

Caitlin Duncan

Professor McGraw

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### Ownership of Theatrical Design and Copyright Infringement

As an up and coming theatrical costume designer, I have often wondered what rights, if any, that I hold on my intellectual property. Having begun to design for an educational setting, I felt unaware of the ownership I have as a designer and how to hold future employers accountable for my original work. In conversations with professionals in the theatrical design field, I realized that theatrical design ownership is a murky topic that needs further defining within the industry. As a double major in Arts Administration and Theatrical Design and Technology, I see the intersection between legislation and designers as one that could aid in the development of further protection of theatrical design ownership. By examining legal cases of theatrical design copyright infringement, the industry can recognize faults in the current legislation and make modifications to prevent similar occurrences. Although theatrical design is essential to any production, it often lacks recognition as a genuine art form and therefore is not awarded copyright regularly. In order to respect the work of the original designers, organizations must provide due recognition when copying the work.

Theatrical designers are people who enhance theatre by designing a specific piece of the world that the show takes place in. Kevin Lee Allen details design work by saying, "Designers must make intelligent choices from broad stroke fundamentals to the tiniest of details. They must be able to clearly communicate and defend those choices, while recognizing and correcting choices that do not work for the specific intent of a particular production of a particular script."

(Allen) Most prominently known for making these choices are the costume, set, and lighting designers, who collaboratively craft their elements to support the playwright vision. Theatrical designers are highly educated and skilled, and most commonly have MFA degrees in their specific genre. To truly understand theatre design intellectual property, we must first fully understand the process a theatrical designer completes with each new work.

After being hired for a specific theatrical production, designers often read the script five to ten times to fully understand the content. These reads include extensive note-taking, annotation, and character development work. While this may seem like a daunting task in and of itself, it is only the beginning of theatrical design work. Designers then move into the preliminary stages of planning and initial design concepts. Often, this includes preparing a design package to pitch to the director and the creative team. If the design pitch is well received, the designer will then move into fully detailing the show design and preparing for a full build and realization. However, if the director is on a different page or the creative team decides to move the show in another direction, the designer must go back to the drawing board. Often, this means there is no additional compensation for the design pitch that was unsuccessful and a crunched timeline that forces extreme work hours onto the designer to meet deadlines. After a designer hands off the finalized design package, their work is still not over. Most designers work closely with the build team to ensure that the integrity of their design remains throughout the build process. When the show begins finalized dress rehearsals, the designer must watch with a tedious eye to make any final adjustments before the show mounts. This process in total can range in the timeline from a couple of short weeks to larger-scale new works requiring years. Wages are often a flat rate and do not account for the total hours worked. And after a show mounts, the designer has no further opportunities for reward, even if a show sees massive box

office success. According to salary.com, "A typical theatrical set designer can see a range of anywhere from \$34,034 to \$72,717 a year with a median yearly income of \$51,899." (Unlock the Power of Pay) This rate leaves many designers in a financial category that would prohibit them from access to highly skilled professionals if lawsuits over copyright infringement were necessary.

Does this flat rate salary directly classify theatre artists under work for hire agreements? This question has been highly debated within the artistic community for reasons ranging from intellectual property concerns to adequate payment representations. The Supreme Court sets forth two ways for work for hire. One is that the work is prepared within the scope of their employment. (Womack) However, this is problematic in classifying theatrical designers because they are not hired as typical employees, seeing as their work is complete once a theatrical production opens. This agreement would require the producer to execute a written document with each designer personally, assigning them as a direct employee of the producer. The second classification for a work for hire is that both parties have agreed in a signed writing. (Womack) This option is more feasible for theatre designers, yet many designers avoid signing such contracts with fear of not receiving adequate compensation upon signing. Agreeing to act under a work for hire order would guarantee that the theatrical designer would sign over all rights to any work created within the contract. The company would then be free to replicate, sell, or alter any designs after the end of the contract. Arguably, leading to the complete loss of artistic integrity of the original design. Improvisation utilizes the work for hire model by transcribing scripts of rehearsal processes. This transcription allows the company full copyright ownership after the process ends. Collaborators are paid on a royalty basis, depending on their contribution level and material success. (Womack) While the work for hire model has proven to be successful within

the field of improvisation, theatrical designers are less accustomed to relinquishing ownership of their work.

The line most often argued in disputes surrounding theatrical design ownership is the line between inspiration and copying. Theatre is known as a collaborative art form, where many theatre artisans work together to create a singular whole, drawing on shared events, places, clothing, and experiences to create a new work. All theatrical designers work from inspiration when tackling any design. In fact, as a current theatrical design student, I have engaged with many lectures revolving around the preliminary stages of gathering inspiration and utilizing it to inform finalized design processes. But when does gathering inspiration to influence step over the line to become direct copying of another artist? This debate has long been disputed within the theatrical community. Most theatre practitioners take a firm stance on very distinct sides of the issue. One side of the dispute believes that inspiration drives all forms of theatre. In truth, what more is theatre creation than the imagination of experiences that draw on personal ties to inform decisions? Art is meant to be shared. If we draw on the principle that we are all imitators of our own previous life experiences, there is no original work. Thus, there is no copying within theatre design, only inspiration. However, in terms of copyright law in literature cases, a direct duplication without personalization is considered to be unlawful and infringement upon original copyright law. (US Legal) Admittedly, there is an intersection to be drawn between inspiration and direct replication within a theatrical work. Notably, in the past, we have seen many theatre disputes about how defined this line may be.

