New Copyright Stories: Clearing the Way for Fair Wages and Equitable Working Conditions in American Theater and other Creative Industries

JESSICA SILBEY*

We need some new intellectual property stories. By stories, I don't mean entertaining fictions. I mean instead accounts or explanations that make sense of the world as it is lived by everyday people.[1] Most of our relevant intellectual property laws were forged in the mid-twentieth century and have failed to keep pace with the transformations in creative and innovative practices of the twenty-first.[2] Being out-of-sync or failing to recognize broader existing stakeholders means laws are poorly aligned with on-the-ground realities and are out-of-touch with values and interests of the people laws serve.[3] The Article at the center of this Symposium by Brent Salter and Professor Catherine Fisk is a thoroughly scathing critique of just this disconnect, between a triad of legal regimes

* Professor of Law and Yanakakis Law Faculty Research Scholar, Boston University School of Law, Boston, Massachusetts. My deepest thanks to Catherine Fisk and Brent Salter for inviting me to write this essay and be in direct conversation with their important work.

[1] *See generally* Jessica Silbey, *The Mythical Beginnings of Intellectual Property Law*, 15 GEO. MASON. L. REV. 319 (2008) (describing the heuristic role of origin stories in intellectual property law) [hereinafter Silbey, *Mythical*]. *See* Carole M. Rose, *Property as Storytelling: Perspectives from Game Theory, Narrative Theory, Feminist Theory*, 2 YALE J. L. & HUMAN. 37, 39 (1990) (explaining that the property regime needs a rhetorical mode of narrative and storytelling to overcome "glitches" in the doctrinal accounts); JESSICA SILBEY, THE EUREKA MYTH: CREATORS, INNOVATORS, AND EVERYDAY INTELLECTUAL PROPERTY 12, 17–18 (2015) [hereinafter THE EUREKA MYTH].

[2] Recent amendments to U.S. IP law, such as the Leahy-Smith America Invents Act (AIA) (2011), amending the Patent Act, and the Sonny Bono Copyright Term Extension Act (CTEA) (1998), were motivated primarily to harmonize U.S. law with European law. *See* Mark Schafer, *How the Leahy-Smith America Invents Act Sought to Harmonize United States Patent Priority with the World, a Comparison with the European Patent Convention*, 12 WASH. U. GLOBAL STUD. L REV. 807, 807 (2013); Victoria A. Grzelak, *Mickey Mouse & Sonny Bono Go to Court: The Copyright Term Extension Act and Its Effect on Current and Future Rights*, 2 J. MARSHALL REV. INTELL. PROP. L. 95, 101 (2002). The Digital Millennium Copyright Act (DMCA), also enacted in 1998, established the "notice and takedown regime" of copyright enforcement on the internet and was credited with growing the internet by immunizing platforms and facilitating user-generated content. *See* 17 U.S.C. § 512.

[3] The difference between "law on the books" and "law in action" is an old one, see generally Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12 (1910), and its evaluation and critique is the basis of the law and society movement. *See* Susan S. Silbey & Austin Sarat, *Critical Traditions in Law and Society Research*, 21 LAW & SOC'Y REV. 165, 170–71 (1987).

(antitrust, labor law, and copyright) and the practices and needs of freelance dramatists that drive American theater.[4]

The Article identifies four core assumptions about this triad of legal regimes, and it explains how these assumptions constrain the just applications of these laws to freelance writers' work. By uncovering these assumptions and demonstrating their contingencies and fragility, the authors lead us to, but do not fully rehearse, the new foundations on which a fair labor system of dramaturgs' work would be built. We might think of these new foundations as the new IP stories that explain how, for example, copyright functions in fact for playwrights and other writers. These new stories could liberate the freelancers from the false constraints derived from the interaction of current copyright law, labor law, and antitrust law. Because I study and write about intellectual property law and am not a labor law or antitrust scholar, this short response essay will propose new stories specifically for copyright law. But the essay's focus doesn't preclude similar narrative and rhetorical work in the other fields.

