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Coming Soon to a Cinema/Television/Website/Video Game/ Theatre Near You...: Theatre, Intellectual Property Rights, and the Control of American Culture 2008

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**COMING SOON TO A CINEMA/TELEVISION/
WEBSITE/VIDEO GAME/THEATRE NEAR YOU...:
THEATRE, INTELLECTUAL PROPERTY RIGHTS,
AND THE CONTROL OF AMERICAN CULTURE**

KIMON KERAMIDAS

Intellectual property rights have quickly become one of the hottest topics of the information age, and an increasingly visible factor in the discourse surrounding cultural production. As the production, reproduction, and dissemination of culture is increasingly facilitated by digital technologies, cultural producers have become keenly aware that the management of their intellectual properties is crucial to their survival and prosperity. The supervision and control of these intellectual properties and the rights bestowed upon property holders by the law have become particular points of contention in debates surrounding digital culture and media. New technologies have facilitated not only the sanctioned reproduction and distribution of content, but also alternative methods of content acquisition that challenge the boundaries of the law and have the potential to greatly disturb traditional economic practices and conditions.

Whereas it is quickly becoming clear that intellectual property rights will play a role in shaping our culture, the impact of intellectual property rights on the development of theatre remains less clear. As the origins of contemporary theatre precede the digital era by millennia, the cultural place of theatre in America is attached to inherent characteristics and traditions that predate PCs, CDs, and Napster. The study of theatre has as a result become separated from the study of other media, and field of theatrical production is rarely a topic of consideration in debates regarding intellectual property rights. Nevertheless, the economic and legal issues surrounding intellectual property that cause such a stir in the realm of digital media continue to have significant repercussions on how theatre is produced.

While recognizing that theatre is being influenced by intellectual property is an important first step in understanding the contemporary state of theatre, the question remains: how do we study these trends if political and economic conditions continue to be of secondary concern in the field of theatre studies? As the field currently stands, the methodologies used in the study of theatre predominantly address the aesthetics of performance and the phenomenology of theatrical experience. As such, shifts in popular culture, competition with technological media, and the process by which theatre has ascended to the status of high art in the United States fall outside the boundaries of most theatrical discourse. But, the rapidly evolving nature of twenty-first century cultural production, has made it imperative that the field adopt additional, interdisciplinary methodologies, which can fully address the technological innovations, economic developments and social changes of the twentieth and twenty-first centuries. Specifically, the study of theatre must more seriously concern itself with the political and economic forces that drive cultural production,

so that scholarship will be as prepared to address the impact of the world beyond the theatre doors as it is to analyze the goings on within the theatre itself.

One of the first steps towards a more complete understanding of theatre is considering theatre as a medium, akin to television, film, video games, and the Internet. Raymond Williams defined »medium« as a social practice that consists of the collaborative work of people involved in the production, dissemination, and consumption of culture (Williams: 161-164). This definition precisely describes theatrical production, which since its beginnings has been the result of the coming together of many individuals to create a cultural good through specific processes of production, dissemination, and reproduction. Thinking of theatre as a medium allows us to better understand theatre as a form of cultural production, as we can now juxtapose theatre alongside the dominant contemporary technological media and borrow homologous methodologies from the fields of communication and media studies. In order to better place their objects of study in cultural context, these fields have embraced political economic theory as a way of understanding productive and consumptive forces. As theatre functions in the same cultural marketplace, it only makes sense to investigate how those same forces impact theatrical production. This methodology of political economic analysis is also a particularly useful manner in which to approach the issue of how intellectual property rights are influencing the development of the field of theatrical production. Understanding how intellectual property rights are shaping contemporary theatrical production demands an interrogation of the cultural logic of capitalism as a system and the logic of corporate and individual behavior within that system. It requires a methodology that can engage with the apparatuses of authorship, ownership, distribution, and commoditization at both the conceptual and practical level and connect the impact of those apparatuses on the resulting theatrical productions. The political economic approach allows us to accomplish these goals by integrating the empirical details of the microinteractions of the producer-creator and distributor-consumer relationships with the macro-level legal and economic forces that provide the structure and logic of theatrical production.

