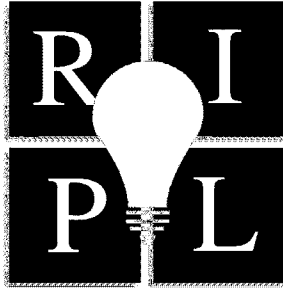


THE JOHN MARSHALL REVIEW OF INTELLECTUAL PROPERTY LAW



MAKING A FEDERAL CASE FOR COPYRIGHTING STAGE DIRECTIONS: *EINHORN V. MERGATROYD PRODUCTIONS*

JENNIFER J. MAXWELL

ABSTRACT

To date, no court has ruled on whether stage directions are copyrightable. *Einhorn v. Mergatroyd Productions* is the most recent case to directly address the copyrightability of stage directions and blocking scripts. However, the court was unable to decide the copyright issue because both parties to the suit failed to address a series of questions necessary to the resolution of the claim. Nonetheless, the *Einhorn* decision gives hope to future directors because it highlights the issues crucial to proving a case of copyright infringement of stage directions. 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 á faire will limit the protection granted to stage directions, thereby ensuring the promotion and advancement of the arts.

Copyright © 2008 The John Marshall Law School



Cite as Jennifer J. Maxwell, *Making a Federal Case for Copyrighting Stage Directions: Einhorn v. Mergatroyd*, 7 J. MARSHALL REV. INTELL. PROP. L. 393 (2008).

MAKING A FEDERAL CASE FOR COPYRIGHTING STAGE DIRECTIONS:
EINHORN V. MERGATROYD PRODUCTIONS

JENNIFER J. MAXWELL*

“Fairyland was in turmoil.”¹

INTRODUCTION

In October 2004, during a rehearsal for the production of the play *Tam Lin*, a conflict between the stage director, the producer, and the play’s author almost ruined the show.² The battle that ensued developed into the federal case of *Einhorn v. Mergatroyd Productions*.³

The stage director, who had authored the blocking script and all the stage directions for the play, was fired after a conflict with the producer and playwright of *Tam Lin*.⁴ The stage director later sued the producer and the playwright, claiming that their further use of his blocking and choreography scripts was copyright infringement.⁵ The copyright issue raised by the lawsuit is intriguing because stage directions are not specifically protected in the Copyright Act of 1976, and no federal judge has ever ruled on the issue of whether stage directions are copyrightable.⁶

Part I of this article discusses *Einhorn* and concepts necessary to understand stage directions. In addition, Part I discusses the relevant copyright laws. Next, Part II analyzes the feasibility of copyright protection of stage directions in light of *Einhorn*. Finally, Part III advocates that courts should grant copyright protection to stage directions, if the work fulfills the requirements of the Copyright Act.

* J.D. Candidate, January 2009, The John Marshall Law School. B.A. English Literature and Writing, Loras College, May 2004. I would like to thank the editorial staff of THE JOHN MARSHALL REVIEW OF INTELLECTUAL PROPERTY LAW, especially my editor, Jennifer Gregory, for all of their help. Finally, I would like to thank my family and friends for their support.

** Available at www.jmripl.com

¹ Jesse Green, *THEATER: Exit, Pursued by A Lawyer*, N.Y. TIMES, Jan. 29, 2006, § 2, at 1.

² *Id.*; see also Tam Lin Online, <http://www.tamlin-online.com> (last visited Feb. 22, 2008) (describing the play, *Tam Lin*, an Off Off Broadway play, and the history of performances).

³ 426 F. Supp. 2d 189, 193 (S.D.N.Y. 2006) (detailing Einhorn’s claims, which included copyright infringement, breach of contract, and violations of the Lanham Act and New York law), *corrected by* 79 U.S.P.Q.2d 1146 (S.D.N.Y. 2006) (making no changes to the copyright infringement analysis, however).

⁴ Green, *supra* note 1, at 1.

⁵ Second Amended Complaint at ¶ 28, *Einhorn*, 426 F. Supp. 2d 189 (No. 05 Civ. 8600).

⁶ See Copyright Act, 17 U.S.C. § 102 (2006) (listing the categories of works of authorship, which do not include stage directions); see also Green, *supra* note 1, at 6 (discussing two previous cases involving directorial copyright, both of which settled without resolving the stage direction copyright issue).

I. BACKGROUND

Einhorn is the first case to directly address the copyrightability of stage directions and blocking scripts.⁷ The court addressed the issue, but did not make a final ruling on it.⁸ This section begins with the background of the *Einhorn* case. The role of directors and stage directions in the overall production of a play are also discussed. In addition, the controlling features of copyright law and the different types of copyright ownership are outlined to clarify the copyright challenges faced by stage directors.

A. *Einhorn Fails to Make a Case*

Einhorn's federal copyright case began in August of 2004, when Nancy McClernan, the author of *Tam Lin* ("the Play"), and the producer, Jonathon X. Flagg, asked Edward Einhorn to direct the Play's rehearsals and create choreography and blocking for the Play.⁹ Einhorn accepted the offer and began coaching the cast, working with the set designers and creating the choreography and blocking script in exchange for a fee of one thousand dollars.¹⁰ In October 2004, the day before the Play's opening performance, McClernan and Flagg fired Einhorn.¹¹

The show went on without Einhorn.¹² The Play opened and ran its scheduled performances using Einhorn's blocking and choreography script.¹³ Despite the Play's further use of Einhorn's work, Einhorn did not receive the one thousand dollar fee nor did he receive any other compensation or credit.¹⁴ In April of 2006, Einhorn filed a lawsuit alleging several actions, including the claim of copyright infringement for the Play's use of his blocking and choreography script.¹⁵

In the complaint, Einhorn alleges that he "authored an original blocking script for [the] stage performance of the Play" and the blocking script "included elements of choreography for dance, fight and black-light puppetry."¹⁶ Einhorn registered the blocking and choreography script he created for the Play with the Copyright Office on

⁷ See *Einhorn*, 426 F. Supp. at 196.

⁸ See *id.*; Green, *supra* note 1, at 6 (discussing *Einhorn* and two previous "prominent cases involving charges of directorial plagiarism"). The first case, involving director Gerald Gutierrez's work in *The Most Happy Fella*, was settled before trial and the copyright issue was not directly addressed by the court. *Id.* The second case, involving director Joe Mantello's work in *Love! Valour! Passion!*, settled partway through discovery. *Id.* The judge's order denying the defendant's motion to dismiss implied that he was "unconvinced by [defendant's] argument that stage directions are inherently not copyrightable." *Id.*

⁹ Second Amended Complaint, *supra* note 5, ¶ 11.

¹⁰ *Id.* ¶ 13, 15. The complaint also alleges that Flagg and McClernan told Einhorn to start directing the play and that a written contract would be entered into a few days later. *Id.* ¶ 14.

¹¹ *Id.* ¶ 16.

¹² Green, *supra* note 1, at 1. McClernan and Flagg then hired an assistant who received the program credit for direction. *Id.* McClernan, Flagg, and the new assistant deny using Einhorn's staging directions, claiming they restaged most of the play. *Id.*

¹³ *Einhorn*, 426 F. Supp. 2d at 192.

¹⁴ Second Amended Complaint, *supra* note 5, at ¶ 17, 32.

