

COMMENTS

BONE AND FLESH: THEATER, COPYRIGHT, AND THE INEFFABLE

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INTRODUCTION

Much remained unsettled when Jonathan Larson dropped dead of an aortic dissection just hours after the final dress rehearsal. The script he had been working with collaborators to revise for months was approaching completion, but the legal status of that collaboration itself remained in limbo. Like most artists on the eve of a hard deadline—opening night—Larson was consumed with making the show the best version of itself that it could be. Spending those last, precious hours divvying up his speculative millions in royalties would have seemed both a waste of valuable time and outrageously hubristic. Larson had presented work in a handful of workshop productions in New York and won a couple of awards, but this full-fledged rock musical was on a very different scale in terms of ambition, resources, and number of people implicated in its failure or success. What mattered was that it be good, and as canny artists know, good ideas can come from anywhere.

The year was 1996 and the show was *Rent*. After it opened, it was, by most metrics, a smashing success. It won the Pulitzer Prize for Drama.¹ It went on to run on Broadway for 12 years, grossing more than \$280 million.² It toured extensively.³ It was translated into many languages and produced all over the world.⁴ It was made into a movie that people went to see, despite the fact that

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1 *The 1996 Pulitzer Prize Winner in Drama: Rent, by Jonathan Larson*, THE PULITZER PRIZES, <https://www.pulitzer.org/winners/jonathan-larson> (last visited Oct. 19, 2020).

2 Richard Zoglin, *Life After Rent*, TIME (Feb. 29, 2008), <http://content.time.com/time/subscriber/printout/0,8816,1718572,00.html>.

3 TOM ROWAN, RENT FAQ: ALL THAT'S LEFT TO KNOW ABOUT BROADWAY'S BLAZE OF GLORY 310 (2017).

4 *Id.*

it featured many of the original performers looking decades too old and entirely too well-fed to credibly play the starving artists called for by the script.⁵ Somewhat improbably for a musical about AIDS, heroin addiction, and homosexuality in the East Village in the 1980s, *Rent* was also adapted into *Rent School Edition*, which continues to generate substantial royalties as it is licensed for high school performances worldwide.⁶

Larson is still dead, so all of the money he would have been entitled to as the author of the show's music, lyrics, and book passes to his estate. Not everyone believes that this is how things should have shaken out. Shortly before the musical transferred to Broadway, the production's dramaturg, Lynn Thomson, approached Larson's heirs and told them she believed that Larson, had he lived, would have offered her a small percentage of his royalties to acknowledge the extent of the contribution she had made to *Rent*.⁷ When Thomson was engaged to work on the project, Larson had songs and a script that was by all accounts narratively defective.⁸ Thomson claimed that she contributed a significant portion of original dialogue in addition to helping shape the overall story and structure of the piece.⁹ While Thomson had originally signed a contract agreeing to a flat fee in consideration for services rendered, as her collaboration with Larson proceeded, she felt, her role as a collaborator had evolved into something more closely resembling a co-author.¹⁰ Larson's heirs did not agree, so Thomson took them to court.¹¹ She lost.¹² Affirming the verdict upon its appeal to the Second Circuit, Judge Calabresi found that because there was no evidence that Larson intended to make Thomson a co-author, she was entitled to nothing more than the fee specified in her original contract.¹³

No one was in a position to say definitively what Larson would have done once it became clear that *Rent* was on its way to becoming a lucrative global phenomenon. Perhaps he would have been generous, as the producers of the wildly successful Broadway musical *Hamilton* recently proved themselves to

5 See A. O. Scott, *New Tenants in Tinseltown*, N.Y. TIMES (Nov. 23, 2005), <https://www.nytimes.com/2005/11/23/movies/new-tenants-in-tinseltown.html> (reviewing the film production of *Rent*).

6 ROWAN, *supra* note 3.

7 Thomson v. Larson, 147 F.3d 195, 198 (2d Cir. 1998).

8 See *id.* at 197 (noting that the professional consensus concerning *Rent* was that, while promising, it needed much work).

9 *Id.* at 198 n.10.

10 *Id.* at 197-98.

11 *Id.* at 198.

12 *Id.* at 199.

13 *Id.* at 206-07.

be in agreeing to share profits with members of that production's original cast.¹⁴ Because it was to be Larson's name up on the marquee, however, any royalty-sharing he agreed to would have been an act of charity.¹⁵ His desires would have been all that mattered.

There was and is no reliable mechanism for an uncredited co-author to claim what is hers in defiance of a credited author's wishes in a situation such as Thomson's, where a collaboration organically develops to the point where original roles become altered beyond recognition.¹⁶ The ability of key collaborators to participate in the profits generated by their work should not depend on the kindness of strangers.

For all the hype it generated, *Rent* was a fairly conventional theatrical work, with fairly traditional creative roles occupied in fairly conventional ways by its collaborators, and existing copyright law still failed to equitably accommodate these stakeholders. As I will demonstrate in this Article, the law is wholly out of step with more innovative forms of theater-making, which make clear the need for a renovation of the joint works doctrine and, I argue, the creation of a new court system to adjudicate complex questions of aesthetics and aesthetic production moving forward.

I. INCENTIVES FOR ART

There are at least three arguments against going to the trouble of modifying the institution of copyright to render it more hospitable to the unpredictable idiosyncrasies of the avant-garde. First, no economic incentive is necessary to stimulate innovative cultural production—there have always been and probably always will be irrepressible artists willing to do their work for free.¹⁷ Second,

14 Richard Morgan, *How Hamilton's Cast Got Broadway's Best Deal*, BLOOMBERG (Sept. 28, 2016), <https://www.bloomberg.com/features/2016-hamilton-broadway-profit/>.

15 See *Thomson*, 147 F.3d at 203-04 ("Every script brought to [the court's] attention says, '*Rent*, by Jonathan Larson.'").

16 See Shyamkrishna Balganes, *Unplanned Coauthorship*, 100 VA. L. REV. 1683, 1688 (2014) ("The search for 'intent' as part of the unplanned coauthorship inquiry is thus unquestionably a proxy for various normative considerations, which courts have failed to articulate with any degree of coherence.").

17 See Jillian Steinhauer, *Artists Still Not Getting Paid (But at Least We're Starting to Talk About It)*, HYPERALLERGIC (June 5, 2014), <https://hyperallergic.com/130371/artists-still-not-getting-paid-but-at-least-were-starting-to-talk-about-it/> (discussing a recent report finding that 71% of artists exhibiting their work in publicly-funded galleries received no fee); see also William Powhida, *Why Are (Most) Artists (So Fucking) Poor?*, HYPERALLERGIC (Apr. 23, 2012), <https://hyperallergic.com/50333/why-are-most-artists-so-fucking-poor-william-powhida-wage/> (discussing the difference between paying artists for the work they produce and funding their work and role as educators in general, and finding that if payment were added to exhibition budgets, there would be fewer exhibits).

actual litigation will almost always be prohibitively expensive for artists working in theater and performance, who typically operate on slim-to-negative profit margins. Third, many of the most significant theater and performance artists of the last century or so have expressly rejected the concept of “owning” works of art at all.

One could be forgiven for wondering why it should matter that the intellectual property rights of artists working in a medium that almost always loses money are insufficiently protected.¹⁸ In the United States, copyright is primarily understood as a way to encourage creative production by providing an economic incentive.¹⁹ The Copyright Clause of the U.S. Constitution provides that Congress has the power to “promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries[.]”²⁰ At the founding, American copyright law was “a distinctly utilitarian construct[.]”²¹ Today, courts and scholars still “understand and discuss the institution of copyright in wholly instrumental terms.”²² We tell ourselves that it makes sense to have a system for regulating intellectual property and compensating “owners” of intellectual property because without the promise of compensation creative people would stop creating, would create less, or would invest less in the way of time, energy, and other resources in their creative endeavors. This rationale makes more sense in the realm of patent law, where significant capital may be necessary to even begin working towards the realization of an idea for, say, a new cancer-fighting drug in the lab.

As Rebecca Tushnet has argued, however, the economic incentive rationale for copyright protection bears little relationship to the reality of creativity for most artists.²³ After all, “[d]esire, not calculation, drives much creative practice.”²⁴ The desire to make art is closer to what most people would

18 See Ben Steverman, *Investing in a Broadway Show is a Fun Way to Lose a Lot of Money*, BLOOMBERG: BUSINESS (June 3, 2015, 9:39 AM), <https://www.bloomberg.com/news/articles/2015-06-03/investing-in-a-broadway-show-is-a-fun-way-to-lose-a-lot-of-money> (discussing how only 20% to 25% of shows make back their initial investment).

