COMMENTS

Intellectual Property Norms in American Theater

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When a musical opens on Broadway, what aspects of the production are covered by copyright's protection of "dramatic works"? The script clearly is (although policing infringement is nigh impossible), but courts have yet to address whether the work of the director or designers should be afforded copyright protections. Nonetheless, within the close-knit professional New York theater community, rarely do artists significantly copy the work of others. This Comment argues that this is because the community has developed its own welfare-maximizing norms to address intellectual property. However, looking at larger cross-sections of American theater (such as all professional theaters independent of location or theaters of all professional statuses within a geographic area), these norms are less consistently followed.

This Comment defines two intellectual property norms in the professional New York theater community: one protecting the intent of playwrights and another protecting the work of directors and designers. The Comment then argues that, although these norms are less efficient in looser-knit theater communities, they are welfare maximizing within the professional New York theater community.

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INTRODUCTION

Professor Robert Ellickson has proposed that a close-knit community will develop rules, customs, and traditions addressing property that maximize the group's welfare—independent of government intervention.[1] Through these welfare-maximizing norms, the communities are able to have "order without law."[2] He has tested this hypothesis by studying cattle farmers in Shasta County, California;[3] businessmen in Wisconsin;[4] and whaling

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1 ROBERT C. ELLICKSON, ORDER WITHOUT LAW 167 (1991). Throughout his scholarly work on the topic, Ellickson has used both "welfare-maximizing" and "wealth-maximizing" to describe the outcomes of these norms. He notes in *Order Without Law* that both phrases should be viewed as equivalents "that refer[ ] to all things and conditions that people value." *Id.* at 168 & n.8.

2 *See id.* at 123; *see also id.* at 168–70 (describing the theoretical basis and limits of his hypothesis).

3 *Id.* at 185–89.

4 *Id.* at 189–91.

communities in seventeenth-century New England.[5] Scholars have extended Ellickson's work beyond real and personal property to analyze norms-based intellectual property systems.[6] This research is necessarily industry specific as "the social norms and market conditions that prevail across creative communities are anything but uniform."[7] Researchers have studied the protections afforded by community norms in a range of fields, including "the fashion industry, creative cuisine, fan fiction, pornography, . . . stand-up comedy, roller derby, . . . tattoos, [and] magic."[8]

Scholars of norms-based legal systems have yet to study the theater industry, however. This may be because "dramatic works" are explicitly protected by U.S. copyright law.[9] Therefore, one might assume that understanding intellectual property rights in theater is merely a matter of understanding copyright law. This is not so.

A theater production can be broken into two parts: the words on the page and the work on stage. As for scripts, U.S. copyright law governs,[10] and a handful of licensing companies control the production rights for most popular plays and musicals that are not in the public domain.[11] As for what is presented onstage, copyright law seemingly provides little, if any, protection. I use "seemingly" because courts have yet to address this topic and because there is a lack of consensus among scholars.[12] Unsurprisingly, this has resulted in confusion in the theater industry about what the law is.[13]

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5 *See generally* Robert C. Ellickson, *A Hypothesis of Wealth-Maximizing Norms: Evidence from the Whaling Industry*, 5 J.L. ECON. & ORG. 83 (1989). *See also* ELLICKSON, *supra* note 1, at 191–206.

6 *See, e.g.*, Christopher Jon Sprigman, *Conclusion: Some Positive Thoughts About IP's Negative Space*, *in* CREATIVITY WITHOUT LAW: CHALLENGING THE ASSUMPTIONS OF INTELLECTUAL PROPERTY 249, 253–54 (Kate Darling & Aaron Perzanowski eds., 2017).

7 Kate Darling & Aaron Perzanowski, *Introduction* to CREATIVITY WITHOUT LAW, *supra* note 6, at 6.

8 Sprigman, *supra* note 6, at 252 (citations omitted).

9 17 U.S.C. § 102(a)(3).

10 17 U.S.C. § 102(a)(3); *see also, e.g.*, MTI Enters. Inc. v. Theaterpalooza Cmty. Theater Prods. Inc., No. 18-cv-650, 2019 WL 99267, at *1 (E.D. Va. Jan. 3, 2019).

11 *See, e.g.*, Michael Paulson, *Concord Music Acquires Samuel French in Big Push into Theater Business*, N.Y. TIMES (Dec. 17, 2018), https://perma.cc/SRY7-SA2U (describing Concord Music's gradual acquisition of musical theater and play licensing companies that hold the rights to works by Rodgers and Hammerstein, Andrew Lloyd Webber, Edward Albee, Lorraine Hansberry, August Wilson, and Arthur Miller).

12 *See infra* Part II.B.

13 *See, e.g.*, Video Interview with Sammi Cannold, Director (Oct. 23, 2020) (discussing the confusion, even in the professional theater industry, about what the relevant intellectual property laws actually are).

This Comment aims to clarify the state of formal law[14] in the theater industry and then add to the norms-based intellectual property literature by applying Ellickson's hypothesis to the American theater community.[15] I argue that, instead of relying on ambiguous government-enacted law, a norms-based intellectual property system has emerged to protect staged works.[16] Adherence to these norms—largely developed in the close-knit professional New York theater community—varies between the subcommunities that compose the larger American theater community. Additionally, theater artists rely on these norms, more than on the law, to understand how a copyrighted script can be interpreted or changed and how playwrights should respond to infringing behavior. Although these norms are well understood within the community, they have not been recorded or studied through an academic or legal lens.

After a brief introduction to American theater and its subcommunities in Part I, Part II surveys current understandings about what kinds of intellectual property the law protects in theater. Although courts have yet to address the legal protections afforded to aspects of staging, settlement agreements and scholarly work provide some insight—albeit contradictory—into the current state of the law. After laying this groundwork, Part III explores the norms held by the theater community regarding intellectual property. Ellickson's welfare-maximizing-norms hypothesis seems to aptly explain the lack of copying of ideas within the close-knit New York theater community. Beyond New York, copying that goes against these norms is more pervasive, which aligns with the limitation that Ellickson's hypothesis applies to only close-knit communities.

I. AMERICAN THEATER

Before diving into the applicable laws and norms within the theater community, an introduction to the theater industry is in order. After explaining the multiple ways that "theater" is used in this Comment, this Part introduces two relevant ways of categorizing theaters: by location and by professional status.

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14 By "formal law," I mean rules and regulations created and enforced by the government.

15 Although "U.S. theater" would more accurately capture the scope of this Comment, theater in the United States is referred to as "American theater" within the industry and is the term that I will be using.

16 *See infra* Part III.

A. Multiple Uses of "Theater"

"Theater" is a noun with multiple definitions[17]—many of which will be used in this Comment. The most straightforward and all-encompassing of these definitions are "dramatic literature" and "dramatic representation as an art or profession."[18] "Theater" also refers to a physical space or the "building or area for dramatic performances."[19] This definition is used, for example, in describing how the Shubert Organization owns and operates seventeen of the forty-one theaters that are designated as Broadway theater houses.[20] Additionally, "theater" can be used to describe the entities that produce a piece of dramatic work.[21] This definition is used when discussing professional and nonprofessional theater companies and troupes.

The latter two definitions are often colloquially conflated. For example, one might state, "I saw *Hamilton* at the Public," to brag that they saw the musical during its original run at the Public Theater before it transferred to the Richard Rodgers Theatre on Broadway.[22] "The Public Theater" refers to both the building at 425 Lafayette Street in New York, where *Hamilton* had its Off-Broadway debut, and the theater company that produced the show.[23]

B. Classifying Theaters

"American theater" is too vast to be functionally considered a singular community. As such, for the purposes of this Comment, subcommunities within the larger American theater landscape will be defined by their location (often in relation to New York City) and professional status. These subcommunities can overlap

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17 It also has multiple spellings: "theater" and "theatre." "Theater" is the more common spelling in American English and is the spelling I will use in this Comment given my focus on American theater. *See* Catherine Traffis, *Theater and Theatre—How Is It Spelled?*, GRAMMARLY BLOG, https://perma.cc/UMA6-9ND2.

18 *Theater*, MERRIAM-WEBSTER, https://perma.cc/84B7-436A.

19 *Id.*

20 *See* Gordon Cox, *Three Dynasties Preside over Broadway's Theater Houses*, VARIETY (Oct. 6, 2017), https://perma.cc/3HYR-V8GA. "Theater house" or simply "house" are also synonyms for this use of "theater."

21 *See, e.g.*, *Member Theatres*, LEAGUE OF RESIDENT THEATRES, https://perma.cc/ZT8M-372T (using the term "theatre" to describe its members, which are all organizations that produce dramatic works).

22 This exchange is played nearly verbatim for comedic effect in the 2019 film *Knives Out*. KNIVES OUT (T-Street 2019).

23 *About the Public*, THE PUBLIC, https://perma.cc/LK3U-RERX.

to create even more narrowly defined communities—such as the close-knit New York professional theater community.

1. Geography.

Theater is meant to be experienced live. Because being in a shared, physical space is an essential aspect of theater itself, geography plays an important role in shaping American theater.[24] Geography also impacts community definition in more quotidian ways. For example, the easy circulation of information is important in defining a close-knit community,[25] and physical proximity can increase this flow of information.

New York City is the center of American theater.[26] And within New York, Broadway is the pinnacle. In theater, Broadway is a term of art referring to forty-one theaters in Manhattan, each of which seats 580 to 1,900 patrons.[27]

Although Broadway may have the brightest lights, "the world of New York theater stretches far beyond Times Square."[28] A 2019

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[24] *See, e.g.*, TIM DONAHUE & JIM PATTERSON, STAGE MONEY: THE BUSINESS OF THE PROFESSIONAL THEATER 7–8 (2020) ("[T]he impact of a single not-for-profit theater not in New York City is usually felt within a single community."); Kevin O'Keeffe, *The 8 Best U.S. Cities for Theater That Aren't New York or Los Angeles*, MIC (Aug. 27, 2015), https://perma.cc/F8KV-XEQL; *cf.* PHILIP AUSLANDER, LIVENESS: PERFORMANCE IN A MEDIATIZED CULTURE 2–9 (Routledge ed., 2d ed. 2008) (discussing traditional theories and introducing a new theory about the value of the "liveness" of theater).

For a discussion of how a production must adapt to fit the physical limits of a theater, see Jesse Green, *Theater Review:* Fun Home *in Its New Round House*, VULTURE (Apr. 19, 2015), https://perma.cc/H7TB-CTMA, explaining that the only change between the Off-Broadway and Broadway productions of *Fun Home* "that's as instantly visible as it is consequential is the venue," which was a theater-in-the-round, unlike its Off-Broadway, proscenium stage. Similarly, instead of adapting the show to fit the physical limitations of its Broadway theater, the production team of *Natasha, Pierre & the Great Comet of 1812*—a show that first premiered in the round and then transferred to proscenium theaters—significantly remodeled its Broadway house to retain the intimate, interactive nature of earlier productions. *See* Michael Gioia, *How* The Great Comet *Transformed the Imperial Theatre into an Immersive Russian Supper Club*, PLAYBILL (Dec. 1, 2016), https://perma.cc/V7K3-5WU5.

[25] *See* ELLICKSON, *supra* note 1, at 177–78.

[26] *See, e.g.*, Caleigh Derreberry, *Conversations About New York Theatre Are Important, Even If You Don't Live in New York*, ONSTAGE BLOG (Apr. 1, 2018), https://perma.cc/3YHY-Q637 ("Though New York isn't the only place the theatre community talks about, it is where the largest, most centralized conversations are being had."); Peter Marks, *New York City Can't Rebound Without Broadway. And Broadway's Road Back Is Uncertain*, WASH. POST (Sept. 8, 2020), https://perma.cc/Y62R-PAL9 (describing New York City as "the nation's premier performing arts district").

[27] *Current Broadway Houses*, INTERNET BROADWAY DATABASE, https://perma.cc/2J85-29YP; *Theatre 101*, TDF, https://perma.cc/38GD-C6TM.

