobo is a stainless steel or glass-etched cutout that, when placed in a pattern projecting light fixture, will project that image onto a wall or other flat surface. See Star Light & Magic, <http://www.starmgc.com/gobowhat.html> (last visited Sept. 14, 2007).

⁵⁸ See Williams, *supra* note 55 (stating that lighting can "cause shadows on the actor's faces" or "shadows on upstage backdrops or scenery").

⁵⁹ Matthew Broderick starred in *The Producers* at the St. James Theater, a Broadway theater in New York, N.Y. See Don Shewey, *The Producers*, Review, THE ADVOCATE, June 19, 2001, available at http://findarticles.com/p/articles/mi_m1589/is_2001_June_19/ai_75435324 (last visited Sept. 14, 2007).

⁶⁰ Lee Evans starred in *The Producers* at Theatre Royal Drury Lane, a West End Theater located in Convent Garden in London, England. See LONDON THEATRE GUIDE, <http://www.londontheatre.co.uk/londontheatre/westendvenues/drurylane.htm> (last visited Sept. 14, 2007); see also BRITISH THEATRE GUIDE, <http://www.britishtheatreinfo.com/reviews/producers-rev.htm> (last visited Sept. 14, 2007).

lighting plot. It is possible, however, to capture the same mood, but copyright law does not protect a “feeling.”

In order for any designer, who collaborates on another’s design, to be legally recognized as a joint author, he must pass the copyrightability test.⁶¹ This test requires that each collaborator’s contribution be stand-alone copyrightable.⁶² A creative collaborator will not be recognized as an author of a joint work unless his contribution “represents original expression that could stand on its own as the subject matter of copyright.”⁶³ A court’s determination of whether a designer has contributed the bare minimum to an end design in order to be branded as an author is not objective. It will depend on the intricacies of the design. Since the law is unclear on what is copyrightable in theater, identifying a valid contribution will be left to a whimsical and subjective determination that is no more certain than a game of roulette.⁶⁴

Part III’s proposed solution to the dilemma of joint authorship in a collaborative environment envelops and resolves the vagueness of the copyrightability of theatrical designs.

II. THE TRIALS AND TRIBULATIONS OF AWARDING JOINT OWNERSHIP IN A COLLABORATIVE ATMOSPHERE

Theater is one of the most specialized art forms of the world as evidenced by the many different varieties of performance such as musicals, Kabuki,⁶⁵ shadow puppetry,⁶⁶ guerilla theater,⁶⁷ and

⁶¹ See *Cabrera v. Teatro Del Sesenta, Inc.*, 914 F. Supp. 743, 764 (D.P.R. 1995) (noting that “all joint authors must make a copyrightable contribution” (citing *Childress v. Taylor*, 945 F.2d 500 (2d Cir. 1991))).

⁶² See *id.* at 764.

⁶³ See *id.* at 765.

⁶⁴ See *id.*

⁶⁵ Kabuki is a form of Japanese theater, which consists of ornate make-up and costumes. Kabuki plays are based on moral conflicts and the actors speak in an old-fashioned language with a monotonous tone. See JAPAN-GUIDE.COM, <http://www.japan-guide.com/e/e2090.html> (last visited Sept. 14, 2007); see also Invitation to Kabuki, Guidance for Kabuki appreciation, http://www2.ntj.jac.go.jp/unesco/kabuki/en/4/4_01.html (last visited Sep. 14, 2007).

⁶⁶ Shadow puppetry is a form a Chinese theatrics in which vivid and colorful puppets are manipulated behind a white cloth screen. See TRAVEL CHINA GUIDE,

classic Shakespeare. The Copyright Act does not acknowledge or provide for the collaborative nature of the theater industry in its definition of ownership. The creative process is innately individual and undeniably social.⁶⁸ An artist's craving to create and his desire to be documented as the creator is uncontainable.⁶⁹ Copyright law has left theatrical designers in a "dog eat dog" world where only one person can win the label of designer on the title page of the Playbill. The non-dominant collaborator is not awarded with recognition from within his creative community, is not adequately compensated and is left in a demeaning and disappointing position.⁷⁰ By permitting only particular creators to be rewarded with authorship and subsequently ownership, copyright law has effectively ignored the unique collaborative practice of theater that "defines the art form as one living, breathing whole."⁷¹

The amount of ownership a theatrical designer enjoys from his design creations for a First-Class Production⁷² depends on the designer's popularity and bargaining power.⁷³ United Scenic Artists (the "union") is the labor union that attempts to provide protections for theatrical designers.⁷⁴ The union requires employers

<http://www.travelchinaguide.com/intro/focus/shadow-puppetry.htm> (last visited Sept. 14, 2007).

