

2007

To Fix or Not to Fix: Copyright's Fixation Requirement and the Rights of Theatrical Collaborators

Carrie Ryan Gallia

Follow this and additional works at: <https://scholarship.law.umn.edu/mlr>



Part of the [Law Commons](#)

Recommended Citation

Gallia, Carrie Ryan, "To Fix or Not to Fix: Copyright's Fixation Requirement and the Rights of Theatrical Collaborators" (2007).
Minnesota Law Review. 575.

<https://scholarship.law.umn.edu/mlr/575>

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Minnesota Law Review collection by an authorized administrator of the Scholarship Repository. For more information, please contact lenzx009@umn.edu.

Note

To Fix or Not to Fix: Copyright's Fixation Requirement and the Rights of Theatrical Collaborators

Carrie Ryan Gallia*

In August 2004, an artistic partnership was born.¹ Nancy McLernan, a playwright, and Jonathan X. Flagg, a producer, approached Edward Einhorn to direct the upcoming production of McLernan's Halloween play, *Tam Lin*.² Flagg offered Einhorn \$1000 to direct the show, and Einhorn accepted.³ The parties never signed a contract.⁴ Einhorn rehearsed the show for weeks in a process that blended dance, fight choreography, puppetry, and staging into a single, coherent production.⁵ Then, on the eve of the scheduled opening, Einhorn was fired.⁶ He was never paid.⁷ The show opened as scheduled, with an assistant credited as director.⁸ Einhorn brought suit in federal court, asserting, among other claims in *Einhorn v. Mergatroyd Productions*, that McLernan and Flagg infringed Einhorn's copyright when they used his staging and choreography in the pro-

* J.D. Candidate 2008, University of Minnesota Law School; M.F.A. 1998, Columbia University School of the Arts; A.B. 1995, Princeton University. The author thanks Professor Ruth Okediji for her unwavering guidance and support throughout this Note's journey to publication and Professors Brett McDonnell and Tom Cotter for their assistance in the development of this topic. The author also thanks the tireless board and staff of the *Minnesota Law Review*, notably David Jenson, Jenni Vainik, Jason Zucchi, Betsy Flanagan, and Kevin O'Riordan. Finally, special thanks to Andy Gallia for his love and proofreading. Copyright © 2007 by Carrie Ryan Gallia.

1. The story of the production of *Tam Lin* is detailed in *Einhorn v. Mergatroyd Productions*, 426 F. Supp. 2d 189, 191–92 (S.D.N.Y. 2006).

2. *Id.* at 192.

3. *Id.*

4. *Id.*

5. *See id.*

6. *Id.*

7. *Id.*

8. Jesse Green, *Exit, Pursued by a Lawyer*, N.Y. TIMES, Jan. 29, 2006, § 2, at 1.

duction of *Tam Lin*.⁹ While the claim survived a motion to dismiss in April 2006,¹⁰ no court—in this or any other case—has ruled that a copyright for stage direction exists.¹¹

Financially, *Tam Lin* pales next to the big musicals.¹² The big musicals, however, do no better when it comes to protecting the creative contributions of directors. In November 2006, a lawyer representing the director of the Broadway production of *Urinetown: The Musical*—which won three Tony Awards in 2002, ran for 965 performances, and recouped its backers' \$3.7 million initial investment¹³—sought fees and damages from the creative teams behind two Midwestern productions that had used the Broadway staging without permission.¹⁴ Both theaters responded by filing for declaratory judgments that they did not infringe the director's copyright.¹⁵

Tam Lin, on the other hand, was a small off-off-Broadway play that ran only ten performances,¹⁶ and none of the artists

9. *Einhorn*, 426 F. Supp. 2d at 193.

10. *Id.* at 196.

11. Green, *supra* note 8.

12. Production costs for a Broadway show can run to \$10 million. Todd Beamon, *So, You Want a Piece of the Action?*, BALT. SUN, June 16, 2003, <http://www.baltimoresun.com/entertainment/stage/bal-hairside061603,0,7540284.story>. Theater producing, however, gives meaning to the adage that great risk reaps great reward: Cameron Mackintosh's productions, including *Les Misérables*, *The Phantom of the Opera*, and *Miss Saigon*, have grossed more than \$8 billion (more than the films *Star Wars*, *Raiders of the Lost Ark*, *Jurassic Park*, and *Titanic* combined). PBS, *Broadway: The American Musical*, <http://www.pbs.org/wnet/broadway/print/p-lp3b.html> (last visited Oct. 14, 2007).

13. See Kenneth Jones, *You Are Now Leaving Urinetown; Musical Hit Will Close Jan. 18, 2004*, PLAYBILL, Nov. 3, 2003, <http://www.playbill.com/news/article/82546.html> (reporting the length of *Urinetown*'s run); URINETOWN: The Musical, http://www.urinetown.com/flash/home_1a.html (follow "Awards" hyperlink) (last visited Oct. 14, 2007) (indicating the number of Tony Awards won by *Urinetown*); Variety.com, *Legit Weekly Box Office, Week 34: Jan. 12–18, 2004*, http://www.variety.com/index.asp?layout=legit_chart&page=legit_0304_34&dept=LEGIT (last visited Oct. 14, 2007) (detailing the financial status of *Urinetown*).

14. See Campbell Robertson, *Creative Team of 'Urinetown' Complains of Midwest Shows*, N.Y. TIMES, Nov. 15, 2006, at E3. The letter was also drafted on behalf of the show's choreographer and design team. *Id.*

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

16. Green, *supra* note 8. *Contra* *Einhorn v. Mergatroyd Prods.*, 426 F. Supp. 2d 189, 192 (S.D.N.Y. 2006) (reporting the number of scheduled performances as eight). In either event, the run of the show was limited to about one week.

involved brought “name-in-lights” star power to the team.¹⁷ The judge ruling on the motion to dismiss in *Einhorn* accused Einhorn of “making a federal case” out of “a dispute over \$1,000.”¹⁸ Einhorn saw it as seeking “a reasonable amount for [his] work as a director and for [his] property, which was used without compensation or consent.”¹⁹

A significant amount of the theatrical work in this country happens at not-for-profit companies where art, not commerce, is the motivating factor.²⁰ Minneapolis and St. Paul, for example, have over two hundred not-for-profit theater companies²¹—more per capita than any American city other than New York.²² Even if artists are not motivated solely by money, all theatrical collaborators deserve the protections and rewards conferred on intellectual property through copyright law.²³ The story of the production of *Tam Lin* is an extreme example of the pitfalls inherent in a copyright system that fails to protect the collaborative contributions to theater, an economically and culturally important American art form. Despite the fact that economic and cultural progress are the two values contemporary copyright law exists to promote,²⁴ the current legal framework ignores the work of the theater director—the artist most responsible for a theatergoer’s experience.²⁵ The President of the

17. See *Einhorn*, 426 F. Supp. 2d at 191 (“The parties to this case all aspire to success in the theater.”).

18. *Id.* (internal quotation marks omitted).

19. Edward Einhorn, Letter to the Editor, *The Director’s View*, N.Y. TIMES, Feb. 12, 2006, § 2, at 2.

20. See THEATRE COMMUNICATIONS GROUP, NOT-FOR-PROFIT THEATRE IN AMERICA: THE FIELD AT A GLANCE 1 (2007), <http://www.tcg.org/Pdfs/Advocacy/Field%20at%20a%20Glance%202007.pdf> (noting that, in 2005, 111,000 people were employed by and 32,500,000 people attended productions at not-for-profit theater companies, which earned over \$1.6 billion).

21. See Minneapolis Public Library, A History of Minneapolis: Theater, <http://www.mpls.lib.mn.us/history/ae2.asp> (last visited Oct. 14, 2007).

22. TODD R. BERGER ET AL., INSIDERS’ GUIDE TO THE TWIN CITIES 219 (4th ed. 2004).

23. Cf. Wendy J. Gordon, *On Owning Information: Intellectual Property and the Restitutory Impulse*, 78 VA. L. REV. 149, 277–78 (1992) (arguing that indulging the restitutory impulse by protecting intellectual property through nontraditional means could lead to a chill in creativity).

24. See JULIE E. COHEN ET AL., COPYRIGHT IN A GLOBAL INFORMATION ECONOMY 6 (2d ed. 2006).

25. See Helen Krich Chinoy, *The Emergence of the Director*, in DIRECTORS ON DIRECTING 17 (Toby Cole & Helen Krich Chinoy eds., rev. ed. 1973) (asserting that directors have come to have “absolute control” over theater productions).

Dramatists Guild of America has described the issue of copyright protection for stage directors as the “most important” “legal collision[]” he has encountered in his tenure at the helm of this professional association of playwrights.²⁶

Copyright law protects “original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated.”²⁷ The work of a theater director is original and authored; the doctrinal obstacle to protection is that it is not “fixed.” This Note argues that copyright’s current fixation requirement is flexible enough to render stage direction copyrightable as a derivative work. Part I looks at the history and purpose of the Copyright Act, with particular focus on the fixation requirement. Part II traces the relationship between copyright law and theater, including the evolution of directing.²⁸ Part III considers solutions to the issue of the intellectual property rights of stage directors and argues that, given the lack of robustness in the fixation doctrine, the staging of a play is sufficiently fixable to warrant protection under the Copyright Act.

I. THE HISTORY AND PURPOSE OF COPYRIGHT LAW AND ITS FIXATION REQUIREMENT

If not for the printing press, there would be no copyright protection. Prior to the introduction of the press in England in 1476, copying by hand was laborious and rarely undertaken.²⁹ The printing press made it faster and cheaper to copy books, threatening the economic interests of both writers and booksellers.³⁰ Various protection schemes emerged in response to this technological advance, evolving by 1709 into the Statute of Anne, which gave authors a protectable right in the publication of their writings.³¹

United States copyright law has its roots in the English tradition. Under the Statute of Anne, copyright protected authors and their writings, as fixed by a printing press, and served dual purposes: economics, by granting authors the right

26. See John Weidman, *Protecting the American Playwright*, 72 BROOK. L. REV. 639, 639 (2007).

27. 17 U.S.C. § 102(a) (2000).

