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A Rollicking Band of Pirates: Licensing the Exclusive Right of Public Performance in the Theatre Industry

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A Rollicking Band of Pirates: Licensing the Exclusive Right of Public Performance in the Theatre Industry

ABSTRACT

With ticket prices on Broadway at an all-time high, amateur and regional theatres are the only venues for theatrical productions to which most Americans are exposed. Licensing these performance rights—known as “stock and amateur rights”—is the primary source of income for many playwrights, even for those whose plays flopped at the highest level. However, the licensing houses responsible for facilitating these transactions frequently retain and exercise the ability to issue exclusive performance licenses to certain large regional theatres. This practice limits public access to particular works and restricts playwrights’ potential earnings in those works. Though this behavior does not amount to an antitrust violation, it does violate the spirit of copyright. The Dramatists’ Guild should mandate that its members limit the theatrical licensing houses’ ability to grant performance licenses to nonexclusive licenses only. Therefore, using the power of the guild, which acts as a quasi-labor union of playwrights, should be influential enough to insert this limitation into the standard-form contracts signed by playwrights. Furthermore, the licensing houses or individual playwrights would likely not oppose granting these exclusive licenses, as both parties would enjoy the additional revenue streams generated by the ability to issue multiple performance licenses.

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“Old” issues in copyright can be just as relevant as new ones. The impact of the Internet and the application of copyright laws to websites like YouTube and other digital content-sharing services often dominate modern intellectual property rhetoric. As these new issues emerge in the field, old issues become less interesting to commentators and lobbyists, accepted as simple quirks in the system. Dramatic pieces, among the oldest forms of copyrightable works, are losing their relevance in copyright law almost as quickly as the professional theatre industry is losing audience members. In many regions of the United States, small regional or amateur productions are the only exposure to live theatre that is financially or logistically available to the public at large.¹ These smaller-scale productions, separated into “stock” (regional professional theatre) and “amateur”

1. See Michael H. Arve, *Why Community Theatre is Important to the Whole Theatre Community*, LYRIC ARTS, <http://www.lyricarts.org/about-us/articles-we-love/why-community-theatre-is-important-to-the-whole-theatre-community> (last visited Feb. 7, 2012) (“Community theatre is most often the first exposure people have to a live theatre experience. But much more importantly, if that experience is a negative one, the professional theatre has lost a ticket sale and a future theatre patron.”).

(community or school-sponsored theatre),² are the primary source of theatrical entertainment for the vast majority of the country. Moreover, stock and amateur productions serve as the primary source of income for playwrights, who cease to earn royalties on the initial runs of their works but continue to enjoy royalties in perpetuity each time a stock or amateur company licenses the right to publicly perform their play.³ Through the facilitation of licensing houses that specialize in issuing performance licenses to stock and amateur companies, playwrights continue to profit from their work at the local level, even as Broadway and high-end regional productions become prohibitively expensive.⁴

Only one aspect of this system threatens the viability of small-scale theatre moving forward: exclusive licenses. At present, regional theatres may obtain an exclusive performance license to block off performance rights to a work within a specific geographical area for a limited period of time, thereby restricting all rival companies within a certain radius (sometimes up to a hundred miles) from performing the same work until the license expires (occasionally not for multiple years).⁵ Such restrictions not only avoid the potential market competition of a rival local theatre, but also prevent smaller venues, such as high schools, colleges, and community theatres, from mounting the show of their choice. This restrictive behavior flies in the face of the traditional principles of the public performance right, the “Copyright Clause” of the Constitution,⁶ and the basic norms of copyright law. Because the impact of these rules is borne by small, usually nonprofit theatre groups, however, the legality of licensing the exclusive right of public performance for stock and amateur productions of theatrical works remains largely unnoticed.⁷ Indeed,

2. See 5 ALEXANDER LINDEY & MICHAEL LANDAU, *LINDEY ON ENTERTAINMENT, PUBLISHING AND THE ARTS* § 11:31 (3d ed. 2011).

3. See generally Robert Hoffer, *Life After Death on Broadway*, VARIETY, Nov. 20, 2009, <http://www.variety.com/article/VR1118011669> (“Joe DiPietro, book writer on ‘All Shook Up,’ made a few thousand dollars in royalties during the six months the Elvis Presley jukebox tuner ran on Broadway in 2005. ‘However, I made tens of thousands of dollars from my first quarterly royalty check for the stock and amateur rights,’ says the scribe.”).

4. Cf. *id.* (“Community theaters and high school productions don’t produce the instant big bucks of Broadway and tours, but the royalties paid to creatives, producers and investors are pure profit, and a behemoth show can bring in \$1 million to \$3 million a year for decades.”).

5. For an example of such a provision, see LINDEY & LANDAU, *supra* note 2, § 11:33(7).

6. U.S. CONST., art 1, § 8, cl. 8.

7. Even scholars who tackle the issue of theatrical licensing directly do not consider the possibility of issuing an exclusive stock or amateur license. *E.g.*, Symposium, *What Permission? A Practitioner’s Guide to Copyright Licensing in Theater*, 29 COLUM. J.L. & ARTS 445, 457 (2006); Douglas M. Nevin, Comment, *No Business Like Show Business: Copyright Law, the Theatre Industry, and the Dilemma of Rewarding Collaboration*, 53 EMORY L.J. 1533 *passim* (2004). However, Lindey lists an exclusive rights provision as part of the standard-form amateur

the viability of an exclusive stock and amateur performance license has never been litigated.⁸

Part I of this Note details the history of the public performance right: its initial creation in England, its growth and codification in the United States, and its contours as applied to the theatre industry. Part II examines the process of licensing stock and amateur rights to perform theatrical works, as well as the current problems copyright law poses to the theatre industry. Using a test previously applied to antitrust suits against music licensing houses, Part III explains why it is unlikely this exclusive licensing scheme violates federal antitrust law.⁹ Finally, Parts IV and V suggests two alternative solutions: the adoption of a compulsory licensing scheme by Congress—which may fit in theory, but is unlikely to be effected in practice—and the possibility of remedying the problem through private contract law via pressure from the playwrights' trade association, the Dramatists Guild.

I. A PIRATE, HORROR!¹⁰: PIRACY IN THE THEATRE INDUSTRY AS THE IMPETUS FOR THE EXCLUSIVE RIGHT OF PUBLIC PERFORMANCE

Well, at first sight it strikes us as dishonest,
But if it's good enough for virtuous England—
The first commercial country in the world—
It's good enough for us.¹¹

Modern American copyright law derives from the US Constitution itself, which guarantees “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.”¹² While the term “author” often refers to the literal creator of the work, the creator does not necessarily always control the “exclusive Right” mentioned in the clause; in many cases, the rights

licensing contract. See LINDEY & LANDAU, *supra* note 2, § 11:33 (“We shall not license any amateur group to present the Play within a radius of [50] miles of your city during the [2] weeks preceding your first performance and [2] weeks following your last one.” (alterations in original)).

8. Cf. *Tams-Witmark Music Library, Inc. v. New Opera Co.*, 81 N.E.2d 70, 74 (N.Y. 1948) (holding a theatre producer did not have to pay royalties to Tams-Witmark for mounting a production of the operetta *The Merry Widow*, despite the presence of a signed licensing agreement, because the work was in the public domain).

9. *CBS, Inc. v. ASCAP*, 400 F. Supp. 737, 745 (S.D.N.Y. 1975), *rev'd*, 562 F.2d 130 (2d Cir. 1977), *rev'd sub nom. BMI v. CBS, Inc.*, 441 U.S. 1 (1979), *aff'd on remand sub nom. CBS, Inc. v. ASCAP*, 620 F.2d 930 (2d Cir. 1980).

10. W.S. GILBERT, *THE PIRATES OF PENZANCE* act 1 (1879), available at http://math.boisestate.edu/gas/pirates/web_op/operhome.html.

11. W.S. GILBERT, *UTOPIA, LIMITED* act 1(1893), available at <http://math.boisestate.edu/gas/utopia/webop/ul011.html>.

12. U.S. CONST. art. I, § 8, cl. 8.

ostensibly owned by creative authors are, in practice, controlled by publishers, producers, or other businessmen who negotiate with authors for the right to exploit their work.¹³ The phrase “Limited Times” is also significant, because the US Copyright Act only protects creative works for a statutorily mandated period of time, after which the work enters the public domain.¹⁴

The right “to perform the copyrighted work publicly” is one of six exclusive rights explicitly granted to copyright owners in § 106 of the Copyright Act.¹⁵ The other five exclusive rights include the right to reproduce the work, the right to prepare derivative works based on the original, the right to distribute copies of the work, and the right to publicly display the work.¹⁶ Like many principles of US law, the exclusive right of public performance originated in England.¹⁷ After being codified in the Copyright Act Amendment of 1856,¹⁸ the confusing and inconsistent application of the public performance right in the United States resulted in a bevy of litigation from playwrights, ultimately leading to a complete restructuring of US copyright law in 1909.¹⁹ Though Congress overhauled the code again in 1976, the public performance right, as it pertains to dramatic works, remains fundamentally the same as it was in 1909, with the notable exception that the various exclusive rights retained by copyright owners (including playwrights) may not be licensed, sold, or leased independently.²⁰

A. *The Public Performance Right in England*

Be eloquent in praise of the very dull old days
which have long since passed away,
And convince 'em, if you can, that the reign of good Queen Anne

13. While the right of termination is reserved to the creator of the work only and is inalienable, this right will not be discussed in this Note. 17 U.S.C. § 203 (2006).

14. *Id.* § 302(a) (setting the length of copyright protection for works created on or after January 1, 1978 at life of the author plus seventy years).

15. *Id.* § 106(4).

16. *Id.* § 106(1)-(3), (5). The sixth right is also a public performance right, but it applies specifically to sound recordings performed via a digital audio transmission. *Id.* § 106(6).

17. See Dramatic Literary Property Act, 1833, 3 & 4 Will. 4, c. 15 (Eng.); *Dramatic Literary Property Act* (1833), in PRIMARY SOURCES ON COPYRIGHT (1450-1900) (L. Bently & M. Kretschmer, eds), available at http://www.copyrighthistory.org/cgi-bin/kleioc/0010/execute/%22uk_1833%22.

18. Act of Aug. 18, 1856, ch. 169, 11 Stat. 138 (codified as amended at 17 U.S.C. § 106(4)).

19. Act of Mar. 4, 1909, Pub. L. No. 60-349, 35 Stat. 1075 (codified at Act of July 30, 1947, ch. 391, § 101(b), Pub. L. No. 80-281, 61 Stat. 652, amended by Copyright Act of 1976, 17 U.S.C. § 101).

20. See *infra* notes 93-96.

was Culture's palmiest day.²¹

British law established copyright for the first time in 1710, when the Statute of Anne granted an exclusive publishing right for a limited time to certain book publishers in England.²² The public performance right, however, did not come into being in England until 1833, when Parliament enacted the Dramatic Literary Property Act.²³ The Act extended the literary copyright established in the Statute of Anne to "dramatic literary property" and conferred the first exclusive performing right to the copyright owners of dramatic works.²⁴ Edward Bulwer-Lytton—an active Member of Parliament, one of the most popular writers of his era, and the author of the Act²⁵—presented two bills in March of 1833.²⁶ The first granted an exclusive right of public performance to the authors of dramatic works, while the second proposed allowing smaller theatres in the city to perform formal dramas and operas in order to destroy the monopoly established by London's two large "patent"²⁷ theatres.²⁸ In arguing to extend to dramatic authors the exclusive right to govern performance of their dramatic works, Bulwer-Lytton explained to the House of Commons:

At this moment dramatic authors possessed no control over the use of their property A play, when published, might be acted upon any stage without the consent of the author, and without his deriving a single shilling from the profits of the performance. It might not only be acted at one theatre, but at 100 theatres, and though,

21. W.S. GILBERT, PATIENCE act 1 (1881), available at <http://math.boisestate.edu/gas/patience/webop/pat06.html>.

22. Statute of Anne, 1710, 8 Ann., c. 19 (Eng.); see also Nevin, *supra* note 7, at 1535.

23. See sources cited *supra* note 17.

24. 3 & 4 Will. 4, c. 15 (Eng.); 13 CORPUS JURIS § 314 n.73 (William Mack 1917).

