Introduction

This book is a historical account about the negotiation of creativity in the American theatre. It is a history of how the American theatre organized its relationships and how stakeholders, and in particular dramatists, responded to these developments. The book examines how copyright law has interacted with the American theatre in dynamic and counterintuitive ways, helping to facilitate theatrical production between authors of original copyright works and audiences. But copyright plays only a supporting role in the much larger theatrical economy. This is a history of how the industry was shaped by the evolution of mediating businesses and the practices they established which copyright has mostly accommodated. The growth in mediating businesses, and responses to these developments, has accompanied enduring uncertainties about the authority dramatists are often assumed to have over the work they create.

Scholarship on the relationship between law and the American theatre devotes considerable energy to the intellectual property rights that creative stakeholders are assumed to control as either text-based writer authors of original works, or aspire to control as nonwriter collaborators.[1] Since 1856, the United States federal statutory copyright framework has continued to appear to expand the protections of the author dramatist. The author of the text – usually the playwright – is assumed to enjoy the exclusive initial rights to the dramatic work. The text-based authorship narrative in the American theatre did not find voice through legal pronouncement alone. Throughout most of the twentieth century, and beyond, the resilient trade association Dramatists Guild has nurtured the cause of playwrights, composers, lyricists, and librettists, successfully negotiating minimum standards for these groups with other stakeholders in the industry.

[1] I use the expressions creative collaborator or creative stakeholder as a way to identify artistic stakeholders involved in the production process that fall into two subgroups including, but not necessarily limited to: (1) "writer" creative collaborators (including playwrights, composers, lyricists, and librettists); and (2) "nonwriter" creative collaborators including dramaturgs, designers, stage directors, and actors (whose creative contribution is not text-based). I distinguish these two subgroups of creative stakeholders from other stakeholders – including, but not limited to – publishers, playbrokers, lawyers, accountants, producers, union, guild and labor associations, that mediate the production process.

Former President of the American Dramatists Guild John Weidman claims that "as long as anyone can remember the community of artists and businessmen who make theatre have shared a common set of assumptions about how a play or a musical makes its way from the page to the stage."[2] At the core of these common assumptions is the historical prioritization of a text-based independent-contracting model of organization. So copyright has protected the work of dramatists as independent contractors, and the playwrights have realized many of these protections through successful and sustained maintenance and enhancement of minimum standards in the form of a basic uniform agreement that has evolved over the last century.[3]

A common narrative in contemporary legal scholarship that explores the relationship between copyright law and the theatre goes something like as follows. The United States Copyright Act of 1976, or its equivalent in many common law jurisdictions, protects dramatic works,[4] distinguishable from literary works because they are performed. The literature will often acknowledge that a key element of copyright law is that it incorporates works of authors "fixed in any tangible medium of expression."[5] Because of the fixation requirement, a framework that prioritizes the contribution of the dramatist emerges. The text-based framework has endured despite theatre's inherently collaborative and ephemeral nature and despite the notable absence of terms including "dramatist" or "playwright" in copyright codes. There are often attempts to imagine what the law could look like that incorporates the contributions of nonwriter creative collaborators such as directors, dramaturgs, or actors.[6] The commentary

[2] John Weidman, "Protecting the American Playwright: The Seventh Annual Media and Society Lecture," *Brooklyn Law Review* 72 (2007): 640.

[3] The broad protections playwrights are assumed to enjoy have been described as an "anomaly," "exceptional," and "a unique power." The playwright's authority is assumed to exist at the intersection of statutory law and "industry custom and practice . . . protected through contractual relationships." *See* Carol Kaplan, "Once More unto the Breach," *Vanderbilt Journal of Entertainment and Technology Law* 16, no. 2 (2014): 303; Shane Valenzi, "A Rollicking Band of Pirates: Licensing the Exclusive Right of Public Performance in the Theatre Industry," *Vanderbilt Journal of Entertainment and Technology Law* 14, no. 3 (2012): 778. *See also* Jessica Litman, "The Invention of Common Law Play Right," *Berkeley Technology Law Journal* 25 (2010): 1425 and analysis below in Chapter 1, however, who maps the tension between the "author-centric rhetoric" and whether the development of the common law play right was ever an author's right: (1424–1425). Litman also acknowledges how dramatists secured "exceptional author's rights through collective action that was not tied to any statute or judicial decision" (at 1425).

