TEACHING theatre

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Who owns the rights?

Copyright, the law, and licensing the show

BY KEVIN N. SCOTT

An amateur producer once wrote to the playwright Moss Hart, pleading that the theatre he represented be allowed a waiver of royalties on one of Hart's plays. It was absolutely perfect for the company's needs, the man explained, except that the royalty fees exceeded the ensemble's budget. Hart replied that, if it were up to him alone, he would be happy to say yes. "But the problem is my agent," the playwright added. "I have to pay him ten percent of something!"

It's a funny story, but with a grain of truth: the "something" Hart was referring to was the money, or royalties, he (and his agent) received for licensing performance rights under a contract that is based on United States copyright law. Almost every play, song, or musical (or excerpt) that is performed in public is subject to the payment of royalties. The only exceptions are works that are no longer in copyright either because the period of protection has expired, or because the author has deliberately, or negligently, released the work to the *public domain* (see the sidebar on page 8 for more on "public domain").

Whether you're a theatre teacher who produces one or ten shows a year—or an individual who produces shows in your community in any sort of public venue, for that matter—copyright is an issue you have to deal with. I've been involved with theatre as an actor, director, and, briefly, as an educator, for nearly thirty years. I also attended law school for a time, and worked as a paralegal involved in corporate litigation. Until recently, I thought I had a good grasp of how copyright laws work. From your years of theatre work, you might think you do as well. Three years ago, in Oregon, I watched as a high school drama teacher got into serious trouble when he attempted an "innovative" production of the musical *How to Succeed in Business Without Really Trying*. He signed a contract, which he apparently did not read, that specifically prohibited most of the kinds of changes he made.

When a press release touting the production made its way to the legal department of the licensing agency, the teacher and his principal were rudely awakened with a very nasty letter. The incident prompted me to investigate more

DON CORATHERS

The Miracle Worker, at Thespian Festival '92. William Gibson's play about the true story of Helen Keller was later made into a movie. Licensing for the stage script is handled by Samuel French, Inc.

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fully how play and musical publishers interpret U.S. copyright law.

My research showed me just how much of what I thought I knew was either not quite right or totally, even dangerously, wrong. I'm going to share with you what I found out. What I'm *not* doing is giving legal advice. I am not an attorney. My goal here is to prompt some questions that you perhaps never thought of asking and suggest some resources that can offer information that will answer those queries intelligently.

If you *do* have access to a good copyright attorney, you should certainly contact him or her every time you're uncertain about what you can and can't do. On the other hand, given how difficult it is to just raise funds to maintain a quality educational theatre program, unless the advice is free, it's not likely your school can afford to pay for the kind of counsel that's available to a producer working on Broadway or in the West End of London.

Unfortunately, the potential penalties for copyright violations are the same for everybody—school theatre director and professional producer alike. As a teacher you should be strongly motivated by both financial and ethical concerns to take every opportunity offered for self-education in the business and legal matters of production. Having and using accurate information about copyright will not only provide some protection from unnecessary financial risk for you and your school, it will also model honorable behavior for your students.

Copyright: what is it?

Copyright means quite literally the "right to copy." In old English common law, it referred to the exclusive right of the author, which expired as soon as he, or anyone else, actually made a copy or published his work. After that, the author's work entered the public domain, where everyone had a right to copy it. As early as 1720 in England and 1790 in the new United States, statutes were enacted making copyright more durable, so that it survived publication for at least a limited period. (In the sidebar on page 10 is a more detailed history of copyright and the rise of theatre licensing organizations.) Modern statutes have defined copyright as a bundle of rights belonging exclusively to the author of a work. This bundle includes the rights to publish, to copy and distribute, to adapt, to display, and to perform the work. As *intellectual property*, any of these rights may be assigned or sold by the author, or by someone licensed to act as the author's agent, to another person or organization. U.S. and international law have established some serious consequences for assuming any of these rights without permission from the current owner of the right, except where an ex-

emption, such as educational *fair use* (see the sidebar on page 9 for more on "fair use"), has been allowed by statute.

Together with contract law—which covers the buying, selling, assignment, and licensing of intellectual property rights, as well as the same transactions for other goods and services used in production—copyright law is the basis for the legal aspects of what is defined as show business.

One of the problems with becoming informed about copyright is that there seems to be a great deal of misinformation about how plays and musicals get licensed for production. The most fundamental thing you need to know and remember is this: unless a producer chooses a play in the public domain or is the author, there will have to be a licensing agreement with the author, the author's personal agent, or a royalty house/licensing agency (which may or may not be a play publisher) acting on behalf of the author. If you have a "reading edition" from a book publisher rather than an acting edition, the copyright notice page should have contact information for at least the author's personal agent and perhaps the licensing agency that handles amateur rights.

Licensing a show

How a play gets from a playwright to a producer usually follows this four-step process.

1. A licensing organization (also known as a royalty house), either through an author or his representative, licenses the right to make a work available for production, setting a royalty payment plan that is agreeable to both parties. The organization prepares performance materials (which may include printing acting editions for sale) and includes the play or musical in their catalogue.

2. A producer submits an application to perform a play listed in a royalty house catalogue. Most application forms ask for the name, address, phone, and fax numbers of the producing organization, the title of the play to be performed, the dates and number of performances desired, the name, location, and seating capacity of the theatre, and the range of ticket prices. Letters of application should include the same information.

3. If the rights are available for those dates and that location, the licensing organization replies with a form of agreement and sets forth royalty terms and the required deposit. In the case of non-musical plays the royalty amount is usually fixed; for musicals the cost is usually based on a percentage (set by the organization) of the revenue generated by the production.

