30 Years Later—the Show Must Go On: Current Trends and Issues in the Theater Industry

By Jason Baruch, Kathy Kim, Adam J. Rosen, Eric Goldman, Alexandra Mary Clapps, Rebecca Frank Oeser, Jason Aylesworth, and David Friedlander

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Five years ago, the *EASL Journal* published an article called "Exit Stage Left, Enter Stage Right: Theater Trends Over the Past 25 Years"[1] to celebrate EASL's 25th Anniversary. In that article, members of the Theatre and Performing Arts Committee (Committee) identified trends in the theater industry over the preceding quarter century, and tried to anticipate the state of play ("state of the play") in the quarter century to come. Among other things, we predicted that the then newly enacted Jumpstart Our Business Startups Act (JOBS Act) could finally liberalize fundraising techniques and democratize the process of bringing a show to market by giving producers new tools to reach a greater number of potential investors with fewer barriers to entry. We anticipated that producers would continue to struggle with ever-increasing costs, including labor costs, and would continue to mitigate risk by identifying beloved and familiar underlying properties to adapt for the stage. We also expected new technologies and techniques, like dynamic pricing, to throw open the theater doors to new and more diverse audiences.

Five years later, as EASL celebrates its 30th Anniversary, the Committee has revisited some of its predictions, while at the same time casting an eye toward new issues and trends that landed center stage recently. In this article, current members of the Committee will look back on the practical impact of the JOBS Act on the theater economy, now that we have had the benefit of years of implementation, and also evaluate how technology has—or has not—altered the way our business, often stubbornly resistant to change, has evolved, financially and artistically. The Committee also will look at sexual harassment in the theater industry, which by no means has escaped the "#MeToo" movement, as well as ongoing efforts to address diversity both on stage and off. Finally, the Committee will examine some of the changes to the law, both judicial and legislative, that could impact several facets of the theater industry, including court cases involving fair use and potential changes in the law relating to rights of publicity.

Theatrical Fundraising and the JOBS Act

By Adam J. Rosen

The JOBS Act[2] was signed into law in 2012, shortly before the Committee published its 25th Anniversary report, but the specific rules promulgated by the Securities and Exchange Commission (SEC) in response have been implemented more recently. The JOBS Act was intended to make equity fundraising easier for issuers of securities, especially for small companies, such as the production entities formed to finance and produce Broadway shows. Although the impact of the new rules on theatrical fundraising has been minimal thus far, it may still be too soon to say with certainty what the future will bring.

The vast majority of recent theatrical offerings have been completed under one of the "safe harbor" exemptions to requirements for securities offerings to be registered with state securities agencies and the SEC. These offerings are much less costly and less complicated for issuers than registered public offerings, but there have always been drawbacks, including rules against general solicitation of investors and limitations on sales to investors that do not have "accredited"[3] status. The new rules implemented pursuant to the JOBS Act were intended to facilitate fundraising by permitting advertising to the general public (including through internet-based crowdfunding) and provide more flexibility with respect to sales to non-accredited investors, while continuing to allow for a more streamlined and simplified process than a registered public offering.

In 2013, the SEC authorized the new Rule 506(c) of Regulation D under the Securities Act to address the JOBS Act's mandate to change Rule 506's ban on "general solicitation and advertising."[4] Most recent Broadway offerings have been completed pursuant to Rule 506's exemption to the public offering registration requirements. Under the commonly used Rule 506(b), issuers may raise an unlimited amount of money from an unlimited number of accredited investors, but only from a limited number of non-accredited investors (and if there are non-accredited investors in the offering, more substantial disclosures are required, so Broadway producers generally are advised against including any non-accredited investors). A 506(b) offering may solely be made to investors with whom the issuer has a pre-existing relationship, but the new Rule 506(c) allows a company to "broadly solicit and generally advertise an offering"[5] (and still be eligible for exemption from registration). One of the primary distinctions between these exemptions is that *all* investors in a Rule 506(c) offering must be accredited and, unlike 506(b), which allows an issuer to rely on a statement by the investor of its accredited status (without requiring further due diligence to confirm), a 506(c) issuer must take "reasonable steps"[6] to verify that every investor is accredited. This verification may be accomplished by reviewing tax returns, statement balances, credit reports, confirmations from a broker-dealer, investment adviser, attorney, and accountant, among others—each of these methods is far more intrusive than 506(b)'s self-certification, and theatrical producers may be reluctant to subject their investors to this sort of invasive scrutiny.[7]

"The theater industry has also seen apps enter the ticket-purchasing space. Broadway Box and TodayTix are new tools available to producers to fill empty seats."

Donation-based internet crowdfunding, e.g., use of platforms like Kickstarter, is a popular method of funding small performing arts projects, but the SEC's new rules for *equity* crowdfunding as required by the JOBS Act (Regulation Crowdfunding)[8] took effect more recently in 2016. The new rules permit issuers to raise up to $1 million per year from accredited *or non-accredited* investors through internet crowdfunding without registration. However, the issuer must use internet funding platforms maintained by an SEC-registered intermediary (either a broker-dealer or a registered funding portal). Issuers also are required to file extensive disclosures about their businesses and ongoing annual reports. These burdens and expenses may make equity crowdfunding less appealing than traditional fundraising options for many issuers. Further, for the Broadway producing community, the $1 million limit will be an insurmountable obstacle as a sole source of fundraising except with respect to certain small and discrete ventures.