19 See generally WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 85–123 (2003) (discussing the economic incentive theory of copyright).

20 U.S. CONST. art. I, § 8, cl. 8.

21 Sara K. Stadler, *Forging a Truly Utilitarian Copyright*, 91 IOWA L. REV. 609, 611 (2006).

22 Shyamkrishna Balganesh, *The Obligatory Structure of Copyright Law: Unbundling the Wrong of Copying*, 125 HARV. L. REV. 1664, 1664 (2012).

23 Rebecca Tushnet, *Economies of Desire: Fair Use and Marketplace Assumptions*, 51 WM. & MARY L. REV., 513, 516 (2009).

24 *Id.*

recognize as masochism than to rational self-interest. The vast majority of artists toil their lives away in obscurity, often supporting their art habit with more remunerative work.²⁵ The artist may bare her soul in highly personal work in the hope that someone will see her, recognize her, and love and praise her for who she really is, but the artist who exposes herself is just as likely to be mocked, accused of self-indulgence, pretension, or worse.²⁶ Nevertheless, people destroy their lives in order to become artists with some frequency. They go into debt.²⁷ They disappoint their parents. They neglect their children. They develop substance-abuse problems.²⁸ They ruin or forego relationships. They wait tables or bag groceries well into middle age.²⁹ These are not people we can assume will respond predictably to rational incentive structures. Only a passion utterly hostile to rational self-interest could motivate a person without a trust fund to pursue a career in the arts.³⁰ Yet we continue to cling to the origin myth of the would-be artist soberly evaluating her options, electing not to go into business, medicine, or law, but instead opting to write novels because the Copyright Clause ensures that this pursuit, too, will provide

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- 25 See Sarah Cascone, *How Hard Is It to Make It as an Artist?*, ARTNET NEWS (June 12, 2018), <https://news.artnet.com/art-world/artist-financial-stability-survey-1300895#:~:text=Nearly%20half%20of%20artists%20surveyed,their%20money%20off%20their%20art> (reporting that 61% of artists engage in freelance work and 42% have other jobs).
- 26 In one review, the notoriously vituperative critic John Simon once wrote “I always thought Miss [Liza] Minnelli’s face deserving—of first prize in the beagle category. Less aphoristically speaking, it is a face going off in three directions simultaneously: the nose always en route to becoming a trunk, blubber lips unable to resist the pull of gravity, and a chin trying its damndest to withdraw into the neck, apparently to avoid responsibility for what goes on above it. It is, like any face, one that could be redeemed by genuine talent, but Miss Minnelli has only brashness, pathos, and energy.” JOHN SIMON, *JOHN SIMON ON THEATER: CRITICISM, 1974–2003*, at 87 (2005). In another, he described an Edward Albee play as “the woolliest, phoniest, most pretentious woolgathering this side of the world’s biggest sheep-shearing festival.” *Id.* at 786. He began another “Mediocrity, thy name is Leslie Bricusse, unless it be Frank Wildhorn. They are the co-authors of [the Broadway musical] *Jekyll & Hyde*.” *Id.* at 676.
- 27 See Diep Tran, *How Rising Student Debt Affects Theatre Graduates*, AM. THEATRE (June 10, 2014), <https://www.americantheatre.org/2014/06/10/how-rising-student-debt-has-affected-theatre-graduates-2/> (showing that in a poll of 500 theatre artists, 98.6% of those polled took out some student loans).
- 28 See Ana Butkovic & Dunja Rancic Dopudj, *Personality Traits and Alcohol Consumption of Classical and Heavy Metal Musicians*, 45 PSYCH. MUSIC 246, 248–249 (2017) (finding alcohol consumption and the use of illicit drugs prevalent amongst musicians).
- 29 See, e.g., Aja Romano, *Geoffrey Owens, Actor and Trader Joe’s Employee, Sparked a Debate About How We Value Work*, VOX (Sept. 4, 2018, 1:11 PM), <https://www.vox.com/culture/2018/9/4/17818300/geoffrey-owens-work-job-trader-joes-actorswithdayjobs>.
- 30 See Rachel Campbell-Johnston, *We Are in Danger of Having a Generation of Trust Fund Artists*, TIMES (Nov. 26, 2014), <https://www.thetimes.co.uk/article/we-are-in-danger-of-having-a-generation-of-trust-fund-artists-bkjsqg3vgrs> (arguing that rising art school tuition fees are making careers in the arts increasingly inaccessible to low-income students).

her with a solid livelihood. “To induce individuals to undertake the personal sacrifices necessary to create such works,” as one judge put it, “federal copyright law extends to the authors of such works a limited monopoly to reap the rewards of their endeavors.”³¹ When it is clear that no such extrinsic inducement is needed to ensure that the public will always have a steady stream of art to consume or disregard as it pleases, what good is copyright really doing?

This paradox is particularly pronounced in the theater, where even at the highest levels of achievement, there is only very seldom any serious money at stake, and therefore only very seldom any reason or means to litigate. As Jennifer Womack puts it, “it is only the rich and famous, who are few and far between in the theater industry, who have the resources to bring a claim in court for an alleged infringement of their work.”³² A playwright whose work is regularly presented on Broadway may earn a respectable living, but Broadway has, with the occasional triumphant exception, “ceased to be a hospitable place for the serious American drama.”³³ The American theater is a strange art form in that, unlike the visual arts, the most critically significant work and the most highly compensated almost never overlap. If the institution of copyright is desperately in need of modification due to its failure to accommodate the unique needs of theater artists who charge fifteen dollars per ticket and perform in leaky basements, disused churches, and public parks, it is not because a change in the law will result in a significant change in the way profits are shared among collaborators. There will likely continue to be little to no profit to share in almost every case.

Finally, it might seem paradoxical to urge the legal framework for intellectual property ownership in the direction of more granular possessory arrangements when the live art of the twentieth and twenty-first centuries has increasingly sought to evade ownership structures, steadily defying the very logic of ownership and acquisition. This trend can be said to have begun in 1909 with the Italian Futurists, who rejected theater that was “static” in favor of dynamic events that solicited the audience’s collaboration, thereby making each performance a unique and unrepeatable experience.³⁴ For the Futurists,

31 *Baltimore Orioles, Inc. v. Major League Baseball Players Ass’n*, 805 F.2d 663, 678 (7th Cir. 1986).

32 See Jennifer Womack, *Big Shop of Horrors: Ownership in Theatrical Design*, 18 FORDHAM INTELL. PROP., MEDIA & ENT. L.J., 225, 237 (2007).

33 TODD LONDON, *AN IDEAL THEATER: FOUNDING VISIONS FOR A NEW AMERICAN ART* 506 (2013).

34 FILIPPO TOMMASO MARINETTI, *THE VARIETY THEATER* (1913), reprinted in *THEATRE/THEORY/THEATRE: THE MAJOR CRITICAL TEXTS FROM ARISTOTLE AND ZEAMI TO SOYINKA AND HAVEL* 422 (Daniel Gerould ed., R. W. Flint, trans., 2000)

the sole *raison d'être* of the theater artist was “incessantly to invent new elements of astonishment,” performances that refused to be fixed or finalized.³⁵ One of their troupes called itself the “Theatre of Surprise.”³⁶ Inspired in part by the Futurists, an international group of artists converged in Zurich in 1916 and established the Cabaret Voltaire and the movement that would come to be known as Dada.³⁷ The Dadaists trafficked in noise, nonsense, cacophony, and chaotic spontaneity, reacting to the carnage of the First World War by striving to outdo in performance the violence, illogic, and unpredictability that characterized the Europe they saw destroying itself all around them.³⁸ In the United States, artists such as composer John Cage and choreographer Merce Cunningham began collaborating on multimedia spectacles and introducing aleatory methods into their work in the 1950s.³⁹ Cunningham would write discrete choreographic steps and gestures for different parts of the body down on scraps of paper, then draw them at random to determine the order of the dance before each performance, or use playing cards or coin tosses to sequence them.⁴⁰ Such a piece lacks an “original” that could be “copied.” The piece may be radically different from one performance to the next, and yet it is always authentically itself. Subsequent performance art in the 1960s and 1970s, particularly feminist performance art, made the body itself the medium of expression, resisting the commodification that afflicted the visual art world by divorcing art and object—the presence of the performer could not be bought, sold, and resold for a higher price, could not be hung up on a wall or permanently exhibited at a museum.⁴¹ Some of Adrian Piper’s *Mythic Being* performances consisted of her cross-dressing, roaming the streets of New York, and observing people’s reactions to her Black male persona.⁴² For *Interior Scroll*, Carolee Schneemann appeared

35 *Id.* at 421.