The Historical, Legal, and Cultural Ramifications of Intellectual Property Rights

Over the course of the twentieth century, the tradition of ownership and authorship in American theatre has, aside from some work in the avant garde and experimental movements, remained relatively unchanged. Playscripts have been seen as the origin point for most theatrical work and the playwright has been given a privileged position as the primary author of the theatrical experience. At the same time the culture industries as a whole have evolved and changed significantly, especially as corporate mega firms have asserted their position in the theatrical field over the last quarter-century. Lastly, the recent digital boom brought with it new technologies such as the Internet, which have lowered the barrier of entry for creative work, begetting new products, new markets, new means of distribution, as well as new ways of perceiving authorship and ownership (Lessig: 126). As the marketplace has expanded and become more complex, the concept of intellectual property has become a significant factor in the elevation of the economic stakes of cultural production. Because of decreasing transaction costs in the production of digital culture, reproduction and distribution have become less expensive and the owner-

ship and protection of strong intellectual properties has become a profitable strategy. In addition, the notoriously vague and complex legal architecture that defines intellectual property has further made the cultural marketplace more contentious and complicated. As a result, the deployment of copyright law plays a significant role in dictating conditions within the cultural marketplace, as copyright holders exert control over their properties and the legal repercussions of violating those copyrights burden cultural producers. Although copyright, patent and trademark laws (the legal foundations of intellectual property) have existed since the early eighteenth century and the Statute of Anne in England, the history of the term intellectual property is in fact a short one. The phrase was first used for the inaugural assembly of the United Nations' World Intellectual Property Organization in 1967 (Lemley: 895). During the subsequent forty years, intellectual property has come to be recognized as a valuable resource in the generation of revenue and the assertion of cultural power. Ronald Bettig argues that

»Since the early 1970s, an ascending fraction of the capitalist class, centered in the knowledge, culture, and high-technology sectors, has begun to organize the transition to a new phase of capitalism – post-Fordism or ›technocapitalism‹ – in which the ownership of intellectual property rights to information, knowledge, and cultural goods is central« (Bettig: 49).

The development of intellectual property has therefore become an important factor in contemporary cultural production, as producers, investors, artists and artisans each try to lay claim to as much of the available intellectual property as possible.

Bettig notes that »since intellectual property rights are both economic and statutory in nature, claims to ownership of intellectual and artistic works must be recognized by law to be effective« (Bettig: 3). The challenge therefore is to develop a system that establishes parameters for intellectual property that are in the best interest of the public good. The system must simultaneously promote creative endeavors by providing protection from plagiarism and exploitation - without constricting creativity. To further complicate the matter, these laws must provide equal protection and control over intellectual property to the independent artist as they do to the corporation. Therefore, the questions of how much protection is too much protection and who benefits most from these laws are central to debates over intellectual property rights. Alex Kozinski, a judge sitting on the Ninth Circuit Court of Appeals, has elucidated the challenge of striking a balance in the protection of intellectual property

Overprotecting intellectual property is as harmful as underprotecting it. Culture is impossible without a rich public domain. Nothing today, likely nothing since we tamed fire, is genuinely new: Culture, like science and technology, grows by accretion, each new creator building on the works of those who came before. Overprotection stifles the very creative forces it's supposed to nurture (Bradford: 4).