Finally, the rules known as "Regulation A+" were adopted by the SEC in 2015. Regulation A+ permits an issuer to accept accredited or unaccredited investors and to seek them through general solicitation and advertising, but the offering remains exempt from registration with the SEC.[9] There are two "tiers" of Regulation A+ offerings, and many Broadway producers likely will elect "Tier 2," which permits issuers to raise up to $50 million in a one-year period and includes preemption of state registration and review requirements, which is a huge saver of time and money. However, these Regulation A+ offerings do require filing of a disclosure statement that must be reviewed by the SEC, and Tier 2 offerings require audited financial statements, ongoing reporting requirements and certain limitations on the investments of non-accredited investors. The process may be too complex and costly to gain popularity among Broadway producers.

Generally, these recent changes have been met with "a big yawn"[10] by the theatrical industry. Broadway is steeped in tradition, and the personal relationships between producers and investors have always been crucially important to fundraising. General solicitation may signify struggles to raise money and the expenses associated with the new structures under the JOBS Act may be too much to bear, as opposed to relying on the traditional Rule 506(b) offering, which has worked very well for established producers. That said, perhaps we will see more adventurous producers and/or some novice producers without ready access to an existing contact list of accredited investors taking advantage of these potentially exciting new options in years to come.

Is Technology Changing the Theater Industry?

By Eric Goldman

As any fan of Patti LuPone will tell you, technology and live theater remain odd bedfellows. On the surface, it would appear that technology is making inroads into how live theater is produced, marketed, and sold. Scratch the surface, though, and one may find an industry resistant to change and leery of the advantages technology has to offer.

The theater industry has also seen apps enter the ticket-purchasing space. Broadway Box and TodayTix are new tools available to producers to fill empty seats. The apps do help producers move inventory, but they are arguably training theatergoers to pay less than full price for tickets. In addition, there is little likelihood that apps are going to replace traditional ticket sellers—Telecharge and box offices.

The fact that three companies own and control the vast majority of Broadway theaters, and that all of those theater owners have exclusive agreements with Telecharge, has successfully kept the disruptive power of apps from greatly altering the theater landscape. While Uber and Lyft, as a comparison, are able to use dynamic

pricing to immediately raise fees in times of high demand for car service, any request for a change in ticket prices requires an approval process. For example, Telecharge requires 72 hours to process a change in prices.

What has presented unique business and legal challenges for producers is the rise of sanctioned online marketplaces for theater tickets. StubHub allows ticket buyers to purchase tickets to popular shows, often at multiple times face value. Other resellers have shifted the capital out of the hands of theater producers and into their hands. The producers of *Hamilton* and *Springsteen on Broadway* have countered this trend by selling tickets at a value above the customary range of prices,[11] but that is not a strategy many producers choose (or are able to) to implement.

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In addition, technology and apps have yet to result in any meaningful advance in theater industry market research. Although it is easier to collect data on ticket purchasers as a result of technology, the industry has still yet to fully embrace the power of the internet to track the habits of theatergoers and has failed to develop a means for sharing such data.

The onstage use of technology has had a more visible effect on the industry. The use of LED screens in productions, such as *Dear Evan Hansen* and *Anastasia,* is making it possible for designers to make new forms of artistic statements. However, technology arguably has not yet translated into substantial cost savings. Yes, LED screens can minimize the costs that would otherwise be allocated to the set budget. However, one may argue that these screens trigger other expenses, such as compensation to projection designer(s) and programmer(s), along with the potential cost of maintenance during the run of the production.

One may also argue that advances in lighting technology are causing new sets of problems in the industry.[12] The LED lighting industry, for example, has yet to be able to produce bulbs suitable for use in theater lighting that are consistent in color. One white LED bulb may be a completely different hue from another, even when purchased from the same manufacturer. In addition, because the market for theater lighting is relatively small, the cost for each theater-appropriate bulb currently is much higher than for traditional bulbs. Presumably this is one of the reasons that the decision in the UK to mandate the use of LED lights in all theaters caused such a furor.[13]

What does all of this mean for the legal practitioner? There may be coming battles between tech giants and theater owners regarding ticket pricing and purchasing. Theater owners and Telecharge may be holding the line now, but resisting the advance and incorporation of technology is not the answer—think Tower Records and Blockbuster.

With Audible (owned by Amazon) starting to produce theater Off-Broadway[14] and abroad to circumvent entrenched interests, such as Broadway theater owners, Telecharge and Equity, it is arguable that the tech industry has Broadway in its sights and that change will most likely follow. The tech industry has not embraced unions, has reduced the value of brick and mortar marketplaces, and has shifted the power of every entertainment industry other than live theater. It is entirely possible that there will be legal battles challenging the power of entrenched interests in the theater industry.

One other item worth mentioning is that legislative and judicial changes may continue to disrupt the theater market. By way of example, theater remains a unionized industry, but unions are under attack nationwide. In fact, the Supreme Court has recently handed down a significant anti-union decision in *Janus v. AFSCME*.[15] As the gig economy advances it may very well be that the power of theater unions will come under attack, with length-of-the-run agreements being deemed anticompetitive and full-time employment for cast, crew and orchestra replaced by part-time and freelance labor.

Harassment and the "Me Too" Movement in Theater

By Alexandra Mary Clapps

While sexual harassment in theater probably dates back as far as the art form itself, in the wake of Hollywood's self-reflection regarding the behavior of Harvey Weinstein and others, the theater industry has seen a shakeup in how it anticipates and reacts to sexual harassment.

