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THE SEVENTH ANNUAL MEDIA AND SOCIETY LECTURE

Protecting the American Playwright

John Weidman[†]

I want to begin by clarifying something which is going to become stunningly clear whether I clarify it now or not. I am not an attorney. I did in fact graduate from law school. I did in fact take and pass the New York Bar Exam. But to give you a sense of how long ago that was, when I finished the exam I celebrated by picking up a six pack of Heineken and going home to watch the Watergate Hearings.

I have never practiced law. But as President of the Dramatists Guild of America for the last eight years I have found myself in the middle of a number of legal collisions, the most important of which I'm going to talk about today, not from a lawyer's perspective—although I may attempt to dazzle you with a couple of actual citations—but from the perspective of the playwrights, composers, and lyricists whose interests the Guild represents.

First, some background: The Dramatists Guild is the only national organization representing the interests of playwrights, composers, and lyricists writing for the living stage.

Founded almost a hundred years ago, the Guild currently has over 6,000 members nationwide ranging from a kid in a dorm room somewhere struggling to finish his first one act play, to established playwrights working on Broadway, Off-Broadway, and in regional theaters all over the country. Members over the years have included George S. Kaufman,

[†] President of the Dramatists Guild of America. This speech was delivered at the Seventh Annual Media and Society Lecture, held on October 25, 2006, at Brooklyn Law School.

Eugene O'Neill, Arthur Miller, Lillian Hellman, and Tennessee Williams. The Guild is governed by a Board of Directors, elected from its membership, which currently includes such writers as Edward Albee, Stephen Sondheim, John Guare, Marsha Norman, and John Patrick Shanley. Past presidents include Richard Rodgers, Moss Hart, Oscar Hammerstein, Alan Jay Lerner, Robert Sherwood, and Peter Stone.

Since its inception, the mission of the Guild has been to assist playwrights in protecting the artistic and economic integrity of the work which they create. These efforts have taken a variety of forms, most significantly the development of a series of standard contracts the terms of which have guaranteed to playwrights the ability to control the content of the plays which they write, to control the disposition of those plays, and to earn a living from those plays if and when they are produced.

Despite a predictable amount of noisy opposition from various elements within the theater community, these efforts have been largely successful. The American theater, organized around the unique, idiosyncratic voice of the American playwright, has thrived, first and foremost, because of the brilliance of quintessentially American dramatists like Eugene O'Neill, Tennessee Williams, Stephen Sondheim and the equally brilliant interpretive artists with whom they've collaborated, but also because of the stable framework—both creative and economic—within which those dramatists and their partners have been able to do their work.

Where did that stability come from? For as long as anyone can remember, the community of artists and businessmen who make theater have shared a common set of assumptions about how a play or a musical makes its way from the page to the stage.

Not infrequently, a new production has rung minor changes on these assumptions, but the basic assumptions have endured. Everyone has known who did what. Everyone has known who owned what. Everyone has known who was in charge and who had the last word. These assumptions were givens; they were taken for granted.

They are not taken for granted anymore.

Beginning perhaps ten to fifteen years ago, in what is still a developing but potentially seismic shift in the way theater is made, these assumptions began to be challenged, deliberately and aggressively, with consequences as yet uncertain for the future of the American playwright and, by

extension, for the future of the American Theater and the American theater-going public.

The challenges have come, primarily, from two sources: First, from a group of producers, new to the business, and largely new to New York, and second, from directors, acting in concert through their union, the Society of Stage Directors and Choreographers, or SSD&C.

At their core, both challenges are about the same thing: copyright. The playwright's copyright. The playwright's undisputed ownership of his play, legally and artistically, which, heretofore, has been the bedrock constant around which all theater-making has been organized.

Until now.

First, I want to talk about the challenges being mounted by producers. But before I do, a brief digression into the difference between writing for the theater and writing for the movies.