4. The producer signs the form of agreement and returns it to the royalty house in the allotted time, accompanied by the required deposit.

It's important to bear in mind two things in regard to obtaining a license to perform a show:

- Just because you want to do a show doesn't mean it's available when you want it; royalty houses limit the number of simultaneous productions they allow on some shows. This might be a condition of the licensing agreement with the author, or because the availability of rental materials is limited.
- Submitting an application doesn't obligate you or the licensing organization to anything. A contract to perform a play is created only if you have signed and returned the royalty house's licensing agreement within the allotted time.

One other thing, entirely apart from copyright, having to do with contractual agreements for plays: many licensing agreements include requirements regarding the presentation of advertising material, which are a restatement of provisions in the agency's contracts with the authors and, in many cases, the producers and possibly the directors of the original productions. These can be quite specific as to, for example, the size of lettering used for the authors'/directors'/producers' names in relation to that used for the play's title. The contract might also require that very specific language about the original production be included. Don't overlook a contract's fine print that might cover such details. Among other things, you may be required to provide the licensing agency with posters and programs for your production that will confirm whether or not you complied with the specifics of a contract.

The myths of copyright

Some of the biggest myths about copyright and plays have to do with what can be done with a script once a producer has secured the rights to perform the script. What's most troubling about these misconceptions is that they appear to have credible authority, both in the standard operating procedure of many educational and community theatres (and even some professional ones), as well as many references in print which are either ambiguous or outright wrong about what the law is and what it allows. An example of just how long these notions have endured can be found in *The Complete Acted Play* (Appleton-Century Crofts, New York), by Allen Crafton and Jessica Royer, a how-to text published in 1943 on producing amateur theatre. On the question of how the director should approach the script Crafton and Royer begin by prudently suggesting that he "should decide to revise only when he is sure that he can improve, in his stage presentation, on what the author has written." After a list of common revisions, they conclude by asserting that "the director should be permitted any change which, while respecting the aim and purpose of the play, will make for a better stage presentation in his theater, by his actors and for his audience."

Going public

When work is protected by copyright and when it's not

The term "public domain," and how it applies to U.S. copyright laws, is often misunderstood. In a nutshell, public domain refers to any work or invention whose copyright or patent has expired (or which never had any such legal protection). Plays, along with other kinds of writing, can pass into public domain. But it's possible that some public domain work also exists in revised, copyright-protected versions. For instance, the U.S. edition of Samuel French's *Basic Catalogue of Plays and Musicals* notes that, though the early plays of George Bernard Shaw have long been in the public domain, the playwright revised all his early works for inclusion in later editions of his collected works. These revised, definitive versions, which form the basis for the current Penguin anthology editions and Samuel French acting editions, are protected by copyright and cannot be performed legally without obtaining a license and paying a royalty.

Trying to figure out when a work actually does pass into public domain can be confusing. The table below was prepared by Laura "Lolly" Gasaway, director of the Katherine R. Everett Law Library and professor of law at the University of North Carolina, with footnotes courtesy of Professor Tom Field, Franklin Pierce Law Center, Concord, New Hampshire. It makes the cumulative effects of the Copyright Acts of 1909 and 1976, the Berne Convention Implementation Act of 1988, and the Sonny Bono Copyright Term Extension Act as clear as they probably can be made.

—K.N.S.

Date of work	Protected	Term
Created 1-1-78 or after.	When work is fixed in a tangible medium of expression.	Life of author plus seventy years* (or if work of corporate authorship, the shorter of ninety-five years from publication, or 120 years from creation.**)
Published before 1923.	In public domain.	None.
Published 1923-63.	When published with notice.***	Twenty-eight years, plus could be renewed for forty-seven years, now extended by twenty years for a total renewal of sixty-seven years. If not so renewed, now in public domain.
Published 1964-77.	When published with notice.	Twenty-eight years for first term; now automatic extension of sixty-seven years for second term.
Created before 1-1-78 but not published.	1-1-78, the effective date of the 1976 Act which eliminated common law copyright.	Life of author plus seventy years, or 12-31-2002, whichever is greater.
Created before 1-1-78 but published between then and 12-31-2002.	1-1-78, the effective date of the 1976 Act which eliminated common law copyright.	Life of author plus seventy years, or 12-31-2047, whichever is greater

* Term of joint works is measured by life of the longest-lived author.

** Works for hire, anonymous and pseudonymous works also have this term.

*** Under the 1909 Act, works published without notice went into the public domain upon publication. Works published without notice between 1-1-78 and 3-1-89, effective date of the Berne Convention Implementation Act, retained copyright only if, e.g., registration was made within five years.

Determining fair use

Under certain very limited circumstances—essentially in the classroom or scene studio—it is legal to make photocopies of portions of a script and to perform copyrighted material without obtaining the permission of the owner.

Those circumstances are defined in a portion of the Copyright Act of 1976 that is generally referred to as the fair use doctrine. What it says is that the "fair use of a copyrighted work. . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright." The law identifies four factors to be considered in making the determination of fair use:

"(1) The purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;

"(2) The nature of the copyrighted work;

"(3) The amount and substantiality of the portion used relative 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."

What that means for theatre teachers, in practical terms, is that they can legally copy short scenes and have students work on them in class without applying for permission or paying a royalty fee, said Craig Pospisil, director of non-professional rights for Dramatists Play Service.

The two key factors in defining this kind of fair use are educational purpose and the "amount and substantiality" test.

"It has to be a legitimate classroom setting," Pospisil said. "You can't have a performance in a classroom and invite a bunch of people in and call that a class. That's a public performance." Similarly, making a photocopies of an entire script for distribution to your theatre classes would flunk the substantiality test.