25. E.g., Philip V. Allingham, *Sir Edward G. D. Bulwer-Lytton: A Brief Introduction*, VICTORIAN WEB, <http://www.victorianweb.org/authors/bulwer/intro.html> (last updated Dec. 12, 2000). Ironically, while Bulwer-Lytton was arguably the greatest advocate for increased statutory intellectual property rights in his day, he was also responsible for coining literary phrases that became so widely used that they would be classified as unprotectable *scenes a faire* today, including "the pen is mightier than the sword," "the great unwashed," "the almighty dollar," and, most famously, "[i]t was a dark and stormy night." *History of the BLFC*, BULWER-LYTTON FICTION CONTEST, <http://www.bulwer-lytton.com> (last visited Oct. 3, 2011).

26. See *infra* text accompanying note 28.

27. At the time, the Lord Chamberlain licensed only two theatres in London (known as "patent theatres") to perform spoken dramas. See *An Introduction to Patent Theatres*, HUMANITIES ADVANCED TECH. & INFO. INST., <http://www.hatii.arts.gla.ac.uk/Multimedia/StudentProjects/99-00/9702981a/mmcourse/project/html/legit.htm> (last visited Feb. 25, 2012). This right ended in 1843. See *infra* note 32.

28. See 16 PARL. DEB., H.C. (3d ser.) (1833) 560-67 (U.K.); Jessica Litman, *The Invention of Common Law Play Right*, 25 BERKELEY TECH. L.J. 1381, 1399 (2010). Bulwer-Lytton, as the chairman of the newly-formed Select Committee on Dramatic Literature, presented these bills after a year of hearings in which he spoke with various theatre practitioners and government officials about the state of the theatre industry in London. See Litman, *supra*, at 1398.

perhaps, it filled the pockets of the managers, not a single penny might accrue from its performance, however successful, or however repeated, to the unfortunate author.²⁹

Though both acts passed through the House of Commons, the House of Lords rejected the restriction on the theatre monopolies, despite support by a vocal minority who advocated “a free competition with respect to theatres.”³⁰ In 1842, Parliament revised the Dramatic Literary Property Act, allowing a copyright holder to assign his public performance right without assigning the entire copyright and expanding the public performance right to include musical compositions.³¹ The patent theatres’ statutory monopoly would end the following year with the Theatres Act of 1843, which granted local authorities the right to issue public performance licenses.³² Nevertheless, neither the British nor the US legislature ever revisited the fundamental problem Bulwer-Lytton and the House of Lords debate had highlighted: large, powerful theatres have the ability to prevent smaller theatres from performing whichever dramatic works they choose.³³ This violates a playwright’s right to extract full economic value from his work and prevents the “Progress of Science and useful Arts”³⁴ by restricting public availability of theatrical works.

B. The Origins of the Public Performance Right in the United States

All hail great Judge! To your bright rays,
We never grudge! Ecstatic praise. . . .
May each decree! As statute rank,
And never be! Reversed in Banc.³⁵

Although Congress established statutory copyright law in the United States in 1790, the public performance right would not appear until 1856, more than two decades after Bulwer-Lytton’s Act went into

29. 16 PARL. DEB., H.C. (3d ser.) (1833) 560 (U.K.).

30. See 20 PARL. DEB., H.C. (3d ser.) (1833) 271-72 (“First of all, the great theatres set up a claim of monopoly. . . . By the 21st of James 1st, too, all monopolies were expressly prohibited; and therefore, could they now succeed in establishing their claim, it would, in his opinion, be at the risk of rendering themselves liable to the penalties of a proemunire. . . . Their Lordships were also told, that this Bill disregarded vested rights and the rights of property.”); Litman, *supra* note 28.

31. See Copyright Law Amendment Act, 1842, 5 & 6 Vict., c. 45, § 3 (Eng.); 13 CORPUS JURIS, *supra* note 24; Litman, *supra* note 28, at 1400.

32. Theatres Act, 1843, 6 & 7 Vict., c. 68 (Eng.).

33. See *supra* note 30.

34. See U.S. CONST. art. I, § 8, cl. 8 (“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”).

35. W.S. GILBERT, TRIAL BY JURY (1875), available at <http://math.boisestate.edu/gas/trial/webopera/tbj03.html>.

effect in England.³⁶ In 1856, Congress finally conferred to dramatic authors (and their heirs and assigns) “the sole right also to act, perform, or represent [the said composition], or cause it to be acted, performed, or represented, on any stage or public place during the whole period for which the copyright is obtained.”³⁷ The *New York Times*, though an unabashed supporter of the bill,³⁸ noted with amusement the unique scene at the Copyright Office shortly after US playwrights gained the right to register and protect public performance of their work:

For some days subsequent to the passage of the Act Murray-street was haunted by singular-looking men, with long hair and inky finger-nails, each with a bundle of soiled paper under his arm . . . All these gentlemen wore an expression of mingled triumph and anxiety. They cast curious glances at each other, and eyed each other's bundles with ill-disguised curiosity. The fact was, every one of the distinguished dramatists was alarmed, lest his companion should be about to copyright a version of his play; . . . and each looked upon the rival stream with the hatred usual among members of the same family.³⁹

The unease and mistrust depicted in the *Times* article reflected two fundamental dilemmas facing US playwrights in the latter half of the nineteenth century. First, dramatic authors were largely unequipped to interpret and navigate the complicated copyright laws of the era.⁴⁰ Second, authors could only protect their work through statutory copyright if they published their plays, but publishing a play—particularly a play that became popular—made the work vulnerable to piracy by rival theatres.⁴¹

36. Act of May 31, 1790, ch. 15, 1 Stat. 124; see e.g., *Brady v. Daly*, 175 U.S. 148, 153 (1899); Litman, *supra* note 28, at 1403.

37. Act of Aug. 18, 1856, 11 Stat. 138; see *Brady*, 175 U.S. at 153.

38. See *Dramatic Copyright*, N.Y. TIMES, Aug. 1, 1856, <http://query.nytimes.com/mem/archive-free/pdf?res=9A0DEEDB1339E134BC4953DFBE66838D649FDE>. Following passage of the bill in the Senate, the *New York Times* urged the House to effect quick action as well, declaring:

We call on the members of the House to show an equal consideration for the high interests involved by passing this bill before the end of the present session, otherwise it will lie with the dust accumulating on it, in that department where the awful words “unfinished business” are inscribed as gloomily prophetic as the terrible legend that DANTE beheld written above the gates of the Inferno.

Id.

39. *Plays and Playwrights*, N.Y. TIMES, Sept. 9, 1856, <http://query.nytimes.com/mem/archive-free/pdf?res=9900E7D71339E134BC4153DFBF66838D649FDE>.

40. *Cf. id.*

41. See Litman, *supra* note 28, at 1384 (“The vast majority of plays . . . were never published . . . Playwrights in America until 1909 faced a choice of arranging to publish their scripts to secure federal statutory protection or relying on whatever copyright protection state courts might afford unpublished works.” (footnote omitted)); Zvi S. Rosen, *The Twilight of the Opera Pirates: A Prehistory of the Exclusive Right of Public Performance for Musical Compositions*, 24 CARDOZO ARTS & ENT. L.J. 1157, 1208 (2007) (“There are innumerable companies in all parts of the country engaged at all times in the unlawful performance of plays to which they have no legal or moral right. The theft of successful new plays and the sale of

Throughout the late nineteenth century, Congress made numerous attempts to clarify and increase the dramatic protection guaranteed to authors, specifically their right to the exclusive public performance of their works.⁴² Unfortunately, neither the courts nor the legislature proved to be particularly effective, in many cases increasing the confusion surrounding US copyright law rather than clarifying it.⁴³

The bulk of litigation concerning the right of exclusive public performance following the Act of 1856 stemmed from the particularly litigious nature of two playwrights, Augustin Daly and Dion Boucicault.⁴⁴ Daly and Boucicault spent more than thirty years battling one another over the alleged piracy of a scene in Daly's play *Under the Gaslight*, in which the villain ties a damsel in distress to a set of railroad tracks, only to have the hero rescue her moments before a train comes roaring past.⁴⁵ Though the Daly litigation clarified some important aspects of copyright protection for dramatic authors,⁴⁶ it also created more confusion, as the courts seemed to spin a common law public performance right out of whole cloth.⁴⁷ This court-invented, common-law right attempted to fill the gaps in the federal statute that left authors without protection both before they registered the title of

stolen copies of the manuscripts has become a regularly organized business." (quoting AM. DRAMATISTS' CLUB, PETITION TO THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES FOR THE AMENDMENT OF THE COPYRIGHT LAW, RELATING TO THE FRAUDULENT PRODUCTION OF PLAYS, FROM THE DRAMATISTS, THEATRICAL MANAGERS AND OTHER MEMBERS OF THE DRAMATIC PROFESSION OF THE UNITED STATES (1890)).

42. See, e.g., *Brady*, 175 U.S. at 153-54 (summarizing the changes made to US statutory copyright law from 1856 to 1870); Rosen, *supra* note 41, at 1200-01 (detailing problems with existing US copyright law in the late 19th century).

43. See *Carte v. Duff (The Mikado Case)*, 25 F. 183, 187 (C.C.S.D.N.Y. 1885) ("While it is much to be regretted that our statutes do not, like the English statutes, protect the author or proprietor in all the uses to which literary property may be legitimately applied, it is not the judicial function to supply the defect."); Rosen, *supra* note 41, at 1169-78 (discussing the inconsistent court rulings associated with the copyrightability of opera scores); see also Litman, *supra* note 28, at 1409-10 ("Courts had recognized common law performance rights where statutory copyrights were defective, but cabined them with odd limits. Few cases had arisen, and no general rule had yet presented itself.").

44. See *Brady*, 175 U.S. at 149; *Daly v. Palmer*, 6 F. Cas. 1132, 1133 (C.C.S.D.N.Y. 1868) (No. 3,552).

45. See *Brady*, 175 U.S. at 149; *Daly*, 6 F. Cas. at 1133. Daly's scene would eventually become a staple of American melodrama; pop culture enthusiasts of the last sixty years would most likely associate Daly's "Railroad Scene" as a favorite device of the cartoon villain, Snidely Whiplash. See generally flyingmoosedotorg, *Snidely Whiplash: Bondage Practitioner*, YOUTUBE (Sept. 13, 2008), http://www.youtube.com/watch?v=PhC_JJwlep0.

46. See *Daly*, 6 F. Cas. at 1137-38 ("Under the act of 1856, . . . [Daly] is entitled to be protected against piracy, in whole or in part, by representation as well as by printing, publishing, and vending.").

47. See Litman, *supra* note 28, at 1415 ("Common law play right was a kluge. Courts had invented it to fill gaps in statutory protection, which applied only to printed, published works by United States citizens or residents.").

their play, and between registration and the depositing of a full copy of the play with the US Copyright Office.⁴⁸

The other significant Gilded Age litigation concerning the right of public performance involved the US productions of certain Gilbert and Sullivan operettas.⁴⁹ W.S. Gilbert (the librettist) and Sir Arthur Sullivan (the composer) authored over a dozen wildly successful comic light operas from 1871 to 1896 for Richard D'Oyly Carte at the Savoy Theatre in London.⁵⁰ Their works have since become the most frequently performed set of operas of all time and are some of the only instances of Victorian-era theatre still performed regularly throughout the English-speaking world.⁵¹ Though the duo had no difficulty securing the British copyright for their first international hit, *HMS Pinafore*, countless ignoble theatre producers immediately pirated the show in theatres across the United States.⁵²

The duo took steps to secure the US copyright for their next production, *The Pirates of Penzance*, by premiering the show with their primary company in New York while securing the British copyright by simultaneously staging a "copyright performance" in London with the running cast of *Pinafore* performing the piece, scripts in hand, to an audience of one.⁵³ At the time, a foreign production could only secure copyright in the United States after it had been

48. See *Daly*, 6 F. Cas. at 1132 n.3 (creating a common-law right for authors to restrain use of their work before publication); see also Litman, *supra* note 28, at 1408-09 ("[A] Copyright Office publication listing every dramatic composition registered between 1870 and 1916 suggests that many dramatists may have sought to register their copyrights without publishing their scripts, despite the fact that the statute did not permit it until 1909.").

