2. Playwrights

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1. INTRODUCTION

Throughout English theatrical history, the relationship between playwrights and managers has been vital yet ever-changing. In the time of Elizabeth I (1558–1603), theatre companies exercised a kind of collective management over performance-texts (while the Stationers' Company controlled many of those same texts in print).[1] Individual playwrights were not viewed as authors in the modern sense and were often quite far removed from the performance process. Typically, they did not receive performance or print royalties. The position of the individual dramatist grew in esteem during the 17th century, especially post-Restoration (1660). With the Statute of Anne 1710, the author of the play-text was centred as right-holder for the first time. During the 18th and 19th centuries, playwrights negotiated copyright licences and assignments via contract with individual theatre managers, who began to exercise strong powers within theatre. By the time the 20th century began, the idea of collective management of theatrical licensing had taken hold, and it largely remains in place today. Contemporary theatre in the UK presents several challenges in the context of authorship, ownership and management of theatrical works.

2. MANAGEMENT OF THEATRICAL TEXTS DURING THE 16TH AND 17TH CENTURIES

Elizabethan 'English Renaissance' theatre companies emerged because of the growth of an early capitalist marketplace for theatrical works and performances. This market benefited the shareholders of theatre companies – entities which in effect can be described as early versions of the 'joint venture of limited liability'.[2] In the Elizabethan period, theatre companies and managers

[1] L McDonagh, Performing Copyright: Law, Theatre and Authorship (Oxford: Hart, 2021).

[2] J Masten, 'Beaumont and/or Fletcher: Collaboration and the Interpretation of Renaissance Drama' (1992) 52 English Literary History 337–339.

effectively owned plays as performance-texts, what Miller calls 'performance commodities'.[3] Playwrights did not control such commodities – once a dramatist had developed a text, whatever 'ownership' that writer could claim was inevitably short-lived: 'Strictly speaking, a playwright owned a copy of a play, a manuscript distinguishable from a scribal copy only by the fact that it was a unique copy….'[4] Acting companies purchased such texts from writers for a flat fee of £6–10; and in a practical sense, that transaction ended the writer's ownership of the play.[5] Regarding management, Litman states:

> Theatre managers valued playwrights as they valued actors, and paid them in the same fashion. Scripts once acquired entered a theatre company's repertory, where they could be revived, adapted, rewritten, performed, and printed without any further license from the writer.[6]

The notion that the playwright could own property in the dramatic text being performed by the company 'would have been difficult to comprehend' for most Elizabethan writers.[7] Print-property also generally eluded playwrights – most could not enter their texts onto the Stationers' Register, nor could they own copyright privileges.[8]

The position of playwrights during the Elizabethan period can be observed from the way they were spoken about on stage – actors would typically refer to a playwright as 'our poet', increasing the sense that the theatre company not

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[3] D Miller, Copyright and the Value of Performance, 1770–1911 (Cambridge: Cambridge University Press, 2018).

[4] J Loewenstein, 'The Script in the Marketplace' (1985) 12 Representations 101, 102.

[5] Loewenstein (n 4) notes that printers sometimes gave 'limited privileges' of revision to authors. See also Z Lesser, Renaissance Drama and the Politics of Publication: Readings in the English Book Trade (Cambridge: Cambridge University Press, 2004).

[6] JD Litman, 'The Invention of Common Law Play Right' (2010) 25 Berkeley Tech. L. J. 1381, 1390. See also T Stern, Rehearsal from Shakespeare to Sheridan (Oxford: Oxford University Press, 2000).

[7] B Salter, 'Taming the trojan horse: an Australian perspective of dramatic authorship' (2009) 56 Journal of the Copyright Society of the USA 789, 815. See also R Knutson, The Repertory of Shakespeare's Company, 1594–1613 (Fayetteville: University of Arkansas Press, 1991).

[8] PWM Blayney, The Stationers' Company and the Printers of London, 1501–1557 (Cambridge: Cambridge University Press, 2013). See also P Blayney, 'The Publication of Playbooks' in J Cox and DS Kastan, A New History of Early English Drama (New York: Columbia University Press, 1997) 383, 394–99.

only owned the play, but that the role of the poet/writer was subsumed within collective management:

> On the margins of dramatic representation – in inductions and epilogues – the Elizabethan play is regularly represented by the speaking actor as 'ours,' the possession and, indeed, the product of the actors. Where the playwright is mentioned, he is almost never 'the Author' or 'the Playwright'; he is 'our poet,' an adjunct to the proprietary group of performers. Of course, playwrights almost always wrote the prologues to their scripts. Still, the marketplace was such that authorial assertions of preeminent domain were all but unthinkable.[9]