What has been surprising about the aftermath of Weinstein's fall from grace in Hollywood is not the number of theater professionals who have been subjected to harassment, humiliation, assault, or retaliation while just trying to do their jobs—it is the sheer number who have come forward to speak publicly about these incidents. The publication of the Weinstein story was followed by thousands of survivors taking to Twitter, Facebook, Medium, and other platforms to say "me too." Stories were told of harassment and assault in professional theaters, during the audition or interview process, in college and university settings, and among collaborators during the development of new works. There has also been a rise of "secret" groups on Facebook and other platforms where people (usually women), sometimes in defiance of non-disclosure agreements, share specific stories about companies that are still operating where the culture of harassment has not yet been addressed.

Such theater luminaries as Kevin Spacey, Ben Vereen, and Dustin Hoffman have stopped shining quite so brightly as revelations have emerged.[16] After Anthony Rapp went public with his story of Spacey's sexual advances towards him in 1986 (when Rapp was still a minor), numerous employees at the Old Vic, where Spacey was Artistic Director, came forward with more recent accounts, and Spacey was forced out of this role at the theater.[17]

In some ways, theater was ahead of Hollywood in exposing bad behavior—*The Chicago Reader* published a story in 2016 exposing decades of abuse by artistic director Darrell W. Cox, who helmed the respected Profiles Theater.[18] The response to the report was swift and dramatic—within days, the company had shut down and Cox had left the industry. Cox's abuse was not limited to sexual harassment, but also included onstage physical assault. Reports of similar behavior emerged in 2017 about Jeremy Menekseoglu, Artistic Director of the Dream Theater Company, which had begun in Chicago and relocated to Atlanta. The company swiftly shut down as well. However, this was a change from the past, in which allegations of harassment or inappropriate sexual conduct would become public and any ramifications would be minor and quickly forgotten. After a season or two passed, previous victims may have even encountered their abusers in the rehearsal room once again. By way of example, allegations against playwright Israel Horovitz were made public as early as 1986, but it was not until 2018 that he was ousted from Gloucester Stage Company.

Other notable departures in the past year have included members of the leadership of the Dallas Theater Center, the Alley Theater, Long Wharf Theater, and the Guthrie Theater. The Guthrie notably undertook a formal investigation of harassment following the resignation of two carpenters citing the toxic culture, particularly for women.[19] Additionally, Justin Huff, former casting director with Telsey + Company, was dismissed, following allegations of inappropriate behavior.

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Women in particular have been attempting for years to address harassment and abuse in local theaters that would not require an individual actor to risk personal retaliation.[20] The organization Not In Our House in Chicago, which grew out of a sexual harassment scandal in the improvisation community, Let Us Work in New York, as well as Intimacy Directors, which operates nationwide, have worked with companies to create policies to protect artists and prevent harassment. Theater Communications Group has a comprehensive list of Resources on Sexual Abuse and Misconduct in Theater available on its website. The Public Theater held a Town Hall following the Weinstein revelations to discuss sexual harassment in the New York City theater community. Actors' Equity has publicly stated to its membership that harassment can be reported to the business representatives, since Equity theaters have a duty under their agreements to provide a harassment-free workplace. The Broadway League created a Sexual Harassment task force. Actor Marin Ireland and attorney Norman Siegel spearheaded the Theatrical Community Sexual Harassment Education and Mediation Pilot Project, focusing on education and mediation, as part of Human Resources for the Arts. Many theaters nationwide have either revisited harassment policies or are implementing them for the first time. The theater community has committed to require these policies to be read at the first rehearsal and posted on callboards. More importantly, perhaps, it appears that this community feels empowered to actually enforce these policies, because despite the temporary negative publicity the exposure of such incidents might bring, the pursuit to make necessary changes seems to be exponentially more powerful. Likewise, perhaps the "cult of personality" (the Old Vic described an environment where there were no reports of misconduct by Kevin Spacey being brought to the management's attention), has been replaced with the expectation from the staff that companies will take reports of sexual harassment seriously, no matter who the allegations are against and without any fear that the report will cause any negative consequences to the one making such a report.

Keeping It Diverse

By Rebecca Frank Oeser

On EASL's 30th anniversary, diversity is a key topic in our conversation about the state of theater and theater law. Since our 25th anniversary article, *Hamilton's* financial success and unapologetic diversity demonstrated to the industry that it could profit from projects celebrating diversity and prompted a push for projects to be developed by a diverse group of artists and producers.

The blanket topic of diversity brings up more questions than answers: How do we unpack diversity in all its forms, let alone report on the current state of diversity in theater? Are we looking only at actors of color? What about press agents, stagehands, producers, and, of course, lawyers? Does the term embrace differently-abled actors and personnel? What about those who are trans and those who identify as non-binary gender?

Earlier this year, *The New York Times* reported on a study by the Asian American Performers Action Coalition (AAPAC),[21] which found that in the 2015-16 season, 35% of all roles were going to minority actors,[22] and that percentage had risen from previous years. In 2015, social

media celebrated that *Waitress* had the first all-female creative team in Broadway's history[23] and conversely, in 2018, social media erupted in outrage that *Pretty Woman* had an all white male creative team (although its lead producer was a woman). Just prior to the beginning of the 2018-19 season, there are 30 Broadway productions currently performing, many of which feature actors of color and two that feature trans actors in leading roles. Notably, one of the productions currently playing and featuring two trans actors is *Straight White Men,* by Young Jean Lee—the first Asian American female writer on Broadway.