28. While this Note focuses on stage direction, much of its analysis may apply to other theatrical collaborators as well.

29. See COHEN ET AL., *supra* note 24, at 19.

30. See *id.*

31. See Statute of Anne, 1709, 8 Ann., c. 19 (Eng.).

of publication, and culture, by “encourag[ing] . . . learning.”³² Similarly, the Constitution’s Intellectual Property Clause grants Congress the power to “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.”³³ Congress passed the first copyright statute and all of its subsequent progeny pursuant to this grant.³⁴ In practice, the Copyright Act has kept pace with developments of new media and forms of expression not within the imagination of either the framers of the Constitution or the drafters of successive iterations of the statute.³⁵ The governing statute today is the Copyright Act of 1976, codified in title seventeen of the United States Code.³⁶ Congress has amended the 1976 Act more than twenty-five times since its passage.³⁷

A. THE PURPOSE AND PHILOSOPHY OF COPYRIGHT PROTECTION

The purpose of copyright protection in this country, as stated in the Constitution, is to promote progress.³⁸ The domi-

32. See COHEN ET AL., *supra* note 24, at 21 (quoting the Statute of Anne, 1709, 8 Ann., c. 19 (Eng.)).

33. U.S. CONST. art. I, § 8, cl. 8.

34. *M. Kramer Mfg. Co. v. Andrews*, 783 F.2d 421, 432 (4th Cir. 1986). Congress passed the first copyright statute in 1790. *Id.* Judicial decisions have further refined the scope of copyright protection. *Id.* Compare *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903) (extending copyright protection to advertisements), and *Kieselstein-Cord v. Accessories by Pearl, Inc.*, 632 F.2d 989, 994 (2d Cir. 1980) (extending copyright protection to belt buckles), with *Brandir Int’l, Inc. v. Cascade Pac. Lumber Co.*, 834 F.2d 1142, 1148–49 (2d Cir. 1987) (holding a bicycle rack not copyrightable), and *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 979–80 (2d Cir. 1980) (finding that historical facts are outside the reach of copyright protection).

35. See COHEN ET AL., *supra* note 24, at 24 (tracing the extension of copyright protection to engravings, etchings, and prints; musical compositions; dramatic works; photographs; and other works of fine art); see also *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 59 (1884) (extending copyright protection to photographs); *Kramer*, 783 F.2d at 432 (extending copyright protection to audiovisuals of computer games); *Midway Mfg. Co. v. Artic Int’l, Inc.*, 704 F.2d 1009, 1012 (7th Cir. 1983) (extending copyright protection to video games).

36. 17 U.S.C.A. §§ 101–1332 (West 2005 & Supp. 2007).

37. COHEN ET AL., *supra* note 24, at 28–29.

38. See U.S. CONST. art. I, § 8, cls. 1 & 8 (“The Congress shall have Power . . . To 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.”). No record survives of any discussion by the framers about the Intellectual Property Clause. See 1 MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 1.02 & n.4 (2007).

nant theory underpinning copyright law is instrumentalism.³⁹ Proponents of instrumentalism contend that creative production requires an economic incentive; quite simply, “would-be producers of information need some assurance that copying will be limited” and that they, and only they, will be able to reap the rewards of their creation.⁴⁰ In other words, an absence of copyright protection would lead to unchecked and uncompensated copying, which would discourage creation.⁴¹ Instrumentalist theories by necessity minimize creative motivations such as “personal pride, self-fulfillment, or desire for self-expression,”⁴² which do not respond as obediently to financial incentives.

Natural law theory more sufficiently accommodates non-economic motivations, including the cultural purposes that also underlie copyright protection. According to natural law theory, an author is morally entitled to ownership of her work because she created it.⁴³ The writings of John Locke, which characterize the fruits of one’s labor as “properly his,”⁴⁴ form the basis of this theory.⁴⁵ Locke argues that ownership requires labor; the taking of an owner’s object entails the taking of labor, which harms the owner of the object.⁴⁶ Professor Wendy Gordon extends Locke’s logic from objects to intangible intellectual property, reasoning that, “if I . . . create a new intangible work of authorship or invention, you should not harm me by copying it

39. Cf. Thomas F. Cotter, *Pragmatism, Economics, and the Droit Moral*, 76 N.C. L. REV. 1, 6 (1997) (“In the United States, rights in works of authorship and inventions traditionally have been viewed as resting upon either a natural-law or an instrumentalist theory (or both).”). For a discussion of instrumentalist theories of copyright, see William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 344–47 (1989).

40. See Trotter Hardy, *Property (and Copyright) in Cyberspace*, 1996 U. CHI. LEGAL F. 217, 222 (emphasis omitted).

41. See Cotter, *supra* note 39, at 7.

42. Hardy, *supra* note 40, at 221 (internal quotation marks omitted); *id.* (arguing that such motivations are more amenable to “broad and unrestricted copying”).

43. See Cotter, *supra* note 39, at 6.

44. JOHN LOCKE, TWO TREATISES ON GOVERNMENT 111 (Ian Shapiro ed., Yale Univ. Press 2003) (1690).

45. See Cotter, *supra* note 39, at 6 n.20.

46. See Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533, 1544–45 (1993).

and interfering with my plans for it. I therefore have property in the intangible as well.”⁴⁷

For the most part, however, United States intellectual property law does not require a demonstration of labor for the conferment of rights.⁴⁸ Alternatively, much European copyright law springs from an idea similar to—but distinct from—that of Locke, promulgated by Georg Wilhelm Friedrich Hegel and Immanuel Kant.⁴⁹ In this conception, an individual acquires property by attaching his will to an external object, which “comes to embody the owner’s personality.”⁵⁰ The loss of such property affects the self and can be measured in terms other than diminution in wealth.⁵¹ An author, therefore, has the right to determine how she will communicate her creation.⁵² The copyright laws of France, Germany, and other continental countries reflect this understanding of moral rights.⁵³

B. THE FIXATION REQUIREMENT

Copyright, which under United States law inheres in “original works of authorship fixed in any tangible medium of expression,” has two basic requirements: originality and fixa-

47. *Id.* at 1545.

48. *See* Alfred Bell & Co. v. Catalda Fine Arts, Inc., 191 F.2d 99, 105 (2d Cir. 1951) (arguing that “a shock caused by a clap of thunder” can cause creation sufficient for copyright protection).

49. For a discussion of Hegel’s and Kant’s conceptions of property, see Cotter, *supra* note 39, at 7–9.

50. *See id.* at 7; *see also* GEORG WILHELM FRIEDRICH HEGEL, PHILOSOPHY OF RIGHT 45 (T.M. Knox trans., Oxford Univ. Press 1964) (1821) (“Since property is the *embodiment* of personality, my inward idea and will that something is to be mine is not enough to make it my property; to secure this end occupancy is requisite.”). Hegel explains that one may take possession of a thing by grasping it, forming it, or marking it. *Id.* at 46.

51. *See* Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 1004 (1982).

52. *See* Cotter, *supra* note 39, at 8.

53. *See, e.g.*, Law No. 92-597 of July 1, 1992, Journal Officiel de la République Française [J.O.] [Official Gazette of France], July 3, 1992, p. 8801, *available in English translation at* http://www.wipo.int/clea/docs_new/pdf/en/fr/fr062en.pdf (“An author shall enjoy the right to respect for his name, his authorship and his work. This right shall attach to his person. It shall be perpetual, inalienable and imprescriptible.”); Gesetz über Urheberrecht und verwandte Schutzrechte [Urheberrechtsgesetze] [German Law Dealing with Copyright and Related Rights], Sept. 9, 1965, BGBI. I at 1273, last amended by Gesetz, July 22, 1997, BGBI. at 1877, art. 7 (F.R.G.), *available in English translation at* http://www.wipo.int/clea/docs_new/pdf/en/de/de078en.pdf (describing the scope of an author’s moral rights as encompassing reproduction, distribution, and exhibition).

tion.⁵⁴ An author's work can be copyrighted only if it fits within the statutory definition of copyrightable subject matter; otherwise, it falls into the public domain and can be used by all.⁵⁵ Although originality is the *sine qua non* of copyright, the threshold is low and a work that "possesses at least some minimal degree of creativity" will satisfy this requirement.⁵⁶ The fixation requirement presents the real hurdle when it comes to extending copyright protection to the work of theater directors. The evolution of fixation and recent efforts to harmonize United States copyright law with international standards demonstrate a trend toward relaxing the fixation requirement.

1. The Development of the Contemporary Fixation Requirement

The Copyright Act makes protection contingent upon fixation.⁵⁷ The idea of fixation has its roots in the printing press, an understanding promulgated by the Supreme Court in its holding in *White-Smith Music Publishing Co. v. Apollo Co.*⁵⁸ The Court held that player piano rolls, readable only by machine, were not copies for the purposes of the Copyright Act, which required a copy to be a "printed record . . . in intelligible notation."⁵⁹ Congress, not happy with the result, created a compulsory licensing scheme in order to compensate artists in the face of such "mechanical" reproductions.⁶⁰ In the 1976 Act, Congress did away altogether with the "artificial and largely unjustifiable distinction[]" that made copyright protection dependent upon the form of fixation.⁶¹

Instead, the 1976 Act shifts the emphasis away from the *means* and toward the *effect* of fixation, defining it as an "embodiment in a copy . . . sufficiently permanent or stable to per-

54. 17 U.S.C. § 102(a) (2000).

55. See Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 966–68 (1990). Professor Litman argues that the public domain is more complicated than the lay understanding of it, serving in fact as a "critical buttress to the copyright system." *Id.* at 977.

56. See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991).

57. 17 U.S.C. § 102(a) (stating that "original works of authorship" must be "fixed in [a] tangible medium of expression").

58. 209 U.S. 1 (1908).

59. *Id.* at 17 (internal quotation marks omitted).

