A Statutory Rebuff to the Idea of a "Director's Copyright"

BY RACHEL S. WOLKOWITZ

Being in the theatre business, we know theatre is happening all around us at myriad levels. We know that it is the rare play that gets to Broadway or the West End without numerous drafts, workshops, or backer's auditions. Shows change over time, as do the connections with various producers, designers and, of course, directors. What does not change is you, the author of the work. You get to decide the order of the scenes, which character is on stage at a given time, the dialogue of the piece. For your efforts, the government gives you ownership of the copyright in your work.

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In the last two decades, the Stage Directors and Choreographers Society (SDC) has pushed for recognition of a separate copyright in stage directions, presumably with the belief that a "director's copyright" would lead to more money and constrain some forms of plagiarism. While we acknowledge and salute the hard work and creativity that directors bring to shows, a copyright would not serve either of the SDC's goals. For a director's copyright to have any effect, impractical assumptions must be made.

Necessary Assumptions

First, it is important to understand that stage directions are not listed in the Copyright Act as an example of a "dramatic work" separate from the dramatist's script. Moreover, no judge has ever expressly recognized a copyright in stand-alone stage directions; the only three cases ever to raise the issue were settled before trial. Due in large part to the SDC's advocacy, many academics have spilled ink over the issue of whether stage directions are truly copyrightable. Most recently, Margit Livingston, a professor at DePaul University College of Law, published an article in the Boston College Law Review on the subject, concluding that if and only if a number of assumptions are true, then stage directions would meet the bare bones requirements for some type of copyright. These assumptions are that (1) only one director is solely responsible for the stage directions being enforced, (2) the stage directions were not dictated by the dialogue or playwright-written stage business, (3) courts will accept a prompt book or video recording as the fixed form of the work, (4) the stage directions will be sufficiently creative

under the statute, and (5) the playwright's public performance right is not implicated. However, she also discussed how any right a director could claim would be extremely limited: "Ultimately, 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" (emphasis added).

Achieving the Threshold of Copyrightability: Originality

Legally, only original works of authorship fixed in a tangible medium attain copyright. The requirements for originality are pretty low — just a minimum creative step is required to be considered original. However, stage directions would be "derivative works," that is, works based on pre-existing artistic works. Judicial opin-ions make clear that derivative works must be more than minimally cre-ative to fulfill the originality require-ment. This means that the standard "Bob stands up and exits stage left" direction, alone, would not be copyrightable because it is not creative enough. Only stage directions that are more than minimally original, by their own terms, are copyrightable.

Moreover, the originality of a "director's copyright" comes into question when directors themselves draw on certain conventions to communicate with an audience. For example, director John Rando recently attempted to copyright the use of a red ribbon to convey the flow of blood from an injured character. However, theatres have been using ribbon to communicate blood for centuries, and it has become an uncopyrightable convention. Another example might be if your play calls for blue light to convey isolation. As the author, you would have a valid copyright in your play, even though you would not have the exclusive right to blue light for isolation. Another playwright is free to come along and call for blue light when one of her characters feels isolated, provided the play as a whole is a different original work of authorship.

This presents a problem for stage directions, though, because so much of what the average director does to communicate with the audience is based on convention, whether these conventions are using a particular color light or having a character tip his fedora when greeting another character. Any copyrightable work would need to go beyond single con-ventions to overcome the originality requirement.

Copyright is a government right designed to reward creativity and the government only grants it to truly original works of authorship. Livingston acknowledges that after filtering out a playwright's contributions, "a particular staging of a play may not contain enough original elements to qualify for copyright protection." Having a valid copyright means that the owner has a series of exclusive rights that can only be limited by a few statutory and judicial exceptions such as fair use and the convention exception discussed above. It is extraordinarily difficult to separate a playwright's intention or a previous director's contribution from the later director's contribution, and thus to be considered sufficiently creative under copyright law. Therefore, three of Livingston's five necessary assumptions are impractical.

The Threshold for Copyrightability: Fixation

The author must also fix the work. As a dramatist, you fix your authorship in the script, either in hard copy or hard drive form. For choreography—the art form most like stage directions—the copyrighted work is fixed in either a special form of notation or in an audiovisual recording. This fixation requirement forces advocates for and against a "director's copyright" to consider what stage directions really are and what a director's contribution to a work really is. If we are discussing creative choices a director gets to approve or deny as the director's copyrightable work, then some notes about movement in a prompt book is not a valid fixation because it would be too incomplete.

More significantly, a video is also an ill fit for fixing a director's work because it would fail to distinguish between the contributions of the various actors, designers, techs, and, of course, playwrights unless carefully annotated. If the director's work is only the movement directions in a prompt book, the directions alone would most

likely not rise to the level of original authorship or would be owned by the dramatist as authorial decision-maker determining what suggestions, influences, and inspirations are allowed to enter into the script. Even so, the directions would not properly differentiate the contributions along the process from workshop to Broadway. As Livingston admits, "When the play finally reaches the upper tier of New York theatres, it will be almost impossible to separate the contributions of these many 'collaborators' from the playwright's independently generated expression." Therefore, a prompt book or video recording will likely not suffice and a director's copyright would require another form of fixation to be considered valid.

Implicating The Playwright's Performance Right

Owning a copyright in a dramatic work, the playwright has certain exclusive rights to the script: reproduction, authorization and preparation of derivatives, distribution of copies, public display (i.e., of a manuscript), and live public performance.