"The law is a complex document," Pospisil said. "But in this case it comes down to a common sense judgment. If you're copying the whole script, that's too much. That's a violation of copyright. If you're copying a scene or two or three pages and working on that material in a legitimate classroom setting, that's okay." **—D. C.**

More recently, in *The Art of Directing* (Wadsworth Publishing Company, Belmont, California, 1985), authors John W. Kirk and Ralph Bellas explained, "The script, of course, is the heart of the theatrical event, and. . . it must be respected by the director. . . . Yet the theatre is a collaborative effort. No playwright, not even Edward Albee (who demands a no-cut agreement in his release statement), ought to insist that every word of his play be in the production script. . . . The realities of stage practice require that the director have some freedom with the script."

While the passages from these two books do accurately reflect certain production realities, they fail to address the issue of contracts and copyright. At least they do not go as far as *Junior Broadway: How to Produce Musicals with Children 9 to 13* (McFarland and Company, Jefferson, North Carolina, second edition, 1998), by Beverly B. Ross and Jean P. Durgin. This text suggests, "Under the terms of your license to perform the show, you usually have the right to omit portions of the book, music, and lyrics if necessary to simplify production." I know of no licensing agreement that makes such a statement. In fact, most licenses specifically *exclude* the right to make any such changes.

"If you don't like the script the way it is, then do another script, or write your own," said Christopher Gould, president of Broadway Play Publishing, Inc. "It really is the grossest violation to 'improve' a script without the collaboration and approval of the author. Yes, there is a lot of gray area here, but I think it is usually pretty clear when a director oversteps his or her role and becomes what is in reality an adaptor."

In truth, *adaptation* is a right that belongs to someone else (that you may get permission to use if you ask for it), and *collaboration* is a two-way street. Some authors will delight in all the different ways their work can be presented, and some will sue your pants off for changing a comma. Whatever the author's opinion, the law is on his side. In the next section on copyright do's and don'ts, I'll explain specific contractual language in regard to cuts and adaptations.

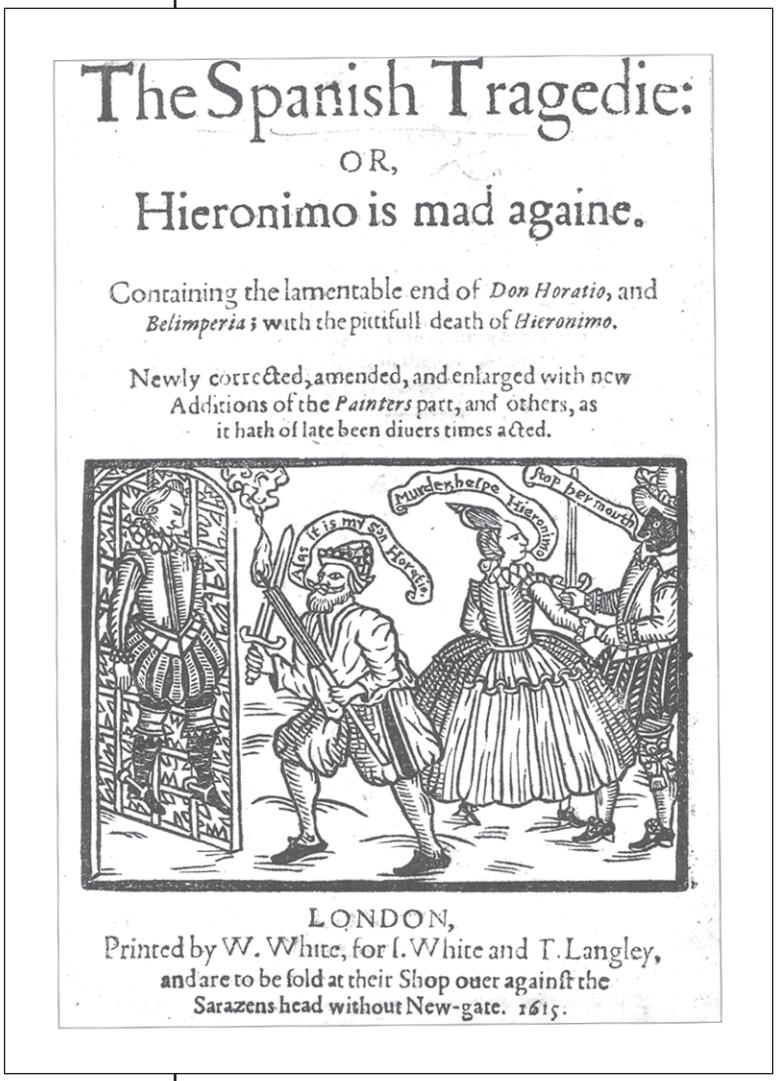
What you can and cannot do

There are some things you can do to a script, and, of course, many others you can't do. I adapted (with permission) the following list from a set of performance regulations prepared and updated for Britain's National Operatic and Dramatic Association by Jonathan Simon of the Really Useful Group, who is also a member of the Performing Right Society Limited, the British equivalent of the U.S. performance rights societies ASCAP, BMI, and SESAC. The list is completely applicable to U.S. copyright laws. The British version was published in the United Kingdom theatre newsletter *NODA News North West.* Editor David Lewis, in granting me permission to adapt these guidelines, said that this "is one area that needs constantly to be kept in the minds of directors, producers, and anyone else involved in running amateur theatre."