[28] Michael Paulson, *What Small Theater Does for New York? A Lot, Study Finds*, N.Y. TIMES (Nov. 20, 2019), https://perma.cc/HCK6-NV7L.

study conducted by the New York City Mayor's Office of Media and Entertainment found 748 non-Broadway theater organizations throughout the city.[29] These non-Broadway New York theaters are categorized as Off-Broadway and Off-Off-Broadway. Off-Broadway houses generally seat 99 to 500 people, and Off-Off-Broadway houses seat fewer than 99.[30]

The impact of New York theater goes far beyond the city's five boroughs. For example, *Hamilton* opened on Broadway in August 2015 and subsequently opened a production in Chicago in October 2016. By April 2019, more people had seen the show in Chicago than had seen it in New York.[31] But theater is not just an export from New York to the rest of the United States. Rather, productions often find themselves on Broadway only after first premiering at theaters across the country. Of the twenty-eight Broadway shows that opened during the 2015–2016 season, "thirteen of these productions were first seen in not-for-profit theaters mostly outside New York City" before transferring to Broadway.[32]

To dichotomize American theater into simply New York and non–New York theater is a gross oversimplification, not only because productions often travel between New York and other cities but also because each major city in the United States has its own distinct and robust theater community.[33] For example, Chicago's theater community is largely influenced by its robust comedy scene, whereas Seattle's is known for riskier art, as it is less expensive to create theater there than in New York or Los Angeles.[34] A unifying entity for many of the professional theaters across the country is the League of Resident Theatres (LORT). LORT is "the largest professional theatre association of its kind in the United States, with 75 member Theatres located in every major market in the U.S."[35] LORT helps build community between these

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29 N.Y.C. MAYOR'S OFF. OF MEDIA & ENT., ALL NEW YORK'S A STAGE: NEW YORK CITY SMALL THEATER INDUSTRY CULTURAL AND ECONOMIC IMPACT STUDY 7 (2019), https://perma.cc/HB6K-25MJ.

30 *Theatre 101*, *supra* note 27.

31 DONAHUE & PATTERSON, *supra* note 24, at 54 (citing Michael Paulson, *A New Kind of* 'Hamilton' *Show, This Time on Lake Michigan*, N.Y. TIMES (Apr. 29, 2019), https://perma.cc/BB68-PHN8.

32 *Id.* at 8.

33 *See* ACTORS' EQUITY ASS'N, 2019 REGIONAL THEATRE REPORT 4 (2019), https://perma.cc/T76J-TY5X (observing that the theater scenes in Chicago, Los Angeles, and New York each "operate very differently" from the theater scenes in other cities).

34 *See* O'Keeffe, *supra* note 24.

35 *Who We Are*, LORT, https://perma.cc/L8JA-XS3F. Of LORT's seventy-five members, only five are New York City theaters. *Member Theaters*, *supra* note 21.

geographically remote theaters. However, LORT's scope is limited. For example, membership is limited to nonprofit, professional theaters.[36]

2. Professional status.

American theater companies can generally be distinguished by whether their artists and administrators are paid or volunteers, which can define the subcommunity that the theater and its artists are a part of. Stephen Langley defined a "nonprofessional theatre" as "one comprised of people who do not derive their income from it and do not spend most of their time engaged in it."[37] In contrast, professional theaters pay the people working on a production.

In practice, however, the dichotomy is not always clear. First-class productions—generally defined as productions with paid actors who are members of the Actors' Equity Association, with a director who is a member of the Stage Directors and Choreographers Society, and that are performed at venues with extended or open-ended runs of shows[38]—are clearly professional. In contrast, entirely volunteer community theater productions are clearly nonprofessional. "Between those extremes, a clear meaning of 'professional' is unclear."[39]

For the purposes of this Comment, a division between professional and nonprofessional theater will be drawn based on the professional intentions of the artists. A theater company where most of the company members are actively pursuing paid opportunities and careers in theater would be classified as professional. In contrast, student theater programs, where students may aspire to careers in theater but are not currently auditioning for paying roles and are primarily focused on their education and training, would be classified as nonprofessional.

C. How a Show Is Produced

The script for a production is either an original piece (gaining protection with its creation for the production at hand), a preexisting piece still protected by copyright, or a preexisting piece

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36 *See How to Join*, LORT, https://perma.cc/LNT5-4B4K.

37 STEPHEN LANGLEY, THEATRE MANAGEMENT AND PRODUCTION IN AMERICA 17 (1990).

38 DONAHUE & PATTERSON, *supra* note 24, at 18–19.

39 *Id.* at 72.

in the public domain.[40] Depending on which of these categories a play or musical falls under, different steps must be taken to legally produce the show.

For original works, producers may commission a playwright to write a piece for them and will usually share in the subsidiary rights of the new work.[41] For productions of preexisting copyrighted works, the producer must acquire a license to produce the show.[42] Standard licenses do not permit a production to make any substantive or material changes to the show without written approval from the licensing company or author.[43] Works in the public domain are, by definition, not protected by copyright, so no rights need to be acquired for these shows.

After selecting a show and acquiring any necessary rights, the producer hires a director who, in turn, hires and oversees the various designers and other creatives working on a production. The rest of this Comment considers the intellectual property concerns that arise from these creative works.

II. COPYRIGHT IN THEATER PRODUCTIONS

Intellectual property in American theater is protected under copyright.[44] This Part introduces the relevant copyright law and then explores how that law has been applied—or theorized to apply—to theater.

A. Relevant Copyright Law

The Constitution empowers Congress to enact copyright legislation. Article I explicitly grants Congress the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[45] The Copyright Act of 1976[46] and its amendments govern copyright law in the United

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40 *See id.* at 19.

41 *Id.* at 19–20.

42 *See id.* at 19.

43 *See, e.g.*, *Performance License*, MUSIC THEATRE INT'L, https://perma.cc/D77U-VZEB.

44 Patent law could potentially protect the work of theater designers. However, designers might face legal obstacles in acquiring patents. Furthermore, even without challenges to patentability, the cost and lengthy process of acquiring a patent make it an unsuitable alternative to copyright for theater artists. *See* Rebeca Sanchez-Roig, *Putting the Show Together and Taking It on the Road: Copyright, the Appropriate Protection for Theatrical Scenic and Costume Designs*, 40 SYRACUSE L. REV. 1089, 1106 n.96 (1989).

45 U.S. CONST. art. I, § 8, cl. 8.

46 Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended at 17 U.S.C. §§ 101–1401).

States today.[47] The goal of copyright is "to expand public knowledge and understanding."[48] Copyright achieves this goal "by giving potential creators exclusive control over the copying of their works, thus giving them a financial incentive to create informative, intellectually enriching works for public consumption."[49]

1. Types of copyrightable work.

The scope of copyright protections is limited to "original works of authorship fixed in any tangible medium of expression."[50] The Supreme Court has held that, to be "original," a piece must have been "independently created by the author (as opposed to copied from other works), and . . . possess[ ] at least some minimal degree of creativity."[51] Per the statute, the "works" protected include, but are not limited to, "(1) literary works; (2) musical works . . . ; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures . . . ; (7) sound recordings; and (8) architectural works."[52] The "tangible medium" requirement is met when the work's "embodiment in a copy or phonorecord . . . is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration."[53]

2. Types of work not protected by copyright.

There are various creative works that are not protectable under copyright. Three types of unprotectable works are pure ideas, expressions that can only be expressed in a specific way, and useful articles.

a) The idea/expression dichotomy. Not all original works fixed in a tangible medium are protected. The Copyright Act clarifies that "[i]n no case does copyright protection . . . extend to any idea, procedure, . . . concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work."[54] This limitation codifies the principle referred

47 MELVILLE B. NIMMER & DAVID NIMMER, 1 NIMMER ON COPYRIGHT § A.01 (2021).
48 Authors Guild v. Google, Inc., 804 F.3d 202, 212 (2d Cir. 2015).
49 *Id.*
50 17 U.S.C. § 102(a).
51 Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991) (citation omitted).
52 17 U.S.C. § 102(a).
53 17 U.S.C. § 101.
54 17 U.S.C. § 102(b).

to as the "idea/expression dichotomy," which distinguishes an author's protectable expression from "every idea, theory, and fact in a copyrighted work"—the latter of which, in contrast, "becomes instantly available for public exploitation at the moment of publication."[55] For example, were Shakespeare's *Romeo and Juliet* under copyright today, a playwright would not be infringing on Shakespeare's copyright by writing a play about two people who fall in love despite their families' hate for each other. The idea of star-crossed lovers is just that, an idea, and not a copyrightable expression.[56] The dichotomy "strike[s] a definitional balance between the First Amendment and the Copyright Act by permitting the free communication of facts while still protecting an author's expression."[57] The Court has called this "the most fundamental axiom of copyright law"[58] because if facts and ideas were protected by copyright, the law would stymie future creativity by foreclosing other artists from creating their own expressions in response to the idea.

b) The merger doctrine and scènes à faire. Related to the idea/expression dichotomy is the merger doctrine. This doctrine "denies copyright protection when creativity merges with reality; that is, when there is only one way to express a particular idea."[59] Under this doctrine, when idea and expression "merge" out of necessity, the expression "cannot be protected, lest one author own the idea itself."[60] An example of this doctrine is the symbol of a circle with a diagonal line across it, communicating "No!" Because there are few ways to effectively communicate impermissible behavior, that symbol could not be copyrighted.[61]

In theater, the merger doctrine can largely be equated to the scènes à faire doctrine. The French phrase *scènes à faire*

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55 Golan v. Holder, 565 U.S. 302, 328 (2012) (quoting Eldred v. Ashcroft, 537 U.S. 186, 219 (2003)).

56 *Cf.* Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930) (describing protecting such an "idea" as comparable to protecting "Einstein's Doctrine of Relativity[ ] or Darwin's theory of the Origin of Species"). For additional examples of the idea/expression dichotomy, see 1 NIMMER & NIMMER, *supra* note 47, § 2A.06[A][3][a][ii]–[v].

57 Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 556 (1985) (alteration in original) (quoting Harper & Row, Publishers, Inc. v. Nation Enters., 723 F.2d 195, 203 (2d Cir. 1983)).

58 *Feist*, 499 U.S. at 353.

59 Coquico, Inc. v. Rodriguez-Miranda, 562 F.3d 62, 68 (1st Cir. 2009).

60 Zalewski v. Cicero Builder Dev. Inc., 754 F.3d 95, 103 (2d Cir. 2014) (citing Morrissey v. Procter & Gamble Co., 379 F.2d 675, 678–79 (1st Cir. 1967)).

61 *See* BUC Int'l Corp. v. Int'l Yacht Council Ltd., 489 F.3d 1129, 1143 (11th Cir. 2007).

translates roughly to "the scenes that must be done"[62] and is applied to scenes that (1) "'must' be included in a given context, because identical situations call for identical scenes"[63] or (2) that are "stock" scenes, meaning scenes which are nondescript and commonly used.[64] Scènes à faire are not copyrightable as "[c]ourts have held repeatedly that such similarities and incidental details necessary to the environment or setting of an action are not the material of which copyrightable originality consists."[65] Of course, this doctrine does not permit the exact copying of dialogue (as that would be a tangible expression) but is instead applied to scenes at large.

For example, in *Cain v. Universal Pictures Co.*,[66] the author of a novel with a romantic scene set in a church argued that the defendant's movie, which had a scene with two lovers in a church, infringed on his work.[67] Both scenes included piano playing and prayer, but the court found that "[o]nce having placed two persons in a church during a big storm, it was inevitable that incidents like these and others which are, necessarily, associated with such a situation should force themselves upon the writer in developing the theme."[68] Other examples of the aspects of a scene that would not be copyrightable are "the cars in a car chase, the kiss in a love scene, the dive bombers in a movie about Pearl Harbor, or for that matter the letters of the alphabet in any written work."[69] When there is only one way of expressing an idea, that expression merges with the idea such that it is not copyrightable.

c) Useful articles. The Copyright Act does not afford protections to "useful articles." A useful article is an object that has "an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information."[70] The Supreme Court has established a two-factor test to determine whether the creative aspect of an object can be separated from its utilitarian function. The test, developed in *Star Athletica, L.L.C. v. Varsity*

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62 Robert Kirk Walker, *Breaking with Convention: The Conceptual Failings of Scènes à Faire*, 38 CARDOZO ARTS & ENT. L.J. 435, 444 (2020).

63 Leslie A. Kurtz, *Copyright: The Scenes a Faire Doctrine*, 41 FLA. L. REV. 79, 81 (1989).

64 *Id.* at 89–90.