⁶⁷ Guerilla theater is an unconventional form of theater that is radical, encourages free expression and usually comments on social revolutions in which no subject is off limits. See Michael William Doyle, *Staging the Revolution: Guerilla Theater as a Countercultural Practice, 1965-1968*, THE DIGGER ARCHIVES, available at http://www.diggers.org/guerrilla_theater.htm (last visited Apr. 26, 2007).

⁶⁸ See Catherine L. Fisk, *Authors at Work: The Origins of the Work-for-Hire Doctrine*, 15 YALE J.L. & HUMAN. 1, 2 (2003).

⁶⁹ See *id.*

⁷⁰ See Kwall, *supra* note 10, at 44.

⁷¹ Douglas M. Nevin, Comment, *No Business Like Show Business: Copyright Law, the Theatre Industry, and the Dilemma of Rewarding Collaboration*, 53 EMORY L.J. 1533, 1534 (2004).

⁷² Broadway productions are labeled First-Class Productions because they are performed in what are considered first class theatres "in a first class manner, with a first class cast and a first class director." See First-Class Production, Matthew Bender, 6-126 ENTERTAINMENT INDUSTRY CONTRACTS 126.02 (Donald C. Faber ed., 2004).

⁷³ See Keller, *supra* note 39, at 926.

⁷⁴ The United Scenic Artist's official website encourages all of its members to submit their designs to the U.S. Copyright Office so that they can be afforded protections. See

who hire their members to use its set contract.⁷⁵ Designers receive a set minimum salary that may be negotiated as well as weekly compensation for each week the show is performed.⁷⁶ The designer may contract his designs away to the Producer, but this is highly unlikely especially if the designer is a member of the union. The lack of protection for collaborative works in copyright law makes for a vulnerable designer.⁷⁷ Designers are left in the murky world of theatrical contracts where frugal producers will offer a dime for a hard day's work in exchange for the designer's name to be listed in the Playbill.

It is only the rich and famous, who are few and far between in the theater industry, who have the resources to bring a claim in court for an alleged infringement of their work. *Love! Valour! Compassion!* was a Broadway production which played at the Walter Kerr Theater and won a 1995 Tony Award.⁷⁸ Joe Mantello, the director of the production, traveled to the Caldwell Theater in Boca Raton, Florida the following year to see a regional theater production of the show.⁷⁹ Mantello saw indistinguishable qualities between this regional production and his Broadway production.⁸⁰

Mantello filed suit against the Caldwell Theater and its CEO, Michael Hall, for copyright infringement.⁸¹ The case was dismissed pursuant to defendant's motion for lack of personal jurisdiction.⁸² Therefore, the court never decided the issue of whether Mantello's staging was the proper subject matter of

DESIGNERS & ARTISTS FOR THE ENTERTAINMENT INDUSTRY, <http://www.usa829.org> (click on "Copyrights" hyperlink) (last visited Sept. 14, 2007).

⁷⁵ Telephone interview with Jay S. Harris, Broadway Producer, Weissberger Theater Group, New York, N.Y. (Apr. 2, 2007).

⁷⁶ Keller, *supra* note 39, at 926.

⁷⁷ See Jeffrey M. Dine, *Are the Cats Out of the Bag? Lessons from the Makeup Designer's Case*, ENTERTAINMENT & SPORTS LAWYER, Vol. 19, Nos. 2-3 (Summer/Fall 2001), available at http://www.usa829.org/USA/copyright_article.htm (last visited Oct. 17, 2007).

⁷⁸ See Internet Broadway Database, <http://www.ibdb.com/production.asp?ID=4284> (click on Awards and nominations) (last visited Sept. 14, 2007).

⁷⁹ See Peter Marks, *Love, Valour, Déjà Vu*, N.Y. TIMES, Mar. 29, 1996, at C2.

⁸⁰ See *id.*

⁸¹ *Mantello v. Hall*, 947 F. Supp. 92, 95 (S.D.N.Y. 1996).