[4] *See* 17 U.S.C., § 102(a)(3) "Works of authorship include the following categories: . . . dramatic works, including any accompanying music."

[5] 17 U.S.C., § 102(a).

[6] Michael Carroll makes the following distinction between "writer" and "nonwriter" collaborators: "Even though producers, directors, and performers may qualify as 'authors' of their contributions under copyright law, this Article treats this group collectively as 'performers' to focus on the mutually dependent relationship between the writers of source works and those who render them in performance." *See* Michael Carroll, "Copyright's Creative Hierarchy in the Performing Arts," *Vanderbilt Journal Entertainment & Technology Law* 14, no. 4 (2012): 804.

will often consider whether[7] it is possible to fix stage directions in a tangible medium of expression,[8] or whether nonwriter contributions meet the threshold of originality.[9] The literature also considers whether, or when, a contribution is a joint work,[10] derivative work,[11] or work-made-for-hire.[12] What often follows is

[7] For examples of the many treatments, *see* Talia Yellin, "New Directions for Copyright: The Property Rights of Stage Directors," *Columbia-VLA Journal of Law & the Arts* 24, no. 3 (2001): 317; Richard Amada, "Elvis Karaoke Shakespeare and the Search for a Copyrightable Stage Directions," *Arizona Law Review* 43, no. 3 (2001): 677; Beth Freemal, "Theatre, Stage Directions & (and) Copyright Law," *Chicago-Kent Law Review* 71, no. 3 (1996): 1017; Jennifer J. Maxwell, "Making a Federal Case for Copyrighting Stage Directions: Einhorn v. Mergatroyd Productions," *John Marshall Review of Intellectual Property Law* 7, no. 2 (Winter 2008): 393; Margit Livingston, "Inspiration or Imitation: Copyright Protection for Stage Directions," *Boston College Law Review* 50, no. 2 (March 2009): 427; Deana S. Stein, "Every Move That She Makes: Copyright Protection for Stage Directions and the Fictional Character Standard," *Cardozo Law Review* 34, no. 4 (April 2013): 1571; Jessica Talati, "Copyrighting Stage Directions & the Constitutional Mandate to Promote the Progress of Science," *Northwestern Journal of Technology and Intellectual Property* 7, no. 2 (Spring 2009): 241; Susan Keller, "Collaboration in Theater: Problems and Copyright Solutions," *UCLA Law Review* 33, no. 3 (February 1986): 891; Douglas M. Nevin, "No Business Like Show Business: Copyright Law, the Theatre Industry, and the Dilemma of Rewarding Collaboration," *Emory Law Journal* 53, no. 3 (Summer 2004): 1533; Pedro Jose F. Bernardo, "Transformative Adaptation, Performance, and Fair Use of Literary and Dramatic Works: Delineating the Rights of Playwrights and Adapters," *Ateneo Law Journal* 53, no. 3 (2008): 582. For an interesting paper outside of the property lens *see generally* David Leichtman, "Most Unhappy Collaborators: An Argument against the Recognition of Property Ownership in Stage Directions," *Columbia-VLA Journal of Law & the Arts* 20, no. 4 (1996): 683.

[8] *See* 17 U.S.C., § 102(a).

[9] *See* 17 U.S.C., § 102(a): "Copyright protection subsists, in accordance with this title, in original works of authorship. . ."