¹⁵ *Einhorn*, 426 F. Supp. 2d at 196. In the suit, Einhorn also alleged breach of contract because McClernan and Flagg refused to pay Einhorn the \$1,000 fee. *Id.* at 193.

¹⁶ Second Amended Complaint, *supra* note 5, ¶ 21, 22.

December 10, 2004, as “a work of Performing Arts.”¹⁷ The Certificate of Registration included a copy of the play’s script, containing stage directions enclosed in parentheses and italicized interlineations.¹⁸ The interlineations made up Einhorn’s blocking script and were the basis of the copyright infringement claim.¹⁹

However, the papers before the court failed to address a series of questions necessary to the resolution of the copyright infringement claim.²⁰ The questions that both parties failed to address included: the extent to which Einhorn’s contributions were fixed in tangible form, the applicability of the doctrine of *scenes a faire*,²¹ the scope and effect of the certificate of registration, the distinction between the blocking script and the depiction of movements on stage, and Einhorn’s alleged contributions.²² In April of 2006, Judge Kaplan held he was incapable of making an informed decision whether Einhorn’s blocking script was copyrightable based on the information filed by the plaintiff.²³ Therefore, the judge granted the defendant’s motion to dismiss the copyright infringement count of Einhorn’s complaint.²⁴

In the end, Einhorn and his attorney brother “made a federal case” out of a dispute over one thousand dollars, which was the amount Einhorn was initially offered as compensation for his contributions.²⁵ Nonetheless, the significance of the *Einhorn* case is that even though Einhorn was denied relief, the court’s decision suggests stage directions may be granted copyright protection.²⁶ In light of the outcome of *Einhorn* and without a definitive statement made by any federal court on the issue, the question remains: can and should stage directions be protected by copyright? This question cannot be answered without an understanding of the roles and contributions of directors, playwrights and producers.

¹⁷ *Id.* (stating Einhorn’s blocking and choreography script received Registration No. PA 1-254-494).

¹⁸ *Einhorn*, 426 F. Supp. at 192–93.

¹⁹ *Id.*

²⁰ *Id.* at 196.

²¹ The doctrine of scenes á faire refers to “incidents, characters or settings which are as a practical matter indispensable, or at least standard, in the treatment of a given topic.” *Atari, Inc. v. N. Am. Philips Consumer Elecs. Corp.*, 672 F.2d 607, 616 (7th Cir. 1982). The doctrine “defines the contours of infringing conduct. Labeling certain stock elements as ‘scenes á faire’ . . . states that similarity between plaintiff’s and defendant’s works that are limited to hackneyed elements cannot furnish the basis for finding substantial similarity.” 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.03[B][4] (2007) (footnotes omitted).

²² *Einhorn*, 426 F. Supp. at 196.

²³ *Id.*

²⁴ *Id.* at 197.

²⁵ *Id.* at 191 (stating that “making a federal case” out of something is to express the sentiment that “someone is blowing something out of proportion”).

²⁶ *Id.* at 196 (suggesting that if Einhorn would have addressed Judge Kaplan’s questions, Judge Kaplan may have granted copyright protection in the stage directions and blocking script).

B. Directors, Playwrights, and Producers, Oh My!

Typically the playwright, as the author of an original play, has always enjoyed the protection of copyright law.²⁷ However, “no legal finding has yet established that a copyright for staging exists.”²⁸ Therefore, directors have relied on contract law to protect their work.²⁹ Producers not only bring together the financial and artistic resources that are necessary to create a production, but they may also be responsible for the original idea for a production.³⁰ The controversy surrounding the possibility of a director’s copyright results from the different, but essential, contributions made by the director, the producer, and the playwright.³¹

“Directing is part of that complex of seeing and doing that makes theatre.”³² Directors create their stage directions by adding notes to the playwright’s script that convey information not explicit in the dialogue or text of the play.³³ As such, stage directions often include blocking, or the movement of actors on stage.³⁴ “Exit through door” is one of the simplest ways of illustrating blocking, however, blocking can be very complex as infinite possibilities of movement exist.³⁵ Plays consist of a constant flow of bodies from place to place and from position to position.³⁶ How the actors are placed, the position of their bodies and the duration they remain in that position creates pictures that change throughout the play.³⁷

Stage directions are not specifically enumerated as a protectable work of authorship in the Copyright Act of 1976.³⁸ However, many directors believe their

²⁷ THE CAMBRIDGE GUIDE TO THEATRE 243 (Martin Banham ed., Cambridge University Press 1995).

²⁸ Green, *supra* note 1, at 6.

²⁹ *Id.* The “contractual work around” avoids the copyright issue by having the directors make contracts and agreements with the authors for a small participation in the subsidiary rights. *Id.*

³⁰ THE CAMBRIDGE GUIDE TO THEATRE, *supra* note 27, at 884.

³¹ Beth Freemal, *Theatre, Stage Directions & Copyright Law*, 71 CHI.-KENT L. REV 1017, 1017 (1996).

³² THE CAMBRIDGE GUIDE TO THEATRE, *supra* note 27, at 297; *see also* Freemal, *supra* note 31, at 1018 (explaining that a director envisions the concept for a production and is responsible for communicating that vision).

³³ Talia Yellin, *New Directions for Copyright: The Property Rights of Stage Directors*, 24 COLUM.-VLA J.L. & ARTS 317, 329–30 (2001).

³⁴ *Id.* Generally, stage directions are concerned with stage effects, scenery, and the actors’ movements. *Id.* at 330. The actors’ movements are all relative to the position of the actor in relation to the audience. *Id.* For example, as an actor moves towards the audience this is said to be “downstage,” where as “upstage” is movement away from the audience. *Id.*

³⁵ LISA FRIEDMAN, BREAK A LEG! 104 (Workman Publ’g Co. 2002) (describing basic blocking including exits and entrances); *see* Edward Einhorn, *A Case for Stage Director’s Copyright*, <http://www.untitledtheater.com/DirectorsCopyright.htm> [hereinafter *Case for Copyright*] (stating that the more characters that are on stage, the more possibilities there are for blocking scripts).

³⁶ *Case for Copyright*, *supra* note 35.

³⁷ *Id.*

³⁸ *See* Copyright Act, 17 U.S.C. § 102(a) (2006) (listing categories of original works of authorship that are protected by copyright, which include literary works, musical works and accompanying words, dramatic works and accompanying music, pantomimes and choreographic works, pictorial, graphic, and sculptural works, motion pictures and audiovisual works, sound recordings, and architectural works).

stage directions, like choreography, should be protected under copyright law and have registered their stage directions at the Copyright Office.³⁹

Conversely, playwrights fear that if stage directors are granted intellectual property rights in stage directions, the legal partnerships between playwrights and directors could become potentially “paralyzing to the playwright’s work.”⁴⁰ The president of the Dramatists Guild of America asserts that recognition of a director’s copyright would limit the playwright’s ability to control the work he creates.⁴¹ Playwrights believe that a director’s copyright would act like a lien on their plays, which could have an adverse effect on theater productions.⁴²

The possibility of directors obtaining copyright protection creates the most potential tension between playwrights and directors.⁴³ However, as illustrated by *Einhorn*, producers are in the midst of this controversy as they too may be sued for copyright infringement for their use of a director’s work in their productions.⁴⁴ The collaborative nature of the theater fuels the controversy created by the possibility of a stage director’s copyright.⁴⁵ While the theater industry has tried to “work around” the copyright issue with contract law, stage directions should simply be copyrightable if they fulfill the requirements of the Act.⁴⁶

C. Copyright Law: How Stage Directions Fit into the Picture

According to the Copyright Act of 1976, the two fundamental requirements for copyright protection are an original work of authorship and fixation of the original work in a tangible form.⁴⁷ While the Copyright Act does not define “original works of authorship,” it does make clear that copyright protection of an original work extends only to the form in which the author expresses the concepts, not the underlying ideas

³⁹ Yellin, *supra* note 33, at 318.