⁸² *Id.* at 102.

copyright infringement.⁸³ Prior to Mantello's lawsuit, Loy Arcenas, the set designer of the Broadway production, brought suit against the Caldwell Theater.⁸⁴ On October 8, 1997, Judge Kenneth L. Ryskamp issued a ruling on a pre-trial motion labeling this the "Case of the Stolen Stage Designs."⁸⁵ Judge Ryskamp denied Caldwell Theater's motion to dismiss because Arcenas produced a certificate of registration for his set designs from the United States Copyright Office.⁸⁶ This is the first time that a United States Federal Court recognized a copyright certificate for a theatrical scenic design and issued a favorable ruling, which deemed stage designs to be copyrightable.⁸⁷ This decision became a milestone in the United Scenic Artist's ongoing scuffle to protect the creative works and designs of their union members.⁸⁸

One of the most hotly contested theatrical design collaboration cases arose not over set, costume or lighting designs but over the makeup designs of the smash-hit musical *Cats*, which ran on Broadway for eighteen years.⁸⁹ Candace Carell, the show's makeup designer, sued eighteen defendants associated with the Broadway production of *Cats* including the producer, the Shubert Organization, Inc., the author, Andrew Lloyd Webber and most notably, the set and costume designer of the show, John Napier.⁹⁰ The court did not determine whether there was actual copyright infringement.⁹¹ Rather, it decided whether any of Carell's allegations against certain defendants could even sustain a valid claim for copyright infringement.⁹²

⁸³ *Id.* at 100 n.1.

⁸⁴ See Jesse Green, *Exit, Pursued by a Lawyer*, N.Y. TIMES, Jan. 29, 2006, § 2, at 3.

⁸⁵ See David Goodman, *Love! Valour! Compassion!*, UNITED SCENIC ARTISTS LOCAL 829, <http://www.usa829.org/> (click on "Copyrights" hyperlink) (last visited Sept. 14, 2007) (discussing Arcenas v. Hall, No. 97-8388, slip op. (S.D. Fla. Oct. 7, 1997)).

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ See *id.*

⁸⁹ See *CatsMusical.com*, <http://www.catsmusical.com/contents/> (click on hyperlink "Productions," then click on hyperlink "Timeline") (last visited Sept. 14 2007).

⁹⁰ *Carell v. Shubert Org. Inc.*, 104 F. Supp. 2d 236, 241-42 (S.D.N.Y. 2000).

⁹¹ See *id.* at 271.

⁹² See *id.*

In 1982, the Cats Company commissioned Carell to create the characters' makeup designs for the Broadway production.⁹³ Napier, the set and costume designer, told Carell to use her "pure imagination" for the designs.⁹⁴ Carell created most of the designs on her own with ideas provided by Napier.⁹⁵ Some designs were created by Carell and Napier together.⁹⁶ Carell claimed that she gave Napier's ideas "full expression" in a tangible form and that nothing Napier contributed was copyrightable.⁹⁷ Carell received credit as the sole makeup designer in the Playbill, which read, "Makeup by Candace Carell."⁹⁸ However, what stirred up this controversy is that neither the video version of *Cats*, nor the international productions of the show provided credit or compensation to Carell.⁹⁹

Several years of controversy prevented Carell from marketing her own book about the makeup designs that were used in *Cats*.¹⁰⁰ Carell eventually filed for and received copyright registration in 1990 for her drawings and designs.¹⁰¹ In 1993, Napier, along with the show's producers, contacted the Copyright Office and requested the cancellation of Carell's copyrights, claiming that the creations were his, and not Carell's.¹⁰² Almost eighteen years after creating the makeup designs, and nine years after receiving registration as the sole copyright owner, Carell brought suit.¹⁰³ In 1994, the Copyright Office informed Napier of its refusal to cancel Carell's copyrights because Carell explicitly rejected co-authorship of any of her designs.¹⁰⁴ The Copyright Office also refused to honor Napier's request to register him as a joint author of the designs.¹⁰⁵ As to the issue of compensation for the unauthorized

⁹³ *Id.* at 242.

⁹⁴ *Id.*

⁹⁵ *Id.* at 243.

⁹⁶ *Id.*

⁹⁷ *Id.* at 244.

⁹⁸ *Id.* at 243.

⁹⁹ *Id.* at 251.

¹⁰⁰ *Id.* at 244.

¹⁰¹ *Id.*

¹⁰² *Id.* at 244-45.

¹⁰³ See Dine, *supra* note 77.

¹⁰⁴ *Carell*, 104 F. Supp. 2d at 245.