65 Cain v. Universal Pictures Co., 47 F. Supp. 1013, 1017 (S.D. Cal. 1942).

66 47 F. Supp. 1013 (S.D. Cal. 1942).

67 *Id.* at 1016–17.

68 *Id.* at 1017.

69 Bucklew v. Hawkins, Ash, Baptie & Co., 329 F.3d 923, 929 (7th Cir. 2003).

70 17 U.S.C. § 101.

Brands, Inc.,[71] permits copyrighting if the "artistic feature" of the work "(1) can be perceived as a two- or three-dimensional work of art separate from the useful article and (2) would qualify as a protectable pictorial, graphic, or sculptural work either on its own or in some other medium if imagined separately from the useful article."[72] For example, according to the Copyright Office, "a carving on the back of a chair or a floral relief design on silver flatware could be protected by copyright, but the design of the chair or flatware itself could not."[73]

3. Gaining copyright.

A work does not need to be registered to be protected by copyright.[74] Rather, "a work of authorship is protected by copyright from the moment it is created, provided that the work is original and has been fixed in a tangible medium of expression."[75] However, to file a lawsuit for copyright infringement and actually enforce the rights that come with copyright, applying for registration is a prerequisite.[76] Additionally, "registration constitutes *prima facie* evidence of the validity of the copyright."[77] This is particularly valuable in the context of theater given that there are ambiguities about what is copyrightable.

Ownership of the copyright vests in the author upon creation unless the work is created by an employee. Under the work-for-hire doctrine, property rights for "work prepared by an employee within the scope of his or her employment" are owned by the employer.[78] While this is the default, these ownership rights can be contractually negotiated. For example, the collective bargaining agreement between the International Alliance of Theatrical Stage Employees (IATSE)—the labor union representing theatrical

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71 137 S. Ct. 1002 (2017).

72 *Id.* at 1016.

73 *Useful Articles*, COPYRIGHT.GOV, https://perma.cc/CS28-WVZV. Although patent law may cover useful articles, patents are not a useful legal tool for theater artists. *See supra* note 44.

74 U.S. COPYRIGHT OFF., COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 202 (3d ed. 2021).

75 *Id.*

76 *See* 17 U.S.C. § 411(a) ("[N]o civil action for infringement of the copyright in any United States work shall be instituted until preregistration or registration of the copyright claim has been made in accordance with this title."); Alaska Stock, LLC v. Houghton Mifflin Harcourt Publ'g Co., 747 F.3d 673, 678 (9th Cir. 2014) ("Though an owner has property rights without registration, he needs to register the copyright to sue for infringement.").

77 U.S. COPYRIGHT OFF., *supra* note 74, at § 202.

78 17 U.S.C. §§ 101, 201(b).

scenic, costume, lighting, sound, and projection designers—and LORT theaters provides that "[a]ll rights in and to the design as conceived by the Designer in the course of the rendition of Designer's services hereunder shall be, upon its creation, and will remain, the sole and exclusive property of the Designer."[79]

4. Rights of copyright owners.

The owner of a copyright is afforded a time-limited monopoly over their creation. Section 106(4) of the Copyright Act provides the owner of a copyright with the exclusive ability to license their work to others to be performed publicly.[80] Similarly, only with the authorization of the copyright owner can someone "reproduce the copyrighted work"[81] or "prepare derivative works based upon the copyrighted work."[82] For all unoriginal dramatic works that are not in the public domain, a theater must acquire a license to publicly perform the work. These rights are usually managed by one of only a handful of licensing companies.[83] A copyright does not bar all reproductions of a work, as fair uses are still permissible. Typical fair uses include "criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, [and] research."[84]

B. Copyright in Theater

While it is clear from the text of the Copyright Act that dramatic works are protected on the page (a tangible medium), the extension of those protections to staged productions is less clear. Plays and musicals, as dramatic works, are written to be performed;[85] to understand the actual weight of copyright in theater, it is necessary to understand what is protected on stage.

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79 *LORT Agreement 2017–2022*, UNITED SCENIC ARTISTS 14 (Dec. 21, 2017), https://perma.cc/TFL9-HZBY.

80 17 U.S.C. § 106(4).

81 17 U.S.C. § 106(1).

82 17 U.S.C. § 106(2).

83 *See* Paulson, *supra* note 11; *see also* Video Interview with Dyan Flores, previous Dir. of Pro. and Int'l Licensing, Theatrical Rts. Worldwide (Oct. 21, 2020). Flores discussed Concord's acquisition of Samuel French and similar acquisitions in the past few years and shared that "[t]here is concern about having such a concentrated group owning so much intellectual property." Video Interview with Dyan Flores, *supra*.

84 17 U.S.C. § 107.

85 *See Drama*, MERRIAM-WEBSTER, https://perma.cc/8VGU-GTXT (defining "drama" as "a composition . . . in verse or prose intended to portray life or character or to tell a story usually involving conflicts and emotions through action and dialogue and typically designed

1. Enumerated protection for scripts, choreography, and musical works.

Scripts, choreography, and musical works are expressly protected by the Copyright Act.[86] Courts have vindicated the rights of copyright owners when theaters have produced a show without acquiring rights.[87] Technology has made this type of blatant infringement easier to catch. For example, licensing companies can use Google Alerts to notify them if a theater is producing one of their shows, allowing them to easily monitor when shows are produced without acquiring a license.[88] These alerts allow licensing companies to proactively prevent infringing behavior. When a company is alerted to an unlicensed production, it will usually offer the theater the opportunity to license the production and perform as scheduled.[89] If the theater refuses to pay the licensing fee, then the company will send a cease and desist letter.[90]

When these letters have been ignored, courts have vindicated the rights of copyright holders. For example, in 2019, MTI (one of the major licensing companies) was awarded $450,000 plus attorneys' fees for a complaint against a Virginia community theater which produced multiple MTI shows without authorization or a license.[91] Similarly, Hospital for Sick Children, which holds the rights to J.M. Barrie's *Peter Pan*, successfully sued Melody Fare Dinner Theatre for their knockoff production of the show.[92]

Choreography and musical works are similarly protected by copyright and are also licensable. As the music is integrated into the script in musicals, it is licensed as one when a theater acquires production rights for a musical.[93] In contrast, choreography is not included in the standard licensing agreement.[94] However,

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for theatrical performance"); *see also* TERRENCE MCNALLY, LOVE! VALOUR! COMPASSION! 4 (1995) (stating in the author's note, "Plays are meant to be seen, not read.").

86 17 U.S.C. § 102(a).

87 *See, e.g.*, MTI Enters., Inc. v. Theaterpalooza Cmty. Theater Prods., Inc., No. 18-cv-650, 2019 WL 99267, at *1 (E.D. Va. Jan. 3, 2019); Hosp. for Sick Children v. Melody Fare Dinner Theatre, 516 F. Supp. 67, 70–72 (E.D. Va. 1980).

88 Video Interview with Dyan Flores, *supra* note 83.

89 *Id.*

90 *Id.*

91 *MTI Enters., Inc.*, 2019 WL 99267, at *2.

92 *Hosp. for Sick Children*, 516 F. Supp. at 72–73.

93 *Cf., e.g.*, *Licensing an MTI Musical*, MUSIC THEATRE INT'L, https://perma.cc/5ZZZ-J9RQ (noting that rental copies of the script, vocal book, piano score, and orchestra scores are included when a musical is licensed).

94 *See, e.g.*, *Performance License*, *supra* note 43.

some choreographers have partnered with licensing companies to make their original choreography available for an additional fee.[95]

2. Legal arguments for and against copyright protection for the work of designers.

Lighting, costume, and set designers face unsettled law and additional challenges in protecting their work through copyright. These designers are able to submit illustrations or textual descriptions of their work to the Copyright Office; these submissions can be copyrighted as visual art or written works.[96] However, the Copyright Office asserts that this "registration does not extend to the costume, prop, set or lighting itself."[97] This has been interpreted by scholars to mean that "[c]opyright law thus provides empty protection to the [ ] designer since the most valuable of the creations, the [costume, set, or lighting] itself, is left prey to profiteering pirates."[98] This interpretation means that a later theater could create sets and costumes that look identical to the original designers' works without infringing, as only the visual arts—and not the three-dimensional rendering of the designs—are copyrighted. Despite the Copyright Office's forceful assertion that copyright protection does not extend to lighting, set, or costume design itself, there are colorable legal arguments that it does.

a) Lighting designers. Of the various design components of a production, the work of lighting designers is the least protectable under copyright. The only fixed aspect of a lighting designer's work is his or her initial lighting plan, which maps out where to hang the lights in the theater.[99] Although there is precedent for the Copyright Office granting copyright to a "compilation of lighting cues for a play," no court has addressed the validity of this copyright.[100]

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95 *See, e.g.*, *Official Jerry Mitchell Choreography for* Hairspray & Legally Blonde, MUSIC THEATRE INT'L (Oct. 18, 2017), https://perma.cc/64KW-XC2F.

96 U.S. COPYRIGHT OFF., *supra* note 74, § 804.3(F).

97 *Id.*

98 Rebecca Ishaq Foster, *Protect the Bastard Child of the Arts: Copyright Protection for Theatrical Costumes*, 22 SW. U. L. REV. 431, 432 (1993).

99 *See* FRANCIS REID, STAGE LIGHTING HANDBOOK 93–95 (6th ed. 2001).

100 *See, e.g.*, *Lighting Design for* Urinetown, The Musical, COPYRIGHT CATALOG (2001), https://perma.cc/3JQQ-YCSQ. Although "registration constitutes *prima facie* evidence of the validity of the copyright," U.S. COPYRIGHT OFF., *supra* note 74, § 202, it does not seem likely that this copyright would be held valid in court for the reasons discussed in this Part.

Once a designer's plan is implemented, however, the designer's work cannot be fixed in a tangible medium. Additionally, the designer would find difficulty overcoming the useful-article limitation on copyrightability as the light fixtures they use serve a utilitarian purpose. Although there can be plenty of nuance and artistic value added through lighting design, theatrical lighting must first and foremost illuminate the action on stage. Therefore, lighting design is intrinsically utilitarian and not protectable by copyright.[101]

Even if a lighting designer's work were granted copyright protections, he or she would likely face difficulty in winning a case against an infringer. The dimensions and lighting capabilities of different stages make copying difficult.[102] As copying is the essential element of an infringement claim, a lighting designer's claim would likely fail.[103] For these reasons, extending copyright to lighting design seems neither feasible nor necessary.

b) Set designers and costume designers. Similar to lighting designers, set and costume designers seeking copyright registration for their work are likely to meet a barrier with the useful-article doctrine, which limits copyright protection for intrinsically utilitarian works.[104] Set designers build the visual world that the characters of a show live in. Actors interact with the product of a set designer's work in very practical ways—they sit on chairs, descend staircases, and climb ladders. The chairs, stairs, ladders, and other elements of the set serve utilitarian functions and are subsumed by the useful-article doctrine. The Copyright Office views costuming as articles of clothing, which "are useful articles that ordinarily contain no artistic authorship separable from their overall utilitarian shape."[105] Many times, set designers will purchase furniture and other items to decorate the set, and costume designers will buy or rent articles of clothing instead of sewing the items themselves.[106] In those instances, even if the work were not considered utilitarian, the designers' claims would fail as they did not author the work.

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[101] *See* 17 U.S.C. § 101 (defining a useful article as a something with "an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information").

[102] *See* Jennifer Womack, Note, *Big Shop of Horrors: Ownership in Theatrical Design*, 18 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 225, 234–35 (2007).

[103] 2 NIMMER & NIMMER, *supra* note 47, § 8.01[A].

[104] 17 U.S.C. § 101; *see also supra* Part II.A.2.c.

[105] Registrability of Costume Designs, 56 Fed. Reg. 56,530, 56,531 (Nov. 5, 1991).

[106] *See, e.g.*, TREVOR GRIFFITHS, PRACTICAL THEATER 85, 117–20 (1982).