⁴⁰ *Id.* (quoting Robert Hoffer, *Directors, Dramatists Draw Swords on Rights*, VARIETY, Aug. 30, 1999, at 161) (citations omitted).

⁴¹ Green, *supra* note 1, at 1; *see also*, The Dramatists Guild of America, <http://www.dramatistsguild.com> (last visited Feb. 26, 2008). The Dramatists Guild of America, a professional association, advances the interests of playwrights, composers and lyricists writing for the living stage. *Id.*

⁴² Green, *supra* note 1, at 1.

⁴³ *Id.* at 6.

⁴⁴ Second amended complaint, *supra* note 5, ¶¶ 2, 9 (naming the producer as a party to the lawsuit for the unauthorized use of Einhorn’s work in the performances); *see also Case for Copyright*, *supra* note 35 (stating that “director’s copyright issue is primarily a producer-director question, covering instances where a director is not compensated for his or her intellectual property contribution by the producer”).

⁴⁵ Donald Nevin, *No Business Like Show Business: Copyright Law, The Theater Industry, and the Dilemma of Rewarding Collaboration*, 53 EMORY L.J. 1533, 1534 (2004).

⁴⁶ Green, *supra* note 1, at 6; *see also* The Society of Stage Directors and Choreographers, www.ssdcc.org/about.php, (last visited Feb. 26, 2007). The Society of Stage Directors and Choreographers is an independent labor union that protects the interests of stage directors throughout the United States. *Id.* Because the law has traditionally not recognized the intellectual property rights of directors, the union encourages its members to enter into special contracts and collective bargaining agreements as a means of protecting their property rights, rights of first refusal, and electronic rights. *Id.*

⁴⁷ Copyright Act, 17 U.S.C. § 102(a) (2006).

revealed by the work.⁴⁸ The requirement of an “original work” has been held to mean that an author must have added something that is more than “a mere trivial variation” and is something “recognizably his own.”⁴⁹

The fixation requirement in the Act is stated broadly, as a means of avoiding unjustifiable distinctions which “depend upon the form or medium in which the work is fixed.”⁵⁰ The legislative history of the Act indicates that the intent was to protect any original work “embodied in a physical object in written, printed, photographic, or other sure form.”⁵¹

Directors seeking copyright protection for their work need to be aware of the different types of ownership under the Copyright Act because their rights will vary with different types of ownership. According to the statute, the copyright in a work initially vests in the author.⁵² For example, the playwright is the copyright owner of an original play because he or she wrote the play.⁵³ Copyright owners have the exclusive right to reproduce, prepare derivatives, distribute copies by sale, perform or display the work.⁵⁴ Therefore, a playwright, as the copyright owner, has the right to perform the play, to publish the play in the original language, to publish a translation of the original play, to turn the play into a film, and so on.⁵⁵

The Copyright Act allows ownership of a copyright to be “transferred in whole or in part by any means of conveyance or by operation of law.”⁵⁶ Any transferee of the copyright is entitled to all of the protection and remedies accorded to the copyright owner.⁵⁷ Just as copyright ownership can be transferred; it can also be shared with another person.⁵⁸ A joint work is defined as “a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.”⁵⁹

⁴⁸ H.R. REP. NO. 94-1476, at 51 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5664. The phrase “original works of authorship” was purposely left undefined so as “not to interfere with the changing standard of originality established by the courts under the present copyright statute.” *Id.*; see *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 556 (1985) (holding that an author may not copyright underlying ideas or facts).

⁴⁹ *Alfred Bell & Co. v. Catalda Fine Arts*, 191 F.2d 99, 103 (2d Cir. 1951).

⁵⁰ 17 U.S.C. § 102(a); see H.R. REP. NO. 94-1476, at 52 (explaining that the medium or form the work takes is irrelevant; it makes no difference whether it is words, numbers, notes, sounds, pictures, or if the work is embodied in a physical object in written, printed, photographic, or any other sure form).

⁵¹ H.R. REP. NO. 94-1476 at 52.

⁵² See 17 U.S.C. § 201(a).

⁵³ THE CAMBRIDGE GUIDE TO THEATRE, *supra* note 27, at 243.

⁵⁴ 17 U.S.C. § 106. The copyright owner, subject to sections 107 through 122, has the exclusive right to reproduce the copyrighted work in copies or phonorecords, prepare derivative works based on the copyrighted work, and distribute copies or phonorecords of the copyrighted work to the public. *Id.* In the case of literary, musical, dramatic, and choreographic works, pantomimes, motion pictures and other audiovisual works, the owner may also publicly perform or display the copyrighted work. *Id.*

⁵⁵ THE CAMBRIDGE GUIDE TO THEATRE, *supra* note 27, at 243.

⁵⁶ 17 U.S.C. § 201(d)(1).

⁵⁷ *Id.* § 201(d)(2).

⁵⁸ *Id.* § 201(a) (stating that the authors of a joint work are co-owners of the copyright in the work).

⁵⁹ *Id.* § 101; see *Picture Music, Inc. v. Bourne, Inc.*, 314 F. Supp. 640, 647 (S.D.N.Y. 1970). The contributions must be “substantial and significant” to satisfy a finding of joint ownership. *Id.*

Alternatively, copyright ownership can belong to someone other than the original author if it was a work made for hire.⁶⁰ For example, in the case of a work made for hire, the employer is the copyright owner, not the employee hired to create work.⁶¹

A work may also be copyrightable if it is determined to be a “derivative work,” a work based on a pre-existing work or works.⁶² The author of a derivative work has a copyright only in the material he contributed to the derivative work and not the preexisting material incorporated in the work.⁶³ Regardless of the type of copyright ownership granted, copyrighted stage directions will be subject to appropriate limitations.

D. Copyright Protection Has Its Limits

The exclusive rights of copyright protection can be limited by the doctrine of “fair use,” which allows the use of copyrighted material without the owner’s permission as long as the use is reasonable.⁶⁴ The purpose of the fair use doctrine is to avoid rigid applications of the copyright laws that could repress the creativity that copyright law is supposed to promote.⁶⁵

The court looks at four factors in determining whether the use of a copyrighted work is fair use: (1) the purpose of the use; (2) the nature of the copyrighted work; (3) the amount and substance of the portion used in relation to the whole copyrighted work; and (4) the effect of the use on the potential market value of the work.⁶⁶ The four statutory factors of fair use should not be treated in isolation.⁶⁷ All of the factors should be explored and the results should be weighted together “in light of the purposes of copyright.”⁶⁸ Even if stage directions are found to be copyrightable, the

⁶⁰ *Id.* § 101. A work made for hire is a work prepared by an employee within the scope of his or her employment. *Id.* If the parties expressly agree in a signed writing that the work shall be considered a work made for hire, a work for hire can also be commissioned for use as a contribution to a collective work, as part of a motion picture, translation, supplementary work, compilation, instructional text, etc. *Id.*

⁶¹ *Id.*; see also THE CAMBRIDGE GUIDE TO THEATRE, *supra* note 27, at 242.