EASL's 25th Anniversary article prepared by the Committee predicted that, "[Producers] will also continue to mitigate risk by relying on pre-branded properties such as well-known films, music catalogues, and celebrity actors and producers." This has substantially proven true. Looking at *Theatrical Index* today, 26 of the 30 productions on Broadway are a revival of a theatrical work or are based on a popular movie title or a popular music catalogue. Mitigating financial risks and marketing challenges with pre-branded properties that overwhelmingly have white creative teams and "name" actors that are predominantly white perpetuates the deep-seated problem in Hollywood and more generally the entertainment industry as a whole—a lack of diversity behind and in front of the camera (or in front of and behind the footlights) and no avenues through which to develop more diverse projects.[24]

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In July 2018, in Ben Brantley's review of the new Go-Go's musical, *Head Over Heels*,[25] he used offensive language to describe a trans character—played, it should be noted and celebrated, by a trans actor. The trans community took note of Brantley's language and expressed its outrage on social media. Brantley subsequently apologized, indicating that he had attempted to "reflect the light tone of the show"[26] in his review. Brantley and *The New York Times* acted swiftly and, seemingly, earnestly to correct the offensive language. Their acknowledgement of the offense and swift correction were a positive outcome.

In the recent review for *Smokey Joe's Café*, Laura Collins-Hughes made a point to mention Alysha Umphress' weight, calling her "a bigger girl" while ostensibly critiquing the costume designer.[27] Umphress called out the body-shaming and received industry-wide support.[28] These incidents highlight that language must be used thoughtfully and that we must own our missteps and move forward.

Conversations about diversity can be messy, difficult to navigate, and fear of a misstep can shut a person down, but the conversations themselves are vital and the only way to move forward. When a casting call for *Hamilton* stirred controversy by seeking "non-white" actors,[29] Actors' Equity Association (AEA) chastised the casting call along with an attorney who stirred the issue up by categorizing the casting call as discrimination. The *Hamilton* producers responded:

> The producers of *Hamilton* regret the confusion that's arisen from the recent posting of an open call casting notice for the show. It is essential to the storytelling of Hamilton that the principal roles—which were written for non-white characters (excepting King George)—be performed by non-white actors. This adheres to the accepted practice that certain characteristics in certain roles constitute a "bona fide occupational qualification" that is legal. This also follows in the tradition of many shows that call for race, ethnicity or age specific casting, whether it's *The Color Purple* or *Porgy & Bess* or *Matilda*. The casting will be amended to also include language we neglected to add, that is, we welcome people of all ethnicities to audition for *Hamilton*.

Both parties kept the issue mainly to one of semantics. Their dispute was about the difference between dictating the race of a character and that of the actor—the former being artistic expression and the latter being discrimination. The President of AEA wrote an impassioned opinion piece in *Variety* supporting color conscious casting and called for the industry to keep working toward better diversity.[30] Where then, does the responsibility lie? Casting directors should champion color conscious casting, take on projects that will add diversity, and add diversity to projects. Playwright Chuck Mee expresses how this may be accomplished:

> There is not a single role in any one of my plays that must be played by a physically intact white person. And directors should go very far out of their way to avoid creating the bizarre, artificial world of all intact white people, a world that no longer exists where I live, in casting my plays.[31]

The AAPAC study notes that in the 2010 Census, New York City demographics were 56% *not* Caucasian. Should we aim for the same in casting? Certainly, the more organizations and people in the spotlight that model the

behavior of good listening and swift responsiveness, the more we can move forward in our conversations and our actions.

The Evolution of Fair Use

By Jason Aylesworth

Writers and designers in the theater industry have been cautious about utilizing pre-existing copyrighted materials in their new works, but a number of recent cases have reaffirmed the power of a fair use defense over an infringement claim from an underlying rights owner. Creatives (and their legal representatives) have relied on *Campbell v. Acuff-Rose Music, Inc.*[32] in determining how courts should apply the four factors under the fair use exception.[33] Even though no factor is given more weight over the others, most decisions are determined by the first one. *Campbell v. Acuff-Rose Music, Inc.* held that "the central purpose . . . is to see … whether the new work merely 'supersede[s] the objects' of the original creation … or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning or message; it asks, in other words, whether and to what extent the new work is "transformative."[34] The more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.[35]

"Based on this verdict, and so long as writers can transform the underlying works into a parody, there may be no limit in taking a character from any pre-existing copyrighted work and creating a future for them in a parodic universe."