Therefore, the acting company took ownership – and thus, control – of the play in the performance context, and would thereafter rework the text, adding edits and improvisations as it was performed.[10] The surviving Shakespearean texts are testaments not only to his brilliance, but also to his successful collaborations with other writers, and more generally to the vibrancy of the polyvocal theatrical authorship of the period.[11]

On discussion of whether writers 'owned' plays in the Elizabethan era, it is revealing that even William Shakespeare did not – and, likely, could not – rely on playwriting to make a living. To obtain a steady income he needed to play multiple roles, becoming, in addition to a writer, an actor, producer and, effectively, a business manager.[12] Thus, Shakespeare fulfilled several different roles in theatre companies over his career, most notably in the Lord Chamberlain's Men (and the successor company – the King's Men).[13]

Indeed, although Shakespeare is the most iconic of all English renaissance playwrights, it is arguable that at the time Ben Jonson had a greater sense of himself *as a theatrical author*. This is evidenced by Jonson's attitude to his published works, which, as I explore below, marks him out from his contempo-

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[9] Loewenstein (n 4) 102. M Straznicky (ed), The Book of the Play: Playwrights, Stationers, and Readers in Early Modern England (Amherst, Boston: University of Massachusetts Press, 2006).

[10] JS Peters, Theatre of the Book, 1480–1880: Print, Text, and Performance in Europe (Oxford: Oxford University Press, 2000), 1, 4–5.

[11] B Vickers, Shakespeare, Co-Author: A Historical Study of Five Collaborative Plays (Oxford: Oxford University Press, 2004). See also J Clare, 'Shakespeare and Paradigms of Early Modern Authorship' (2012) 1 Journal of Early Modern Studies 137–53.

[12] Shakespeare was a founder of an acting company (The Lord Chamberlain's Men) and a shareholder – D Price, 'Evidence for A Literary Biography' (2004) 72 Tenn. L. Rev. 111, 133–34.

[13] Vickers (n 11). See eg D Bruster, 'Shakespeare the Stationer' in M Straznicky (ed), Shakespeare's Stationers (Philadelphia: University of Pennsylvania Press, 2013) 112–31.

raries (and, to some extent, from the prevailing norms of polyvocal authorship). By contrast, our modern understanding of William Shakespeare as English author par excellence began with the posthumous publication of the First Folio in 1623 – organised by the actors John Heminges and Henry Condell – which called attention to his genius. It included numerous previously unpublished plays, proving that several major Shakespeare works were not registered at all at the Stationers' Company during his lifetime, demonstrating how distant the world of print was from performance. While Shakespeare is undoubtedly the greatest playwright in English theatrical history, we turn now to Ben Jonson, perhaps the key author-figure of the time.

Jonson pursued multiple avenues of revenue to earn an income primarily from his writings. First, he sold plays to acting companies; second, he made appeals for patronage based on his manuscripts; third, he sold 'masques' to the Royal court for performances at, for example, the Banqueting House at Whitehall; and finally, he sold 'verse' for registration at the Stationers' Company and thereafter print dissemination.[14]

During the 1590s Jonson formed a business relationship with Philip Henslowe, the prominent theatrical manager of the Rose Theatre and 'The Admiral's Men' – though 'it would not be far from the truth to say that he was indentured to Henslowe'.[15] This relationship blossomed at the end of the Elizabethan era as the market for plays in printed form grew in significance. Henslowe arranged for Jonson's texts, including Jonson's paratextual additions, to be registered at the Stationers' Company, which provided the acting company with a potential additional source of income once audiences for a formerly popular play had begun to dwindle.[16]

3. MANAGEMENT OF THEATRICAL TEXTS DURING THE 18TH AND 19TH CENTURIES

The essential moment of 18th-century copyright is undoubtedly the passing of the Statute of Anne 1710. This set the scene for the legal print rights the individual playwright could claim to expand in practice. During the mid-to-late 18th century, theatre companies began to agree contracts with writers that allowed the playwrights to keep ownership of the play in its printed form – this allowed writers to make agreements directly with the Stationers.[17] By the end

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[14] Loewenstein (n 4) 102.

[15] Loewenstein (n 4) 103.

[16] Loewenstein (n 4) 104. See also AW Pollard, Shakespeare's Fight with the Pirates and the Problems of the Transmission of His Text, 2nd edn (Cambridge: Cambridge University Press, 1920) 35–52.