Playwrights write plays. Screenwriters write screenplays. On the most fundamental level, they both engage in the same creative exercise. The writer sits down in front of a blank piece of paper and stares at it with a mounting sense of dread until, as George S. Kaufman said, blood begins to seep from his forehead. Writing can be painful, whether you're writing a play or a screenplay. But the intermittent sense of suicidal desperation which playwrights and screenwriters sometimes share is about the only thing they share.

A screenwriter is an employee. The work he does is work for hire. From the beginning, he understands that everything he writes will immediately become the property of the studio which employs him.

As legal author of the film, that studio can change the content of the screenwriter's script at will. His pirate captain can become a teenage runaway, his teenage runaway a Cocker Spaniel, his original story, set in Boston during the War of 1812, can be moved to the fifth moon of Jupiter.

Sooner or later, things like this will happen, because things like this *always* happen, and when they do, the screenwriter will feel talentless, humiliated, and, most importantly, every single author's impulse that made him want to be a writer in the first place will be ground into the dust.

What about the playwright? The playwright is an independent contractor. He owns his work and is free to dispose of it as he sees fit. If a producer wants to mount a production of his play, the playwright will grant the producer a

defined package of performance rights for a limited time while reserving all other rights to himself. The producer will not be able to hire a director, or actors, or designers to work on his play without his approval. And no one will be able to change a word of what he's written without his permission.

So why would anyone choose to write for the movies when they could write for the theater? The answer is—as it so often is—money.

Screenwriters are actually paid to write. The typical studio deal involves a hefty advance paid to the writer before he goes to work, and as he continues working, he can count on receiving a predictable series of additional payments.

The playwright, on the other hand, works for nothing. Some plays are written on commission, but the vast majority are simply written—by someone, somewhere with an impulse and an idea.

The playwright will be compensated, if at all, not with studio-style advances and step deal payments, but with a small prospective sliver of every dollar which may or may not one day come in at the box office. Which means he will not see any return on his labors unless and until a producer decides to produce his play and an audience decides to buy tickets to see it.

So why does he do it?

He does it because it is in the theater, and only in the theater, that the dramatic writer can retain ownership and control of the work which he creates. He does it because it is in the theater, and only in the theater, that he knows his own unique, idiosyncratic voice will be heard, unedited and uncompromised.

Which brings us back to copyright. That the playwright owns his copyright is both a reflection of the fact that the theater is a writer's medium, and a legal firewall guaranteeing that it will remain that way.

Assaults on that copyright would have been unheard of thirty years ago. But as Jerry Brown said, that was then and this is now. And now, as I have said, assaults on the playwright's copyright are being mounted by both producers *and* directors.

First the producers.

Twenty-five years ago, something happened on Broadway. The musical *Cats* opened, and in certain fundamental ways, the commercial theater was changed forever. Prior to *Cats*, a hit show was a show which ran for

two, perhaps three years. A smash hit, like *My Fair Lady*, might run for five or six. *Cats* ran for eighteen years. And even more significantly, the London production, which had been replicated on Broadway, was then replicated in dozens of other Broadway-like productions around the world.

In the old days, meaning let's say the 1960s, the producers of a hit Broadway show might send out a national touring company, after which they might mount the show in London's West End.

From the point of view of the producers, the investors, and the authors, the income from these productions would certainly have been substantial, but not so substantial as to call attention to itself outside the relatively insulated economic world of the theater.

Cats, along with sister shows like *Les Miserables* and *Phantom of the Opera*, changed all that. The money to be made from two dozen identical versions of a hit show, playing to sold out houses in two dozen cities around the world, was clearly enormous. Indeed, in January of this year, *Variety* reported that *Phantom of the Opera* had become the most successful entertainment venture of all time—more successful than *Star Wars*, more successful than *Harry Potter*—grossing 1.9 billion dollars in the United States, 3.2 billion dollars world wide, from ticket sales alone.¹

Clearly, these were sums of money not to be left in the hands or the pockets of what had heretofore been thought of as a mere Broadway producer.

