Creative Equity: A Practical Approach to the Actor's Copyright

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CREATIVE EQUITY: A PRACTICAL APPROACH TO THE ACTOR’S COPYRIGHT

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I. INTRODUCTION

If a person sends a minimally creative, original e-mail to a friend, that writing can be registered with the U.S. Copyright Office. Remarkably, the same probably cannot be said for an actor’s contribution to a play or movie. In Minneapolis, Actors’ Equity Association (AEA) member Nathan Keepers has developed a following for his personalized take on the Jacques Lecoq, improvisational clowning, movement method. Keepers is perhaps best known for playing 20 different characters in the hit one-man

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1 Non-union stage actor, playwright, theater producer at Cardboard Productions, and Minnesota Lawyers for the Arts Legal Program Associate at St. Paul nonprofit Springboard for the Arts; J.D. Candidate, William Mitchell College of Law, 2015. Much appreciation and credit is owed to: David Howes for introducing me to the magical world of theater; Peter Kieselbach, Nic Püchner, Melissa Lorentz, Adam Szymanski, Lydia Lui, Professor Heidenreich, Dean Mary Pat Byrn and the Cybaris® staff for providing many valuable, non-copyrightable comments; and, finally to the many Minnesota theater artists who contributed their wisdom and time to my research. Continue to make art happen!


3 Below are working definitions of the roles that this paper discusses. Producers are persons in charge of a production’s business affairs, including hiring the crew, ticket sales and marketing. Playwrights write a play’s plot, dialogue, and often the initial stage directions. Actors on stage or in film are charged with portraying the playwright’s fictional characters. Directors make final decisions on most creative decisions in a theatrical production (e.g., deciding where actors stand, approving costume and set designs). Choreographers design and instruct the placement and movement of actors or dances on a stage.

4 Jessica McKinney, Is an Actor’s Performance Copyrightable? Innocence of Muslims Lawsuit Filed by Cindy Lee Garcia May Decide the Question, 85 PAT. TRADEMARK & COPYRIGHT J. at n.12 (2012) (The actor’s copyright “has yet to be directly addressed by any court, both the Copyright Act and existing case law suggest that the answer is yes, at least in the narrow facts and circumstances alleged [in Garcia v. Nakoula]”).

5 AEA, http://www.actorsequity.org/AboutEquity/aboutequityhome.asp (last visited Sept. 29, 2013) (“founded in 1913, AEA is the labor union that represents more than 49,000 Actors and Stage Managers in the United States.”).

show *Fully Committed* at the Jungle Theater. His professional biography includes roles at the Guthrie Theater and the American Repertory Theater; and being a company member at the Tony-winning Theatre de la Jeune Lune. As the law stands, Keepers owns neither the copyright to his performances, nor the dialogue that comes about through his improvisation.

In professional theater, copyright ownership has been a point of contention for theater collaborators. Unlike film or television writers, playwrights typically retain the copyright to their plays. But the person who profits most from a production is usually the producer, not the playwright. Depending on the agreement, playwrights are generally given only around 5–8% of the profits. Even so, with American musicals bringing in as much as $5 billion, directors and choreographers are claiming their contributions are worthy of joint-authorship. Conversely, the AEA stage actor’s union has been silent on copyright ownership, leaving that fight to individual actors. Producers and playwrights oppose authorship

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7 *Id.*

8 *Id.; See* YouTube Video: *The Fishtank* (Theatre de la Jeune Lune) at https://www.youtube.com/watch?v=ovyRJLWjxe0.

9 *See generally* 17 U.S.C §§ 106, 204, 504(c)(1) (2012) (A copyright owner is given exclusive control over his or her work, and is afforded a bundle of property rights: the right to copy, to distribute, to create derivative works, to perform, and to publicly display. Property rights can be assigned, or licensed individually or in entirety. If a work is registered with the U.S. Copyright Office and another party infringes that work, the author qualifies for statutory damages and attorney fees).

10 *See* YouTube Video: *DG Controversies & Their Resolutions* (The Dramatist Guild of America 2013), https://www.youtube.com/watch?v=aOhek5s0jT8.


13 *Infra* part 3(c); Margit Livingston, *Article: Inspiration or Imitation: Copyright Protection for Stage Directions*, 50 B.C. L. REV. 427, 428 (2009).

claims because multiple authors complicate the production process, diminishing profits for royalty holders. For example, if actors were to own their individual performances, producers might have to ask permission or negotiate an assignment before streaming a live broadcast. If an actor’s performance were elevated to the level of meriting joint authorship, the playwright would be forced to split both his earnings and control with the actor.

From the actor’s perspective, copyright ownership would provide new benefits to the craft of acting, including royalties and the ability to control one’s work. First, this change would give actors one of a copyright owner’s property rights: the right to control distribution. Some states have adopted publicity rights, which mirror this power by protecting one’s name, image and likeness in commercial settings. But if the image is embedded in copyrighted material, federal copyright law preempts access to this cause of action. As a result, actors are left without a remedy to control the work’s unwanted distribution. Second, as copyright law is an economic tool used to collect royalties, actors and their unions could leverage this property interest as a bargaining chip. This is particularly paramount, since actors are typically paid little. Even at a big house like Chanhassen Dinner Theater, the largest dinner theater in the nation, a first-rate

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15 See Aalmuhammed v. Lee, 202 F.3d 1227, 1233 (9th Cir. 1999) (granting all creative contributors of a film authorship would result in endless authors given the large quantity of creatives on set).
17 Infra part 3(c).
19 62A Am. Jur.2d Privacy § 17 (right to publicity in when there is an “association of one’s name, face, or likeness with a business, produce or service creates a tangible and salable production … there may be a ‘right of publicity’ in the value of a person’s name or likeness which is a variety of the tort of invasion of privacy.”).
20 Infra part 2(b).
21 Carrie Ryan Callia, To Fix or Not to Fix: Copyright Fixation Requirement and the Rights of Theatrical Collaborators, 92 MINN. L. REV. 231, 234-35 (2007) (Copyright “served dual purposes: economics, by granting authors the right of publication, and culture, by “encouraging … learning”).

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AEA actor like Keepers is only guaranteed $656 a week.22 The status quo is even worse for non-union actors who are typically only offered modest stipends, if that.23 In summary, copyright ownership could open the door to giving actors better pay, more control over one’s work, and the opportunity to argue for joint authorship. Recognizing authorship in the actor’s performance would balance the producer’s need to control dissemination with the actor’s right to his or her property interest.

II. NON-UNION ACTORS ARE FIGHTING THE BATTLE IN COURT

Copyright protection, not explicitly listed in the Act, materializes either through state24 or federal common law, or through private contractual agreements. The theater industry is unionized from top to bottom, negotiating most employment contracts through collective bargaining. Apart from making a couple of ownership-like agreements available, AEA has left copyright ownership to the actors to negotiate themselves.25 Some non-union actors have done just that. Overall, the actor’s copyright has gained little traction in state and federal court.