[17] Litman (n 6).

of the 18th century, the two 'patent' theatres began to pay authors flat fees rather than the prior system of partial performance 'benefit'.[18] The theatres intended to limit their cost outlay, but the impact on writers was that, on average, by contracting with the publishers themselves, they received a greater amount of money than in the earlier periods – as well as acknowledgement of authorial ownership.[19] As a result, by the end of the 18th century 'it was becoming possible for at least some playwrights to earn a living writing for the theatre'.[20]

Two subsequent cases are central to the law's development and are known as the 'literary property debate' cases. Prior to the Statute of Anne there had been some rhetorical acceptance of the idea that at common law there existed a form of author's 'literary property'.[21] In *Millar v Taylor* (1769)[22] it was ruled that such a right did exist in the form of a perpetual exclusive right belonging to the author which was not removed by the time-limited right provided for in the 1710 Act. Yet, the outcome of *Donaldson v Becket* (1774)[23] was that any common law literary property right was extinguished as soon as the work was published (when it became, in effect, the statutory right under the 1710 Act).[24]

A substantive consequence of the debate was the application of the common law notion of property (object-ownership) to intangible, literary texts, which enabled the further conceptual development of statutory copyright law, including the emergence of the idea/expression distinction and the broader copyright work concept.[25]

During the 18th century the works of Shakespeare were revived and adapted – albeit often as 'tragedies with happy endings', as in the case of the Nahum Tate version of *King Lear* – with famous performances by leading actors such as David Garrick;[26] meanwhile Restoration comedies such as Congreve's *The*

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[18] House of Commons Report from the Select Committee on Dramatic Literature with Minutes of Evidence (1832), available at www.copyrighthistory.org/cgibin/kleioc/0010/exec/ausgabe/%22uk_1832%22.

[19] Litman (n 6).

[20] Litman (n 6) 1397.

[21] HT Gómez-Arostegui, 'What History Teaches Us About Copyright Injunctions and the Inadequate-Remedy-at-Law Requirement' (2008) 81 S. Cal. L. Rev. 1197

[22] Millar v Taylor (1769) 4 Burr 2303.

[23] Donaldson v Becket (1774) 4 Burr 2408.

[24] P Masiyakurima, Copyright Protection of Unpublished Works in the Common Law World (Oxford: Hart, 2020).

[25] R Kennedy, 'Was it Author's Rights All The Time?: Copyright as a Constitutional Right in Ireland' (2011) 33 Dublin University Law Journal 253. See also Stern (n 6).

[26] CB Hardman, "Our Drooping Country Now Erects Her Head": Nahum Tate's "History of King Lear" (2000) 95 The Modern Language Review 913.

Way of the World (1700) remained popular.[27] Today the most respected of the 18th-century playwrights who wrote for the London stage are two Irish writers of satire: Oliver Goldsmith (1722–1774), whose most famous work – *She Stoops to Conquer* (1773) – continues to be revived frequently in the 21st century; and Richard Brinsley Sheridan (1751–1816), who wrote *The School for Scandal* (1777) and several other popular plays.[28] Authorship of theatrical works was more individualist than in the Elizabethan/Jacobean eras, but it still thrived on collaborative input, with several parties – writers, actors and theatre managers – 'playing at authorship'.[29] For example, Goldsmith engaged the actor and manager David Garrick to write the prologue to *She Stoops to Conquer*, which introduced the play's comedic style and themes to the audience.[30]

Theatre managers and playwrights took copyright cases to the Court of Chancery, overseen by the Lord Chancellor, seeking injunctions.[31] The first of the key Chancery rulings relevant to performance was in the 1770 case of *Macklin v Richardson*, which concerned the play *Love a la mode* by Charles Macklin.[32] Macklin had performed *Love a la mode* on many occasions, but it had not yet been printed. This was deliberate – Macklin kept control over copies of the text to try to prevent others from performing it. To get around this, the defendants had employed a scribe to attend a performance and transcribe the play; the defendants then published the first act of the play in their magazine and intended to publish the second act. The defendants argued that since the play had been performed publicly, this ought to entitle anyone in the audience to make use of the play in any way they saw fit, including printing it. As a result of the literary property debate, there was ambiguity about whether, when a work had been performed, but not printed, an author retained a right at common law to authorise first publication. The court found for the plaintiff, granting an injunction to prevent unauthorised printing of the second act, holding that performance did not equate to publication. The ruling therefore confirmed that the right to authorise first printing of the play belonged to the author; but its consequences for performance were ambiguous. If a play was

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[27] See www.bl.uk/collection-items/congreves-the-way-of-the-world.

[28] D Worrall, 'Charles Macklin and Arthur Murphy: theatre, law and an eighteenth-century London Irish diaspora' (2020) 14 Law and Humanities 113. See also www.bl.uk/restoration-18th-century-literature/articles/18th-century-british-theatre.

