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THEATRE, STAGE DIRECTIONS & COPYRIGHT LAW

Beth Freemal*

INTRODUCTION

It is opening night on Broadway and the curtain comes down. The company attends the traditional opening night party, celebrating the end of arduous weeks of rehearsal. The tension rises as the company nervously awaits the early editions of the newspapers carrying the critics' responses. The papers arrive. The reviews are raves. The show is a grand success. Everyone leaves the party in good spirits, secure in the knowledge that the show will not close any time soon. Inevitably, the success of a Broadway opening creates a snowball effect. Regional theatres, dinner theatres, and commercial producers want to obtain the rights to reproduce the play. The copyright owner of the play, often the playwright, licenses the play to those companies and receives royalty payments. The director, however, will receive no compensation from any of those productions.

As a result, to gain remuneration for their work, directors apply for copyright protection of their stage directions. The directors argue, justifiably, that their contributions were essential in making the play successful. After all, the theatrical community considers the subsequent productions by the regional theatres, dinner theatres, and commercial producers “remounts” because those productions are often stylistically similar to the original Broadway production. The remounts may use the designers’ set, costume, and lighting designs, and often the original Broadway performers are hired to reprise their starring roles.

Mounting a successful Broadway production involves hundreds of people from the producer to the usher. The cast, crew, and staff work together toward the common goal of a good production. To achieve that goal, everyone must fulfill their specific role. The producer hires the personnel and ensures that adequate resources exist to open the show.2

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2. Id. For a comprehensive guide to theatrical producing, see Donald Farber, Producing Theatre (1993).
The director exerts complete artistic control. A director envisions a concept for the production and communicates it to their designers and cast. The designers and the director collaborate to express the visual images of the play; in contrast, the actors collaborate with the director to create the movement of the play, the stage directions. This partnership between a director and their creative team is essential for a successful production. The mark of a good director is the ability to use the ideas that further their concept and to discard the ideas, no matter how interesting, that distract from the concept.

Historically, of all the artists collaborating to create the production, only playwrights were granted copyright protection. This Note discusses whether directors can copyright a production's stage directions. Part I discusses copyright law and the rights it confers. Part II applies the required elements of copyright law to stage directions and reaches the conclusion that stage directions are not copyrightable. Part III analyzes specific copyright doctrines which prevent granting copyright protection to stage directions. Part IV presents policy arguments supporting the conclusion that stage directions should not be afforded copyright protection. Part V proposes that directors should use contract law to protect their rights.

I. THE RIGHTS COPYRIGHT LAW CONFFERS UPON COPYRIGHTABLE MATERIALS

Copyright law evolved from one of the enumerated powers exclusively granted to Congress by the Constitution. The Constitution specifically provides that, "[t]he Congress shall have the power . . . [t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." This is the only enumerated power that also includes a purpose, that is, the promotion of the arts.

4. Id. at 8.
5. Theatre is a collaborative art. Therefore, the importance of these relationships cannot be stressed enough. See John Counsell, Play Direction 36-43 (describing the relationship of the author and director), 44-59 (describing the relationship of the designers and the director), 60-78 (describing the relationship of the actors and the director)(1973); see also McCaffery, supra note 3, at 46-56 (discussing relationship between the director and the cast).
6. Counsell, supra note 5, at 89.
7. U.S. Const. art. I, § 8, cl. 8.
The interpretation of what constitutes a "Writing" under the Constitution has continually expanded.9 Burrow-Giles Lithographic Company v. Sarony,10 decided by the Supreme Court in 1884, remains the hallmark case for the definition of "Writings." The Court defined writings as any means "by which the ideas in the mind of the author are given visible expression."11

Thus, ownership vests in the expression of the idea, not in the idea itself.12 Therefore, one can freely copy another's idea without the threat of liability because the author owns only the expression of the idea.13 This prevents directors from copyrighting their concept of the play because their concept is an idea. For example, if a director's concept consists of doing an all female version of Hamlet, any director may use that idea and direct an all female Hamlet.

Under the current Copyright Act, passed in 1976,14 Congress further expanded the definition of "Writings" by substituting the phrase "original work of authorship" for the term "Writings."15 Congress incorporated this change as a result of the technological advances that occurred over the century.16 Since artists constantly find new media through which to express themselves, Congress did not want to limit the subject matter of copyright.17

In 1834, the Supreme Court held that copyright protection was not a common law right, but that it was exclusively statutory.18 It is not a traditional property right founded upon the act of creation.19 Therefore, a director's stage directions must fulfill the statutory elements to be protected. The 1976 Act requires that three elements be
fulfilled for the work of authorship to receive copyright protection: (1) the work must fulfill one of the enumerated subject matter categories;20 (2) it must be an original work of authorship; and (3) it must be fixed in any tangible form of expression.21 The Act does not protect "any idea, procedure, process, system, method of operation, [or] concept. . . ."22

In the broadest sense, the copyright is not legitimate until it withstands an infringement suit. The Copyright Office does not determine the validity of the copyright; the courts determine a copyright’s validity.23 Upon fulfilling the three statutory elements, the author24 applies to the Copyright Office for a copyright certificate. To register a copyright, no examination process exists; one need only submit the requisite fee along with the application form and one copy of the work if it is unpublished or two copies if it is published.25 Only certain actions require possession of the copyright certificate.26 Therefore, once the work is fixed,27 the author automatically owns a valid copyright.28

The copyright owner now has the exclusive rights to do and to authorize any of the following:

(1) to reproduce the copyrighted work in copies or phonorecords;
(2) to prepare derivative works based upon the copyrighted work;
(3) to distribute copies or phonorecords of the copyrighted work to the public . . . ;
(4) . . . to perform the copyrighted work publicly;
(5) . . . to display the copyrighted work publicly; and
(6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.29