[10] *See* Copyright Act of 1976, § 101. There is an expansive literature on the application of joint works to theatre, especially with respect to *Thomson* v. *Larson*, 147 F.3d 195 (2nd Cir. 1998) (involved a nonprofit theatre that workshopped new plays where a dramaturg Lynn Thomson developed a work with writer Jonathan Larson). To name just a few articles that examine joint works and the case: Matthew Rimmer, "Heretic: Copyright Law and Dramatic Works," *Queensland University of Technology Law and Justice Journal* 2, no. 1 (2002): 137–141; Jane C. Lee, "Upstaging the Playwright: The Joint Authorship Entanglement between Dramaturgs and Playwrights," *Loyola of Los Angeles Entertainment Law Journal* 19, no. 1 (1998): 75; "Recent Cases," *Harvard Law Review* 112, no. 4 (February 1999): 964; Nevin, "No Business Like Show Business," 1533; Mary LaFrance, "Authorship, Dominance, and the Captive Collaborator: Preserving the Rights of Joint Authors," *Emory Law Journal* 50, no. 1 (Winter 2001): 193; Jennifer Womack, "Big Shop of Horrors: Ownership in Theatrical Design," *Fordham Intellectual Property, Media & Entertainment Law Journal* 18, no. 1 (Autumn 2007): 225; Paulette S. Fox, "Preserving the Collaborative Spirit of American Theater: The Need for a Joint Authorship Default Rule in Light of the Rent Decision's Unanswered Question," *Cardozo Arts & Entertainment Law Journal* 19, no. 3 (2001): 497; Faye Buckalew, "Joint Authorship in the Second Circuit: A Critique of the Law in the Second Circuit Following Childress v. Taylor and as Exemplified in Thomson v. Larson," *Brooklyn Law Review* 64, no. 2 (1998): 545; Roberta Rosenthal Kwall, "Author-Stories: Narrative's Implications for Moral Rights and Copyright's Joint Authorship Doctrine," *Southern California Law Review* 75, no. 1 (November 2001): 1 (Kwall's illuminating work focuses more on issues of moral rights); Carrie Ryan Gallia, "To Fix or Not to Fix: Copyright's Fixation Requirement and the Rights of Theatrical Collaborators," *Minnesota Law Review* 92, no. 1 (November2007): 231. *See also* Shyamkrishna Balganesh, "Unplanned Coauthorship," *Virginia Law Review* 100, no. 8 (December 2014): 1683.

[11] *See* 17 U.S.C., § 101. *See also* 17 U.S.C., § 106(2): Under the Copyright Act, a copyright owner has the exclusive right "to prepare derivative works based upon the copyrighted work."

[12] *See* 17 U.S.C., § 201(b).

an examination of the limits of copyright: fair use;[13] merger doctrine;[14] and *Scenes a Faire*;[15] or, for example, whether a new work is distinctly delineated.[16] Finally, there may be a consideration of options outside of copyright including breach of contract, false representation, or unfair competition,[17] unjust enrichment, and misappropriation law.[18]

Following the exploration of potential options what is left but to decide other appropriate legislative and judicial responses. It could be a statutory licensing scheme,[19] or an amalgamated system incorporating doctrines of joint authorship and derivative works.[20] It is more likely there will be a more general, and very reasonable, plea to broaden judicial interpretation for instances of novel contributions.[21]

Unquestionably, there are authors of successful works who have achieved critical acclaim and reaped extraordinary economic benefits through industry royalty structures.[22] But as obvious as it is to state that the history of the American theatre includes incredible stories of success, it is just as undeniable to acknowledge the multitude of tales of playwright subordination. Todd London and his coauthors in

[13] *See* 17 U.S.C., § 107.

[14] When there is only one or a limited number of ways to express an idea, copyright law will not protect merger between the expression and the idea. *See Morrissey* v. *Proctor & Gamble Company*, 379 F.2d 675, 678–679 (1 Cir. 1967); *Aliotti* v. *R. Dakin & Co.*, 831 F.2d 898, 901 (9th Cir.1987).

[15] The circumstance where there is no other way to express an idea except by using particular elements and in such instances the elements are referred to as *Scenes a Faire*. *See, for example*, *Atari, Inc.* v. *N. Am. Phillips Consumer Elecs. Corp.*, 672 F.2d 607, 616 (7th Cir. 1982); *Murray Hill Publications, Inc.* v. *Twentieth Century Fox Film Corp.*, 361 F.3d 312, 319–320 (6th Cir. 2004); *Zambito* v. *Paramount Pictures Corp.*, 613 F. Supp. 1107, 1111–1112 (E.D.N.Y 1985); 788 F.2d 2 (2d Cir. 1985); *Schwartz* v. *Universal Pictures Co.* 85 F. Supp. 270(S.D. Cal. 1949). *See also* Maxwell, "Making a Federal Case," 393.

[16] *See Nichols* v. *Universal Pictures Corporation*, 45 F.2d 119 (2d Cir. 1930); *see* Stein, "Every Move that She Makes," 1593–1607 (particularly 1597–1600).

[17] *See generally* Yellin, "New Directions for Copyright," 317–347 (particularly 344–345).

[18] *See* Livingston, "Inspiration of Imitation," 469–479.