[29] EH Anderson, Eighteenth-Century Authorship and the Play of Fiction: Novels and the Theater, Haywood to Austen (London: Routledge, 2009) 1–20.

[30] See www.bl.uk/collection-items/first-edition-of-she-stoops-to-conquer-1773#.

[31] O Gerland, 'The Haymarket Theatre and Literary Property: Constructing the Common Law Playright, 1770–1833' (2015) 69 Theatre Notebook 74, 79–80.

[32] Macklin v Richardson (1770) Amb. 694.

published in print, then it could be performed without permission or payment, since performances were not protected. However, the possibility of common law literary property in *unpublished* texts remained alive; moreover, if a playwright/company could maintain control over their copies of an unpublished play-text as Macklin had done, no other theatre would be able to perform it for the simple reason that they could not obtain the text.

This is an instance where the law affected theatre practices directly and considerably. Its impact among theatre practitioners was to encourage playwrights and theatres to hold back from publishing plays in print, so to keep an exclusive right to perform the work.[33] Gerland notes that in the 1750s and 1760s, the publication of new plays provided lucrative revenues to printers, with several plays, such as Isaac Bickerstaffe's *Maid of the Mill*, selling out multiple print runs; but by the 1770s the supply of new plays in print dried up, exemplified by the fact that Richard Brinsley Sheridan's popular play *The School for Scandal*, first staged in 1777, was deliberately kept unpublished (in authorised form) until the 1800s.[34] Miller relates that the effect was to create a norm that plays should not be performed without permission of the author; a norm that appears to have been in effect in spite of – or perhaps more accurately, because of – the absence of a specific performance right under the law.[35] Indeed, Gerland notes that between 1777 and 1800, the London patent theatres – Drury Lane, Covent Garden Theatre and Haymarket (which since 1766 had been the third patent theatre, issued to Samuel Foote) – generally cooperated so that, for instance, only Drury Lane showed performances of *The School for Scandal*.[36]

In 1795, Samuel Ireland and Richard Brinsley Sheridan signalled their willingness to go to arbitration, allowing the solicitor Albany Wallis to decide the terms for the staging of the play *Vortigern* (a play initially falsely attributed to Shakespeare).[37]

That the performance of a published play was not protected by copyright was emphasised in *Coleman v Wathen*, a case taken to the King's Bench in 1793.[38] The dispute concerned *The Agreeable Surprise* – a comic musical, the libretto of which had been written by the Irish dramatist John O'Keefe.

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[33] JR Stevens, The Profession of the Playwright (Cambridge: Cambridge University Press, 1992) 86.

[34] Gerland (n 31) 77.

[35] Miller (n 3).

[36] Gerland (n 31) 81.

[37] J Kahan, Reforging Shakespeare: The Story of a Theatrical Scandal (Bethlehem, PA: Lehigh University Press, 1998) 127–29. See also RB Sheridan 'Richard Brinsley Sheridan to Samuel Ireland, 9 Jun. 1795' in C Price (ed), The Letters of Richard Brinsley Sheridan, vol. II (Oxford: Clarendon Press, 1966) 17.

[38] Coleman v Wathen (1793) 5 D. & E. 245.

O'Keefe assigned copyright to the Haymarket Theatre, where performances became extremely popular.[39] When the defendant staged an unauthorised public performance of *The Agreeable Surprise*, the manager of the Haymarket Theatre – George Colman, a trained lawyer – took action, claiming the public performance undertaken without permission was equivalent to an unauthorised print publication under the Statute of Anne. The court rejected this analogy, with Kenyon CJ noting that the Statute of Anne 'only extends to the publication of the book itself'.[40] Therefore, a performance of the text from memory (by the actors) could not be described as akin to an unauthorised reprinting under the Statute of Anne (the implication being that a performance was not publication, and publication solely meant printing).[41]

In the 1822 case of *Murray v Elliston*,[42] the influence of the earlier *Millar* and *Donaldson* 'literary property' sagas became clear. The case concerned Lord Byron's *Marino Faliero*. Lord Byron had assigned the copyright to the plaintiff, who published it in print. The defendant sought to put on a public performance of the play at the Drury Lane Theatre without the permission of the plaintiff copyright owner. The plaintiff based his claim on the common law right to literary property rather than on the Statute of Anne.[43] The court ruled for the defendant, arguing that 'an action cannot be maintained by the plaintiff against the defendant for publicly acting and represented the said tragedy, abridged in the manner aforesaid'.[44] The case confirmed that an unauthorised performance of a published play was legally acceptable under the Statute of Anne, with the courts maintaining a print-centric approach to copyright.[45] As the theatre market suffered a decline in the 1820s, the prior system of monopoly patents and cooperative norms began to break down; that performances

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[39] WJ Burling, Summer Theatre in London, 1661–1820, and the Rise of Haymarket Theatre (London: Associated University Presses, 2000) 150–51.