Although most of the work of set and costume designers is likely unprotected, there are portions of a set or costume designer's work that may be able to avoid the useful-article doctrine. For example, *Wicked*, which won the Tony Award for Best Scenic Design in 2004,[107] features a large map of the fictitious land of Oz in front of the stage before the show begins.[108] While the curtain itself may be deemed a useful article, the two-dimensional artistic rendering of the map could itself be copyrightable under the *Star Athletica* rule.[109] Additionally, the Copyright Office and at least one court have found masks, which are often designed by the costume designer, to be copyrightable because their only utilitarian function is to portray a character.[110]

A set designer's best argument for the copyrightability of their work is that it should be viewed in its totality.[111] Just as the author of a book seeks copyright for their unique combination of words, a set designer could seek copyright for their unique combination of scenic elements.[112] Ronald Shechtman, a leading litigator in theatrical copyright, argues that set designs should be copyrighted when the designer makes such significant contributions that the set design becomes sufficiently creative to be considered its own work.[113] Although Shechtman has filed lawsuits based on this theory, these suits have all settled (with the defendants paying damages to his clients) before courts ruled on the merits of this claim. Another attorney advanced this legal theory when the set design of the 1995 Broadway production of *Love! Valour! Compassion!* was heavily copied in 1996 by the Caldwell Theater Company. Loy Arcenas, the set designer, sued the theater for copyright infringement and received an undisclosed settlement payment from the allegedly infringing theater.[114]

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107 *Winners and Honorees*, TONY AWARDS, https://perma.cc/E9Z2-QD5E.

108 *See Gershwin Theater Seating Chart*, HEADOUT, https://perma.cc/4ECF-9EJ7 (featuring an image of *Wicked*'s set as its header image).

109 *See Star Athletica*, 137 S. Ct. at 1016.

110 *See* Registrability of Costume Designs, 56 Fed. Reg. at 56,531–32; *see also* Nat'l Theme Prods., Inc. v. Jerry B. Beck, Inc., 696 F. Supp. 1348, 1352–54 (S.D. Cal. 1988).

111 This argument would be less persuasive for costume designers because their pieces are more discrete and individualized, with each costume specifically designed for a character and tailored to fit the actor.

112 *See* Womack, *supra* note 102, at 232 ("What makes the [set] design worthy of being labeled a 'scenic design' is the grouping of all the individual parts into a unified whole.").

113 Telephone Interview with Ronald Shechtman, Managing Partner at Pryor Cashman LLP (Nov. 23, 2020).

114 *See* Jesse Green, *Exit, Pursued by a Lawyer*, N.Y. TIMES (Jan. 29, 2006), https://perma.cc/PNC4-KU6J.

Lighting, set, and costume designers do not have a clear right to protection of their work like a playwright does. Although some have found protection through formal copyright, set and costume designers are largely at the mercy of the Copyright Office, which holds the policy that the work of designers can be copyrighted only as visual and written works and that "the registration does not extend to the costume, prop, set or lighting itself."[115] Conceptually, a designer whose copyright application is denied by the Copyright Office can challenge the decision in federal court under the Administrative Procedure Act.[116] However, to succeed on such a claim, the applicant must prove that the Copyright Office's actions were "arbitrary, capricious, [or] an abuse of discretion."[117] This burden, and the cost of pursuing the lawsuit, is likely high enough to preclude designers from pursuing this route.

3. Legal arguments for and against copyright protection for the work of directors.

Like designers, directors face ambiguity around the protection of their works. No court has ruled directly on this issue yet, and scholarly articles addressing the work of directors come down on both sides of the issue—though most conclude that a director's work is not copyrightable.

Directors are the final decision makers in the artistic vision of a project, and their ideas infuse everything on stage.[118] However, the entirety of their work is tied to the work of others. Their stage directions are embodied by actors, and the themes and moods that they aim to create are implemented through the work of designers.[119] Perhaps the sum of the parts could be considered the director's work and viewed as greater than the individual contributions of the other artists, but this view requires such a level of abstraction that the work becomes simply a concept or idea. Because of the idea/expression dichotomy in copyright law, the director's work at this level of abstraction would not be protected as an expression.[120]

Copyright is not well suited to deal with collaborative works. Joint authorship does exist but only when a work is "prepared by

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115 U.S. COPYRIGHT OFF., *supra* note 74, at § 804.3(F).

116 *See* 5 U.S.C. §§ 701–706.

117 5 U.S.C. § 706(2)(A).

118 *Cf.* GRIFFITHS, *supra note* 106, at 9, 29 (describing the director's role).

119 *See id.* at 17–18, 28.

120 *See* 17 U.S.C. § 102(b).

two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole"[121] and when all authors contribute independently copyrightable work.[122] While the development process of workshops and out-of-town trials undoubtedly results in the work and feedback of the director shaping the final product, playwrights do not intend to become coauthors with the director through this process. This is different than in other types of collaborative work, such as novels, paintings, and motion pictures, where "people work[ ] together consciously for a finite period to complete a specific project in a final version."[123]

Much of the commentary surrounding intellectual property rights in theater has focused on whether copyright does or should protect a director's stage directions. Most of these normative and positive scholarly works conclude that, while the law is ambiguous, this type of work should not be protected by copyright.

Professor Margit Livingston argues by analogy: stage directions (which are fixed by notations in the prompt script) are so similar to choreography and pantomime (which are both explicitly protected in the Copyright Act) that these directions should be afforded protection.[124] She concludes that "a director who creates a truly novel staging of a classic or new play should be able to sue successfully a later director for copyright infringement if the later director closely copies the most striking features of the original director's staging."[125] In contrast, Talia Yellin's analysis of the Copyright Act finds the law to be ambiguous on this question and any potential protections afforded to directors to be, at best, feeble.[126]

Yellin also argues that protecting stage directions would be normatively bad because it would restrict other productions.[127] Laura Temme makes a similar normative argument, but she is even more skeptical than Yellin about whether a court, as a

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[121] 17 U.S.C. § 101.

[122] *See* Childress v. Taylor, 945 F.2d 500, 506–07 (2d Cir. 1991) (collecting cases and adopting the same requirement).

[123] Susan Keller, Comment, *Collaboration in Theater: Problems and Copyright Solutions*, 33 UCLA L. REV. 891, 894 (1986).

[124] Margit Livingston, *Inspiration or Imitation: Copyright Protection for Stage Directions*, 50 B.C. L. REV. 427, 440 (2009).

[125] *Id.* at 487.

[126] Talia Yellin, *New Directions for Copyright: The Property Rights of Stage Directors*, 24 COLUM.-VLA J.L. & ARTS 317, 346 (2001).

[127] *See id.* (expressing concern that attempts by directors "to enforce their alleged property rights" would quash collaboration in theater).

matter of law, would find that stage directions are protectable.[128] First, Temme stresses that the stage manager, not the director, is usually the one who actually fixes the directions on a tangible medium.[129] Second, Temme argues that the additional royalties that would come from needing to license staging would make it too expensive for regional theaters to afford a production (even for plays that may be in the public domain and would otherwise be free).[130]

Jessica Talati argues that the issue is so unclear that congressional action is necessary.[131] Talati asserts that a mass granting of copyright protection would frustrate—rather than enhance—the goal of the Copyright Act by enabling an infinite number of stage instructions to be filed for the same play, thereby stymying a theater's willingness to perform a work.[132]

Directors seeking protection for their work from the Copyright Office or the courts are unlikely to find much success. While courts have thus far been silent on the issue, scholars tend to argue against extending copyright protections to directors.

4. Settlements for designers and directors.

While the Copyright Office's policy and the conclusions of most scholarly research cut against protections for designers and directors, cases brought by these creators have consistently settled with the original designers and directors receiving payments from the later artists.[133]

There have been three marquee cases that address the rights of directors and designers, all of which have settled with payments to the plaintiffs before legal precedent could be set.[134] The first of these cases was brought by Gerald Gutierrez, the

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[128] *See* Laura Temme, *To Be, or Not to Be: The Potential Consequences of Granting Copyright Protection for Stage Directions*, 9 CYBARIS INTELL. PROP. L. REV. 1, 20 (2018) ("In the case of stage directions, the claims of a few would greatly burden the artistic freedom of many.").

[129] *See id.* at 13–14.

[130] *See id.* at 15–17.

[131] Jessica Talati, Comment, *Copyrighting Stage Directions and the Constitutional Mandate to "Promote the Progress of Science"*, 7 NW. J. TECH. & INTELL. PROP. 241, 258–59 (2009).

[132] *Id.* at 259 ("Taking the debate over copyrightable stage directions as one example, this Comment has shown that Congress' existing scheme may permit copyrights to be issued in situations that frustrate the purpose of this mandate.").

[133] *See* Green, *supra* note 114; Andrew Gans & Zachary Pincus-Roth, *Akron* Urinetown *Lawsuit Settled*, PLAYBILL (July 2, 2008), https://perma.cc/2ZNF-BQYF.

[134] Jenn McKee, *Property Rights and Wrongs*, AM. THEATRE (Jan. 19, 2018), https://www.americantheatre.org/2018/01/19/property-rights-and-wrongs.

Broadway director of *The Most Happy Fella* in 1992, against Grant Griffin, who directed the same show in 1994 in Chicago. Shechtman described Gutierrez's production as such a "unique, conceptual production"[135] that—when "not just poses and movement but also the particular rearrangement of scenes and dialogue [Gutierrez] had created with the approval of the estate of the show's creator" were used in Griffin's production—it was obvious that Griffin had copied the original.[136] The case settled with the Chicago theater paying an undisclosed amount to Gutierrez and publicly acknowledging Gutierrez's "contribution" in an advertisement in *Variety*, a leading trade magazine in the entertainment industry.[137] Because of *Variety*'s national reach (and strong circulation in cities like New York),[138] many more people in the professional theater industry would have seen this advertisement than Drury Lane's production in Chicago. Furthermore, Gutierrez's acceptance of nonmonetary relief lends credence to the legitimacy of his claim.

The directorial work of the Broadway production of *Love! Valour! Compassion!* was, much like the set design of the same play, largely copied in a later production by the Caldwell Theater Company. Joe Mantello, the director, sued the theater for copyright infringement.[139] Mantello applied for copyright of his annotated script, a prerequisite to filing an infringement claim,[140] and received registration.[141]

Both cases ultimately settled, but Mantello's case progressed further than the Gutierrez case, as the judge was presented with, and ruled against, a motion to dismiss by the defendant. The court held that Mantello's registration was sufficient to deny the motion and that the burden shifted to the defendants to overcome the presumption of copyrightability that came with Mantello's copyright.[142] But the posture of this decision (a district court

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135 Telephone Interview with Ronald Shechtman, *supra* note 113.

136 Green, *supra* note 114.

137 *Id.*

138 *See History of Variety*, VARIETY, https://perma.cc/5VZD-KJKW ("[S]ince 1933, unchallenged industry leader *Daily Variety* has been required reading for key showbiz players, delivering breaking news, exclusive scoops and must-read features.").

139 *See* Green, *supra* note 114.

140 17 U.S.C. § 411(a).

141 *Mantello Stage Production of* Love! Valour! Compassion!, COPYRIGHT CATALOG (1996), https://perma.cc/4XDR-TB99.

142 Mantello v. Hall, No. 97-8196 CIV, at *12–15 (S.D. Fla. July 22, 1997) (order granting in part and denying in part motion to dismiss and/or for summary judgment) (Bloomberg, Court Dockets); *see also* Green, *supra* note 114.

ruling on a motion to dismiss) does not establish strong precedent on the copyrightability of stage directions. Before going to a full trial, the parties reached a settlement in which Mantello received $7,000. He donated this money to his union, the Society of Stage Directors and Choreographers, perhaps showing that Mantello cared more about the principle than any monetary gain to be had from enforcing his claim.[143]

In a similar vein, a Chicago production of *Urinetown* faced scrutiny for its design and directing and was sued by the Broadway director, choreographer, and light, set, and costume designers. This case, too, settled out of court with the Broadway team receiving a payment of an undisclosed amount.[144]

If the analysis in Part II.B.2–3 is a correct assessment of theatrical copyright law, we would not expect original designers and directors to recover from subsequent designers and directors. The Priest-Klein model, which seeks to explain why certain cases settle, posits that "the determinants of settlement and litigation are solely economic, including the expected costs to parties of favorable or adverse decisions, the information that parties possess about the likelihood of success at trial, and the direct costs of litigation and settlement."[145] Although I cannot speak to the cost of litigation or the expected cost of a decision (given that those have yet to occur in this context), the discussion in Part II.B.2–3 is informative of "the information that parties possess about the likelihood of success at trial."[146] Given the Copyright Office's strong reluctance to protect the work of designers and directors, plaintiffs' lawyers would presumably advise against pursuing these claims, and defendants' lawyers would likely be unwilling to accept a proposed settlement in which their client had to pay. Yet these cases continue to settle with payments to the plaintiff. Because many factors can affect settlement decisions, any conclusions drawn from these settlements are necessarily tentative. However, the trend is worth acknowledging.