36 ROSELEE GOLDBERG, *PERFORMANCE: LIVE ART 1909 TO THE PRESENT* 21 (1979).

37 *Id.* at 34.

38 See HUGO BALL, *FLIGHT OUT OF TIME: A DADA DIARY* 61 (John Elderfield ed., Ann Raimés trans., 1996) (“Our cabaret is a gesture. Every word that is spoken and sung here says at least this one thing: that this humiliating age has not succeeded in winning our respect. What could be respectable and impressive about it? Its cannons? Our big drum drowns them. Its idealism? That has long been a laughingstock, in its popular and its academic edition. The grandiose slaughters and cannibalistic exploits? Our spontaneous foolishness and our enthusiasm for illusion will destroy them.”).

39 GOLDBERG, *supra* note 36, at 82.

40 *Id.* at 81.

41 See Peggy Phelan, *Marina Abramović: Witnessing Shadows*, 56 *THEATRE J.*, 569, 570 (2004) (discussing the opposition to commodity-based art in the 1970s).

42 John P. Bowles, “Acting like a Man”: *Adrian Piper’s Mythic Being and Black Feminism in the 1970s*, 32 *SIGNS: J. WOMEN CULTURE & SOC’Y* 621, 626 (2007).

nude before an audience, extracted a folded-up ribbon of paper from her vagina, and read from it a text that counterposed intuitive, bodily-informed, traditionally “feminine” creative processes and rational, traditionally “male” processes.⁴³ In Yoko Ono’s *Cut Piece*, the artist invited spectators to approach and take turns cutting off pieces of her clothing with a pair of scissors.⁴⁴ For such performances, you quite literally had to be there. Such events traffic in the ineffable, in a particular timbre of presence. Such events produce no objects. Such experiences are not portable. Any re-performance will necessarily entail a transformation.⁴⁵

Despite the fact that a more nimble and inclusive joint authorship doctrine is unlikely to stimulate more or better creative production, is unlikely to be enforced in court, and is likely to run counter to at least the philosophical commitments of many leading artists, a society that declines to recognize the value of its artists’ most consequential contributions is an impoverished society. It matters whether individual collaborators have standing to avail themselves of copyright protections because, at present, the copyright system is the only legal system we have for assigning social value to works of art or their component parts—we nullify them when we determine that they are not legally cognizable and reify them by deeming them protectable. If our legal system is not equipped to parse innovative performance work, it signals a profound lack of national investment in the arts, that is, a profound underinvestment in the very substrate of civilization.

The existence of a legal right is socially and culturally meaningful even if it is never tested or enforced in court. The bare existence of a legal right or prohibition shapes behavior, social norms, and expectations. As Shyamkrishna Balganeshe observes, copyright law performs “an important ‘guidance’ function, independent of and in addition to any potential incentive it may provide to creators.”⁴⁶ Consciously or instinctively, we “know” that it is “wrong” to copy or take credit for someone else’s work in part because we have internalized at least the general contours of what is enshrined in law by the Copyright Act of 1976. What is more, even if the law could be shown to have no impact on behavior, law codifies and articulates what we value, and this articulation is itself socially meaningful. This is what Cass Sunstein calls

43 JAYNE WARK, *RADICAL GESTURES: FEMINISM AND PERFORMANCE ART IN NORTH AMERICA* 45 (2006).

44 Jessica Rizzo, *Now You See Her*, 44 *THEATER* 96, 99 (2014).

45 *Id.* at 96.

46 Shyamkrishna Balganeshe, *The Obligatory Structure of Copyright Law: Unbundling the Wrong of Copying*, 125 *HARV. L. REV.* 1664, 1674 (2012).

“the expressive function of law[,]” that is, “the notion that the valuation that law expresses is worth attention independent of social consequences.”⁴⁷ In the realm of copyright law, these functions—guidance and expression—may be as important if not more important than the law’s instrumental function.

Ryan Morris, who works with indigent artists as Executive Director of Philadelphia Volunteer Lawyers for the Arts (PVLAA), frequently hears from artists that remuneration is not their primary consideration in seeking to obtain copyright protection of their work.⁴⁸ For the artists who come to PVLAA, Morris reports, seeking copyright protection is more typically “about pride in ownership.”⁴⁹ In Morris’s experience, artists “want to notify others that they were the original author of a given work, and they want to be able to definitively control and shape the way their work is portrayed.”⁵⁰ Since the United States lacks the more robust frameworks for guaranteeing artists’ moral rights that exist in some countries, according to Morris, copyright is the best tool for artists who want to prevent their work from being used in a way that violates their wishes.⁵¹ For the artists Morris works with, monetary considerations are often secondary to the “recognition” that copyright protection provides.⁵² “Artists put a lot of time, effort, blood, sweat, and tears into the creation of their works,” he says, “[i]t is a significant commitment.”⁵³ Artists, Morris continues, “want to be recognized for their creations. They want to have that right of attribution enforced.”⁵⁴ He recalls working with one client, an older jazz musician who had recorded a few songs with a collaborator over forty years ago.⁵⁵ When he came to PVLAA, the client’s problem was that his collaborator, all these years later, was now selling copies of the recording they

47 Cass R. Sunstein, *Conflicting Values in Law*, 62 *FORDHAM L. REV.* 1661, 1668–1669 (1994). See also Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 *MICH. L. REV.* 779, 823 (1994) (“A society might identify the kind of valuation to which it is committed and insist on that kind, even if the consequences of the insistence are obscure or unknown. A society might, for example, insist on an antidiscrimination law for expressive reasons even if it does not know whether the law actually helps members of minority groups. A society might protect endangered species partly because it believes that the protection makes best sense of its self-understanding, by expressing an appropriate valuation of what it means for one species to eliminate another. A society might endorse or reject capital punishment because it wants to express a certain understanding of the appropriate course of action after one person has taken the life of another.”).

48 Telephone Interview with Ryan Morris, Executive Director, Philadelphia Volunteer Lawyers for the Arts (Jan. 23, 2020).

49 *Id.*

50 *Id.*

51 *Id.*

52 *Id.*

53 *Id.*

54 *Id.*

55 *Id.*

had made together, but without listing him as a coauthor or giving him any share in the proceeds.⁵⁶ The pride the client took in his work was evident. Money was a secondary consideration. “[E]ven if I can’t get the money,” the musician told Morris, “even if I can’t get the royalties that I’m owed, I still want the recognition, I still want him to tell the truth, to say that I was part of this, that I helped to create this.”⁵⁷

II. STRUCTURES OF COLLABORATION

It has been observed that the concept of joint authorship as articulated in the current Copyright Act “does not begin to accommodate the unique problems of theatrical collaboration.”⁵⁸ As Thomson’s ordeal suggests, the function and position of the dramaturg is paradigmatic of the problems associated with teasing out theatrical authorship. Even many people who work in the theater do not understand what it is that the dramaturg does.⁵⁹ Her job is heavily dependent on the individual project and the particular personalities in the rehearsal room—the case of the dramaturg will always be fact-specific.⁶⁰

Dramaturgs perform a wide range of functions, some integral and some incidental. Their more minor contributions are, paradoxically, the most visible, while their most important work may be completely imperceptible to anyone but themselves. Some dramaturgs, particularly those employed on a full-time basis by regional theaters, may produce distinct quantities of what can be identified as their own work-product. They may draft contextualizing essays to be printed in the playbill. They may craft demystifying lobby displays for the audience to peruse while waiting for the house to open.⁶¹ When working on a play written in another historical era or any play that seeks to “realistically” depict a distinct place and time, a dramaturg might research and

56 *Id.*

57 *Id.*

58 Susan Keller, Comment, *Collaboration in Theater: Problems and Copyright Solutions*, 33 UCLA L. Rev. 891, 909 (1986).

59 See Lawrence Switzky, *Dramaturgy as Skill, Function, and Verb*, in THE ROUTLEDGE COMPANION TO DRAMATURGY 173 (Magda Romanska ed., 2014) (“What is continuous over two centuries is the ambition of the dramaturg’s role, as well as the diffuseness, and often illegibility, of dramaturgical work in the eyes of the rest of a production staff.”).

60 See *id.* (“Any description of dramaturgical work requires an unusually flexible frame.”).

61 See Miriam Weisfeld, *Framing the Theatrical Experience: Lobby Displays*, in THE ROUTLEDGE COMPANION TO DRAMATURGY, *supra* note 59, at 472 (noting that lobby displays educate audiences about aspects of the play with which they are unfamiliar, spark discussion amongst members, and fuel enthusiasm for the theater among multiple goals).

report back to the director and designers on period-specific details that enable the production to attain greater verisimilitude.⁶² What brand of cigarettes might an elegant, well-to-do woman like this character have smoked in the 1920s? What kind of music might have been playing at this kind of club in this part of town in 1979? This kind of research-driven dramaturgy is relatively straightforward, and while it may help to frame or add texture to the work of the production's principal artists, it is more instrumental than creative.