A. AEA’s current response to intellectual property is minimal

AEA currently provides the following contracts to its members involved in new work: the Mini Contract and the Workshop Agreement and Rules Governing Employment at Chanhassen Dinner Theater, AEA at 64 (effective May 25, 2014) at http://www.actorsequity.org/docs/rulebooks/Chanhassen_Rulebook_10-14.pdf. Actors and producers are free to negotiate higher weekly salaries, as well as any additional terms of employment.

22 Agreement and Rules Governing Employment at Chanhassen Dinner Theater, AEA at 64 (effective May 25, 2014) at http://www.actorsequity.org/docs/rulebooks/Chanhassen_Rulebook_10-14.pdf. Actors and producers are free to negotiate higher weekly salaries, as well as any additional terms of employment.


24 See CAL CIV. CODE § 980; 3 Goldstein on Copyright §§ 17.5.11, 17.36. (While section 301 of the Act permits states to protect works not eligible for federal protection, this body of law differs from state to state, and appears to focus on the protection of pre-1972 sound recordings, and unfixed bootlegged copies of live performances).

25 Ryan Hasting supra at note 14.
Agreement.\textsuperscript{26} The rights included in these agreements resemble some of the property rights afforded to copyright owners without reference to property ownership. An actor uses a Mini Contract when he or she commits to a short-term play premiering at a smaller venue.\textsuperscript{27} Embedded in the contract is a conversion clause entitling an actor to either additional money, or a guaranteed part in a larger, subsequent production.\textsuperscript{28}

A Workshop Agreement defines an author’s involvement in the development of a new play.\textsuperscript{29} In consideration for the actor’s participation, she can “earn a share in the future success of the show.”\textsuperscript{30} Actors under this agreement are placed inside of a diluted

\begin{footnotes}
\item[27] See generally AEA, \textit{ADDITIONAL RULES GOVERNING EMPLOYMENT UNDER THE MINI CONTRACT, \textit{available at} \url{http://www.actorsequity.org/docs/rulebooks/Mini_Rulebook_2011.pdf}.}
\item[28] \textit{Id.}
\item[29] Email interview with Leah Cooper, Executive Director, Theater Alliance (Aug. 16, 2013) (on file with the author).
\item[30] AEA, \textit{WORKSHOP AGREEMENT OVERVIEW, \textit{available at} \url{http://www.actorsequity.org/docs/rulebooks/Workshop_Overview.pdf}.}
\end{footnotes}
 royalty pool, and are not given any control over the work. 31 Most actors perform in small productions without compensation, let alone profit sharing. 32

To many theater professionals, AEA does not have a great record of providing more to its actors than standard agreements. 33 However, before collective bargaining, actors often received no pay for rehearsals, were forced to provide their own costumes and transportation, and were pressured into signing illusory contracts. 34 Today, AEA requires producers to classify actors as employees, provide reasonable working conditions, and pay minimum weekly salaries. Alternative avenues to revenue like actor collective business models, performing in unusual spaces, and the actors’ copyright are just not viewed as priorities to the union. 35 Particularly since copyright law automatically transfers the work of an employee to his employer. Given this result, fighting for employee classification might be a better battle. Employees enjoy immediate job securities and benefits to the actor, including eligibility to unemployment insurance and workman’s compensation. 36 Still, if the courts

31 Supra Part III (A).
32 Email interview with Zaraawar Mistry, Director, Dreamland Theater (Sept. 16, 2013) (“Most of the people and companies I work with operate in the non-profit arena, on a relatively small scale, where one’s contribution is considered work made for hire, so the question of actor’s copyright doesn’t really matter anyway.”) (on file with the author).
33 Telephone interview by Gülgün Kayim, Director, Arts, Culture and Creative Economy (Sept. 25, 2013); Leah Cooper supra note 26; Zawaawar Mistry supra note 29.
34 ROBERT SIMONSON, PERFORMANCE OF A CENTURY, 25-28 (Applause Theatre & Cinema Books 2012) (“Under the ‘satisfaction clause,’ an actor who failed to please the manage in any way could be dismissed.” It was not uncommon for a touring company to go belly-up, leaving the unpaid actors without a way to get home).
35 Kayim, supra note 33.
36 17 U.S.C. § 101 (2012) (“A ‘work made for hire’ is (1) a work prepared by an employer within the scope of his or her employment; or (2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture [, etc] … if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.”); Ryan Hastings supra note 13 (AEA does not bargain for intellectual property rights, but strictly requires all production houses to classify actors as employees, and to process W-2s).
recognized the actor’s copyright, AEA would still benefit by having an additional perk to promote employee classification. Further, as most actors are not members of a union, they typically go without both employee benefits, and intellectual property rights.\footnote{In Minnesota, the future of employee classification for non-union actors is uncertain. The MN Court of Appeals is set to hear a dispute between an opera company and the Minnesota Department of Employment and Economic Development about the classification of non-union actor-singers as independent contractors. See Statement of the Case of Relator at para. 4, Skylark Opera, Relator, v. Dep’t of Emp’t and Econ. Dev., No. A13-2343 (Minn. Ct. App. 2013)}

B. The Act preempts actors for using state publicity rights

Stephen Fleet, a non-union film actor who appeared in \textit{Legend of the White Horse}, later distributed by CBS, brought a publicity rights case that brought the actor’s copyright into question.\footnote{Fleet v. CBS 50 Cal. 2d 1913, 1914-15 (Cal. Ct. App. 1996).} After not being paid, he filed suit in California state court in 1997 for misappropriation of his name, image and likeness for commercial gain.\footnote{Id.} The appellate court granted a motion for summary judgment because federal copyright law preempts publicity rights.\footnote{Id. at 1924.} When images are embedded in a film, the rights involved are that of copyright, not publicity.\footnote{Id. at 1922.} The judge noted that because it was suspect as to whether the performance fell within a work made for hire agreement,\footnote{17 U.S.C. § 101 ("A ‘work made for hire’); Fleet, supra note 59 at 1916-17 (CBS failed to present an evidence to prove that the actors were neither employees of the production company, nor that they signed explicit work made for hire agreements, as required by law. Conversely, as the plaintiffs failed to challenge this component, the court was unable to make a ruling on the matter).} the actor would have been more successful in bringing a claim for copyright infringement.\footnote{Fleet, supra note 35, at 1921 (“An actor who wishes to protect the use of the image contained in a single, fixed dramatic performance need simply retain the copyright”).} The court felt, unlike a model in a photograph, CBS was distributing his dramatic performance, which was “copyrightable.”\footnote{Downing v. Abercrombie & Fitch 265 F.3d 994, 1003-04 (9th Cir. 2001) (holding that the a model’s image in a photograph is owned by the photographer author).}
Four years after Fleet, another California court found in favor of a model who brought a publicity rights claim in the unauthorized distribution of her image. The court qualified the Fleet opinion by holding that when a party is ineligible for copyright protection (e.g., an actor, or model), and they are challenging an unauthorized distributor, the claim is not preempted. The court challenged Fleet’s characterization of the actor’s performance as copyrightable. Ultimately, it allowed a narrow holding for the specific actor in Fleet, but proceeded to group other actors in the same unprotected category as models. The court made no comment as to what made the Fleet actor an exception.