1. Dramatic works (plays and musicals). No public performance or public reading of a copyright-

A brief history of copyright and play licensing

In Shakespeare's time, England had common law copyright: the author's exclusive right to copy and distribute his creation lasted only until the work was published, at which point it entered the public domain. There was no performance copyright—anyone with a copy of the script could perform any play licensed by the Lord Chamberlain. If he hoped to make money on the work, the author had to make sure that his profit was maximized by the conditions of that first publication. That's why Shakespeare was in no rush to publish his own works, and why theatre owners tried to prevent anyone else from publishing the plays they were producing. The fear of piracy joined with the scarcity of paper to establish the tradition of actors' "sides"—sheets that contained only each actor's lines with often cryptic cues. No one saw the complete script except the author, the actor-manager, and the trusted keeper of the promptbook. Despite all precautions, piracy was rife—scribes smuggled pen and paper into the gallery to record the script in the Elizabethan equivalent of bootleg videos, and disgruntled actors reconstructed from memory scripts in which they had played, so the plays could be rushed into publication and onto other stages.


The Spanish Tragedie:
OR,
Hieronimo is mad againe.

Containing the lamentable end of *Don Horatio*, and *Belimperia*; with the pittifull death of *Hieronimo*.

Newly corrected, amended, and enlarged with new Additions of the *Painters* part, and others, as it hath of late been diuers times acted.

LONDON,
Printed by W. White, for I. White and T. Langley, and are to be sold at their Shop ouer against the Sarazens head without New-gate. 1615.

Public domain: This 1615 edition of Thomas Kidd's *The Spanish Tragedy* made the play available for production by anyone who had a copy.

A century later, during the reign of Queen Anne, the English Parliament finally decided that common law copyright was not necessarily a good thing. Fearing the instant rush to the public domain, authors were holding new writing back from publication, sharing it only with a trusted private circle. As a result, new works of art and science were not finding their way to the public eye. The solution: Parliament established a statute of exclusive ownership for a limited period after publication. The rule simultaneously ensured that authors would continue to profit after their work was published and, once the period of ownership expired, that the public good would be enriched. So, in 1720 England had its first modern copyright law.

After the revolt of England's American colonies in 1776, the drafters incorporated language from that first English statute into the intellectual property clause of our Constitution. In 1790, acting upon the authority of that clause, the new Congress passed the first U.S. copyright law. At that time, the limited period of ownership was fourteen years, with a possible additional fourteen upon re-registration. The Copyright Act of 1909 doubled both those periods, protecting a work for up to fifty-six years from the date of its first publication.

The Copyright Act of 1976 and the Sonny Bono Copyright Term Extension Act of 1998 further extended the limits of copyright ownership. In simplest

protected play or musical play may be given, either in its entirety or in the form of excerpts, without a license to perform it having been obtained in advance from the copyright owner (usually through a representative agency in the business of licensing and collecting royalties for subsidiary performance rights, which may also be in the business of publishing plays). In the case of a musical play, the rights licensed by the royalty house are referred to as *grand performing rights*. The requirement to license excerpts includes monologues and scenes presented for adjudication. It is especially important to apply early for permission to use such excerpts, since some authors do not allow them to be taken from some works. For instance, Thornton Wilder's will prohibits the performance of any cuttings from his plays,

terms, between now and December 31, 2018, anything first published on or after January 1, 1923, is *probably* protected by copyright (including revised, republished work that was originally published prior to 1923). The system in the United Kingdom and Europe, to which we are gradually converting, is easier to comprehend: the copyright expires seventy years after the death of the author.

The rise of theatrical publishers

When the middle class in Victorian England began to emerge, it discovered it had leisure time. For many, amateur theatricals were a popular diversion. In 1830 an entrepreneur named Samuel French had what turned out to be a brilliant and highly profitable idea: he would license from the authors of plays of proven popularity the rights both to publish (as cheaply as possible) acting editions of those plays, so that each actor could have a full script to work from, and to sub-license the performing rights for those plays to amateur groups and provincial professional companies, keeping a healthy commission from the royalties collected for the authors. (Or, alternatively, buy the play outright from the author and keep all the royalties for himself.)

By the time U.S. copyright law recognized Brtitish copyrights, and vice versa, Samuel French's company had established offices in London, Toronto, and New York (and eventually Los Angeles as well), and had the power and prestige that allowed it to charge commissions as high as fifty percent of the royalties on some of the plays the company published and licensed. By the late 1800s, it represented most of the major playwrights of the English-speaking world. (Today the many authors represented by Samuel French range from Neil Simon and Jane Martin to Samuel Beckett and Agatha Christie.) The company's play publisher/licensing agent model is almost universally followed in the field of non-musical plays. Two other play publishers founded in the nineteenth century—Baker's Plays (1845) and Dramatic Publishing Company (1885)—are also still active, concentrating heavily on the school and community theatre market.

The licensing model for musicals was also shaped during the nineteenth century, beginning in the opera houses and music publishers of Europe. This model, used by music publishers for symphonic works and "grand" works such as ballets, operas, and operettas, has been adopted by most present-day musical theatre licensing houses. (Musicals are also considered "grand" works, in which the compositions are licensed as part of the dramatic whole.) In his book *Giuseppe Verdi and Giovanni Ricordi with notes on Francesco Lucca: from Oberto to La Traviata* (Garland Publishing, Inc., 1989, New York and London), author Luke Jensen explained the evolution. Giovanni Ricordi, founder of the publishing house, Casa Ricordi, which became Verdi's publisher, and later Puccini's, began his career in the very early years of the century as a music copyist for various opera houses.

Ricordi developed a rental library of manuscript scores and orchestral parts, and became a licensing agent for performing rights of various operas before opening a print shop to publish piano-vocal scores and libretti for sale. Most performance materials were kept in the library rather than being published. The American company M. Witmark & Sons, founded in 1870, followed this almost universal practice of having a print-for-sale and a rental library division. The prominence of Witmark and the Witmark Music Library was cemented by their representing Victor Herbert, the composer who was to pre-World War I American operetta what Verdi was to nineteenth-century Italian opera (except that Verdi seemed to find better librettists). Eventually Witmark Music Library became Tams-Witmark.