About whom a brief aside: Max Bialystock, Mel Brooks's super-shyster impresario, when accused of defrauding the investors in his new musical, *Springtime for Hitler*, defends himself to the judge as follows: "It's true, your honor, I've spent a lifetime lying and cheating and stealing, but I couldn't help myself. I was a Broadway Producer."²

It should be noted that at the first staged reading of Brooks's show this line got the afternoon's biggest laugh—from an audience made up almost entirely of Broadway producers. But in what I am still referring to as the old days, for every producer like a Max Bialystock or a David Merrick, there were half a dozen Kermit Bloomgartens, Leland Haywards, and Harold Princes—consummate professionals who had made

¹ Zachary Pincus-Roth, *Movies Aren't the Only B.O. Monsters*, VARIETY, Jan. 9, 2006.

² THE PRODUCERS (Metro-Goldwyn-Mayer 1968).

lives for themselves in the theater, perhaps first as stage managers, then as company managers, then finally as full-fledged producers. These were men and women as dedicated to the theater as the most dedicated playwright. They survive today in the person of producers like Manny Azenberg and Liz McCann.

But with the geysers of money tapped into by shows like *Cats* and *Les Miserables*, it was only a matter of time before a new breed of producer appeared on the scene. And when that new breed arrived, predictably, it came from Hollywood.

First came Disney, mounting enormously successful stage versions of its animated features like *Beauty and the Beast* and *The Lion King*. Then came Fox Searchlight Pictures, Universal, and a number of other studios, often on their own, sometimes partnering with experienced Broadway presenters.

When in Rome, most people make at least some attempt to do as the Romans do. In this case, however, in at least one crucial area, the attempt was minimal.

What the most aggressive of the movie studios brought with them was a desire to do business, not according to the theater model which put the playwright in first position, but according to the Hollywood model, in which the producing studio owned the author's copyright and writers could be hired and fired at will.

Individual writers, supported by organizations like the Dramatists Guild, have for the most part been able to resist the pressure to work under these conditions. Usually, by simply refusing to do it. But the pressures are intense, and with the appearance of more and more studio-produced musicals like *Tarzan* and *Aida*, those pressures are only going to grow more intense.

Case in point: Dreamworks Animation is gearing up to produce a stage version of its wildly successful animated feature film, *Shrek*. The first *Shrek* grossed 455 million dollars.³ Its sequel grossed 880 million dollars.⁴ Add to this the vast revenues from toys, t-shirts, and who knows what else, and one would have to agree with the executives at Dreamworks Animation that the *Shrek* imprint represents a franchise of goldmine-like proportions.

³ See All-Time Worldwide Boxoffice Chart, <http://insiders.com/gross/top150-world.php> (last visited Jan. 8, 2007).

⁴ *Id.*

As such, the studio would argue, it has a duty to its shareholders to maintain control of anything and everything which appears under the *Shrek* banner. And that control would extend to the content, to every line of dialogue uttered in a dramatic adaptation.

Who could disagree?

The appearance behind a drugstore counter of one package of green, ogre-sized *Shrek* condoms could do immeasurable damage to the *Shrek* franchise. As could a stubborn lyricist who insisted on making a green, ogre-sized *Shrek* condom joke in the middle of the opening number of *Shrek: The Musical*.

So what's to be done? The studio's interest in maintaining control of the content of the stage version of *Shrek* seems irreconcilable with the theatrical mandate which gives the playwright ultimate control of the work which he creates.

Apparently a stand-off, but maybe one that doesn't matter that much. You could make a case that a great big Broadway musical version of an animated film like *Shrek* is *sui generis*. That like other great big Broadway musicals based on animated films it has so little to do with what we traditionally think of as theater—Chekhov, Beckett, Rodgers & Hammerstein—that it's actually O.K. if it makes its own rules. That whatever those rules are, you can build a wall around them and keep them quarantined.