21. Id.
22. Id. § 102(b).
23. The Copyright Office, while interpreting the Copyright Act, does not determine if the works are similar. Copyright Office and Procedures, 37 C.F.R. § 201.2(a) (1995). The courts apply the substantial similarity test to the works. See infra text accompanying notes 114-23.
24. Original ownership of the copyright “vests initially in the author or authors of the work.” Id. § 201(a). If the copyright applicant is not the author, one obtains a copyright in the work by including “a brief statement of how the claimant obtained ownership of the copyright.” Id. § 409(5). For example, the claimant must show the original author transferred the copyright ownership to him.
25. COPYRIGHT OFFICE, COPYRIGHT BASICS CIRCULAR 1, 8 (1994) [hereinafter “BASICS”]. The fee is currently $20.00. Id.
26. 17 U.S.C. §§ 411(a), 412 (1994)(stating certificate registration is required as a prerequisite to any action against infringement and to recover statutory damages and attorneys’ fees).
27. See infra part II.C (discussing that the fixation requires the work to be able to be perceived by others and reproduced).
28. Copyright “is an incident of the process of authorship.” BASICS, supra note 25, at 2.
A series of exemptions, which follow the exclusive rights, place limitations on those rights. These five exclusive rights are separate rights. They can be individually transferred, but an exclusive transfer must be in writing. Therefore, the copyright owner may choose to retain all of her rights, none of her rights, or some of her rights.

For example, if a director owns the copyright to stage directions, they may choose to transfer the right to reproduce to a publisher. They may also grant their right to perform to a Broadway producer for a limited amount of time. These rights, licensed from a director to the publisher and the producer, are strictly construed. Thus, the publisher, to whom the owner granted the right to reproduce, may not perform the stage directions without violating the producer's right to perform.

II. STAGE DIRECTIONS DO NOT FULFILL THE COPYRIGHT ELEMENTS

To gain remuneration by licensing their exclusive rights to others, a director must first gain copyright protection for their stage directions by fulfilling the following three elements: (1) the stage directions
must fulfill one of the enumerated subject matter categories;\(^3\) (2) the stage directions must be an original work of authorship; and (3) the stage directions must be fixed in a tangible form of expression.\(^4\) Each of these elements will be analyzed in turn.

Throughout the analysis of whether stage directions can be copyrighted, this Note will refer to Gerald Gutierrez. The Copyright Office granted him a copyright certificate for his stage directions in the Broadway revival, *The Most Happy Fella*.\(^5\) Subsequently, Gutierrez filed suit against Drury Lane Oakbrook Theatre for copyright infringement,\(^6\) claiming that the Oakbrook production used Gutierrez's "original staging."\(^7\) This suit ended with a settlement requiring Drury Lane Oakbrook to pay Gutierrez an undisclosed amount of money, and to acknowledge Gutierrez's contribution to the production through an ad published in *Variety*.\(^8\) The settlement, however, does not indicate that Gutierrez's copyright was valid since the suit settled before trial.\(^9\)

Instead, it appears Gutierrez would have lost the lawsuit had it proceeded to trial. Frank Loesser's estate owns the original copyright on *The Most Happy Fella*.\(^10\) Their lawyer, Harold Orenstein,\(^11\) possesses a letter from the Copyright Office that suggests Gutierrez's copyright in his stage directions would not have withstood the lawsuit. The letter states, "[r]eference to 'stage directions' in an application, however, does not imply any protection . . . for the actions dictated by them. The authorship on the application in this case is 'text of stage directions.' We understand this to represent a claim in the text."\(^12\)

\(^{39}\) 17 U.S.C. § 102(a).
\(^{40}\) *Id.*
\(^{41}\) COPYRIGHT OFFICE, Registration No. PAul1920015.
\(^{42}\) Gutierrez v. Drury Lane Oakbrook Theatre, No. 95 CV. 1949 (S.D.N.Y. Mar. 27, 1995).
\(^{44}\) *Id.*
\(^{45}\) *See supra* text accompanying note 23.
\(^{46}\) COPYRIGHT OFFICE, Registration No. DU41443(\textit{original}) and RE207159(\textit{renewed}). The renewed registration indicates the rights to *The Most Happy Fella* are owned by Frank Loesser's wife, Jo Sullivan Loesser, and their children John Loesser, Hannah Loesser, Emily Loesser, and Susan Loesser Gallagher. *Id.*
\(^{48}\) *Id.* (emphasis added)
A. Stage Directions Do Not Fulfill an Enumerated Subject Matter Category

To gain copyright protection, the work being protected must satisfy the first element by falling within one of the eight enumerated subject matter categories. 49 Directors place stage directions in the subject matter category of pantomimes and choreographic works based on an analogy between dance and stage directions. 50 The stage directions 51 of a play tell an actor how and when to move throughout the course of the play. For example, on a specific line the actor might walk from one side of the stage to the other; or the actor might turn to face a different direction, or merely tilt their head; or the actor may perform a piece of stage business, such as sipping a cup of coffee. Thus, the stage directions encompass everything an actor does both large and small. Therefore, like dance, stage directions consist of the movement of people through space.

To determine whether stage directions are copyrightable, it is beneficial to examine the subject matter area of pantomime and choreographic works. Copyright law did not protect choreography until the 1976 amendment to the Copyright Act. 52 Before 1976, the Copyright Office granted protection only to choreography that told a story. 53 The courts granted those dances protection because they ful-

49. 17 U.S.C. § 102(a)(1)-(8)(1994). "Works of Authorship include the following categories:
   (1) literary works;
   (2) musical works, including any accompanying words;
   (3) dramatic works, including any accompanying music;
   (4) pantomimes and choreographic works;
   (5) pictorial, graphic, and sculptural works;
   (6) motion pictures and other audiovisual works;
   (7) sound recordings; and
   (8) architectural works."