[40] Coleman v Wathen (n 38) 245. See R Deazley, Rethinking Copyright (Cheltenham: Edward Elgar, 2006) 30.

[41] Ibid. See also Morris v Kelly (1820) 1 J&W 481 and I Alexander, '"Neither Bolt nor Chain, Iron Safe nor Private Watchman, Can Prevent the Theft of Words": The Birth of the Performing Right in Britain' in R Deazley, M Kretschmer and L Bently (eds), Privilege and Property: Essays on the History of Copyright (Cambridge: Open Book Publishers, 2010) 321, available at https://books.openedition.org/obp/1083?lang=en#text.

[42] Murray v Elliston (1822) 5 B and A 657.

[43] R Deazley, 'Commentary on Dramatic Literary Property Act 1833' in L Bently and M Kretschmer, Primary Sources on Copyright (1450–1900), available at www.copyrighthistory.org/cam/tools/request/showRecord?id=commentary_uk_1833.

[44] Murray v Elliston (1822) 5 B. & Ald. 657 at 661. CB Collins. 'Playright and the Common Law' (1927) 15 California Law Review 381, 382–83.

[45] YH Lee, 'The persistence of the text: the concept of the work in copyright law – Part I' (2018) Intellectual Property Quarterly 22, 33.

went unprotected became a particular point of controversy, leading to calls for reforms to assist in the revitalisation of the theatre industry.[46]

The Dramatic Literary Property Act was passed in 1833.[47] It created a new right of representation that for the first time gave authors (or their assignees) the legal right to control public performances.[48] The 1833 Act provided the author of 'any tragedy, comedy, play, opera, farce, or any other dramatic piece or entertainment' the exclusive right of performing or representing it at 'any place or places of dramatic entertainment'. The Dramatic Authors' Society was founded and acted as the first licensing agency for plays.[49] An example of the performance right being asserted by a dramatic author is *Planché v Hooper* (1844), a case where Theatre Royal at Bath staged Planché's play *White Cat* without his authorisation.[50]

Eventually this prompted an additional reform in the form of the Copyright Act 1842,[51] which stated that the public performance right in the context of drama could be the subject of a separate assignment from the traditional 'print' copyright.[52] Furthermore, a dramatic piece's first public performance was stated to be akin to publication for the purpose of copyright law.[53] Shortly thereafter, the Theatres Act 1843 abolished the exclusive right of the patent theatres to produce serious drama on stage.[54] The combined effect of these reforms was that the performance commodity was now, finally, protected by the law.[55]

Cases such as *Reade v Conquest*[56] and *Toole v Young*[57] confirmed that copyright in the novel as literary text did not go so far as to prevent unauthorised parties from performing publicly plays based on such novels. The lack of such a right angered some of the prominent novelists of the period, including

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[46] Miller (n 3) 56–57.

[47] Dramatic Literary Property Act, 1833, 3 & 4 Will.IV, c.15.

[48] Litman (n 6) 1399–1401.

[49] M Banham, The Cambridge Guide to the Theatre (Cambridge: Cambridge University Press, 1995) 302.

[50] Planché v Hooper (1844) The Times, 19 January 1844, 7c.

[51] Copyright Act 1842, 5 & 6 Vict., c.45.

[52] C Seville, Literary Copyright Reform in Early Victorian England: The Framing of the 1842 Copyright Act (Cambridge: Cambridge University Press, 1999).

[53] Litman (n 6) 1400, suggests the 1842 Act meant that playwrights lost 'any common law public performance rights in their scripts upon the initial public performance'.

[54] Theatres Act 1843 (6 & 7 Vict., c. 68).

[55] D Miller (n 3) 66.

[56] Reade v Conquest (1861) 142 Eng. Rep. 297 (CPD). See also Reade v Lacey (1861) 70 Eng. Rep. 853, 854 (1861) (KB) and Russell v Smith (1848) 12 QB 217.

[57] Toole v Young (1874) 9 LR 523.