Finally, when a porn actor-producer brought a publicity rights claim in federal court, the court ignored the Fleet actor altogether. The court determined that preemption should depend on whether the product itself was copyrightable, and should pay no attention to the claimant’s individual rights. A publicity rights claim is preempted when it is “equivalent of a claim for infringement of a copyrightable work … regardless of what legal rights the defendant might have acquired.” As a result, a stage actor is ineligible for legal remedies when a producer broadcasts his performance without authorization.

1. An actor’s right to restrict manipulation of her performance

Actors are not only concerned with being fairly compensated, but also how their image and voice is used. A YouTube film actor tried to get Google to take down a controversial film by claiming copyright...
infringement. The filmmakers, without the actor’s knowledge, colored the Muslim Prophet Muhammad as a child molester by altering the dialogue in the actor’s 30-second performance. No work made for hire agreement was signed. The actor did not argue that she was a joint author, but simply that she held a derivative copyright in her own performance. Regrettably, the court refused to comment on the actor’s copyright, deciding that by acting in the film, she gave the producers an implied license to distribute and modify her performance. If the claimant was the copyright owner of her performance, and not a joint author, then the law may have required the producers to get the actor’s permission before creating a modified version of the agreed upon film.

2. Actors granted authorship over characters they performed.

A Puerto Rican federal district court found it absurd not to grant an actor authorship to the character she played. Actors starring in a Spanish television show brought infringement claims alleging that a different program included substantially similar characters to the ones played by the plaintiff actors. Relying on a string of cases that held fictionalized characters deserve copyright protection, the court concluded that an actor holds an authorship right to the character they develop. If James Bond is copyrightable, Sean Connery’s portrayal of him deserves the same right. When “characters depicted audio-visually” are “especially distinctive” they should receive copyright protection.

54 Id.; Jessica McKinney, supra note 4, para 1-2. (The actor sought relief as her performance sparked several Muslim leaders to have those involved in the film to be killed. The actor received a threat that her daughter would be raped, because of her involvement in the film).
56 Id.
57 See 17 U.S.C. § 101; 106 (derivative works).
59 Id. at 236 citing Rice v. Fox Broadcasting Co., 330 F.3d 1170, 1175 (Godzilla), Toho Co. Ltd. V. William Morrow and Co., Inc. 33 F. Supp. 2d 1206, 1215 (James Bond).
60 TMTV Corp., supra note 58.
protection.\textsuperscript{61} Consistent with \textit{scene a faire}, copyright protection should not be given to stock characters and basic dialogue.\textsuperscript{62} The court applied the same reasoning to actors.\textsuperscript{63} Despite giving the actors authorship, this holding deviates from this article’s thesis by creating an impractical result. An actor should not be given authorship over his character simply for endowing the role with unique characteristics. Doing so would prevent future actors from reinventing the role, which would be particularly harmful in theater as roles are repeated all over the world. Instead, actors should be granted copyright ownership to the specific collection of audio and visual choices that embody their performance.

III. THE ACTOR’S COPYRIGHT IS LEGALLY JUSTIFIED

There is little justification to continue denying actors protection. The once practical difficulties in fixing live performance “in a tangible medium”\textsuperscript{64} have been made much less cumbersome with modern recording equipment. Further, collaborative practices exist in other art forms (e.g. dance and music) so courts should not exclude theater collaborators simply because it would complicate the industry. Furthermore, producers and actors already negotiate lengthy employee contracts, so recognizing copyright ownership would just add another stick to the pile. Especially given that negotiation over copyright ownership was likely desired by the Constitution’s original Framers. Finally, while playwrights share in low bargaining power and hardships with actors, and should be given consideration by the court, joint-authorship claims are particularly troublesome to win.

A. Fixation is old news with the advent of recording equipment

The law protects “original works of authorship fixed in any tangible medium of expression.”\textsuperscript{65} American copyright law is unique

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\item \textsuperscript{61}Id. at 236.
\item \textsuperscript{62}Id.
\item \textsuperscript{63}Id.
\item \textsuperscript{64}17 U.S.C. §102 (2012).
\item \textsuperscript{65}Id.
\end{itemize}
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in its fixation requirement.\textsuperscript{66} It must be fixed “sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.”\textsuperscript{67} The actor’s performance struggles with the fixation requirement on two counts. First, staged performances rely on the memories of its performers, so an audience member will never see the same performance twice. Second, while the actor herself is tangible, and she could likely restage her performance before a judge, there is nothing tangible about her creation.\textsuperscript{68} It is not painted on canvas, or molded into a statue. Recently, big-ticket productions have started providing live broadcasts of their performances; however, most productions never see the lens of a film camera.\textsuperscript{69}

As long as Congress persists in requiring fixation, actors will need to create systems to fulfill this requirement.\textsuperscript{70} Dancers, like actors, struggled with fixation as dancing too represents a momentary, live expression. In response, the law began to accept either written

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\textsuperscript{66} Carrie Ryan Gallia \textit{supra} note 21, at 240 (Civil law countries have done away with the fixation requirement).
\textsuperscript{68} Talia Yellin, \textit{Article: New Directions for Copyright: The Property Rights of Stage Directors}, 24 COLUM.- VLA J.L & ARTS 317, 327 (2001), citing Barbara A. Singer, \textit{In Search of Adequate Protection for Choreographic Works: Legislative and Judicial Alternatives v. The Custom of the Dance Community}, 38 U. MIAMI L. REV. 287, 301 (1984) (“Because dance is, in essence, an intangible work of art that lives primarily through performance instead of through recordation, the fixation requirement creates a formidable obstacle to the registration of choreographic works.”).
\textsuperscript{69} Carry Ryan Gallia \textit{supra} note 21 at 239 (If a live theater production is broadcasted, it should be afforded protection as long as it is recorded at the “same time as it is being transmitted.”).
\textsuperscript{70} Id. at 240-43 (author noted that adherence to international treaties has brought about a loosening of the fixation requirement. Since the 1994 signing of the TRIPS (Trade Related Aspects of Intellectual Property Rights,) the U.S. has had to comply with all of the provisions of the Berne Convention, with the exception of moral rights. Then in 1996 when the TRIPS Performances and Phonograms Treaty passed, the U.S. Copyright Act had to conform by making live \textit{musical} performances without recognition of the fixation requirement. Jurisdictions differ as to whether this was permitted under the Commerce Clause, so it uncertain whether America will continue to be stubborn about the fixation requirement).
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notation or videotaping as evidence.\textsuperscript{71} Case law suggests that actors have a heavier burden than dancers in proving their contribution.\textsuperscript{72} In Einhorn, a director sought ownership of his stage directions in Tam Lin, an off-off-Broadway production.\textsuperscript{73} The court found the submission of his prompt book, containing his blocking notes, unsatisfactory in proving his individual contribution.\textsuperscript{74} Further, Director Gerald Gutierrez’s deposits of his prompt book for The Most Happy Fella were rejected. The U.S. Copyright Office noted that the prompt book only represents the [blocking] text, and would not equate to property ownership in the “manner, style, or method of directing, or for the actions dictated by them.”\textsuperscript{75} This decision is consistent with section 102 (b) of the Act, which excludes ideas, no matter what medium that idea takes.\textsuperscript{76}