When dealing with the first production of a new play, as Thomson's experience indicates, the dramaturg's role is often more complex. The dramaturg may work closely with the playwright from the first draft through the last.⁶³ The dramaturg may be a part of initial discussions about the work even before a word is written.⁶⁴ She may make minor suggestions during the rehearsal process about individual words here and there that ring false, or she might help the playwright shape every scene by talking through character, action, structure, and meaning before actors get anywhere near the text.⁶⁵ The playwright is generally the person who distills those conversations into words on the page, but in every collaboration, the percentage of the cloud of ideas from which the play is born that "belongs" to the dramaturg is not zero.

When the production is of a classic play, the animating question is rarely how to convey the story clearly, though it is nice when creative teams remember to attend to this concern as well. Instead, the question might be one of abrasion—when producing a version of *Hamlet* in 2021, how to cut through the layers and layers of cultural accretion that have settled on this language since 1600? How is this Hamlet going to do the great "To be or not to be" speech in a way that feels truthful and present-tense and fully embodied, and not like a pale imitation of Richard Burton imitating Laurence Olivier imitating John Gielgud? Or, if what one is after is a production that intentionally invokes all of these ghosts, how does one artfully trigger those memories, those references? For a production of a classic play that uses the text as pretext for a new "story" the creative team is telling about cultural inheritance, the framing of text, the critique of text, the citing (or site-ing) of

62 See e.g., Walter Byongsok Chon, *Intercultural Dramaturgy: Dramaturg as Cultural Liaison*, in THE ROUTLEDGE COMPANION TO DRAMATURGY, *supra* note 59, at 138 (providing a personal anecdote of a dramaturg who provided maps, historical research, news articles, journals, and glossaries for actors).

63 See Switzky, *supra* note 59, at 175 (describing Christopher Baker's notes of his time as a dramaturg where he helped the director translate another screenwriter's screenplay into the physical stage set).

64 See *id.* at 176 (noting that dramaturgs often select new scripts from a pile of submissions).

65 See *id.* (noting that dramaturgs painstakingly review every detail and word in a script and often try to elicit multiple "audience reactions to the same performance").

text, or the strategic ignoring of text become more important than the text itself. The form becomes more communicative than the “content.”

The dramaturg is a shadowy figure in the theater, her role a mysterious one because—with the exception of her most superficial contributions—she works through others. She has no creative “control” in the traditional sense. As a rule, her ideas must be executed by other collaborators. She whispers in the ears of the playwright and the director. Sometimes she finds that straightforwardly making suggestions is less effective than insinuating an idea into the mind of her collaborator and allowing him to believe that it is his own. Sometimes her ideas are rejected, but they inspire ideas that come to shape the production. Most often, her ideas are entertained, revised, and entwined with the impulses of other collaborators so that when they are ultimately realized in production the collaboratively-achieved product has become something greater than the sum of its parts. In a dynamically collaborative art form such as the theater, it is often impossible to perceive where one person’s contribution ends and another’s begins. In the theater, individual authorship is always a fiction.

Increasingly, for much of our most sophisticated contemporary theater—what we call postdramatic theater—the authorship is in the dramaturgy itself, whether there is a person called a dramaturg attached to the production or not.⁶⁶ However much this new mode of theatrical authorship might be accepted and acknowledged in the art-critical literature, the law has, lamentably, lagged behind. Our current joint authorship doctrine is woefully inadequate for assigning value to the contributions of collaborators even in the traditional theater, where artistic roles are more recognizable and well-defined. It is utterly unsuited to parsing the more complex and mutable vectors of authorship in more experimental, de-hierarchized collaborative configurations.

III. STATE OF THE LAW

The Copyright Act of 1976 imperfectly codified what had developed as the common-law understanding of joint authorship. In the 1915 case *Maurel v. Smith*, Judge Learned Hand noted that there was “strangely little law regarding the rights of joint authors of books or dramatic compositions” and

66 KATALIN TRENCSENYI & BERNADETTE COCHRANE, *NEW DRAMATURGY: INTERNATIONAL PERSPECTIVES ON THEORY AND PRACTICE*, at xiii (2014) (“Compared with traditional dramaturgical roles, the ‘new dramaturg’ is nearer to the centre of creation; sometimes so near that the role itself dissolves and is taken on by the company.”).

deemed the contested opera before him a joint work when it was demonstrated that the plaintiff provided a scenario, or detailed plot outline, that the defendant librettists heavily relied on in drafting their contributions.⁶⁷ “A scenario followed as much as this,” he wrote, “goes into the bone and flesh of the production.”⁶⁸ Judge Hand, widely regarded as our most discerning copyright jurist, has been praised for “his characteristic skepticism about deceptive generalities.”⁶⁹ For Hand, “case-by-case adjudication would have to do.”⁷⁰ In fact, he often reasoned from such bespoke metaphors, finding appropriately artful language for each artistic undertaking he found himself called upon to appraise.⁷¹

Judge Hand’s jurisprudence also formed the basis for much of our generalizable joint authorship doctrine during a period when the statutory framework for copyright was silent on the question of joint works.⁷² Citing English precedent in *Maurel*, he held that:

[I]f two persons undertake jointly to write a play, agreeing on the general outline and design and sharing the labor of working it out, each would be contributing to the whole production, and they might be said to be joint authors of it; but to constitute joint authorship there must be a common design.⁷³

In 1944, Judge Hand held that a song was the joint work of a composer and lyricist because “they mean[t] their contributions to be complementary in the sense that they [we]re to be embodied in a single work to be performed as such.”⁷⁴ These principles have persisted, but additional judge-made requirements have made the doctrine poorly suited to certain kinds of collective creation.

The Copyright Act of 1976 defines a “joint work” as “a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.”⁷⁵ Circuits are divided

67 *Maurel v. Smith*, 220 F. 195, 199 (S.D.N.Y. 1915).

68 *Id.*

69 Gerald Gunther, *Learned Hand: Outstanding Copyright Judge: The 24th Annual Donald C. Brace Lecture*, 41 J. COPYRIGHT SOC’Y U.S.A. 315, 320 (1994).

70 *Id.*

71 *See, e.g.*, *Edward B. Marks Music Corp. v. Jerry Vogel Music Co.*, 140 F.2d 266, 267 (2d Cir. 1944) (“To allow the author to prevent the composer, or the composer to prevent the author, from exploiting that power to please, would be to allow him to deprive his fellow of the most valuable part of his contribution; to take away the kernel, and leave him only the husk.”).

72 *See* Copyright Act of 1909, Pub. L. No. 60-349, 35 Stat. 1075 (1909) (omitting statutory guidelines on generalizable joint authorship).

73 *Maurel v. Smith*, 220 F. at 199 (quoting *Levy v. Rutley*, L.R. 6 C.P. 523, 529 (1871)).

74 *Edward B. Marks Music Corp.*, 140 F.2d at 267.

75 17 U.S.C. §101 (2018).

on the question what constitutes a “contribution” within the meaning of the statute. For a work to qualify as a joint work in the Ninth Circuit, for example, each author must have made an “independently copyrightable contribution” to the work.⁷⁶ The Second Circuit has also reluctantly recognized this requirement, even while observing that the component parts of a joint work are by definition seldom wholly independent of one another.⁷⁷ Parts of a unitary whole are “inseparable[,]” said the *Childress v. Taylor* court in 1991, “when they have little or no independent meaning standing alone.”⁷⁸ By contrast, parts of a unitary whole are “interdependent,” that court said, when “they have some meaning standing alone but achieve their primary significance because of their combined effect”⁷⁹ The D.C. Circuit has adopted Nimmer’s view that the contribution of each author need only be “more than *de minimis*” and that “one may qualify as a joint author even if his contribution, ‘standing alone would not be copyrightable.’”⁸⁰ Judge Posner in the Seventh Circuit has lucidly observed that there must at least be exceptions to the independently copyrightable contribution requirement.⁸¹ “The decisions that say,” he wrote in *Gaiman v. McFarlane*, “that each contributor to a joint work must make a contribution that if it stood alone would be copyrightable weren’t thinking of the case in which it *couldn’t* stand alone because of the nature of the particular creative process that had produced it.”⁸² Such creative processes, I contend, are increasingly coming to be the rule and not the exception in contemporary art-making, and the institution of copyright should be adjusted accordingly.