[19] *See* Carroll, "Copyright's Creative Hierarchy," 810–827.

[20] *See* Nevin, "No Business Like Show Business," 1560–1569.

[21] A broader understanding might read like the following: "Ultimately, a director who creates a truly novel staging of a classic or new play should be able to sue successfully a later director for copyright infringement if the later director closely copies the most striking features of the original director's staging. That result is consistent with copyright doctrine and policies, which seek to encourage creation of artistic works while allowing second comers to be inspired by earlier efforts, and with the theatre's long tradition as both an individual and collaborative art." (Livingston, "Inspiration of Imitation," 487.) Or maybe: "This comment advocates for the copyright protection of stage directions that fulfill the requirements of the Copyright Act and proposes that copyrighting stage directions will not devastate the rights of playwrights because fair use and *scenes a faire* will limit the protection granted to stage directions, thereby ensuring the promotion and advancement of the arts" (Maxwell, "Making a Federal Case," 393 (abstract)).

[22] Philip Boroff, for example, reports that *Hamilton* "composer-lyricist-librettist and actor" Lin Manuel Miranda "amassed $12.7 million in author royalties and profit participation from the Broadway production in the 12 months ending in July 2017." *See* Philip Boroff "'Hamilton' Pays Miranda & Seller Tens of Millions a Year," *Broadway Journal*, April 26, 2018, http://broadwayjournal.com/hamilton-pays-miranda-seller-tens-of-millions-a-year/.

Outrageous Fortune: The Life and Times of the New American Play, expose the many impossible economic challenges confronting the American dramatist.[23] The theatre literature also charts a less certain and more fragile economic and artistic history for the American playwright. That history often suggests the professional experience of the American dramatist is one of economic marginalization, isolation, and considerable compromise rather than authority.[24]

What we are left with is a standoff between dueling, and equally legitimate, tales of oppression – an unedifying struggle between creative claimants over legal recognition of intellectual property rights they are assumed to possess or think they ought to possess. For many dramatists, as writer Peter Stone reminds us, copyright is often conceived as a "birthright" that starts with a blank page and is only rewarded after the production is realized on the stage.[25] The dramatists also describe themselves as "property owners" under the law "who license the use of their property."[26] Copyright serves as the necessary legal shield against infringement and is an instrument used for compensating creation. In contrast, for nonwriter collaborators, and scholars that champion their cause, copyright protection is an aspirational normative project about what a rights framework ought to be. Courts and legislators should be able to find ways within the law to acknowledge the inherently collaborative nature of how theatre is created.

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The standoff between writer and nonwriter collaborators, therefore, is an ongoing theme in the legal history of the American theatre – the intellectual property rights that stakeholders either possess or aspire to possess. But another way to think about

[23] *See* Todd London with Ben Pesner and Zannie G. Voss, *Outrageous Fortune: The Life and Times of the New American Play* (New York: TDF, 2009). *See also* Todd London: Keynote Speech *American Dramatists Guild Annual Conference*, Washington DC, June 10, 2011 (available on YouTube: www.youtube.com/watch?v=5E_l-ZlevR8).

[24] *See generally* Todd London et al., *Outrageous Fortune*. *See also*, a far from exhaustive list: Percy MacKaye, *Epoch: The Life of Steele MacKaye, Genius of the Theatre* (New York: Boni and Liveright, 1927: 2 vols.); George Middleton, *These Things Are Mine: The Autobiography of a Journeyman Playwright* (New York: The Macmillan Company, 1947); Thomas Kitts, *The Theatrical Life of George Henry Boker* (New York: P. Lang, 1994); Arthur Hornblow, *A History of the Theatre in America: From Its Beginnings to the Present time* (Vol. 2, Philadelphia, PA: J. B. Lippincotte and Co., 1919); Clement Foust, *The Life and Dramatic Works of Robert Montgomery Bird* (New York: The Knickerbocker Press, 1919); Howard Teichmann, *George S Kaufman: An Intimate Portrait* (New York: Atheneum, 1972); John Gassner (ed.) in association with Mollie Gassner, *Best Plays of the Early American Theatre: 1787–1911* (Mineola, NY: Dover Publications, [2000], c.1967); Cecile Rukgaber, *The Theatrical Syndicate and Its Effects upon the American Theatre* (MA Thesis, University of Wyoming, 1955). Jack Poggi's analysis is limited to economic matters with a cursory consideration of legal issues: Jack Poggi, *Theatre in America: The Impact of Economic Forces, 1870–1967* (Ithaca, NY: Cornell University Press, 1968).