⁶² 17 U.S.C. § 101. Pre-existing works would include: translations, musical arrangements, dramatizations, motion picture versions, sound recordings, art reproductions, abridgments or any other form in which a work may be recast, transformed, or adapted. *Id.* In addition, a derivative work would be one that consists of editorial revisions, annotations, elaborations, or other modifications which, when taken as a whole, are representative of an original work. *Id.*

⁶³ *Id.* § 103(b). Copyright in a derivative work “does not imply any exclusive right in the preexisting material nor it does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the preexisting material.” *Id.*

⁶⁴ *Rosemont Enters., Inc. v. Random House, Inc.*, 366 F.2d 303, 306. (2d Cir. 1966); see also 17 U.S.C. § 107. A copyright is not infringed if the work is reproduced without permission in copies or phonorecords for purposes such as teaching, scholarship, research, news, reporting, comment or criticism. *Id.*

⁶⁵ *Iowa State Univ. Research Found., Inc. v. Am. Broad. Co., Inc.*, 621 F.2d 57, 60 (2d Cir. 1980).

⁶⁶ 17 U.S.C. § 107; see also *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577–90 (1994) (analyzing the four factors of fair use).

⁶⁷ *Campbell*, 510 U.S. at 578.

⁶⁸ *Id.*

fair use doctrine would appropriately limit the scope of that protection, ensuring that new productions are not discouraged.⁶⁹

Like fair use, the Merger Doctrine can also limit copyright protection. The Merger Doctrine applies when the idea and the expression of the idea are inseparable.⁷⁰ The Merger Doctrine does not allow copyright protection to be granted in situations where there is only one way or a very limited way of expressing an idea.⁷¹ The doctrine is used as a means of preventing the exhaustion of all possibilities of future use of the substance.⁷²

The doctrine of scenes á faire is similar to the Merger Doctrine in that it limits the scope of copyright protection.⁷³ However, scenes á faire is more relevant to stage directions than the Merger Doctrine because scenes á faire specifically deals with dramatic conventions.⁷⁴ The doctrine of scenes á faire refers to incidents, settings, or characters that are so standard in the treatment of a given topic that they should not be protected by copyright laws.⁷⁵ Therefore, if stage directions are held to be copyright protected, the application of the doctrines of fair use, merger, and scenes á faire would effectively limit the protection to enable the continued promotion of new productions.

As previously stated, stage directions are not specifically included in the categories of protected works of authorship in the Act.⁷⁶ However, the list is “illustrative and not limitative” and a court has not yet made a definitive ruling on the issue.⁷⁷ Therefore, if stage directions can be shown to either fulfill the copyright requirements or fit into one of the enumerated categories, such as choreography or dramatic works, they should be copyrightable.⁷⁸

⁶⁹ Yellin, *supra* note 33, at 338.

⁷⁰ 2 WILLIAM J. PATRY, PATRY ON COPYRIGHT § 4:28 (2007). The Merger Doctrine involves the application of the idea/expression dichotomy. *Id.* “Copyright does not preclude others from using the ideas or information revealed by the author’s work.” *Id.* § 4:31. Anyone can use the ideas and concepts contained in a copyrighted work so long as he does not copy the author’s form of expression. *Id.*

⁷¹ Yellin, *supra* note 33, at 339.

⁷² *Morrissey v. Procter & Gamble* 379 F.2d 675, 678–79 (1st Cir. 1967). The court states that, in such circumstances of limited expression, it would not be accurate to say that any particular form of expression comes from the subject matter. *Id.* “However, it is necessary to say that the subject matter would be appropriated by permitting the copyrighting of its expression.” *Id.* at 679.

⁷³ 2 PATRY, *supra* note 70, § 4:28. The doctrine of scenes á faire is applicable to situations where the similarity of expression results from stock scenes or elements that necessarily flow from a common idea. *Id.*

⁷⁴ *Id.*

⁷⁵ *Kaplan v. Stock Mkt. Photo Agency, Inc.*, 133 F. Supp. 2d 317, 322–23 (S.D.N.Y. 2001).

⁷⁶ Copyright Act, 17 U.S.C. § 102(a) (2006).

⁷⁷ H.R. REP. NO. 94-1476, at 51 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5664 (stating that the seven categories listed in 17 U.S.C. § 102(a) provide the general scope of copyrightable subject matter and are flexible so that the courts are free from rigid or outmoded concepts of the scope of particular categories); *see Einhorn v. Mergatroyd Prods.*, 426 F. Supp. 2d 189, 196 (S.D.N.Y. 2006) (finding that the court was not in a position to make an informed judgment on the claim of copyrightability of stage directions because neither party addressed whether and to what extent the directions were fixed in tangible form), *corrected by* 79 U.S.P.Q.2d 1146 (S.D.N.Y. 2006) (making no changes to the copyright infringement analysis, however).

⁷⁸ *See* 17 U.S.C. § 102(a)(3)–(4); 2 PATRY, *supra* note 70, § 3:94 (stating dramatic works include operas; choral works; song lyrics; and plays prepared for stage presentation). *But see* 2 PATRY,

II. ANALYSIS

The court in *Einhorn* alluded to several factors that need to be addressed when making a claim that stage directions are copyrightable.⁷⁹ First, this section focuses on whether stage directions meet the requirements for copyright protection, focusing on the need for fixation in a tangible medium. Next, the copyright registration of stage directions is examined. In addition, this section considers whether stage directions and choreography are distinguishable. Finally, the applicability of scenes à faire and fair use are analyzed as possible limitations on copyright protection.

A. Fixation: Is Written Notation Enough?

In *Einhorn*, Judge Kaplan's decision stated that the parties should have addressed "whether, to what extent, and when Einhorn's alleged contributions were fixed in tangible form" if he were to decide on the copyrightability issue⁸⁰ because section 102(a) of the Copyright Act so requires.⁸¹ Einhorn appears to have satisfied the fixation requirement because he recorded his blocking contributions via the italicized interlineations he added to the playwright's script.⁸² However, the extent to which Einhorn's contributions were fixed is unclear because stage directions have essentially two forms—the written notation and the performance.⁸³ While blocking can be written down on paper, blocking must also be done in space, by way of actors interacting with a stage.⁸⁴

For example, Einhorn's initial written interlineations may have included only simple directions that he added before rehearsals, such as: "Tam Lin and MacDougal sneak off Stage Right just before Dunbar and Thompson enter Stage Left."⁸⁵ However, during rehearsal, Einhorn might have verbally added much more explicit directions regarding the actors' movements and interactions on stage.⁸⁶ The additional and more explicit verbal directions may or may not have been recorded on Einhorn's blocking script, which was registered with the Copyright Office.⁸⁷ This makes it extraordinarily difficult for a judge to determine the full extent of the stage director's contributions, much less his potential entitlement to copyright protection.

supra note 70, § 3:94 n.7 (stating that "simple directions for using scenery, stage setting, or ideas for sounds effects do not in themselves constitute dramatic content") (citations omitted).