The biggest problem with our current joint works doctrine is that, “[i]n a joint work, the joint authors hold undivided interests in a work, despite any differences in each author’s contribution.”⁸³ This means that “[i]n the absence of an agreement specifying otherwise, any profits earned are to be divided equally,” even when the joint authors’ contributions to the work are clearly

76 *Aalmuhammed v. Lee*, 202 F.3d 1227, 1231 (9th Cir. 2000) (quoting *Ashton-Tate Corp. v. Ross*, 916 F.2d 516, 521 (9th Cir. 1990)).

77 *See Childress v. Taylor*, 945 F.2d 500, 505 (2d Cir. 1991) (holding that each artist must contribute independent artistic elements to qualify as a joint work while also noting that each creative part would entitle the contributor to an individual copyright).

78 *Id.*

79 *Id.*

80 *Cnty. for Creative Non-Violence v. Reid*, 846 F.2d 1485, 1496 (D.C. Cir. 1988) (quoting 1 M. NIMMER & D. NIMMER, *NIMMER ON COPYRIGHT* § 6.03, at 6-6, § 6.17, at 6-18 (1985)).

81 *Gaiman v. McFarlane*, 360 F.3d 644, 658 (7th Cir. 2004) (noting that mere suggestions about the addition of artistic elements does not make the suggester and the artist joint authors).

82 *Id.* at 659.

83 *Erickson v. Trinity Theatre, Inc.*, 13 F.3d 1061, 1068 (7th Cir. 1994).

unequal.⁸⁴ The practical implication of this inflexible rule is that courts are exceedingly reluctant to recognize joint works as such unless the authors commence their collaboration with the demonstrably unambiguous intention of sharing and sharing alike, or unless the authors can be shown to have in fact made roughly equal contributions to the final form the work takes. Under current law, the collaborator who lacks an advance, formal co-authorship agreement and cannot be shown to have contributed an “equal” share will always be at a disadvantage in what Balganesch calls “unplanned coauthorship” situations.⁸⁵

The best advice an attorney can currently give an artist client embarking on a collaborative project is to get the terms of their agreement in writing before anyone so much as walks into a rehearsal room or shares an idea. Courts tend to defer to such written agreements.⁸⁶ Because of the inherent fluidity of the collaborative process, though, this is not an adequate solution to the problem of fairly apportioning ownership stakes in collaboratively-generated works. It would fatally inhibit the free exchange of ideas if whenever the “terms” of a collaborative relationship shifted, the artists felt obliged to pause and revise the terms of their contract before proceeding with their work. Momentum is often a critical component of successful collaboration. So is trust. So is a certain freedom from inhibition.

In the theater, when a production is being rehearsed, it is often the job of the stage manager to observe and record the work of the director and actors as they “block” scenes, developing the physical movements and emotional score that the actors will use during performances. After the actor has tried the scene half a dozen times entering from stage left, half a dozen times entering from stage right, and half a dozen times entering through the center aisle in the house, the stage manager might be the only person who not only remembers but has a written record of what decision about the entrance was ultimately made. The stage manager’s notes can then be referred back to at a subsequent rehearsal or once performances have begun to make sure that the performers are hewing close to the agreed-upon blocking. To properly keep tabs on an evolving joint authorship relationship, the creative team would also have to invite an intellectual property attorney to sit in on every rehearsal and every pre- and post-rehearsal conversation about rehearsal over dinner, over drinks, on the walk to the train. The team would have to conference said

84 *Comty. for Creative Non-Violence*, 846 F.2d at 1498.

85 Shyamkrishna Balganesch, *Unplanned Coauthorship*, 100 VA. L. REV. 1683, 1688 (2014).

86 *Thomson v. Larson*, 147 F.3d 195, 204 (2d Cir. 1998) (noting that courts look for written agreements to see if the parties intended to be co-authors).

intellectual property attorney in on every late-night phone call between the playwright and the director or any other configuration of collaborators. The attorney would be professionally obligated to interrupt every few minutes to point out that the way things were going, the team should really take a few minutes to revise the terms of their co-authorship agreement. The rehearsal process would take thrice as long, the joy of discovery would be extinguished by the pedantic presence of the attorney, and the team would likely have to pay the attorney a fee exceeding the amount the production stood to ultimately gross.⁸⁷ While such an arrangement might itself make for an amusing modern comedy of manners, it is of course thoroughly impractical as a solution to the problem of joint authorship. Instead, it falls to the courts to make such determinations *ex post*, relying on whatever evidence of artists' cooperative behavior is available.⁸⁸

In the realm of patent law, it is acknowledged that the contested innovations are often the product of special technical expertise, and that it is best for everyone if such cases are adjudicated by judges who are at least passingly familiar with the way scientists and engineers think.⁸⁹ Copyright issues for the arts, however, are entrusted to generalist judges who may never have seen the inside of a studio or rehearsal room.⁹⁰ Unsurprisingly, this too often results in judges misunderstanding the nature of collaborative dynamics and issuing inequitable rulings on authorship because they are left to analogize from what they know of more conservative, traditionally hierarchical professional contexts.

In *Cabrera v. Teatro del Sesenta*, for example, the judge charged with assessing the authorship of a collectively-created play devotes pages of her

87 Jon Garon, *Director's Choice: The Fine Line Between Interpretation and Infringement of an Author's Work*, 12 COLUM.-VLA J.L. & ARTS 277, 303 (1988) ("A contractual solution to decide who owns the rights to the different elements in the initial production is still problematic on the pragmatic level. The nature of not-for-profit theatre, workshops and the other forms of play development militate against any solution which increases the need for documentation and paper work. . . . The authors and producers who are most in need of these agreements are often the very people who are without the resources to utilize them.").

88 Balganes, *supra* note 85, at 1696.

89 *See, e.g.*, Warner-Jenkinson Co. v. Hilton Davis Chem. Co., 520 U.S. 17, 40 (1997) (remanding a patent case to the Federal Circuit with the benediction, "we see no purpose in going further and micromanaging the Federal Circuit's particular word choice We expect that the Federal Circuit will refine the formulation . . . and we leave such refinement to that court's sound judgment in this area of its special expertise.").

90 Chad M. Oldfather, *Judging, Expertise, and the Rule of Law*, 89 WASH. U. L. REV. 847, 864 (noting with satisfaction that the iconic American judge remains a generalist: "The generalist seems much more likely to be, in Isaiah Berlin's famous typology, a fox (someone who knows many things) rather than a hedgehog (someone who knows one big thing)").

opinion to cataloguing the relative expertise (measured in significant part by graduate degrees and faculty appointments in Theater Studies) of the project's contributors.⁹¹ "The task . . . is more difficult than simply assessing the credibility of the witnesses," Judge Delgado-Colón wrote, "[b]oth parties . . . had the necessary expertise, knowledge and skills within the theater media to have completed and rehearsed the script over a rather short period of time, and both parties had been involved in adaptations of works of other writers."⁹² Such considerations should have exactly nothing to do with determining authorship. Anton Chekhov studied medicine and then practiced as a physician for most of his career as a writer.⁹³ Sam Shepard briefly studied animal husbandry at a junior college, then dropped out before graduating to pursue theater.⁹⁴

IV. STATE OF THE ART

While our existing joint works doctrine does not adequately accommodate theater in general, it is entirely ill-suited to much of the formally innovative or otherwise experimental theater that is today regarded as the most critically significant. In the U.S., this avant-garde lineage includes the Living Theater, the Performance Group, Bread and Puppet Theater, Robert Wilson, Richard Foreman, the Wooster Group, and Mabou Mines.⁹⁵ As the names on this list suggest, most of these key innovators are companies or collaborators who share creative responsibilities, rather than specialized individual creators.⁹⁶ In the 1960s and 1970s, roughly around the same time now-canonical European

91 914 F. Supp. 743, 746-750 (D.P.R. 1995).

92 *Id.* at 752.

93 See Alexander Chudakov, *Dr Chekhov: A Biographical Essay (29 January 1860-15 July 1904)*, in THE CAMBRIDGE COMPANION TO CHEKHOV 3, 11 (Vera Gottlieb & Paul Allain eds., 2000) (providing a biography of Anton Chekhov).

94 See John O'Mahony, *The Write Stuff*, GUARDIAN (Oct. 10, 2003), <https://www.theguardian.com/stage/2003/oct/11/theatre.music> (profiling Sam Shepard).

95 See generally THEODORE SHANK, AMERICAN ALTERNATIVE THEATER (1982) (examining alternative theater in the United States).