[25] Sandra Salmans, "Why Investors in Broadway Hits Are Often Losers," *New York Times*, November 22, 1981, 129, 138.

[26] *See* Dramatists Guild of America, "Authors Should Maintain a Legal Right to Their Work," www.dramatistsguild.com/no-union (and *see* full quote in Epilogue).

the history of economic and artistic control over theatrical creation is to reconstruct the dynamic path that the production process has to undergo to eventually be realized in front of an audience in a performance space. How does the industry organize its relationships in this space of transformation and who controls this space?

If the central inquiry is to explain the historical structure of the industry, we can also begin to think about copyright's relationship with the author of the original work in the context of the larger production process. For example, vesting the author with initial control over copyright is a practical place to begin transforming a work into a final production on the stage. Initial copyright control serves the role of an administrative adjunct for production to commence. And the author or authors could be anyone, but the point is that it is a practical and reliable place to begin to organize production in the larger theatrical economy where the common goal among all stakeholders is eventual staging. Copyright, in the context of the broader structure of the industry, can also be framed as an instrument that helps move the evolving work from one stage of the process to the next in the space between the author and the audience.[27]

Copyright understood as one tool within a larger bag that helps facilitate the process of production in the American theatre takes on different characteristics to that of competing creative claimants seeking to define the intellectual property rights that they possess, do not possess, or aspire to possess. The author's control over copyright is understood in relational terms with other stakeholders. The author subject's initial control over copyright is an offering to the production process – it undergoes constant dynamic renegotiation within the larger organizational space between the author and the audience. In the ongoing relationship between stakeholders, the triumvirate of authorship, ownership, and control coexist only in form at an initial static point in time; a starting point from which to renegotiate control as

[27] Carys Craig, for example, explores authorship as a "dialogical process," where the works of an author "must be understood in their social context, and her acquired rights must be examined in relation to her audience and other members of her communicative communities." *See* Carys Craig, *Copyright, Communication and Culture: Towards a Relational Theory of Copyright Law* (Cheltenham UK: Edward Elgar, 2011), 54. *See also* Rebecca Curtin's work on the private ordering and commercial practices between authors and publishers prior to the Statute of Anne which helps explain practices after the enactment of the Statute of Anne: Rebecca Schoff Curtin, "The Transactional Origins of Authors' Copyright," *Columbia Journal of Law & the Arts* 40, no. 2 (2016): 175. My work also owes much to the earlier relational contracts literature. Stewart Macaulay, "Non-Contractual Relations in Business: A Preliminary Study," *American Sociological Review* 28 (1963): 55. *See also* Lisa Bernstein, "Opting out of the Legal System: Extralegal Contractual Relations in the Diamond Industry," *Journal of Legal Studies* 21, no. 1 (1992): 115; David Campbell and Donald Harris, "Flexibility in Long-Term Contractual Relationships: The Role of Co-operation," *Journal of Law and Society* 20, no. 2 (1993): 166. On the hidden and often unfettered power of stronger parties to dictate the terms of industry practice *see also* Stewart Macaulay, "Lawyers and Consumer Protection Laws," *Law & Society Review* 14, no. 1 (1979): 115. (As also discussed in Robert Gordon, "Is the World of Contracting Relations One of Spontaneous Order or Pervasive State Action? Stewart Macaulay Scrambles the Public-Private Distinction," in *Revisiting the Contracts Scholarship of Stewart Macaulay*, ed. Jean Braucher, John Kidwell, and William Whitford (Oxford, UK and Portland, OR: Hart Publishing, 2013), 49.)

the work transforms into a performance. The initial allocation of rights to the author must inevitably cede to the larger institutional structures of the theatrical economy. As a necessary consequence, stakeholders other than creative writer and nonwriter collaborators – that establish and control the institutional structures in the space between authors and audiences – assert extraordinary influence over both economic and artistic dimensions of the production process.