III. EXTRALEGAL INTELLECTUAL PROPERTY NORMS IN THEATER

The Copyright Act, as written and currently interpreted, does not provide much, if any, protection for theater designers and

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143 Green, *supra* note 114.

144 Gans & Pincus-Roth, *supra* note 133.

145 George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 4 (1984).

146 *Id.*

directors. As the law is friendlier to later designers and directors who may borrow heavily from an original creator's work, one might think that the copying of designs and staging would run rampant. But this is not the case.

In reality, the amount of copying that occurs is inversely related to the closeness of the theater community at issue. Within the professional New York theater community, very little co-opting occurs. Additionally, any copying that does occur is of a kind or degree that seems to be accepted by the community. "[B]ecause all the lines are so blurry artistically, . . . the community sort of acts as the jury on whether or not [the extent of copying that occurs in a show is] acceptable," according to Sammi Cannold, a New York–based director.[147] In contrast, community theaters scattered across the country co-opt Broadway designs for their productions with near-reckless abandon. Using the theater-classification system described in Part I.B, these subcommunities are most distant from Broadway because they share neither geography nor professional status.

Ellickson's hypothesis, which "predicts that, the more close-knit a group is, the better it will be able to use its informal-control system to minimize the sum of transaction costs and deadweight losses,"[148] may explain the behavior seen within and between theater subcommunities. To understand the nature of the various theater communities and their norms, I relied on published works that discuss this topic and a series of interviews that I conducted in October and November 2020. Each interviewee was selected for their unique perspective and background: Sammi Cannold is a New York–based director with multiple Off-Broadway directing credits.[149] Dyan Flores is an arts administrator who has worked in licensing at Samuel French and Theatrical Rights Worldwide.[150] Matt Davis is the production manager for the Philadelphia

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147 Video Interview with Sammi Cannold, *supra* note 13.

148 ELLICKSON, *supra* note 1, at 177 n.35.

149 *Sammi Cannold Biography*, BROADWAY WORLD, https://perma.cc/Z8JV-282D. Additionally, Cannold has worked on Broadway as an associate director. Her other credits include directing immersive shows (staged, for example, on buses and on Ellis Island) and a fellowship with the American Repertory Theater. She was a member of *Forbes Magazine*'s 30 Under 30 in Hollywood and Entertainment in 2019. *Id.*

150 Video Interview with Dyan Flores, *supra* note 83. At Samuel French, Flores worked in amateur licensing, meaning nonprofessional productions like school and community theater. At Theatrical Rights Worldwide, Flores licensed works to professional and international theaters. *Id.*

Theatre Company, a LORT theater.[151] Ronald Shechtman is the managing partner of Pryor Cashman LLP and is a preeminent theater lawyer.[152] These interviews provided details about intellectual property norms in the theater that could not be gleaned from publications alone. However, these findings are limited as they only represent the understandings of those I interviewed.

This Part uses Ellickson's hypothesis to illustrate how intellectual property rights are protected and understood in American theater. Because professional New York theater is the apex of American theater,[153] I treat the norms of that subcommunity as the baseline for norms in the American theater community at large. This Part will first more fully introduce Ellickson's hypothesis. It will then explore how norms are enforced within the theater community before introducing two norms—one addressing the interpretation of scripts (clearly protected by copyright), another addressing design and directorial choices (unclear whether protected by copyright)—practiced in the professional New York theater community. These norms illustrate how the intuitions of theater artists align with many copyright principles and how these norms breakdown as communities become more distant.

Finally, this Part will consider what it means for a norm to be welfare maximizing in the theater community. Ellickson's definition of welfare includes "all things and conditions that people value,"[154] and his hypothesis posits that the welfare-maximizing norms of a close-knit community are only necessarily welfare maximizing within the community.[155] Because internally welfare-maximizing norms may harm society at large, I am not arguing that the professional New York theater community's norms are good for American theater (or society) at large. Rather, I aim to show descriptively that these norms appear welfare maximizing for this community.

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[151] *About Me*, MATT DAVIS, https://perma.cc/K3QG-LY7E; *see also* Video Interview with Matt Davis, Prod. Manager for the Phila. Theatre Co. (Nov. 4, 2020). He holds an M.F.A. from the Yale School of Drama and wrote a thesis entitled *Intellectual Property for Producing Theatres*. *Id.*

[152] *Ronald H. Shechtman*, PRYOR CASHMAN, https://perma.cc/JR94-SKH6. Shechtman represented the plaintiffs (excluding the set designer of *Love! Valour! Compassion!*) in all three of the marquee cases discussed in Part II.B.4. *See* Telephone Interview with Ronald Shechtman, *supra* note 113. All these cases settled out of court with the defendants paying Shechtman's clients. *See* Green, *supra* note 114; McKee, *supra* note 134.

[153] *See supra* notes 26–27 and accompanying text.

[154] ELLICKSON, *supra* note 1, at 168.

[155] *See id.* at 169.

In addition to applying Ellickson's hypothesis to the theater community, this Part will explore some alternative explanations for the role, or lack thereof, of litigation in intellectual property rights in theater.

A. Ellickson's Hypothesis of Welfare-Maximizing Norms

It is helpful to begin with an explanation of Ellickson's hypothesis. Ellickson hypothesizes that "members of a close-knit group develop and maintain norms whose content serves to maximize the aggregate welfare that members obtain in their workaday affairs with one another."[156] This Section will focus on what Ellickson means by "close-knit" and "welfare-maximizing."

Ellickson limits his hypothesis to only close-knit communities. This is because he is uncertain that loose-knit communities have the necessary social conditions for an informal control system to be effective.[157] Ellickson describes a community as close-knit "when informal power is broadly distributed among group members and the information pertinent to informal control circulates easily among them."[158] He concedes, however, that such a definition is vague and largely unquantifiable.[159]

Ellickson expands upon this definition with other attributes that importantly relate to "close-knittedness."[160] First, individuals within a close-knit group hold the power to impose sanctions on each other, which requires repeat interactions (so that sanctions can be applied to future interactions in response to past wrongs).[161] Second, members of a close-knit community have means of acquiring historical and contemporary information about the parties that they are interacting with and the accompanying circumstances of those interactions.[162] Close-knit communities have webs of relationships that facilitate robust gossip networks, which help spread knowledge about the past behavior of community members.[163] This can be negative gossip about behavior that goes against communal interests or positive gossip celebrating a "third-party Good Samaritan [that] exercise[d]

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156 *Id.* at 167 (emphasis omitted).
157 *Id.* at 177.
158 *Id.* at 177–78.
159 ELLICKSON, *supra* note 1, at 178.
160 *Id.* at 181–82.
161 *See id.* at 178–80.
162 *See id.* at 180.
163 *Id.* at 180–81.

vicarious self-help to enforce norms."[164] The sharing of information provides further knowledge about the community's values, which is essential in assessing whether a developing norm is welfare enhancing.[165] Ellickson concludes his definition of close-knit by clarifying that a close-knit group "need not have an exclusive hold on a particular member" (meaning that a person can be a member of multiple close-knit groups) and that the group does not need to be small (although "smallness is [ ] indeed highly correlated with close-knittedness").[166]

Although Ellickson's hypothesis is "agnostic" about whether close-knittedness is necessary for the emergence of welfare-maximizing norms,[167] other scholars have tried to answer this question.[168] Professor Lior Strahilevitz finds that cooperative norms can arise even in loose-knit communities.[169] However, he considers Ellickson's explanations for the emergence of welfare-maximizing norms unpersuasive in the context of loose-knit communities.[170]

Ellickson's definition of welfare maximizing is quite expansive. He defines welfare to include "all things and conditions that people value."[171] Norm makers can determine what is welfare maximizing by observing the exchanges and behaviors that occur within their community.[172] He considers a norm to be welfare maximizing when it minimizes the sum of deadweight losses and transaction costs.[173] For example, group members would increase enforcement activities only when they expect the marginal gain from increased adherence to the norm outweighs the marginal cost of the additional enforcement.[174]

Although Ellickson cleanly presents his definition of welfare maximization, its application is messier. It can be difficult, if not impossible, to quantify the objective costs and benefits of alternative norms.[175] Instead, he relies on "largely intuitive assessments

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164 ELLICKSON, *supra* note 1, at 181.

165 *Id.*

166 *Id.* at 182.

167 *Id.* at 177.

168 *See generally, e.g.*, Lior Jacob Strahilevitz, *Social Norms from Close-Knit Groups to Loose-Knit Groups*, 70 U. CHI. L. REV. 359 (2003); April Mara Major, *Norm Origin and Development in Cyberspace: Models of Cybernorm Evolution*, 78 WASH. U. L.Q. 59 (2000).

169 Strahilevitz, *supra* note 168, at 362–63.

170 *See id.*

171 ELLICKSON, *supra* note 1, at 168.

172 *Id.* at 172.

173 *Id.* at 173.

174 *Id.*

175 *Id.* at 183.

of the utilitarian potential of alternative rules."[176] Ellickson also discusses how norm makers can adapt their norms to changes in their environment.[177] This hints at the idea that norms will continue to evolve toward welfare maximization (so long as the evolution is more beneficial than the cost of adapting). Otherwise, the norms would die out.

Ellickson is quick to acknowledge that he is not creating a "blanket normative recommendation that social controllers use norms as rules."[178] As mentioned, he does not think that his hypothesis will predict the development of efficient norms in non-close-knit communities, which describes many social environments.[179] Additionally, he is acutely aware that norms that maximize welfare in a community can impoverish outsiders, potentially outweighing any internal welfare maximization.[180] Finally, he acknowledges that welfare maximization may not be the ideal goal of a rule system.[181] Measuring welfare uses objective, instead of subjective, utilities and may promote ends antithetical to equality or other social goals.[182]

B. Enforcement of Norms

Central to Ellickson's hypothesis is that a group's closeness allows it to "exercise informal social control."[183] For social control to exist, there must be "*rules* of normatively appropriate human behavior" that "are enforced through *sanctions*."[184] The scope of his hypothesis is limited to communities with social control. For example, his "hypothesis does not predict that the norm-making process would lead to the evolution of cooperation in a transient social environment such as a singles bar at O'Hare Airport."[185]

Furthermore, Ellickson proposes that a rash of lawsuits seen in a previously nonlitigious community could be explained by a loss of closeness within the group. For example, he suggests that the spate of litigation over whale ownership in the Sea of Okhotsk

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176 ELLICKSON, *supra* note 1, at 183.
177 *Id.* at 173.
178 *Id.* at 169.
179 *Id.*
180 *Id.*
181 ELLICKSON, *supra* note 1, at 169–70.
182 *Id.* at 170.
183 Ellickson, *supra* note 5, at 84.
184 ELLICKSON, *supra* note 1, at 124 (emphasis in original).
185 *Id.* at 169.

in the 1850s occurred because "the New England whaling community was becoming less close-knit."[186]

Communities of professional theater artists within a geographic area fall within Ellickson's definition of a close-knit group.[187] In contrast, geographically distant communities or those spanning professional and nonprofessional theaters do not meet these conditions. Ellickson refers to these "departures from conditions of reciprocal power, ready sanctioning opportunities, and adequate information" as "'social imperfections,' analogous to the 'market imperfections' identified in traditional economic theory."[188]

1. Self-enforcement in New York.

The professional New York theater community is close-knit. This is unsurprising given the personal nature of artistic work and the necessity of collaboration in theater.[189] Particularly important to sanctioning, gossip is prevalent in the New York theater community and affects hiring decisions for future productions.[190]

Ellickson explains that "any close-knit group is likely to have procedural norms that ask members to help spread truthful information about the prior prosocial or antisocial behavior of other members."[191] The theater community is no exception. The traditional information channels of gossip and rumors are supplemented with a variety of theater blogs and message boards.[192] Cannold discussed the frequency with which people share their thoughts about productions and creative choices on social media platforms.[193] Asked to consider a hypothetical in which her work was copied in a norm-violating way,[194] Cannold stated, "[T]he internet would act as a check. And the fact that enough people in

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186 Ellickson, *supra* note 5, at 94 n.39.