96 See *id.* at 3 ("Instead of the two-process method of the conventional theatre—a playwright writing a script in isolation and other artists staging it—the autonomous method involves a single process wherein the same artists develop the work from initial conception to finished performance. In part the development of this method was a reaction against the psychic fragmentation the artists experienced in the technocratic society which believed that human needs could be satisfied by technical means requiring a high degree of specialization. Instead of the individual specialists of the established theatre, the typical member of an alternative theatre has broad creative responsibilities.").

literary theorists were pronouncing the “death of the author,”⁹⁷ the American theater began its repudiation of the preeminence of the playwright and the centrality of narrative drama and language to the theatrical event.⁹⁸ What emerged to displace the old drama was what Hans-Thies Lehmann calls postdramatic theater, a general aesthetic category within which subgenres including devised theater, site-specific theater, and the theater of images may be identified.⁹⁹ These forms remain among the most vital forms of theatrical production in the twenty-first century.¹⁰⁰

A. Devised Theater

“Devising” can be understood as “a mode of work in which *no* script—neither written play-text nor performance score—exists prior to the work’s creation by the company.”¹⁰¹ The Wooster Group, named for the address of their home base in lower Manhattan,¹⁰² is one company that exemplifies this style of production.¹⁰³ Together, the Wooster Group fashions performances from assorted “pieces of culture,” as the company’s frequent director Elizabeth LeCompte inclusively calls them.¹⁰⁴ Source material might include

97 See ROLAND BARTHES, *IMAGE MUSIC TEXT* 148 (Stephen Heath trans., 1977) (“We are now beginning to let ourselves be fooled no longer by the arrogant antiphrastical recriminations of good society in favour of the very thing it sets aside, ignores, smothers, or destroys; we know that to give writing its future, it is necessary to overthrow the myth: the birth of the reader must be at the cost of the death of the Author.”).

98 See, e.g., Bonnie Marranca, *Introduction* to *THE THEATRE OF IMAGES*, at ix (Bonnie Marranca ed., Johns Hopkins U. Press 1996) (1977) (“Experimental groups of the sixties and early seventies broke down traditional parameters of theatrical experience by introducing new approaches to acting, playwriting and the creation of theatrical environments; they reorganized audience and performing space relationships, and eliminated dialogue from drama. Collaborative creation became the rule.”); see also Richard Schechner, *The Decline and Fall of the (American) Avant-Garde: Why It Happened and What We Can Do About It*, 5 *PERFORMING ARTS J.*, 9, 10 (1981) (“When the sixties began, a challenge was proclaimed by directors against writers. We directors wanted to shape texts—the whole collection of ‘texts’ theatrically speaking: words, space, audience interaction with the performance, performer training, acting. Directors wanted writers to cease dictating their ‘intentions’ to us; or to insist that directors and performers ought to be mere ‘interpreters.’”).

99 See generally HANS-THIES LEHMANN, *POSTDRAMATIC THEATRE* (Karen Jürs-Munby trans., 2006) (providing a study of the theatre forms that have developed since the 1960s).

100 See generally *THE TWENTY-FIRST CENTURY PERFORMANCE READER* (Terry Brayshaw, Anna Fenemore & Noel Witts eds., 2020) (compiling extracts from performance experts to form a sourcebook on performance art).

101 DEIRDRE HEDDON & JANE MILLING, *DEVISING PERFORMANCE: A CRITICAL HISTORY* 3 (2006).

102 See DAVID SAVRAN, *BREAKING THE RULES: THE WOOSTER GROUP* 3-5 (1986) (providing a brief history of the origins of the Wooster Group).

103 See *id.* at 2 (describing the ways in which the Wooster Group “rejected the commercial theatre and its mode of production, choosing instead to create their own producing organizations”).

104 ELINOR FUCHS, *THE DEATH OF CHARACTER: PERSPECTIVES ON THEATER AFTER MODERNISM* 113 (1996).

old vaudeville sketches,¹⁰⁵ pornographic films,¹⁰⁶ art films,¹⁰⁷ Encyclopedia Britannica teaching films,¹⁰⁸ private interviews,¹⁰⁹ public debates,¹¹⁰ video art,¹¹¹ or previously-written dramatic material.¹¹² In their 1975 *Sakonnet Point* and 1977 *Rumstick Road*, the Wooster Group used the autobiography of company member Spalding Gray, whose mother had recently committed suicide, as a starting point.¹¹³ *Sakonnet Point* “was not planned in detail before rehearsals began, but [Gray] knew that he wanted to make a play about his growing up.”¹¹⁴ Gray brought objects, mainly children’s toys, to each rehearsal and “[t]he play was built entirely from free associations as the performers improvised with the objects.”¹¹⁵ For *Rumstick Road*, Gray brought in letters written by his parents, old family photos, and tape recordings he had made with family members and the psychiatrist who treated his mother during her breakdown.¹¹⁶ Again, the play took shape through group improvisations the performers did in response to this material.¹¹⁷ These two productions were billed as “composed by” Spalding Gray and Elizabeth LeCompte “in collaboration with” named additional performers, and “directed by” Elizabeth LeCompte.¹¹⁸

105 SAVRAN, *supra* note 102, at 19.

106 FUCHS, *supra* note 104.

107 Ryan M. Davis, *Double Exposure*, 34 PAJ: J. PERFORMANCE & ART 46, 50 (2012).

108 SAVRAN, *supra* note 102, at 14.

109 *Id.* at 51.

110 *Id.*

111 Davis, *supra* note 107.

112 SAVRAN, *supra* note 104, at 51.

113 SHANK, *supra* note 95, at 171.

114 *Id.*

115 *Id.*

116 *Id.* at 171-172.

117 *See id.* at 172 (“As the group worked with the tapes, using them as background for their improvisations and exploring through improvisation some of the situations described, surreal dream-like imagery emerged. In real life Gray’s mother, a Christian Scientist, believed that she had been visited by Christ and had been healed by him. This led to an improvisation in which The Man attempts to heal The Woman. The improvisation culminated in a scene in which Gray, with a sheet over him, lies under a table. The Woman lies on the table. The Man raises her dress exposing her mid-section and gives a lecture to the audience about a process for relaxing the muscles of the torso. The lecture is followed by a demonstration in which he massages The Woman’s belly with his hands and then with his lips, causing The Woman to laugh hysterically.”).

118 *Rumstick Road*, THE WOOSTER GROUP (last visited Oct. 21, 2020), <http://thewoostergroup.org/rumstick-road>.

B. The Theater of Images

The “theater of images” has been described as a mode of theatrical authorship in which “the painterly and sculptural qualities of performance are stressed, transforming this theatre into a spatially-dominated one activated by sense impressions, as opposed to a time-dominated one ruled by linear narrative.”¹¹⁹ One of the companies that exemplifies this aesthetic is Mabou Mines. When their 1970 *Red Horse Animation* was selected for inclusion in critic Bonnie Marranca’s seminal anthology *The Theatre of Images*, it was determined that a color comic approximating the look and feel of the production would more faithfully capture the essence of the production than would a traditional script with only dialogue and stage directions.¹²⁰ Like the Wooster Group, Mabou Mines uses a collective creation model.¹²¹ From the beginning, they embraced a catholic range of source material, and “everyone wrote, directed, performed, and designed.”¹²² In *Red Horse Animation*, an attempt to narrate the emotional life of the piece’s eponymous horse, the company radically redefined the traditional, proscenium-framed use of theater space by taking their performances horizontal—much of the play was performed with the actors lying down, using the floor as backdrop with the audience watching from above.¹²³ To evoke the subjective experience of its subject, the piece unfolds in “a series of non-sequential stage pictures.”¹²⁴ Many of these pictures were generated by the company in improvisational response to photographs of horses in motion.¹²⁵ The performers did not play individuated characters, but rather spoke a series of choral narratives while arranging their bodies into corresponding images, creating a fragmented, unnarrativized play of impressions in place of the conventional elements of plot and character.¹²⁶

119 Marranca, *supra* note 98, at xii.

120 *See id.* at 124–156 (capturing vivid colors and strong imagery).

121 *See* IRIS SMITH FISCHER, MABOU MINES: MAKING AVANT-GARDE THEATER IN THE 1970S 5 (2011) (“The Members of Mabou Mines were (and still are) its artistic directors and executive board.”).

122 *Id.* at 6.

123 *See* Lee Breuer, *Mabou Mines*, in *THE THEATRE OF IMAGES*, *supra* note 100, at 113 (describing the use of performance space in *Red Horse*).

124 *Id.*

125 *Id.* at 115–16.

126 *Id.* at 115.