Actors should be prepared to submit both a copy of their rehearsal script, and a videotaped performance of their work as deposits for copyright registration.\textsuperscript{77} Fact-finders can compare the two to differentiate the work of the playwright from that of the actor.\textsuperscript{78}

\textsuperscript{71} Talia Yellin \textit{supra} note 68 at 327; Jennifer J. Maxwell, \textit{Article: Making a Federal Case for Copyrighting Stage Directions: Einhorn v. Mergatroyd Productions}, 7 J. MARSHALL REV. INTELL. PROP. L. 393, 401 (2008) (“The Copyright Office's position creates an inconsistency by providing copyright protection for movements dictated by choreographic notations, but not providing this same protection for movements dictated by stage direction).\textsuperscript{72} Talia Yellin \textit{supra} note 68 at 328 (“It is generally accepted that choreographic notation gives rise to a copyright in the movement dictated by the notation, not just in the notation itself.”).\textsuperscript{73} Einhorn v. Mergatroyd Prods., 426 F. Supp. 2d 189, 191-92 ( S.D.N.Y 2006).\textsuperscript{74} \textit{Id.} at 196.\textsuperscript{75} Talia Yellin \textit{supra} note 68, at 328 citing Letter from Joseph Miranda, Supervisory Examiner, Performing Arts Section, United States Copyright Office (June 22, 1995) (emphasis added).\textsuperscript{76} 17 U.S.C. 102 (b). \textit{See, e.g., ADA v. Delta Dental Plans Ass’n}, 126 F.3d 977, 981 (holding that a code of long descriptions of medical procedures was copyrightable, even if the systems inside were not).\textsuperscript{77} Jennifer J. Maxwell, \textit{Making a Federal Case for Copyrighting Stage Directions: Einhorn v. Mergatroyd Prod.}, 7 J. MARSHALL REV. INTELL. PROP. L. 393, 400 (2008).\textsuperscript{78} \textit{Id.} at 401.
Jennifer Maxwell, in her article on the *Einhorn* decision, commented on the judge’s challenge with these types of claims:

[A] videotape of the performance alone should not fulfill the fixation requirement without any evidence of written recordation. For example, anyone watching a play may perceive that the character on stage is ‘powerful, without realizing he is positioned in the most powerful point on the stage.’ In such an instance, the judge or any lay person becomes so absorbed by the ‘illusion of theater’ that they credit the actor rather than the staging.”

It is important to note that the nature of performance makes it difficult to separate what is the writer’s work from what is the actor’s work. What is one without the other? The filming of *Jerry Maguire* illustrates this unique relationship, as both the writer-director Cameron Crowe and actor Tom Cruise were meticulous in their respective roles:

[Cruise] carried the [marked-up] script in a black notebook with multicolored page markers for easy access. Layer by layer, Cruise began to strip down to the part that many told [Crowe] he would never play … [Similarly, in every picture Crowe is] holding pages from the script in hand, and the pages are mostly filled with scribbled notes about how each line could be played.

In this specific situation, there existed a mutual appreciation for the other’s contribution. Crowe gushed over Cruises’ commitment to the role, and Cruise viewed the script to be Crowe’s work: ‘Your words,
man,’ he said, ‘you spent three and a half years on this script.’ In less amicable situations, the judge will be tasked with determining the degree a claimant contributed to the work. The judiciary should be sensitive to the limitations of the common stage actor in providing tangible evidence; however, it would do an injustice to simply take an actor’s word for it. It would be unrealistic, and excessive to require collaborators to document every single suggestion or movement that they make throughout the rehearsal process. Still, the fixation requirement provides evidence in this abstract field of law. The submission of both rehearsal scripts and recorded performance should be sufficient for fixation.

B. The Framers were not fully supportive of the producer’s monopoly

Playwrights and actors may be the creators, but theater producers are the ones who sell tickets. Copyright’s primary goal is to encourage the creation of new work, such as a play, and the Framers felt this was best achieved by maximizing ticket sales. As such, copyright law has always favored producers by encouraging either the exclusive licensing of certain rights or outright assignment for any amount of consideration. Still, if presented with the actor’s

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81 Cameron Crowe, The Jerry Maguire Journal, ROLLING STONES, issue #750
82 But see Jennifer J. Maxwell supra note 77, at 401 (suggesting that stage directors should “record all of their contributions, including verbal directions during rehearsals, in the prompt book or on the script as a means of evidencing the full range of their contributions from the first time the read the script all the way through to the last performance).
83 Interview with Patricia Mitchell, CEO of the Ordway in St. Paul, MN (Sept. 20, 2013) (Artistic directors and producers are charged with the constant task of making money and filling seats).
84 Mark Rose, The Statute of Anne and authors’ rights: Pope v. Curll (1741), in GLOBAL COPYRIGHT 71 (Lionel Bently ed., 2010) (The first 20 cases under the British 1710 Statute of Anne involved bookseller against bookseller); Benedict Atkinson & Brian Fizegerald, Making Copies 1 COPYRIGHT LAW : THE SCOPE AND HISTORICAL CONTEXT 207 (The Library of Essays on the Law 2011) (The original copyright bill permitted rights to be held by either the author or those who “hath or have purchased or acquired the copy or copies of any book or books.” This remains true today); Id. at 204 (the bill itself was “simply parliamentary confirmation of traditional [bookseller] guild practices.”).
When America formed as a new nation, it brought with it England’s copyright tradition. Under Article I of the U.S. Constitution, Congress can “promote … useful Arts by securing for limited Times to Authors … the exclusive Rights to their respective Writings.” The mere inclusion of the copyright clause in the Constitution, a document famous for its brevity, is telling of its political importance. Framers disagreed as to the extent of the Act’s power. To James Madison, “the right to useful inventions seems with equal reason to belong to the inventors.” However, not all of the Framers agreed with Madison. Thomas Jefferson, for example, expressed reservations about granting too strong a monopoly in their work. If inventions are forever locked away, it would burden consumers with overpriced goods, and stifle future creators.