The text of the play is originally a blueprint. That is, the play is active and requires the collaboration of others to be fully experienced as culture and to generate income for those associated. It is only by the transformation of the original physical text into the performance that, for the most part, copyright income is generated. Control over the intangible theatrical right in the text and performance of that text has no inherent economic or artistic value in itself until exploited in a material place and time. A rights discourse engages in conversations about whether dramatists or other creative collaborator contributions such as stage directors, actors, dramaturgs, or designers are valued both economically and artistically, and consequently, there is an inevitable preoccupation with the rights that claimants should or should not possess. But these preoccupations divert attention away from the ongoing collective managerial contributions working within larger industry structures that establish how creation is realized. Who are the actual stakeholders – and what organizational structures do they create – that control how theatrical production is realized on the stage? How do creators like playwrights respond as a group to these structures?

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Mediating stakeholders who controlled the transformation of the theatrical work from the playwright's manuscript to the theatrical stage shaped the structure of the industry from the mid-nineteenth to mid-twentieth centuries. Further, copyright law developed in ways that accommodated these mediating interests.[28] The mediating stakeholders evolved in different forms: for-profit, nonprofit, and government projects.[29] The stakeholders included playbrokers and transnational publishers, and the commercial impresarios emerging in the 1890s that formed booking businesses. They included trade associations such as the playwrights' association Dramatists Guild and government agencies created during the New Deal period. These mediating stakeholders and the institutional structures they developed also informed practices in the second half of the twentieth century and continue to influence practices to this day.

I call these stakeholders mediators as they do not only facilitate the process of production from page to the stage but transform the work into the material

[28] *See* discussion of the legal developments in Chapter 1.

[29] The nonprofit and government discussions in this book are not analyzed in detail, but form part of my larger research agenda and are to be published in separate article-length studies: *See* Brent Salter, "The Ordinary Authors of the Bureau Of New Plays: Copyright and Reallocating Authority in the American Theatre (1936–1949)," *Cardozo Arts & Entertainment Law Journal* 39 no. 1 (2021); "Copyright, Crisis, and Welfare in the Federal Theatre Project (1935–1939)" (article under preparation).

performance.[30] The ability to transform the original script is how mediators assert economic and artistic influence over theatrical creation. Thus, when I speak to the notion of control over production in the American theatre, I am referring to how stakeholders who have the resources and capabilities to turn an intangible right into a production on the stage negotiate that transformation process in the space between authors and audiences.

The resources and capabilities essential for production that mediators possess – of which copyright is only one part – exist in various forms. For example, staging involves control over rehearsal prompt scripts, dramaturgical notes, advance royalty notices, theatrical programs, material correspondence in the form of letters and memos, and theatrical contracts. Realization of the production involves control over theatre real properties in which to present the theatrical work, and, for example, control over the physical printing of the play. The realization of the theatrical work requires control over physical material such as sets and costumes. Staging the production involves control over administrative processes including business organization, media strategies, controlling transportation routes, accounting procedures, and controlling communication networks between internal stakeholders that mediate the movement of creativity daily between authors and audiences.[31] Realizing the

[30] Thus, understanding the space between author and audience where the work transforms to the stage requires more than an investigation of the human agent alone as the source of authority over creativity. This requires a move away from viewing the process through the prism of the theatrical stakeholder as a cultural intermediary toward mediation. Bruno Latour's departure from the intermediary is his rejection of compartmentalized human agency and its different categories in which there is someone "inter." Mediators are things that transform the connecting points they mediate while intermediaries are just human carriers of information/opportunities – "transport[ing] meaning or force without transformation." Bruno Latour, *Reassembling the Social: An introduction to Actor-Network Theory* (New York: Oxford University Press, 2005), 39. Theatre scholar Marlis Schweitzer examines the "assemblage of objects that accelerated the transnational movement of theatrical commodities," at the turn of the nineteenth century. Schweitzer, also drawing on Latour, is interested in "moments of disturbance or rupture, when managerial dependency on machines or other objects became all-too visible." *See* Marlis Schweitzer, *Transatlantic Broadway: The Infrastructural Politics of Global Performance* (Houndmills, Basingstoke, Hampshire, UK; New York: Palgrave Macmillan, 2015), 17.

