

Playwrights and Copyright

by Doug Wright*

Broadway, 1926.

The Rialto is alive with drama.

At the Mansfield Theater, a revival of the Pulitzer Prize-winning play *Beyond the Horizon* is enjoying a healthy run.¹ At the Imperial, George Gershwin's Prohibition romp *Oh, Kay* is a bona fide sell-out.² At the Mayfair, an unexpected guest upstages the opening night of a searing marital tragedy entitled *The Half-Naked Truth*. In the words of critic Brooks Atkinson:

Toward the end of the second act . . . a gray cat walked amiably across the stage, peeped curiously over the footlights, and then sat down comfortably, yawned a little, blinked sleepily and apparently settled for the night. . . .

. . . What drama could vie with the reality of a cat? Or what actor could put a cat to shame? . . .

. . . Unfortunately . . . the play . . . was amateurish in every [other] respect.³

The Half-Naked Truth closed within a month; the fate of the cat remains unknown.

But the dramas playing out on Broadway that fateful year aren't all happening onstage; in a nearby office building behind closed doors, a cluster of playwrights—Eugene O'Neill and humorist George Kaufman among them—are meeting with a group of theatrical producers.⁴

The writers have recently established a Guild, just fourteen years old, to fight for equitable practices in their profession. Somewhat reluctantly, the producers have agreed to meet with them. On one point, the Guild is intractable: *the right of its members to control their copyrights and prevent unauthorized changes in their scripts*.

Negotiations are grueling. In desperation, the dramatists threaten to withdraw their plays, submit no new ones, and effectively halt the upcoming Broadway

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1. Brooks Atkinson *Theater (Broadway)*, PLAYBILL, <http://perma.cc/HPZ6-VLJ7> (last visited Jan. 25, 2015).

2. *See Show: Oh, Kay!*, GERSHWIN MUSIC, <http://perma.cc/R79W-NV83> (last visited Jan. 25, 2015).

3. Brooks Atkinson, *The Play: Drama Rebuked by Cat*, N.Y. TIMES, June 8, 1926, at 23.

4. For a brief account of the Dramatists Guild's early history, see George Middleton, *DG History Timeline*, DRAMATIST, Nov/Dec 2012, at 10–51, available at <http://perma.cc/2FCP-QESZ>.

season. Producers are incensed. Finally, five months later, the writers emerge, victorious.

Fast-forward eighty-eight years.

Broadway, 2014.

Beloved comedian Nathan Lane has newly opened in Terrence McNally's raucous farce *It's Only a Play*.⁵ The aforementioned George Gershwin now has a theater named after him, and nightly in it, the musical *Wicked* plays to cheering audiences.⁶ *Kinky Boots* is all the rage. And high above 44th Street, the Dramatists Guild of America is still vehemently protecting that all-important victory some eight decades before.

Over the years, playwrights have sacrificed a great deal to preserve copyright ownership. First and foremost, they've had to forsake the perks of union membership.⁷ Unions, after all, are designed to serve employees, and playwrights have declared themselves "property owners," licensing their work to producers for a fee. As such, the law tells us, they are not eligible to unionize.

Playwrights are alone among their colleagues; directors, actors and designers all enjoy healthcare and pension funds, as well the right to collectively bargain for higher remuneration and improved working conditions.⁸ These artists are all employees, retained for certain services: staging a play, or acting a role. When the show concludes, so (in theory) does their involvement, and they move on to the next one.

This stance even separates playwrights from their fellow scribes in film and television. In Hollywood, writers create work made for hire.⁹ While they have no claim to copyright ownership, through their union they can aggressively barter for benefits.¹⁰ I've worked as a screenwriter, and I've tasted the rewards first-hand: fresh-baked chocolate chip cookies in first class; posh hotel stays in Beverly Hills, where instead of caloric chocolates on your nightly pillow, they leave tasteful quotes from Deepak Chopra; teeth whitening, covered by my dental plan. Once, I agreed to "punch up" another writer's dialogue in an epic costume drama. For my labors, I was paid roughly eighty times the fee for my most recent play commission.