Well into the twentieth century, while Tams-Witmark did very well licensing professional and semi-professional productions of operettas like Lehar's perennially popular *The Merry Widow*, the school portion of the market catered to by the organization and its competitors mostly consisted of simplified versions of either Gilbert and Sullivan or Victor Herbert, or "school operettas" centered around historical characters like Miles Standish, Paul Revere, or Betsy Ross. This was because, despite the wonderful popular songs, most Broadway musicals of the teens, twenties, and thirties were built around star performers, and had books that were too silly and/or too risqué for high school (and most community theatre) standards, while European operetta, aside from its possibly more wholesome content,

Continued on next page

including *Our Town*.

2. Unstaged concerts of excerpts from musicals and other music. So long as the rendition is not *dramatic* (see number 4), it is always permissible to perform music that was not originally part of a musical play with a license from a performance rights society such as ASCAP, BMI, and SESAC. It is also normally permissible to perform excerpts from musical plays with a license from a performance rights society, provided that the excerpt:

- Is not a complete act of the musical play.
- Does not constitute an abridged version of the musical play.
- Is performed without any change to either music or lyrics.
- Is performed using only published or autho-

made vocal demands beyond the perceived capacity of the average high school (and many community theatre) performers. Tams-Witmark's competitors included specialty divisions of "serious" music publishers, companies entirely devoted to this portion of the market, and the operetta divisions of play publishers like Samuel French.

Until the passage of the U.S. Copyright Act of 1976, "unpublished" rental parts, even those essential to the performance with full orchestra of works that had already passed into the public domain, such as Gilbert and Sullivan operettas, were potentially protected under common law copyright in perpetuity. The 1976 Act did away with common law copyright and set a date for the expiration of copyright on works created before 1978 but still unpublished. Even without copyright protection, the music publishers/licensing houses that own and rent them can probably continue to protect works from unauthorized copying through "no copy" clauses in the rental agreements. The point is, rental income does not need to stop just because royalty income is no longer legally collectible.

Changing players

As the middle of the twentieth century approached, changes in the theatrical marketplace helped create new players in the publishing/licensing field. In 1936, dissatisfaction with Samuel French's policy of charging up to fifty percent in commissions prompted a group of Dramatist Guild playwrights and literary agents to form the Dramatists Play Service. The group (who included, initially, Robert E. Sherwood, George S. Kaufman, and Moss Hart, and later, Arthur Miller and Tennessee Williams) would own the company as shareholders, acting as both buyer and seller of publication and licensing rights. Agent shareholders of Dramatists would receive a pro rata share of the company's profits based on the business they brought in. To meet this competition, Samuel French began to also offer commission sharing for authors' agents.

In the musical field the advent of a new genre during World War II both powerfully influenced the creation of new productions and revisions of older works for revival and created a new market for amateur licensing. The "musical play," starting with the 1943 production of Rodgers and Hammerstein's *Oklahoma!*, integrated a strong (and basically wholesome) serious/romantic operetta-like storyline with a popular score. Other shows that Rodgers and Hammerstein wrote, such as *Carousel* and *South Pacific*, or produced, like Irving Berlin's *Annie Get Your Gun* and the 1946 revival of *Show Boat,* gave pre-sold hit status to family entertainment not beyond the skills of the advanced community or high school group. Both Tams-Witmark and Samuel French hoped to cultivate the new market.

The new musical theatre field was broad enough for individuals with highly successful shows to license for amateur production to enter the licensing/publishing market as well. Both Rodgers and Hammerstein and Frank Loesser had already followed Irving Berlin's example and started their own music publishing houses, Williamson Music (now part of the Rodgers and Hammerstein Organization) and Frank Music. Now they decided to cultivate the licensing field as well, founding, respectively, the Rodgers and Hammerstein Theatre Library in 1948, and Music Theatre International in 1952. The stables of these houses include some of the major warhorses of amateur musical production, both those created by the founders and those by other authors brought in later. Meanwhile, Tams-Witmark signed other musical theatre heavyweights such as Alan Jay Lerner and Frederick Loewe, and Cole Porter. Samuel French initially concentrated on procuring Off Broadway musical hits. Today, almost every major musical is licensed by one of these four organizations.

One of the most recent additions in the non-musical category is Broadway Play Publishing, Inc., founded in 1982 by Christopher Gould, former head of the musicals department at Samuel French. BPPI, now the third largest play publisher and licensing agency in New York, is primarily committed to contemporary playwrights. It represents such writers as Tony Kushner, Richard Nelson, and Eric Overmeyer, as well as works by the Reduced Shakespeare Company and George C. Wolfe. Among BPPI's innovations are an on-line catalog and adjustable royalty fees.

—K. N. S.

rized musical arrangements.

• Makes no use of any form of scenery, costume, choreography (other than minimal movement), staging, character representation, or special lighting—even if such elements are not designed to imitate or recall any production of the musical play.

In many cases theatres, halls, and other venues (including the auditorium in many high schools) may have a *blanket* license from one or more performance rights societies (a license to perform all the repertoire licensed by ASCAP, BMI, and/or SESAC). This should be determined beforehand and, in the absence of such a license, application should be made to the performance rights society (or societies) that licenses the music to be used.

The rights licensed by performance rights societies are referred to as *small performing rights.* Any performance that does not fall within the above

provisions cannot be subject to a performance rights society or "small" rights license.