60. COHEN ET AL., *supra* note 24, at 47.

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

mit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.”⁶² While the use of the word “Writings” in the Intellectual Property Clause suggests that fixation is a constitutional requirement,⁶³ courts have never limited copyright protection to works that are “written,” as that term is traditionally understood.⁶⁴ Nor has Congress, as evidenced by the extension of fixation in the Copyright Act to “work[s] consisting of sounds, images, or both, that are being transmitted . . . if a fixation of the work is being made simultaneously with its transmission.”⁶⁵ While courts and Congress have interpreted “Writings” liberally, they have taken the idea of “transitory duration” literally, finding temporary, even momentary fixations sufficiently fixed for copyright purposes.⁶⁶

Today, the fixation requirement does not dictate the medium in which a work must be fixed, as long as that work is capable of being perceived.⁶⁷ This functional goal is furthered by Congress’s intention that fixation encompass live broadcasts recorded at the same time they are being transmitted.⁶⁸ While the definition of fixation seeks to exclude from protection “purely evanescent or transient reproductions,” the simple and for-

62. 17 U.S.C.A. § 101 (West 2005).

63. U.S. CONST. art. I, § 8, cl. 8; *see* *Goldstein v. California*, 412 U.S. 546, 561 (1973) (“[A]lthough the word ‘writings’ might be limited to script or printed material, it may be interpreted to include any physical rendering of the fruits of creative intellectual or aesthetic labor.” (citing *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884))).

64. *See* MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 1447 (11th ed. 2003) (defining “write” as “to form (as characters or symbols) on a surface with an instrument (as a pen)”; *see also* *Burrow-Giles*, 111 U.S. at 61 (holding photographs copyrightable); *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 519 (9th Cir. 1993) (holding computer software copyrightable).

65. 17 U.S.C.A. § 101.

66. *See* *MAI Sys.*, 991 F.2d at 518 (concluding that the “loading of copyrighted software into RAM creates a ‘copy’ of that software in violation of the Copyright Act” (citing *Apple Computer, Inc. v. Formula Int’l, Inc.*, 594 F. Supp. 617, 621 (C.D. Cal. 1984))).

67. H.R. REP. NO. 94-1476, at 52, *as reprinted in* 1976 U.S.C.C.A.N. at 5665 (“Under the bill it makes no difference what the form, manner, or medium of fixation may be—whether it is in words, numbers, notes, sounds, pictures, or any other graphic or symbolic indicia, whether embodied in a physical object in written, printed, photographic, sculptural, punched, magnetic, or any other stable form, and whether it is capable of perception directly or by means of any machine or device ‘now known or later developed.’”).

68. *Id.* at 52–53, *as reprinted in* 1976 U.S.C.C.A.N. at 5665–66. The Copyright Act defines transmission as the communication of a performance or a display “by any device or process whereby images or sounds are received beyond the place from which they are sent.” 17 U.S.C.A. § 101.

malistic act of recording a transient broadcast, while not altering or enhancing the underlying work, renders it eligible for copyright.⁶⁹ On the other hand, the simultaneous recording of a live—as opposed to broadcast—theatrical performance does not, under current law, extend copyright protection to that performance.⁷⁰

2. The Harmonization of the Fixation Requirement with International Standards

While most countries require some measure of originality before protecting a work, the fixation requirement is decidedly American.⁷¹ In general, countries like the United States with a common law copyright tradition require fixation; civil law countries do not.⁷² Professor Ysolde Gendreau argues that the fixation requirement reflects the evolution of a country's copyright law and suggests that a country that has abandoned fixation has a “more modern version of copyright.”⁷³ France, for example, initially required fixation but now has abandoned it entirely as a prerequisite to copyright protection.⁷⁴

After amending the Copyright Act in 1976, Congress took steps to harmonize United States copyright law with the rest of the world. In 1994, the United States joined the other member nations of the World Trade Organization (WTO) and signed the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS Agreement).⁷⁵ The TRIPS Agreement considers intellectual property a key part of international trade.⁷⁶ At the same time, Article 9 of the TRIPS Agreement requires all WTO

69. See H.R. REP. NO. 94-1476, at 53, as reprinted in 1976 U.S.C.C.A.N. at 5666.

70. See 1 NIMMER & NIMMER, *supra* note 38, § 1.08(c)(2) (reading the Copyright Act as limiting copyrightability through simultaneous recording to material “being transmitted”).

71. See COHEN ET AL., *supra* note 24, at 47.

72. PAUL GOLDSTEIN, INTERNATIONAL COPYRIGHT § 5.1.1.4 (2001).

73. *Id.* (citation omitted).

74. *Id.*

75. Agreement on Trade-Related Aspects of Intellectual Property Rights pt. I, art. 1, Apr. 15, 1994, 108 Stat. 4809, 1869 U.N.T.S. 299 [hereinafter TRIPS Agreement]; World Trade Organization, Members and Observers, http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last visited Oct. 14, 2007) (showing that the United States' membership became effective on January 1, 2005).

76. World Trade Organization, Intellectual Property: Protection and Enforcement, http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm7_e.htm (last visited Oct. 14, 2007).

members to comply with the Berne Convention, with one important exclusion: adoption of the moral rights conferred under Article 6^{bis} is optional.⁷⁷ Unlike the Copyright Act, the TRIPS Agreement does not require that copyrightable works be fixed in some way. Instead, the incorporated Berne Convention allows each signatory to determine whether it will require fixation “in some material form.”⁷⁸

The Sonny Bono Copyright Term Extension Act (CTEA) is an example of United States harmonization with international law.⁷⁹ The Berne Convention requires that copyright protection last for the life of the author plus fifty years.⁸⁰ By extending the United States copyright term to life plus seventy years under the CTEA, Congress “sought to ensure that American authors would receive the same copyright protection in Europe as their European counterparts.”⁸¹ Congress’s adoption of the CTEA and subsequent harmonization with international standards was motivated in large part by the lobbying of the culture industry.⁸²

Harmonization has led to a relaxation of the fixation requirement in United States copyright law. For example, the TRIPS Agreement and the World Intellectual Property Organization Performances and Phonograms Treaty extend protection to live performance.⁸³ In light of this protection, Congress amended the Copyright Act to include § 1101(a), the “anti-bootlegging” provision, which prohibits the unauthorized fix-

77. TRIPS Agreement, *supra* note 75, pt. II, § 1, art. 9(1); *see also* Berne Convention for the Protection of Literary and Artistic Works art. 6^{bis}, July 24, 1971, 1161 U.N.T.S. 36 [hereinafter Berne Convention] (“Independently of the author’s economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.”). The United States implemented some of the 1971 revisions of the Berne Convention before signing the TRIPS Agreement. *See* Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853.

78. *See* Berne Convention, *supra* note 77, art. 2(2).

79. Pub. L. No. 105-298, 112 Stat. 2827 (1998) (codified at 17 U.S.C. §§ 108, 203, 301–04 (2000)).

80. Berne Convention, *supra* note 77, art. 7(1).

81. *Eldred v. Ashcroft*, 537 U.S. 186, 188 (2003).

82. COHEN ET AL., *supra* note 24, at 159. Disney executives, dreading the prospect of *Steamboat Willie* falling into the public domain, voiced their support of the CTEA in testimony before Congress. *Id.*

83. *See* Performances and Phonograms Treaty, Dec. 20, 1996, World Intellectual Property Organization, 112 Stat. 2860, 36 I.L.M. 76; *see also* TRIPS Agreement, *supra* note 75, pt. II, § 1, art. 14(1).

tion or distribution of live musical performance.⁸⁴ In effect, § 1101(a) grants copyright protection to something fleeting and transitory—a live performance—which does not fall within the purview of “writings.” While courts have disagreed about Congress’s authority to so define copyright under the Intellectual Property Clause, § 1101(a) represents a relaxation of the fixation requirement and a resulting expansion of copyright, or copyright-like protection, to live performance.⁸⁵

Case law also reflects a dilution of the fixation requirement, with some cases even suggesting that live performance may be copyrightable.⁸⁶ Computer programming cases have provided a particularly powerful catalyst, owing to the transitory nature of digital files and transmissions.⁸⁷ In relaxing fix-

84. Uruguay Round Agreements Act, Pub. L. No. 103-465, § 512, 108 Stat. 4809, 4974 (1994) (codified at 17 U.S.C. § 1101(a) (2000)); H.R. REP. NO. 103-826, pt. 1, at 8 (1994), *as reprinted in* 1994 U.S.C.C.A.N. 3773, 3780.

85. *See* United States v. Moghadam, 175 F.3d 1269, 1280 (11th Cir. 1999) (holding Congress’s power pursuant to the Commerce Clause sufficient to support an anti-bootlegging statute that would not satisfy the Copyright Clause’s fixation requirement); Kiss Catalog, Ltd. v. Passport Int’l Prods., Inc., 405 F. Supp. 2d 1169, 1173 (C.D. Cal. 2005) (finding constitutional underpinnings for the anti-bootlegging statute not in the Intellectual Property Clause but the Commerce Clause, which “has been interpreted broadly in the modern era”). *But see* United States v. Martignon, 346 F. Supp. 2d 413, 428–29 (S.D.N.Y. 2004) (holding that Congress cannot use the Commerce Clause to pass legislation that reaches beyond the scope of the Copyright Clause), *vacated*, 492 F.3d 140 (2d Cir. 2007).

86. *See* Balt. Orioles, Inc. v. Major League Baseball Players Ass’n, 805 F.2d 663, 669 n.7 (7th Cir. 1986) (suggesting that a baseball game might satisfy the requirements of copyright); *Metrano v. Fox Broad. Co.*, No. CV-00-02279 CAS (JWJX), 2000 WL 979664, at *4 (C.D. Cal. Apr. 24, 2000) (finding protection for a live, unbroadcast, unrecorded movie pitch fixed in note cards and an outline); *Zen Music, Inc. v. CVS Corp.*, No. 98 Civ. 4246 DLC, 1999 WL 605462, at *7 (S.D.N.Y. Aug. 11, 1999) (finding a song recorded prior to its live performance fixed for copyright purposes). *But see* *Medforms, Inc. v. Healthcare Mgmt. Solutions, Inc.*, 290 F.3d 98, 107–08 (2d Cir. 2002) (holding that fixation requires something more than rote transcription, which lacks originality, for copyright to adhere); *Prod. Contractors, Inc. v. WGN Cont’l Broad. Co.*, 622 F. Supp. 1500, 1503 (N.D. Ill. 1985) (refusing to extend copyright to a parade); 1 NIMMER & NIMMER, *supra* note 38, § 1.08(c)(2) (finding live performance outside the protection of copyright law).