Contrast that to a recent experience I had developing a new musical at a theater on the West Coast: the last row next to the lavatory on JetBlue; a tiny apartment

5. See *It's Only a Play!*, N.Y. TIMES, <http://nyti.ms/1q0xdVi> (last visited Jan. 25, 2015).

6. See *Gershwin Theater (Broadway)*, PLAYBILL, <http://perma.cc/Y9ZK-YLEQ> (last visited Jan. 25, 2015).

7. See KIMON KERAMIDAS, *THE PAY'S THE THING: INTELLECTUAL PROPERTY AND THE POLITICAL ECONOMY OF CONTEMPORARY AMERICAN THEATRICAL PRODUCTION* 398 (2008), available at ProQuest Dissertations & Theses Global, No. 304670755.

8. See *id.*

9. See Ashley Kelly, *Bargaining Power on Broadway: Why Congress Should Pass the Playwrights Licensing Antitrust Initiative Act in the Era of Hollywood on Broadway*, 16 J.L. & POL'Y 877, 894 (2008).

10. See *id.* at 894–98.

without air conditioning and with a broken headboard; a gift basket upon arrival, containing dishwashing liquid and a roll of toilet paper; and no compensation whatsoever, just the chance to pursue my Muse away from the distractions of my life in Manhattan. The script I'm penning is wholly speculative; no theater has yet consented to produce it, and it may never earn a dime. (Still, I was profoundly grateful for the opportunity.)

Why, then, have playwrights sacrificed so much for the sake of copyright?

Why have we deemed it more important to us, more crucial to our craft and well being, than annual trips to the doctor, retirement funds and even a living wage?

I hasten to disclose that I am *not* a legal expert; I am merely a working writer. Instead of any concrete knowledge about law, I'm drawing on the customary resources afforded those in my profession: the occasional hunch, a huge dollop of emotionally charged subjectivity and a ferocious and protective passion for my craft.

Nevertheless, I can Google with the best of them, and I know from my search engine that copyright originated as a means for authors to earn income from their work—to “provide incentives” for creativity.¹¹ Supposedly, copyright has real, monetary value. A successful play is, after all, an annuity. It can run for years commercially on- or off-Broadway, and then enjoy a long life in resident theaters across the country, and the writer benefits each and every time it is produced.

This is certainly true for some, but not for me. I've had the great privilege of seeing four works produced on Broadway¹²—the most high profile, potentially lucrative theatrical marketplace in the world—and I've even been awarded some very fancy prizes for my work. And yet I fail to earn a full-time living from my royalties. In a career that now spans a quarter century, I can attribute, maybe, five good years to my collected plays. Robert Anderson famously said, “You can make a killing in the theater, but you can't make a living.”¹³ I have yet to score a major kill.

Nevertheless, I'm one of the lucky ones. For a glimpse into the economic lives of American playwrights, I urge you to take a peek at Todd London's indispensable study *Outrageous Fortune: The Life and Times of the New American Play*.¹⁴ He found that the average playwright earns between \$25,000 and \$39,000 a year, and that roughly 15% of that income is actually derived from theatrical productions of plays.¹⁵ The remainder comes from supplemental jobs.

If we've staked our financial future on copyright law, then for most of us, it's a very foolish wager.

11. See U.S. CONST. art. I, § 8, cl. 8 (granting Congress the power “To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries”).

12. See DOUG WRIGHT, *GREY GARDENS* (2006); DOUG WRIGHT, *HANDS ON A HARDBODY* (2013); DOUG WRIGHT, *I AM MY OWN WIFE* (2005); DOUG WRIGHT, *THE LITTLE MERMAID* (2008).

13. Herbert Mitgang, *Robert Anderson: The Drama of Being a Dramatist*, N.Y. TIMES, June 12, 1988, at H6.

14. TODD LONDON, *OUTRAGEOUS FORTUNE: THE LIFE AND TIMES OF THE NEW AMERICAN PLAY* (2009).

15. See *id.* at 51, 53.

No, in my humble opinion, copyright guarantees us only one thing, one ephemeral, fleeting, but indispensable thing: our singularity as artists.

Copyright acknowledges the innate worth of an individual author's voice: that a well-turned phrase by Philip Roth, or an acerbic line of dialogue by Edward Albee or the haunting melody of "Sunrise, Sunset" by Jerry Bock is as special, as distinctive, as a thumb print or a strand of DNA.

It's a patent, if you will, on artistic expression. Because of copyright, I get to be the CEO of my own imagination. When I create a work, copyright acknowledges that it belongs to me as fully as a newborn belongs to its mother. And just like a parent, I am granted responsibility for its future.