49. See Rosen, *supra* note 41, at 1169-78.

50. See generally Samuel Silvers, *Professional Opera Companies that Regularly Perform G&S*, GILBERT & SULLIVAN ARCHIVE, available at http://math.boisestate.edu/gas/html/perf_grps/professional.html (last updated Apr. 7, 2009); *The Gilbert and Sullivan Operas*, GILBERT & SULLIVAN ARCHIVE, available at <http://math.boisestate.edu/gas/html/gasopera.html> (last updated July 6, 2006).

51. See *The Gilbert and Sullivan Operas*, *supra* note 50.

52. E.g., Francois Cellier, *The Making of H.M.S. Pinafore*, in FRANÇOIS CELLIER & CUNNINGHAM BRIDGEMAN, *GILBERT AND SULLIVAN AND THEIR OPERAS* (1914), available at http://math.boisestate.edu/gas/pinafore/html/making_pinafore.html ("[Richard D'Oyly Carte], accompanied by Gilbert and Sullivan, had gone to the United States with the special object of countermining the plots of American pirates who had been guilty of privateering the 'Pinafore' and who would be ready, if no preventive measures were adopted, to steal in the same flagrant manner the next Gilbert and Sullivan opera produced.").

53. H.M. WALBROOK, *GILBERT & SULLIVAN OPERA: A HISTORY AND A COMMENT* ch. 6 (1922), reprinted in GILBERT & SULLIVAN ARCHIVE, available at <http://math.boisestate.edu/gas/books/walbrook/chap6.html> ("*The Pirates of Penzance, or the Slave of Duty* was produced at the Opéra Comique on April 3rd, 1880. There had previously been given one of those absurd 'copyright performances' at which (to secure the copyright of the work) the piece is gone through anyhow, a placard is exhibited in the box-office, and one spectator is allowed to pay a guinea for a seat, the amount being handed back to him at the end of the performance!").

performed in the country by a US citizen.⁵⁴ D'Oyly Carte, Gilbert, and Sullivan were particularly diligent about policing pirated productions of *The Pirates of Penzance* but were simultaneously forced to battle sheet-music-publishing companies who recreated Sullivan's melodies for sale as piano music.⁵⁵ Though case law at the time allowed these companies to recreate a performance piece through aural recollection, the unpublished *Pirates of Penzance* litigation gave the trio a brief respite from this unsympathetic precedent, ordering an injunction on the sale of the sheet-music book.⁵⁶

The respite was short lived, however, as play pirates forced Carte into litigation a mere three years later, this time over a series of pirated productions of Gilbert and Sullivan's latest hit,⁵⁷ *Iolanthe*.⁵⁸ Incredibly, the court held that, under then-existing US copyright law, the copyright holder of a dramatic composition had the exclusive right to print and sell copies of his work as well as the exclusive right to publicly perform the work; but once the copyright holder had published his work, he lost all rights to control the use others might make of it.⁵⁹ In effect, the court held that these two rights of a dramatic author were actually disjunctive, and the exercise of

54. Act of July 8, 1870, ch. 230, § 86, 16 Stat. 198, 212 (“[A]ny citizen of the United States, . . . who shall be the author . . . of any book, map, chart, dramatic or musical composition, . . . shall, upon complying with the provisions of this act, have the sole liberty of printing, reprinting, publishing, completing, copying, executing, and vending the same; and in the case of a dramatic composition, of publicly performing or representing it.”).

55. See *The Drama in America*, THE ERA (Feb. 22, 1880), available at <http://math.boisestate.edu/gas/pirates/reviews/USA/ustours.html> (“The surreptitious companies bent on Pinafore-ing *The Pirates of Penzance* are being closely watched, and measures have been taken to sternly repress any infringement on the author's rights. Mr. Gilbert states that arrangements have been made with legal firms in every considerable town of the United States to proceed against every company, Manager, or Lessee of Theatre playing the piece without authorisation.”); see also Rosen, *supra* note 41, at 1169. The rampant piracy of the duo's earlier work may well have served as partial inspiration for the plot of *Pirates of Penzance*, which featured bumbling policemen chasing inept pirates.

56. See Rosen, *supra* note 41, at 1169.

57. Gilbert and Sullivan composed another operetta, PATIENCE, between THE PIRATES OF PENZANCE and IOLANTHE, which was certainly popular in its day but, for some reason, did not yield any litigation. See GILBERT, *infra* note 67 (1882); GILBERT, *supra* note 21 (1881); GILBERT, *supra* note 10 (1879).

58. See *Carte v. Ford* (“*Iolanthe Case*”), 15 F. 439, 440-41 (C.C.D. Md. 1883). Interestingly, it was the prodigious skill of John Philip Sousa that enabled this particular instance of opera piracy, as he was engaged by the tour producers to recreate Sullivan's orchestrations from only the published piano reductions. See *id.* at 441.

59. See *id.* at 442 (“[I]t is a proposition now so well settled as to be almost axiomatic, that, except so far as preserved to him by statute, when the composer of any work, literary, musical, or dramatic, has authorized its publication in print, his control over so much as he has so published, and of the use which others may make of it, is at an end. And in the present case it could not be and it is not denied that it is the right of any one to publicly perform all that the book contains, which would in fact be the whole opera as composed by the authors . . .” (citation omitted)).

publication rights extinguished the exclusive right to public performance.⁶⁰

The litigation surrounding Gilbert and Sullivan's most successful work, *The Mikado*, clarified the *Iolanthe Case* in a more logical but equally unsympathetic way.⁶¹ After clarifying that publication, in any country, only extinguishes the exclusive public performance right at common law, the court reasoned that because Gilbert and Sullivan (and Carte) were not US citizens, they were not afforded federal copyright protection.⁶² The trio had anticipated this difficulty and, in response, engaged US citizen George Tracey to register the piano reduction of the orchestral score in his own name with the Copyright Office.⁶³ Nonetheless, the court held that, because music without words did not constitute a dramatic work, Tracey had only reserved a statutory copyright in the musical composition (and not the dramatic work).⁶⁴ Because the copyright laws at that time reserved the public performance right to dramatic works only—and not musical compositions—the court held that Gilbert and Sullivan had failed to secure the US copyright to their work and therefore could not enjoin the play pirates from producing unlicensed productions of *The Mikado* in the United States.⁶⁵ The combination of sound legal reasoning and fundamental unfairness evident in the *Mikado* litigation signaled that statutory reform was necessary.⁶⁶

C. The Statutory Response to Piracy

The Law is the true embodiment
Of everything that's excellent.
It has no kind of fault or flaw,
And I, my Lords, embody the Law!⁶⁷

60. See *id.*

61. See *The Mikado Case*, 25 F. 183 (C.C.S.D.N.Y. 1885).

62. *Id.* at 185 (holding the federal copyright laws were “enacted for the protection of our own citizens only”).

63. *Id.* at 183.

64. See *id.* at 185-87.

65. See *id.* at 187. Though the court somewhat weakly declared that the defendant was not permitted to “mislead the public” into thinking the piece contained the orchestrations of Gilbert and Sullivan, it failed to explain how, exactly, a producer presenting an unlicensed production could avoid giving the public a false impression of the authors' endorsement. *Id.*

66. Copyright protection was, in fact, extended to foreign nationals in 1891, just in time to allow Gilbert and Sullivan to protect their final two collaboration pieces, the spectacular flops UTOPIA, LIMITED and THE GRAND DUKE. International Copyright (Chace) Act, ch. 565, §§ 10, 13, 26 Stat. 1106 (1891); see also W.S. GILBERT, THE GRAND DUKE (1896), available at http://math.boisestate.edu/gas/grand_duke/web_op/operhome.html; GILBERT, *supra* note 11.

67. W.S. GILBERT, IOLANTHE act 1 (1882), available at http://math.boisestate.edu/gas/iolanthe/web_op/iol07.html.

By the final decade of the nineteenth century, the insufficiencies of federal copyright protection for dramatists were glaring. Play pirates could simply factor in the statutory fine as a cost of doing business, and touring productions moved so frequently that even an expedited injunction hearing proved toothless.⁶⁸ The producer of a pirated production could move the show out of a circuit court's jurisdiction long before an injunction would issue or, in the case of a static production, simply assign any rights associated with the pirated production, whether legitimate or not, to a third party who had not been enjoined in the court proceedings.⁶⁹ In response, the prominent playwrights of the era formed the American Dramatists' Club and asked Judge Abram Jesse Dittenhoefer, one of the top theatre attorneys in the country, to draft legislation that would protect dramatic and operatic works more completely.⁷⁰ The Cummings Copyright Bill originated in both houses of Congress in 1894 and became law in 1897, strengthening protection for dramatists by increasing statutory fines, expanding the reach of the federal courts to issue binding injunctions across districts, and making willful infringement a criminal offense.⁷¹ The Act also extended the exclusive right of public performance to musical compositions for the first time, signaling the first step in what would ultimately become a seismic shift in the lobbying interests of the copyright industry.⁷²

The passage of the Cummings Copyright Bill in 1897 represented the zenith of the influence of the theatre lobby upon Congress, led by the newly formed American Dramatists Club.⁷³ Members of the club and prominent playwrights testified at hearings of both the House and Senate Committees on Patents in 1895 and again in 1896, extolling the virtues of the bill, the problem of play piracy, and the importance of the theatre industry in US society.⁷⁴ Unwilling to limit their war on piracy to the trudging waters of Congressional committee hearings, the American Dramatists Club also compiled and distributed a list of all then-copyrighted performance works to theatre managers across the United States,

68. See Rosen, *supra* note 41, at 1200-01.

69. See *id.*

70. See *id.* at 1201. Dittenhoefer, ironically, represented the pirating producers in *The Mikado Case*. *Id.* Though Dittenhoefer was a staunch advocate for strengthening the rights of playwrights and composers, he was also outspoken in his belief that the current copyright laws did not adequately protect them. *Id.* Dittenhoefer thus chose not to represent Carte or Gilbert and Sullivan, as he did not believe they had any current protection under the laws. *Id.*

71. Act of Jan. 6, 1897, ch. 4, 29 Stat. 481, 481-82.

72. *Id.*

73. Rosen, *supra* note 41, at 1201, 1207-09 (detailing the creation of the American Dramatists Club and lobbying efforts by the club to secure passage of the Cummings Bill).

74. See *id.* at 1207.

lobbied individual states to create their own statutory protection for dramatic performance rights, and distributed a petition in favor of the Cummings Bill.⁷⁵ Despite objections from the publishing lobby,⁷⁶ the theatre lobby managed to push the bill through.⁷⁷ The American Dramatists Club's role in this effort was vital, as a similar bill proposed to the same Congress, but with more substantive protection of public performance rights, died in committee.⁷⁸ The only appreciable difference between the bills was that the strong, organized theatre lobby backed the Cummings Bill, but not the Treolar Bill.⁷⁹

Never again would the theatre lobby hold such a prominent place in the political arena. As devices for the mechanical reproduction of music developed and vaudeville and Tin Pan Alley⁸⁰ caused popular interest in music performance to explode, the music-publishing industry, which featured songwriters working hand in hand with publishers, grew far larger than the independent sheet-music-publishing houses.⁸¹ By the end of World War I, it was the music industry—not the theatre industry—that would have the ear of Congress regarding public performance rights.⁸²

75. See *id.* at 1205-08.

76. See *id.* at 1203-04 (“Scientific American published an editorial sharply critical of the Senate version of the bill, and shortly thereafter the Publisher’s Weekly did the same” (footnote omitted)).

77. See *id.* at 1209-10 (quoting remarks made by the Chairman of the Senate Committee on Patents suggesting the Cummings Bill would likely pass due to the pressure being placed on the committee by the “musical, operatic, and dramatic, profession, and dramatic authors”).

78. See *generally id.* at 1178-1200 (detailing the history and fall of the Treolar Copyright Bill, and noting that opposition from the music publishing lobby, along with language suggesting the bill would abrogate the 1891 act extending copyright protection to foreign nationals, likely contributed to its demise).