Live stage parodies of popular works have been popping up on the theater scene over the last few years, including *Hamilton*, *Game of Thrones* and *Friends*.[36] Some parodists reach a mutual understanding with owners of the original works,[37] while others are determined that their parodies are not infringements and consequently, do not seek such approval. Regardless of whether dramatists have a good faith argument that their works do not infringe on the underlying works, they are nevertheless vulnerable to threats of litigation. Playwrights David Adjmi and Matthew Lombardo both received "cease and desist" notices from exploiting their works, and ended up in court defending their parodies.[38]

For parodies, *Campbell* established that using the heart of the underlying work is essential so audiences can recognize what the writer is poking fun at, there was an allowance that was broader when examining the third factor of the fair use analysis.[39] While 2 Live Crew's use of Roy Orbison's song *Pretty Woman* was limited to a repeated bass riff and the words "pretty woman," Adjmi's play *3C* copied extensively from the television series, *Three's Company*, including but not limited to characters and plot points.[40] Moreover, Adjmi used "many minor elements, which had neither 'parodic purpose nor were necessary to evoke' (e.g., the three main characters of both works included a Chef-in-Training, a Minister's daughter and an employee in a flower shop)."[41] The New York district court acknowledged that "*3C's* copying of not only Three's Company's heart, but also its metaphorical appendages, considered on its own, weigh against a finding of fair use."[42] Nevertheless, the court reminded us that the Supreme Court in *Campbell* "set a floor, not a ceiling."[43] Consequently, due to the court's label of *3C* as a "highly transformative parody," plus the minimal effect on the market (or value of *Three's Company*), the third factor (which leaned favorably towards DLT Entertainment, the owner of the copyright in *Three's Company*) weighed less compared to the first and fourth factors in favor of Adjmi.[44]

The recent United States Court of Appeals, Second Circuit affirmation of its district court's ruling in *Lombardo* not only memorialized the notion that a parody will defeat an infringement claim, but that one of the derivative rights of a copyright owner may also be in jeopardy.[45] While the attorneys on behalf of Dr. Seuss Enterprises, L.P., argued that *Who's Holiday* takes one of its characters and proposes an epilogue on what transpired in her life (and to a certain degree, the Grinch's life), which would amount to a sequel, the New York Court of Appeals nevertheless held that Lombardo's use was in service of his parody.[46] Unlike *Salinger v. Colting*,[47] where this court held that a derivative work reimagining the iconic teenager Holden Caulfield from *A Catcher in the Rye* as a 70-year old was not fair use, Lombardo's colorful use of rhyming couplets in an expletive-filled play persuaded judges that his work was a parody of the story (and unique style) of Dr. Seuss.[48] Based on this verdict, and so long as writers can transform the underlying works into a parody, there may be no limit in taking a character from any pre-existing copyrighted work and creating a future for them in a parodic universe.

Another noteworthy ruling was in *TCA Television Corp. v. McCollum*,[49] where the New York Court of Appeals disagreed with the lower court's fair use analysis of the use of the text from Abbott and Costello's "*Who's on First*" in the play *Hand to God*.[50] The major distinction between this case and the ones in *Adjmi* and *Lombardo* was whether the use of the copyrighted work was transformative. This Court ruled that the use was not parodic, as it did not critique or comment on the original work.[51] In addition, the written text was not modified except in its performance.[52] For these reasons (as well as the commercial nature of its use), the first fair use factor favored the copyright owner.[53] Examination of the other factors (e.g., how much of the underlying work was taken in comparison to the whole; interference with the licensing market),

supported its conclusion that the copying of the text was not fair use.[54]

Besides authors, projection designers also face fair use issues when creating their works for live stage productions. Unlike parodists, projection designers generally are not commenting on or critiquing the authors of the underlying works they are using, but nevertheless are still transforming the underlying work into a new medium of expression. Typically either the projection designers or producers would license the copyrighted work, but a few decisions have opened up the door that such license may not be necessary. In *SOFA Entertainment, Inc. v. Dodger Productions, Inc.*,[55] the producers of *Jersey Boys* were victorious in their unauthorized use of a seven-second video clip from *The Ed Sullivan Show*, which was part of the projection design. All of the factors weighed toward the producers of *Jersey Boys* (including the second factor regarding the nature of the copyrighted work, which typically favors the original copyright owner, but did not here because it was a factual representation in history).[56] One statement within the fourth factor analysis is worth noting: The California court noted that the musical *Jersey Boys* was "not manufactured on DVDs," so presumably that would not interfere with the market since the clip was used only during a live performance.[57] Not only have a number of musicals since then been exploited on DVDs, but many have also been captured for screenings in movie theaters, as well as streaming platforms such as Broadway HD and Netflix. The verdict probably would not have shifted in favor of the owners of the *The Ed Sullivan Show* clips solely on this issue, but it is certainly one that courts may consider when assessing uses that can be reproduced and disseminated throughout the universe and on the internet.

"Famously (or infamously), New York State has no common law right of privacy and, only by statute, creates a right of action for the privacy tort of appropriation. Again, generally speaking, appropriation is the use of another person's name or likeness without consent for one's own use or benefit."

Another fair use case supporting projection designers who may add new imagery content to pre-existing materials in their designs is *Blanch v. Koons.*[58] Artist Jeff Koons created and exploited a collage painting incorporating a copyrighted photo by Andrea Blanch.[59] Besides determining that Koons' work was transformative, it also noted "his purposes in using Blanch's image are sharply different from Blanch's goals in creating it."[60] This point is truly helpful for projection designers, as it is hard to imagine that any photographer, painter or cinematographer envisioned having his or her works reimagined in a fixated moving collage supporting the narrative of a live stage presentation.