Charles Dickens.[58] It became a practice for novelists to create and 'stage' their own dramatisation of a novel in order to claim the performance right – for example Bram Stoker did this in 1897 by engaging the well-known Victorian actor Henry Irving to perform *Dracula* on stage for just two paying customers.[59] This was further emphasised in the cases of *Tinsley v Lacy*[60] and *Warne & Co v Seebohm*,[61] where it was held that although it was not against the law to perform publicly an unauthorised dramatisation of a novel, to publish that dramatisation in a printed form would amount to copyright infringement.[62] Thus only if the theatrical adaptation was published would a copyright claim be available; a mere public performance did not violate the law.[63]

Singular authorship in the Victorian era was assumed to be linked with the physical act of, for example, putting pen to paper. This can be observed from *Kenrick v Lawrence*[64] – a case which involved a basic drawing protected by the Fine Art Copyright Act 1862.[65] Similarly, under the Copyright Act 1842, putting pen to paper appears to have been key. There was not yet a specific legal requirement that a copyright text (or dramatic piece) be 'original'. In 1900 it was held in *Walter v Lane*[66] that even a verbatim copy of a speech by Lord Rosebery as transcribed by a reporter could be protected by copyright.[67] Yet, *Walter v Lane* ended up having an unexpected afterlife as a precedent for the low threshold of originality.[68]

If singular authorship was viewed in relatively technical, functionalist terms, what about joint authorship? The possibility that there may be more than one author was not expressly covered by the terms of the Copyright Act

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[58] JR Planché, The Recollections and Reflections of J.R. Planché (London: Tinsley Brothers, 1872) 50–51.

[59] McDonagh (n 1) 55.

[60] (1863) 1 Hem. & M. 747.

[61] (1888) 39 Ch. D. 73.

[62] E Cutler, The Law of Musical and Dramatic Copyright (London: Cassell & Co., 1892) 14–17.

[63] Warne & Co v Seebohm (1888) 39 Ch. D. 73 Ch D at 78–79. Miller (n 3) and Lee (n 45) 36.

[64] (1890) 25 QBD 99.

[65] Fine Arts Copyright Act, 1862, 25 & 26 Vict., c.68.

[66] Walter v Lane [1900] AC 539. See also Sawkins v Hyperion Records Ltd [2005] EWCA Civ 565.

[67] Copyright Act 1842, s 2 and s 3 (5 amp 6 Vict. c. 45).

[68] N Gravells, 'Authorship and Originality: The Persistent Influence of Walter v. Lane' (2007) Intellectual Property Quarterly 267, 278; J Pila, 'An Intentional View of the Copyright Work' (2008) 71 The Modern Law Review 535, 548. The case is cited in 20th- and 21st-century cases such as Express Newspapers v News (UK) Ltd [1990] FSR 359 and Sawkins v Hyperion Records Ltd [2005] EWCA Civ 565.

1842. Nonetheless, the cases of *Maclean v Moody* (1858)[69] and *Marzial v Gibbons* (1873–74) suggest it was acceptable.[70] However, joint authorship was explicitly envisaged in the context of dramatic pieces under sections I and IV of the Dramatic Literary Property Act 1833. This is the primary reason why the Victorian cases on claims of co-authorship involved works of drama. There is, perhaps, another factor. In the Victorian era theatre went through periodic spells of decline and lull, but it nonetheless remained the primary public forum of art, with famous actors such as Henry Irving, Edward Gordon Craig and Ellen Terry being hailed for their performances; meanwhile, the most popular playwrights included the Irish dramatists Dion Boucicault, Oscar Wilde and George Bernard Shaw.[71] Drama was in the public eye and the newly protected performance commodity was capable of generating substantial revenues – this made a successful copyright claim for joint authorship potentially lucrative.

Studying the facts of the disputes on drama and authorship reveals the power relations that existed between theatre managers and playwrights in the 19th century.[72] At the time it was common for theatre managers to try to prevent rival theatres from staging the plays that dramatists had previously written for them.[73] One tactic to this end was for the theatre manager to attempt to claim a share of ownership in the copyright in the dramatic piece, and thus the ability to stop that play from being performed elsewhere.

A relevant dispute came to court in 1856 – *Shepherd v Conquest* – where the courts ruled that the dramatist, not the theatre proprietor, was the author of the dramatic piece.[74] However, in the 1860 case of *Hatton v Kean*, the courts came to the opposite conclusion, holding that a theatre manager was the author of the dramatic piece in question – a dramatico-musical Shakespeare adaptation – in circumstances where it had been the manager who had 'employed' the dramatist-composer to create the work, even in the absence of written assignment.[75]

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[69] Maclean v Moody (1858) 20 Sc. Sess. Cas. 2nd Ser. 1154.

[70] Marzial v Gibbons (1873–1874) L.R. 8 Ch. App. 518.

[71] See generally A Jenkins, The Making of Victorian Drama (Cambridge: Cambridge University Press, 1991). See also R Gilman, The Making of Modern Drama (New York: Farrar, 1972) and R Leach, The Makers of Modern Theatre – An Introduction (Oxford: Routledge, 2004).