¹⁰⁵ *Id.*

use of Carell's designs, the court ruled that since Carell had waited more than three years after her ownership was contested to bring suit, the claim was barred by the statute of limitations.¹⁰⁶ However, the court held that because Carell had provided valid registrations reflecting sole ownership for some of the designs and also identified the defendants' infringing acts, she could sustain a copyright infringement action against some of the defendants.¹⁰⁷ The case was settled before Carell had a chance to bring this action.¹⁰⁸

Most of the commentary that focuses on this case sheds a tear for Carell. However, it is Napier that suffered a likelihood of "irreparable harm."¹⁰⁹ Having won Tony Awards for his designs in *Cats*, *Sunset Boulevard*, *Starlight Express*, and *Les Miserables*, Napier is one of the most prized designers in the Broadway industry.¹¹⁰ Napier inspired the designs of Carell and gave her the direction she needed to create them. For example, Napier informed Carell that the makeup design for the "White Cat," should be "soft, white and sensual," while Grizabella's makeup design should be "full of aging beauty and despair, confronting her mortality."¹¹¹ These are more than mere ideas. These examples illustrate that Napier and Carell were involved in a collaborative creative effort, intending to work together toward an end result. Because Napier could not satisfy the insurmountable intent prong, the court could not find joint ownership of the designs.¹¹² The

¹⁰⁶ *Id.* at 248–49. A plaintiff who seeks declaration of copyright ownership must commence an action within three years of the accrual of the claim. *Id.* at 248 (citing 17 U.S.C. § 507 (1998)). In this case, "plaintiff's sole ownership and accounting claims . . . accrued more than three years prior to the commencement of the action." *Id.* at 249.

¹⁰⁷ *Id.* at 250–251. Defendants conceded that Carell was the sole author of ten of the designs, but contended that fifteen were co-authored with Napier, and three were authored solely by Napier. *Id.* at 248.

¹⁰⁸ See Dine, *supra* note 77.

¹⁰⁹ *Triad Sys. Corp. v. Se. Express Co.*, 64 F.3d 1330, 1334 (9th Cir. 1995). To obtain an injunction for copyright infringement, the moving party must show a likelihood of success on the merits and the possibility of irreparable harm. *Id.*

¹¹⁰ John Napier, Internet Broadway Database, <http://www.ibdb.com/person.asp?ID=25171> (last visited Sept. 14, 2007).

¹¹¹ *Carell*, 104 F. Supp. 2d at 243.

¹¹² *Id.* at 256.

court viewed Napier's efforts as suggestions and didn't recognize him as an author to the designs.¹¹³

While it is quite plausible that someone in Carell's position would deny her intention to be a co-author with Napier, it is less plausible that Carell could have created the designs without the influence, advice and submissions of Napier. Napier, as evidenced by his astounding credits, was not attempting to reap where he had not sewn. Rather, Napier was merely attempting to gain from the fruits of his own work.

The intent prong in this scenario, and imaginably in many other scenarios where one creator is attempting to claim sole ownership in a collaborative work, is insurmountable. In theater, collaboration simply happens without a set procedure or formal discussion. Due to the need for cohesiveness between all design aspects of a show, it is a generally understood principle that a production's designers will influence each others' work. In the end, at least one creator will be slighted and in this case, it was Napier. Even though there are concrete examples that go against joint authorship, such as Carell's billing in the Playbill, a rigid intent requirement is not properly administered in a creative profession that thrives on the amalgamation of talents.

Another current controversy over intellectual property rights in theater concerns the Broadway production of *Urinetown: The Musical* ("Urinetown").¹¹⁴ *Urinetown* opened on Broadway on September 20, 2001, and was successfully performed for over three years.¹¹⁵ It was nominated for nine 2002 Tony Awards bringing home the trophies for Best Director, Best Book of a Musical, and Best Original Score.¹¹⁶ *Urinetown* is a parody of the

¹¹³ *Id.* at 256. In a similar case, the 7th Circuit has held that suggestions of text by an actor did not constitute co-authorship of the play. See *Erickson v. Trinity Theatre, Inc.*, 13 F.3d 1061, 1071-72 (7th Cir. 1994).

¹¹⁴ See Gordon Cox, *Whiff of Controversy: Legit Unions Accuse Two Shows of Plagiarism*, VARIETY, Nov. 19, 2006, available at <http://www.variety.com/article/VR1117954171.html?cs=1>.