Over the last quarter century intellectual property rights have evolved from a tool for the promotion of invention and cultural production in the name of the public good into a method by which developing conceptions of ownership could be codified into natural law. This transformation belies the intention of the crafters of early American intellectual property legislation. Section 8 of Article I of the Constitution states that one of the powers of Congress is »To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries« (US Constitu-

tion). This article was meant to provide authors and inventors with the protection necessary to ensure they would be able to generate revenue from their intellectual work, and not to establish a tool for profit-making and cultural control. But the application of copyright laws has shifted as they are now deployed to codify what can be defined as property, a definition they are neither designed for nor are particularly well suited to provide. Since every party with a vested interest in the definition and scope of intellectual property has a different opinion on how much protection is too much, intellectual property rights have become an increasingly heated topic of debate. On the one hand, media corporations, music producers, and film studios argue that if they are to continue to be creative and productive they must remain profitable, and maintaining control over these properties is the way they are able to do that. On the other hand, creative artists who sample music and remix culture in their own production of culture argue that less strict controls ultimately lead to more production and a more diverse and creative culture. Every time a claim of copyright infringement puts the creation of a new cultural good in jeopardy, creators become more cautious of the economic implications of any misstep. No matter how trivial and seemingly unjustifiable these claims seem to be, each case sees a little bit of control of the creative process eroded from artists and more ceded to corporations with the financial and legal resources to afford a court battle. Siva Vaidhyanathan has written that the role of intellectual property rights in our culture has changed, and that »copyright issues are now more about large corporations limiting access to and use of their products, and less about lonely songwriters snapping their pencil tips under the glare of bare bulbs« (Vaidhyanathan: 12). For Vaidhyanathan the evolution of intellectual property rights over the last hundred years has »really been about the rights of publishers first, authors second, and the public a distant third« (15). Finally, Bettig argues that the problematic state of intellectual property rights and in particular the role of media conglomerates in shaping legislation and setting precedents has resulted »in the unequal distribution of the rewards for human intellectual and artistic creativity, especially to the detriment of actual creators, and that it primarily benefits the capitalist class rather than society as a whole« (Bettig: 44).

Assessing the Impact of Intellectual Property on Theatrical Production

With this perspective on the state of intellectual property rights and having engaged a methodology with which to better study the impact of intellectual property on theatre, we must consider what political economic and cultural conditions most directly influence this aspect of the cultural marketplace. One reason the study of intellectual property tends to occur within fields that address film, television, publishing, and the Internet, is that copyright law is designed to address those media that can be copied. United States law protects »works of authorship fixed in any tangible medium of expression ... from which they can be perceived, reproduced, or otherwise communicated« (Circular 92: Copyright Law of the United States of America and Related Laws Contained in Title 17 of the *United States Code*, June 2003, § 101). This particular definition of works of authorship is ill suited to address the particular ephemeral nature of theatrical production and the irreproducibility of many of its resulting commodities. While play scripts, music, lyrics, and choreography – all of which can be notated and reproduced – are protec-

ted by copyright laws, the performance, direction, acting, and portions of the design are only ever protected if individual agreements are made between producers and artists or producers and unions. Despite the incongruity of copyright law with the practice of making theatre, there are very real and significant impacts on theatre, as artistic control, the freedom to create, and economic possibility are affected at a number of different levels.

The first level at which we see intellectual property rights playing a role in the development of theatrical production is the interaction between individual artists and producers. As the digital age has increased the exposure of these rights and notions of authorship have been challenged and redefined, the individual artists involved in the creation of theatre have likewise become more keenly aware of the income generating potential of their work. Many sectors of the theatrical community who already receive protection under copyright laws, such as playwrights, choreographers, and composers, have sought out further clarification as to the applicability of those laws on their work to ensure they will retain the same amount of protection. The Dramatists Guild, which represents the interests of American playwrights, has looked to maintain the position of privilege in the theatrical field that copyright affords playwrights. But other members of the theatrical community, such as Lynn Thomson, the dramaturg for *RENT*, and the Society for Stage Directors and Choreographers, the union for theatrical directors, which has supported a number of director's in copyright issues, have fought to change or expand the existing laws, so that their intellectual labor would receive equal protection under the law. This changing notion of who is the ›author‹ of theatre has important conceptual as well as economic implications, because as property rights take center stage, theatre's ontology is questioned. As the notion of separate ownership and the potential for income from royalties and licensing become points of contention, they may serve to undermine the collaborative structures that have acted as the framework for the development of individual works as well as the field as a whole.