3. Staged concerts and revues. Many revues devised and/or compiled and previously performed by professionals are available from licensing agencies under the same licensing conditions that apply to musical plays. If the intention is to stage (with costumes and/or scenery and/or movement) an original revue or compilation show, then if any of the content originates in a musical play, permission (which may or may not be forthcoming) must be sought in advance from the licensing agency representing the copyright owner. If the song(s) or music concerned are not originally from a musical play, then it is probable that their performance could be covered by a performance rights society license, so long as the performance is not to be a dramatic rendition of the music (see number 4). This should be checked in advance with the performance rights society and/or the music publisher that holds the copyright on the music. Permission to perform revue sketches must be obtained in advance from the authors' agents who, if the use is approved, will issue licenses upon payment of appropriate fees.

4. Dramatic rendition of music. In a chapter entitled "The Grand Rights Controversy," the authors of *Kohn on Music Licensing* state that, while many think only in terms of "grand" and "small" performing rights, the right to perform a dramatic rendition of music is distinct from either, and is licensed neither through a "grand" rights licensing agency nor through a performance rights society, but directly from the music publisher that holds the copyright on the music (or the personal agent of the composer of an unpublished work). According to the defining language (drafted, it is said, by Oscar Hammerstein II, who was an attorney as well as a librettist), music is rendered "dramatically" if it is "woven into and carries forward [a definite] plot and its accompanying action." These rights come into play when a playwright or director chooses to use a popular song (either recorded or performed live) as underscoring or incidental music.

In some cases, arrangements have been made between the play licensing agencies and the composers involved, so that permission to perform music called for in the play is included in the license to perform the play. This is usually noted in the acting edition and in the licensing agreement. Many published scripts provide contact information for the composers, or their agents, for songs and incidental music used in the original production.

If you want to use in your production either musical compositions still under copyright or copyrighted arrangements of music in the public domain, the best place to start may be the website of the National Music Publishers Association, found at www.nmpa.org. The site provides links to the Harry Fox Agency, Inc., a wholly owned subsidiary of the NMPA, which acts as intermediary for most member publishers in negotiating and collecting fees on *mechanical*, *synchronization*, and live stage licenses. (A "mechanical" license permits you to make a recording of the composition, audio only. A "synchronization" license allows you to perform the composition in "synch" with visual elements, whether for film or video recording, or for live stage, and must be obtained in conjunction with any film/TV or live stage license.)

The advantage to dealing with the Fox Agency website is that it includes a searchable database that includes every piece of copyrighted music published by NMPA members, each with its own assigned code number, and downloadable, printable license application forms. The disadvantage is that, if you wish to obtain a reduced rate on the royalties, you must first negotiate with the publisher and obtain their authorization, and then submit that with the other required paperwork to Fox and wait six to eight weeks for them to process it.

If the music is to be used in the production in a recorded form, at least one other permission (and royalty fee) is probably required: either from the record company to use an existing commercial recording, or a mechanical license from the music publisher to make a recording especially for the production. You can check out the Fox website for this information as well, including the license for any necessary transfer of the recording to a master soundtrack tape.

The simplest way to avoid both the hassle of music licensing and the fear of being caught unlicensed is to limit the use of music to works in the public domain and original music commissioned for the production. It's prudent to have a licensing agreement in place for the original music, just as it is a good idea to have a performance contract with the authors of original plays, including students. Like anyone else, they can withdraw permission to use their material in a performance. If only such music is used, performed live or in recordings made especially for the production, there should be no copyright worries.

5. Charity or free performances. It should be remembered that even a public performance for which no admission is charged, or which is for a charitable cause, still requires a license.

6. Photocopying, arrangements, and adaptations. The making of photocopies is restricted under copyright law. There are "fair use" provisions although it is unlikely that they would apply in the case of public performance.

If copies of scripts are required for rehearsal or performance purposes and they are unavailable either for purchase or rental, then permission to copy must be sought from the play publisher. If copies of music or songs are required for rehearsal or perfor-

Resources for copyright and licensing information

Books

The first two books I've listed are particularly valuable. The Kohn on Music Licensing *text is extremely expensive ($150), so you might want to check it out in the library to see if you want to make the investment.*

Producing Theatre: A Comprehensive Legal and Business Guide, by Donald C. Farber (second edition), Limelight Editions, New York, 1997. The first chapter has a good overview of public domain and "small" and "grand" performing rights questions.

Kohn on Music Licensing, by Al Kohn and Bob Kohn (second edition), Aspen Law and Business, New York, 1996; one volume and forms on computer disk; updated by supplement periodically (most recently in 1999). The part of most interest to theatre educators would most likely be chapter 18, "The Grand Rights Controversy." Chapter 14, "Synchronization Licenses," is of more interest and application than most realize.

The Performing Arts Business Encyclopedia, by Leonard D. DuBoff, Allworth Press, New York, 1996.

Media Law for Producers, by Philip Miller (third edition), Focal Press, Boston, 1998.

Show Business Law: Motion Pictures, Television, Video, by Peter Muller, Quorum Books, Westport, Connecticut, 1990.