¹¹⁵ *Urinetown* Production Credits, Internet Broadway Database, <http://www.ibdb.com/production.asp?ID=12936> (last visited Sept. 14, 2007).

¹¹⁶ *Urinetown* Awards, Internet Broadway Database <http://ibdb.com/awardproduction.asp?id=12936> (last visited Sept. 14, 2007). The director of *Urinetown* was John Rando.

genre of stage musicals.¹¹⁷ The show's premise is very odd, yet truly original.¹¹⁸ The show takes place at some point in the future where decades have brought a drought and private restrooms have been outlawed.¹¹⁹ The corporation, Urine Good Company, manages the water supply by charging people for using public restrooms.¹²⁰ If a citizen violates this rule, they are sent to Urinetown.¹²¹

Five members of the Broadway creative team, which include the director, choreographer, and set, lighting and costume designers, claimed that two licensed¹²² productions of *Urinetown* copied their designs and creations without permission.¹²³ The license that the two regional theaters were granted included the right to reproduce the script and music, but did not include the right to copy the original expression of the creative team.¹²⁴

The first of these regional productions was produced in Chicago at Chi's Mercury Theater in 2006.¹²⁵ *Time Out Chicago* noted that the show was a "virtual replication" of the Broadway production, but the Mercury Theater's production failed to credit the original Broadway creative team.¹²⁶ Ironically, the Chicago production won a Jefferson Award¹²⁷ for the choreography.¹²⁸ Original Broadway choreographer John Carrafa and Broadway

Id. The bookwriter of *Urinetown* is Greg Kotis. *Id.* The composer of *Urinetown* is Mark Hollman and the lyricists are Mark Hollman & Greg Kotis. *Id.*

¹¹⁷ Anita Gates, *Theater Review: An Audacious Urban Fable for a Suburban Audience*, N.Y. TIMES, Sept. 24, 2006, available at <http://query.nytimes.com/gst/fullpage.html?res=9D07E1DE1131F937A1575AC0A9609C8B63>.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ Broadway.com, <http://www.broadway.com/gen/show.aspx?SI=1415> (last visited Sept. 14, 2007).

¹²² See Dawsey, *supra* note 19.

¹²³ *Id.*

¹²⁴ Cox, *supra* note 114.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ "The Jefferson Awards are a prestigious national recognition system honoring community and public service in America. The Jefferson Awards are presented on two levels: national and local." Jefferson Awards for Public Service, <http://www.aips.org/about/faqs.html> (last visited Sept. 14, 2007).

¹²⁸ Cox, *supra* note 114.

director John Rando went to see the Chicago production after Mr. Carrafa viewed a photograph on the internet which denoted a striking similarity to the Broadway production.¹²⁹

The second regional playhouse that is a party to this controversy is the Carousel Dinner Theater in Akron, Ohio.¹³⁰ Mr. Carrafa also saw this production and took offensive note to the substantial similarities.¹³¹

While the Broadway team has made allegations that the two regional productions are “virtually identical” to their production, they have not yet filed a lawsuit.¹³² The Broadway lighting design obtained a valid copyright on August 21, 2006 and the lawyer for the Broadway team said he has also obtained copyright registration for the choreography and the set design.¹³³ As for the copyright registration of the direction and the costume design, applications were filed in summer 2006 and are still pending.¹³⁴ Interestingly, both regional theaters have filed suit against the Broadway team and have asked the court to declare that they have not violated the Copyright Act’s provisions.¹³⁵ Specifically, the Chicago production denied copying the choreography of the Broadway production and described the new dance positions that were implemented into the performances, including a parody of *Wicked*, which opened on Broadway two years after *Urinetown*.¹³⁶ There has been no discussion in the press concerning the specificities of the design elements that have been allegedly copied. Even though both regional productions have made it loud and clear that their productions were original and did not violate anyone’s creative rights, the Broadway team continued to believe their rights were

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Charged with Plagiarism, supra* note 56.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ Zachary Pincus-Roth, *We’re Not Sorry: Chicago Urinetown Sues Broadway Team*, PLAYBILL, Dec. 11, 2006, <http://www.playbill.com/news/article/104140.html> [hereinafter *We’re Not Sorry*].