Even if writers and designers are determined that their creations would withstand threats of copyright infringement, many are not able to financially litigate these disputes. Moreover, producers and theater owners are often attached as parties of such claims, as they are presenting these works without authorization. Furthermore, even with a good faith belief that their use is protected under the fair use doctrine, the theater community still may seek informal consent from the underlying rights owners to maintain good relations, who may control other copyrighted properties that would require a license. For those artists who choose to create works that would survive a fair use test, but nevertheless get challenged by the underlying rights owners, organizations such as The Dramatists Legal Defense Fund have significantly contributed to protecting their First Amendment rights,[61] not to mention a number of attorneys who worked for those without the financial resources to front the exorbitant costs of litigation.[62]

Proposed Revision to NY State's Right of Privacy Statute

By David H. Friedlander

New York State's law on the right of publicity may undergo a major overhaul. On June 18, 2018, the New York State Assembly, by a margin of 131 to 9, passed Bill No. A08155B, which is entitled "An Act to Amend the Civil Rights Law, in Relation to the Right of Privacy and the Right of Publicity; And to Amend the Civil Practice Law and Rules, in Relation to the Timeliness of Commencement of an Action for Violation of the Right of Publicity."[63] The bill now goes to the New York State Senate (as Bill No. S5857B)[64] and, if passed, to the Governor to be signed (presumably) or vetoed.

A summary of some of the proposed revisions is below but, most notably, the new law will create a post-mortem right of publicity (which currently does not exist under New York Law) extending for 40 years following the death of the individual, make the right of publicity descendible and freely transferrable, establish a public registry of post-mortem rights to facilitate their exploitation, and create regulations regarding the use of digital avatars. Many of the changes will transform the statute to resemble the laws in California and, ideally, reduce some of the concerns surrounding which jurisdiction recognizes these rights.

New York's right of publicity statutes are found in §§ 50 and 51 of the New York Civil Rights Law (CRL). Though CRL § 50 is entitled "Right of Privacy," it is, in fact, a right of publicity—the right to use (or prevent others from using without consent) certain identifying attributes of a living person for advertising or trade purposes.

Though a full discussion of the differences and similarities of the rights of publicity and privacy is beyond the scope of this summary of current legislation, it is useful to put the statute (and its proposed revision) in context. In comparison, the right of privacy arises within the framework of torts, and is the right of a person to control the disclosure and spreading of information about themselves—often referred to as "the right to be let alone."[65] Most states recognize four different privacy right causes of action: (1) disclosure of private facts; (2) intrusion upon seclusion; (3) false light; and (4) appropriation.

"If there is no inter-vivos or testamentary document of transfer, and no survivors to take in intestacy, then the deceased individual's right of publicity would terminate."

Famously (or infamously), New York State has no common law right of privacy and, only by statute, creates a right of action for the privacy tort of appropriation. Again, generally speaking, appropriation is the use of another person's name or likeness without consent for one's own use or benefit. It is easy to see how the right of privacy concept is embodied into CRL § 50 which states, in its entirety:

> § 50. Right of privacy. A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor.

Its companion, CRL § 51 creates a civil cause of action for a violation of § 50, and expands the list of protected attributes to include "voice":

> § 51. Action for injunction and for damages. Any person whose name, portrait, picture or voice is used within this state for advertising purposes or for the purposes of trade without the written consent first obtained as above provided may maintain an equitable action in the supreme court of this state […] and may also sue and recover damages for any injuries sustained by reason of such use…

There are some exceptions, including for those "practicing the profession of photography" exhibiting their work under certain circumstances, and, of perhaps greater relevance to members of the EASL Section, for those "using the name, portrait, picture or voice of any author, composer or artist in connection with his literary, musical or artistic productions…" where the use of those attributes was granted along with production rights.

With this limited right, let us now turn to what is being proposed:

The bedrock CRL § 50 would be deemed renumbered as § 50-f (the existing §§ 50-a through 50-e discuss privacy rights related to personnel records of various law enforcement officers, and victims of sex offenses or offenses involving the transmission of HIV) and § 50 will instead set forth critical definitions. First, the statute would define "Persona" and expand the protected attributes to include "…the name, portrait or picture, voice ***or signature*** of an individual" [proposed CRL § 50(8), emphasis added]. Next, the bill will finally create definitions and clear distinctions between the right of privacy and right of publicity:

> 9. "Right of privacy" means a personal right, which protects against the unauthorized use of a living individual's name, portrait or picture, voice, or signature for advertising purposes or purposes of trade without written consent, extinguished upon death.
>
> 10. "Right of publicity" means an independent property right, derived from and independent of the right of privacy, which protects the unauthorized use of a living or deceased individual's name, portrait or picture, voice, or signature for advertising purposes or purposes of trade without written consent.

As drafted, the "right of privacy" would be consistent with the concepts embodied in the current § 50, which applies only to a "living person" [see CRL § 50]—which it defines as a "personal right … extinguished upon death" [proposed CRL § 50(9)]. The radical change comes in the definition of "right of publicity," which would create "an independent property right" protecting an individual's Persona whether that individual is "living or deceased" [proposed CRL § 50(10)].

Not only is it a property right, but an individual's right of publicity would extend post-mortem and "continue to exist for forty years after his or her death" [proposed CRL § 50-g]. During and after the individual's life, the right of publicity would be "freely transferable and descendible, in whole or in part" by (a) contract; (b) license; (c) gift; (d) trust; (e) testamentary document (either as a specific bequest or as part of the residuary estate); or (f) intestate succession [proposed CRL § 50-h(1)].

If there is no inter-vivos or testamentary document of transfer, and no survivors to take in intestacy, then the deceased individual's right of publicity would terminate [proposed CRL § 50-h(3)]. If the right of publicity were to pass by intestate succession, the right may be "exercised

and enforced by a person or persons who possess at least a fifty-one percent interest of the individual's right of publicity" subject to the controlling majority's obligation to "act at all times in good faith" and share the proceeds pro-rata with any other intestate successor(s)-in-interest [proposed CRL § 50-h(1)(f)].