Play publishers/licensing agencies

Baker's Plays, P. O. Box 699222, Quincy, Massachusetts 02269
Call: (617) 745-0805; fax (617) 745-9891
E-mail: info@BakersPlays.com
www.bakersplays.com

Broadway Play Publishing, Inc., 56 East 81st Street, New York 10028
Call: (212) 772-8334; fax (212) 772-8358
E-mail: bppi@broadwayplaypubl.com
www.broadwayplaypubl.com

Dramatic Publishing, 311 Washington Street, Woodstock, Illinois 60098
Call: (800) 448-7469; fax (800) 334-5302
E-mail: dana@dramaticpublishing.com
www.dramaticpublishing.com

Dramatists Play Service, Inc., 440 Park Avenue South, New York 10016
Call: (212) 683-8960; fax: (212) 213-1539
E-mail: postmaster@dramatists.com
www.dramatists.com

Music Theatre International, 421 West 54th Street, New York 10019
Call: (212) 541-4684; fax (212) 397-4684
E-mail: licensing@mtishows.com
www.mtishows.com

Pioneer Drama Service, Inc., P.O. Box 4267, Englewood, Colorado 80155
Call: (800) 333-7262; fax (303) 779-4315
E-mail: orders@pioneerdrama.com
www.pioneerdrama.com

The Rodgers & Hammerstein Theatre Library, 229 West 28th Street, 11th Floor, New York 10001
Call: (212) 564-4000; fax (212) 268-1245
E-mail: theatre@rnh.com
www.rnh.com

Samuel French, **Inc**., 45 West 25th Street, Department W, New York 10010
Call: (212) 206-8990; fax (212) 206-1429
E-mail samuelfrench@earthlink.net
www.samuelfrench.com

mance purposes and they are unavailable either for purchase or rental, then permission to copy must be sought from the music publisher named on the music, not the owner of the stage rights nor the performance rights society. If permission to copy is granted, then this may be conditional upon payment of a reproduction fee and/or an undertaking to deliver all copies made to the publisher after use.

The licensing agreement with the licensing agency will almost certainly contain language regarding making no changes in the script and/or music as provided without first obtaining written permission. Here's a typical example of how an agreement might read: "The granting of this license to you to perform the play is not to be construed as a right to. . . [make] changes of any kind. . . in the play including but not limited to the deletion or interpolation of new music, lyrics or dialogue or change in the period, characters or characterizations in the presently existing play. . . . Any violation hereof will be deemed a willful infringement of the copyright of the author(s) and shall automatically terminate this license."

Tams-Witmark Music Library, Inc., 560 Lexington Avenue, New York 10022
Call: (800) 221-7196; fax (212) 688-3232

Websites of interest

With the advent of the internet, there are innumerable sites that can help you better understand copyright and licensing. I've listed some of the ones I've found most useful. No doubt there are others. The World Wide Web, like the law, keeps changing.

Brown, Pinnisi & Michaels, PC
www.bpmlegal.com
This law firm in Ithaca, New York, has a good set of copyright Q&As on their site.

Dramatists Play Service
www.dramatists.com
The Rights and Restrictions page includes three articles of interest by Craig Pospisil, director of nonprofessional rights: "Changing the script" (copyright), "Obtaining permission" (restrictions), and "Copy cat" (photocopying and videotaping).

The Groton, Connecticut School District
www.groton.k12.ct.us
This Connecticut school district features a well-organized online copyright manual on its Media Technology Services/Polices and Procedures page. While it currently has very little on copyright as it relates to dramatic and musical performance, more revisions are planned for fall 1999.

Kohn on Music Licensing
www.kohnmusic.com
Maintained by the authors of the book of the same name, this site calls itself "a free resource for anyone who has questions about copyright law and licensing music." Features include Q&A conferences on related matters, and links to most relevant music licensing sites, such as ASCAP, BMI, SESAC, and the National Music Publishers Association/Harry Fox Agency.

Lawgirl.com
www.lawgirl.com
Attorney Jodi Sax works in Los Angeles in music/entertainment law. Her site is geared more toward artists seeking copyright protection, but it clarifies the fundamental things everyone needs to know.

Music Theatre International
www.mtishows.com
The Customer Support FAQ page addresses several topics including how to obtain a performance license, why you can't change details of a show, why some shows are restricted, and why videotaping is prohibited.

National Music Publishers Association
www.nmpa.org
The NMPA page links to the Harry Fox Agency, which acts as the licensing intermediary for most NMPA member publishers. The site includes a searchable database of all copyrighted songs (including copyrighted arrangements of public domain materials) published by members, and downloadable licensing forms.

The Rodgers & Hammerstein Theatre Library
www.rnh.com/theatre/tlnews
The Theatre Library News page features an article on royalties and a Q&A area that answers the following questions: "May we videotape our production?", "We purchased our scripts years ago. Do we still need to rent yours?", and "Can we cut scenes, songs, lines of dialogue in the scripts you have provided?"

10 Big Myths about Copyright Explained
www.templetons.com
In his articles, Brad Templeton, the publisher of several online newspapers, addresses the most common misconceptions about copyright. Craig Pospisil of Dramatists Play Service says, "He sets the record straight in a clear concise manner." It's true.

Title 17 of the United State Code
http://lcweb.loc.gov/copyright/title17
For the last word: a complete online text of U.S. copyright law, with links to the U.S. Copyright Office and Library of Congress home pages.

—K. N. S.

Changes requiring written authorization range from simply "cleaning up the language" to changing the gender of roles in the play. This is especially important to consider if the script requires any adaptation to conform to community standards of acceptable language or behavior. If the changes required by the community are not allowed by the copyright holder, the producer's only option is to select another play. It does not matter if "they did it that way in the movie." The movie producer paid a substantial amount of money for the film rights, which usually *do* include the right to make any necessary changes.

Even what was done in recent major revivals cannot be used to justify an unauthorized departure from the script as provided by the licensing agency. Remember that such productions involve not only, again, a substantial amount of money, but also the active participation of the copyright holder(s) or their representatives. Nothing is done without their consent. The fact that such changes have not been authorized for release to the licensing agency may

mean that the persons with the authority to permit have had second thoughts after seeing the changed script onstage.

The making of musical arrangements of copyrighted works, changing the melody or words, or adding new words all arguably constitute an adaptation and should be strenuously avoided.