[31] I use the expression movement to capture the fluid negotiations that shape authority structures between stakeholders in practice. And movement also embodies the ephemerality of the art form itself. There is a rich more recent body of theatre literature that scrutinizes histories of theatrical management and processes of production in the space between authors and audiences. Marlis Schweitzer describes this work as pushing back against "the anti-commercial bias in theatre scholarship, emphasizing the value of attending to economics and the practicalities of business decisions." *See* Marlis Schweitzer, "Aggressive, Beleaguered, Commercial, Defiant: Marc Klaw and Abraham Erlanger," in *The Palgrave Handbook of Musical Theatre Producers*, eds. Laura McDonald and William Everett (New York: Palgrave Macmillan US: Imprint: Palgrave Macmillan, 2017), 60. *See also*, for example, Schweitzer, *Transatlantic Broadway*; Nic Leonhardt, "Transatlantic Theatrical Traces: Oceanic Trade Routes and Globe-Trotting Amusement Explorers," *The Passing Show* 30 (2013/2014): 2; Nic Leonhardt and Stanca Scholz-Cionca: "Circulation, Theatre Mobility and Its Professionalization in the Nineteenth Century," in *A Cultural History of Theatre in the Age of Empire (1800–1920)*, ed. Peter W. Marx (London: Bloomsbury, 2017); James Harding and John Rouse, *Not the Other Avant-garde: The Transnational Foundations of Avant-garde Performance* (Ann Arbor:

production also involves a process of forming personal relationships and networks of trust. A well-placed reliable source of quality product in a theatrical economy where one's word was their bond, and finance, depended on who thought well of you. The historically specific nature of the relationship matters to the reading of the dynamics in the industry. Creation has distinctive historical forms that generate different kinds of interpersonal and normative demands that theatrical stakeholders both include and exclude.[32]

Steven Wilf writes of the need "to turn to a deeper understanding of how historical actors have sought to recast the contours of intellectual property law."[33] I aim to understand the practices of various stakeholders in the theatre community both known and relatively unknown.[34] Historical actors do not only include creative

University of Michigan Press, 2006); Christin Essin and Marlis Schweitzer, "Communities of Production: A Materialist Reading with an Offstage View," in *A Cultural History of Theatre in the Modern Age*, ed. Kim Solga (London, UK; New York: Bloomsbury, 2017); David Savran, *A Queer Sort of Materialism: Recontextualizing American Theatre* (Ann Arbor: The University of Michigan Press, 2003); Mark Hodin, "The Disavowal of Ethnicity: Legitimate Theatre and the Social Construction of Literary Value in Turn-of-the-Century America," *Theatre Journal* 52 (2000): 219; Tracy C. Davis, *The Economics of the British Stage: 1800–1914* (Cambridge, UK; New York: Cambridge University Press, 2000); David Savran, *Highbrow/Lowdown: Theater, Jazz, and the Making of the New Middle Class* (Ann Arbor: The University of Michigan Press, 2009); Peter A. Davis, "The Syndicate/Shubert War," in *Inventing Times Square: Commerce and Culture at the Crossroads of the World*, ed. William R. Taylor (New York: Russell Sage Foundation, 1991); Michael Schwartz, *Broadway and Corporate Capitalism: The Rise of the Professional-Managerial Class, 1900–1920* (New York: Palgrave Macmillan, 2009); Lisa Surwillo, *Stages of Property: Copyrighting Theatre in Spain* (Toronto: University of Toronto Press, 2007); Mattie Burkert, *Speculative Enterprise: Public Theaters and Financial Markets in London, 1688–1763* (Charlottesville: University of Virginia Press, 2021). And *see* Derek Miller's ongoing research of the history of Broadway and the American theatre: *See, for example*, Derek Miller, "Average Broadway," *Theatre Journal* 68, no. 4 (December 2016): 529; Derek Miller, *Copyright and the Value of Performance, 1770–1911* (Cambridge, UK: Cambridge University Press, 2018).

32 I am grateful for discussions with Kathy Bowrey on this point. This book, and ongoing research, also hopes to engage with scholarship on anthropologies of bureaucracy in private, nonprofit, and state-based organizations and through the prism of law, history, and creativity. *See* Kathy Bowrey, *Copyright, Creativity, Big Media and Cultural Value Incorporating the Author* (Abingdon, UK; New York: Routledge Books, 2021). *See* Chihab El Khachab, "Current Trends in the Anthropology of Bureaucracy – A Report," https://allegralaboratory.net/current-trends-in-the-anthropology-of-bureaucracy-a-report/. And such work also owes a great debt to the long line of scholarship on bureaucracy influenced by Max Weber, *Economy and Society: An Outline of Interpretive Sociology* (Berkeley: University of California Press, 1978) (edited by Guenther Roth and Claus Wittich; translators, Ephraim Fischoff et al.).