Recently, I had occasion to act on that responsibility.

Last summer, a musical I wrote with composers Amanda Green and Trey Anastasio was produced by a theater in Houston. The show chronicles a contest at a car dealership in Texas, where contestants place their hands on a new pickup truck; whoever stands the longest without removing their hand from the truck drives it off the lot. We loved the dramatic possibilities inherent in the story; to us, the contest was a distillation of the American experience. Individuals who might never acknowledge one another on the street suddenly find themselves side-by-side in a common endeavor. The sun blares overhead, hours pass, idle conversations ensue. A redneck finds commonality with a first generation immigrant. An atheist finds strength in the prayers of a die-hard believer. A bigot is disarmed by the kindness shown him by an African American. By the musical's end, winning becomes secondary to the community forged by the contestants themselves. In a country increasingly torn by partisan divide, we felt this was a story worth telling.

Despite warm reviews, the show lasted only twenty-eight performances on Broadway. The reasons were many, from the quirky subject, to the show's ribald, misleading title (*Hands on a Hardbody*), to the cruel economic vagaries of the Great White Way. Nevertheless, we were proud of the work, and delighted to learn that it was about to enjoy a production at a celebrated theater in the very state where the action was set.

Unfortunately, the director in Houston flattered himself an auteur, and decided to radically revise the show in rehearsal. He transposed songs from the first act into the second, and vice versa. He reordered scenes, juggling them with impunity and minimal logic, disrupting the line of narrative tension we'd worked four years to achieve. Alliances between certain characters were irrevocably altered, and some eliminated altogether. Our script was treated like little more than a jigsaw puzzle, or a deck of cards waiting to be shuffled by a hapless croupier. Our names were on the title page of the program, but the resulting production was a far cry from our authorial intentions. Thanks to rigorous copyright law and an ironclad licensing agreement with our publisher, Samuel French, in a matter of days, Amanda, Trey and I were able to shut the production down, rather than tarnish the musical's reputation or ours.

Because we own our material, playwrights have been able to obtain other rights essential to its successful realization. We can exercise final approval over the show's cast, its director and even its design team. In an inaugural production, these

elements can make or break a new, untested work.

But nothing has taught me the value of copyright more emphatically than working in film and television, where instead of writers, it is granted to producers, networks and studios.¹⁶ Robert Towne doesn't hold the copyright to the script to the classic thriller *Chinatown*; Long Road Productions does.¹⁷ Similarly, for legal purposes, Warner Brothers penned *Casablanca*,¹⁸ and Twentieth Century Fox wrote *12 Years a Slave*.¹⁹

In this high-stakes world, writers aren't artists, but craftsman, as interchangeable as house painters or electricians, hired to carry out a specific function at the behest of others. In the theater, we are architects. In Hollywood, we are merely contractors.

I've been fired off certain movies, only to see them in the cinema years later and note with rueful amusement that a few of my *bon mots* survived to the final cut. In screenwriting, that counts as a triumph.

I've also been hired to spruce up the work of fellow writers, much to their indignation. Some of these gigs have been almost comical. Once, I was retained by Sony Pictures to compose new dialogue for a film set in Japan. To maximize international profits, the studio cast major stars from all of the Asian territories: Japan, China, Korea and Malaysia. Unfortunately, many in the cast couldn't speak English. They had to learn their lines phonetically. My task? To rewrite the lines with simple diction, avoiding Western consonants our actors couldn't pronounce. (Imagine the reverse: modifying Mandarin for Tom Hanks, or Burmese for Angelina Jolie.) Suffice it to say, it was a far cry from my romantic image of the dramatists' life, sitting before a Smith Corona and a bottle of whiskey, giving voice to a dream-addled American salesman or the denizens of a place identified only as "Our Town."

Thanks to copyright, in theater, the word is authoritative. But in film, screenplays are merely raw clay, provided by writers, then rewritten, reordered, trimmed and reshaped by directors, actors and editors. This is perhaps why—although films have achieved status as enduring cultural artifacts—screenplays have yet to enter the national literature.