The licensing agreement for a musical play will specify which accompaniment option is to be used (usually either full orchestra or single piano reduction, though other options may be available for some shows). The use of any other arrangements, including recorded music or MIDI sequencing, is allowed only with advance written permission.

7. Audio or video recording. As explained earlier, in certain circumstances, it's possible to obtain a license to make a sound recording. However, the making of video recordings is prohibited almost without exception. The license to make a video must be obtained from the owner of the film and TV rights to the work, plus a synchronization license must be obtained from the publisher(s) of all music used in the production (again usually through the Harry Fox Agency). The owner of the film and TV rights may be a film studio or independent producer who has purchased them from the owner of the copyright. The Rodgers & Hammerstein Organization is probably unique in not only having retained the film and TV rights to certain of its founders' works, but also in having under the same roof the "grand" rights licensing agency and the music publisher for those works. For this reason, amateur producers of those works can negotiate a "special" license which includes the rights to videotape the whole work in performance, and to record the music in synchronization. However, the terms of the license allow for a single tape for archival purposes only; no copies may be made and distributed.

One of the worst horror stories I heard while researching this material concerned a girls' school in the United Kingdom. They had videotaped their production of a popular musical play and had distributed fifty copies of the tape. They had the misfortune to be reported to both the owner of the film and TV rights and the music publisher, both of whom sought the maximum penalty for the infringement of their rights.

Getting caught

Here is the most dangerous myth of all concerning copyright: "They'll never know what I do in my little high school in the middle of nowhere and, besides, even if the publisher/licensing agency finds out, they never go after high school and community theatres anyway." It is more accurate to say that you rarely hear about licensing agencies or music publishers going after high school theatres. It is not good public relations for either the publisher or the high school to advertise the fact that it has happened, but the licensing agencies and the music publishers have a fiduciary responsibility to the authors and composers they represent to not allow the rights of those authors and composers to be infringed by anyone at any level of production. If they find out about an infringement, they are *bound* to pursue it.

How are they likely to find out? There are probably more ways than can be counted, but here are a few examples:

- In the Oregon case I cited earlier, the licensing agency's first inkling of the drama teacher's intentions came when a clipping of a newspaper article found its way to the agency's legal department *after* the show had closed. As it turns out, this is much worse than if it had arrived there *before* the show opened. Then the agency would have simply issued a "cease-and-desist" letter, and the show would have been canceled. The school probably would have forfeited the royalties, but not have incurred damages for infringement. A major claim for such damages was what the drama director and his school district now found facing them. The case, as far as I know, was settled privately.
- In another Oregon case, a conservative parent attended an adjudicated competition that included cuts from *Rent*, *Chicago*, and *West Side Story*. The parent found several selections objectionable, one so much so that he tried to have the drama director arrested for child abuse for allowing/encouraging the students to participate. (This came to nothing because the students involved were over eighteen.) The incident provoked a very public debate over content and community standards. As it turned out, several of the selections identified in the newspaper reportage of the incident and its aftermath were being performed without the permission or knowledge of the appropriate licensing agencies.
- A student in Southern California, enthused with his school's recent production of *Man of La Mancha*, created a personal web page that included sound files ripped off from the original cast recording and promoted it on musicals.net, an internet site that includes resources, links, and a forum for those interested in musical theatre. Compounding what was already a copyright infringement, he included photos of the production that clearly showed that several roles written as male were being played by female performers.
- In numerous other instances on musicals.net, I noted several student posts about "how we did it in *our* production": Arvide Abernathy in *Guys and Dolls* becoming Agatha, Pawnee Bill in *Annie Get Your Gun* becoming Pawnee Jill, replacing "My White Knight" in *The Music Man* with "Being in Love," and restoring the duet for Tommy Djilas and Zaneeta Shinn the director found on the *Lost in Boston* album. One student summed it up this way: "We just

cut that stupid song—we followed the movie instead of the stupid script they sent us."

The point of all these examples is to emphasize that you never know who is sitting in the audience, or reading an unintentionally revealing account of your production. So, if you do violate copyright, what *is* the worst that can happen? Federal copyright law establishes statutory fines for *each* act of copyright infringement, ranging from a minimum of $500 for "innocent" infringement to a maximum of $100,000 for "willful" infringement. (This is why it is important to know that most licensing agreements *define* any unauthorized changes as "willful" infringements.) The Federal Copyright Act extends "joint and several" liability for each infringement (meaning each individual could be held responsible for the whole amount) to: the members of the production staff, the student cast and crew (or their legal guardians), the school (acting as producer), and the owner of the building in which the performances take place (often the school board or district).

As I mentioned at the outset of this article, unlike most amateur producers, the licensing agencies *can* afford to hire highly expert attorneys, who daily work exclusively in this area of expertise. Courts tend to look unkindly at the misappropriation of the intellectual property rights of others and upon those who commit themselves to a contract without full knowledge of its terms. If you try to defend such a case in court, you are most likely going to lose, and to have to pay the statutory fine. This is why most of these cases never come to court. A private, confidential settlement is made, to the advantage of the side that would almost certainly prevail if the case did come to court. No one not directly involved in the case ever hears about it, preserving the reputation of both the school and the publisher/licensing agency. The school district somehow swallows paying for a drama director's costly mistake (and remembers it well when budget time rolls round), and the myths continue to live. I hope that what I've explained here will help extinguish at least some of that mythology and maybe save you, your school, and, most of all, your students, the embarrassment and expense of a copyright infringement.

Kevin N. Scott lives in his native Oregon. He's acted professionally in a variety of styles and media. He also worked as a paralegal for Wendell Wilkie's old law firm.