Id.

50. Ronald Schechtman, Gutierrez's attorney, argues that copyright covers choreography and pantomime, "and that's the essence of directing, a combination of choreography and pantomime." Fleming, supra note 47.

51. A distinction can be made between the director's articulation of the stage directions and the expression of those directions as performed by the actor. This Note focuses on the expression of the stage directions because the directors want to be remunerated for subsequent performances where the actors express the stage directions in a manner that is substantially similar to that of the original cast.


filled the subject matter category of "dramatic or dramatico-musical compositions." 54

Although the 1976 amendment allows the protection of choreography, pinpointing what works are protected is not clear-cut because the subject matter category of "pantomime and choreographic works" is not defined. The House Report indicates Congress deliberately did not define pantomime and choreographic works because the terms "have fairly settled meanings." 55 Nevertheless, the House Report went on to state that "choreographic works do not include social dance steps and simple routines." 56

There are two conclusions which can be drawn from the House Report. One commentator asserts that by excluding simple routines, Congress intended not to protect "mere stage movement." 57 Another conclusion is that the steps must have a minimum level of difficulty to be copyrightable. 58 The Copyright Office, as is evident by their definition of choreography, accepted the latter conclusion and adopted a minimum level of difficulty standard.

The Copyright Office defines choreography as "the composition and arrangement of dance movements and patterns . . . usually intended to be accompanied by music." 59 Thus, the definition excludes individual building blocks of choreography; 60 however, those basic steps can be incorporated into an otherwise copyrightable work.

The courts have yet to establish a clear standard for the level of difficulty required. Because choreographers' work remained unprotected for such a long period of time, most choreographers relied on the dance community's customs, 61 and not on the legal system, to protect their works. 62 As a result, Horgan v. MacMillan 63 is the only case

54. Id. at n.46.
56. Id. at 54.
58. Singer, supra note 53, at 297-98.
60. Id.
61. An example of a custom that evolved to protect choreographer's rights is the following: when a dance company requests the choreographer's permission to perform the work, the choreographer did not grant permission until she was convinced that the company would be capable of performing the piece. See Singer, supra note 53, at 293-94.
62. See generally Singer, supra note 53. The Dance Notation Bureau functions "as a licensing agent between choreographers and companies that wish to have a choreographer's work reconstructed from a notated score." Id. at 293 n.24, (quoting, Anderson, Preserving Dances in Print, N.Y. Times, May 6, 1979, § 2, at 20, col. 2).
63. 789 F.2d at 157.
ever decided involving the subject matter category of choreography. Horgan, however, does not address what type of steps would be complex enough to gain protection because that issue was not before the court. Thus, no written guidelines exist regarding the length and intricacy required for dance steps to be protected.

Under this higher level of difficulty required for movement, stage directions would certainly not qualify. Stage directions ordinarily consist of the most simple movement possible, for example, walking from point X to point Y. Complexity in direction derives from the number of actors on stage that a director forms into a picture, not the difficulty of the movement the cast performs. Thus, an easy scene to direct consists of two people interacting. The most complex scenes to direct are those in which the entire cast enters the stage and the cast members move to their positions to create the stage picture. Although the entire cast may be walking, a well directed scene that smoothly creates a stage picture and is easy for the audience to follow takes great skill to create. Even though the stage picture may be highly intricate, the individual actors walking into position are not performing intricate steps. Therefore, stage directions consisting of walking will not fulfill the minimum level of difficulty required for protection by the statute.

It is true that actors do not always simply walk. A more complex movement occurs when the character requires the actor to move with a specific physical deformity. For example, the title character in Shakespeare's Richard III is a hunchback. In the typical portrayal, the actor playing Richard hunches his shoulders forward to create a grotesque angle and moves with a limp.

This physicalization that the actor uses to portray the character, while difficult, still does not rise to the level of complex routine as required by the statute. The character will move the same way throughout the entire play. The exact same step is performed again and again over the course of the show. This indicates that the movement should be classified as a simple routine, rather than a complex one. Therefore, even the most complex stage directions will not fulfill the minimum level of difficulty required by the statute.

64. Horgan v. MacMillan, 789 F.2d 157 (2d Cir. 1986).
65. The classic example is the opera Aida where over a hundred cast members as well as several elephants are required. The sole focus of most directing classes is "how to create a stage picture." For example, Northwestern University's Theatre Department offers a class exclusively dealing with this called Presentational Aesthetics.
66. This is the very reason some dance scholars criticize the statute because the threshold of difficulty "can act to deny registration to very simple or highly innovative dances." Singer, supra note 53, at 298.
Since stage directions do not fulfill one of the eight subject matter categories, they should not be granted copyright protection. Even if the specific movements of Richard III do rise to the level of being a complex routine, a director still has several more hurdles to overcome: a director must show first, that the stage directions are an original work of authorship and second, that the stage directions are fixed.

B. Stage Directions are not a Work of Authorship that Originated from the Director

Even if stage directions do constitute copyrightable subject matter, a director cannot fulfill the second element of copyright law, which requires an original work of authorship. This element requires two factors. The first factor requires originality because an author is "he to whom anything owes its origin; originator; maker." To be original, the work must owe its origin — it must originate with — the author. The second factor requires a work of authorship. To be a work of authorship, the stage directions must visibly express a director's idea.

The stage directions in a play do not originate entirely with a director. The playwright, as well as the actors, are responsible for creating some of the stage directions. Therefore, those stage directions not exclusively created by a director do not fulfill the first factor. Without the minimum requisite of originality, a director is prevented from acquiring copyright protection.