Permitting the actor’s copyright is compatible with the intentions of America’s Framers. Copyright commentator Lyman Patterson concluded that artists’ rights were included in copyright legislation.

85 Lyman Patterson, Copyright in Historical Perspective 147 (1968).
87 U.S. Const. art. 1, § 8.
88 See Lyman Patterson supra note 85 (noting it was odd how fast America adopted British copyright traditions, especially when there was only a small author community).
89 The Federalist No. 43 (James Madison)
90 The utility of this power will scarcely be questioned. The copyright of authors has been solemnly adjudged, in Great Britain, to be a right of common law. The right to useful inventions seems with equal reason to belong to the inventors. The public good fully coincides in both cases with the claims of individuals. The States cannot separately make effectual provisions for either of the cases, and most of them have anticipated the decision of this point, by laws passed at the instance of Congress.
91 Id.
purely to act as a “weapon against monopoly.” 92 When an artist has a
higher royalty amount, the cost of production eats away at the
distributor’s profits, which discourages dissemination. Artists also
restrict producers by protesting choices that belittle the work.93 As
such, artists’s rights—like term limits—restrict monopolies, making it
an important consideration for modern policymakers. 94 However,
producers are not the only ones opposed to the actor’s copyright;
playwrights, who are also artists, are fearful of other theater
collaborators encroaching on their modest, well-protected piece of the
pie.

C. Joint authorship is difficult to prove

Playwrights should be comforted in the fact that actors are
unlikely to win joint authorship claims. Joint work is “work prepared
by two or more authors with the intention that their contributions
merge into inseparable parts of a unitary whole.” 95 Joint authorship
functions as a tenancy in common, meaning it gives the new owner
all of the rights of copyright, including an equal share in earnings.96
Subsequently, these rights pass to the new joint author’s heirs, forever
stripping the original author of valuable property interest.97 As the
law stands, an actor given joint authorship will receive 50% of the
playwright’s royalties, even if they only created 10% of the script.

92 Lyman Patterson supra note 85, at 147.
93 E.g., Turner Entertainment Co. v. Huston, Cours d’appel [CA] [Court of
available at http://www.unclaw.com/chin/teaching/iip/turner.pdf (Holding the
colorization of Huston’s films violated the author’s moral right under French law.
The court held this way despite recognizing that it would be an economic detriment
the producers).
94 Patterson supra note 85, at 147.
96 Susan Keller, Comment: Collaboration in Theater: Problems and Solutions,
33 UCLA L. REV. 891, 911 (“Under copyright, as a tenant in common with the other
copyright owners, each joint owner may grant a nonexclusive license in the entire
work without obtaining the consent of the other joint owners.”).
97 Id.
To prevent unjust results, courts should require more than a *de minimis* of contribution. The seventh circuit denied actors joint authorship when their contributions were limited to line suggestions. The court adopted Professor Goldstein’s two-prong test: the contribution must be copyrightable, and the parties must have intended to create a “unified” whole. In regards to the first prong, without clarity of the actor’s copyright, actors automatically lose here. The second prong is what makes this test difficult to achieve by any collaborator. No matter the jurisdiction, it appears judges are looking for an explicit admission by either the original author or the producer that they intended on joint authorship with the claimant. Requiring an admission gives little hope to an adverse party looking to prove intent. If authors are going to admit authorship they likely are going to agree to profit sharing without a court order.

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98 Nimmer § 6.07, at 6-21 (Professor Nimmer suggests that contributions that are more than ideas, basic lines or stock characters should be granted authorship. No federal district court has adopted this standard. While courts do differ as to what intent means, none suggest that merely contributing should merit joint authorship).

99 Erickson v. Trinity Theatre, 13 F.3d 1061,1072 (7th Cir. 1993) (The actors failed to show copyrightable contributions: “Ideas, refinements, and suggestions, standing alone, are not subjects of copyright.”)

100 Id. at 1070 citing 1 Goldstein on Copyrights § 4.21 4:16 (2011 Supplement) (“A contribution will not obtain a co-ownership interest, unless the contribution represents original expression that could stand on its own as the subject matter of copyright.”); Id. at 1071 (Ideas can be protected with contracts, not copyright).

101 Compare Aalmuhammad v. Lee, supra note 15, at 1235 (denied joint authorship as the party lacked an “objective manifestation of intent” such as explicit contractual agreements, or whether the party had top billing) with Erickson v. Trinity Theatre, supra note Error! Bookmark not defined., at 1072 (while denying joint authorship as the contributions were not copyrightable, the court found intent in one of the plays as the author admitted that she intended it to be “hers as well as Ms. Erickson’s) and Childress v. Taylor, 945 F.2d 500, 508 (2d Cir. 1991) (denied joint authorship when it was clear that one author “ever contemplated,” much less accepted, crediting the play as [written by the other.]). 1 Goldstein on Copyrights § 4.21 4:18.2 (2011 Supplement).

102 Margit Livingston, *Article: Inspiration or Imitation: Copyright Protection for Stage Directions*, 50 B.C. L. Rev. 427, 454 (“directors would typically fail to satisfy the "intent" criterion in the judicial test for joint authorship.”); Talia Yellin, supra note 68, at 154 (Dramatist Guild President John Weidman gave joint authorship to a colleague who he believed truly was a co-author).
In its Bill of Rights, the Dramatist Guild affirms its strong stance by reminding members they “own the copyright of [their] dramatic work. Authors in theatre business do not assign (i.e. give away or sell in entirety) their copyrights, nor do they ever engage in ‘work-for-hire.’”\(^{103}\) While it is admirable that playwrights have managed to retain their copyrights, it is unjust to say that playwrights should be immune from joint authorship claims.\(^{104}\) By choosing to collaborate with other artists, be it to spark creativity or develop entire scenes, the playwright is accepting the legal consequences.\(^{105}\) No one is suggesting that playwrights simply sit in a hole, and run from professional feedback. Receiving a few good ideas should not result in losing half of one’s profits.\(^{106}\) Playwrights rely on peer feedback they receive in the writing, workshop, and rehearsal process.\(^{107}\) Feedback makes for better products, and ultimately more dissemination.