87. *See* *Matthew Bender & Co. v. West Publ’g Co.*, 158 F.3d 693, 702 (2d Cir. 1998) (finding perception by a “machine or device” sufficient fixation for copyright purposes); *Micro Star v. Formgen, Inc.*, 154 F.3d 1107, 1110–12 (9th Cir. 1998) (finding an audiovisual display sufficiently fixed for copyright purposes in the form of a computer file that is “an exact, down to the last detail, description”); *Firooyze v. Earthlink Network*, 153 F. Supp. 2d 1115, 1124–25 (N.D. Cal. 2001) (“[C]omputer programs in general come within the subject matter of copyright.”).

tion, however, courts have not lost sight of the fixation requirement's functional purpose, noting the importance of fixation to proving an infringement cause of action.⁸⁸ The actions of Congress and the courts in relation to the fixation requirement suggest that, as long as the goals of copyright law are advanced and a work is perceptible, reproducible, or otherwise communicable, fixation can be relaxed and still satisfy constitutional mandates.

II. THE DEVELOPMENT OF AMERICAN THEATER DIRECTION AND ITS RELATION TO COPYRIGHT LAW

Congress first extended copyright protection to dramatic scripts in 1856.⁸⁹ The existence, let alone prominence, of the theater director is a much more recent phenomenon. Copyright law has not kept pace with the emergence of the director as the primary player in American theater, leaving the contributions of this essential, creative artist without recognition or protection.

A. THE EMERGENCE OF THE DIRECTOR IN AMERICAN THEATER

By the time Congress passed the 1909 Copyright Act, the role of the director had just begun to emerge in Europe.⁹⁰ Prior to that time, plays were staged, often successfully, without a single figure tasked solely with integrating the script, the performance of the script, and the audience experience into a single, unified whole.⁹¹ The mantle of preparing a script for performance often fell to the playwright.⁹² The ancient Greek poet Aeschylus, for example, choreographed his plays, rehearsed the text with the actors, and arranged the costumes.⁹³ Shakespeare coached the actors who performed in his plays.⁹⁴ Molière cast the actors for each of his plays and then critiqued their inter-

88. *Matthew Bender*, 158 F.3d at 702–03.

89. COHEN ET AL., *supra* note 24, at 24.

90. *See Chinoy*, *supra* note 25, at 3.

91. *Id.* at 3–4.

92. *Id.* at 4.

93. *Id.* at 6.

94. *Id.* Hamlet's advice to the players who visit Elsinore articulates a philosophy of acting. *See WILLIAM SHAKESPEARE, THE TRAGEDY OF HAMLET, PRINCE OF DENMARK* act 3, sc. 2, at 129 (T. J. B. Spencer ed., Penguin Books 1980) (“[O]’erstep not the modesty of nature. For anything so o’erdone is from the purpose of playing, whose end, both at the first and now, was and is to hold, as ’twere, the mirror up to nature, to show virtue her own feature, scorn her own image, and the very age and body of the time his form and pressure.”).

pretations of the roles he had written.⁹⁵ These writers represent three of the golden ages of drama, where “writing and staging a play were a single creative process.”⁹⁶ At other times, an actor would serve as manager of his fellow performers, maintaining order and supervising performances.⁹⁷

In the nineteenth century, the performance of plays emerged as a vibrant form of expression in its own right.⁹⁸ The growing prominence of live performance reflected a new sophistication in the elements of staging—rehearsals, actors, and scenic elements—under a director’s control.⁹⁹ The director became more important as the modern world fragmented values and mores, since a homogenous society does not need an artist to provide unity in the way a heterogeneous society does.¹⁰⁰

Regardless of the reason, directors began experimenting with elements of production other than the script.¹⁰¹ Shakespeare’s plays, for example, so familiar to audiences, became canvases on which directors tried new techniques.¹⁰² Directors, like other artists, dabbled in different movements, such as naturalism and expressionism.¹⁰³ Continental Europe took the lead, producing innovative, visionary directors,¹⁰⁴ but by the twentieth century the new art form had gained traction in the United States.¹⁰⁵ As the position of the director took hold, the work of American directors explored artistic, social, and political ideas.¹⁰⁶ Today, a theatergoer in this country would be hard

95. Chinoy, *supra* note 25, at 6 (observing that Molière’s play *Impromptu at Versailles* functions as a primer for modern directors).

96. *Id.* at 4.

97. *Id.* at 3; *see also* GLYNNE WICKHAM, A HISTORY OF THE THEATRE 11–14 (2d ed. 1992) (crediting actors and managers with infusing “the breath of life” into the “dynamic and provocative art” that is the theater).

98. Chinoy, *supra* note 25, at 17.

99. *Id.*

100. *Id.* at 14 (“The decay of a universal system of values and a traditional way of life at the beginning of our modern era deprived theater of its homogeneous and representative public and of its accepted conventions for mirroring a shared human experience.”).

101. *See id.* at 20.

102. *See id.*

103. *See id.* at 45.

104. *See id.* at 58–73 (detailing the work of Russian, German, French, and English directors).

105. *See id.* at 73.

106. *See id.* at 73–74.

pressed to attend a performance *not* helmed by a director.¹⁰⁷ The director's contribution is comprehensive and conceptual, determining how a script is presented to an audience.¹⁰⁸ On a practical level, her task includes studying the script, casting and rehearsing the actors, and coordinating the physical design of the production.¹⁰⁹ The production the audience sees is the final product of the director's many efforts.

Prominence cuts both ways; as directors have become an increasingly influential force in the American theater, imitators have copied their work in other productions.¹¹⁰ The few lawsuits brought by directors asserting property interests in their work settled out of court.¹¹¹ No court has extended copyright protection to the contribution of a director to a theatrical production.

107. A search of the 2006–07 seasons at five American theater companies turned up not a single production without a director. See Brian Scott Lipton, *The Wiz and Zhivago Slated for La Jolla's 2006–2007 Season*, THEATER MANIA, Jan. 12, 2006, <http://www.theatermania.com/content/news.cfm/story/7463>; Press Release, Wilma Theater, *The Wilma Theater Announces Its 2006–2007 Season* (May 2006), available at <http://www.wilmatheater.org/newsroom/pressreleases/Wilma%2006-07%20Season%20Release.pdf>; Berkeley Repertory Theatre, *06/07 Season*, <http://www.berkeleyrep.org/season/0607/index.asp> (last visited Oct. 14, 2007) (follow hyperlinks to individual shows); Guthrie Theater, *2006–2007 Season*, http://www.guthrietheater.org/learn/study_guides/2006_2007_season (last visited Oct. 14, 2007); Long Wharf Theatre, *2006–2007 Season*, http://www.longwharf.org/season_06-07.html (last visited Oct. 14, 2007).

108. See Carrie Ryan, *Translating The Invention of Love: The Journey from Page to Stage for Tom Stoppard's Latest Play*, 24 J. MOD. LITERATURE 197, 198 (2000/2001) (noting that the director conceives “an overall interpretation of the script that guides the transition from page to stage”).

109. *Id.*; see also Laurence Olivier, *The Olivier Method*, N.Y. TIMES, Feb. 7, 1960, reprinted in DIRECTORS ON DIRECTING, *supra* note 25, at 413 (describing the “chief business of the director” as providing “a point of view on the shape, meaning, and rhythm of the play”); Joseph Papp, *Modernity and the American Actor*, 45 THEATRE ARTS 63 (1961), reprinted in DIRECTORS ON DIRECTING, *supra* note 25, at 432 (highlighting the importance of casting, wherein the “choice of actor . . . determine[s] the style of . . . productions”). For examples of directors discussing their artistic processes, see generally the twenty-one interviews in ARTHUR BARTOW, *THE DIRECTOR'S VOICE* (1988).

110. See, e.g., *Mantello v. Hall*, 947 F. Supp. 92, 96 (S.D.N.Y. 1996) (asserting that the defendants “intentionally recreated [the plaintiff's] unique direction and staging including the replication of the stage movement, design, lighting, and sound” (internal quotation marks omitted)); Talia Yellin, *New Directions for Copyright: The Property Rights of Stage Directors*, 24 COLUM.-VLA J.L. & ARTS 317, 328 (2001) (relating the assertion made by director Gerald Gutierrez that his direction of *The Most Happy Fella* had been copied).

111. See Yellin, *supra* note 110, at 345.

B. PLAYMAKING AND COPYRIGHT

The goal of copyright is to grant authors the right to protect and profit from their creations.¹¹² Currently, however, copyright neglects the author of a live theatrical production—the director. The playwright has copyright in the script she writes as a “dramatic work.”¹¹³ Choreography, often incorporated into the staging of both plays and musicals, is also protected by the Copyright Act.¹¹⁴ Yet stage direction, primarily because it is not considered fixed, is not currently recognized as worthy of copyright protection.¹¹⁵ Because the director is the author of the production the audience sees, however, copyright provides the most appropriate framework for protecting that work of authorship.

Given the shortcomings of copyright law, directors are most commonly compensated contractually for their creative contributions to a production.¹¹⁶ This solution leaves much work unprotected because it favors directors with the prominence and power to command a strong negotiating position. The translation of a script from page to stage is, inherently, an act of collaboration, but copyright’s joint authorship scheme, like contract law, does not extend protection far enough. Ultimately, a director, based on the playwright’s underlying script, authors a derivative work entitled to copyright protection.