⁷⁹ *Einhorn*, 426 F. Supp. 2d at 196 (listing the several factors that needed to be addressed for a copyright infringement claim of stage directions).

⁸⁰ *Id.*

⁸¹ 17 U.S.C. § 102(a).

⁸² *Einhorn*, 426 F. Supp. 2d at 193.

⁸³ Yellin, *supra* note 33, at 329–30 (asserting that written stage directions are a record or notation of the director's work and performance is the translation of those notations).

⁸⁴ FRIEDMAN, *supra* note 35, at 98.

⁸⁵ See *Tam Lin*, *supra* note 2 (listing Tam Lin and MacDougal as characters in the play).

⁸⁶ FRIEDMAN, *supra* note 35, at 107 (stating that during rehearsals directors give notes to the cast and keep notes in a notebook).

⁸⁷ See Yellin, *supra* note 33, at 327–28 (asserting that a prompt book is basically an annotated script describing the movement of the actors which is created during the rehearsal, thus fixing stage directions in a tangible medium of expression).

The judge's criticism of the lack of evidence presented in *Einhorn* suggests that a stage director could make a better case for copyright protection of stage directions.⁸⁸ Stage directors would be well advised to record all of their contributions, including verbal directions during rehearsals, in the prompt book or on the script as a means of evidencing the full range of their contributions from the first time they read the script all the way through to the last performance.

However, even with meticulous notations in the prompt book and substantive additions to the script, a lay person may still find it difficult to comprehend the extent to which a stage director's work has contributed to the overall performance.⁸⁹ Therefore, seeing the blocking performed via videotape could have helped Judge Kaplan to evaluate whether Einhorn's contributions fulfilled the fixation requirement of copyright and to what extent.⁹⁰

Nevertheless, a videotape of the performance alone should not fulfill the fixation requirement without any evidence of written recordation. For example, anyone watching a play may perceive that the character on stage is "powerful, without realizing he is positioned in the most compositionally powerful point on the stage."⁹¹ In such an instance, the judge or any lay person becomes so absorbed by the "illusion of theater" that they credit the actor rather than the staging.⁹² Therefore, the best way for a judge to evaluate whether stage directions should be entitled to copyright protection is by examination of both a videotape recording along with detailed written records of the director's contributions.⁹³ Preserving stage directions by written and visual recordation would help a judge determine whether a director's contributions were in fixed tangible form and it would also help the judge address the scope and effect of the certificate of copyright registration.⁹⁴

⁸⁸ *Einhorn v. Mergatroyd Prods.*, 426 F. Supp. 2d 189, 196 (S.D.N.Y. 2006) (suggesting that if Einhorn had shown fixation, he would not have had to address whether and to what extent his contributions were fixed in a tangible form), *corrected by* 79 U.S.P.Q.2d 1146 (S.D.N.Y. 2006) (making no changes to the copyright infringement analysis, however); *see also* Carrie Ryan Gallia, *To Fix or Not to Fix: Copyright's Fixation Requirement and the Rights of Theatrical Collaborators*, 92 MINN. L. REV. 231, 257-258 (2007) (arguing that a director's work should be copyrightable because "the proliferation of lawsuits in the past fifteen years proves the lie of the assertion that a director's work is not sufficiently fixed to be copied").

⁸⁹ *Case for Copyright*, *supra* note 35 (opining that an average person looking at blocking notations would have trouble envisioning the performance on stage as even an experienced director can have trouble doing the same).

⁹⁰ *Id.* *But see* Freemal, *supra* note 31, at 1029 (asserting that videotapes and prompt books create a permanent copy of the stage directions but do not fix the work). Freemal further argues that stage directions cannot be recreated without the text of the play so stage directions must be fixed in relation to the script. *Id.* However, this cannot be done without violating the rights of the script owner. *Id.* Thus, her article concludes that stage directions fail to satisfy the fixation requirement of copyright. *Id.*

⁹¹ *Case for Copyright*, *supra* note 35.

⁹² *Id.* *But see* Freemal, *supra* note 31, at 1027 (asserting that stage directions that do not originate with the playwright owe their origin to the actor, especially with the case when a director allows the actors to work through a scene to see how it plays out or an actor ignores the director's blocking). However, the textual analysis of this comment is based on situations where the actors do follow the director's stage directions.

⁹³ Yellin, *supra* note 33, at 328.

⁹⁴ *See Einhorn v. Mergatroyd Prods.*, 426 F. Supp. 2d 189, 196 (S.D.N.Y. 2006) (suggesting that the scope and effect of the certificate of registration need to be addressed because the copy of the work that was filed was only the alleged blocking script as distinguished from images of a

B. Copyright Registration and Stage Directions

Choreography receives copyright registration and protection so long as it is fixed in a written system of notation.⁹⁵ The choreographic notations are the basis for the “copyright in the movement dictated by the notation, not just in the notation itself.”⁹⁶ However, if the Copyright Office issues a certificate of registration on stage directions, the certificate only protects the written directions, but not the movements of the actors dictated by the writing.⁹⁷ As a result, the Copyright Office seems to contradict itself by stating that fixed notation of stage directions fulfills the fixation requirement, but “does not imply any protection for a manner, style or method of directing, or for the actions dictated by them.”⁹⁸

The Copyright Office’s position creates an inconsistency by providing copyright protection for movements dictated by choreographic notations, but not providing this same protection for movements dictated by stage direction.⁹⁹ Consequently, stage directors should argue that the action or expression that results from notations of stage directions is indistinguishable from choreographic movements and should also be protected by copyright to ensure consistency in the application of the law. Copyright protection for directors should extend not only to the written stage directions, but also to the translation of the script into action through the movements of the actors.¹⁰⁰

In *Einhorn*, Judge Kaplan’s decision specifically stated that the parties failed to address “the scope and effect of the certificate of registration” because “the copy of the work that was filed was only the alleged blocking script as distinguished from images of a performance depicting positions and movements.”¹⁰¹ If *Einhorn* had made the above arguments and provided visual proof of his blocking script in action—for example, through a video recording of the performance—he may have established copyrightability. The copyright registration contradiction illustrates the importance of the scope of registration of stage directions and choreography. More importantly, it shows that both stage directions and choreography are similar because both art forms involve written notations that dictate movements of dancers and actors on stage during a performance.

performance depicting positions and movements), *corrected by* 79 U.S.P.Q.2d 1146 (S.D.N.Y. 2006) (making no changes to the copyright infringement analysis, however).

⁹⁵ See Copyright Act, 17 U.S.C. § 102(a)(4) (2006).

⁹⁶ Yellin, *supra* note 33, at 328.

⁹⁷ *Id.* at 329.

⁹⁸ *Id.*

⁹⁹ *Id.* at 328–29 (asserting that copyright protection of choreography extends to the dance itself, not just to the recordation of the dance).

¹⁰⁰ See *id.*

¹⁰¹ *Einhorn v. Mergatroyd Prods.*, 426 F. Supp. 2d 189, 196 (S.D.N.Y. 2006), *corrected by* 79 U.S.P.Q.2d 1146 (S.D.N.Y. 2006) (making no changes to the copyright infringement analysis, however).