187 *See* ELLICKSON, *supra* note 1, at 181.

188 *Id.*

189 *See* OSCAR HAMMERSTEIN II, LYRICS 47 (1985).

190 *See* Video Interview with Sammi Cannold, *supra* note 13; *see also* 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, 1540 (2004) (citing DONALD C. FARBER, PRODUCING THEATRE: A COMPREHENSIVE LEGAL AND BUSINESS GUIDE, at xii (1997)) ("[E]go, personal relationships, paranoia, unbelievable insecurities, and severe financial hardships . . . are especially present in the theatre.").

191 ELLICKSON, *supra* note 1, at 232 (citing Jeffrey A. Kurland & Stephen J. Beckerman, *Optimal Foraging and Hominid Evolution: Labor and Reciprocity*, 87 AM. ANTHRO. 73 (1985)).

192 *See* Jesse McKinley, *THEATER; Gossip! Divas! It's Theater on the Web*, N.Y. TIMES (Oct. 8, 2000), https://perma.cc/9VYM-8ZJY.

193 Video Interview with Sammi Cannold, *supra* note 13.

194 See *infra* Part III.C for a discussion of the relevant norms.

the New York theater community saw [my] productions would act as a check before I would have to."[195] Furthermore, she was confident that people would inform her of any such copying.[196]

Violating community norms results in reputational damage that can hinder one's career. Reputation is invaluable in the theater community. As an article from *Backstage*, a reputable industry magazine, advised: "Your reputation is your brand. A reputation for hard work, generosity, and excellence leads to a long and successful career. But if the word on the street is that you're difficult to work with, no matter how brilliantly talented you are, you'll have fewer opportunities to work."[197]

When Cannold was asked how she would react to a director or designer opening their production of *Evita* with a hanging ball gown as she did in her 2019 production at New York City Center (an example of the type of co-opting that would violate the norm), she said she would be upset, but she would neither confront them nor consider legal action.[198] Instead, she would text her friends and her *Evita* colleagues to gripe.[199]

Additionally, if Cannold had heard that a designer she was considering hiring was known for borrowing too heavily from the work of others, she would not hire that person. Her reasons were twofold. First, she would generally question their ethics. Second, she "would wonder why they don't have their own original impulses and ideas about the work. . . . It's opportunistic."[200] Cannold seeks out collaborators who have creative vision and drive, and someone who takes the ideas of others would bring very little to the table.[201]

Similar gossip channels for enforcement have been observed in other creative industries. For example, Professors Dotan Oliar and Christopher Sprigman studied how the content of jokes are protected via norms (instead of copyright or formal law) in the stand-up comedy community.[202] They found that the detection of joke stealing was a communal effort, with comedians looking out

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195 Video Interview with Sammi Cannold, *supra* note 13.

196 *Id.*

197 Heidi Dean, *The 1 Thing That Can Destroy Your Acting Career*, BACKSTAGE (Feb. 1, 2016), https://perma.cc/5MVB-3HXM.

198 Video Interview with Sammi Cannold, *supra* note 13.

199 *Id.*

200 *Id.*

201 *Id.*

202 *See generally* Dotan Oliar & Christopher Sprigman, *There's No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-Up Comedy*, 94 VA. L. REV. 1787 (2008).

for each other.[203] When a comedian detects a stolen joke, they "enforce a sort of 'prison-gang justice.'"[204] An interviewed comedian shared, "If you get a rep as a thief or a hack (as they call it), it can hurt your career. You're not going to work. They just cast you out. The funny original comics are the ones who keep working."[205] This enforcement mechanism operates similarly to that in the New York theater community.

2. Self-enforcement within subcommunities outside of New York.

Intracommunity conversations are not limited to the New York theater community. Davis spoke to the role of gossip in self-policing the copying of designs within the Philadelphia theater community. "People would certainly notice if we copied another Philadelphia-area theater," he shared.[206] The size of the community allows information to be somewhat easily gained and transmitted. "There are people that see every single show at all fifty-seven theaters in Philadelphia, and they would notice [any copying]."[207]

In Dallas in 2016, Lyric Stage's producer reached out to the set designer, Bob Lavallee, of Trinity Shakespeare Festival's *A Midsummer Night's Dream* to ask if Lyric could use Lavallee's set for their production of *Camelot*.[208] Lavallee declined, yet Lyric Theater used Lavallee's set. Interestingly, the set designer credited in the program was "Cornelius Parker, an unfamiliar name with no bio in the program."[209] It is improbable that a set designer with no credits to his name would begin his career at a LORT theater. The fact that Lyric tried to hide behind a fake designer's name implies that they knew they were breaking the norm by copying Lavallee's set and were seeking a scapegoat with their fictional designer. In a knowing nod to what had been done, both Lavallee and Parker were nominated for best set design at the Column Awards, a Dallas–Fort Worth theater award. Lavallee's takeaway was simple: "This is a small town, in terms of the theatre community. People knew what was going on."[210]

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203 *Id.* at 1813.
204 *Id.*
205 *Id.* (quoting an interview with an anonymous comedian).
206 Video Interview with Matt Davis, *supra* note 151.
207 *Id.*
208 McKee, *supra* note 134.
209 *Id.*
210 *Id.*

3. Self-enforcement between New York and LORT theaters.

While gossip networks are strongest within geographically distinct communities, the somewhat transient nature of professional theater artists allows for some enforcement between theaters in different cities. Davis discussed how easily artists and ideas are able to flow between Philadelphia and New York as the cities are just a train ride apart.[211] By tagging a show and its writer or original creative team on social media posts, the creators will often learn about and see pictures of productions around the country.[212] As a professional theater artist, Cannold feels like "no matter the community that you make [a creative] choice in, the theater community is so connected that other subsets of it are going to hear about it. You make a bad choice on Broadway, but your friends back in Boston know."[213]

Grant Griffin is a director who has felt both the legal and long-term career effects of being known for co-opting the work of another. He was the defendant in the first of the marquee cases discussed in Part II.B.4, where Gutierrez, the original director, had such "a unique, conceptual production" that Griffin's copying seemed blatantly obvious.[214] After being accused of copying "so many details of [the original] staging," Griffin settled the case by paying an undisclosed sum of money to Gutierrez and publicly acknowledging Gutierrez's contribution.[215] After this case, "Mr. Griffin has been trailed by rumors about subsequent productions."[216] For example, "his minimalist 'My Fair Lady' . . . is often said to have resembled too closely a [ ] production directed by Amanda Dehnert at Trinity Rep in Providence, R.I."[217] Geographically, Griffin's Chicago production was far from New York, which might explain why reputation alone was insufficient to police his behavior, despite the ramifications of his actions on his standing in the professional community.

These observations about the value of gossip and sanctions in enforcing norms in communities of varying closeness are not unique to theater. For example, in a survey of ethnographic

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211 Video Interview with Matt Davis, *supra* note 151.

212 *See* Video Interview with Dyan Flores, *supra* note 83; Video Interview with Sammi Cannold, *supra* note 13.

213 Video Interview with Sammi Cannold, *supra* note 13.

214 Telephone Interview with Ronald Shechtman, *supra* note 113.

215 Green, *supra* note 114.

216 *Id.*

217 *Id.*

literature, Professor Sally Engle Merry observed that gossip "can have serious economic consequences" in communities where individuals depend on each other and can similarly "lead[ ] to social consequences of both an individual and a collective nature."[218] Merry additionally emphasized the central role that gossip plays "in societies that rely to a large extent on self-help."[219] Ellickson similarly noted how the value his theory places on gossip aligns with what sociologists have long understood.[220] The gossip channels that exist in the professional theater community allow the community to sanction those whose behavior violates their norms.

4. A non-self-enforcement explanation.

An alternative explanation for the inverse correlation between copying and close-knittedness may be that the decision whether to copy is market driven. For example, two theaters in the same community—and, therefore, in competition for audience members—may put their artistic efforts into distinguishing themselves from each other. However, it is unclear that market forces would encourage divergence, instead of convergence, in the theater industry. In particular, the prevalence of trends in the industry might show that theaters are more likely to try to emulate the success of others rather than differentiate themselves.[221] The likelihood that market pressure explains copying is further lessened by the unpredictability of a theatrical success. In general, producers do not know whether their next show will be a hit or a flop.[222] Because it is hard for a producer to predict what makes a show succeed, it is also difficult for them to determine if their next show should be more similar to or more different from their competitor's.[223]

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[218] Sally Engle Merry, *Rethinking Gossip and Scandal*, *in* 1 TOWARD A GENERAL THEORY OF SOCIAL CONTROL 271, 284–85 (Donald Black ed., 1984).

[219] *Id.* at 285.

[220] *See* ELLICKSON, *supra* note 1, at 143 (citing Merry, *supra* note 218).

[221] For a discussion of trends on Broadway, see Kimberly Kaye, *Broadway.com at 10: The 10 Biggest Broadway Trends of the Decade*, BROADWAY.COM (May 10, 2010), https://perma.cc/KJB8-LJ22.

[222] *See* Sarah Hemming, Opinion, *There Is No Manual for Making a Hit Musical*, FIN. TIMES (Mar. 15, 2016), https://www.ft.com/content/4fb7421a-eac5-11e5-bb79-2303682345c8.

[223] Uncertainty also plagues the film industry, which has turned to remakes and sequels, at times, to try to achieve repeat successes. *See, e.g.*, Jacob Bogage, *Why Film Studios Really Like Movie Remakes*, WASH. POST (Aug. 23, 2016), https://perma.cc/3KV5-9G2E; Knut Haanaes & Michael Sorell, *Déjà Vu: Is the Film Industry's Sequel and Remake Addiction a Sign of the End?*, IMD (June 2017), https://perma.cc/48EW-8689.

Additionally, it seems unlikely that the scale of copying that this Comment is concerned with is large enough to matter significantly to ticket buyers and is, therefore, unlikely to be a force shaping the behavior of those producing shows. Usually, purchasing decisions are not based off the buzz around a particular set design.[224] Similarly, many consumers may be wholly unaware of a show's design or direction before they see it. Even curious theatergoers may struggle to find relevant information because many shows only release limited photos or footage of their current productions.[225] Therefore, it seems improbable that design elements or directorial choices—whether copied or wholly original—affect the behavior of a significant number of ticket buyers. Without significant interest or detailed information among consumers, it is unlikely that market dynamics substantially affect copying decisions made by producers.

C. Intellectual Property Norms in American Theater

This Section examines two norms that have developed in the close-knit professional New York theater community. As Ellickson concedes, he did not test his hypothesis on non-close-knit communities.[226] Accordingly, this Section provides examples of how community self-enforcement mechanisms have failed for each of the norms when applied across non-close-knit American theater communities. This breakdown in non-close-knit communities supports Ellickson's reluctance to assert that his theory is applicable outside of close-knit groups. I reserve discussion of whether these norms are welfare maximizing for the next Section.

1. Protecting the intent of writers.

Scripts are clearly protected by copyright, and this protection provides playwrights with the exclusive power to license their works for public performance.[227] As discussed in Part II.B.1, licensing companies can efficiently police whether productions acquire the license for a production. However, they are not nearly

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[224] However, exceptions—such as the helicopter that flies in during *Miss Saigon*—exist. *See* Diep Tran, *So, About* Miss Saigon*'s Real Onstage Helicopter . . .*, PLAYBILL (Mar. 9, 2017), https://perma.cc/GR9G-SPEW.

[225] For example, *Playbill* shares production photos on its website. These galleries often have fewer than twenty photos. *See, e.g.*, *Production Photos*, PLAYBILL, https://perma.cc/6MCC-4PHY.

[226] ELLICKSON, *supra* note 1, at 169; *see supra* text accompanying notes 155, 167.