1. The Insufficiency of Contract

In theory, a private agreement could protect the intellectual property interests of a theater director, and some commentators look to contract law as an attractive means of solving this problem without resort to the complexities of copyright law.¹¹⁷ Most courts faced with a contract dispute seek to give effect to the intent of the parties.¹¹⁸ Therefore, as long as the parties to a contract agree that the director’s contributions are to be protected, courts should honor this choice.

112. See U.S. CONST. art. I, § 8, cl. 8; 17 U.S.C. § 102(a) (2000).

113. 17 U.S.C. § 102(a)(3).

114. *Id.* § 102(a)(4).

115. See Yellin, *supra* note 110, at 318–23.

116. See Weidman, *supra* note 26, at 653.

117. See Matthew Rimmer, *Heretic: Copyright Law and Dramatic Works*, 2 QUEENSLAND U. TECH. L. & JUST. J. 131, 133 (2002).

118. See *Ins. Co. v. Boon*, 95 U.S. 117, 128 (1877) (holding that contracts “must receive a reasonable interpretation consonant with the apparent object and plain intent of the parties”).

Two basic contractual models govern the intellectual property interests of theatrical collaborators: the artist-driven model and the union- or guild-driven model. In the artist-driven model, a playwright agrees to share a portion of her royalties—on the current production, for future productions, or both—with her collaborators. The collaborators who most often benefit from such contractual relationships are directors and dramaturgs.¹¹⁹ For example, the Tony Award- and Pulitzer Prize-winning playwright Tony Kushner agreed by contract to share fifteen percent of his royalties on *Angels in America* with the two dramaturgs who helped him develop the piece.¹²⁰ Similarly, the Tony Award-winning director Joe Mantello protects his interests by entering a contract with a playwright that entitles him to a small portion of the author's subsidiary rights.¹²¹

The artist-driven model has two shortcomings. First, the director needs to be powerful enough to negotiate successfully for a portion of the author's royalties. Second, the author must be successful enough to afford to part with a portion of her royalties. The collaborator in this model is not earning an independent royalty to reflect her artistic contribution to the production. Instead, she takes a share of the author's earnings. Kushner's model works because he earned enough on *Angels in America* to allow him to share fifteen percent of his earnings with his dramaturgs. Perhaps more importantly, Kushner, a critic of the "myth of the Individual" steeped in Marxism, admits that had he "written these plays without the direct and indirect participation of [his] collaborators, the results would have been entirely different and much the poorer for the deprivation—would, in fact, never have come to be."¹²² Mantello, on the other hand, is able to make "side agreements" with the authors with whom he works because he is a successful, acclaimed director whose participation in a production ensures higher visibility and an increased chance for commercial success.

119. See Susan Jonas & Geoff Proehl, *Preface* to *DRAMATURGY IN AMERICAN THEATER: A SOURCE BOOK*, at vii, vii (Susan Jonas et al. eds., 1997) (defining "dramaturg" as an artist who fulfills a number of different roles in the theater, including season selection, play development, audience enhancement, and production collaboration).

120. Rimmer, *supra* note 117, at 140.

121. Green, *supra* note 8.

122. TONY KUSHNER, *ANGELS IN AMERICA, PART TWO: PERESTROIKA* 150 (1994).

In the case of Edward Einhorn and the production of *Tam Lin*, the stakes were simply too low for a contractual solution. None of the players were well-known or successful; Einhorn was working for just \$1000 with no written contract at all, let alone an exceptional agreement that would have given him a portion of McLernan's author's royalty.¹²³ It is not unreasonable to speculate that Einhorn may have been happy simply to have been offered the job and did not dare jeopardize the opportunity by asking for more. While on a purely economic level Einhorn may have gotten what he bargained for—in this case, not much—such reasoning sanctions the exploitation of the player whose work is essential to the translation of a script from page to stage. Furthermore, this justification extends fair compensation only to those directors already established enough to negotiate for a share of royalties in addition to their relatively generous salaries.

The union- or guild-driven model pits the standard agreements of two professional organizations against each other. The Dramatists Guild's position states that the playwright "owns and controls the intellectual property, including copyright, of the author's script and of all changes of any kind whatsoever in the manuscript, title, stage business or performance of the play."¹²⁴ Directors, represented by the Society of Stage Directors and Choreographers, contend that they are the "sole and exclusive" owners of their own intellectual property.¹²⁵ In most professional productions, the playwright and director are represented by these contradictory agreements, and no disagreement over intellectual property rights arises.¹²⁶ Were an issue to arise, however, the practical effect of these contracts provides little to no clarity.

123. See *Einhorn v. Mergatroyd Prods.*, 426 F. Supp. 2d 189, 192 (S.D.N.Y. 2006).

124. Policy Statement, Dramatists Guild of America, *Dramatists' Copyright and Intellectual Property Rights* (2000), http://dramatistsguild.com/content.aspx?id=public_policy_copyright&level=1.

125. Artist Employment Agreement, Society of Stage Directors and Choreographers, available at <http://www.ssdcc.org/Special2007.pdf>.

126. See Yellin, *supra* note 110, at 341–43, for a discussion of the conflicts between the Society of Stage Directors and Choreographers (SSDC) Model Agreement and the Approved Production Contract used on Broadway, which specifically grants authors all rights to any changes in their plays. Yellin observes that the SSDC Agreement "is not intended to alter, diminish, or affect, in any way, any of the Author's rights in the play," further complicating the conflict between the various industry standard agreements. *Id.*

Neither the artist-driven model nor the union- or guild-driven model is a satisfactory answer to the challenge of protecting a director's intellectual property. Contract law cannot reward the work of a director who innovatively stages a production of a play in the public domain. In that case, the playwright is not entitled to royalties because her work enjoys no copyright protection, and therefore she cannot share her royalties with a director. Furthermore, a contractual solution speaks to the director's contribution only in the short term; a portion of royalties might compensate a director for a single production, but it would do nothing to prevent others in the future from copying the director's work without credit or payment. Therefore, contract, because it depends on the individual players, does not solve the challenge of protecting the contributions of collaborators to theatrical production.

2. The Limitations of Joint Authorship

Staging a theatrical production is an inherently collaborative endeavor. When authors collaborate, the product of that collaboration can receive copyright protection as a "joint work."¹²⁷ All authors of a joint work are co-owners of the copyright, each with an equal and undivided interest in the whole.¹²⁸ The Copyright Act defines a joint work as "a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole."¹²⁹ To qualify as joint authors, not only must each collaborator contribute independently copyrightable material to the whole, but she also must intend to be considered a joint author.¹³⁰ In *Erickson v. Trinity Theatre*, the Seventh Circuit held that "[t]o qualify as an author, one must supply more than mere direction or ideas."¹³¹ The intent to be considered a joint author can be determinative. In *Thomson v. Larson*, the court gave great weight to a playwright's repeated assertions that he alone wrote the Broadway musical *Rent*, ultimately finding a dramaturg who contributed actual language to the text of the play not to be a co-author of the work.¹³²

127. See 17 U.S.C.A. § 101 (West 2005).

128. 17 U.S.C. § 201(a) (2000).

129. 17 U.S.C.A. § 101.

130. *Erickson v. Trinity Theatre, Inc.*, 13 F.3d 1061, 1070 (7th Cir. 1994).

131. *Id.* at 1071.

132. 147 F.3d 195, 204–05 (2d Cir. 1998).

The joint authorship idea is particularly attractive in the world of theater where the dominant conception of the director's job is to "make the stage speak with one voice" in order to elicit a "unanimous reaction" from a diverse audience¹³³—not unlike the "unitary whole" imagined by the Copyright Act's definition of "joint work."¹³⁴ A number of commentators have explored a joint authorship solution to the issue of protecting the rights of stage directors.¹³⁵

The fact that courts strictly apply the intent requirement for joint authorship, however, presents an obstacle to relying on this scheme to protect the contributions of directors. Many writers, while eager to work with a director, may not be as eager to view that artist as an actual co-author of the play. Even Tony Kushner, who openly acknowledges and credits the contributions of his collaborators, goes to great pains to "shore up [his] claim to authorship" of his plays.¹³⁶ *Thomson v. Larson* demonstrates how readily an author's exhortations of sole authorship may be used to defeat a claim of joint authorship.¹³⁷

A playwright and a director who work as collaborators with the *mutual* intent of creating a piece of theater that is a single, unified whole are welcome to seek copyright protection for their work as joint authors.¹³⁸ Limiting copyright to works that fit a joint authorship model, however, only protects new plays in their first productions and ignores the interpretive creativity of directing. One of the strengths of theater is the opportunity the

133. See Chinoy, *supra* note 25, at 73 (internal quotation marks omitted).

134. See 17 U.S.C.A. § 101 (West 2005).

135. See Yellin, *supra* note 110, at 331–33 (noting that whether a director qualifies as a joint author is a circumstance-specific inquiry); Richard Amada, Note, *Elvis Karaoke Shakespeare and the Search for a Copyrightable Stage Direction*, 43 ARIZ. L. REV. 677, 691–93 (2001) (rejecting the idea of protecting the director as a joint author based on the unlikelihood of a director qualifying as such); Douglas M. Nevin, Note, *No Business Like Show Business: Copyright Law, the Theatre Industry, and the Dilemma of Rewarding Collaboration*, 53 EMORY L.J. 1533, 1560–62 (2004) (asserting that "[t]he only feasible means of preserving the theatre's group dynamic . . . requires the categorization of all collaborators within the joint authorship structure").

136. KUSHNER, *supra* note 122, at 149.

137. *Thomson v. Larson*, 147 F.3d 195, 206 (2d Cir. 1998) (upholding the district court's finding that there was "absolutely no evidence whatever" that the playwright considered Lynn Thomson a coauthor of *Rent*); see also Amada, *supra* note 135, at 693 (concluding that courts will not likely consider a director to be a joint author "absent an explicit agreement with the playwright").