79. See *id.*

80. “Tin Pan Alley,” literally the section of 28th street between Broadway and Sixth Avenue in New York City, refers to a group of New York City publishers and songwriters who created music between 1880 and 1950, including George and Ira Gershwin, Cole Porter, Irving Berlin, and George M. Cohen, who were responsible for the advent of “popular music” as we know it today. *E.g.*, 1 AMERICAN POPULAR MUSIC: THE NINETEENTH CENTURY TIN PAN ALLEY 87 (Timothy E. Scheurer, ed., 1989).

81. See *id.* The primary difference between the sheet music publishers of the nineteenth century and today’s music publishing industry, which began in Tin Pan Alley, is that the sheet music publishers would typically exploit or steal melodies from outside composers, while the music publishing industry paid staff or freelance composers for their melodies. See *generally* Karl Hagstrom Miller, *Music Industry*, in DICTIONARY OF AMERICAN HISTORY (2003), available at <http://www.encyclopedia.com/doc/1G2-3401802800.html>.

82. See Rosen, *supra* note 41, at 1197-99; see also Litman, *supra* note 28, at 1417 (detailing the fall of the popular theatre industry from the end of the nineteenth century to the end of World War I).

D. The 1909 Copyright Act

Fold your flapping wings,/ Soaring legislature!
Stoop to little things,/ Stoop to human nature!⁸³

Federal legislators finally endeavored to revise the confusing and contradictory copyright laws in 1909, four years after President Teddy Roosevelt spoke to Congress on this issue.⁸⁴ This streamlining and clarification of the copyright laws retained the exclusive right of public performance for dramatic works, and the House Report affirmed that protection against piracy remained the primary purpose of the provision.⁸⁵

Continuing the line of reasoning dating back to the birth of the public performance right, this explanation clarified that it was economic considerations (the threat of piracy) rather than a judgment about the moral rights of authors that kept the exclusive right of public performance alive. Boucicault and Gilbert and Sullivan were never directly involved in litigation regarding their works; it was their producers who fought their legal battles, as, by and large, the authors had contracted away whatever rights they had in their works.⁸⁶ Indeed, the House Report of the 1909 Act justified the creation of a compulsory license for mechanical reproductions of music on economic grounds:

The main object to be desired in expanding copyright protection accorded to music has been to give to the composer an adequate return for the value of his composition, . . . and

83. GILBERT, *supra* note 67, at act 2.

84. See H.R. REP. NO. 60-2222, at 1 (1909). The House Report from the 1909 Copyright Act contains a portion of Roosevelt's speech:

Our copyright laws urgently need revision. They are imperfect in definition, confused and inconsistent in expression; they omit provision for many articles which . . . are entitled to protection; they impose hardships upon the copyright proprietor . . . ; they are difficult for the courts to interpret and impossible for the Copyright Office to administer with satisfaction to the public. . . . A complete revision of them is essential.

Id.

85. See *id.* at 4 ("It has sometimes happened that upon the first production of a dramatic work a stenographer would be present and would take all the words down and would then turn the manuscript over to some one who had hired him to do the work or sell it to outside parties. This manuscript would then be duplicated and sold to persons who, without any authority whatever from the author, would give public performances of the work. It needs no argument to demonstrate how great the injustice of such a proceeding is, for under it the author's rights are necessarily greatly impaired. If an author desires to keep his dramatic work in unpublished form and give public representations thereof only, this right should be fully secured to him by law.")

86. Neither Boucicault nor Gilbert and Sullivan (as an entity or separately) appear as named parties in the cases litigated over their works, such as *Brady v. Daly*, 175 U.S. 148 (1899), and *The Mikado Case*, 25 F. 183 (C.C.S.D.N.Y. 1885). Rather, their respective producers (Brady for Boucicault and D'Oyly Carte for Gilbert and Sullivan) appear as the named parties and, presumably, were responsible for hiring the litigating attorneys. *Brady*, 175 U.S. at 148; *Carte*, 25 F. 183.

to so frame an act that it would accomplish the double purpose of securing to the composer an adequate return for all use made of his composition and at the same time prevent the formation of oppressive monopolies, which might be founded upon the very rights granted to the composer for the purpose of protecting his interests.⁸⁷

Congress's attempt to prevent both artistic theft and artistic monopoly is instructive, as the individual rights of authors never come into play. After all, it was the monopolistic behavior of the music publishing houses that spurred Congress's enactment of a compulsory license, not the behavior of the composers themselves.⁸⁸

E. The 1976 Copyright Act

[I]t is one of the happiest characteristics of this glorious country that official utterances are invariably regarded as unanswerable.⁸⁹

The current version of the Copyright Act, passed in 1976 and enacted in 1978, came about not because of any glaring inadequacies in the legal drafting of the 1909 Act, but because of the rapid advancement of technology that was unavailable—and thus unaddressed—at the turn of the century.⁹⁰ Protection for dramatic works was left more or less intact, with the legislative history of the Act focusing more on definitions of “public performance” in the context of television and film broadcasting.⁹¹ However, the Act did alter the 1909 Act in two respects directly relevant to theatrical production.

First, the 1909 Act gave the authors of dramatic works full control over the public performance of their works—both for-profit and non-profit—while granting authors of published music control over only for-profit performances.⁹² The 1976 Act combined these two

87. H.R. REP. NO. 60-2222, at 7 (1909).

88. *See id.* at 7-8 (“It appeared that some years ago contracts were made by one of the leading mechanical reproducing establishments of the country with more than 80 of the leading music publishing houses in this country. . . . [U]nder them the reproducing company acquired the rights for mechanical reproduction in all the copyrighted music which the publishing house controlled or might acquire and that they covered a period of . . . almost indefinite extension. . . . Not only would there be a possibility of a great music trust in this country and abroad, but arrangements are being actively made to bring it about. . . . A condition of affairs which would limit the market for what the composer has to sell to one customer might be quite as injurious to the composer as it would be to the public.”).

89. W.S. GILBERT, H.M.S. PINAFORE act 2 (1878), available at http://math.boisestate.edu/gas/pinafore/pf_lib.pdf.

90. H.R. REP. NO. 94-1476, at 47 (1976) (“Since [1909] significant changes in technology have affected the operation of the copyright law. Motion pictures and sound recordings had just made their appearance in 1909, and radio and television were still in the early stages of their development. . . . The technical advances have generated new industries and new methods for the reproduction and dissemination of copyrighted works, and the business relations between authors and users have evolved new patterns.”).

91. *See id.* at 63-64.

92. *See* Act of Mar. 4, 1909, Pub. L. No. 60-349, 35 Stat. 1075 (“[A]ny person entitled thereto . . . shall have the exclusive right . . . (d) [t]o perform or represent the copyrighted work

provisions into one, eliminating the “for-profit” distinction.⁹³ The House Report noted:

The line between commercial and “nonprofit” organizations is increasingly difficult to draw. Many “non-profit” organizations are highly subsidized and capable of paying royalties, and the widespread public exploitation of copyrighted works by public broadcasters and other noncommercial organizations is likely to grow. In addition to these trends, it is worth noting that performances and displays are continuing to supplant markets for printed copies and that in the future a broad “not for profit” exemption could not only hurt authors but could dry up their incentive to write.⁹⁴

Courts had already interpreted the “for-profit” distinction quite broadly. Justice Holmes all but abrogated the distinction in 1917 in his opinion in *Herbert v. Shanley Co.*, where he declared: “If the rights under the copyright are infringed only by a performance where money is taken at the door, they are very imperfectly protected. . . . Whether [music] pays or not, the purpose of employing it is profit and that is enough.”⁹⁵ The 1976 revision merely codified what had been common practice for years and at the same time relegated dramatic works from an art form worthy of the creation of a new exclusive right in 1833 to merely one of seven categories of works granted the same rights in 1976.⁹⁶

In addition to abrogating the profit distinction, the 1976 Act also explicitly made the “bundle of exclusive rights” in § 106, including the public performance right, available for independent sale, lease, or license, which reversed the established judicial interpretation of the 1909 Act.⁹⁷ Before 1976, the individual rights granted to copyright holders could either be sold together or licensed separately; the 1976 Act awarded authors more control by allowing them to sell or lease some exclusive rights while retaining others.⁹⁸ The principal functional difference between the two schemes is that, prior to 1976,

publicly if it be a drama . . . ; (e) [t]o perform the copyrighted work publicly *for profit* if it be a musical composition and for the purpose of public performance for profit . . .” (emphasis added)).

93. Compare *id.* with 17 U.S.C. § 106(4) (2006) (“[T]he owner of copyright under this title has the exclusive rights to do and to authorize any of the following: . . . in the case of literary, musical, dramatic, and choreographic works, . . . to perform the copyrighted work publicly . . .”).

94. H.R. REP. NO. 94-1476, at 62-63 (1976).

95. *Herbert v. Shanley Co.*, 242 U.S. 591, 594-95 (1917).

96. 17 U.S.C. § 106 (listing literary, musical, dramatic, and choreographic works, pantomimes, motion pictures, and other audiovisual works as entitled to the exclusive right of public performance). Dramatic works are not even defined in the legislative history of the Act, much less in the Act itself. See H.R. REP. NO. 94-1476, at 53 (noting that “dramatic works’ . . . [has a] fairly settled meaning[]”).

97. 17 U.S.C. § 201; see SAMUEL SPRING, *RISKS & RIGHTS* 167 (1st ed. 1952) (“Any assignment of the copyright is invalid unless all of the bundle of rights is transferred at one time But an assignment of some of the rights included in the bundle . . . is invalid and unenforceable [sic], except as a license.”).

98. See 17 U.S.C. § 201.

authors could only license, not sell, exclusive rights to their work. While authors retained full ownership, they were also the only party capable of bringing suit for infringement.⁹⁹ In practice, however, authors had very little bargaining power, so theatre managers, production companies, or publishing houses who wished to exploit their work for profit virtually always forced authors to sell their work.¹⁰⁰

Aside from those changes, the 1976 Act continued to treat dramatic work as an antiquity. The Act focused on adapting to new technologies: computers and television broadcasts in particular, as well as the more widespread use of motion pictures and recorded music.¹⁰¹ Indeed, dramatic works are only mentioned twice in the entire legislative history of the bill: first to note that "dramatic works" would be left undefined both in the Act and in the legislative history due to its "fairly settled meaning," and later citing "acting out a dramatic work" as an example of "performance."¹⁰² The legislative histories of both the 1909 Act and the 1976 Act make clear that Congress's rationale for compulsory licensing changed from a desire to curb monopolistic behavior in established industries (in 1909) to an attempt to reduce transaction costs associated with emerging industries (in 1976).¹⁰³ With copyright's focus firmly shifted to adapting to new entertainments and technologies, the theatre industry has, for better or worse, been left to fend for itself.

99. See SPRING, *supra* note 97, at 168 ("A licensee therefore can not [sic] sue an infringer in his own name for infringements of rights he holds as licensee. The licensor, i.e. the copyright proprietor, must sue for him.")

100. *Cf.* Stewart v. Abend, 495 U.S. 207, 220 (1990) ("An author holds a bundle of exclusive rights in the copyrighted work, among them the right to copy and the right to incorporate the work into derivative works. By assigning the renewal copyright in the work without limitation, . . . the author assigns all of these rights." (footnote omitted)).

101. H.R. REP. NO. 94-1476, at 47.

102. *Id.* at 53, 63.

103. Compare H.R. REP. NO. 60-2222, at 7 (1909) ("[I]t has been a serious and a difficult task to . . . accomplish the double purpose of securing to the composer an adequate return for all use made of his composition and at the same time prevent the formation of oppressive monopolies . . ."), with H.R. REP. NO. 94-1476, at 89 ("[I]t would be *impractical and unduly burdensome* to require every cable system to negotiate with every copyright owner whose work was retransmitted by a cable system. Accordingly, the Committee has determined to . . . establish a compulsory copyright license for the retransmission of those over-the-air broadcast signals . . ." (emphasis added)), and H.R. REP. NO. 94-1476, at 107 ("[T]he present [compulsory licensing] system is unfair and unnecessarily burdensome on copyright owners, and . . . the present statutory rate is too low [sic]." (quoting H.R. REP. NO. 90-83 (1967) (internal quotation marks omitted))).