¹³⁶ *See Charged with Plagiarism, supra* note 56.

violated when they requested that the Mercury Theater give up their Jefferson Award for Best Choreography.¹³⁷

Depending on the outcome of the lawsuits filed against the Broadway team and whether the Broadway team files a lawsuit of their own, this controversy could have an eye-opening effect on the copyrightability of theatrical designs. Theater is not fixed forever. Once the curtain goes down on closing night, that same production with the same actors wearing the same costumes is most likely never to be seen by an audience again. This is unlike a copied photograph or novel which can practically last forever in tangible form. How can a court make an accurate comparison of two productions that can no longer be seen? How can the fact finders determine whether two productions emit the same total concept and feel¹³⁸ if they can't experience both shows as audience members?

A model must be adopted that allows for the protection of a designer's expression which does not require him to travel across the nation to watch reproductions of shows. In addition, this model needs to address the collaborative nature of theatrical designers and ensure that a non-dominant contributor is rewarded for his expression. Lastly, this model should resolve which theatrical design elements can be copyrighted.

III. A PROPOSED SOLUTION

One is better than two, especially in the midst of the theatrical ownership controversy. How could design collaborators be morphed into one entity so that there exists one sole owner and no designer feels as though his individual contributions aren't acknowledged? The answer to this problem lies in section 101 of the Copyright Act, which defines "a work made for hire" as "(1) a work prepared by an employee within the scope of his or her employment; or (2) a work specially ordered or commissioned for

¹³⁷ *We're Not Sorry*, *supra* note 135.

¹³⁸ The ordinary observer test is used to determine whether two works are substantially similar. This test asks whether the two works at issue emit the same "total concept." *See* *Worlds of Wonder v. Veritel Learning Sys., Inc.*, 658 F. Supp. 351, 355 (N.D. Tex. 1986).

use as a contribution to a collective work, as a part of a motion picture”¹³⁹ This doctrine is the model that is used in Hollywood concerning motion pictures. It is not nearly as difficult to determine who the author is of a motion picture as it is to determine who the author is for a theatrical production. The authorship of a motion picture does not turn on whether a person contributed a portion of their own creativity because the sole copyright owner is the producer or production company of the movie.¹⁴⁰ Consequently, the special effects, editing, advertising, wardrobe, sound effects, etc. are all wrapped up into a bundle in which there is one stick to be had. No one can claim rights to this stick except the studio producer. While there are many disagreements with this model because it precludes a movie’s designer from gaining ownership in his creations,¹⁴¹ it is the best method to keep contributory ownership claims from arising and sweeping their way into the courts and the press. At least one scholar has proposed a solution to the unstableness of theatrical collaboration, proposing that a production be viewed as a derivative work.¹⁴² This Note attempts to build on this theory by proposing that Broadway producers and designers embrace the work for hire doctrine. This proposal makes an effort to resolve the uncertainty in the copyrightability of theatrical designs, and

¹³⁹ 17 U.S.C. § 101 (2005). Section (2) of the definition the Copyright Act’s “work made for hire” in full reads: “a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire. For the purpose of the foregoing sentence, a ‘supplementary work’ is a work prepared for publication as a secondary adjunct to a work by another author for the purpose of introducing, concluding, illustrating, explaining, revising, commenting upon, or assisting in the use of the other work, such as forewords, afterwords, pictorial illustrations, maps, charts, tables, editorial notes, musical arrangements, answer material for tests, bibliographies, appendixes, and indexes, and an ‘instructional text’ is a literary, pictorial, or graphic work prepared for publication and with the purpose of use in systematic instructional activities.” *Id.*

¹⁴⁰ See Stuart K. Kauffman, Note, *Motion Pictures, Moral Rights, and the Incentive Theory of Copyright: The Independent Film Producer as “Author,”* 17 CARDOZO ARTS & ENT. L.J. 749, 766–70 (1999).

¹⁴¹ See *id.*

¹⁴² See Keller, *supra* note 39, at 936.

reward a non-dominant collaborator for his efforts by providing him with credit and clear economic rights.

A design can be classified as a work made for hire in two ways.¹⁴³ First, a work is automatically designated as a work for hire if it is “prepared by an employee in the scope of his or her employment.”¹⁴⁴ The Supreme Court has set forth factors to consider in determining whether a work fits this definition.¹⁴⁵ These factors include the right to control the process of production, the right of the hiring party to assign additional work, the provisions of the employee’s benefits, and the duration of the employer-employee relationship.¹⁴⁶ This classification of a work for hire is not a perfect fit for freelance artists. An artist is not hired as a typical employee since once a theatrical production closes, the designer’s duties are over.