IV. THE POTENTIAL OF ROYALTIES

In Minneapolis-St. Paul, owning the copyright to a new work seems fruitless, as plays typically are short-lived and result in little revenue for even the producers.\(^{108}\) As a result, not a lot of money is put into original, new works. The larger theater houses in town typically produce familiar works, or adapt popular movies or books to attract larger audiences.\(^{109}\) Conversely, New York City sees several

\(^{103}\) BILL OF RIGHTS, DRAMATIST GUILD OF AMERICA, http://www.dramatistsguild.com/billofrights/.

\(^{104}\) Contra John Weidman, supra note 11, at 639.

\(^{105}\) Mistry, supra note 32 (“There are certainly some cases where this might be possible.”).

\(^{106}\) Cooper, supra note 29 (Playwrights “invest quite a bit more time in a script than an actor does, and it has no guarantee of being produced widely if at all).

\(^{107}\) Jeffrey Knapp, \textit{What is a Co-Author?}, REPRESENTATIONS, Vol. 89 No. 1, at 2 (Uni. of Cali. Press 2005) (citing G.E. Bentley: Collaboration in play development at least dates back to 1590: playwriting ‘was itself essentially a collaboration: it was the joint accomplishment of dramatists, actors, musicians, costumers.’).

\(^{108}\) The author of this article was compensated a modest $150 for co-authoring a play that ran for several weeks at a Minneapolis theater house, and even enjoyed touring performances.

profitable new works each year. In summary, a stage actor developing an up and coming Broadway production would be a fool to turn down authorship rights.

A. Chorus Line illustrates the potential of royalties

_A Chorus Line_ remains the poster child for collaborative authorship problems. The musical won nine Tony Awards, a Pulitzer Prize, and has received over $280 million in profits. The script was based on the personal stories of 19 dancer-actors. The dancer-actors were invited to participate in a play development session where a video camera recorded them talking about child abuse, divorce, and dancing for 12 hours. In exchange for having a video camera record their experiences, they were paid a nominal $1. Later, the original cast continued where they left off, and helped develop and shape the final product. After making it to Broadway, choreographer-playwright Michael Bennett agreed to give the 37 dancer-actors collectively .5% of his share in gross box office. When a revival opened in 2006, the dancer-actors learned that their original contract excluded profits from such a venture. After all, they were given profit shares to the original show, not copyright ownership to the underlying story.

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110 Campbell Robertson, ‘Chorus Line’ Returns, as Do Regrets, N.Y. TIMES, available at http://www.nytimes.com/ref/theater/01line.html (It is uncertain what the current figures are for this musical, as this article is not dated).
111 Id.
112 Id. (One original dancer knew the $1 pay off was wrong, but she thought “If I don’t sign this, I’m not going to be part of it.”).
113 Id. (Not all of the dancers who contributed to the original script were offered roles “to play themselves.”).
114 Id. (Not all of the dancers who contributed to the original script were offered roles “to play themselves.”).
115 Keller, supra note 96 at 931 (Bennett shared the rest of his royalties with four other collaborators, which were brought in later. Playwrights are typically given 6% of gross box office profits.); Robertson, supra 110 (There were 37 dancer-actors in total. They were broken up into three groups according to the level of contribution).
116 Robertson, supra note 110.
117 Mistry, supra note 32 (“When it comes to a discussion of royalties and future rights to a work, the most important thing in any collaboration is to have expectations clearly stated in a written contract.”).
B. Very few new works make any money

In Broadway, “you can’t make a living, but you can make a killing.”\(^\text{118}\) In the early nineties, the Tony Winner for Best Musical, *The Will Rogers Follies* brought in as much as $425,000 a week in ticket sales, but after two years still only saw a 60% return on the producer’s $7.5 million investment.\(^\text{119}\) On the flip side, the highest grossing musicals, worldwide, have brought in billions of dollars for their investors. In some ways, a successful Broadway production can see more revenue than Hollywood films because they can run for years.\(^\text{120}\) For instance, *The Lion King* (an offspring of Broadway “Disneyfication”)\(^\text{121}\) opened in 1997, costing Disney $15 million to mount, has brought in a total of $5 billion in gross revenue.\(^\text{122}\) Compare this with its original Hollywood film version, which initially brought in an impressive (2D original release) $312.9 million, and later (2011 3D release) $29.3 million.\(^\text{123}\) As shown, theater has the potential of making more money than its film counterpart in certain

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\(^{120}\) Weidman, *supra* note 11, at 643 (“Variety reported that Phantom of the Opera had become the most successful entertainment venture of all time -- more successful than Star Wars, more successful than Harry Potter -- grossing 1.9 billion dollars in the United States, 3.2 billion dollars world wide, from ticket sales alone.”).


scenarios; however, the industry as a whole remains dependent on big house productions, nonprofit models and grants to stay afloat.124

C. New technologies open the door to more revenue

Theaters are finally seeing the “Light at the End of the Tunnel” when it comes to new technologies.125 Historically, theater does not enjoy the same residual benefits as film as it is limited in its ability to distribute.126 Now, there appears to be an audience for live broadcasting of theater. Powerhouses like London’s National Theater and New York City’s Metropolitan Opera are now broadcasting performances all over the world.127 With new technologies, theater collaborators may one day enjoy the residual benefits shared by their brothers and sisters in the film industry.128

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124 Mitchell, supra note 83 (Smaller theaters depend on the larger theater houses like the Guthrie to stay out of the red. The Guthrie not only makes theater a priority in the community, but it also gives directors, actors and writers a livable paycheck to supplement their other work).

125 Chi, supra note 126 at 37 (In response to Hollywood competition, Broadway has had to spend all of its money on creating elaborate special effects that movie screens cannot offer.); ANDREW LLOYD WEBBER, LIGHT AT THE END OF THE TUNNEL (Universal Int’l 2005).

126 See generally Emily C. Chi, Star Quality and Job Security: The role of the performers’ union in controlling access to the acting profession, 18 CARDOZO ARTS & ENT. LJ 1, 37 (2000).


128 “Actors and Money” by Teresa Eyring, American Theatre, Jan. 08 pg. 6 (AEA former Executive Director John Connolly proposed the solution to helping actors was to “ride the wave of opportunities offered through new technology-based media performance” and to “utilize old technology—such as videotape—to promote disseminate and celebrate the work of theatres and actors”); Chi, supra note 126 at 82 (“Under collective bargaining agreements with producers, SAG actors receive residuals for the reuse of their original film and television products on network, cable, foreign, and pay-per-view television and on videocassette.”); Interview with Ordway CEO, Patricia Mitchell (With the success of live broadcasting at the Met, there is the potential for regional houses to go national or international. Producers are facing backlash from the artists who are concerned...
V. IMPROVING THE LIFE OF THE COMMON STAGE ACTOR

The financial benefits of copyright ownership could assist in improving the stage actor’s dreary economic situation. In 2008, the National Endowment for the Arts (NEA) identified actors as having the highest unemployment rate among the entire artist labor force. At the time, 32.2% of the 44,000 reported union and non-union actors were unemployed. Most striking is that while actors are more educated than the general labor force they receive much less pay. Today, the average AEA union member works only 17 weeks per year with an annual income of only $7,382. This figure places AEA actors well below the poverty line.

about the quality of work. Broadcasting or taping live performances run the risk of not reading well to new audiences. Further, performers are curious about their cut before there is a cut to be had. Producers need to be given flexibility in piloting new technologies. If it is successful, then the performers should vocalize their respective rights.)