C. Site-Specific Theater

Site-specific performances are, generally speaking “conceived for, mounted within and conditioned by the particulars of found spaces, existing social situations or locations, both used and disused They are inseparable from their sites, the only contexts within which they are intelligible.”¹²⁷ A site-specific performance is typically tailor-made for the place where it is to be staged—if there is a text, it is likely to be selected because it suits the location, rather than the other way around.¹²⁸ This was how production company En Garde Arts and director Reza Abdoh’s *Father Was a Peculiar Man*, an adaptation of *The Brothers Karamazov*, came together in 1990.¹²⁹ Producer Anne Hamburger selected the streets of Manhattan’s then-ungentrified Meatpacking District.¹³⁰ “Congested and bloody with animal carcasses in the early morning hours,” it was “scarily deserted in the evening,” as one critic put it, frequented primarily by transgender sex workers and their customers.¹³¹ The audience roamed the streets and interiors of surrounding warehouses with the actors, who leaned heavily into the violent and vulgar aspects of Dostoevsky’s story of patricide, free will, and morality.¹³² For the climax of the performance, the entire hundred-person audience was seated *en plein air* at a block-long dining table, upon which the actors performed obscene acts instead of serving food.¹³³ The text, such as it was, functioned as mere pretext for the total sensory experience of being in a corridor of the city one would never otherwise dare to venture into after dark, the feelings of danger and transgression, the sights and smells of animal and human flesh on sale.¹³⁴

Perhaps the most formidable example of site-specific theater is director Robert Wilson’s 1972 *KA MOUNTAIN AND GUARDenia TERRACE: a story of a family and some people changing*, a single performance staged at different locations atop Haft Tan Mountain in Shiraz, Iran.¹³⁵ The

127 MIKE PEARSON & MICHAEL SHANKS, *THEATRE/ARCHAEOLOGY* 23 (2001).

128 See, e.g., FUCHS, *supra* note 104, at 135 (explaining how *The Brothers Karamazov* was set in the infamous New York meatpacking district, creating a “frantic *mise-en-scène*”).

129 *Id.*

130 *Id.*

131 *Id.*

132 See *id.* at 135–36 (noting that spectators could browse rooms that included “a scene of a fashion mannequin lying under a circular saw blade with blood on her neck [] near a scene of hooded monks praying”).

133 See *id.* (describing the scene where spectators were served water and the actors “used the table as a stage to perform some of the Karamazovs’ more raucous and perverse obscenities”).

134 See *id.* (providing a description of the “hellish installation”).

135 Marc Robinson, *Robert Wilson, Nicolas Poussin, and Lohengrin*, in *LAND/SCAPE/THEATER* 161 (Elinor Fuchs & Una Chaudhuri eds., 2002).

performance lasted seven continuous days and nights and was organized around the audience's progression up seven peaks of the mountain.¹³⁶ Audiences had to brave intense heat during the day and the cold of the night, sitting "huddled under blankets against wind and blinding dust storms."¹³⁷ For a performance of such magnitude, no one involved could possibly stay awake and aware for the entirety of the performance without occasionally pausing for sleep: not the performers, not the spectators, not even Wilson, the master of ceremonies himself.¹³⁸ At least in part out of necessity, he delegated some directing and writing responsibilities to other members of the company, including nine-year-old Jessie Dunn Gilbert.¹³⁹ Wilson made the piece's most expressively determinative creative decision by choosing the location where *KA MOUNTAIN* would be staged, but countless acts of authorship contained by the vast performance took place without his knowledge, let alone his approval.

D. Recent Developments

In recent years, some experimental theater ensembles have returned to using text to anchor their aesthetic explorations, but they continue to eschew plays and playwriting in favor of various kinds of "found texts" which become pretexts for productions. The company Elevator Repair Service has created stagings of classic American novels, including *Gatz*, an eight-hour production of *The Great Gatsby* that preserves every last word of F. Scott Fitzgerald's text.¹⁴⁰ While certain parallels between the novel's characters and those embodied by the performers onstage gradually emerge, the adaptation is by no means a traditional adaptation—in this version, a depressed modern office worker picks up a copy of the novel, starts reading, and does not stop until he gets to the little green light at the end of Daisy's dock.¹⁴¹ His co-workers join

136 See *id.* ("Few spectators (if any) saw everything that happened over the seven-day continuous performance . . .").

137 Basil Langton, *Journey to Ka Mountain*, 17 DRAMA REV.: TDR 48, 54 (1973).

138 Jessica Rizzo, *Immanent Utopia/Utopia Imminent: Thomas Hirschhorn's Gramsci Monument*, TDR 170, 174 (2014).

139 Ossia Trilling, *Robert Wilson's Ka Mountain and Guardenia Terrace*, 17 DRAMA REV.: TDR 33, 34 (1973).

140 See Jason Zinoman, *'Gatz' and 'The Great Gatsby' Vie for Broadway Stages*, N.Y. TIMES (July 16, 2006), <https://www.nytimes.com/2006/07/16/theater/16zino.html?searchResultPosition=2> (underscoring the theater's need for a renovation of copyright law, the Fitzgerald estate exercised their right to prevent *Gatz* from opening in New York for years, concerned that the eight-hour, experimental extravaganza would somehow be confused with a conventional stage adaptation of the novel that the estate hoped to bring to Broadway).

141 *Id.*

in and hijinks ensue; the text is both central to and separate from the creative work that made the production, which jumps off of its source text and becomes something else entirely.¹⁴² In their 2013 *Arguendo*, Elevator Repair Service staged verbatim the entire oral argument of *Barnes v. Glen Theatre*, a 1991 Supreme Court case that dealt with the question of whether an Indiana law banning public nudity violated the First Amendment rights of the group of erotic dancers who brought the action.¹⁴³ In 2019, the company Half Straddle fashioned a piece from the transcript of an FBI interview with Reality Winner, who went to federal prison for leaking information about Russian interference in the 2016 U.S. presidential election.¹⁴⁴

In none of the work discussed in this section would it make sense to give the lion's share of the authorial credit to a "playwright," if indeed a playwright could even be identified—the authorship of such productions is clearly in the dramaturgy—and yet copyright law persists in its hopelessly outdated logocentricism. The law persists in privileging the collaborator who puts the proverbial pen to paper even though the art moved on long ago.

V. PROPOSALS FOR CHANGE

There have long been calls for either a formal, statutory amendment to the existing joint works doctrine or a shift in the way joint authorship disputes are adjudicated. None of the proposed strategies for modifying the law go far enough toward accommodating postdramatic theater.

Susan Keller proposes two alternatives. First, she suggests doing away with the automatic grant of the entire copyright to the playwright, and instead dividing the copyright among "all the actual 'authors.'"¹⁴⁵ In this scenario, the collaborators would be required to agree on their respective contributions, as determined at the time of the work's first public performance.¹⁴⁶ Should the parties prove unable to come to an agreement, "a neutral body should be appointed to arbitrate a binding allocation decision."¹⁴⁷ The existing professional organization Keller nominates to be responsible for convening

142 *Id.*

143 See Ben Brantley, *Full-Frontal Justice, a Matter of Redress*, N.Y. TIMES (Sept. 24, 2013) <https://www.nytimes.com/2013/09/25/theater/reviews/arguendo-by-elevator-repair-service-at-the-public-theater.html> (reviewing the production).

144 Amanda Hess, *Staging Reality Winner: An F.B.I. Transcript Becomes an Offbeat Thriller*, N. Y. TIMES, (Dec. 30, 2018) <https://www.nytimes.com/2018/12/30/theater/reality-winner-tina-satter-half-straddle.html?action=click&module=RelatedLinks&pgtype=Article>.

145 Keller, *supra* note 58, at 934.

146 *Id.*

147 *Id.* at 934–935.

such a body is the Dramatists Guild, the national trade association of playwrights, composers, lyricists, and librettists.¹⁴⁸ This solution is inadequate because, as even Keller herself recognizes, the Dramatists Guild is “not absolutely neutral.”¹⁴⁹ This is an understatement. The Dramatists Guild exists for the express purpose of “aiding dramatists in protecting both the artistic and economic integrity of their work.”¹⁵⁰ The Guild was specifically founded to help wrest copyright ownership away from producers and secure it for playwrights.¹⁵¹ All of the Guild’s board members are playwrights, composers, lyricists, or librettists.¹⁵² Bias towards the interests of playwrights is baked into the mission of the Guild; it would be inappropriate for them to exhibit neutrality in arbitrating a dispute between a playwright and a director, dramaturg, or actor, and it would be naïve to expect them to exhibit such neutrality.