II. CURRENT STRUCTURE AND PROBLEMS WITH COPYRIGHT LAW IN THE THEATRE

In other professions in which men engage . . . ,
The Army, the Navy, the Church, and the Stage . . . ,
Professional license, if carried too far,
Your chance of promotion will certainly mar—
And I fancy the rule might apply to the Bar¹⁰⁴

With the specter of dramatic piracy firmly put to rest, playwrights bargained for increased control over their work throughout the early twentieth century through the Dramatists Guild of America.¹⁰⁵ While early efforts of the guild occasionally went too far, constituting antitrust violations,¹⁰⁶ today dramatic authors very clearly own the copyright to their work and will not engage in work-for-hire agreements.¹⁰⁷ Though copyright law provides a baseline by which playwrights may shape agreements with theatres and producers to present their works, it is these agreements themselves that create the bundle of rights each playwright enjoys over his work. In other words, the contours of dramatic authorship are purely contractual ones.¹⁰⁸ Typically, under the Minimum Basic Production Agreements crafted by the Dramatists Guild, authors receive a percentage of weekly box office receipts for First Class Productions¹⁰⁹ while retaining full control over subsidiary rights: movies, sound recordings, merchandise, and most importantly, stock and amateur rights.¹¹⁰

104. GILBERT, *supra* note 67, at act 1.

105. See generally *Info*, DRAMATISTS GUILD AM., <http://www.dramatistsguild.com/info/index.aspx> (last visited Feb. 25, 2012). For a general history of the development of the Minimum Basic Agreement (MBA) between the Dramatists Guild and the League of New York Theatres and Producers from the creation of the guild in 1921 to the early 1990s, see Joel Bassin, *The Minimum Basic Agreement of the Dramatists' Guild: A History of Inadequate Protection*, 25 J. ARTS MGMT. L. & SOC'Y 157 *passim* (1995).

106. See, e.g., *Ring v. Spina*, 148 F.2d 647, 650 (2d Cir. 1945) (per curiam) (holding the 1941 Dramatists Guild MBA to be an illegal restraint of trade, as the Dramatists Guild was not a labor union).

107. *Bill of Rights*, DRAMATISTS GUILD AM., <http://www.dramatistsguild.com/billofrights> (last visited Oct. 15, 2011). In a work made for hire agreement, an employer retains the right to copyright the creative product produced by an employee. 17 U.S.C. § 201(b) (2006).

108. See Susan Keller, Comment, *Collaboration in Theater: Problems and Copyright Solutions*, 33 UCLA L. REV. 891, 911 (1986).

109. Theatrical rights are unique in that they are divided into First Class and subsidiary rights. LINDEY & LANDAU, *supra* note 7, § 11.1. "First Class" refers to the rights and royalties associated with the original Broadway production (along with first-class tours), while secondary rights encompass all future tours, revivals, film rights, commercial rights, and, of course, stock and amateur productions. See *id.*

110. See L. Arnold Weissberger, *Subsidiary Rights in the Theatre*, in SUBSIDIARY RIGHTS AND RESIDUALS 115, 125 (Joseph Taubman, ed., 1968); Keller, *supra* note 108, at 912-13.

Dramatic authors hold a unique power over their work, respective both to their peers in other industries and their theatrical collaborators.¹¹¹ Writers for television and film typically do not own their works; rather, the scripts they create constitute works-for-hire owned by the studio or production company. Under work-for-hire agreements, the companies retain ownership of all rights to the writers' works, including subsidiary rights.¹¹² Similarly, directors, choreographers, and designers cannot receive joint authorship status in the work regardless of their level of contribution. Unless their contract states otherwise, the law classifies their work as work made for hire as well, though the model union contracts for directors and choreographers specifically reserve ownership of the underlying intellectual property rights in their work to the artists themselves, and not the theatre that employs them.¹¹³ Though high-profile directors and choreographers occasionally can bargain for joint authorship, this phenomenon is exceedingly rare.¹¹⁴ While the fundamentally collaborative nature of the theatre gives credence to the notion that directors and choreographers should properly be considered joint authors under copyright law, the law is firm that no level of "sweat of the brow" work or intellectual output will compel joint authorship of a theatrical work; authorship belongs to the dramatists alone, unless otherwise stipulated by contract.¹¹⁵

111. See, e.g., Keller, *supra* note 108, *passim*; see also Bassin, *supra* note 105, at 160 (contrasting the actor's role as employee of the producer with the playwright's role as quasi-partner with the producer).

112. See Keller, *supra* note 108, at 914-15.

113. See, e.g., BROADWAY LEAGUE & STAGE DIRS. & CHOREOGRAPHERS SOC'Y, INC., COLLECTIVE BARGAINING AGREEMENT: SEPTEMBER 1, 2008-AUGUST 31, 2011 § XVIII(A) (2008) [hereinafter COLLECTIVE BARGAINING AGREEMENT], available at <http://www.sdcweb.org/sdc/pdfs/contracts/bway/bdwy%20agmt%2008-11.pdf> ("[T]he Producer and the Director and/or Choreographer agree that . . . all rights in and to the Direction and Choreography created by the Director and/or Choreographer in the course of the rendition of his/her services shall be, upon its creation, and will remain the sole and exclusive property of the Director and/or Choreographer respectively; it being understood, however, that the Producer and its licensee(s) shall have a perpetual and irrevocable license to use such direction and/or choreography in any stage production of the play for which the Director and/or Choreographer is entitled to receive a payment The foregoing is not intended to alter, diminish or affect, in any way, any of the Author's rights in the play.").

114. See *Choreographic Director's Guide*, MUSIC THEATRE INT'L, http://mtishows.com/resources.asp?id=6_3_0_1&theatricalresourceid=3 (last visited Feb. 25, 2012). Agnes De Mille, the original choreographer for *Oklahoma!*, *Carousel*, and a myriad of other popular works publicly lamented her inability to protect her works or receive royalties. See Agnes De Mille, *Residual Rights in Choreography*, in SUBSIDIARY RIGHTS AND RESIDUALS, *supra* note 110, at 185 *passim*. As the producers and authors grew rich, De Mille's original choreography was stolen repeatedly in professional productions all over the world, even by the US government itself. See *id.*

115. See *Thomson v. Larson*, 147 F.3d 195, 201-03 (2d Cir. 1998).

The contours of the authors' exclusive control over subsidiary rights are less discussed, but increasingly relevant. At the height of Broadway's popularity in the United States during the mid-twentieth century, authors tried to make their shows attractive to production studios, hoping to capitalize on the most lucrative subsidiary rights available to stage productions: film rights.¹¹⁶ Today, however, the landscape of theatrical rights has changed considerably; long gone are the days when courts agreed that a starring role in a western film would provide a far inferior financial opportunity to a starring role in a movie musical.¹¹⁷ Today, the sale of stock and amateur rights—not the sale of film rights—has emerged as the principal money-making vehicle for authors.¹¹⁸ Though stock companies, which mounted multiple separate productions with substantially the same cast of actors over a short time period, have largely disappeared, regional theatres—and in particular amateur companies—have grown exponentially.¹¹⁹ Although no exact figures are available, around forty thousand amateur theatre groups produce around fifty thousand amateur theatrical productions every year, creating a lucrative market even for works that flopped on Broadway.¹²⁰ To manage the immense effort it would take for authors to negotiate licenses with each company, authors lease the stock and amateur production rights to licensing houses that specialize in those transactions.¹²¹ Presently, six licensing houses control close to 100 percent of the market for theatrical works.¹²² Dramatists Play Service¹²³ and Samuel French¹²⁴

116. See Edward E. Colton, *Sales of Motion Picture Rights in Plays*, in SUBSIDIARY RIGHTS AND RESIDUALS, *supra* note 110, at 67.

117. See *Parker v. Twentieth Century-Fox Film Corp.*, 474 P.2d 689, 694 (Cal. 1970) (“[T]he female lead as a dramatic actress in a western-style motion picture can by no stretch of imagination be considered the equivalent of or substantially similar to the lead in a song-and-dance production.”). If anything, the trend has reversed; new musicals are today much more frequently based on popular movies like *Catch Me If You Can*, *Hairspray*, and *The Wedding Singer*, banking on the popularity of the source material to drive initial interest and box office sales. *E.g.*, LINDEY & LANDAU, *supra* note 7, § 11.1(10) (“There has also been a fairly successful trend of creating plays from based upon famous motion pictures and/or television shows, including motion pictures based upon preexisting books. What is interesting about the trend is that in many cases, the demand for the play was initially created by the success of the audiovisual work, instead of the other way around.”).

118. See Hofler, *supra* note 3.

119. See LINDEY & LANDAU, *supra* note 7, § 11:31(4) (“If the number of stock companies has dwindled, the reverse has been true of the amateur field. Accurate figures are not available, but it is estimated that there are about 40,000 high school, college and university drama groups, community theatres, drama clubs, and miscellaneous amateur producing entities (church, labor and Armed Forces groups) scattered over this country.”).

120. *Id.*; see Hofler, *supra* note 3.

121. See Nevin, *supra* note 7, at 1556 n.148.

122. See *infra* notes 125-30. Dramatic Publishing also has a substantial number of plays and musicals available for license, but its plays are designed for production in schools and it does

license nearly every “straight play” (drama without music) ever produced on or Off-Broadway available for license.¹²⁵ Both also dabble in musical theatre: Dramatists Play Service owns the stock performance rights to several recognizable musical theatre works,¹²⁶ and Samuel French licenses a small number of low-overhead, highly popular musicals like *Grease* and *Chicago*.¹²⁷ In the world of musical theatre, however, the hierarchy is clear: Tams-Witmark continues to license the Cole Porter and George Gershwin musicals;¹²⁸ Rodgers & Hammerstein Theatricals licenses the works of its namesake duo along with the works of Lerner and Loewe (*My Fair Lady* and *Camelot*, among others) and Andrew Lloyd Weber (*Phantom of the Opera*, *Evita*, *Cats*, and many more);¹²⁹ and Music Theatre International remains the titan of the market, licensing the works of most every successful musical theatre author not mentioned above, including the Broadway musicals of the Disney Corporation.¹³⁰

Normally, this arrangement works quite well for all parties involved. By leasing the exclusive right to license stock and amateur productions of their work, authors are able to maximize revenue by

not license any works that enjoy anything resembling the profile and prestige of a Broadway opening. See DRAMATIC PUB., <http://www.dramaticpublishing.com> (last visited Jan. 29, 2012).

123. DRAMATISTS PLAY SERVICE, INC., <http://www.dramatists.com> (last visited Feb. 9, 2012).

124. *Royalties & Rights Information*, SAMUEL FRENCH, INC., <http://www.samueelfrench.com/store/royalties.php> (last visited Feb. 9, 2012).

125. See sources cited in notes 123-24; see also Kevin A. Goldman, Comment, *Limited Times: Rethinking the Bounds of Copyright Protection*, 154 U. PA. L. REV. 705, 723 (2006) (noting that Samuel French enjoys a lucrative market in acquiring and licensing protected works).

126. See *Musicals*, DRAMATISTS PLAY SERV., INC., <http://www.dramatists.com/text/musicals.html> (last visited Feb. 25, 2012) (including recent Tony Award nominees *The Scottsboro Boys* and *Grey Gardens*, as well as cult favorites like *Bat Boy: The Musical* and *Hedwig and the Angry Inch*, among the musicals offered for license).

127. See *Chicago*, SAMUEL FRENCH, INC., http://www.samueelfrench.com/store/product_info.php/products_id/2670 (last visited Dec. 22, 2011); *Grease*, SAMUEL FRENCH, INC., http://www.samueelfrench.com/store/product_info.php/products_id/6458 (last visited Dec. 22, 2011). Samuel French used to license well known plays and musicals equally, but has sold off its license rights to many of its musicals over the years (most notably *Little Shop of Horrors*, to Music Theatre International), now basing its business model off of the comparative simplicity of well-known plays and obscure musicals. Compare, e.g., *Classics (O'Neill)*, SAMUEL FRENCH, INC., <http://www.samueelfrench.com/store/index.php/cPath/214> (last visited Feb. 25, 2012) (showcasing the entire canon of Eugene O'Neill works available for license), with *Musicals*, SAMUEL FRENCH, INC., <http://www.samueelfrench.com/store/index.php/cPath/30> (last visited Feb. 25, 2012) (listing the first hundred musicals available for license by Samuel French, with only *Chicago*, *Chess*, and *Dames at Sea* readily identifiable as commonly produced musical shows.).