129 NAT’L ENDOWMENT FOR THE ARTS, ARTISTS IN A YEAR OF RECESSION: IMPACT ON JOBS IN 2008, NEA RESEARCH NOTE NO. 97, at 5-6. (2009), at http://arts.gov/sites/default/files/97.pdf (Performing artists have the highest unemployment rates; actors being the highest); Telephone interview with Gülgün Kayim, Dir., Arts, Culture and Creative Econ., in Minneapolis, Minn. (Sept. 25, 2013) (Economic studies on acting and dancing are misleading as they only actors that report income. The unemployment rate would be much higher if it accounted for all actors participating in the audition circuit).

130 See ARTISTS IN A YEAR OF RECESSION supra note 10.

131 NATIONAL ENDOWMENT FOR THE ARTS, ARTISTS IN THE WORKFORCE 1990-2005, at 23, at http://arts.gov/sites/default/files/ArtistsInWorkforce.pdf (“Almost 60 percent of actors have completed college—more than double the rate of the labor force as a whole— but their median income of $23,400 is below the $30,100 median for the total labor force”); Teresa Erying, Actors and Money, AMERICAN THEATRE, Jan. 2008 at 6 (Educational debt for actors is a huge problem, causing young actors to ditch their dreams of being on the stage, and instead “head straight for pilot season”).


133 CENSUS BUREAU, 2013 POVERTY GUIDELINES FOR THE 48 CONTIGUOUS STATES (2013), available at http://aspe.hhs.gov/poverty/13poverty.cfm#thresholds (The U.S. Federal Poverty line for a single person household is $11,490); Contract
According to Arts, Culture and Creative Economy, the industry started to suffer when theaters stopped doing repertory with artists in residency. Those actors worked entire seasons, and enjoyed livable wages. Today, cast AEA actors enjoy sought-after, although short-lived, employee-status roles, whereas non-union actors operate as independent contractors. Even those talented and lucky enough to get into AEA still need to get regularly cast to qualify for union benefits. As a general rule, actors jump from short-term gig to short-term gig, never seeing future earnings from past work. An actor’s life is a perpetual return to the unemployment pool. Before *Third Rock from the Sun* and *Dexter*, John Lithgow worked the audition circuit in New York City. Despite being a Fulbright Scholar at London Academy of Music and Dramatic Art, Lithgow found himself unemployed and begging for chances to read for commercials. During his first week in New York, a fellow actor

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*Benefits, Minimum Salaries—Small Professional Theatre Agreements, AEA, at https://www.actorsequity.org/Benefits/contractbenefits.asp* (If an AEA member gets cast, he or she is guaranteed a minimum weekly salary, depending on the role and geographic region. For example, an actor working at small professional theater can make anywhere from $215 to $626 per week).

*Id.* (The Guthrie used its huge endowment to increase “actor salaries and support a large year-round acting company); Kayim, *supra* note 10; Chi, *supra* note 126 at 76-77 (Producers dissolved the use of artist in residency, or long-term company members to cut substantial costs, and to encourage diversity in casting. Producers wanted to be able to seek out new blood to play roles); Kevin Winge, *Sally Wingert: The Meryl Streep of the Twin Cities, Star Tribune*, March 22nd, 2010, available at http://www.startribune.com/local/yourvoices/88808952.html (Wingert was an actor who benefited from the former Guthrie’s residency program—performing in over 80 Guthrie productions to date).

*Id.*

*ARTISTS IN THE WORKFORCE, supra 12 (“Only 15 percent of actors work full time for the entire year”); Telephone interview with Ryan Hastings, Equity Union-AEA Business Representative (Jan. 03, 2014).

*AEA Health Insurance, AEA, at http://www.actorsequity.org/Benefits/healthinsurance.asp* (“In order to qualify for plan eligibility, you must have at least 12 weeks of covered employment in the previous four quarters (12 months) to qualify for SIX (6) months of coverage”).

*Id.*


*Id.*
told him to go to the Unemployment Insurance Office to collect the “closest thing to state support for the arts,” only to be told that he would first have to get 20 weeks of work under his belt.\textsuperscript{141}

Copyright ownership could help the common stage actor in both the short and the long-term. In the short-term, an actor could negotiate a higher weekly salary if he agreed to transfer the copyright of his performance to the producer. If the Guthrie Theater wanted to cast a non-union actor to play Lysander in \textit{Midsummer Night’s Dream}, the theater might need to ask permission to use images or videos of his performance outside of the scope of his employment contract. For example, the Guthrie might decide to stream a live performance to China. In the long-term, an actor could see residuals if a recording of the performance was sold to PBS or packaged into DVDs. Furthermore, in the rare circumstance that a court labels an actor a joint-author, the actor could see profits seventy years past her life.

\textbf{VI. Merge the Actor’s Performance into Existing Subject Matters}

The judiciary is the best place to resolve the actor’s copyright as Congress paved the way for new art forms to be categorized by way of judicial interpretation.\textsuperscript{142} When the 1976 Copyright Act was enacted, its drafters strategically adjusted the scope of protection from “all writings of an author” to “original works of authorship.”\textsuperscript{143} This adjustment resolved the conflict between Congress’ inclusion of new art forms and the Constitution’s narrow protection of book authors.\textsuperscript{144} As clearly articulated by the drafters of the 1976 Act, “authors are continually finding new ways of expressing themselves, but it is impossible to foresee the forms that these new expressive methods

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\textsuperscript{141} \textit{Id.}
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\textsuperscript{144} \textit{Id.}
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The actor’s performance can categorized as both a “pantomimes and choreographic” work and a “dramatic” work. The two subject matters already overlap with one another as speaking and actions are used to perform a dramatic work. The former would issue an actor a derivative copyright interest and would operate much like the marriage of “musical works” and “sound recording.” The latter would allow actors to claim joint authorship. By using existing models, there would be no need to make congressional amendments to the bill. Furthermore, the implementation of this system would balance the rights of the actor with the playwright.

Defining the actors’ performance within the walls of “pantomimes and choreographic works” gives flexibility to the various scenarios that may result in a copyrightable work. The Oxford English Dictionary defines acting as “[t]he performing of plays or other fictitious scenes and incidents, playing, dramatic performance; feigning a character not one’s own.”