33 Steven Wilf, "Copyright and Social Movements in Late Nineteenth-Century America," *Theoretical Inquiries in Law* 12, no. 1 (January 2011): 123.

34 This project is influenced by a broader legal history literature that interrogates histories of the ordinary, and histories of the local. For example, in Lisa Ford's close reading of law and frontier settlements in Georgia and New South Wales, the author argues that the legal conflicts of the 1830s reflected uncertainties about which rules governed the land and indigenous people and settlers on the peripheries of these settlements. Laura Edwards' extensive archival research of post-revolutionary records from the Carolinas explores the differences between state laws that protected the rights of legally recognized individuals, and local laws, built around maintaining the "peace" and social order.

collaborators. Actors that engage in theatrical creation include administrators, accountants, lawyers, and government agents. Other actors include playbrokers, publishers, play reporters, and film studio executives. By framing control over production through the lens of these alternative mediating stakeholders, the histories of other actors also emerge. The legal histories of extraordinary women engaged in shaping theatrical business and legal practices go largely untold, as do the histories of minority groups,[35] and ordinary authors without the omnipotent reputation of an O'Neill, Miller, Williams, or Bernard Shaw.[36]

I, therefore, turn to how a variety of mediating actors control the production process in the space between the author and audience by how they establish and consolidate personal relationships, by how they interact with their surrounding resources essential for production, and by how they establish administrative processes. Copyright is only one part that combines with these many other dimensions of the larger project involved in realizing theatre creation. By the term realize, I refer to the ability to turn the intangible right into the material performance on stage. Stakeholders able to realize the production are also in a better position to design internal contracting procedures, define and establish relationships of use with other stakeholders, restructure legal strategies around areas of law outside of copyright, and are also in a better position to take advantage of a copyright framework that, for the most part, has accommodated mediating interests. Stakeholders removed from

It is in the minutiae of everyday interactions between actors – the reconstruction of "a previously unknown historical world" – that the complexity of the issues surrounding copyright control can begin to be explored. *See* Lisa Ford, *Settler Sovereignty Jurisdiction and Indigenous People in America and Australia, 1788–1836* (Cambridge, MA: Harvard University Press, 2010); Laura Edwards, *The People and Their Peace: Legal Culture and the Transformation of Inequality in the Post-Revolutionary South* (Chapel Hill: University of North Carolina Press, 2009). *See also* John Witt's biographical organization in *Patriots and Cosmopolitans: Hidden Histories of American Law* (Cambridge, MA: Harvard University Press, 2007). *See also* Karen Tani's brilliant grand and localized history of the welfare state in twentieth-century America: Karen Tani, *States of Dependency: Welfare, Rights, and American Governance, 1935–1972* (New York: Cambridge University Press, 2016).

35 For an illuminating study on the intersection of race, copyright, and the history of American performance communities, *see*: Anthea Kraut, *Choreographing Copyright: Race, Gender, and Intellectual Property Rights in American Dance* (New York: Oxford University Press, 2016). *See also* among the exciting and expanding literature: Caroline Joan Picart, *Critical Race Theory and Copyright in American Dance: Whiteness as Status Property* (New York: Palgrave Macmillan, 2013); Olufunmilayo Arewa, "Copyright on Catfish Row: Musical Borrowing, Porgy and Bess, and Unfair Use," *Rutgers Law Journal* 37, no. 2 (2006): 277; K. J. Greene, "Intellectual Property at the Intersection of Race and Gender: Lady Sings The Blues," *Journal of Gender, Social Policy & The Law* 16, no. 3 (2008): 365; Matthew Morrison, "Race, Blacksound, and the (Re)Making of Musicological Discourse," *Journal of the American Musicological Society* 72, no. 3 (2019): 781.

36 The scope of this book does not examine some of these histories in detail, but they are explored at greater length in ongoing research, particularly with respect to the Federal Theatre Project and the noncommercial theatres of the first half of the twentieth century. *See* Salter, "The Ordinary Authors of the Bureau Of New Plays" and "Copyright, Crisis, and Welfare in the Federal Theatre Project."