128. See *Our Musical Shows*, TAMS-WITMARK MUSIC LIBR., INC., <http://www.tams-witmark.com/musical.html> (last visited Jan. 29, 2012).

129. See *All Shows*, RODGERS & HAMMERSTEIN, http://www.rnh.com/shows_all.html (last visited Feb. 9, 2012).

130. See *All Shows*, MUSIC THEATRE INT'L, http://mtishows.com/show_results.asp (last visited Feb. 9, 2012).

increasing efficiency. Under this system, authors can profit from as many stock companies, regional theatres, community theatres, universities, and schools as desire to perform their works, uninhibited by the practical difficulties associated with the actual volume of transactions. Licensing companies earn a commission on every play they license, and they are able to develop and cater to growing markets by producing supplementary materials that assist amateur companies and schools with producing the work.¹³¹ Most significantly, small-budget theatres gain the opportunity to perform works they otherwise would be unable to afford or access because the original authors are either too famous or deceased.

For all its virtues, however, the stock and amateur licensing system in the theatre has its faults. The theatrical licensing houses have rarely faced litigation; a prohibition against charging royalties for works in the public domain is the only judicial decision ever imposed on a licensing house, and many of the licensing houses today still routinely violate this simple rule.¹³² Tams-Witmark still sells stage licenses to perform some of the more popular Gilbert and Sullivan operettas, all of which are firmly in the public domain.¹³³ This practice is, at a minimum, a misrepresentation and may possibly constitute fraud, yet Tams-Witmark is not alone in this behavior: Rodgers & Hammerstein Theatricals also purports to license the stock and amateur performance rights to the same shows.¹³⁴

Other, more nuanced legal problems plague the theatrical licensing system. Standard-form licensing agreements prevent regional and amateur companies from editing the works in any way;

131. For example, MTI dedicates multiple pages of their website to selling theatrical resources to make productions easier. See *Theatrical Resources*, MUSIC THEATRE INT'L http://www.mtishows.com/content.asp?id=6_0_0 (last visited Dec. 22, 2011). MTI also offers a forum in which schools and theatres can rent sets, costumes, or props for specific productions from one another. *All Site Community Rentals*, MTI SHOWSPACE, <http://www.mtishowspace.com/mod/ad/everyone.php> (last visited Dec. 22, 2011); see also Hofler, *supra* note 3 (describing MTI's success in turning *Little Shop of Horrors* into a profitable show by creating and renting fifteen "Audrey II" plants to community and amateur groups who had licensed the production).

132. See *Tams-Witmark Music Library, Inc. v. New Opera Co.*, 81 N.E.2d 70, 74 (N.Y. 1948) (holding a theatre producer did not have to pay royalties to Tams-Witmark for mounting a production of the operetta *The Merry Widow*, despite the presence of a signed licensing agreement, because the work was in the public domain).

133. See *id.*; *Licensing Gilbert & Sullivan*, TAMS-WITMARK MUSIC LIBR., INC., <http://www.tams-witmark.com/musicals/gilbert.html> (last visited Jan. 29, 2012). The operettas at issue are in the public domain not because of the Copyright Act, but because they were never protected by US copyright law in the first place. See discussion *supra* Part I.B.

134. See *Shows: Gilbert, RODGERS & HAMMERSTEIN*, <http://www.rnh.com/shows.html?controller=ajax&show-title=Gilbert> (last visited Dec. 22, 2011).

even cutting for time or content is prohibited.¹³⁵ Directors may not (and should not) directly copy another director's work, yet the licensing agreements prevent them from deviating too far from the author's intent, embodied in the look and feel of the original production.¹³⁶ Most egregiously, licensing companies have bargained for the right to issue exclusive licenses that empower them to restrict the public performance rights in a specific geographic area to a single producer for as long as they desire.¹³⁷ These agreements plainly contravene the Copyright Clause of the US Constitution because they prevent the wide dissemination of the authors' works, thereby failing to "promote the Progress of . . . useful Arts."¹³⁸ They also edge dangerously close to antitrust violations.

III. DO THE AGREEMENTS THEATRICAL LICENSING HOUSES PROMULGATE CONSTITUTE ANTITRUST VIOLATIONS?: THE CBS/BUFFALO BROADCASTING TEST

And I expect you'll all agree
That he was right to so decree.
And I am right,
And you are right,
And all is right as right can be!¹³⁹

Absent a body of case law concerning the licensing of stock and amateur rights, the legal treatment of music licensing companies can

135. *E.g., Frequently Asked Questions: Changing the Script*, DRAMATISTS PLAY SERVICE, INC., <http://www.dramatists.com/faqsmanager/applications/faqsmanager> (last visited Dec. 22, 2011).

136. *See, e.g.,* Campbell Robertson, *Creative Team of 'Urinetown' Complains of Midwest Shows*, N.Y. TIMES, Nov. 15, 2006, <http://www.nytimes.com/2006/11/15/theater/15urin.html>.

137. *E.g., But We're Just a High School/College/Community Theatre . . .*, DRAMATISTS PLAY SERVICE, INC., <http://www.dramatists.com/faqsmanager/applications/faqsmanager/index.asp?ItemID=4> (last visited Dec. 23, 2011) ("You may feel that your production poses no threat to anyone else's, but the producer holding the rights may feel differently. Restrictions exist because professional producers and touring groups pay much higher royalties than nonprofessionals, thus guaranteeing them exclusivity and financial 'security.'"); *Frequently Asked Questions*, RODGERS & HAMMERSTEIN, <http://www.rnh.com/faq.html#w11> (last visited Dec. 23, 2011) ("A show can be restricted as a result of any of the following: professional activity or interest in an area, touring activity in an area, or extenuating rights issues."); *What Does "Restricted" Mean?*, DRAMATISTS PLAY SERVICE, INC., <http://www.dramatists.com/faqsmanager/applications/faqsmanager/index.asp?ItemID=3> (last visited Dec. 23, 2011) ("Restricted means that the performance rights to a play may not be available to you. . . . [One] reason might be that a professional theatre in your area is planning to produce the play, barring all other local productions until its run has closed.").

138. U.S. CONST. art. I, § 8, cl. 8 ("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.").

139. W.S. GILBERT, *THE MIKADO* act 1 (1885), available at <http://math.boisestate.edu/gas/mikado/webopera/mk103.html>.

be a useful analogy. The American Society of Composers, Authors and Publishers (ASCAP), Broadcast Music Incorporated (BMI), and the Society of European Stage Authors and Composers (SESAC) protect the performing rights to nearly all musical compositions,¹⁴⁰ similar to the licensing structures of MTI, Rodgers & Hammerstein Theatricals, and Tams-Witmark. The US government began pursuing ASCAP for potential antitrust violations in 1934, but the investigation resulted in a consent decree in 1941.¹⁴¹ As the result of federal antitrust litigation, the government and the music licensing companies have modified the decree four times since then, most recently in 2001.¹⁴² Among other restrictions, the decree prohibits ASCAP from issuing exclusive performance licenses, interfering with the ability of member composers from issuing nonexclusive public performance rights directly, discriminating among license users with regard to fees, and granting public performance rights for longer than five years.¹⁴³ Typically, ASCAP negotiates a blanket license with consumers; in exchange for a flat fee, users may publicly perform all the works in ASCAP's repertoire.¹⁴⁴ While this arrangement is often advantageous for licensees, such as radio stations and business owners who wish to play music in their establishments, the financial benefit ASCAP receives from licensing all rights at once has subjected the organization to frequent antitrust litigation.¹⁴⁵

Critics have argued the scheme constitutes an illegal restraint of trade, since the arrangement forces prospective license-seekers to lease the rights to the entire library of songs owned by ASCAP rather than only the song(s) in which they are interested.¹⁴⁶ Consequently, in *CBS v. ASCAP*, the US Court of Appeals for the Second Circuit created a test to determine whether or not a licensing scheme of the

140. E.g., Robin Karr, Note, *Blanket Licensing of Music Performing Rights in Syndicated Television: It's Time to Change the System*, 9 WHITTIER L. REV. 331, 332 (1987); see also *About ASCAP*, ASCAP, <http://www.ascap.com/about> (last visited Feb. 25, 2012); *About Us*, SESAC, <http://www.sesac.com/About/About.aspx> (last visited Feb. 25, 2012) ("Performing rights organizations (there are three of us in the U.S.) are businesses designed to represent songwriters and publishers and their right to be compensated for having their music performed in public."); *Get a BMI Music License*, BMI, <http://www.bmi.com/licensing> (last visited Feb. 25, 2012).

141. See *Buffalo Broad. I*, 546 F. Supp. 274, 286 (S.D.N.Y. 1982). Later, the US Court of Appeals for the Second Circuit applied the same *CBS* test as the district court, but reversed on the merits. *Buffalo Broad. Co. v. ASCAP (Buffalo Broad. II)*, 744 F.2d 917 (2d Cir. 1984).

142. *United States v. ASCAP*, No. 41-1395 (WCC), 2001 WL 1589999, at *1 (S.D.N.Y. June 11, 2001) (second amended final judgment).

143. *Id.* at *3-5.

144. See *id.* at *1.

145. See generally Karr, *supra* note 140 (outlining the history of antitrust litigation involving ASCAP).

146. See generally *id.*

public performance right is an antitrust violation.¹⁴⁷ Television studios across the country initiated the litigation because they preferred not to pay for every song in the ASCAP catalog when they were only interested in broadcasting certain, pre-identified works.¹⁴⁸ Further, ASCAP forced syndicated stations, when purchasing the broadcast rights to television programs containing ASCAP-controlled music, to license the music in those programs separately.¹⁴⁹

On remand from the US Supreme Court, the Second Circuit applied a two-step inquiry to determine whether ASCAP's blanket-licensing system constituted a violation of the Sherman Antitrust Act.¹⁵⁰ First, the court considered whether the licensing scheme had any restraining effect on trade based on the "particular circumstances prevailing in the industry."¹⁵¹ If the scheme did have a restraining effect—that is, if the licensee did not choose the scheme from among other reasonably available alternatives—the court then considered whether the scheme's "anti-competitive effects outweigh[ed] its pro-competitive effects."¹⁵² Ultimately, the Second Circuit found that there was a financially reasonable alternative available—namely, direct licensing—and that the blanket-licensing system was not a restraint of trade.¹⁵³ Therefore, the court never reached the balancing prong of the test.¹⁵⁴

The *CBS* analysis is instructive with regard to theatrical stock and amateur performing licensing. Contractual licenses for the performing rights to plays are subject to federal law as interstate commerce, and thus fall under the purview of the Sherman Act.¹⁵⁵ Of the two possible Sherman antitrust violations, codified in 15 U.S.C. §§ 1 & 2, § 1 is the most applicable here, as it deals with restraints of trade.¹⁵⁶ A § 1 antitrust violation requires (1) an agreement, (2) that affects interstate commerce, and (3) is an unreasonable restraint of

147. *CBS v. ASCAP*, 620 F.2d 930, 934-35 (2d Cir. 1980).

148. *See id.* at 932.

149. *See id.* at 933.

150. *See id.* at 932 (applying Sherman Antitrust Act, 15 U.S.C. § 1 (2006)).

151. *Id.* at 935.

152. *Id.* at 934; *accord Buffalo Broad. I*, 546 F. Supp. 274, 286 (S.D.N.Y. 1982).

153. *See CBS*, 620 F. 2d at 936.

154. *See id.* at 939.

155. *See Ring v. Spina*, 148 F.2d 647, 651 (2d Cir. 1945) (per curiam) ("The Supreme Court has not hesitated to regard the distribution of motion picture films as interstate commerce, and it may seem invidious to draw a different conclusion as to a stage production." (citations omitted)).