Taking a step back from individual artists and producers, we see intellectual property rights impacting the development of theatre at the level of content selection and production trends, as media conglomerates such as Disney, Time Warner, and Viacom have entered the theatrical marketplace, increasing the corporate presence and changing the economic stakes. As these companies have realized the value in extending the life of their libraries of intellectual properties, they have looked to propagate these properties across a variety of media to generate new streams of revenue and increase cultural exposure. As a result of this increased corporate presence in theatre, the trend of plays and musical being turned into movies, which prevailed during the twentieth century, has been reversed, and stages across the country and on Broadway in particular are now filled with second or third generation manifestations of already established intellectual properties. These corporations, using their sizable capital resources to absorb the financial risks of producing theatre, have made musicals derived from older intellectual properties such as *HAIRSPRAY*, *MAMMA MIA!*, *THE LION KING* and plays such as *THE GRADUATE* more common in American theatres. The confluence of this corporate assertion along with the increasing economic challenge of producing a new play or musical has quickly made this style of secondary or tertiary production the rule and no longer the exception on Broadway, as musicals for *SHREK*, *LEGALLY BLONDE*, and other Hollywood blockbusters are on the way. As Broadway and the New York theatre scene is the origin point for theatrical notoriety in the United States, and the plays and musicals that are licensed by a majority of other theatres in the country

are based on this notoriety, it is likely that this trend will spread and these properties further propagated. While this is a good economic situation for the corporations, it is yet to be seen how it bodes for the generation of innovative, original works of theatre. It has always been difficult for a new work of theatre to overcome the many obstacles on the way to success and longevity, but now independent writers, producers, and composers must compete against the economic resources of media conglomerates, which are intent on concentrating and consolidating control of American culture.

Finally, in placing theatre within the larger field of cultural production, we can see how new digital technologies have made it easier to reproduce and distribute content. This technology has also made it easier for cultural producers to adapt their intellectual properties across a number of different media, extending the life and profitability of those properties. But, the success of this model is predicated on creating durable creative goods that can be easily reproduced, mass marketed, and cross-promoted via delivery media such as DVDs, CDs, or the Internet. The ephemeral and live nature of theatre makes it difficult for theatrical producers to profit greatly in this market as the primary commodity of theatrical production vanishes at the end of each live performance. The cost of copying and distributing music, books, or films pales in comparison to the costs of recreating a theatrical performance, which include actor and crew salaries, rent for space, costs of props and scenery, playwright royalties, etc. This difference in cost is made even more glaring by the audience limitations of live performance, which can reach at most thousands of viewers while other media can easily reach millions or even billions. The laws that outline copyright and other intellectual property rights further exacerbate this disparity. As these laws focus on works created in any »tangible medium of expression« a certain protection and preferential value is given to those types of works that can be recorded. The end result is that the ephemeral nature of theatre and the difficulty of capturing the complete experience on recordable media leave theatre at a distinct economic disadvantage in the contemporary capitalist system of American culture.

Looking at the contemporary theatrical field we see a Disneyfied Broadway, disagreements between playwrights and directors over who reaps the rewards for creating dramatic action, and *THE BRADY BUNCH*, *LESTAT*, and *MAMMA MIA!* on American stages. These developments are symptomatic of the condition of theatre in contemporary culture and reveal how theatrical producers are responding to the role of property rights as part of the cultural logic of capitalism in the twenty-first century. So, if we are to comprehensively monitor and predict how theatre as a medium will continue to develop in the contemporary cultural marketplace, it is imperative that we continue to interrogate the role of intellectual property rights in that development.

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