You could make that case, but you'd regret it. Because if the author's copyright in a *Shrek*-sized musical migrates from the bookwriter, composer, and lyricist to the producer, it will only be a matter of time before the producer of a straight play demands the same arrangement.

Why? Because as a general rule, what one producer gets, all producers want. And the lowest common denominator deal tends to become *the* deal.

In addition, the producer will argue, with some justice, that in order to raise money from his investors he must demonstrate that he has a deal which will protect their money at least as well as the *next* producer's deal. And if the *next* producer owns the author's copyright and he doesn't, he may have a hard time capitalizing his show.

So—what we are looking at is indeed a slippery slope, down which the playwright's copyright runs the risk of sliding into oblivion.

Imagine for a moment that this change has already taken place. Now imagine that Arthur Miller is still alive and

that he has just completed a play called *Death of a Salesman*. A producer has optioned it, put it into production, and that producer is now standing at the back of the theater as the curtain comes down at the end of the first preview. The audience looks shell-shocked. Middle-aged men are weeping openly as they walk past him up the aisle. Understandably nervous, the producer wonders if maybe the Willy Loman story might not run just a little bit longer if it didn't have such a downbeat ending. After all, Willy doesn't *have* to drive his car into a bridge abutment. Why can't all the Lomans—Linda, Happy, Biff, maybe even the hooker from the hotel in Boston—why can't they all pile into the family jalopy and take off on a comical but heartwarming cross-country road trip in which they confront their demons, defeat them, and start a new life in Alaska with Uncle Ben?

Miller doesn't want to write it? The producer fires him and finds somebody who will.

And now, on to the directors.

Beginning perhaps ten years ago, theater directors launched an aggressive campaign to establish a new, independent property right—a director's copyright—in the work which they create. Speaking through their union, directors have gone to great pains to emphasize that, unlike producers, they are not attempting to wrest copyright away from the playwright.

Which is true.

They then go on to emphasize that the creation of a director's copyright will have no impact on playwrights or on the way in which theater is and has been made for decades.

Which is not true.

On the contrary, if a director's copyright is ever established, it will drastically limit a playwright's ability to control the work which he creates, it will inevitably undermine the spirit of trust and openness which is essential to the collaborative process that makes theater happen, and it will have a deeply disruptive, potentially paralyzing effect on theatrical production generally.

Unlike playwrights, directors are employees. When a producer acquires the live performance rights in a play, he begins to hire the people who will make those performances possible: A set designer, a lighting designer, a costume designer, actors of course, and most importantly, a director.

It is the director's status as an employee which has allowed directors as a group to organize, and to be certified as a labor union.

And it is the directors' union, the SSD&C, which has led the fight to create an intellectual property right where none has previously existed. Ted Pappas, former President of the SSD&C, writing in the February, 1999 issue of *American Theater Magazine*, attempted to take this non-existent right for granted.

"Property rights," wrote Mr. Pappas, "give a director or a choreographer ownership of the staging they create for a production of a play or a musical."⁵ This is certainly true of choreographers, who are specifically identified in the Copyright Act of 1976. But it is not true of directors.

In fact, there is no recognized property right that gives a director ownership of any aspect of a theatrical production. Traditionally, directors have not attempted to copyright their work, and no court has ever recognized the validity of a director's copyright claim.

Ron Shechtman, attorney for the SSD&C, has referred to the law in this area as "murky." In order to support this characterization, he and his union rely heavily on two cases, and perhaps one other, recently decided.

The first, *Mantello v. Hall*,⁶ is generally cited as having supported the notion that directors can copyright their stage directions. In fact, it did nothing of the kind.

The case arose out of a production of Terrence McNally's play *Love! Valor! Compassion!* mounted at the Caldwell Theater in Boca Raton, Florida in 1996.⁷ In 1994, Joe Mantello—a brilliant director with whom I have had the immense pleasure of working—staged the original production of *Love! Valor! Compassion!* in New York, where it won the Tony Award for Best Play.⁸

Two years later, Mantello's attention was directed to the Caldwell production, which was reportedly a virtual replica of his New York production, and he sued, alleging among other things, infringement of a copyright which he had acquired when he filed a copy of McNally's script with his stage

⁵ Ted Pappas, *Protecting the Director*, AM THEATER MAG., Feb. 1999, at 6.