For example, several types of stage directions originate with the playwright: those that indicate which characters are present on stage as each act begins; those that indicate the entrances and exits of the actor; and those that a playwright uses to dictate the actions their characters perform. Even the Copyright Office literature indicates that stage directions originate with the playwright. The guidelines

69. Burrow-Giles, 111 U.S. at 58.
70. For example, Act III of Our Town begins with Mrs Gibbs, Simon Stimson, Mrs. Soames, Wally Webb and the stage manager, a character in the play, already present onstage as the act begins. THORTON WILDER, OUR TOWN 79 (Harper & Row 1985)(1938).
71. In Our Town, the playwright directs Dr. Gibbs to enter the stage at the same time Mrs. Webb and Joe Crowell, Jr. enter the stage. Id. at 8.
72. For example, Our Town begins with the stage manager moving furniture in accordance with the stage directions the playwright wrote. Id. at 5.
state that a copyright on a dramatic work [a play] "usually include
spoken text, plot, and directions for actions." 73

Most of the remaining stage directions owe their origin to the
actors and not to the director. Often a director allows the actors to
work through a scene to see how it plays out; professional actors will
often create a beautiful scene simply by acting off of one another. The
director then shapes the scene by giving the actors notes. 74 Although
he may suggest that the actor choose an earlier line on which to move
across the stage, the actor may ultimately choose not to follow the
suggestion. 75

Some small portion of the stage directions owe their origin to the
director and, arguably, fulfill the first factor, but the stage directions
still do not fulfill the second factor, a work of authorship. Stage direc-
tions, to be a work of authorship, must express a director’s idea. For
example, two characters staged far apart may express the director’s
idea that there is tension between the characters.

A careful examination of the stage directions show, however,
that, alone, they do not express an idea. To examine the stage direc-
tions, apart from the rest of the production, each element of the pro-
duction that is not stage direction must be stripped away. One test,
used by the courts, is the abstraction, filtration, and comparison test. 76

Stripping the production includes discarding the scenery, the cos-
tumes, and the lighting. In a musical, the choreography, music, and
lyrics are also taken away leaving only actors on an empty stage
speaking their lines to one another as they execute the stage direc-
tions. One more element, the words, must be stripped away because
the words—the text—owe their origin to the playwright. Taking away
the words, we see a group of people walking around in a space. There
would be no specific cues as to movement because the timing of

74. A director would never give a note that entailed the director showing the actor how he
wants it done. The director’s job is to coax and elicit a performance from the actor not show the
75. Id. at 64.
filtration, and comparison test requires the court first to dissect the computer program to break
down the program into parts. Id. at 706-07. Second, the court applies the filtration step to
determine if the element is an expression of the idea or if it was dictated by concerns of effi-
ciency. Id. at 707. The elements that are protected (i.e., those that have not yet been screened
out) are used to determine if copyright infringement occurred. Id. at 710; see also Lotus Dev.
Corp. v. Borland Int’l, 49 F.3d 807, 814 (1st Cir. 1995)(describing a similar test in a computer
program infringement case); Country Kids ’N City Slicks, Inc. v. Sheen, 77 F.3d 1280, 1285-88
(10th Cir. 1996)(using the abstraction-filtration-comparison test to determine if one set of
wooden dolls infringed upon another set).
movement occurs with the delivery of a line. We would have random movement, and random movement cannot be considered an expression.  

As a result, the stage directions cannot be separated from the text and qualify as an expression. The art of stage direction does not, by itself, express a director's idea. The stage directions express an idea only when the text is present. The earlier example, where two characters staged far apart expressed the idea that a tension existed between the characters, while certainly plausible, means nothing without the surrounding context, which is controlled by the text. A patron entering the theatre at that moment would have no idea why the two actors stood far apart. Copyright protection is not granted to a work that does not express an idea because such a work is not a work of authorship. Accordingly, even the stage directions that originate solely from a director are not a work of authorship and, therefore, do not fulfill the second element required by the copyright statute.

These conclusions are certainly supported by the collaboration that is essential to theatrical performances. Live theatre is not a solitary art. Each individual piece standing alone does not necessarily express an idea. The pieces should work together to express the idea. Thus, directors cannot copyright their concept because it is an idea and the expression of that idea—the production—does not originate with them, it originates in the collaboration of all involved.

**C. Stage Directions Cannot be Fixed**

Stage directions also do not fulfill the third element required for copyright protection, that the work be fixed in a tangible form. For a work to be fixed, it must be "sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration." Thus, a work is fixed when it can be perceived other than in the author's mind.

A book, a photograph, a movie, or a sound recording are all examples of fixed works containing the expression of an author's idea. An oral statement or an unrecorded, unwritten improvisation, however, are not examples of fixed works. They are not permanent and, therefore, cannot be reproduced.

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77. Analogizing to *Altai*, stage directions are screened out after the second level, the filtration test, and as a result, are not protected.
78. The argument that stage directions are barred from copyright protection because they serve a useful function will be explored *infra* part III.C.
Throughout the rehearsal process, a stage manager meticulously notates the movement of the actors. Actors usually move on their line, that is, they walk while delivering the line. The stage manager writes down a description of the movement adjacent to that line indicating that the actor is moving on the line. This notated script is called a prompt book. One of the reasons for this notation is to allow the stage manager to rehearse understudies or replacements into the play. Thus, the stage manager uses the prompt book to "reproduce" the work of a director and original actor when a new actor is hired.

This creates an insurmountable fixation problem because the fixation is based upon the text of the play, which a director usually does not own. Practically speaking, the actors could not perform the stage directions without the text. Thus, a director's expression—the stage directions—cannot be fixed, because without the text, the stage directions cannot be recreated.