Many of our most critically revered screenwriters regularly return to write for the stage. John Logan of *Gladiator* fame won a Tony Award for *Red*, his play about the artist Mark Rothko.²⁰ Nora Ephron ended her career with *Lucky Guy*, on Broadway last year.²¹ Director Steven Soderbergh's longtime collaborator Scott Burns debuted at the Public Theater with *The Library*, a drama inspired by the

16. See generally LAW AND BUSINESS OF THE ENTERTAINMENT INDUSTRIES 763–64 (Donald E. Biederman et al. eds., 5th ed. 2006) (discussing writer agreements in the film industry).

17. *Chinatown*, U.S. Copyright No. LP43628 (filed June 20, 1974).

18. *Casablanca*, U.S. Copyright No. LP11818 (filed Jan. 23, 1942).

19. *12 Years a Slave*, U.S. Copyright No. PA0001908827 (filed May 2, 2014).

20. Andrew Gans, *Red Is in the Black: Tony-Winning Play Recoups*, PLAYBILL (June 21, 2010), <http://perma.cc/LH8P-KTWU>.

21. Adam Hetrick, *Nora Ephron's Play Lucky Guy, Starring Tom Hanks, Ends Its Broadway Run July 3*, PLAYBILL (July 3, 2013), <http://perma.cc/63M7-5HTM>.

horrific killings at Columbine.²² I can't speak for these writers, but I suspect they seek solace in our humble, penny-pinching, endangered and besieged medium because it grants them something that Tinseltown cannot: dominion over the words they pen.

I have a professional maxim that I've followed for years: I'll accept movie jobs if they are adaptations of novels or magazines, or rewrites of existing scripts. But if I have a truly original idea, one I've dredged up from my soul, I'm saving it for the stage. I have to protect my heart.

Copyright also acknowledges the importance of attribution: it helps to indelibly link the names of authors to their work. Its current duration—life, plus seventy years²³—helps to forever link a playwright to his plays.

For scholars charting the history of American culture, it's useful to know that Tennessee Williams wrote *The Glass Menagerie*—not the actors who intone the lines, the director who stages the action, a collective of producers, an anonymous blogger or an un-credited “punch up” writer. It was Williams who agonized over each word; who sat before a blank page and opened a vein; who united his present self and the ghosts of his past, his mother Edwina and his sister Rose, and his circumscribed life in a cramped tenement in St. Louis—to pen a work borne of that unique confluence of life experience, and his aesthetic ability to invent and to transcend.

Copyright acknowledges that fearless act of creation and self-disclosure, and gives it worth. It says, “This play is the result of one man's wish to forge a universal human truth from his own hardship, his own pain, and bequeath it to us in a meaningful and generous way. For the health of the culture, we must honor that gesture. We must give it value.”

I hasten to add that writers like me aren't only copyright holders; we are users, too. Often, our material is based on pre-existing work. My musical *Grey Gardens* was drawn from an underlying documentary film, and so we appropriately licensed the rights. My script *Creditors* was adapted from the original August Strindberg text, now in the public domain. I understand and support the cultural imperative of “fair use,” but within reason.

Arguably, we live in a golden age for dramatic writers. There are more outlets than ever before; stories unspool on movie screens, on television sets, on our laptops, even our iPads. Netflix doesn't just stream films anymore; now, they're in the business of producing them. Even Amazon creates original content. You can watch a movie on your telephone. Penning drama need not be a pauper's profession.

But the theater offers something these other mediums, however remunerative, cannot. Pundits have been predicting its death for over a century now; radio, then film, then television and now the Internet were expected to subsume it. To my mind, there is one reason for the theater's survival: *dramatists so value copyright*

22. David Ng, *Steven Soderbergh to Direct Chloe Grace Moretz at Public Theater*, L.A. TIMES (Jan. 16, 2014, 12:07 P.M.), <http://perma.cc/E6PY-JJ4E>.

23. U.S. COPYRIGHT OFFICE, CIRCULAR 15A, DURATION OF COPYRIGHT (2011), available at <http://perma.cc/NV77-D633>.

that they continue to write for it.

Copyright for playwrights is under threat, of course. There are theorists who think that as a concept, it has outlived its value. The web has made piracy ludicrously easy, and producers sometimes download entire plays and musical scores without paying a penny in royalty fees, and protection for authors is scant. Theater is a collaborative art, and some of our colleagues would like to encumber our work with copyright claims of their own.

But copyright keeps our art, the theater, often referred to as The Fabulous Invalid, alive. For playwrights like me, copyright doesn't provide incentives; it *is* the incentive.