This model of the work for hire doctrine has been utilized in improvisation, which is a narrow part of the theatrical industry.¹⁴⁷ In particular, Chicago’s Second City company implements the work made for hire doctrine as applied to all of its collaborative artists.¹⁴⁸ The shows that are presented by Second City are developed throughout the rehearsal process by way of improvisation.¹⁴⁹ After the rehearsal process ends, a script is transcribed and fixed into a tangible written form in which Second City, Inc. becomes the sole copyright owner.¹⁵⁰ Second City treats its collaborators as employees.¹⁵¹ It implements a royalty structure; an author receives a set amount of royalty payments for his employment and then an additional fee based on the amount of material he contributed to the end product.¹⁵² The incentive provided to the creators is that they may enjoy the security of

¹⁴³ See 17 U.S.C. § 101 (2005).

¹⁴⁴ *Id.*

¹⁴⁵ See *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 751–52 (1989).

¹⁴⁶ See *id.*

¹⁴⁷ See Keller, *supra* note 39, at 915–19.

¹⁴⁸ *Id.* at 916.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ See *id.*

¹⁵² *Id.*

regular employment,¹⁵³ which is a rarity in the theater industry. This system precludes any of the co-authors from claiming a stick in the bundled production and rewards their individual efforts by providing adequate compensation and security.¹⁵⁴ This way, an artist is afforded a clear economic right plus credit where it is due. It is the “best of both worlds.” An author receives recognition for his efforts by being given a credit in the playbill and is provided with the incentive to continue creating by receiving monetary compensation.

Why is this model not implemented in the commercial field of Broadway? For one, artists are reluctant to forfeit over their designs to a producer who, as the copyright owner, could manipulate the designs in any fashion he so desires.¹⁵⁵ Artists, plain and simple, do not trust that a producer will maintain the integrity of their designs and assume that the producer will modify their works in order to make them more commercially viable.¹⁵⁶ Also, a producer does not necessarily want to bind himself to using the same set designer for every Broadway production in which he invests. While it is of utmost importance for artists to maintain pride in their designs in order to fulfill one of the main policies of copyright law, which is the incentive to create original works, an employer-employee model is as stable as a rickety shack built with termite infested wood.

It is more appropriate to consider a designer’s role under the second classification of a work for hire. A work is classified as a work for hire if the parties have so agreed in a signed writing.¹⁵⁷ There is, however, a limitation on which works are eligible under this classification. For a work to be designated a work for hire by way of a written agreement, that work must be “specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisualwork”¹⁵⁸ This

¹⁵³ *Id.*

¹⁵⁴ *See id.*

¹⁵⁵ Telephone Interview with Alexa Shaughnessy, Assistant Producer, N.Y. Int’l Fringe Festival, in New York, N.Y. (Apr. 10, 2007).

¹⁵⁶ *Id.*

¹⁵⁷ 17 U.S.C. § 101 (2005).

¹⁵⁸ *Id.*

narrow definition doesn't seem to provide for live performances on its face. However, a generalized reading may include theatrical performances as a "contribution to a collective work." A collective work is a work that is comprised of separate and independent works, which when fused together represent a collective whole.¹⁵⁹ Although most collective works are designated as literary compilations such as magazines,¹⁶⁰ the definition does not preclude a stretch of the imagination. The elements of a Broadway show, including the set design, script, choreography, and lighting design, are all separate and independent works. When all the works are combined they constitute one work, a theatrical live performance. This Note advocates that this collective work, the theatrical production of a script, should receive a single copyright in which the producer is designated as the proprietor.

The theatrical production would be viewed as a derivative work of the written play or musical.¹⁶¹ It is derivative¹⁶² because the entirety of the production recasts, transforms and adopts the underlying work and turns it into a new work that is prepared for public performance.¹⁶³ The producer would receive the rights to this derivative work in which a portion would be allotted to the

¹⁵⁹ See *id.*

¹⁶⁰ See, e.g., *Faulkner v. Nat'l Geographic Enters. Inc.*, 409 F.3d 26, 38 (2d Cir. 2005) (discussing whether a digital collection of the past issues of the National Geographic Magazine fall within the definition of a collective work).

¹⁶¹ See Keller, *supra* note 39, at 936.

¹⁶² "A 'derivative work' is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a 'derivative work.'" 17 U.S.C. § 101 (2005).