The post-mortem right of publicity has a number of conditions in order to be exploited by a successor(s)-in-interest:

- The successor must register the claim to ownership of the right with the New York State Secretary of State, on a registry to be established, and upon payment of a fee of $100. Claimants would be required to provide (a) the name and date of death of the deceased individual, (b) the name and address of the claimant, (c) the basis of the claim, and (d) a sworn affidavit as to the rights claimed. [proposed CRL § 50-h(4)]. The registry of successors would be publicly accessible on the State's website [proposed CRL § 50-h(5)].
- Similar to copyright, registration of a claim by a successor-in-interest would be a prerequisite to bringing an action for enforcement [proposed CRL § 50-h(7)]. However, actions for violations prior to registration may be brought if the claim is registered within six months of the date of death of the individual [proposed CRL § 50-h(7)(a)].
- Anyone seeking a license of an individual's right of publicity can then rely on the records appearing on the State's website; and reliance on a registered licensor would be a defense to infringement [proposed CRL § 50-h(8)].
- The statute of limitations for an action under the proposed statute is one year from the earlier of the date of discovery, or from the date on which due diligence would have revealed the injury to the plaintiff [proposed revision to CPLR S215(3)]

The bill maintains many of the same exceptions where consent to use another's Persona is not required, such as news, public affairs or a sports broadcast. Of particular interest to EASL Section members, consent would not be required for the use of another's Persona in:

(i) a play, book, magazine, newspaper, musical composition, visual work, work of art, audiovisual work, radio or television program if it is fictional or nonfictional entertainment, or a dramatic, literary or musical work;

(ii) a work of political, public interest or newsworthy value including a comment, criticism, parody, satire or a transformative creation of a work of authorship [proposed CRL § 51(2)(b)].

Another new creation from the proposed bill is the recognition of rights in avatars based on an individual's Persona. The proposal would define "Digital replica" as: "an individual's likeness or voice that realistically depicts the likeness or voice of the individual being portrayed. A digital replica is included within an individual's portrait" [Proposed CRL § 50(2)]. The bill would prohibit the use of the digital replica of an individual without consent in a manner that intends to or creates the impression that the individual is performing an activity for which he or she is known (i) in the role of a fictional character in a scripted audiovisual, audio or live performance of a dramatic work; (ii) in a musical performance; or (iii) in an audiovisual work depicting the individual's engagement in athletic activity [proposed CRL § 51(3)]. Not surprisingly, this prohibition would also apply to the unauthorized use of an individual's digital replica "in an audiovisual pornographic work" that intends to or creates the impression that the individual is performing in such work.

There are, of course, exceptions to the consent requirement for digital replicas, but EASL members are encouraged to review the text of the proposed bill to gain a full understanding of the legislation to anticipate how the changes may affect his or her practice.

Conclusion

So far, the JOBS Act has received an underwhelming response from Broadway producers, although it still may have a meaningful impact on smaller capitalized projects, while changes in technology have introduced more sophisticated sales and marketing techniques without necessarily driving down ever-increasing production costs. As in other industries, the theater community has shown that it is not immune to the problems of harassment and lack of diversity, although we see tangible efforts on the part of members of the community to address both. Finally, changes in the law are potentially impacting theatrical content, and specifically what can—and cannot—be put on stage, and who has the right to decide.

We look forward to periodically checking in and updating interested readers on the state of the theater industry. The show, after all, must go on. We wish EASL a happy 30th birthday.

Endnotes

1. Originally published in Volume 29, Number 3 of the *Entertainment, Arts and Sports Law Journal* (Fall/Winter, 2018), a publication of the Entertainment, Arts and Sports Law Section of the New York State Bar Association.
2. Small Business Jobs Act of 2010, Pub. L. No. 111-240, 124 Stat. 2504.
3. As defined in Rule 501 of Regulation D, categories of "accredited" investor include, e.g., a person with a net worth that exceeds $1 million (excluding the individual's primary residence) and a person with income exceeding $200,000 in each of the two most recent years.
4. https://www.sec.gov/news/press/2013/2013-124-item1.htm.
5. https://www.sec.gov/smallbusiness/exemptofferings/rule506c.
6. https://www.sec.gov/info/smallbus/secg/general-solicitation-small-entity-compliance-guide.htm.