In terms of who is doing the copying when it comes to theatrical design ownership, we find examples of direct replications within larger regional theatres. Regional theatres are professional or semi-professional theatres that produce their own seasons, relying on box office,

donations, and grants to remain in operation. Many regional theatres are known for designing seasons based on new theatrical rights of major Broadway hits that have just entered the market. Drawing on the inaccessibility of Broadway, many regional theatres work to replicate the "Broadway experience" for patrons in their respective geography and demographic. This reliance on replication often leads regional theatres to seek to duplicate the experience even down to the original stage direction, choreography, set, costume, and lighting design. This reputation has rubbed original Broadway designers the wrong way for many generations. Many Broadway designers have come to view regional theatres as nothing more than the fabricators of a cheaper Broadway production. However, regional theatres have fought back, declaring that their representation is nothing more than an opportunity for the original work to reach a greater audience.

The most known case against regional theatres and theatrical design ownership is the battle between the creative team of the original Broadway production of *Urinetown: The Musical* and The Carousel Dinner Theatre in Akron, Ohio. (*Urinetown*, 2001, Greg Kotis) In 2006, the director, choreographer, set, lighting, and costume designers of the original Broadway production banded together to file a copyright infringement case against The Carousel Dinner Theatre for direct replication of their original production of *Urinetown: The Musical*. (*Urinetown*, 2001, Greg Kotis). Assisted by lawyer Ronald H. Shechtman, they made specific claims that production rights to the musical did not include reproductions of creative decisions made by the original team. (Robertson) The Broadway team demanded a detailed account of all revenues earned from the production, from which an "appropriate license fee and damages" would be determined. While not all of the original Broadway designers had obtained copyright at the time of this incident, the lighting designer possessed copyright. The copyright for direction

and costume design had been properly filed at this time and were under review. (Womack) Resolving in 2007, the Carousel Dinner Theatre agreed to pay the Broadway team an undisclosed amount. (Jones) This closing of this case leaves many theatrical designers even more unsure of their legal rights. While the original design team did receive compensation, it is uncertain whether other lawsuits would receive similar in the future. Since there was no official court verdict, the confusion with theatre design ownership was only amplified. If handled within the courts, this case could have become the precedent for all future lawsuits. However, Broadway creative teams feel undermined by the lack of transparency within the closing of this case.

However, what about characters who must look a certain way due to dialogue detailing their appearance or a script that is period and location-specific. For example, in producing *Miss Saigon*, the costume designer would have no other choice than to dress all the soldiers in traditional 1970 Viet Cong Communist uniforms to uphold the playwright's intentions of the storyline. (*Miss Saigon*, 1989, Alain Boublil and Claude-Michel Schönberg) However, how far do the period and location cover? Are all of Chris' costumes also covered in the fact that they must be identical to the original Broadway production to uphold the storyline? Or is only his uniform covered under that clause? If so, what ownership does the original Broadway costume designer, Suzy Benzinger, hold over the design of the show? Can any theatre with the rights of *Miss Saigon* feasibly replicate Benzinger's work without accreditation with protection from the script intentions? Many theatrical copiers often use playwright intentions as a way of not giving due credit. We see this in legal battles against the use of original stage directions. Most often referenced in cases of stage directions is Gerald Gutierrez for his copyright certificate for his stage directions in the Broadway revival, *The Most Happy Fella*. (*The Most Happy Fella*, 1956,

Frank Loesser) While Gutierrez did receive financial compensation for his copyright claim of original stage directions, it is agreed that if the case had settled within the court, he would have lost. (Freemal) While most theatrical designers do acknowledge script specifics as a legitimate cause for duplication, an entire design duplication could rarely claim playwright intentions.

While the standard for copyright infringement of theatrical designs is not precedent, many cases entered into the court of law to settle a dispute. One of the most disputed theatre design ownership cases came about in 1982 when the *Cats* Company commissioned makeup designer Candace Carell to work alongside the set and costume designer, John Napier, to design makeup for the Broadway Production. (*Cats*, 1980, T. S. Eliot) Makeup designs were supposedly created solely by Carell, crediting her as the sole makeup designer in the Playbill, which read “Makeup by Candace Carell”. Carell went on to note that she gave Napier’s ideas “full expression” in a tangible form. The work that Napier contributed should hold no copyright on her work. Several disputes and years of controversy prevented Carell from utilizing her work on *Cats* in her portfolio to gain other artistic opportunities from its success. Finally, in 1990, Carell filed and received copyright registration for her original drawings and designs. But this decision was not without controversy from Napier himself, who contacted the Copyright Office in a request of canceling Carell’s copyrights, claiming that the majority of the work was his. After much debate, in 1994, The Copyright Office reached out to Napier to inform him of its refusal to cancel copyrights because Carell directly rejected the co-authorship of any of the designs. While Carell filed many suits for Napier’s continued unauthorized use of her design work in the years following the original, no grants of compensation were awarded to her by the courts. (Womack) This case adds to the messiness of theatrical design ownership by emphasizing the collaborative nature of the design process. How will legislation be able to decide who owns a larger

percentage of the design intellectual property? This topic has been highly debated with theatrical communities and serves as yet another hurdle to theatre design copyright.