Like the notations in prompt books, videotaping the stage directions, or simulating them by computer, do not fix them. These methods would result in a silent movie of the play. Each method would create a permanent copy of the stage directions, but would be virtually impossible to reproduce. The only way to reproduce the stage directions of one production, for use in another production, is to fix the movement in relation to the script. Since this cannot be done without violating the rights of the script owner, a director should not be granted copyright protection in stage directions.

III. OTHER DOCTRINES THAT PROHIBIT THE COPYRIGHTABILITY OF STAGE DIRECTIONS

If Gutierrez's case had gone to trial and the court had found that stage directions were copyrightable, three other principles remain that would nullify Gutierrez's copyright. They are the copyright owners' exclusive right to make derivatives of their work, the merger doctrine, and the doctrine of utility.

80. STERN, supra note 1, at 101-06.
81. The method is individualized by each stage manager but retains enough standard marks to allow any stage manager to be able to read it. Id.
82. The prompt book or prompt script is the stage manager's script; it contains all the notated stage directions. STERN, supra note 1, at 20.
83. Id. at 198-99.
84. The notion that the stage directions necessarily infringe the rights of the copyright owner of the play because they are derivative work is discussed infra part III.A.
A. The Copyright Owner Controls the Exclusive Right to Make Derivative Works

A work of authorship is considered a derivative work if it is "based upon one or more preexisting works." Stage directions can clearly be classified as a derivative work because they are based entirely on the preexisting work - the copyrighted play. Without the play, the stage directions convey nothing. The stage directions express an idea only in support of the underlying text. In a well-directed performance, the movement enhances the text, indicating relationships between characters or foreshadowing certain events. If a play is copyrighted and a director copyrights the stage directions without the owner's permission, the director has infringed upon the owner's exclusive right to make derivative works of the play.

If the copyright owner grants permission to a director for a derivative work to be prepared, the stage directions would no longer constitute an infringement. A director's stage directions, however, would have to fulfill a different standard of originality. A higher standard of originality, which replaces the traditional standard that the work is original if it owes its origin to the author, exists in derivative works. This new standard requires the author to make a substantial contribution, a more than "merely trivial variation" from the underlying work.

This implies that the standard requires a value judgment. If a director's stage directions are ordinary and do not enhance the play, copyright law will not protect them. If, however, the stage directions are superb and enhance the play, a director will have contributed something more than trivial, thus, entitling a director to copyright protection. Central to this analysis would be the amount of stage directions given by the playwright in the text of the play. For example, Shakespeare's plays include minimal stage directions. On the other hand, Eugene O'Neill describes the stage directions of his plays in the

86. For example, Jo Loesser owns the copyright on the play The Most Happy Fella, that Gutierrez staged. See supra note 46.
89. Alfred Bell & Co., 191 F.2d at 103-05 & n.22 (finding that a change from one medium to another is a substantial variation because it took great skill); but see L. Batlin & Son, Inc. v. Snyder, 536 F.2d 486, 492 (2d Cir.), cert. denied, 429 U.S. 857 (1976)(transferring design from iron to plastic was merely a trivial variation).
90. Shakespeare's plays are all in the public domain, but serve as excellent examples of texts with minimal staging written in them.
greatest detail, arguably, preventing a director from making the substantial contribution required in a derivative work.

B. The Merger Doctrine

The merger doctrine applies where there is a merger of idea and expression. A merger occurs when only a limited number of ways exist to express an idea. The merger doctrine prevents a single author from monopolizing a specific idea by copyrighting all of the expressions of that idea.

To express their idea of the play, a director tells the actor to move from one place on stage to another. It is true that stage directions, as a whole, encompass an infinite amount of action by the actors. Within the infinite amount of movements, however, a limited number of paths exist. For example, the actors may exit through the front door of the set countless times before the play is over, but, they can exit in only three ways: the actor can go directly to the door; or if there is not a direct path to the door, the actor must go around the obstacle in one direction or the other. Allowing a director to copyright all three of the movements gives him a complete monopoly in the movement, "exiting through the door." The merger doctrine exists to prevent exactly this, the monopolization of an idea's expressions.

C. The Utility Doctrine

Under the doctrine of utility, if an article is "useful," it cannot be copyrighted. The copyright statute defines a "useful article" as an article that has an intrinsically utilitarian purpose. Useful articles that incorporate pictorial, graphic, or sculptural features are copyrightable, however, if those features can be separated from the utilitarian features.

91. O'Neill describes the exit of two characters, in Desire Under the Elms, as follows: "They turn, shouldering each other, their bodies bumping and rubbing together as they hurry clumsily to their food, like two friendly oxen toward their evening meal. They disappear around the right corner of the house and can be heard entering the door." EUGENE O'NEILL, Desire Under the Elms, in THREE PLAYS 5 (Random House 1959)(1924).
93. Toro Co. v. R & R Prods. Co., 787 F.2d 1208, 1212 (8th Cir. 1986). For example, a merger occurs with instructions for a sweepstakes contest because only a few ways exist to express the rules for such a contest. Morrissey v. Proctor & Gamble Co., 379 F.2d 675 (1st Cir. 1967).
94. Morrissey, 379 F. 2d at 678-79; see also Toro Co., 787 F.2d at 1212.
96. Id.
97. For example, the Second Circuit held that a copyright did exist in belt buckles. Kieselstein-Cord v. Accessories By Pearl, Inc., 632 F.2d 989, 994 (2d Cir. 1980). Although the buckle
Although the doctrine expressly applies only to objects, the courts should recognize movement under this doctrine. If the courts interpret the choreography section of the Copyright Act to include stage directions, then the utility section should be interpreted in a similar manner, to include stage directions. Applying the utility doctrine to movement also fulfills the goal of the 1976 Copyright Act: interpreting the statute with sufficient flexibility to include circumstances Congress could not possibly anticipate.