C. Are Stage Directions Distinguishable from Choreography?

Einhorn described his contributions to the play *Tam Lin* as a “choreography and blocking script.”¹⁰² Judge Kaplan’s decision suggests that a clear distinction between the blocking script and the choreography script would have been useful.¹⁰³ Therefore, if Einhorn had distinguished his blocking contributions from his choreographic contributions, he may have stated a valid copyright infringement claim at least for his choreographic contribution.¹⁰⁴

Additionally, if Einhorn had been able to establish a basis for protection of his choreography script, he may have used the copyright in choreography as a basis for arguing that his blocking script was also entitled to copyright protection. As indicated by Judge Kaplan’s decision, the fixation requirement is an important consideration in copyright protection for stage directions.¹⁰⁵ Dance, like stage directions and blocking, is a work of art that “lives primarily through performance instead of through recordation.”¹⁰⁶ Despite this seeming inconsistency with other copyrightable materials like books, the Copyright Act has provided protection for choreographic works.¹⁰⁷

For example, choreographic works satisfy the fixation requirement as long as the choreography is recorded by film or videotape or a written system of notation.¹⁰⁸ While simple, basic dance steps and social dances like the waltz are not in and of themselves copyrightable, combinations of those steps which form new dances or routines are copyrightable.¹⁰⁹ Because stage directions, like dance, live through performance, copyright protection could reasonably be extended to stage directions in their entirety if similar guidelines were created for stage directions.

In sum, because stage directions are similar to choreography, stage directions should be protected by copyright law if they satisfy the originality and fixation requirements of the Copyright Act. The scope of copyright protection afforded to stage directions, like choreography, would still be subject to effective limitations under the Act and other doctrines.

¹⁰² *Id.* at 192; Second Amended Complaint, *supra* note 5, ¶ 13.

¹⁰³ *Einhorn*, 426 F. Supp. 2d at 195.

¹⁰⁴ *Id.* at 196. The defendants argued that the material Einhorn added to the script was incapable of protection as choreography. *Id.* However, Judge Kaplan did not even address defendants’ argument because they did not provide any papers or other evidence to support their assertion. *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ Yellin, *supra* note 33, at 327 (citations omitted).

¹⁰⁷ Copyright Act, 17 U.S.C. § 102(a)(4) (2006).

¹⁰⁸ *Martha Graham Sch. and Dance Found., Inc. v. Martha Graham Ctr. of Contemporary Dance, Inc.*, 380 F.3d 624, 632, (2d Cir. 2004).

¹⁰⁹ Freemal, *supra* note 31, at 1024 (citations omitted). From her analysis, Freemal draws the conclusion that Congress also intended not to protect mere stage movement. *Id.*

D. Limiting the Proposed Copyright Protection of Stage Directions

If stage directions received copyright protection, their protection could be effectively limited by the fair use doctrine, the Merger Doctrine, or scenes à faire.¹¹⁰ Fair use acts like a “safety valve” because it would prevent a copyright of stage directions from discouraging new productions.¹¹¹ The fair use analysis requires inquiry into all four of its factors, but certain factors may weigh more heavily than others in certain cases.¹¹²

Mantello v. Hall,¹¹³ a case involving a theater company that had outright copied the original stage directions of the director, illustrates the importance of the amount of the work used.¹¹⁴ Mr. Mantello, a director, created stage directions, which at the end of Act I, put Gregory, a character in the play, behind a scrim, upstage left, working on a dance.¹¹⁵ Gregory was in the exact same spot, doing the exact same thing, in the Caldwell production.¹¹⁶ The director watching the infringing performance observed that ninety-five percent of the show was an exact replica of his staging, including visual images, blocking and choice of music.¹¹⁷ Hence, had the case not settled, it is likely that the court would have found in this case that Caldwell’s use was not “fair” but rather an infringement of Mantello’s work due to the blatant copying of such a large amount of the stage directions.¹¹⁸

Another factor, the purpose and character of the use, is especially relevant to copyrighted stage directions.¹¹⁹ In *Mantello*, the fact that the accused infringer was a “very substantial theatre” with a “substantial market” supports Mantello’s claim of infringement as the character of the use appeared to be commercial in nature.¹²⁰ Finally, a court would address the third and fourth factors: the nature of the copyrighted work and the effect of the use on the potential market.¹²¹ If Mantello could have successfully negated these last two factors of fair use, he likely could have proven a case of copyright infringement of his stage directions.¹²² Fair use is an

¹¹⁰ See generally 17 U.S.C. § 107 (setting forth the factors of fair use); *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577–90 (1994) (analyzing the four factors of fair use); *Ets-Hokin v. Sky Spirits, Inc.*, 323 F.3d 763, 765 (9th Cir. 2003) (discussing the Merger Doctrine and scenes à faire).

¹¹¹ Yellin, *supra* note 33, at 338.

¹¹² See 17 U.S.C. § 107 (setting forth the four factors of fair use). The courts determine fair use on a case by case basis. *Id.*; see generally *Campbell*, 510 U.S. at 581 (holding that the four factors should not be treated in isolation).

¹¹³ 947 F. Supp. 92 (S.D.N.Y. 1996).

¹¹⁴ *Id.* at 95.

¹¹⁵ *Id.*; Green, *supra* note 1, at 1 (providing an example of the substantial similarities between Mantello’s original blocking for the play and Caldwell’s unauthorized reproduction).

¹¹⁶ Green, *supra* note 1, at 6. In addition, Mantello used a doll house to represent the play’s setting. *Id.* The set designer for Mantello researched houses in upstate New York, where the story takes place, and created a two-story Victorian. *Id.* The Caldwell Theater production also used a doll house, which bore a strong resemblance to the one that appeared in Mantello’s staging. *Id.*

¹¹⁷ *Id.*

¹¹⁸ See Yellin, *supra* note 33, at 338 (asserting that Caldwell’s use of Mantello’s stage directions constituted copyright infringement).

¹¹⁹ See Copyright Act, 17 U.S.C. § 107(1) (2006).

¹²⁰ Yellin, *supra* note 33, at 321.

¹²¹ 17 U.S.C. § 107 (1)–(4); see also *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 (1994) (asserting that all four factors of fair use must be weighed together).

¹²² Yellin, *supra* note 33, at 338.

effective limitation on copyrighted stage directions because the inquiry of unauthorized use through the four factors considers the rights of the owner as well as the promotion of the arts.

The Merger Doctrine restricts copyright in situations where the idea and the expression of the idea are inseparable.¹²³ A director expresses his ideas when he tells an actor to move from one place on the stage to another.¹²⁴ According to the Merger Doctrine, even if a stage director's notes are copyrighted, the protection would not extend to basic directions like "exit through the door" because the idea of exiting through a door is inseparable from the expression of exiting through the door.¹²⁵ Also, the argument can be made that "exiting through the door" is a concept and copyright does not protect ideas and concepts.¹²⁶ Therefore, even if stage directions are copyrighted, the merger doctrine would prevent basic movements from being copyrighted to avoid handcuffing future performances of the work.