According to Copyright Law, to "'perform' a work means to recite, render, play, dance, or act it, either directly or by means of any device or process..." (emphasis added). In the House Report explaining this section of the Act, Congress elaborated: "To 'perform' a work... includes reading a literary work aloud, singing or playing music, dancing a ballet or other choreographic work, and acting out a dramatic work or pantomime. A performance may be accomplished 'either directly or by means of any device or process,' including all kinds of equipment... and any other techniques and systems not yet in use or even invented." Under this definition, what directors do—interpreting from page to stage—would be one part of the public performance right licensed, not assigned, to a producer by the playwright. This distinction is critical as a playwright retains owner-ship of the copyright though the work is performed. Granting a copyright in stage directions would change the playwright's performance right from exclusive to nonexclusive. This would be an absurd result and not recognized under the court tradition to interpret law as to avoid absurd results. In this way, a director's copyright would inherently implicate and conflict with the playwright's public performance right.

Jennifer Maxwell of the John Marshall School of Law, in her note entitled "Making a Federal Case for Copyright Stage Directions: Einhorn v. Mergatroyd Productions," declared that "playwrights are well protected and should not fear a director's ability to copyright stage directions" because playwrights would still have rights in the script itself. However, one only needs to look to the standard performance or publication license to see that there are plenty of reasons to "fear."

Licensing and publishing agreements include warranties and representations that the playwright has the sole and exclusive right to license the public performance of a work free of any encumbrances. If a work is performed thousands of times—for example, hundreds of productions of *Oklahoma!* are performed each year—each director would have a property right in the performance and the po-tential to sue a follow-on liscense of the playwright for infringement. This would drastically reduce the market for a script.

Additionally, many contracts have an indemnity clause that holds the playwright responsible for any copyright challenges to the production. This means that they agree to be responsible for any copyright claims that come up on a production. Thus, when a director sues a playhouse because it is using their stage directions without licensing that right from the director, contractually, the playhouse can bring the playwright into the suit for breach and/or indemnification. Presumably, directors would want to start licensing their stage direc-tions much like playwrights do now. However, stock and amateur licensing contracts mandate that changes cannot be made to the script or music. While the extent to which this "no-change rule" is enforced in the school system is questionable at best, stage directors may well put such a clause in their contracts, too. This would severely limit the creativity in schools as well. Though schools could use bits of the staging and

claim fair use or convention at the trial stage, most schools and not-for-profit theatres do not have the resources to risk a suit. Thus, the staging would have to be licensed or completely thrown out. Unfortunately, these in-stitutions do not have the resources to completely restage a piece. Thus, the piece would not be performed or amateurs and stock companies would not be able to put their interpreta-tion on a piece if there was overlap with any previous interpretation.

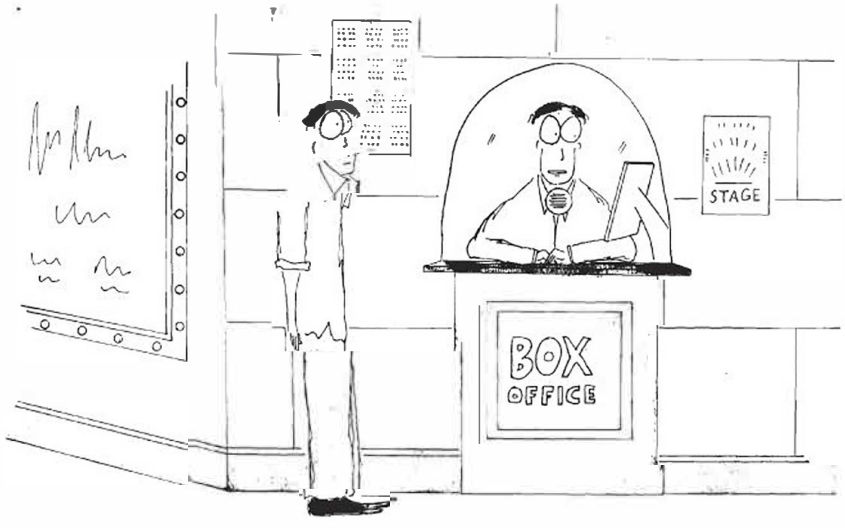
A Union of Sole Directors?

As acknowledged by Ron Schechtman, counsel to the SDC, every director participates differently in each production. Some help shape a work as it moves through its development from readings to showcases to workshops to full scale productions, perhaps even to Broadway. Others are only fleetingly involved. While figures are not available for how often a director stays with a piece from inception to first-class production, the conventional wisdom is that very few shows have the same director all the way through. In this way, it is likely very rare for one person to be the sole director enforcing certain stage directions. Rarer still is the developed show that does not incorporate at least some of the creative, interpretive decisions of earlier directors. Determining who would be the author of a particular show's stage directions and who would be cut out would be an administrative mess.

Current Protection for Directors

Though recent literature suggests that there is some fuzziness as to what a judge or jury would do with stage di-rections (this is often the case with many areas of the law), there is con-sensus that if some judge were to grant a copyright in stage directions it would mean very little. Because of safety valves in the copyright law—the most common examples being fair use and the inability to copyright ideas-directors would only be able to claim infringement on complete plagiarism. Yet, SDC membership rules already protect against outright "plagiarism" between directors. It is dealt with internally and does not justify granting a legal right that would interfere with the playwright's right to work.

In sum, directors have an extreme-ly weak case for a copyright in stage directions. Even if a judge would agree that stage directions in a bubble were valid copyrightable subject matter, the playwright's public performance right would step in and invalidate the copyright. Also, the detrimental ef-fects of a director's copyright to the public would far outweigh the ben-efits. Let's support each other in the theatre, but let's not bring copyright into the picture.



All I have left is obstructed mezzanine or inaudible aisle. MARK KRAUSE