[227] 17 U.S.C. § 106(4).

as efficient at policing whether the terms of the licensing agreement are being followed. These standard agreements are explicit that licensees may not make any changes without written approval from the licensing company.[228] When a theater requests a change, the licensing company will ask the playwright—or, more often, their agent—to approve or deny the request.[229]

Although that is how all script changes are meant to be approved, it may not be done that way in practice. Nonprofessional theaters, such as community and college theaters, may assume that they will never get caught, so they choose not to go through the hoops of applying for approval or risk applying and being told no.[230] The assumption about not being caught is likely correct. Flores discussed that licensing companies have no efficient way of monitoring changes to a licensed production.[231]

As one enters the professional world, changes are more likely to be caught because other professionals are more likely to know the work of their peers and notice modifications.[232] Even when one does not intend to alter a script, there may be textual ambiguities or impossibilities—for example, Shakespeare famously calls for a

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[228] *See, e.g.*, *Performance License*, *supra* note 43 (emphasis in original):

> 2. *Changing the play:* Under federal law, you may not make any changes, including but not limited to the following:
>
> a. *You may not add* new music, dialogue, lyrics or anything to the text included with the rented material.
> b. *You may not delete*, in whole or in part, any material in the existing Play.
> c. *You may not make changes of any kind*, including but not limited to changes of music, lyrics or dialogue or change in the period, characters or characterizations in the presently existing Play.

See also Can I Make Changes to the Script for My Production?, CONCORD THEATRICALS, https://perma.cc/XNS6-CPGD ("[I]t is a violation of Federal Copyright Law to make any changes to a play or musical for the purposes of production without first obtaining written permission from the rights holder." (emphasis omitted)).

[229] Video Interview with Dyan Flores, *supra* note 83.

[230] *See* Video Interview with Sammi Cannold, *supra* note 13 (discussing the general ethos of college theater and her perspective directing *Evita* with two actors in the role of Eva Perón in college); *Copyright 101*, DRAMATISTS GUILD, https://perma.cc/YV6X-LFAE (explaining the launch of the #DontChangeTheWords initiative "[i]n response to persistent and troubling reports of copyright infringement within high school and college theater departments").

[231] *See* Video Interview with Dyan Flores, *supra* note 83 (observing that if a high school production split a character in two, "[t]here is probably no way that the licensing company or the author would find out about it").

[232] *See* Video Interview with Sammi Cannold, *supra* note 13 ("Particularly when you're directing in New York and you're directing work that has already existed, you can't hide anything. Everybody knows this work. You have people who are fans of this work that come to the work that would know immediately if you did something that wasn't kosher.").

character to "[e]xit, pursued by a bear" in *The Winter's Tale*[233]—which open a script up to interpretation by directors.

Whether exercising discretion by choice or necessity, directors recognize the importance of honoring the intent of the playwright. This norm, combined with the close-knittedness of the New York community, leads to little tension between directors and playwrights in the professional New York theater community. However, there is a breakdown in the norm when looking at all professional theaters as a community, independent of geography. This nationwide community of professional theaters is less close, and this break is illustrated by the handful of lawsuits that have been brought by playwrights against LORT directors for copyright infringement.

a) The norm exemplified. Directors self-regulate their artistic choices to comport with a playwright's intent. Cannold starts her work as a director by reading the script to understand the parameters set by the playwright.[234] When she wants to make choices that change something explicitly stated in the script, she will work with the playwright to get his or her approval.[235] When the script does not provide direction or is ambiguous, Cannold makes sure that the choice she makes is "honoring the original intent of the work."[236]

Cannold provided an example of how she made a staging choice, without seeking approval, that was not expressly addressed in *Evita*. Her change made the scene more historically accurate, which aligns with the piece's intent as a musical biography of Eva Perón.[237] An essential plot point in the musical is that a famous tango singer, Agustín Magaldi, visits Eva's small town, they have an affair, and she convinces him to bring her back to Buenos Aires.[238] Cannold found, in preparation for directing the show, that Magaldi's wife would have been in Junín when he seduced Eva. The scene takes place in a cabaret, and Eva, Magaldi, Che, and Eva's family members are the only characters named in the libretto.[239] Because of its setting, however, most productions have ensemble members in the scene as well. Cannold used the

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233 WILLIAM SHAKESPEARE, THE WINTER'S TALE act 3, sc. 3.

234 Video Interview with Sammi Cannold, *supra* note 13.

235 *Id.*

236 *Id.*

237 *Id.*

238 ANDREW LLOYD WEBBER & TIM RICE, EVITA: MUSICAL EXCERPTS AND COMPLETE LIBRETTO 58–59 (1979).

239 *Id.* at 58.

presence of ensemble members and the historical facts to justify her inclusion of an actress who played Magaldi's wife. This character "stood next to [Magaldi] and . . . put her arm around him. It was clear that she was his wife. . . . [Cannold] didn't change the text at all, but [she] did sort of run with that idea."[240] When Tim Rice—who wrote the lyrics of *Evita*—saw the show, he thought that including the wife was "cool."[241]

Because directors want to respect the work of the fellow artists (the playwrights) in their community, they are careful—particularly in New York—when exercising their artistic liberty to make sure that they are respecting the intent of the work. However, because enforcement comes, in part, via gossip, there is a subjective element to this norm. It is only when the community views a director's decision as going too far that reputational harms will arise. As such, this norm operates more like a context-specific standard than a bright-line rule. Furthermore, the sanction of gossip is responsive to the egregiousness of the violation. In borderline cases, only some members of the community will spread negative gossip about the work, and the content of the gossip may be tempered. But, in extreme cases, it might be all that anyone is talking about.

b) The breakdown of the norm and enforcement between communities. Although changes to a script are generally difficult to police, there have been a handful of instances where playwrights have been made aware of alterations to their works and have pursued litigation instead of relying on self-enforcement mechanisms. These cases have all settled outside of court. One such case arose from a production of Samuel Beckett's *Endgame* at the American Repertory Theater (ART) in 1985.[242] Beckett's script explicitly calls for a "[b]are interior."[243] The ART's set was a derelict subway station.[244] Beckett, taking great offense at the liberties that the ART was taking with his stage directions, ordered his lawyer to file suit to halt the production.[245] The parties were able to avoid litigation through a settlement agreement that included the requirement that the ART insert into each program

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240 Video Interview with Sammi Cannold, *supra* note 13.

241 *Id.*

242 *See* Richard Christiansen, *Beckett vs. Director*, CHI. TRIB. (Jan. 21, 1985), https://perma.cc/JJ7F-WE6S.

243 SAMUEL BECKETT, ENDGAME: A PLAY IN ONE ACT 1 (1958).

244 Christiansen, *supra* note 242.

245 Thomas Pallen, *The Strange Case of Samuel Beckett vs. Artistic Freedom in Theatre*, 13 J. TENN. SPEECH COMMC'N ASS'N 35, 36 (1987).

a disclaimer written by Beckett that denounced the production, stating, "Any production of *Endgame* which ignores my stage directions is completely unacceptable to me. . . . Anybody who cares for the work couldn't fail to be disgusted by this."[246]

The fact that litigation occurs between LORT theaters and playwrights, but not with New York professional theaters, illustrates the breakdown of norms across the country.

2. A sliding scale of protections for originality.

a) The norm and its alignment with copyright law. In conversations with theater artists, the artistic intuition was that the extent of protection afforded to an artistic choice depended on the originality of that choice. These norms parallel copyright conventions and requirements such as the requirement for originality and the idea/expression dichotomy.[247]

From my research, I found that the general rule held by directors and designers in the New York theater community is that the more specific or inventive a choice is, the more protected it is and the less acceptable it would be for someone to appropriate it.

A director does not feel the same ownership over their conceptual vision for a show as they do for more defined choices. This belief comports with the Copyright Act's limit that "[i]n no case does copyright protection . . . extend to any idea . . . [or] concept."[248] Cannold's staging of the musical *Violet* illustrates this aspect of the norm. *Violet* tells the story of "a scarred woman who embarks on a cross-country bus trip to be healed by a minister."[249] Instead of staging the musical in a theater, Cannold directed the show with the actors and audience on a moving bus.[250] Her production was certainly unique—no one has staged the show on an actual bus before or since. But if another director wanted to stage the show on a bus, her impulse is that she would probably not "have any claim to say, 'That's my idea' . . . because it's not original enough."[251] Her idea was to stage a show about people on a bus, on a bus. Cannold, who has also directed the musical

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246 *Id.* at 39.

247 17 U.S.C. § 102.

248 17 U.S.C. § 102(b).

249 *Violet*, MUSIC THEATRE INT'L, https://perma.cc/PCM9-2N2W.

250 *See* Michael Gioia, Violet *on a Moving Bus, Which Began at a College, Will Resurface at A.R.T.*, PLAYBILL (Aug. 4, 2016), https://perma.cc/A5HE-NFKF.

251 Video Interview with Sammi Cannold, *supra* note 13. Her intuition about originality here is conceptually distinct from the scènes à faire doctrine, as every other production of *Violet* has been able to evoke bus travel without actually traveling on a bus.

Ragtime—which has a prominent storyline about immigrants arriving in the United States—on Ellis Island,[252] says that these types of site-specific productions pose "a weird quandary as a director, because is that [site-specific staging] my idea, or is it an obvious idea?"[253]

Cannold's production of *Evita* at New York City Center welcomed the audience to the theater with Eva's iconic white ball gown over the center of the stage, twinkling under the spotlights.[254] As far as Cannold knows, no other production of *Evita* had opened in such a way.[255] The specificity and originality of that scenic picture makes Cannold feel like that staging is hers, and she would be upset to see another production use the same opening.[256]

Mantello, the director from the *Love! Valour! Compassion!* lawsuit, has shared similar sentiments. He stated, "Not everything I do is a unique contribution. I would never try to copyright my staging of 'Glengarry Glen Ross,' for instance, which is so straightforward."[257] Gutierrez, of the *The Most Happy Fella* lawsuit, shared a similar sentiment with his lawyer, Shechtman: Gutierrez had no interest in copyrighting his direction of *The Heiress*. He felt like he did not make sufficiently original contributions to the work for it be "his," as it was a straightforward drawing-room play.[258]

My interviews indicate that when staging is obvious, the directors feel no ownership or right to the blocking. It is as the piece becomes more particular that the director feels increased ownership of it and it becomes incrementally less acceptable for another director to copy or co-opt the original's work. Although this norm comports with many copyright principles, there is value in it being a community-regulated norm as opposed to a legal rule, like copyright. Under the Copyright Act, a work is either original (and potentially copyrightable) or not (and therefore never protectable under copyright). The norm held in the theater community allows for more flexibility.

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[252] Michael Gioia, *What It Was Like Last Night on Ellis Island, with* Ragtime *Resounding*, PLAYBILL (Aug. 9, 2016), https://perma.cc/K2UN-DNHK.

[253] Video Interview with Sammi Cannold, *supra* note 13.

[254] *See* Jesse Green, *Review: An 'Evita' Newly Tailored for Our Time*, N.Y. TIMES (Nov. 15, 2019), https://perma.cc/3B6Q-YREY.

[255] Video Interview with Sammi Cannold, *supra* note 13.

[256] *Id.*

[257] Green, *supra* note 114.

[258] Telephone Interview with Ronald Shechtman, *supra* note 113.

b) Litigation with LORT productions. Briefly revisiting the three marquee cases discussed in Part II.B.4, it is worth noting that all three were Broadway teams suing LORT theaters. The distance between these theater communities may explain why the LORT designers and directors were comfortable using the original ideas of the Broadway team that would otherwise be protected by this norm. For example, Mantello highlighted the copying of the opening scene of his Broadway production of *Love! Valour! Compassion!* as one of the reasons that he brought his lawsuit.[259] The script calls for simply a "[b]are stage" at the start of the show.[260] Instead, Mantello opened the show with the actors all standing around a doll house.[261] This was clearly a unique addition to the show that he made. Michael Hall, the director of Caldwell Theater Company's production in Florida, copied that stage picture exactly.[262] When asked "on what basis he felt he had the right to copy another director's work, [Hall] answered, 'On the basis of the history of the theater going back to the Greeks.'"[263] The division between the belief held by this LORT director and New York theater professionals confirms the limitations of Ellickson's hypothesis when applied to communities that are not close-knit.

c) Infringement by nonprofessional theaters. Perhaps unsurprisingly, nonprofessional theaters seem to frequently violate the norm held within the New York theater community. Set designer Beowulf Boritt, in a conversation with *Playbill* about intellectual property in theater, pulled out his phone during the interview to search for productions of two shows he had designed. He shared, "[M]y search yielded a pile of images that were clearly copies of my designs. It's hardly worth my time to start chasing down every high school or community theatre that does this."[264] Although anecdotal, it is logical that nonprofessional theaters who may lack awareness of the norm or the training to create their own artistic choices breach this norm frequently. I do not aim to take a normative stance here on whether nonprofessional theaters ought to be allowed more leeway in copying Broadway designs or directorial choices. Rather, this example merely shows that, because these are such distant communities, the New York

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259 Green, *supra* note 114.