In essence, the stage directions are the stage picture. Applying the utility doctrine, a director, using moving actors to express ideas, clearly creates a three dimensional picture. The stage directions are intrinsically utilitarian because the sole function of the actors' movements and gestures is to convey the underlying text. A director's stage picture achieves its beauty from the effect of all of the characters' expressing the stage directions. The stage picture cannot be separated from the utilitarian stage directions, and such separation is required to gain copyright protection.

Even if a court holds that stage directions fulfill the three statutory elements of copyright, the playwright's right to make derivative works and the doctrines of merger and utility should prevent copyright protection.

IV. COPYRIGHTING STAGE DIRECTIONS DOES NOT PROMOTE THE ARTS

The purpose of copyright law, as stated in the Constitution, is to promote the arts. The Supreme Court defined this purpose as “to stimulate” the arts, “to encourage” the arts, or “to induce” the arts. Granting copyright protection to stage directions, however, would create administrative problems that are so severe, the purpose of copyright law would not be fulfilled.

98. The doctrine of utility, codified in § 101 of the 1976 Copyright Act, first emerged as a common law doctrine in the 1950's. See Mazer v. Stein, 347 U.S. 201 (1954). Movement, however, was not granted copyright protection until 1976, under either statutory or common law. As a result, it is understandable that the statutory definition of utility does not expressly provide for movement.

99. HOUSE REPORT, supra note 14, at 51.

100. U.S. CONST. art. I, § 8, cl. 8.

The public policy interpretation of promoting the arts authorizes Congress to balance the artists' rights in having monopoly protection in their works against the general public's rights to have unrestricted access to the works. This balancing test assumes that the benefit the public receives from the dissemination of the work outweighs the detriment to the public caused by giving the artists a monopoly in their works.\textsuperscript{102} The Supreme Court, supporting this public policy goal of dissemination, found that the ultimate aim of copyright law is "to simulate artistic creativity for the general public good."\textsuperscript{103}

Thus, even though Congress grants an economic incentive in the form of a monopoly,\textsuperscript{104} copyright law does not exist to remunerate the copyright owner.\textsuperscript{105} This monopoly exists because Congress believes conferring a benefit creates the best incentive for the authors to disseminate their ideas.\textsuperscript{106} The monopoly granted to artists, however, is limited in duration;\textsuperscript{107} the Constitution expressly states "for limited Times."\textsuperscript{108} Therefore, granting artists perpetual copyright protection in their work violates the Constitution.\textsuperscript{109} Conferring an unlimited monopoly would also undermine the public policy goal of dissemination because an unlimited monopoly would prevent the public from gaining access to the work.\textsuperscript{110}

It is clear that creativity would not cease if artists were not protected or remunerated, because often artists create for the sole purpose of creating. It is, however, imperative to protect their rights and remunerate artists for their work if we want those artists to disseminate their work. The public cannot benefit from a piece of artwork that has not been disseminated. Thus, copyright law exists to enable the public to benefit from authors disseminating their work.\textsuperscript{111}

The "art" to be promoted by copyrighting stage directions can be broadly defined as "theatre" or narrowly defined as "stage directions." Allowing directors to copyright their stage directions adversely affects both, because it creates an administrative burden.

\textsuperscript{102} Nimmer, supra note 9, § 1.03[A].
\textsuperscript{103} Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1974).
\textsuperscript{104} "The copyright law ... makes reward to the owner as a secondary consideration." United States v. Paramount Pictures Inc., 334 U.S. 131, 158 (1948).
\textsuperscript{105} Twentieth Century Music Corp., 422 U.S. at 150.
\textsuperscript{106} Mazer v. Stein, 347 U.S. 201, 219 (1954).
\textsuperscript{107} Twentieth Century Music Corp., 422 U.S. at 156.
\textsuperscript{108} U.S. Const. art. I, § 8, cl. 8.
\textsuperscript{109} See Marx v. United States, 96 F.2d 204, 206 (1938).
\textsuperscript{110} Nimmer, supra note 9, § 1.05[A][1].
\textsuperscript{111} Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932).
If directors are granted copyright protection for their individual contribution to the production—the stage directions—logically, all of the other collaborators should be granted protection for their individual contributions as well. As a result, several copyrights would encumber every play creating an administrative burden. The playwright, the director, each of the designers, the choreographer, and even certain cast members are all, arguably, entitled to copyright protection for their contributions.

This would encumber the play for two reasons. First, to own a valid copyright in your work, registering with the copyright office is not required. Once the production is fixed, the collaborators own valid copyrights. As a result, upon finding a script to produce, the producer must first, determine how many copyrights exist on the production and second, the producer must locate all of the copyright owners. Requiring a regional theatre producer to find each copyright owner is extremely difficult, time consuming, and cost prohibitive. Even if the producer located all the copyright owners, he still needs permission from each one to mount the show.

Consequently, a second encumbrance exists on the play—high licensing fees. The fees are high because the producer must pay several licensing fees, and because one copyright owner could hold-out for a larger licensing fee. The copyright owner has such leverage because, essentially, they hold a veto power over the producer. Yet, the budget of most theatrical organizations barely cover operating expenses as they currently exist. Thus, producers would no longer be able to afford to produce these plays. As a result, the majority of the public will be prevented from seeing the play because regional theatre houses, which serve the important function of bringing theatre from New York to the rest of the country, will no longer produce those plays.

It is essential for theatre to be seen by audiences. Allowing the collaborators to copyright their contributions to the piece requires producers to ascertain and then get permission from each collaborator, which prevents audiences from seeing theatre. A live audience watching live performers makes theatre a unique art form. Quite a difference exists between watching Tennessee Williams' *Streetcar*

113. This function is recognized annually when the League of American Theatres and Producers and the American Theatre Wing present an Antoinette Perry Award, the Tony, for “outstanding regional theater.” *Tony Awards Presented, World News Dig.*, June 15, 1995, available in LEXIS, Nexis Library, News file.
Named Desire in a theatre and watching it on television as the Sunday night movie.