[72] E Cooper, 'Joint authorship and copyright in comparative perspective: the emergence of divergence in the UK and USA' (2015) 62 Journal of the Copyright Society of the USA 245, 250.

[73] Ibid. Cooper notes that such disputes were between theatre managers claiming to be 'employers' while claiming playwrights were mere 'employees'.

[74] Shepherd v Conquest (1856) 17 CB 427; 139 E.R. 1140, 1147.

[75] Hatton v Kean (1860) 29 L.J.C.P. 20, 25. See also Barfield v Nicholson (1824) 2 Sim. and Stu., 2.

Levy v Rutley (1870–71) remains the essential case of this period because it established the principle that joint authors of a dramatic work must pursue a common design.[76] The facts of *Levy* concerned the dramatic piece *The King's Wager; or The Camp, the Cottage and the Court* written by the playwright Thomas Egerton Wilks. The plaintiff was a theatre manager who had added a scene and made some edits to the text before it was staged, later claiming that this made him a joint author of the play. This claim was rejected on the basis that there needed to be a common design between the two parties, and this was sorely lacking in this case. As Cooper states, Levy 'had merely made subsequent additions and alterations, there being no common design with Wilks'.[77] A similar ruling was made in *Shelly v Ross*,[78] where it was held that making minor alterations and edits to a piece of drama could not suffice as the basis of a joint authorship claim.

One aspect that is particularly notable about these decisions is acceptance by the courts of the *norms* of theatre practice. The courts took account of the fact that theatre managers – who often performed a role somewhat akin to the modern theatre director of today – often made alterations to play-scripts before putting them on stage. The courts rejected the idea that this ought to make such contributions sufficient to create a joint authorship interest. Cooper notes: 'The approach in *Levy* therefore ensured that the usual activities of theatre managers, in making subsequent alterations to play scripts, would not be sufficient to find a claim to joint authorship.'[79]

The immediate effect of these decisions was to support the position of the dramatists during their negotiations with theatre managers during the Victorian era. Even more importantly, these rulings form the backbone of judicial analysis of joint authorship in modern copyright law, with *Levy* in particular continuing to be cited in contemporary case law.[80] This anticipates debates over theatrical authorship that emerged in the 20th century, and which continue even today.[81]

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[76] Levy v Rutley (1870–71) L.R. 6 C.P. 523. See also Levy v Cave (Ct. C.P.), The Times, 14 December 1870 at 11.

[77] Cooper (n 72) 256.

[78] Shelley v Ross (1870–71) L.R. 6 C.P. 531; Bail Court 7 June, The Times, 8 June 1871 at 10.

[79] Cooper (n 72) 257.

[80] Ibid, 258, noting divergence between UK and US positions can be traced to these cases.

[81] Brighton and Dubbeljoint v Jones [2004] EWHC 1157 (Ch); [2004] EMLR 507.

4. INTO THE 20TH AND 21ST CENTURIES: MODERN AND CONTEMPORARY THEATRE

In surveying the last half-century of contemporary theatre, it is clear there is a diverse range of plays within the canon, from those that resemble single-author texts (Samuel Beckett, Harold Pinter, Martin McDonagh, etc.) to works that feature substantial revision through workshops (Caryl Churchill, David Edgar, Marie Jones, etc.) to highly collaborative 'devised' pieces (Complicité, Frantic Assembly, Forced Entertainment, etc.).[82]

The development of 'devised' theatre from the 1960s onward encouraged actors to be creative, reflecting 'a commitment to breaking the authority of directors and, in some instances, to challenging the authorial voice of the playwright'.[83] Oddey thus views devised theatre as a challenge to literary or text-based theatre, which she argues is co-dominated, often in a patriarchal fashion, by the playwright and director.[84] In contrast, Heddon and Milling argue against such a binary perspective, noting that the rise of the creative actor in devised theatre has at times worked alongside the roles of director and writer, with all playing a role in the collaboration.[85] Indeed, rather than a stark opposition between text-based theatre and devised theatre, there is in fact a lot of shared practice between the two.[86] In this vein, Heddon and Milling argue that 'devised performance lies on a continuum with script work'.[87]

Perhaps the most famous early UK example of a company founded to develop texts collaboratively is the Joint Stock Company, which was formed in 1973 by Max Stafford-Clark, David Hare and David Aukin.[88] The central idea was to use collectivist working methods to create new plays. Joint Stock's resultant work with the writer Caryl Churchill during the 1970s and 1980s was

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[82] S Shepherd and M Wallis, Drama/Theatre/Performance (London: Routledge, 2004) 1–8. See also A Field, 'All Theatre is Devised and Text-based' The Guardian (April 21 2009) – http://www.guardian.co.uk/stage/theatreblog/2009/apr/21/theatre-devised-text-based.