Alongside the progression of technology both outside and within the theatre has come the accessibility of theatrical designs online. With professional photography now becoming a standby in theatrical productions, designers have more access to their finalized design than ever before. The advancement of self-creation websites has led to an influx of theatrical design portfolios switching from a physical book into a digital website that is easily accessed. While this accessibility has aided designers in their ability to share previous work with future employers, it has also led to increased theatrical design copyright abilities. With a simple google search, I have millions of images from any original Broadway show that I may be producing. I could completely replicate a Broadway design and market it as my own to any theatre that may be willing to hire me. This accessibility has made the protection of theatrical design increasingly tricky.

On top of a simple google search for images, many designers choose to sell their original sketches, renderings, or photographs to raise money for themselves or other causes. This sell directly releases its content into the market for copying and direct reproduction. The Broadway Design Exchange is a website that provides a marketplace for Broadway designers to sell original renderings, artwork, models, props, costumes, and more. (Broadway Design Exchange) The purchase of these items does not come without a significant cost. However, nothing would stop me as a designer from accessing the free website and taking screenshots of any of the work, and replicating it from there. While many designers see the Broadway Design Exchange as an opportunity for their renderings to become a treasured collector item, many others directly oppose this site and what it stands for. How are any theatrical designers ever going to make a



case for copyright infringement when others are posting their work freely and opting to sell it as artwork?

Even though regional theatres make up a large percent of theatrical design copyright infringement cases, they are not the only place we often see plagiarism. High school theatres also serve a prominent role in the duplication of theatre designs. We often characterize high school theatre as an underfunded, underappreciated art form that sees the creation of up and coming artists in the field. Many Broadway designers are much less concerned with copyright infringement on an educational level. However, many prominent theatrical high schools are turning a profit by duplicating designs from Broadway productions or even regional works. Many high school theatres would claim their copyright infringement as an accidental or unintentional violation due to a lack of resources available and a lack of funding to hire individual designers.

While cases against regional theatres may seem to take more precedence in court, what is the future generation of artists learning from this undisclosed practice of theatrical copyright in their high schools? Arguments against enforcement of theatre design copyright in schools often cite educational use as a way around necessary accreditation or payment. As convenient as it may be for high school theatre practitioners to duplicate Broadway productions, we must change the narrative of acceptance of theatrical copyright infringement within young artists. Erik Viker, an associate professor at Susquehanna University, recommends that “Students should be directed to several reputable citation resources about plagiarism approved by their instructors, such as citation guides provided by university libraries, to ensure that the students are fully informed about how to properly give credit when it is due.” (Viker) In addition to resources, students learn by example. Therefore, all theatre educators must be putting their best foot forward to uphold

theatrical copyright and engage in meaningful conversations with students about theatre design and inspiration.

Do we have to learn to completely dismiss copyright within the theatre to have a fully collaborative experience? Many theatrical designers would push back on this dismissal as a cop-out to the larger discussion that needs to happen. Avoiding the inclusion of copyright in theatrical design ownership only creates more problems within the industry. In 2015, The International Alliance of Theatrical Stage Employees (IATSE) signed on to letters to Congress affirming core copyright principles in an effort to provide additional support for the current copyright system. These letters discuss the necessity of a copyright system, creativity, innovation, and technology. (Loeb) While it is still uncertain five years later whether the additional support of IATSE strengthened copyright law for theatrical designers, it is worth mentioning that union leaders are taking the issue seriously.

Theatrical designers need more support from arts administrators than they have received in the past. This support should include new legislation that details theatre design copyright, with individualized attention to each form of theatrical design. Legislators should work alongside prominent theatrical designers in writing new copyright laws and should include current designers in as much of the process as possible. The International Alliance of Theatrical Stage Employees (IATSE) should be in the conversation and partnered with to best meet the needs of unionized designers. Action must happen in support of theatrical design as an integral part of a theatrical production experience. We must advocate for more designers to receive adequate pay and accreditation in original works and duplications that may follow. Regional theatres should seek partnerships with original Broadway designers by utilizing their designs but providing Playbill credit and compensation, even if at a lower rate. High school theatres should work to

create art freely without duplication and have serious conversations about the consequences of theatrical copying. Design packages are what many current Broadway designers are now advocating for. This package would come alongside rights to the show, with prices for each design element. A design package would allow for regional and high school theatres alike to duplicate the “Broadway experience” without infringing upon copyright law. Design packages would incentivize designers by continuing to pay them a royalty each time their design was used. For theatrical ownership and copyright to take a step in representation, we all must do our part. Theatre change happens as a unified whole, actors, designers, technicians, directors, producers, and arts administrators all working towards the same cause.

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