Even if the legal system granted only directors, not the other collaborators, protection in their contribution to the production, the art of stage directions is still inhibited. This occurs because, administratively, the established system will not protect a director's rights in their stage directions. The substantial similarity test, used to establish infringement, cannot be accurately applied to stage directions.

To determine that copyright infringement has occurred, the plaintiff must prove that the defendant copied the work. Since direct evidence is typically not available, copying is usually shown through circumstantial evidence. The circumstantial evidence consists of proof that: 1) the defendant had access to the original work, and 2) the works are substantially similar. Determining the existence of substantial similarity between two works requires a two step analysis, extrinsic and intrinsic.

The extrinsic analysis requires an examination of the works to see if enough similarities exist to justify a finding that the defendant copied the plaintiff's work. In this step, the court will compare the original stage directions to the allegedly infringing stage directions on an objective level. The basis of this decision, however, is not ratios. If the allegedly infringing work copies a small portion of the original, the court can find infringement. The stage directions are controlled by the script. Therefore, the extrinsic analysis cannot accurately be applied to stage directions because this test necessarily results in a finding of similarity.

A regional producer who brings a Broadway hit to their community can be guilty of infringing the original director's rights if their production takes an element from the original production that is "qualitatively significant." Arguably, the defining moment could be


116. Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp., 562 F.2d 1157, 1164-65 (9th Cir. 1977)(superseded on other grounds).

117. Concrete Mach. Co., 843 F.2d at 608.

118. See Jason v. Fonda, 526 F. Supp. 774, 777 (C.D. Cal. 1981) (stating that the elements to be compared in determining if a movie infringed a book are: plot, themes, dialogue, mood, setting, pace, and sequence), aff'd, 698 F.2d 966 (9th Cir. 1982); see also Narell v. Freeman, 872 F.2d 907, 912 (9th Cir. 1989).

119. Horgan v. MacMillan, 789 F.2d 157, 162 (2d Cir. 1986); see also Baxter v. MCA, Inc., 812 F.2d 421 (9th Cir.) (holding that a series of six notes of an entire song could be qualitatively
as small as one single movement by a character across the stage. For example, the defining moment of Hello Dolly is Dolly walking down a staircase as the chorus of waiters sings the title song. Since copying such a small amount constitutes infringement, every production of Dolly necessarily infringes on earlier productions because the script requires that entrance.

Likewise, the intrinsic test cannot be applied accurately to stage directions. This test employs the "ordinary reasonable person" standard. The jury subjectively compares the copyrighted stage directions to the allegedly infringing stage directions to determine if they are so similar that the ordinary, reasonable person would conclude that the defendant "unlawfully appropriated" the plaintiff's work.

The intrinsic test cannot be accurately applied because the productions cannot be restaged for the jury to view the stage directions side by side to make their decision. Viewing videotapes of both productions would also create an inaccurate result. The essence of stage directions is the reaction they create from a live audience. A well directed play causes the viewer's eye to follow the action naturally. One may also choose, however, to watch whatever they want. The camera eliminates this aspect. The camera dictates what you see and how you see it. The jury would be judging the infringement of one set of live stage directions as to another set in the different medium of videotape. In addition, this also assumes a videotape of both works exist. Even if one uses the written notations of both shows to compare the stage directions, it is impossible to tell from written notation that, perhaps, the single movement downstage in Act V is the defining moment of the play.

If stage directions were protected, the courts would not be able to adequately protect the rights of a director, since the test cannot accurately determine what constitutes infringing behavior. Under these circumstances, a case by case analysis will develop, causing unpredictability and chaos in copyright law. Directors would own a right that

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122. The standard, as defined by Judge Learned Hand, is if "the ordinary observer, unless he set out to detect the disparities, would be disposed to overlook them, and regard their aesthetic appeal as the same." Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487, 489 (2d Cir. 1960).
123. Downstage is a theatrical term that refers to the section of the stage that is closest to the audience.
the courts cannot consistently protect. Consequently, copyrighting stage directions creates a terribly ineffective use of copyright law.

V. Contract Law Protects the Director's Interests Better Than Copyright Law.

Contract law remains the most effective method of protecting a director's work. Although directors want copyright protection, it is probably fair to interpret this desire as artists wanting remuneration and recognition for their work. Contract law is much better suited for these purposes than copyright law.

With a contract, a director can establish a clear and definite agreement with the producer. The director promises to direct the play in exchange for remuneration. Once each party makes their respective promises, a valid contract exists that the courts will enforce.\textsuperscript{124} Thus, the director and producer have created mutual obligations to one another that are legally enforceable. If either party does not fulfill its promise, the injured party may bring a lawsuit against the other party for damages.\textsuperscript{125}

Under copyright law, directors would have to police the entire world to protect their work. If directors discovered that someone appropriated their stage directions, then they must bring a copyright infringement suit. The cost of this process would be extremely prohibitive.\textsuperscript{126} Not only must directors travel to see and to document infringing productions, but they would also have to hire a lawyer to litigate the suit.\textsuperscript{127}

The copyright lawsuit is more cost prohibitive than the contract lawsuit. The lawsuit for copyright infringement is an incredible risk because the court cannot accurately and consistently apply the substantial similarity test. In contrast, determining the merits of a breach of contract lawsuit is easier since the basis of the suit is a written document that delineates the rights and obligations the producer and direc-

124. \textit{E. Allan Farnsworth, Farnsworth on Contracts} 4-6 (1990).
126. Wilford Leach, director of the Shakespeare Festival Production, states, "lawsuits are enormously expensive. You can't necessarily afford to recover the money; it would cost more to get it than you would get." \textit{Leslie Bennetts, Pirating of 'The Pirates of Penzance,' The N.Y. Times}, August 18, 1982, § C, at 15 col. 1.
127. In a column espousing artists to use contract law to protect themselves, one lawyer states that it is impossible for artists to afford lawyers, unless they have already achieved financial success. \textit{Carol J. Steinberg, How Not to Need a Lawyer; Written Collaboration Agreements, Back Stage}, April 22, 1994, at 13.
tor owe one another in accordance with well settled contract law principles.