⁶ *Mantello v. Hall*, No. 97cv8196 (S.D. Fla. filed Mar. 21, 1997).

⁷ *Id.*

⁸ *Id.*

directions written in the margins with the U.S. Copyright Office.⁹

Mantello v. Hall was settled before it went to trial.¹⁰ Mantello's copyright filing had been processed by the Copyright Office without any opinion offered as to whether the stage directions which he had filed were in fact copyrightable or not. The court reached no decision on the matter.

In response to defendant theater's motion for summary judgment, the court did find that Mantello had in fact received a copyright certificate from the Copyright Office. But both the filing of the claim and the issuance of the certificate were purely mechanical. Nevertheless, "Possession of this certificate," said Judge Ryskamp, "creates the presumption that the work in question is copyrightable."¹¹ Defendant's assertion that stage directions are not copyrightable as a matter of law might or might not have been resolved at trial, but to quote Judge Ryskamp again, "with the record in its present undeveloped state, the Court cannot grant summary judgment on this basis."¹²

And that's as far as it went.

Another, more recent case, *Einhorn v. Mergatroyd Productions*,¹³ raised a director's copyright claim in a similar, but slightly different context. Plaintiff Einhorn was hired by defendant Mergatroyd to direct playwright Nancy McLernan's play, *Tam Lin*.¹⁴ Einhorn was fired before the play opened.¹⁵ Subsequent to his firing, he filed a copy of McLernan's script with some of his stage directions written in the margins with the Copyright Office, a filing which—to quote Judge Kaplan in his opinion delivered from the bench—eventually "matured into a certificate of registration."¹⁶

Whether or not that certificate had any legal force—indeed, whether, as a matter of law, stage directions are copyrightable at all, was an issue the court never reached—

⁹ *Id.*

¹⁰ See Jesse Green, *Exit, Pursued by a Lawyer*, N.Y. TIMES, Jan. 29, 2006, § 2, at 1.

¹¹ Order Granting in Part and Den. in Part Mot. to Dismiss and/or for Summ. J. at 14, *Mantello v. Hall*, No. 97cv8196 (S.D. Fla. July 22, 1997).

¹² *Id.*

¹³ 426 F.Supp. 2d 189 (S.D.N.Y. 2006).

¹⁴ *Id.* at 191.

¹⁵ *Id.* at 192.

¹⁶ Transcript of Record at 12, *Einhorn v. Mergatroyd Prods.*, 426 F.Supp. 2d 189 (S.D.N.Y. Apr. 25, 2006) (No. 05 Civ. 8600).

because prior to Judge Kaplan delivering his opinion, plaintiff director Einhorn had agreed to withdraw the registration.

And that's as far as *that* went.

Finally, the granddaddy of all these cases, *Gutierrez v. DeSantis*.¹⁷ It was the first one to stir the pot and the one which demonstrates most clearly the potentially devastating effect of a director's copyright on the way playwrights do their work, and on the vitality of theatrical production generally. The case involved a production of Frank Loesser's *The Most Happy Fella*, directed at the Goodspeed Opera House and subsequently on Broadway, by Gerry Gutierrez in 1991.¹⁸

As would later be the case in *Einhorn* and *Mantello*, Gutierrez attempted to copyright his work by filing a copy of his stage directions, written in the margins of Frank Loesser's script, with the U.S. Copyright Office.

As has been noted, such a filing is simply that—a filing. It does not establish a copyright, and in fact, there has never been a judicial determination that stage directions, filed by a director, are copyrightable.

But for the sake of argument, let's say they are. Let's say Mr. Gutierrez could and did acquire copyright ownership of his staging of *The Most Happy Fella*. What would be the consequence?