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145 Id.
146 Copyright Act of 1790, 1 Statues At Large, 124 found in Copyright Law Volume I: the scope and historical context. Benedict Atkinson and Brian Fitzgerald.
147 17 U.S.C. §102 (“Literary works,” “musical works,” “dramatic works,” pantomimes,” “pictorial, graphic, and sculptural works,” “motion pictures and other audio visual works”; and “sound recordings.”)
148 In fact, since the 1976 Act, the only amendment to the subject matter list came in 1990 with the addition of “architectural works.”
150 Goldstein, 2:106
151 Jennifer J. Maxwell, Making a Federal Case for Copying Stage Directions, 7 J. Marshall Rev. Intell. Propl. L. 393, 407 (Author proposes “directors may also make the secondary argument that stage directions are a derivative work”).
152 When Congress passed the Vessel Hull Design Protection Act in 2008, copyright scholar David Nimmer comically criticized the bill for both being far outside the scope of copyright’s purpose, and for taking up far too much space in the bill itself.
commonly found on stage, can occur in any situation without impacting the artistic quality of the work. Furthermore, it is a fitting title to the work of the actor, as acting is largely a physical feat. The actor’s choices in blocking and physical characterizations largely make up their unique contribution.

As long as a performance is original and minimally creative, the actor would be granted copyright ownership, no matter the quality of the work. In *Horgan v. MacMillian*, the court extended a dancer’s copyright beyond physical movements to include attitudes and the placement of dancers on the stage. By extending this holding to acting, an actor’s physical choices, expressions and line delivery could be protected work. After all, an actor’s movements and line delivery blend to create a performance. For example, in portraying a stereotypically distraught teenager, an actor may decide to model his character off of Sid Vicious from the Sex Pistol, having him pounce about the stage while flailing his arms, and delivering every line with a passive aggressive, angsty tone. This type of copyright ownership would be limited to the actor’s work, and would not impact the rights of the playwright’s underlying work, as is a requirement of derivative works.

If an actor claims their performance altered the underlying script, then there will be a battle of joint-authorship for the playwright’s

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154 Phone interview with Gülgün Kayim (AEA fails to provide systems for its members to get involved in performances that are outside of a brick and mortar theater house.)

155 David Bridel. American Theater January 1, 2011 “In the Beginning was the Body”, 129-30. Vol. 28 Issue 1. (discussing the interplay between the body, the mind and the spirit in theater performance, which explains the vast array of physical acting training programs available.)

156 Goldstein Section 2.10

157 17 U.S.C. § 103 (b) (A derivative work “extends only to the material contributed by the author of such a work, as distinguished from the preexisting material employed in the work”); Entm’t Research Group v. Genesis Creative Group, 122 F.3d 1211, 1220 (“If copyright protection were given to derivative works that are virtually identical to the underlying works, then the owner of the underlying copyrighted work would effectively be prevented from permitting others to copy her work since the original derivative copyright holder would have a de facto monopoly”).
“dramatic works” interest. This argument might come about if an actor creates dialogue or characters through performance, which the playwright uses in her finished product. For instance, authorship could be found if an actor is asked to improvise scenes or dialogue in a workshop or rehearsal setting. Arguably, there is real commercial gold in having dialogue improvised rather than scripted as audiences take kindly to unpredictable, choppy exchanges. The late-night comedy star Conan O’Brien, for example, speaks of improv being as good, if not better than, pre-scripted material: “There is something in the human mind that knows when something is organic … the energy in the [audience] changes when [it] is the real thing, when [the] cookies are being made right in front of them … its exciting.”

Not every performance will merit joint-authorship, but some will. When blocking and rehearsing a play, directors, choreographers, and actors contribute varying degrees of creativity and originality. A director or choreographer may come prepared with blocking notes, and tell the actor line-by-line how they are going to move and speak. More likely, an actor will come prepared with notes on line delivery, comic beats and ideas for physical gags. The director may give some general blocking notes to set up the shape of the scene, but then will invite the actors to show “what they’ve got.” As each production functions differently, based on the talents and personalities of the collaborators involved, disagreements should be settled on a case-by-case analysis. If an actor’s performance results in contributions to the

158 17 U.S.C. §102; H.R REP. NO. 94-1476, 53 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5666-67. Congress failed to provide definitions to either “dramatic works” or “pantomimes and choreographic.” These categories have “fairly settled meanings.” The arguments by actors and directors as to their contributions to a theatrical work have proved this assumption false.

159 Email interview with Leah Cooper (“Ensemble-driven work is a growing trend, especially now in a second wave from the younger generation (those that followed Jeune Lune”).

160 Conan O’Brien Interview with Fast Company. www.youtube.com/watch?v=iP8t16Z1byM

161 Email interview with director Zaraawar Mistry (“There are many ways that new theater works get made- theater companies commission works from individual playwrights, ensembles create collaborative works, visionary directors create original new plays with the help of a talented cast—the list goes on.”)
script or storyline, then an actor should argue for joint authorship under the “dramatic works” category.

This division of a performance would not be the first time that the Act divided a singular work into various interests. In 1971, Congress created the “sound recording” copyright, distinct from “musical works” to respond to the millions lost to unauthorized copying of sound recordings. 162 Under this category, song performers and producers claim authorship that is separate from the underlying music or lyrics. 163 The law should replicate this successful model by utilizing the “pantomime and choreographic” and “dramatic works” categories. Largely, it would be a systematic way to create limitless derivative works, and a ticket for actors to claim joint-authorship. 164 The flexibility of derivative works is particularly relevant to live theater, where a play will be reproduced, with new directors and casts, throughout the world. 165

VII. CONCLUSION

In cases involving an actor’s performance, the courts should confidently and explicitly categorize the work as copyrightable material. Courts are failing to acknowledge that easy access to cheap and accessible camcorders has transformed a performance from existing only in the mind of the viewer to being tangible evidence. Even though AEA is committed to improving the economic situation of its members, the union appears to be prioritizing employee classification, leaving intellectual property rights for the actor to negotiate herself. Without clarity on the actor’s copyright, the individual actor has little to leverage against a producer’s bottom line.

162 1 Nimmer Section 2.10[A][1] 2-175.
163 Id.
164 1 Nimmer Section 2.10[A][1] 2-175.
165 Keller, supra note 96 at 936 (The author proposes derivative works for theater collaboration as the “the playwright keeps intact a copyright in the original script as written and has the option of licensing it in that form. A new and separate copyright is available in the derivative play and its resulting production script”); Gallia, supra note 21, at 251 (“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.”).
Furthermore, without being a copyright owner, an actor cannot stop the unauthorized distribution of their image or likeness. It is the role of the judiciary to correct this mistreatment of the law. When the court rejects, without exception, an actor's performance as a matter of law, the court is depriving an actor control over her work, and is degrading the actor’s economic potential.