Moreover, if directors use copyright law to protect their work, they merely own the exclusive rights that every other copyright owner owns. Most important to directors is their exclusive right to perform their specific stage directions and their exclusive right to license their stage directions to others. A director has no rights under copyright law, however, in any subsequent productions of the play or in stage directions that are not substantially similar to theirs.

Contract law, however, can and does protect a director's rights to more than just remuneration from licensing fees. The collective bargaining agreement that currently exists between producers and union directors serves as an example of the number of rights, beyond remuneration, that a director can protect through contract law, but cannot protect through copyright law. The parties to the agreement are the Society for Stage Directors and Choreographers ("SSDC"), a labor union for directors and choreographers, and the League of Resident Theatres, an association of non-profit resident theatres, essentially a group of producers.

Directors can be remunerated for their contribution to the overall success of the original show, not just their specific stage directions. To do this, a director enters into a contract with the producer to receive both remuneration and credit as the original director for subse-

128. See supra text accompanying note 29.
129. Society for Stage Directors/LORT Contract (on file with author) [hereinafter "Contract"].
130. Id. § I.B.
131. Id. § I.A.
132. The producer would also enter into a contract with the playwright to acquire a percentage of the playwright's royalties to pay the director. The royalties are the payments the playwright receives when, as the copyright owner, he licenses the play to be performed from each subsequent production that occurs within a set time frame. An example of such contractual language is contained in the following clause between a regional theater and a playwright who eventually brought his play to Broadway. (on file with author) [hereinafter "Agreement"].

4. PERCENTAGES DUE PRODUCER If producer has presented the Play at [the regional theater], for as a minimum of twenty-one paid performances, Producer shall be entitled to receive a sum equal to ten percent (10%) of the Author's [the playwright] share of all proceeds received by or on behalf of the author from any agreements with respect to the Play entered into by Author except that . . . the Producer shall be entitled to receive this sum from any such agreements entered into by the Author within five (5) years next following the last performance of the Play at [the regional theater]. As used herein, the term "proceeds" shall include, without limitation, all sums received from subsequent productions of the Play in any theater in the world, from any exploitation or disposition of subsidiary or world-wide motion picture rights, and, with respect to the United States and Canada, all sums received on account of exploitation or disposition of the Play on radio, television, foreign language programs, condensed and tabloid versions, concert tour versions, musical and operatic productions, play albums of records, stock and amateur productions and other commercial uses.
sequent productions, even if those productions are not substantially similar to the director's production. This occurs because the reviews and success of the first production are crucial to the success of future productions, even if significant rewriting or redirecting has occurred.

Several clauses in the contract pertain to the minimum level of remuneration and acknowledgement that a director is entitled to, but these minimum levels are not protectable under copyright law. For example, if the theatre chooses to extend the production, directors receive a recognition payment, which entitles them to a percentage of their salary for every week the production is open. Using contract law, a director can also secure the right to redirect the play, at the same salary as the first production, not only if the theatre chooses to revive the production in the same season, but also if the theatre chooses to tour the production.

Under the terms of the contract, directors are not only entitled to remuneration, but also to acknowledgment for their work. Moreover, even if a director chose not to direct the revival or the tour, he must receive credit in the subsequent productions. A director receives such credit even though the new production may not be similar to their production at all.

Lastly, contract law, not copyright law, will ultimately promote the art of theatre. The public policy goal of disseminating the art to the public will be achieved because it is in the best economic interest of, not only the producer, but also the director, for more people to see the show. With contract law, directors will be remunerated and credited for their work on the production.

**Conclusion**

The essential role played by a director in a successful production should not, in good conscience, be ignored. Copyright law, however, cannot adequately protect a director. Not only do stage directions fail to fulfill the elements of copyright, several other well settled copyright doctrines prevent stage directions from being copyrightable. Stage di-

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Agreement at 2, § 4. The playwright usually agrees to such an arrangement because he wants his play produced and producing an unknown play requires a huge financial investment by the theatre, which the playwright most likely does not have.

133. *Contract*, supra note 129, § XII.B.
134. *Id.*
135. *Id.* § XII.A.1.
136. *Id.* § XII.C.1.
137. *Id.* § XII.A.5. For specifications on billing, see § XVIII.A.
138. *Id.* § XII.C.7.
revisions directly infringe upon the exclusive right, owned by the copyright holder on the play, to prepare derivative works. The doctrine of merger also prevents stage directions from gaining copyright protection because there are only a limited number of stage directions that exist in the world of each play. Since stage direction is an intrinsically useful activity, the doctrine of utility also operates to invalidate any copyright protection granted to stage directions.

Besides these insurmountable doctrinal problems, public policy does not support granting stage directions such protection. The resulting administrative problems would ultimately prevent the dissemination of theatre and the legal system would be unable to protect and enforce a director’s exclusive rights in their stage directions.

Moreover, an accessible, well-established alternative to copyright law, contract law, exists. Not only does contract law protect the same rights as copyright law, it allows a director even more protection. Therefore, contract law is the alternative that directors should choose to effectively protect their rights.