7. Nevertheless, producers Howard and Janet Kagan tested out the new freedom from general solicitation restrictions by using crowdfunding, in part, to capitalize the 2014 Broadway revival of *On the Town*. *See* https://variety.com/2014/legit/news/broadway-crowdfunding-investment-on-the-town-1201282160/.
8. https://www.sec.gov/smallbusiness/exemptofferings/regcrowdfunding.
9. https://www.sec.gov/smallbusiness/exemptofferings/rega.
10. https://broadway.news/2018/02/20/jobs-act-not-caught-broadway-producers/.
11. https://www.nytimes.com/2016/06/09/theater/hamilton-raises-ticket-prices-the-best-seats-will-now-cost-849.html.
12. https://www.theguardian.com/stage/2018/apr/29/eu-rule-could-leave-theatres-dark.
13. https://www.thestage.co.uk/news/2018/theatres-exempt-devastating-eu-lighting-rules/#_=_.
14. https://www.americantheatre.org/2018/08/20/audible-announces-new-audio-theatre-productions/; https://deadline.com/2018/08/patti-smith-amazon-audible-minetta-lane-aasif-mandvi-off-broadway-1202448440/.
15. https://www.supremecourt.gov/opinions/17pdf/16-1466_2b3j.pdf.
16. https://www.buzzfeednews.com/article/louispeitzman/theater-professionals-say-eliminating-sexual-harassment-on.
17. https://www.theguardian.com/culture/2017/nov/16/kevin-spacey-old-vic-inquiry-finds-20-claims-of- inappropriate-behaviour.
18. https://www.chicagoreader.com/chicago/profiles-theatre-theater-abuse-investigation/Content?oid=22415861.
19. http://www.startribune.com/women-lift-the-curtain-on-harassment-at-minnesota-theaters/464255173/.
20. https://www.americantheatre.org/2018/02/09/times-up-for-theatre-too/.
21. *Ethnic Representation on New York City Stages, Special 10-Year Edition*. The Asian American Performers Action Coalition, *available at* http://www.aapacnyc.org/.
22. Chow, Andrew R., *Study Finds Increasing Diversity on Broadway*, The New York Times (Jan. 15, 2018), Page C3.
23. Cox, Gordon, *Waitress Musical Serves Up Broadway's First All-Female Creative Team,* Variety.com (Dec. 1, 2015).
24. *Inequality in 1,100 Popular Films: Examining Portrayals of Gender, Race/Ethnicity, LGBT & Disability from 2007 to 2017,* Dr. Stacy L. Smith, Marc Choueiti, Dr. Katherine Pieper, Ariana Case, & Angel Choi. Annenberg Foundation and USC Annenberg Inclusion Initiative, (July 2018).
25. Brantley, Ben, *Ye Olde Go-Go's Songs Hit the Renaissance in 'Head Over Heels',* The new York Times, (July 26, 2018), Page C1.
26. McHenry, Jackson *New York Times Critic Gets Dragged for Misgendering in Head Over Heels Review,* Vulture.com, (July 27, 2018).
27. Collins-Hughes, Laura. *Smokey Joe's Café is a Feast of Pop Nostalgia*, The New York Times, (July 23, 2018), Page C1.
28. Wong, Curtis M., *Broadway's Alysha Umphress Calls Out New York Times Critic For Body Shaming*, Huffington Post, (July 25, 2018).
29. Kornhaber, Spencer, *Hamilton: Casting After Colorblindness*, The Atlantic (March 31, 2016).
30. Shindle, Kate, *Hamilton Casting Controversy Spotlights the Importance of Diversity*, Variety (April 5, 2016).
31. Charles Mee, *A note on casting*, *available at* http://www.charlesmee.org/casting.shtml.
32. 510 U.S. 569.
33. Pursuant to 17 U.S.C § 107, the four fair use factors are (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.
34. Campbell, 510 U.S. at 579.
35. *Id*.
36. David Gordon, *Full House* to *Hamilton,* Theatrical Parodies Are All the Rage (2017).
37. *Id*.
38. David Adjmi's play, *3C* (using material from the television series, *Three's Company)* was litigated in *Adjmi v. DLT Entertainment*, 97 F. Supp. 3d 512, and Matthew Lombardo's play, *Who's Holiday* (using material from the children's book, *How the Grinch Stole Christmas*) was litigated in *Lombardo v. Dr. Seuss Enterprises, L.P.*, 729 Fed. Appx. 131.
39. *Campbell*, 510 U.S. at 588.
40. *Adjmi*, 97 F. Supp. 3d at 533.
41. *Id.*
42. *Id.* at 534.
43. *Id.*
44. *Id*.
45. *Lombardo*, 729 Fed. Appx. 131.
46. *Id.* at 133.
47. 607 F.3d 68.
48. *Lombardo*, 729 Fed. Appx. 131.
49. 839 F.3d 168.
50. Notwithstanding the court's determination that the use was not protected under the fair use test, the defendants still prevailed since the plaintiffs failed to plead a valid copyright interest. *Id.* at 172.
51. *TCA Television Corp.*, 839 F.3d at 182.
52. *Id*.
53. *Id.* at 183.
54. *Id.* at 187.
55. 709 F.3d 1273.
56. *Id.* at 1279 (noting that "while the entire episode of *The Ed Sullivan Show* or the individual performances [of the Four Seasons] may be near to the core of copyright, the clip conveys mainly factual information").
57. *Id.* at 1280.
58. 467 F.3d 244.
59. *Id.*
60. *Id.* at 252.
61. David Faux, Esq., Attorney for the Dramatists Legal Defense Fund, submitted Amicus Briefs in connection with *Adjmi v. DLT Entertainment, Ltd.* and *Lombardo v. Dr. Seuss Enterprises*.
62. The late Edward J. Davis, Esq. for David Adjmi, and Jordan K. Greenberger, Esq. for Matthew Lombardo.
63. http://assembly.state.ny.us/leg/?default_fld=&bn=A08155&term=2017&Summary=Y&Actions=Y&Text=Y&Committee%26nbspVotes=Y&Floor%26nbspVotes=Y.
64. https://www.nysenate.gov/legislation/bills/2017/s5857/amendment/b.
65. (Restatement (Second) of Torts § 652A (citing Samuel D. Warren & Louis D. Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193, 195 [1890]).