Keller’s second proposal would require no change to the Copyright Act.¹⁵³ Instead, the playwright would retain ownership of the copyright for the original script as written.¹⁵⁴ In addition, a new and separate copyright would be available for the production script, which would be treated as a derivative work.¹⁵⁵ The ownership of the production script copyright would be apportioned according to how much other collaborators in fact contributed to the new dialogue and written stage directions that made it into the new version of the script.¹⁵⁶ Here, too, a “neutral arbitrating body,” presumably convened by the Dramatist’s Guild, would assist with settling any disputes.¹⁵⁷ This proposal is flawed for the same reasons Keller’s first proposal is—it is bound to unfairly favor playwrights. This second proposal also unhelpfully reverts to the logocentricism that contemporary theater artists are increasingly rejecting.

Jennifer Womack argues that the theatrical production of a script should receive a single copyright designating the production as a derivative work—derived from the playwright’s written script—and designating the producer as

148 *Id.* at 935.

149 *Id.*

150 *About the Guild*, DRAMATISTS GUILD, <https://www.dramatistsguild.com/about-the-guild> (last visited Oct. 21, 2020).

151 *See id.* (“By 1926, the [Guild] had authorized a strike in order to establish a Minimum Basic Agreement, promising to withhold work from producers who would not sign it.”)

152 *See id.* (stating that members of the Guild Counsel are “writers, in various stages of their theatrical careers”).

153 Keller, *supra* note 58, at 936.

154 *Id.*

155 *Id.*

156 *Id.*

157 *Id.*

the sole proprietor.¹⁵⁸ This overly logocentric proposal is further flawed because it rewards investing in art, but not making art. While there has been the occasional visionary producer-director like Anne Hamburger or, in the commercial theater, Hal Prince, whose personal aesthetic has seemed to suffuse every production they sponsor, such active artistic involvement is not a traditional part of the producer's job description.¹⁵⁹ The role of the producer is generally that of a facilitator. Their main and only indispensable role is that of fundraiser. This is of course an important role, but since the producer's connection to the production is more likely to be merely financial than personal or expressive, the producer is the last person who should be able to claim authorship rights.

Jane Lee acknowledges that "copyright law is not well-suited to the collaborative nature of theater" but argues that contract law sufficiently fills in the gaps left by copyright law.¹⁶⁰ Ryan Richardson comes to a similar conclusion, making the rather befuddling claim that "[i]f the law is unable to adequately accommodate custom and practice, custom and practice must accommodate the law."¹⁶¹ Richardson suggests that contract law, being the most malleable institution of enforcement, provides the best mechanism for regulating artistic relationships, raising again the specter of the intellectual property attorney in the rehearsal room.¹⁶² These proposals fail to grapple with the problem of unplanned coauthorship.¹⁶³ They also exhibit an odd willingness to accept that copyright does not now and will never be able to adequately serve the needs of one entire major category of artistic production. Since the function of copyright is to promote and protect art and artists, unless the artist is proposing to violate some provision of the criminal code on stage, the law should whenever possible be structured to facilitate the customs and practices of artists, and not the other way around.

Faye Buckalew has proposed leaving intact the requirement of the joint works doctrine that all contributors fully intend to be coauthors, but changing

158 Womack, *supra* note **Error! Bookmark not defined.**, at 248.

159 See Jesse Green, *My Summer with Hal*, N.Y. TIMES (July 31, 2019), <https://www.nytimes.com/2019/07/31/theater/harold-prince-death.html> (noting the author's time as an apprentice, and illuminating Hal Prince's hands-on approach to producing).

160 Jane C. Lee, *Upstaging the Playwright: The Joint Authorship Entanglement Between Dramaturgs and Playwrights*, 19 LOY. L.A. ENT. L.J. 75, 101-102 (1998).

161 Ryan J. Richardson, Comment, *The Art of Making Art: A Narrative of Collaboration in American Theatre and a Response to Calls for Change to the Copyright Act of 1976*, 42 CUMB. L. REV. 489, 547 (2012).

162 *Id.*

163 See generally Balganes, *supra* note 16 (examining the relationship between unplanned coauthorship and copyright law).

the way this intention is evaluated.¹⁶⁴ Rather than using a purely subjective standard, Buckalew advocates adopting a version of the “reasonable person” standard to assess whether the parties intended to be coauthors.¹⁶⁵ The court would consider “whether a reasonable person would use the work of another in the manner in which it was used and not expect the other person to receive authorship status for that contribution” and “whether a reasonable person making such a contribution would expect to be considered an author.”¹⁶⁶ This adjustment, Buckalew persuasively argues, would prevent a collaborator in a position favored by the statute from denying other contributors coauthorship status simply because she “unreasonably believes herself to be the sole creator of a work.”¹⁶⁷ Buckalew’s suggestion is an excellent one, but it does not go far enough.

VI. UNITED STATES COURT OF ART APPEALS FOR THE FEDERAL CIRCUIT

Since the federal government has no legitimate interest in favoring or promoting text-based narrative drama over other forms of live art, Congress would do well to consider amending the Copyright Act so that it: (1) Invalidates the judge-made law that currently requires an independently copyrightable contribution for joint authors in theater and (2) Makes space for the law to pay attention to the relative contributions of the coauthors of a joint work, and to assign them proportional ownership shares rather than automatically assigning them equal ownership stakes that do not correspond to their actual contributions. These adjustments could also be brought about judicially by overruling bad precedents.

Moving forward, however, it should not be generalist judges charged with settling copyright disputes between artists after a collaboration gone awry. Learned Hand was an exception that proved the rule, and measures should be taken to ensure that more judges of his caliber, aesthetically attuned and somewhat sensitive to the workings of the creative process, handle our important copyright cases. Worries about unqualified judges being thrust into the role of art critic are well-established, but have been newly articulated by

164 Faye Buckalew, *Joint Authorship in the Second Circuit: A Critique of the Law in the Second Circuit Following Childress v. Taylor and as Exemplified in Thomson v. Larson*, 64 BROOK. L. REV. 545, 580-581 (1998).

165 *Id.*

166 *Id.* at 581.

167 *Id.*

those in both the legal community and the art world in recent years.¹⁶⁸ Asking generalist judges to speculate about what goes on behind the scenes is similarly fraught. Art, like science, has a specialized technical language all its own, and the conditions under which art is made are particular and often peculiar. To increase the likelihood of fair outcomes for artists and the public in general, we should establish a Court of Appeals for Art akin to the Federal Circuit.¹⁶⁹ Just as the Federal Circuit is presided over by specialist judges with the requisite technical background to ensure that they understand the scientific material before them in patent cases, a Court of Appeals for Art could be presided over by judges who had some training in the arts and some familiarity with the creative process. As the Federal Circuit has judges who have worked as engineers or hold doctoral degrees in chemistry,¹⁷⁰ the Court of Appeals for Art could have judges who have danced with ballet companies, written novels, or who hold doctoral degrees in theater. Such a court would be far more likely to be, like Learned Hand, skeptical of deceptive generalities. Such a court could be expected to render well-informed judgements on a case-by-case basis, ensuring that we adequately reward the unconventional and experimental at least as consistently as we do the hackneyed and mainstream.

If it is to be true to its constitutional mandate, copyright law must promote artistic *progress*, that is to say, experimentation and innovation. In this Article, I have confined my observations to those copyright problems presented by certain subcategories of theater, but scholars of dance, music, film, and the visual arts could identify comparable problems in the application of copyright law to works in their fields. It may be too much to ask that the law keep pace

168 See *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903) (“It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits. At the one extreme some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke.”); see also Sergio Muñoz Sarmiento & Lauren van Haften-Schick, *Cariou v. Prince: Toward a Theory of Aesthetic-Judicial Judgments*, 1 TEX. A&M L. REV. 941, 946–948 (2014) (discussing concern over cases in which judges take on the roles of art critics).

169 A specialized court of appeals for copyright could also be of tremendous value in handling copyright litigation involving computer code, which is, rightly or wrongly, treated as a species of literary work under current copyright law.

170 See e.g., *Kimberly A. Moore, Circuit Judge*, U.S. CT. OF APPEALS FOR THE FED. CIR.: JUDGES, <http://www.cafc.uscourts.gov/judges/kimberly-moore-circuit-judge> (last visited Oct. 21, 2020) (describing how Federal Circuit Judge Kimberly A. Moore was employed in electrical engineering with the Naval Surface Warfare Center); *Alan D. Lourie, Circuit Judge*, U.S. CT. OF APPEALS FOR THE FED. CIR.: JUDGES, <http://www.cafc.uscourts.gov/judges/alan-d-lourie-circuit-judge> (last visited Oct. 21, 2020) (describing how Federal Circuit Judge Alan D. Lourie holds a doctoral degree in chemistry from the University of Pennsylvania).

with the manifold developments in the ever-expanding (and increasingly interdisciplinary) art world, but a new, specialized Article III court could at least mitigate against the law being left where it is today, in the proverbial dust.