[83] Ibid, 16.

[84] A Oddey, Devising Theatre: A Practical and Theoretical Handbook (London: Routledge, 1994) 7–11.

[85] D Heddon and J Milling, Devising Performance: A Critical History (Basingstoke: Palgrave Macmillan, 2005) 7.

[86] See also A Field, 'All Theatre is Devised and Text-based' The Guardian (April 21 2009) – http://www.guardian.co.uk/stage/theatreblog/2009/apr/21/theatre-devised-text-based.

[87] Heddon and Milling (n 85) 36.

[88] R Ritchie, The Joint Stock Book: The Making of a Theatre Collective (London: Methuen, 1987) and T Shank, (ed), Contemporary British Theatre (Basingstoke: Palgrave Macmillan, 1996).

profound and truly collaborative.[89] In more recent years, devising companies like Complicité,[90] Frantic Assembly[91] and Forced Entertainment[92] emphasise dialogic collaboration – rather than singular composition – in the way they work.[93] These kinds of structures can have an impact on the key legal questions of ownership, credit-sharing and royalty-sharing. Heddon and Milling comment that the twin problems of how collaborations work in practice and how companies committed to fostering the creativity of the performer manage divisions of labour tend to be 'recurring issues for devising companies'.[94] Even in devising companies there will often be a 'constant' leader but also a 'tendency to work collaboratively within this hierarchical structure'.[95] For example, Sheffield-based company Forced Entertainment develops performances collaboratively – but artistic director Tim Etchells typically takes on the leadership role of director and writer.[96] Similarly, Simon McBurney is undoubtedly the lead figure in Complicité. Even in the most creatively chaotic, improvisory forms, reliable management of texts and personnel remains important to the success of theatre.

5. CONCLUSION

Throughout English theatrical history, the relationship between playwrights and managers has been vital yet ever-changing. In the time of Elizabeth I (1558–1603), theatre companies exercised a kind of collective management over performance-texts (while the Stationers controlled those same texts in

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[89] C Churchill, Cloud 9 (London: Methuen, 1984).

[90] H Freshwater, 'Physical Theatre: Complicite and the Question of Authority' in N Holdsworth and M Luckhurst (eds), A Concise Companion to Contemporary British and Irish Drama (Oxford: Blackwell, 2008) 171–99. See also 'Simon McBurney on Devised Theatre – it's absolutely petrifying' The Telegraph (3 August 2015) at www.telegraph.co.uk/theatre/actors/simon-mcburney-on-devised-theatre-absolutely-petrifying/; also www.complicite.org/media/1439372000Complicite_Teachers_pack.pdf and www.bl.uk/20th-century-literature/articles/theatre-de-complicite-and-storytelling.

[91] See S Graham and S Hoggett, The Frantic Assembly Book of Devising Theatre (Abingdon: Routledge, 2009).

[92] See H Freshwater, 'Delirium: In Rehearsal with theatre O' in A Mermikides and J Smart (eds), Devising in Process (Basingstoke: Palgrave Macmillan, 2010) 128–45, and A Frost and R Yarrow, Improvisation in Drama, 2nd edn (Basingstoke: Palgrave Macmillan, 2007).

[93] D Williams, 'Killing the Audience: Forced Entertainment's First Night' (2009) 54 Australasian Drama Studies 50. See also R Hornby, 'Forgetting the Text: Derrida and the "Liberation" of the Actor' (2002) 18 New Theatre Quarterly 355.

[94] Heddon and Milling (n 85) 38.

[95] Ibid,213.

[96] Ibid,213.

print). Individual playwrights were not viewed as authors in the modern sense and were often quite far removed from the performance process. Typically, they did not receive performance or print royalties. The position of the individual dramatist grew in esteem during the 17th century, especially post-Restoration (1660). With the Statute of Anne 1710, the author of the play-text was centred as right-holder for the first time. During the 18th and 19th centuries, playwrights negotiated copyright licences and assignments via contract with individual theatre managers, who began to exercise strong powers within theatre. By the time the 20th century began, the idea of collective management of theatrical licensing had taken hold, and it largely remains in place today. In the context of 21st century devised theatre a manager figure remains important for shepherding chaotic performance processes into works that can be staged. Ownership of devised works can be agreed amicably between the parties, but this requires foresight and strong management, with the risk that participants may feel aggrieved if their contributions are not recognised as authorial.[97]

[97] McDonagh (n 1).