138. See Nevin, *supra* note 135, at 1561–62 (arguing that, by agreeing to see her script performed, a playwright implicitly intends to collaborate with a director).

art form affords for different artists to bring the same script to life in unique ways. Under a joint authorship regime, the director of the first production of a play would share equal and undivided ownership rights with the playwright.¹³⁹ Conferring copyright on the first production of a play might function to seal a single interpretation to the script and chill theatrical innovation. Such a chill would flout the constitutional purpose of copyright protection, which is to “promote . . . progress.”¹⁴⁰ Finally, joint authorship offers no protection to subsequent directors of a copyrighted work or to directors of works in the public domain, leaving much creation uncovered. A different authorship scheme would better serve the interests of theater collaborators and the public at large.

3. The Flexibility of Derivative Works Protection

Ultimately, the production the director creates is a derivative work. The Copyright Act extends protection to derivative works, which are based upon preexisting works.¹⁴¹ Congress conceived of derivative works as “recasting, transforming, or adapting” other works (copyrighted or not).¹⁴² The work of a director falls squarely within this definition. She takes a stack of pages—the script—and recasts or transforms those words into a live performance. At its heart, copyright law serves to protect “original work[s] of authorship.”¹⁴³ While in most cases the director did not write the underlying script upon which a production is based, she did author the conception of that production. Therefore, her authorship should be eligible for copyright as a derivative work, and several doctrinal means exist to facilitate this result.

a. The Requirements and Bounds of Derivative Works Protection

Granting directors protection as authors of derivative works offers a flexible arrangement, one that can accommodate first and subsequent productions of plays for which the playwright owns the copyright as well as productions of work in the public domain. The production of a play constitutes a work of

139. See 17 U.S.C. § 201(a) (2000).

140. U.S. CONST. art. I, § 8, cl. 8.

141. 17 U.S.C.A. § 101 (West 2005).

142. H.R. REP. NO. 94-1476, at 57 (1976), as reprinted in 1976 U.S.C.C.A.N. 5659, 5670.

143. 17 U.S.C.A. § 101.

art distinct from the script itself. While the playwright creates a text to begin the process, the text only becomes a play—a work of art in real time on a stage—after it is handed over to a company of collaborators guided by the overall interpretation of the director.¹⁴⁴ In other words, the translation of a script from page to stage is more than “mere reproduction of a work of art in a different medium,” which would likely not demonstrate enough originality to warrant copyright protection as a derivative work.¹⁴⁵ Instead, the staging of a text exemplifies Congress’s purpose in choosing to extend copyright protection to derivative works.¹⁴⁶ At least one court has recognized the distinction between script and performance in the context of motion pictures.¹⁴⁷ The same distinction holds when it comes to theater; the work of a director in staging a production should be protectable as a derivative work.

Copyright in a derivative work covers only contributions independent of the underlying work.¹⁴⁸ Therefore the text of the play and any stage directions the playwright wrote into the script would not be covered by a derivative copyright. Shakespeare, for example, indicates at one point in *The Winter’s Tale* that Antigonus is to “[e]xit, pursued by a bear.”¹⁴⁹ A director who staged the exit with Antigonus chased off stage by an actor in a bear suit could hardly claim copyright protection for that literal interpretation of the text.

Furthermore, to warrant protection as a derivative work, the director’s staging must “contain an original contribution not present in the underlying work of art and be more than a mere

144. See Ryan, *supra* note 108, at 198.

145. L. Batlin & Son, Inc. v. Snyder, 536 F.2d 486, 491 (2d Cir. 1976) (quoting 1 M. NIMMER, THE LAW OF COPYRIGHT § 20.2, at 94 (1975)).

146. H.R. REP. NO. 94-1476, at 57, as reprinted in 1976 U.S.C.C.A.N. at 5670–71.

147. *Shoptalk, Ltd. v. Concorde-New Horizons Corp.*, 897 F. Supp. 144, 147 (S.D.N.Y. 1995) (“Although a screenplay [is] but a roadmap for fixing dialogue on the screen, and Defendant has shown minimal variation in the text of the Motion Picture, no court has gone so far as to hold that two such works are, by definition, one work [T]his Court declines to find that, as a matter of law, . . . the Screenplay is the same work as the Motion Picture” (alteration in original) (citation and internal quotation marks omitted)), *aff’d in part, vacated and remanded in part*, 168 F.3d 586 (2d Cir. 1999); see also Nevin, *supra* note 135, at 1563 (applying the reasoning of *Shoptalk* to theatrical performance).

148. 17 U.S.C. § 103(b) (2000).

149. WILLIAM SHAKESPEARE, THE WINTER’S TALE act 3, sc. 3, at 54 (Frances E. Dolan ed., Penguin Books 1999).

copy.”¹⁵⁰ As mentioned earlier, originality does not pose a particularly high hurdle for the director seeking copyright protection.¹⁵¹ The director’s metamorphosis of script into performance is, in itself, original. It entails the realization of a vision, a synthesis of a variety of elements—text, actors, scenery, lighting, and sound—into a coherent whole.

Some theatrical productions will require the use of *scenes à faire*, or “incidents, characters, or settings which are as a practical matter indispensable, or at least standard, in the treatment of a given topic.”¹⁵² *Hamlet*, for example, ends in an elaborate swordfight punctuated with poisoning.¹⁵³ A director who staged the battle with épées, thrusts, and parries would simply be employing *scenes à faire*, and this element of her production would not be copyrightable. Staging the same scene with laser guns or bullwhips, however, would likely demonstrate the requisite originality for copyright protection.¹⁵⁴ While one can imagine a director’s contribution that relies on *scenes à faire* to such a degree that it contains no originality at all, most productions will easily clear the minimal originality requirement for the purposes of copyright law.

Many contemporary scripts deliberately leave much room for the director’s contribution. Terrence McNally’s *Love! Valour! Compassion!*, for example, begins with a simple stage direction: “Bare stage.”¹⁵⁵ In the New York production, the director Joe Mantello interpreted this by staging “a tableau of all the characters arranged on a green knoll around a doll house representing the home where they are spending the weekend.”¹⁵⁶ Arguably, Mantello’s contribution to the production of *Love! Valour! Compassion!* was independent from McNally’s underlying script and original enough to earn copyright. The

150. *L. Batlin & Son*, 536 F.2d at 491 (2d Cir. 1976) (citation and internal quotation marks omitted).

151. See *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991) (“To be sure, the requisite level of creativity is extremely low; even a slight amount will suffice.”).

152. See *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 979 (2d Cir. 1980) (citation and internal quotation marks omitted).

153. See SHAKESPEARE, *supra* note 94, act 5, sc. 2.

154. Such protection may be thin, however, more akin to a compilation copyright where the second-comer is barred from duplicating the same selection or arrangement. See *Feist*, 499 U.S. at 361. Nonetheless, thin protection still bars slavish copying.

155. See Green, *supra* note 8.

156. *Id.*

eligibility of a director's contributions for derivative copyright protection would require a case-by-case inquiry, but many scripts allow for the addition of independent originality in the production, and many directorial interpretations demonstrate it.¹⁵⁷

Finally, some commentators lament the fact that derivative copyright offers directors little protection because they would be unable to license their work without the permission of the playwright, owner of the underlying copyright.¹⁵⁸ *Gilliam v. American Broadcasting Cos.* makes clear that, because "the ability of the copyright holder to control his work remains paramount in our copyright law," the owner of copyright in a derivative work cannot use that copyright in a way that infringes on the underlying copyright.¹⁵⁹ In other words, it would be impossible for a director to license his direction of a play to a third party without implicating the underlying play, which remains the playwright's alone to license for public performance. In fact, when the Society of Stage Directors and Choreographers asserts that directors hold intellectual property rights in their productions, it does so with the understanding that these rights are distinct from and do not diminish those of the writer.¹⁶⁰

Despite these criticisms, the derivative-works copyright remains the most flexible and fair means of extending protection to theater directors, who are currently without recourse if their production concepts are copied or used without permission.¹⁶¹ A derivative copyright cannot be exploited in a way that infringes the copyright of the underlying work; a director, for example, cannot "perform" or "display" her copyrighted work

157. In an infringement action, a court would be tasked with determining what constitutes the director's contribution independent of the underlying script. Various tests exist for determining what constitutes copyrightable expression, and these tests, which have functioned in the much more technical realm of computer programming, could be employed effectively here as well. See, e.g., *Computer Assocs. Int'l, Inc. v. Altai, Inc.*, 982 F.2d 693, 706 (2d Cir. 1992) (adopting a three-part "abstraction-filtration-comparison" test); *Roth Greeting Cards v. United Card Co.*, 429 F.2d 1106, 1110 (9th Cir. 1970) (examining the "total concept and feel" of two works); see also *Amada*, *supra* note 135, at 701-06 (suggesting a combination of tests for courts to determine if the work of a stage director is copyrightable at all).

158. See *Yellin*, *supra* note 110, at 335.

159. 538 F.2d 14, 21 (2d Cir. 1976).

160. See *Yellin*, *supra* note 110, at 341-43.

161. See, e.g., *Green*, *supra* note 8 (illustrating specific examples of copyright controversies involving theater directors).

without the permission of the playwright.¹⁶² Therefore, granting directors copyright in their production concepts as derivative works does not derogate the rights of playwrights; instead, it allows directors to protect their own creativity from unauthorized, uncompensated, and unacknowledged reproduction.

b. Doctrinal Means of Establishing the Director's Derivative Works Copyright

One of the bundle of rights inherent in copyright protection is the right to “prepare derivative works based upon the copyrighted work.”¹⁶³ This reserved right means that the playwright controls the ability of the director to prepare a derivative work based on the playwright's underlying script. Three basic doctrinal solutions—permission, compulsory licensing, and an implied right to create derivative works—exist through which a director can secure the ability to make a copyrightable derivative work based on a playwright's underlying script.¹⁶⁴

i. Permission

The director could seek the permission of the playwright to prepare a derivative work. This solution places the burden on the director, the party seeking to use the playwright's copyright. Because the playwright also retains the right “to perform the copyrighted work publicly,”¹⁶⁵ the director already must seek the playwright's permission in order to direct the script. At the same time, the director could seek permission to create a derivative work based on that script; a single contract or other written instrument could encompass both permissions. The director's right to create a derivative work would be contingent on the playwright's permission, but securing the right to create a derivative work should not be any more onerous than seeking the playwright's permission to stage the play in the first place. The playwright, aware both of the essentially collaborative nature of creating plays and the fact that the creation of a derivative work in no way diminishes the playwright's own copyright

162. See 17 U.S.C. § 106 (2000 & Supp. IV 2006) (enumerating the exclusive rights of copyright).

163. 17 U.S.C. § 106(2).