Judge Kaplan's decision in *Einhorn* asserted that the parties should have addressed copyright limitations, specifically the application of scenes á faire.¹²⁷ Scenes á faire is the most relevant limitation on copyright in the context of stage directions.¹²⁸ Scenes á faire does not allow a plaintiff to prove copyright infringement by breaking down a work into uncopyrightable pieces because it is the combination of elements that supplies the minimal originality required for copyright protection.¹²⁹

For example, a kiss in a love scene, in and of itself is not copyrightable.¹³⁰ Yet, that fact alone would not prevent copyright protection of that scene or of the work in its entirety.¹³¹ Similarly, the use of "exit through the door" would not preclude the stage directions in their entirety from being copyrightable, so long as the combination

¹²³ 2 PATRY *supra* note 70, § 4:28.

¹²⁴ Freemal, *supra* note 31, at 1031.

¹²⁵ *Id.* (asserting that allowing copyright protection in a situation where the actors only had three distinct paths to exit the stage, because of the stage set-up, would create a monopoly of the expression "exiting through the door").

¹²⁶ 17 U.S.C. § 102(b).

¹²⁷ *Einhorn v. Mergatroyd Prods.*, 426 F. Supp. 2d 189, 196 (S.D.N.Y. 2006), *corrected by* 79 U.S.P.Q.2d 1146 (S.D.N.Y. 2006) (making no changes to the copyright infringement analysis, however).

¹²⁸ 2 PATRY, *supra* note 70, § 4:25. *Scenes á faire*, literally "scenes for action," is defined as "the most important scene in a play or opera, made inevitable by the action which leads up to it." *Id.*

¹²⁹ *Id.* (citing *Bucklew v. Hawkins, Ash, Baptie & Co.*, 329 F.3d 923, 929 (7th Cir. 2003)). The doctrine of scenes á faire instructs that a claim of copyright infringement cannot be founded solely on parts of the original work also found in the defendant's work that are so "commonplace, standard, or unavoidable that they do not serve to distinguish one work within a class of works from another." *Id.* Therefore, scenes á faire should be evaluated at the infringement stage in order to give full effect to the interrelationships among various parts of the work. *Id.* § 4:27.

¹³⁰ *Id.* § 4:25. A kiss in a love scene is an example of how a work can be decomposed into elements that are not copyrightable. *Id.* The crux of *Romeo and Juliet* includes "the war between rival clans, developing love between children of the clans, death and reconciliation after the rejection of revenge," all of which are in the public domain. *Id.* (quoting *Reed-Union Corp. v. Turtle Wax, Inc.*, 77 F.3d 909, 914 (7th Cir. 1996)). Therefore, the scenes were incorporated into *West Side Story* without placing *West Side Story* into the public domain. *Id.* This is because the language, exposition and music of *West Side Story* are different than Shakespeare's *Romeo and Juliet*. *Id.*

¹³¹ *Id.*

of such blocking movements and directions fulfill the originality required for copyright protection.¹³²

The doctrine of *scènes à faire* instructs that a claim of copyright infringement cannot be founded solely on parts of the original work also found in the defendant's work that are commonplace or unavoidable.¹³³ Therefore, *scènes à faire* would allow a stage director to copyright a set of directions for a production, even if it contained some uncopyrightable components, while preventing directors from having monopolies on basic and commonplace stage directions.¹³⁴

Not only must stage directions fulfill the requirements of the Copyright Act to receive protection, but the granted copyright protection is then subject to the limitations of the fair use doctrine, the merger doctrine and *scènes à faire*. Therefore, any protection granted to directors' stage directions would be effectively limited.

III. PROPOSAL

Not all stage directions can be precluded from copyright protection and not all stage directions are copyrightable, thus, copyright protection should extend to stage directions only in limited circumstances. If specific guidelines are followed, copyrighting stage directions will not devastate the rights of playwrights and will protect the theater industry in general. Also, when stage directions are protected by copyright, the limitations on copyright protection will ensure the promotion and advancement of the arts.

A. Making the Case: Stage Directions Should Be Granted Copyright Protection

Whether stage directions are copyrightable is still an unanswered legal question. While the *Einhorn* case did not affirmatively answer this question, it certainly suggested that a court may grant copyright protection for stage directions in some circumstances.¹³⁵ In *Einhorn*, Judge Kaplan was unable to make an informed decision on Einhorn's copyright claim because both parties did not address the issues and facts of the case that were necessary to the resolution of the claim.¹³⁶ As a result, Judge Kaplan indicated some basic guidelines as to what stage directors need to address in making their copyright case and what judges could consider in granting copyright protection.¹³⁷ Judge Kaplan stated that the parties in *Einhorn* should have

¹³² *Id.* (stating that combining such elements must fulfill the originality required for copyright protection or *scènes à faire* will not prevent infringement).

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ See *Einhorn v. Mergatroyd Prods.*, 426 F. Supp. 2d 189, 196 (S.D.N.Y. 2006) (stating that the motion papers before the court did not answer the necessary questions to resolve the copyright infringement claim), *corrected by* 79 U.S.P.Q.2d 1146 (S.D.N.Y. 2006) (making no changes to the copyright infringement analysis, however).

¹³⁶ *Id.*

¹³⁷ *Id.*

addressed fixation in a tangible form, applicability of scenes á faire, scope of the certificate of registration, and Einhorn's specific contributions.¹³⁸

Regarding the fixation requirement, Judge Kaplan asserted that courts should consider the extent and time the director's contributions were fixed in tangible form.¹³⁹ Courts should extend copyright protection only to stage directions upon a showing that the director's contributions as a whole are original, substantial and fixed in tangible form.¹⁴⁰

In determining whether stage directions are fixed in a tangible medium, a judge should compare the director's written and videotaped stage directions to the playwright's original script.¹⁴¹ For example, the playwright Samuel Beckett provides extensive stage directions in his original play scripts.¹⁴² Therefore, a director staging a Beckett play would have to either completely ignore Beckett's directions or come up with a completely different blocking script to create an original work.¹⁴³ The comparison of stage directions to the original play script would prevent a director from claiming the directions appearing in the original play script are his "original work."

Stage directions can meet the requirements of originality and fixation as an original work in and of themselves, but directors may also make the secondary argument that stage directions are a derivative work.¹⁴⁴ This secondary argument is persuasive because stage directions are specifically created for a pre-existing work, the play.¹⁴⁵ Derivative works are specifically protected under the Act.¹⁴⁶

Like derivative works, the Copyright Act also contains specific protection for choreography.¹⁴⁷ Therefore, directors should argue that because similarities exist between choreography and stage direction, the courts should protect stage directions as well.¹⁴⁸ Furthermore, the fixation requirement as tailored to choreography serves as a model of how and to what extent stage directions should be fixed to satisfy the requirements of the Copyright Act. While a videotape recording of the stage

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ See Copyright Act, 17 U.S.C. § 102(a) (2006) (stating that copyright protection is granted to original works of authorship fixed in any tangible medium of expression).

¹⁴¹ Yellin, *supra* note 33, at 329 (discussing a study which found that both a prompt book (written recordation) and a videotape of the performance may be sufficient to fulfill the fixation requirement so that stage directors can receive copyright protection for their work).

¹⁴² *Case for Copyright*, *supra* note 35. Playwright Samuel Beckett writes unusual plays that consist mostly of stage directions. *Id.* Einhorn takes the textual Samuel Beckett example further by asserting that if Beckett's plays, which consist mostly of blocking, are copyrightable, then blocking scripts created by stage directors should also be copyrightable. *Id.*

¹⁴³ *Id.* A playwright could argue that if a script containing mostly blocking is copyrightable, then a director's blocking script should also be copyrightable.