The Most Happy Fella opened on Broadway in 1956. In the thirty-five years between that opening and Mr. Gutierrez's revival, there must have been thousands of productions of this brilliant musical play.

If Mr. Gutierrez could acquire copyright ownership of *his* staging, then the directors of each and every one of these productions could have acquired copyright ownership of theirs as well. Had this happened, over the course of the last four decades *The Most Happy Fella* would have gradually ceased to exist as an independent piece of dramatic literature, giving way instead to a multitude of "Most Happy Fellas," each one a legal partnership between Frank Loesser and a director whose production he and his heirs had, in all likelihood, never even seen.

Should such copyright partnerships ever come into existence, they would clearly operate as liens on a playwright's play, restricting—often in unknown and unpredictable ways—

¹⁷ *Gutierrez v. DeSantis*, No. 95-1949 (S.D.N.Y. filed Mar. 22, 1995).

¹⁸ Green, *supra* note 10.

the playwright's fundamental right to control what he has created.

But beyond that, they would have a potentially devastating effect on the facility and vitality of theatrical production.

For example. If at some point in the future, a theater wished to produce *The Most Happy Fella*, they would be faced with a choice. They could examine—how?—each of the then existing copyrighted productions and select the one they wished to reproduce. Or they could proceed with their own original production, running the risk that a particular piece of business, or a stage effect, or their overall approach would be attacked by a director as an infringement of his previously copyrighted version.

Of course, *The Most Happy Fella* is merely illustrative.

Even plays which are currently in the public domain, plays which have been freely available to producers and directors and most importantly to the *public* for hundreds of years—*Hamlet*, *King Lear*—would acquire *de facto* copyrights as more and more directors asserted ownership of *their* versions of these classics. Producing them would become increasingly problematic.

And risky.

Theaters do not want to be sued. Indeed, most of them cannot afford the expense of defending a lawsuit. And if directors are able to copyright their work, the day will inevitably come—and soon—when a theater decides to cancel a production simply because they have been threatened by a director who perceives—rightly or wrongly, it doesn't matter—that the theater's production will infringe on a version which belongs to him.

Infringement, of course, requires copying. And copying requires access. But directors are not attorneys, they are artists. And there are plenty of artists—and I am not exempting playwrights—who are prone to see their influence in other people's entirely original work. It is not difficult to initiate a lawsuit. It is even less difficult to write a letter threatening one.

Which brings us back to the SSD&C.

The directors' union lays great emphasis on the fact that it has acted with restraint, that it has only pursued cases in which a director's work has been copied intentionally, and in which the copying was substantial and pervasive.

These limits are meant to be reassuring. But obviously they are self-imposed. And if a director's copyright is ever established, it will belong, not to the union, but to directors individually.

Consider Mr. Mantello and Mr. Gutierrez again. Both have said that the directing work they've done has not always risen to a level where they personally felt it deserved copyright protection. Yes it did, said Mr. Mantello of his award-winning production of *Love! Valor! Compassion!* No it didn't, of his award-winning production of *Glenn, Gary, Glenn Ross*. Yes it did, said Mr. Gutierrez, of his award winning production of *The Most Happy Fella*. No it didn't, of his award-winning production of *The Heiress*.

Could any judgment be more subjective? What if Mr. Mantello disagreed with Mr. Gutierrez, and argued that Mr. Gutierrez' staging of *The Heiress* *did* deserve copyright protection? Who would be the better judge?

In a letter to the *New York Times*, director Charles Marowitz offered the following:

As a director who has found his staging appropriated by less resourceful colleagues, I know that without the text prompting motivation, movement and gestures, no director would be able even to begin 'staging' a play. Directorial conception, however, is altogether different from staging and adds an entirely new dimension to a dramatist's work. Reinterpretations of both modern or classic plays should be entitled to copyright protection because they are the original outgrowth of a director's imagination.¹⁹

But who decides? Who determines when a "director's imagination" has been sufficiently activated to give birth to a copyrightable piece of work? Who decides when it hasn't? Are objective standards even possible? And isn't any line in the sand which makes some direction copyrightable and some not an invitation to an avalanche of litigation casting a cloud over some theatrical productions and paralyzing others?