164. Cf. Mark A. Lemley, *Dealing with Overlapping Copyrights on the Internet*, 22 U. DAYTON L. REV. 547, 578–84 (1997) (discussing three solutions to transmission on the Internet, including a new “right of net transmission”).

165. 17 U.S.C. § 106(4).

in the underlying work,¹⁶⁶ should have little reason to object to the granting of this right to the director.

ii. Compulsory Licensing

Second, Congress could introduce a compulsory licensing scheme not unlike that used in the music industry. Section 115 of the Copyright Act establishes a compulsory licensing framework for recording artists seeking to cover the works of other artists.¹⁶⁷ Where § 115 denies these recordings protection as derivative works,¹⁶⁸ Congress could draft a theatrical compulsory licensing system to extend derivative works protection to the contributions of directors. The playwright would therefore be compensated for supplying the source material for the director's derivative work. Furthermore, the playwright could negotiate with the director to contract around this extension of derivative works protection. The main obstacle to this solution reflects the insufficiency of contract as a means of protecting directors. The players in theater, compared to other entertainment and culture industries, lack clout and are unlikely to be able to lobby Congress successfully for independent statutory protection.

iii. Implied Right to Create Derivative Works

The third solution, an implied right to create a derivative work in the case of theater, takes the logic of the permission solution to its natural end. In addition to its enumerated rights, copyright law grants several implied rights, such as an author's implied rights to choose *not* to make her work available and to limit a consumer's autonomy in accessing her work.¹⁶⁹ In the case of theater, an implied right to create a derivative work would recognize the fact that a playwright knows that staging a script is a necessarily collaborative process. Therefore, by licensing her script to a director for a public performance, the playwright would also grant that director the right to create a derivative work based on her script. The burden in this case is

166. 17 U.S.C. § 103(b) (2000).

167. *Id.* § 115.

168. *See id.*

169. *See* Kevin M. Lemley, *The Innovative Medium Defense: A Doctrine to Promote the Multiple Goals of Copyright in the Wake of Advancing Digital Technologies*, 110 PENN ST. L. REV. 111, 116–24 (2005) (discussing the Copyright Act's implied rights of availability, limited access, limited use, and autonomy).

on the playwright to expressly withhold the right to create derivative works. Playwrights would be less likely to do so, however, if the grant of the right is the default rule. While Congress could create this right by amending the exclusive rights granted by copyright, the implied right to create derivative works could also be read into transactions between playwrights and directors by courts. Given the increasing number of lawsuits brought by directors asserting a copyright interest in their intellectual property, the judicial creation of an implied right to create derivative works is the strongest doctrinal solution to the issue of directorial control.

III. THE RELAXATION OF THE FIXATION REQUIREMENT AND THE EXTENSION OF COPYRIGHT PROTECTION TO THE WORK OF DIRECTORS

Stage direction, just coming into its own as a visionary, innovative theatrical art form, deserves protection. Currently, directors have no control over the exploitation of their work, and their investment and creativity are not protected. Copyright protection can promote the progress of stage direction by extending protection to the investment and creativity of all directors, the emerging and the established alike, as long as their work fulfills the basic statutory requirements.

Just like any other copyright, a derivative copyright requires original authorship and fixation.¹⁷⁰ The artistic contribution of a director to most theatrical productions easily satisfies these mandates—it is both original and authored. The final obstacle to protecting the work of the theater director as a derivative work is the fixation requirement. Presently, live theatrical performance is not copyrightable because it is not fixed; however, the fixation requirement has been diluted by Congress and interpreted by courts in such a way to render it functionally equivalent with perceptibility.¹⁷¹ The contribution of a director is certainly perceptible; if it were not, it would not be repeatable performance after performance during the run of a play. Even more crucially for the purposes of copyright protection, if a director's work were not perceptible, others would be unable to copy it. The proliferation of lawsuits in the past

170. See 17 U.S.C. § 103(a); see also *Entm't Research Group, Inc. v. Genesis Creative Group, Inc.*, 122 F.3d 1211, 1220 (9th Cir. 1997) (citing *Durham Indus., Inc. v. Tomy Corp.*, 630 F.2d 905, 909 (2d Cir. 1980)).

171. See *supra* notes 76–87 and accompanying text.

fifteen years proves the lie of the assertion that a director's work is not sufficiently fixed to be copied. Ultimately, the work of a director is as perceptible as a software loop or a television broadcast of a football game and should therefore be offered similar copyright protection.

A. RECENT CONGRESSIONAL DILUTION OF THE FIXATION REQUIREMENT

For all practical purposes, Congress has already extended copyright protection to live performance. When Congress made simultaneously recorded broadcasts copyrightable in the 1976 Copyright Act, it in effect extended protection to momentary events.¹⁷² Congress described this new protection as covering works “that are reaching the public in unfixed form but that are simultaneously being recorded.”¹⁷³ It is challenging to understand why this provision does not apply to a play that is recorded (perhaps by videotape) while simultaneously being performed. After all, a play reaches its audience “in unfixed form” but is recordable. The example Congress cites as its reason for extending this new protection, however, is particularly instructive:

When a football game is being covered by four television cameras, with a director guiding the activities of the four cameramen and choosing which of their electronic images are sent out to the public and in what order, there is little doubt that what the cameramen and the director are doing constitutes “authorship.” The further question to be considered is whether there has been a fixation. If the images and sounds to be broadcast are first recorded . . . and then transmitted, the recorded work would be considered a “motion picture” subject to statutory protection against unauthorized reproduction or retransmission of the broadcast. If the program content is transmitted live to the public while being recorded at the same time, the case would be treated the same.¹⁷⁴

Certainly the work of a theater director is at least as original, for authorship purposes, as coordinating camera operators and sequencing imagery, and a play is as easily recorded during performance as a football game. While a theatrical performance is not “transmitted” like the broadcast of a football game, the meaningful difference here comes down to money.

172. See 17 U.S.C.A. § 101 (West 2005); H.R. REP. NO. 94-1476, at 53 (1976), as reprinted in 1976 U.S.C.C.A.N. 5659, 5666.

173. H.R. REP. NO. 94-1476, at 52, as reprinted in 1976 U.S.C.C.A.N. at 5665.

174. *Id.*

In 2004, the National Football League, in a season that runs just six months during which each team plays no more than one game a week, earned a total revenue of \$5.3 billion.¹⁷⁵ The total box office receipts for Broadway and touring productions in the 2004–05 season, which ran year round and usually featured at least eight performances a week at each venue, totaled \$1.4 billion.¹⁷⁶ The stakes for football, with its corporate sponsorships and big television contracts, are different from theater by an order of magnitude.¹⁷⁷ Moreover, these figures, reflecting commercial theater, do not account for artists like Edward Einhorn, working in a small off-Broadway theater for a single fee of \$1000.¹⁷⁸ Ultimately, the difference is formalistic. Congress has extended protection to live events being transmitted through its revision of § 101, and there is no principled reason for denying this protection to theatrical performance, if fixed through recordation.

Congress went even further in relaxing the fixation requirement with its passage of § 1101(a), adopted to bring the United States in line with the other signatories of the TRIPS Agreement.¹⁷⁹ This anti-bootlegging provision is another example of protecting evanescent or transitory events by barring the unauthorized fixation of a live musical performance.¹⁸⁰ Unlike the new definition of fixation in § 101, this provision does not extend copyright protection to the performer; instead, it allows the performer to prevent others from fixing her work without her permission.¹⁸¹ Although a weaker solution, an analogous framework could suffice to protect a theater director. In such a scheme, the director would not own copyright in her work. Instead, she would be able to stop others from copying her work without her permission.

In fact, much of Congress's recent copyright legislation has functioned to harmonize the United States system with other

175. Michael K. Ozanian, *Football Fiefdoms*, FORBES.COM, Sept. 3, 2004, http://www.forbes.com/business/2004/09/02/cz_kb_0902nflintro.html.

176. Variety.com, Charts and Data, http://www.variety.com/index.asp?layout=chart_pass&charttype=chart_bwaycombined (last visited Oct. 14, 2007).

177. See Ozanian, *supra* note 175.

178. Einhorn v. Mergatroyd Prods., 426 F. Supp. 2d 189, 192 (S.D.N.Y. 2006).

179. See H.R. REP. NO. 103-826, pt. 1, at 8 (1994), as reprinted in 1994 U.S.C.A.N. 3773, 3780.

180. *Id.*

181. See 17 U.S.C. § 1101(a)(1) (2000).

nations.¹⁸² If such harmonization is really one of Congress's goals, then one cannot help but wonder about the persistent disclaimer of moral rights in United States copyright law.¹⁸³ As long as an economic purpose underlies copyright law, many collaborative artists—some of whom are for a good reason referred to colloquially as “starving”—will go unprotected. Congress need not go so far as to modify the traditional purpose of copyright law, however, in order to protect the intellectual property contributions of theater directors. It has already extended protection to live events, and to do the same for theatrical performance would be doctrinally indistinguishable.

B. RECENT JUDICIAL DILUTION OF THE FIXATION REQUIREMENT

Case law in the Second and Ninth Circuit Courts of Appeals has interpreted the fixation requirement as flexible, particularly when considering computer programs. Computers were a new technology when Congress passed the 1976 Copyright Act, and courts have been tasked with fitting the statutory provisions to the needs of this unprecedented form of expression. Similarly, given its late ascendancy in the American theater, direction could be seen as a new development that can be accommodated by the flexibility of copyright law.