260 MCNALLY, *supra* note 85, at 9.

261 Green, *supra* note 114.

262 *Id.*

263 *Id.*

264 Robert Simonson, *ASK PLAYBILL.COM: Why Can't I Take Photos in a Broadway Theatre?*, PLAYBILL.COM (June 27, 2011), https://perma.cc/7ZL6-CPPV.

professional norms are not enforced as rigorously against members of the nonprofessional community.

D. Welfare Maximization

Determining whether a norm is welfare maximizing is difficult. One must both determine what welfare maximization means in the given context and the extent to which the norm promotes that goal. Ellickson notes that "[i]n most contexts the objective costs and benefits of alternative norms are impossible to quantify with precision. Therefore, both norm makers and analysts of norms must fall back on largely intuitive assessments of the utilitarian potential of alternative rules."[265]

In the context of intellectual property rights in theater, the welfare-maximizing goals of a norm align largely with the traditional justifications for protecting intellectual property. The Supreme Court has established that "[t]he immediate effect of our copyright law is to secure a fair return for an author's creative labor. community, a welfare-maximizing norm would reward original creators for their contributions while also allowing later artists to build on and find inspiration in the work of others. Because the welfare maximization only occurs intragroup, it might be that this norm harms the development of art outside of the close-knit community.[266]

This Section analyzes how the discussed norms promote welfare within the professional New York theater community. To those in the community, the norms seem intuitively welfare maximizing, which is largely the metric relied upon by Ellickson.[267] However, Ellickson bolstered his analysis by considering alternative, inferior norms.[268] I will similarly explore alternatives to the two norms discussed and conclude that these alternatives are less efficient than what is currently seen in practice.

1. The intent of writers.

Does the New York professional theater community benefit when directors are able to take limited artistic liberties with a

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265 ELLICKSON, *supra* note 1, at 183.

266 ELLICKSON, *supra* note 1, at 169.

267 *Id.* at 183. For example, respecting the intent of playwrights seemed obvious to Cannold: "[I]f I were a writer, I would want . . . my work respected in that regard." Video Interview with Sammi Cannold, *supra* note 13. In short, those in the community largely abide by the Golden Rule, treating others' work as they would like their own to be treated.

268 *See, e.g.*, Ellickson, *supra* note 5, at 87–88.

work so long as it conforms to the playwright's intent? I argue that it does. This norm facilitates a balance (set by the community) between the interests of the playwright and the director.

Without this norm, playwrights might rely more heavily on filing copyright infringement claims whenever directors make significant changes. In addition to litigation costs, such action would have social costs. Because welfare can include the well-being of the community, threats to harmony are threats to welfare.[269] Furthermore, harsh regulation favoring playwrights would stifle directorial creativity—potentially depriving the world of "cool" (to borrow Rice's term) choices.[270]

Because playwrights have a legal claim when their work is infringed, it is unlikely that the community norm would swing too far the other way—granting broad discretion to directors and little protection to playwrights. If such a norm were to develop, it might chill playwriting. Intellectual property law is largely predicated on the idea that ownership encourages production.[271] A rule granting directors so much control over the playwright's work that it can no longer be said to be the playwright's would eliminate the incentive to produce.

The current norm allows directors to take risks and playwrights to protect the intent of their works. With this middling norm, the question then becomes whether the norm might better approach welfare maximization if it were to lean more toward one side or the other. To this, I suggest that the community has landed on an equilibrium that seems to be working for it, but it could internally adjust by becoming more or less stringent in its gossip.

2. The sliding scale of originality.

The sliding scale of the originality norm in theater permits a balancing between these opposing goals. It rewards more creativity with more protection and allows the community to serve as its own judge. Keeping the regulation within the community also

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269 *Cf.* ELLICKSON, *supra* note 1, at 170 (noting that welfare can include "other outcomes that people might value as much or more, such as . . . high social status[ ] and close personal relationships").

270 *See supra* notes 237–41 and accompanying text.

271 *See* U.S. CONST. art. I, § 8, cl. 8. *But see generally* Eric E. Johnson, *Intellectual Property and the Incentive Fallacy*, 39 FLA. ST. U. L. REV. 623 (2012) (recognizing that intellectual property law is based on the "incentive theory" but arguing that extrinsic incentives are unnecessary for creativity and innovation to occur).

minimizes the transaction costs associated with lawsuits, acquiring the rights to a design or staging, and potential tension within the community.

One alternative norm would afford no protection to designers and directors. Such a norm would lower transaction costs insofar as there would need not be tension over whether an idea was illegally stolen. It would also allow for the larger dissemination of exciting creative ideas. If a Broadway designer makes an innovative and effective design, theaters across the country could use that same design in their productions. This would save them the cost of hiring their own designer and would give them access to higher quality designs. But the major drawback of such a regime is that it would lessen the incentive for creativity, and the initial benefits of increased access to the works would fade with time as the quality of work decreases. Furthermore, it might increase search costs for producers hoping to hire designers and directors for a new work.[272] Because it would be permissible for an artist to copy the work of another, the producer could not easily know if a designer or director's portfolio is a representation of their own creativity or just their ability to copy the work of others. This norm, particularly with its lack of incentives for original creation, is unlikely to promote "creative labor" or "stimulate artistic creativity for the general public good."[273] In short, such a norm would harm the professional New York theater community, therefore producing less welfare than the current norm.[274]

Another alternative would be to afford complete, or at least significantly more, protection to designers and directors. This norm would be inefficient because it would stifle future creativity and would likely be impossible to implement given that there are

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[272] *See* Video Interview with Sammi Cannold, *supra* note 13 (discussing the importance of working with designers who are creative and original in their own right).

[273] *Twentieth Century Music Corp.*, 422 U.S. at 156.

[274] Such a norm would likely not be welfare maximizing for American theater as a whole in the long term. Stunted creativity in New York is likely to result in poorer art for others to build on.

It might also have long-lasting effects on the training of future creatives. Artists speak often of honing their craft, which requires experimentation. If schools simply copy the latest and greatest designs from Broadway, there would be fewer opportunities for young artists to develop their skills. Furthermore, becoming a designer or director might be less lucrative (since one's work would be less protected under this regime). Therefore, there would be additional barriers to developing professional artists. Professor Eric Johnson has argued that creativity can occur without the incentives provided by intellectual property law. *See generally* Johnson, *supra* note 271. However, even if creativity can persist in such a legal environment, I am unconvinced that legal rights do not at least marginally influence creative output.

no bright lines when it comes to creativity. For example, the type of scenes that are not copyrightable under the scènes à faire doctrine would potentially be protected under this regime. Although licensing arrangements could be used to allow later artists to use the work of earlier artists, managing such a system would increase transaction costs. An overly protective rule like this would not be welfare maximizing.

The norms that have naturally evolved in the professional New York theater community better promote creativity and have lower transaction costs than potential alternative norms.

E. Alternative Explanations for the Lack of Litigation

Although social norms seem to be the driving force behind the theater community's views about intellectual property rights for directors and designers, assumptions about the law may also directly shape behavior or, at least, inform the development of the norms themselves. There are two main assumptions in this field. The first, which is probably wrong, is that the work of designers and directors is their protected intellectual property. The second is that, despite these works being presumed to be protected, litigation is futile as an infringing theater will be unable to pay damages to the property owner.

Independent of what the Copyright Office, case law, or scholarly articles conclude about copyright in theater design, there is a widely held belief within the theater community that the work of a designer is their protected intellectual property. Ushers in many theaters are instructed to stop patrons from taking photos inside the theater even before the production has begun.[275] Representatives from IATSE Local 360 (the union which represents theater staff, including ushers) and the Stage Directors and Choreographers Society (the union for directors and choreographers) both cited intellectual property issues as the reason for this policy.[276]

In the same *Playbill* article discussed in Part III.C.2.c, Boritt confidently asserts that "scenery is intellectual property, much like a book, or a song. While you may not be doing anything nefarious with your snapshots, if they end up on the web, that visual information is available to anyone with a quick Google search,

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[275] Simonson, *supra* note 264.

[276] *Id.*

and the designs can essentially be stolen."[277] Howard Sherman, a previous director of the American Theatre Wing, questioned, "What is occurring in people's training that made them not understand that this is both illegal and disrespectful of fellow artists?"[278] In reality, copying the ideas of another designer may not be illegal, yet theater administrators and practitioners speak of it as if it is. In some ways, this assumption further highlights the strength of the norms in the professional New York theater community without formal legal backing.[279]

However, the belief that designs are protected—and that the threat of litigation is the determining factor in why people avoid copying—is not persuasive. Talking to theater artists, a fear of litigation is not a driving motivator.[280] People become artists because they want to create art, and copying somebody else's ideas is not creating art.[281] Instead, Cannold considers the playwright's intent and what she hopes to add to the theater through her production.[282] Additionally, the fact that few lawsuits are filed (and even fewer litigated) suggests that potentially infringing behavior is not deterred by a fear of copyright enforcement.

Another potential reason for the lack of litigation is the belief that infringers would be judgment-proof or that the infringed could not afford to bring a claim. Sherman believes that the lack of litigation is unsurprising, especially for designers who are not a part of a union. "When someone has to [take legal action] alone, these designers, who are barely paid in the first place—it's hard to overstate how difficult that is for someone in that position."[283] It could also be that cease-and-desist letters are sufficient to deter potentially infringing productions from opening. "Productions are often shut down if anyone even mentions copyright infringement, whether a lawsuit is actually filed or not."[284] Nonprofit theaters—particularly small, regional theaters—operate on small budgets

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277 *Id.*

278 McKee, *supra* note 134.

279 *Cf.* Hendrik Hartog, *Pigs and Positivism*, 1985 WIS. L. REV. 899, 912–19, 924 (discussing, historically, how norms can explain the gap between the "law-in-the-books" and "law-in-action" in English common law).

280 *See, e.g.*, Video Interview with Sammi Cannold, *supra* note 13.

281 This is not to say that artists create only out of passion. Artists need to be paid for their work if they are to work in the arts as a career.

282 Video Interview with Sammi Cannold, *supra* note 13.

283 McKee, *supra* note 134 (alteration in original).

284 Temme, *supra* note 128, at 15.

that barely cover their expenses.[285] Given their small margins, the cost of a lawsuit may be prohibitive.

CONCLUSION

Despite ambiguous intellectual property laws for the staged aspects of a play or musical, the theater community continues to create new shows and reimagine old favorites. The (potential) lack of legal protections is neither deterring creativity nor causing endless copying in the professional theater world.

This can be explained by the application of Ellickson's hypothesis to the professional New York theater community and conforms with findings in other creative industries with norms-based intellectual property regimes.[286] The close-knittedness of this subcommunity has allowed for the development of norms and enforcement mechanisms that protect original works to the extent that the community finds appropriate. Outside of the close-knit professional New York theater community, however, these norms are not followed as regularly. Additionally, because community enforcement of the norms is not as efficient, disagreements between artists from less-close-knit communities are more likely to rely on litigation to resolve tensions. Because these court cases continue to settle, this turn to litigation does little to clarify the ambiguities in the Copyright Act's applicability to theater designers and directors. Nonetheless, even without legal clarity, the robust self-regulated norms of the New York theater community facilitates the production and protection of creative work in American theater.

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[285] *Id.* at 15–16 (citing Kevin Brass, *What It Takes to Keep a Community Theater Running*, WALL ST. J. (Nov. 3, 2014), https://www.wsj.com/articles/what-it-takes-to-keep-a-community-theater-running-1414965272.

[286] *See* Sprigman, *supra* note 6, at 252–53.