Clearly, I would say yes. I would also say that I share the universal feeling that something fundamentally unfair has happened when a "less resourceful" director, to use Mr. Marowitz's phrase, puts up a production which clearly duplicates one mounted by someone else. If an artist is proud of what he's done, he wants credit for it. He certainly does not

¹⁹ Charles Marowitz, Letter to the Editor, *Stage Copyrights; What the Director Brings*, N.Y. TIMES, Feb. 5, 2006 (responding to Green, *supra* note 10).

want someone *else* taking credit for it. And without question, what happens in a case like this feels instinctively like stealing.

In the end, of course, it's only stealing if the thing taken belonged to somebody. And not everything which feels unfair, or is unfair, can or should be corrected by the courts.

At first glance, it would appear that the SSD&C's campaign to create a director's copyright is an attempt to correct the fundamental unfairness described above. But let's take a second glance.

Interviewed by the *New York Times* for an article about director's copyright and the *Einhorn* case, SSD&C attorney Ron Shechtman had this to say:

If it's truly a collaborative art form, then why is it only the author who participates in the subsidiary rights that flow from a successful New York production? The appropriate resolution is to give fair credit to all the artists' contributions. One day, it may end up that the author gets eighty percent, the director ten percent, the original cast X and the designers Z. Because, at bottom, this is all about money.²⁰

"Because at bottom, this is all about money."

Well, maybe it is, and maybe it isn't, but for the moment, let's take Mr. Shechtman at his word. If the union's push to establish a director's copyright is even *mostly* about money, and even more specifically money generated from a first New York production, then the director should be looking, not to the playwright, but to the New York producer for his payday.

When a producer takes the risk involved in mounting a new play or musical on Broadway, he is giving the authors something of enormous value beyond the production itself. He is giving them the visibility and status which attaches to having written a "Broadway show."

This visibility immediately increases the value of all the subsidiary rights which the authors retain. These include the right to license stock and amateur productions of the show, the right to sell it to the movies, the right to authorize a future Broadway revival, and so on.

In recognition of this value added, the authors grant the producer a participation, and a substantial one, in all revenues

²⁰ Green, *supra* note 10.

they realize from the exploitation of these rights for a defined period of time.

The revenues flow to the authors because, as authors, the sub rights belong to them. But they share them with the producer in recognition of the production he mounted, and by extension, in recognition of the contributions made by all of the artists the producer hired to make that first production possible.

Foremost among those artists is, of course, the director, who has negotiated an employment contract with the producer specifying the compensation he will receive in exchange for his labors. If, as part of his compensation, the director, and the director's union, feel he should be entitled to a participation in the author's sub rights, then it is not to the author, but to the producer's pre-negotiated share of those sub rights that he should logically look when he is negotiating his contract.

Copyright, as wielded by the SSD&C, has begun to feel like a sledgehammer. If directors think they can use it to surgically remove a small stream of income from the playwright's subsidiary rights, then not only do they have their hands on the wrong weapon, but if they continue to swing it, aggressively and irresponsibly, the law of unintended consequences says the landscape of theatrical production in this country may be altered in ways which no one can entirely predict, but which we may all, directors included, come to regret.

Copyright law, as I understand it, exists to maximize the creative output of artists, so that their work can enrich the marketplace of ideas necessary to inform and challenge the citizens of a vital, vibrant democracy.

What is and isn't entitled to copyright protection should be determined by this largest goal.

David Mamet once said that people come to the theater to be told the truth. From Sophocles to Shakespeare to O'Neill, the voice that has spoken that truth has been the voice of the playwright. Anything we do, whether intentionally or inadvertently, which hobbles that voice or hampers access to it, we do as a society at our peril.