In *Torah Soft Ltd. v. Drosnin*, for example, the court reasoned that because computer matrices could be recreated with identical input, they were sufficiently fixed for the purposes of copyright law.¹⁸⁴ Theatrical performances are similarly repeatable with the same input, only the input is not data but the collaborative contributions of the actors and designers as curated by the director. One could argue that truly identical input is impossible when it comes to an endeavor as human as theater, which often involves volatile, artistic personalities. That argu-

182. See, e.g., *Eldred v. Ashcroft*, 537 U.S. 186, 205–06 (2003) (“[A] key factor in the [Copyright Term Extension Act]’s passage was a 1993 European Union (EU) directive instructing EU members to establish a copyright term of life plus 70 years. . . . [T]he EU directed its members to deny this longer term to the works of any non-EU country whose laws did not secure the same extended term. By extending the baseline United States copyright term, . . . Congress sought to ensure that American authors would receive the same copyright protection in Europe as their European counterparts.” (internal citations omitted)).

183. See TRIPS Agreement, *supra* note 75, pt. II, § 1, art. 9(1) (allowing countries to not adopt the Berne Convention’s requirement that moral rights be recognized).

184. 136 F. Supp. 2d 276, 283 (S.D.N.Y. 2001).

ment, however, favors the creativity of machines over that of artists, and the Constitution, after all, empowers Congress to “secure[] . . . to Authors,” not machines, “the exclusive Right to their . . . Writings.”¹⁸⁵

Furthermore, as *MAI Systems Corp. v. Peak Computer, Inc.* demonstrates, even fleeting, momentary fixations in the memory system of a computer, perceivable only by a machine, are considered sufficiently fixed to earn copyright.¹⁸⁶ While this corruption of the fixation requirement may be a reaction to the needs of the financially robust computer industry, in practice it functions to redefine what fixation means. A theatrical performance, even one that is not recorded, is perceptible without the aid of a machine, even if it is similarly fleeting. If an important underpinning of the fixation requirement is the enforcement of copyright infringement actions, as at least one court has argued,¹⁸⁷ then several means of fixation exist, including videorecording and notation,¹⁸⁸ that would sufficiently serve theater.

In fact, the Ninth Circuit ruled in *Micro Star v. Formgen Inc.* that descriptive fixation sufficed for statutory purposes.¹⁸⁹ A computer file that fixes an audiovisual display is analytically indistinguishable from notation or a videorecording that fixes stage direction—Judge Kozinski, in fact, relies on this analogy in his opinion, describing a melody as fixed in sheet music and pantomimes fixed if “described in sufficient detail to enable the work to be performed from that description.”¹⁹⁰ Directing, be it recorded or notated, is similarly fixed enough to allow work to be performed, as demonstrated by the copying cases that have already been filed. Under the reasoning of *Micro Star*, directing is already fixed, and therefore it deserves copyright protection.

Sports cases, where courts have held that broadcasts are copyrightable while the underlying game is not, are distinguishable.¹⁹¹ In *National Basketball Ass’n v. Motorola, Inc.*, the

185. U.S. CONST. art. I, § 8, cl. 8.

186. *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 519 (9th Cir. 1993) (“[W]e hold that the loading of software into the RAM creates a copy under the Copyright Act.”); see also *Matthew Bender & Co. v. West Publ’g Co.*, 158 F.3d 693, 702 (2d Cir. 1998).

187. See *Matthew Bender*, 158 F.3d at 702–03.

188. Notation suffices to fix the work of choreographers. See Sheila A. Skojec, Annotation, *Copyright of Dance or Choreography*, 85 A.L.R. FED. 906, 907 (1987).

189. 154 F.3d 1107, 1111–12 (9th Cir. 1998).

190. See *id.* at 1112.

191. See *Nat’l Basketball Ass’n v. Motorola, Inc.*, 105 F.3d 841, 847 (2d Cir.

court relied on the improvisational nature of sports performance, which has no “underlying script” and is prone to mistakes regardless of how much practice precedes the game, when it held that a basketball game was not copyrightable.¹⁹² In fact, the opportunity to copy—and perhaps perfect—the feats of other athletes is essential to the particular kind of competition that lies at the heart of sport.¹⁹³ Most theatrical productions, however, are based on an underlying script. Where practice in sports functions to ready a team to respond dynamically and opportunistically to variables, rehearsal in theater strives to shape a performance that will be repeatable as designed in spite of variables. Mistakes in theater are just that—deviations from what is supposed to happen, not the product of interactive competition. Based on this reasoning, the director’s work in creating a performance out of an underlying script deserves copyright protection.

Finally, one court in the Ninth Circuit has extended copyright protection to a live event—a movie pitch.¹⁹⁴ In *Metrano v. Fox Broadcasting Co.*, the court found that an outline and note cards sufficed for the purposes of fixing the screenwriter’s ideas as he expressed them.¹⁹⁵ Although the *Bleistein* nondiscrimination principle counsels courts to refrain from making aesthetic judgments,¹⁹⁶ the slippery slope is apparent: if a movie pitch is fixable, so should be a theatrical performance.¹⁹⁷ Several directors have applied for copyright protection for their work, submitting annotated scripts indicating their stage directions.¹⁹⁸ In

1997). *Contra* Balt. Orioles, Inc. v. Major League Baseball Players Ass’n, 805 F.2d 663, 669 n.7 (7th Cir. 1986).

192. *Nat’l Basketball Ass’n*, 105 F.3d at 846.

193. *See id.* (“A claim of being the only athlete to perform a feat doesn’t mean much if no one else is allowed to try.”). A court in the Ninth Circuit concurs. *See* Open Source Yoga Unity v. Choudhury, 74 U.S.P.Q.2d (BNA) 1434, 1437 (N.D. Cal. 2005).

194. *See* *Metrano v. Fox Broad. Co.*, No. CV-00-02279 CAS (JWJX), 2000 WL 979664, at *4 (C.D. Cal. Apr. 24, 2000) (finding a movie pitch fixed in an outline and note cards).

195. *Id.*

196. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903) (“It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits.”).

197. Again, here, economic considerations may be at play. The movie industry is richer than theater, and a movie pitch on one level really is a commercial transaction.

198. *See* Yellin, *supra* note 110, at 328 (discussing the registration of Gerald Gutierrez’s copyright for his direction of *The Most Happy Fella*); Nevin,

response, the United States Copyright Office has classified those registrations as “literary authorship,” restricting protection to the “text of stage directions.”¹⁹⁹ The insufficiency of this solution is apparent; it is not the copying of the written directions but their embodiment on stage that is at issue.

The work of both the legislature and the courts has diluted the fixation requirement. When examined according to the standards applied to computer programs or sporting events, a theatrical performance ought to be considered fixed. For the purposes of an infringement action, fixation in either recording or notation should be sufficient to demonstrate copying. Ultimately, the statutory requirement that work be fixed in any tangible medium of expression poses no real barrier to copyright protection for the creative, original work of authorship that is stage direction.

CONCLUSION

The Copyright Act represents an antiquated view of the American theater, one that elevates the work of the playwright above the contributions of her collaborators. In many of today’s theatrical productions, the director is the driving force. The staging of a play, be it classic or contemporary, represents “the original outgrowth of a director’s imagination.”²⁰⁰ The director’s contribution, however, is not yet copyrightable. A second-comer is free to watch a show, take notes, and recreate it elsewhere without licensing the work or giving the original director credit. On an economic level, the original director is robbed of the chance to be compensated for directing the work in another venue. More importantly, on a moral level, creative work is stolen.

supra note 135, at 1557 n.153 (noting the trend of directors copyrighting their stage directions).

199. Yellin, *supra* note 110, at 327–28 (“Reference to ‘stage directions’ in an application, however, does not imply any protection for a manner, style or method of directing, or for the actions dictated by them.”) (quoting the United States Copyright Office’s response to a director’s submission of his prompt book, an annotated copy of the script indicating all stage directions added by the director, for copyright registration). This classification raises the issue of which category of copyrightable work in § 102 encompasses the work of stage directors. *See* 17 U.S.C. § 102(a) (2000). Stage direction could perhaps be copyrighted as a “dramatic work.” *Id.* § 102(a)(3). Another option would be to consider stage direction akin to choreography, *id.* § 102(a)(4), which can be fixed through “dance notation, film, and videotape.” Skojec, *supra* note 188, at 907.

200. Charles Marowitz, Letter to the Editor, *What the Director Brings*, N.Y. TIMES, Feb. 5, 2006, § 2, at 4.

The current copyright scheme in this country is sufficiently flexible to accommodate the copyright claims of stage directors. By transforming a stack of pages into a live performance, a director demonstrates sufficient originality. Because the performance is based on a script usually written by another, the director is not the sole author of her creation but instead is the author of a derivative work. The most onerous obstacle to copyrighting stage direction is the requirement that the director's work be fixed. Theater, by its nature, is a fleeting live event. Since 1976, however, Congress has weakened the fixation requirement in order to accommodate live broadcasts and to prevent bootlegging. Judicial opinions, particularly those concerning computer programs and sporting events, have further weakened the idea of fixation. As it stands today, the work of a director, particularly if it is recorded or notated, is sufficiently fixed for the purposes of copyright protection. The resulting protection may be thin, but it would be enough to prevent another from shamelessly stealing a director's work.

What is required, more than anything, is a leap of faith. As long as the focus on the economic underpinnings of copyright law dominates the discourse, judges will characterize the claims of an underpaid amateur director like Edward Einhorn as making a mountain out of a molehill. Instead, the story of *Tam Lin* is one of weeks of unpaid and unrecognized work. Ultimately, protecting the intellectual property rights of directors—and directors here stand synecdochically for all theatrical collaborators, including designers and dramaturgs—is a moral issue, and recognizing the moral implications of these artists' copyright claims would further bring the United States in line with other TRIPS Agreement signatories. Finally, protecting the work of directors would promote progress. Many theater directors are not paid handsomely in cash; extending copyright protection to their work, however humble, affords another kind of payment altogether: respect.