156. 15 U.S.C. §§ 1, 2 (2006).

trade.¹⁵⁷ Theatrical productions fall squarely within the first two requirements of the Act, as they reflect an interstate agreement between the theatre producers and the public performance licensors, and *CBS* provides a useful test to determine whether a license meets the third requirement.¹⁵⁸

A. Are There Other Realistically Available Licensing Alternatives?

Madam, I take three possibilities,
And strike a balance, then, between the three . . .¹⁵⁹

There are four generally accepted licensing scheme possibilities used in music performance: direct, blanket, source, and per-program licensing.¹⁶⁰ Per-program licensing is a form of blanket licensing in which television stations pay a separate fee to the music licensing houses only for those television programs that use copyrighted music. Though theoretically cheaper for the television stations, the stations must submit detailed reports of each individual program they broadcast, to assure that the number of shows using copyrighted music does not exceed the ratio of shows accounted for by the fee.¹⁶¹ Due to the excessive transaction costs associated with its stringent reporting and monitoring requirements, television stations rarely utilize this option.¹⁶² A per-program license would not be of much use to musical theatre companies either, as they tend to produce only copyrightable plays, and therefore the number of productions not subject to royalty payments would be too small to justify a per-program scheme. The same is true for opera companies for the opposite reason: because opera companies generally produce only works in the public domain, they apply for royalties so rarely that there would be no need to arrange a per-program structure, as the

157. See *id.* § 1; see also *Richter Concrete Corp. v. Hilltop Basic Res., Inc.*, 547 F. Supp. 893, 917 (S.D. Ohio 1981) (stating the requirements of an antitrust violation), *aff'd*, 691 F.2d 818 (6th Cir. 1982).

158. *Ring*, 148 F.2d at 651 (“But much more is here involved than merely an agreement for the production of a single play; under attack is a broad plan for controlling the dramatic productions of the country. It is clear that the plaintiff in an anti-trust suit need not himself be in interstate commerce. It is sufficient that the combination which is the cause of his injury seeks to restrain such commerce.”).

159. W.S. GILBERT, *PRINCESS IDA* act 2, available at http://math.boisestate.edu/gas/princess_ida/webop/pi_10d.html (1884).

160. See, e.g., *Buffalo Broad. II*, 744 F.2d 917, 926 (2d Cir. 1984).

161. See AL KOHN & BOB KOHN, *KOHN ON MUSIC LICENSING* 12 (3d ed. 2002).

162. See *Buffalo Broad. I*, 546 F. Supp. 274, 288-89 (S.D.N.Y. 1982) (noting only two out of 750 local stations chose a per program license over a blanket license and noting the significant reporting obligations and higher rates as potential reasons), *rev'd*, *Buffalo Broad. II*, 744 F.2d 917 (holding higher prices are insufficient to make an alternative not reasonably available unless they are artificially inflated to prevent users from choosing the option).

monthly transaction costs would far exceed the expense of the occasional royalty application and fee. Companies who routinely produce both classical works and modern copyrightable works might find a per-program license appealing, as they would be guaranteed access to the entire repertoire of licensable plays while simultaneously avoiding being charged a fee for plays that are in the public domain. Nevertheless, theatre companies choose their seasons so far in advance that there is no risk of unpredictability in terms of the plays they wish to license (i.e., they can adjust the plays they wish to produce far in advance of a production date),¹⁶³ and therefore there would be no justification for the increased cost associated with a per-program blanket license.

1. Source Licensing

Under a source-licensing system, television syndicators would negotiate for the public performance rights to the music contained in their programs themselves, so they would license the entire bundle of rights necessary to air their programs to local television stations directly rather than force the stations to pursue music performance licenses independently.¹⁶⁴ This system is closest to the current theatrical licensing scheme, as licensing companies lease the entire bundle of rights necessary to perform a theatrical work so the copyright owners do not have to deal with stock or amateur companies directly. For the source licensing system to constitute a per se violation of the Sherman Act, a prospective licensee must first show that a direct or blanket-licensing system, as the only theoretical alternatives, are not realistically available.

2. Direct Licensing

Direct licensing is not generally available as an alternative to licensing through one of the theatrical-licensing houses.¹⁶⁵ In some cases, professional companies are able to negotiate with the rights holders to make certain changes to their work. However, the entire

163. E.g., Sharon Eberson, *Civic Light Opera Season Balances New Fare, Classics*, PITT. POST-GAZETTE, Oct. 19, 2011, <http://www.post-gazette.com/pg/11292/1183051-325.stm> (publicly announcing a prominent stock theatre company's lineup of musical plays eight months before production).

164. See *Buffalo Broad. I*, 546 F. Supp. at 292.

165. See generally LINDEY & LANDAU, *supra* note 7, § 11:31(7) ("As a rule dramatists entrust the handling of the amateur rights to agencies specializing in the business. The agencies circulate catalogs of the plays they control among the amateur groups, and grant them licenses to produce. . . . Since the amounts involved in the individual transactions are small, arrangements are handled informally, often on the basis of short memoranda.").

formation and growth of the licensing houses was based on the premise that copyright holders do not have the time or inclination to deal individually with rights seekers, even if they do desire to profit from a high volume of stock and amateur performance licenses.¹⁶⁶ A direct-licensing system would destroy the entire concept of the licensing houses to better reflect the wishes of the playwrights themselves; however, the significant transaction costs associated with individually negotiating each amateur license has made such a scheme impracticable.¹⁶⁷ Further, once an author grants any sort of exclusive license to a producer, the author loses the ability to control that particular right, making direct licensing inapplicable.

3. Blanket Licensing

No one has ever tried to implement a blanket-licensing system in the realm of theatre production. Under such a system, theatre companies would pay a set percentage of their revenues (likely 1-2 percent, mirroring the blanket-licensing systems that ASCAP, BMI, and SESAC offer for music performance rights) in exchange for a blanket license to produce whatever dramatic works they choose over the course of a season. MTI would likely favor this arrangement, as it would incentivize theatres to produce shows from as few licensing houses as possible in order to buy as few blanket licenses as possible; the licensing house with the most number of shows—MTI—would likely benefit the most. Such a scheme might benefit theatres who produce a large volume of different shows each year and would prevent licensing houses from restricting the availability of shows from certain licensees (unless, of course, they exempted certain popular shows from their blanket licenses). Regardless, there are no other schemes realistically available for those who wish to mount a theatrical work other than obtaining their stock or amateur performance license from the specific licensing house that leases it. The current licensing system, then, does restrain trade under *CBS*, so the second step of the test applies: whether the efficiencies of the current system outweigh its anti-competitive effects.¹⁶⁸

166. *Cf. id.* (noting both the small amounts involved in each transaction and the enormous number of individual transactions per year, which would make it impracticable for an individual author to handle stock and amateur licensing himself).

167. *Cf. id.*

168. *Buffalo Broad. I*, 546 F. Supp. at 286.

B. Do the Pro-Competitive Effects Outweigh the Anti-Competitive Effects?

Individually, I love you all with affection unspeakable; but, collectively, I look upon you with a disgust that amounts to absolute detestation.¹⁶⁹

The efficiencies of the current system are evident: stock and amateur companies gain access to the performance rights for works they would otherwise be unable to license. Whereas it would be inefficient for copyright owners to negotiate license terms with each and every amateur production company independently, it is much more practicable—not to mention profitable—to leave negotiations for numerous small-scale licenses to licensing houses that specialize in those transactions and charge relatively low fees. This allows authors to benefit economically, provides a solid source of revenue to the licensing houses, and ensures widespread public access to copyrighted dramatic works.

There is only one major drawback to the system as it exists today: prominent licensees have the ability to negotiate exclusive licenses to perform particular works, and that could ultimately restrict access to the public.¹⁷⁰ Whereas the consent decree between the US government and ASCAP specifically forbids issuing exclusive public performance rights to musical works, no such provision exists with regard to theatrical works.¹⁷¹

On balance, however, the efficiencies of the current system likely outweigh any anti-competitive effects. Certain works are still off-limits at any particular point in time to stock and amateur companies in a specific region. However, a higher number of works would be off-limits were these companies required to bargain with copyright holders directly, since such a scheme would force companies to deal with individual estates, not all of whom are equipped to handle a high volume of license requests. Further, while authors would prefer to issue licenses to as many producers as possible in order to increase their revenues (at least when the First Class Production has closed and their cut of the box office receipts ends), they are able to bargain freely with the licensing houses and therefore could refuse to allow exclusive licenses. Since authors are free to refuse to sell, license, or exercise any of the exclusive rights associated with their

169. GILBERT, *supra* note 10, at act 1.

170. See LINDEY & LANDAU, *supra* note 7, § 11:31(8) (“Stock and amateur production licenses covering non-musicals are generally not exclusive, but agents take care not to license plays for presentation in the same locality at the same time. In the case of a musical, exclusivity for a limited period is sometimes granted.”).

171. See *United States v. ASCAP*, No. 41-1395 (WCC), 2001 WL 1589999, at *3 (S.D.N.Y. June 11, 2001) (second amended final judgment).

work,¹⁷² copyright owners are free to allow a lessee to grant an exclusive right of public performance of their work, despite the occasional objection by legal scholars.¹⁷³ Finally, a more thorough analysis of the antitrust laws as applied to theatrical licensing would likely prove fruitless; the blanket-licensing scheme that ASCAP has adopted for music is plainly more coercive than the theatrical-licensing scheme, yet it has managed to survive in the face of frequent antitrust litigation. It is highly unlikely that a court would find the theatrical-licensing houses to have violated antitrust laws where ASCAP has been freed from similar liability.

IV. THE DRAMATISTS GUILD SHOULD REFUSE TO ALLOW LICENSING HOUSES TO ISSUE EXCLUSIVE STOCK AND AMATEUR PERFORMANCE LICENSES

Then came rather risky dances (under certain circumstances)
Which would shock that worthy gentleman, the Licensor of Plays.¹⁷⁴

Other than the possibilities of direct and blanket licensing discussed above, two additional options remain for solving the current inequity in stock and amateur performance licensing: compulsory licensing and contractual bargaining by the Dramatists Guild. This Part will consider both in turn, concluding that the most feasible option in the context of current copyright laws is for the Dramatists Guild to exert pressure upon its members to refuse to lease the right to grant exclusive performance licenses of their work.

A. Compulsory Licensing As a Trust-Busting Measure

I have long wished for a reasonable pretext for such a
change as you suggest. It has come at last. I do it on compulsion!¹⁷⁵

Amidst much debate, the Copyright Act of 1909 introduced compulsory licensing as a means of preventing music publishers from controlling the market for recorded music.¹⁷⁶ At that time, a select few

172. See *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932).

173. See, e.g., Catherine Parrish, Note, *Unilateral Refusals to License Software: Limitations on the Right to Exclude and the Need for Compulsory Licensing*, 68 BROOK. L. REV. 557, 574-75 (2002) (arguing the dictum from *Fox Film* had a narrow contextual meaning and applied only to tax law). Parrish also distinguishes the Court's narrow reading of the Copyright Act as unique to the laissez-faire economic policies of the early 1930s and unlikely to apply post-New Deal. See *id.*

174. W.S. GILBERT, *THE GRAND DUKE* act 2, available at http://math.boisestate.edu/gas/grand_duke/web_op/gd14.html (1896).

175. GILBERT, *supra* note 21, at act 2.

176. H.R. REP. NO. 60-2222, at 7-8 (1909) ("This danger lies in the possibility that some one company might secure, by purchase or otherwise, a large number of copyrights of the most

companies controlled the entire bundle of rights to nearly every piece of music protected under US copyright law, and Congress feared that creation of a “music trust” would prevent public access to musical works and limit the return to composers.¹⁷⁷ In response, Congress decreed that once an author released his work for mechanical reproduction, he must also authorize all copying for a reasonable royalty fee.¹⁷⁸ Today, anyone wishing to make mechanical reproductions of a musical work pays the Harry Fox Agency, which acts as the clearinghouse for music copyright licensing, a rate set by statute.¹⁷⁹ This centralized collection and distribution system streamlines the process.¹⁸⁰

In 1976, Congress revised and expanded compulsory licensing to include cable television,¹⁸¹ jukeboxes,¹⁸² and public broadcasting,¹⁸³ in addition to nondramatic musical works.¹⁸⁴ The new compulsory licensing schemes were primarily designed to alleviate the prohibitive transaction costs associated with copyright licensing in new technologies.¹⁸⁵ The statutory royalty rates are set and amended as

popular music, and by controlling these copyrights monopolize the business of manufacturing the selling [sic] music-producing machines, otherwise free to the world. . . . Not only would there be a possibility of a great music trust in this country and abroad, but arrangements are being actively made to bring it about.”).