¹⁶³ "To perform or display a work 'publicly' means—

(1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or

(2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times." *Id.*

playwright, composer and lyricist. This is a percentage to be determined by contract.

This representation rids of any uncertainty of what is and what is not individually copyrightable within a theatrical production. All of the designs would receive copyright protection as a whole. This is the most rational style in which theatrical components should be copyrighted because without the costume designer, the actors would be wearing jeans and t-shirts, and without the set designer, the lights would be hitting a blank stage. A design's primary source of value is how it is viewed in conjunction with the other designs. Deeming all the designs as one collective whole invites a workable method of awarding collaboration.

The producer would execute a written agreement with each of the designers that would designate them as the employees of the producer. The agreement would provide protections for the artist including recognition in the Playbill and adequate compensation. They are protected up front with a contractual provision which provides adequate billing so that they can be acknowledged in the artistic community for their accomplishments. They are also afforded economic incentives, by way of the contract, to use their skills and produce their own designs. They would receive an additional fee for any other designs in which they contributed. This suggestion would most likely raise the amount of compensation currently paid to designers, possibly in the form of royalties, since they are forfeiting the right to own their designs. The extra money that the producer has to peel from his money clip is nothing to be complained about since he is receiving ownership rights in the whole package. This also rids of the need for designers to tackle the intent prong of claiming joint ownership. The anxiety of collaborating with other designers is effectively erased because each designer knows up front who the owner is. By removing this apprehension, artists will feel unrestrained to collaborate and at the same time will receive the recognition they deserve. This model would attain the same objectives of the film industry, which is to reduce intracollaborative friction involving

the outcome of a project.¹⁶⁴ Most importantly, this model furthers the two policies of the Copyright Act: incentives for authors to create new works and the dissemination of those works to the public.

PLEASE UNWRAP YOUR CANDY NOW, THE SHOW IS ABOUT TO
START

There is no need to draw a hard and fast line that forces theatrical designers to either abdicate all rights in their creative contributions or claim domination over all other contributors. A collaborative environment is about the fostering of love and teamwork, not about who can break the piñata first. The work for hire doctrine, as applied to the theater industry, maximizes creative value by providing security and stability. If the work for hire model was in place at the time *Rent* was created, *Thomson v. Larson* may have been avoided.

When a producer is the chief proprietor in a show's production, each element could be licensed as a package to regional theaters that choose to publicly perform a re-production. The *Urinetown* fear would vanish because what a regional theater would receive by way of a proper license would not only be the rights to the underlying script, music and lyrics, but also the right to use any of the designs that were originally created for the Broadway show. Presumably, there would be a pricing plan set in place depending on what design elements a regional theater had a need for or would prefer to license. Each time a regional theater licensed a design of a show, that particular designer would be compensated in the form of a royalty payment. This would have been one of the provisions in the designer's original contract with the Broadway producer. Therefore, the economic incentives for designers are kept intact.

This undoubtedly furthers dissemination of copyrighted works to the public in a meticulous and grandiose fashion. The ability to license every element of a production brings the quality of a Broadway show to a regional theater audience whose members

¹⁶⁴ Rochelle C. Dreyfuss, *Collaborative Research: Conflicts on Authorship, Ownership, and Accountability*, 53 VAND. L. REV. 1161, 1201 (2000).

don't have the privilege of stepping inside a Broadway theater. The panic that would set into New York producers' hearts is that thespians would now be discouraged from traveling to New York and paying over \$100¹⁶⁵ for a theater ticket because they can get the same quality in their hometown for nearly half that price.¹⁶⁶ This argument is impractical because there is nothing like sitting in a Broadway theater when the lights go down. The amount of money and talent that is swept into the commercial theater industry ensures that Broadway will always be paramount to any other theatrical venue.

¹⁶⁵ This is the approximate price for an orchestra seat to a Broadway musical. See PLAYBILL.COM, www.playbill.com/events/listing/1.html (last visited Sept. 14, 2007).

¹⁶⁶ Fifty dollars is the price for a "best available" seat at the Carousel Dinner Theater in Akron, Ohio. See CAROUSEL DINNER & A BROADWAY SHOW, <http://www.carouseldinnertheatre.com/tickets.htm> (follow "Buy Tickets Now!" hyperlink; then follow "Buy Tickets" hyperlink for the desired show; then input number of adult tickets; then follow "Get Best Available" hyperlink) (last visited Sept. 14, 2007).

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