¹⁴⁴ See 17 U.S.C. § 102(a).

¹⁴⁵ *Id.* § 103(a).

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* § 102(a)(4).

¹⁴⁸ Yellin, *supra* note 33, at 331 (asserting that stage directions are like choreography because both involve "composition and arrangement of movement"); see also 17 U.S.C. § 102(a)(4) (listing choreographic works as a work of authorship).

directions would strengthen the fixation argument, it should not be a necessity.¹⁴⁹ Detailed stage directions written by the director on the original script, prompt book or other documents should satisfy the fixation requirement.¹⁵⁰ However, to address the scope and effect of a Certificate of Registration, a videotape of the stage directions translated into movements on stage may be necessary.

As discussed above, there are several ways the courts could deem stage directions copyrightable. Therefore, future court decisions should grant copyright protection to stage directions if they fulfill the requirements of the Copyright Act.

B. Copyrighting Stage Directions Will Not Interfere with the Rights of Playwrights

Many playwrights fear that copyrighting stage directions will interfere with their rights as owners of the original play.¹⁵¹ However, theater is a collaborative process in which playwrights rely on directors to bring their plays to life on stage.¹⁵² Directors, like playwrights, are entitled to copyright protection for their original works of authorship in fixed form.¹⁵³

If stage directions are classified as derivative works, directors would receive copyright protection for only the director's contributions to the play's script.¹⁵⁴ The playwright would still have rights in the script he or she authored. Consequently, playwrights are well protected and should not fear a director's ability to copyright stage directions. Appropriate limits on directors' copyrights will also ensure that the theater industry is not unduly restrained.

C. Limits on Copyright Protection Will Help Ensure That the Theater Advances and Flourishes

Opponents have argued that copyright protection of stage directions would lead to the demise of the theater industry.¹⁵⁵ However, fair use and scenes à faire are two doctrines that would limit the extent of copyright protection so that the art of theater would continue to progress.¹⁵⁶

¹⁴⁹ Yellin, *supra* note 33, at 327–28 (suggesting that videotaping stage directions satisfies the fixation requirement, but the most common way to fix stage directions is through the creation of a prompt book).

¹⁵⁰ *Id.*

¹⁵¹ Green, *supra* note 1, at 1.

¹⁵² Freemal, *supra* note 31, at 1017 (discussing the collaborative nature of theater).

¹⁵³ Yellin, *supra* note 33, at 339 (asserting that playwrights' fears about a director's copyright are not well founded because the copyright protection would be thin, not extending to the work as a whole).

¹⁵⁴ *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 348 (1991) (stating that "copyright protection may extend only to those components of a work that are original to the author").

¹⁵⁵ Green, *supra* note 1, at 1.

¹⁵⁶ *See Feist Publ'ns, Inc.*, 499 U.S. at 349 (the primary objective of copyright is to assure authors of their right to their original expression while encouraging others to build freely on the ideas conveyed in the work).

Fair use would allow for copyrighted stage directions to be used in other productions.¹⁵⁷ Fair use would preclude people from blatantly copying a director's work, as was the case in *Mantello*.¹⁵⁸ More importantly, fair use would allow people to use copyrighted works educational purposes.¹⁵⁹ Therefore, the theater industry will continue to advance as theater students, art students, and teachers of theater continue to study or use copyrighted stage directions for their educational enhancement.

Scenes á faire is the most appropriate doctrine for limiting copyright protection of stage directions because it originates from the world of theater.¹⁶⁰ More importantly, scenes á faire does not break down the stage directions in question into uncopyrightable parts.¹⁶¹ Many simple and common blocking instructions, like "Stage Left," would not in and of themselves be copyrightable and would be left for free use in the public domain.¹⁶² Therefore, under the doctrine of scenes á faire, the courts would only grant copyright protection to stage directions as a whole¹⁶³

In summary, the courts should grant copyright protection to stage directions because fair use and scenes á faire would help to limit the extent of the protection which would further help to prevent interference with the rights of playwrights and the progress of theater.

IV. CONCLUSION

Unfortunately, Einhorn failed to produce enough evidence for the judge to find in his favor.¹⁶⁴ But Einhorn, like most directors, just wanted recognition for his important contribution to the collaborative art of theater.¹⁶⁵ Regardless of recognition or money, directors are entitled to copyright protection if their stage directions satisfy the requirements of the Copyright Act.¹⁶⁶ The *Einhorn* decision gives hope to future directors by highlighting the issues crucial to proving a case of copyright infringement of stage directions.¹⁶⁷

¹⁵⁷ Copyright Act, 17 U.S.C. § 107 (2006) (stating that the use of copyrighted works for purposes of criticism, comment, news, reporting, teaching, scholarship or research does not constitute infringement).

¹⁵⁸ See generally *Mantello v. Hall*, 947 F. Supp. 92, 96 (S.D.N.Y. 1996) (alleging blatant copying).

¹⁵⁹ 17 U.S.C. § 107.

¹⁶⁰ 2 PATRY, *supra* note 70, § 4:27.

¹⁶¹ *Id.*

¹⁶² *Id.* (citing *Bucklew v. Hawkins, Ash, Baptie & Co.*, 329 F.3d 923, 929 (7th Cir. 2003)).

¹⁶³ 2 PATRY, *supra* note 70, § 4:25.

¹⁶⁴ *Einhorn v. Mergatroyd Prods.*, 426 F. Supp. 2d 189, 191 (S.D.N.Y. 2006), *corrected by* 79 U.S.P.Q.2d 1146 (S.D.N.Y. 2006) (making no changes to the copyright infringement analysis, however).

¹⁶⁵ Edward Einhorn, *STAGE COPYRIGHTS: The Director's View*, N.Y. TIMES, Feb. 12, 2006, § 2, at 2.

¹⁶⁶ Green, *supra* note 1, at 6. The article suggests that the "appropriate resolution is to give fair credit to all the artists' contributions. One day, it may end up that the author gets 80 percent, the director 10 percent, the original cast X and the designers Z. Because, at the bottom, this is all about money." *Id.* In the *Einhorn* case, the potential damages were around three million dollars because Einhorn's directions were being used in new performances without his authorization. *Id.*

¹⁶⁷ *Einhorn*, 426 F. Supp. 2d at 196.

Furthermore, granting stage directions copyright protection would be consistent with the intentions of the Copyright Act and other areas of copyright law. Directors are largely responsible for creating the parts of a play that cannot be told by words, but are necessary to the telling of the story. Such contributions should be entitled to copyright protection. As Judge Learned Hand once observed: “[A] nod, a movement of the hand, a pause, may tell the audience more than words could tell. To be sure, not all this is always copyrighted, though there is no reason why it may not be.”¹⁶⁸

¹⁶⁸ 2 PATRY, *supra* note 70, § 3:94 (citing *Sheldon v. MGM Pictures*, 81 F.2d 49, 55–56 (2d Cir. 1936)). Judge Learned Hand also stated that a play can be copied illegally without using the dialogue whereas pantomime, which consists only of movements, could not be pirated. *Id.*; *see also* *Kalem v. Harper Bros.*, 222 U.S. 55, 61 (1911) (asserting that “action[s] can tell a story” because actions can show the dramatic relationships that exist amongst people and actions also depict every human emotion without using any words).