177. See *id.* (“[I]t has been a serious and a difficult task to . . . so frame an act that it would accomplish the double purpose of securing to the composer an adequate return for all use made of his composition and at the same time prevent the formation of oppressive monopolies, which might be founded upon the very rights granted to the composer for the purpose of protecting his interests. . . . A condition of affairs which would limit the market for what the composer has to sell to one customer might be quite as injurious to the composer as it would be to the public.”).

178. See *id.* at 6 (“How to protect [a composer] in [his copyright] rights without establishing a great music monopoly was the practical question the committee had to deal with. The only way to effect both purposes . . . , was, after giving the composer the exclusive right to prohibit the use of his music by the mechanical reproducers, to provide that if he used or permitted the use of his music for such purpose then, upon the payment of a reasonable royalty, all who desired might reproduce the music.”).

179. See *Statutory Royalty Rates*, HARRY FOX AGENCY, INC., <http://www.harryfox.com/public/StatutoryReports.jsp> (last visited Jan. 29, 2012).

180. See *Mechanical Licensing*, HARRY FOX AGENCY, INC., <http://www.harryfox.com/public/MechanicalLicenseslic.jsp> (last visited Jan. 29, 2012).

181. 17 U.S.C. § 111 (2006).

182. *Id.* § 116.

183. *Id.* § 118.

184. *Id.* § 115. See generally Midge M. Hyman, Note, *The Socialization of Copyright: The Increased Use of Compulsory Licenses*, 4 CARDOZO ARTS & ENT. L.J. 105, 108-09 (1985).

185. See, e.g., H.R. REP. NO. 94-1476, at 89 (1976) (“The Committee recognizes . . . that it would be impractical and unduly burdensome to require every cable system to negotiate with every copyright owner whose work was retransmitted by a cable system. Accordingly, the Committee has determined to maintain the basic principle of the Senate bill to establish a compulsory copyright license for the retransmission of those over-the-air broadcast signals that a cable system is authorized to carry . . .”).

need be by the Copyright Royalty Board, made up of three appointed Copyright Royalty Judges.¹⁸⁶

Normatively, compulsory licensing for stock and amateur performances of theatrical works would solve many of the conceptual and practical problems the current scheme presents. Under such a system, Congress would adopt the formulas that licensing houses use to set royalty rates for each individual show, taking into account the size of the theatre, length of the performance run, ticket prices, and whether the producing organization was a professional or amateur company.¹⁸⁷ Moreover, the licensing houses could retain their business model, functioning like the Harry Fox Agency does for ASCAP; the Copyright Royalty Judges need never get involved.¹⁸⁸ Indeed, the only effect such a scheme would have on the current system of licensing stock and amateur performance rights to theatrical works would be to prevent the licensing houses from issuing limited exclusive licenses, thereby preventing some companies from licensing certain works. Additionally, such a scheme would provide a governmental check on the licensing houses' ability to create the same effect as an exclusive license by charging exorbitant royalty rates that would make performances of certain works financially impracticable for amateur companies.

Though neither the legislature nor the judiciary have adopted compulsory licensing in situations that did not directly involve copyright of "new" technological innovations,¹⁸⁹ the fact that the scheme has continued to exist relatively unchanged (other than increased royalty rates) since 1909 suggests that compulsory licensing works well and is fair to both copyright owners and potential licensees. Further, compulsory licensing would fit within the larger normative goals of copyright, promoting the progress of science and the useful arts by protecting the interests of both copyright holders (by guaranteeing them royalties for their work) and the public at large (by

186. 17 U.S.C. § 801(a). See generally COPYRIGHT ROYALTY BOARD, <http://www.loc.gov/crb> (last visited Dec. 26, 2011).

187. For example, the Dramatists Play Service website contains links to several separate amateur rights performance licenses. *Nonprofessional Licensing*, DRAMATISTS PLAY SERV., INC., <http://www.dramatists.com/text/npalinks.html> (last visited Dec. 26, 2011).

188. See generally *About HFA*, HARRY FOX AGENCY, INC., <http://www.harryfox.com/public/AboutHFA.jsp> (last visited Dec. 26, 2011).

189. *E.g.*, *Foster v. Am. Mach. & Foundry Co.*, 492 F.2d 1317, 1324 (2d Cir. 1974) ("[T]he District Court avoided ordering a cessation of business to the benefit of neither party by compensating appellant in the form of a compulsory license with royalties. This Court has approved such a 'flexible approach' in patent litigation." (citing *Royal-McBee Corp. v. Smith-Corona Marchant, Inc.*, 295 F.2d 1, 6 (2d Cir. 1961))); see also H.R. REP. NO. 94-1476, at 47 (1976).

guaranteeing increased access to the entire volume of licensable theatrical works).

Despite the virtues of a compulsory licensing scheme, such a change in the law is unlikely. The theatre lobby has exerted very little influence on Congress since the Cummings Act of 1897 and has never faced new and changing technologies necessitating a robust lobbying interest akin to that of the music publishing industry.¹⁹⁰ Furthermore, the lobbying interests that do exist among dramatists are likely to support Broadway producers and dramatic artists, not the small stock and amateur companies most harmed by the current performance licensing scheme. Without strong lobbying, Congress is not likely to ever effectuate such a dramatic shift in copyright law, particularly to resolve an issue that only affects a single industry. Instead, the theatre industry can resolve the issue the same way it has resolved copyright ownership issues since 1897: through private contract law.¹⁹¹

B. Look For the Union Label: the Dramatists Guild's Ability to Curtail Exclusive Performance Rights in Theatrical Productions

Hereupon we're both agreed,
All that we two
Do agree to
We'll secure by solemn deed,
To prevent all
Error mental.¹⁹²

Since the newly formed Dramatists Club petitioned its members to support the passage of the Cummings Copyright Bill, playwrights have been their own best advocates for protecting their rights. Indeed, the Second Circuit slapped the current Dramatists Guild (unrelated to the Dramatists Club) on the wrist for protecting the rights of members so zealously that its behavior became

190. See Rosen, *supra* note 41, at 1209-10 (noting the influence of theatrical lobbying efforts in passing the Cummings Act); Karr, *supra* note 140, at 356 n.191 ("ASCAP and BMI have been leaders in involving recording artists in legislative lobbying efforts.").

191. See Keller, *supra* note 108, at 912 ("In commercial theater, contract arrangements have attempted to standardize practices of allocating royalties and rights to authors from productions of their works. For the past 20 years, the Dramatists Guild's Minimum Basic Production Contract (MBPC) for Dramatic works and the MBPC for Dramatico-Musical works produced on Broadway provided models for the licensing provisions of professional theaters all over the country, most of which incorporate many or all of the MBPC's terms and conditions into their own agreements.").

192. W.S. GILBERT, THE YEOMEN OF THE GUARD act 2 (1888), available at http://math.boisestate.edu/gas/yeomen/web_opera/yeomen_15.html.

monopolistic.¹⁹³ In *Ring v. Spina*, the relatively new Dramatists Guild attempted to strong-arm a theatre producer into joining the guild (thereby agreeing to a number of onerous contractual provisions) as a contractual condition of any production agreement with a playwright.¹⁹⁴ The court found such a requirement to be an impermissible restraint of trade, as the guild never unionized.¹⁹⁵

Increasing access (and royalties) to their works should be of paramount importance to playwrights, as the licensing of stock and amateur rights makes up the bulk of their income once the initial First Class runs of their works close.¹⁹⁶ As such, the Dramatists Guild should make a point to include in any lease agreement between a playwright and a licensing house that, while the licensing house holds an exclusive right to license stock and amateur performance rights of the playwright's work, that right does not extend to the right to issue *exclusive* performance licenses. Such private contractual law has plugged holes in copyright law before; the Society of Stage Directors and Choreographers has long included in its standard form work for hire contracts a stipulation that the individual artist retains all copyright ownership of whatever intellectual property he contributes to the production (whether direction or choreography).¹⁹⁷ Further, the guild would not face opposition from a competing union, as theatrical producers are not unionized.¹⁹⁸ The licensing houses do hold a superior bargaining position over many playwrights due to the potentially lucrative stock and amateur market. However, the licensing houses should favor contracting away their ability to grant exclusive licenses, as this would allow them to issue multiple performance licenses to a given geographic area rather than being

193. See *Ring v. Spina*, 148 F.2d 647, 649 (2d Cir. 1945) (per curiam) ("Restraint of trade is alleged to be accomplished by means of the Guild's Minimum Basic Agreement, which is [sic] a producer or 'manager' must sign before any Guild members . . . may license or sell to him their works. . . . The Basic Agreement, among other things, fixes the minimum terms under which the Guild permits any of its members to lease or license a play, including the minimum advance payments and the minimum royalties to be paid by a manager. It limits contracts by both managers and authors to those made under its own terms, and between managers and members, both of whom are 'in good standing' with the Guild. It also provides that any dispute shall be finally adjudicated by arbitration." (footnote omitted)).

194. *Id.*

195. *Id.*; see Bassin, *supra* note 105, at 158. Unions are exempt from the Sherman Act, and the guild never unionized, likely because the playwrights served as mediators between actors and producers during the actors' union strike in 1919. See Bassin, *supra* note 105 at 160-61.

196. See Hofler, *supra* note 3.

197. See COLLECTIVE BARGAINING AGREEMENT, *supra* note 113.

198. See *About the League*, THE BROADWAY LEAGUE, <http://www.livebroadway.com> (last visited Feb. 25, 2012); Bassin, *supra* note 105, at 158. The League of Broadway Producers is not a union, and besides would have no interest in the Stock and Amateur Rights, as Broadway productions only involve First Class performance rights. See Bassin, *supra* note 105 at 158.

pressured to limit a performance license to a single, powerful theatre.¹⁹⁹

Finally, such an advocacy position would represent good policy. Even though tiny amateur productions generate insubstantial revenue for an author, they expose works to a segment of the population that may not have the financial means to attend a performance at the premier regional theatre in the area, or the logistical means to attend a touring production. Copyright holders will also benefit from the increased number of performances of their work, which will yield larger royalties and allow them to achieve greater notoriety through increased exposure. Authors always retain the ability to prevent stock and amateur companies from misappropriating their work; granting more licenses would not restrict this right.²⁰⁰ Even those regional theatres that routinely bargain for exclusive licenses should benefit, as works that are now available to other local companies should increase the marketability of the work; inferior local productions increase name recognition of the piece and allow superior productions to prosper.

V. CONCLUSION

Dear me. Well, theatrical property is not what it was.²⁰¹

Stock and amateur productions are the backbone of the modern theatre industry. As the economy continues to falter and Broadway ticket prices continue to rise, local productions are frequently the only opportunity the public at large has to see a particular theatre piece. The ability of regional theatres to prevent other theatres in the same area from producing a specific play harms all parties involved. The audience is deprived of a free market to choose among different productions (or, perhaps, of an opportunity to see a show at all). The playwright is denied the opportunity of increased royalties. Finally, such an exclusive license prevents progress of science and the useful arts. An exclusive license is a grant of monopoly that does not benefit an author or incentivize an author to create more artistic product. Rather, such a license benefits a licensee, who bargains with a third party for the exclusive license and whose rights the Copyright Act

199. Indeed, this author's experience has been that, when a stock or amateur theatre attempts to license a production that is restricted in the area, the controlling licensing house contacts the current exclusive licensee to ask permission to issue a new license before rejecting the application outright.

200. See *Gilliam v. ABC, Inc.*, 538 F.2d 14, 20 (2d Cir. 1976) ("One who obtains permission to use a copyrighted script in the production of a derivative work . . . may not exceed the specific purpose for which permission was granted.")

201. GILBERT, *supra* note 11, at act 2.

does not contemplate. Though this practice is perhaps not sufficiently dire to warrant Congressional action, increased union advocacy could easily rectify the problem. Preventing select theatres from holding the exclusive right to produce certain plays was one of the two specific issues that spurred the initial creation of the public performance right in 1833. Though new technologies continue to test the contours of copyright law, it remains more important now than ever before to take care to protect those very rights that formed the basis for the robust copyright protection authors enjoy today.

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