Salter and Fisk describe several core sticking points for playwrights in the web of copyright, antitrust, and labor law. The first is playwrights' insistence on being designated "independent contractors" under copyright law, which assures they retain copyright in their authored plays rather than being employees whose authored work is "for hire" and owned by employers. The second is that the independent contractor status precludes their unionization as dramatists under the National Labor Relations Act and antitrust law. The third point is that were the Dramatists Guild a union dramaturgs would lose creative autonomy that is essential to producing good work, even though as non-unionized freelancers currently, they lack the leverage and power to negotiate fair wages and meaningful control over their plays. As the authors write, "The irony of the Guild's insistence that playwrights are independent contractors who benefit from ownership of copyrights is that they insist, as a matter of artistic autonomy, on the conditions that make them vulnerable in matters of labor and antitrust."[5]

Why are the playwrights vulnerable? Over the course of the twentieth century, while the economic power of major theater producers has grown, other unionized workers (such as actors, set designers, musicians, and composers) have bargained for larger portions of the theatrical profits,[6] and this leaves independent playwrights in a "precarious legal status" where they must depend upon the one legal straw they believe provides them "important protection": copyright ownership.[7] But, as the authors recognize, "copyright ownership seems increasingly to provide neither economic security nor creative autonomy."[8] This is of course mostly true only for those copyright owners

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[4] *See generally* Brent Salter & Catherine Fisk, *Assumptions About Antitrust and Freelance Work and the Fragility of Labor Relations in the American Theatre*, 83 OHIO ST. L. J. 217 (2022).

[5] *Id.* at 273.

[6] *See id.*

[7] *Id.*

[8] *Id.*

without leverage or power. Copyright in the hands of Microsoft or Universal Studios may in fact provide significant economic security and autonomy. The story of copyright's impotence that Salter and Fisk tell is copyright for the 99%. Why, then, do the dramaturgs insist on holding tight to their copyrights, leaving them "impecunious" (as Salter and Fisk say)? And what accounts for the dramatists' blinders that prevents them from appreciating the fuller picture revealing the futility of existing copyright doctrine for most everyday creators? This is where new IP stories are relevant to explain the dramaturgs' situation.

Salter and Fisk propose decoupling independent contractor status under copyright law from labor law as one way out of the bind.[9] They do so to avoid the problem of inconsistency between the three regimes, emphasizing that a "work for hire" under copyright law should have no bearing on the Dramatists Guild ability to bargain collectively under the NLRA.[10] To be sure, the insistence on consistency of terminology and its application across regimes looks and sounds logical, which is important in law: if you're an "independent contractor" under copyright law, you shouldn't be designated an "employee" for the purpose of labor law. But insisting on superficial consistencies across disparate legal regimes is a trick of the powerful; and in order to retain power, they avoid making sense of distinctions in the particular historical evolution of a legal framework or in its current application, which distinctions matter for achieving its stated goals. For these reasons, Salter and Fisk explain that insisting on consistency can be irrational—and thus decoupling the terms makes sense; this is a fine start.[11] But to my mind it's not the first step in evaluating the problem. The first step is to expose the assumptions with which the authors start as based on deeply-felt but false ideological beliefs (or myths) that legitimate certain relations between creators and copyright as inevitable (when they're not) and which structure intellectual property doctrine.[12] This myth-making in IP law tends to reinforce the power dynamics of existing institutional structures and fails to account for the everyday creators and innovators who are also intended to be beneficiaries of IP law.[13] What follows is a rewriting of these myths in the form of new stories that account for the practices and needs of everyday creators and innovators and that expose the assumptions, which the Article rightly criticizes, as not inevitable and thus subject to change.

New story #1: Copyright retention does not assure creative autonomy or control. Creative autonomy and control most plausibly derive from work conditions and professional relationships, which IP law only weakly affects, if at all.

Playwrights appear to insist on "independent contractor" status to retain their copyright and maintain creative control over their work. In other words,

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9 *Id.* at 274.

10 Salter & Fisk, *supra* note 4, at 274.

11 *See id.* at 274–75 (pointing out that the NLRB has at least two versions of its own common law test depending on the political party in power).

12 *See generally* Silbey, *Mythical*, *supra* note 1.

13 *Id.*

they seek creative autonomy and control over the conditions of their work and of its output through copyright ownership. But why assume that retention of copyright achieves those goals? This assumption is shot through with theories connecting property ownership to master-servant relationships and individual liberation and self-realization. It elides copyright with real property and financial surplus, and it partakes in the myth that romanticizes the "author" as the master of the work. Putting aside the enduring debates about whether "intellectual property" is enough like real or personal property for these theories to hold (to my mind, it is not),[14] and whether real property ownership in fact provides the kind of dominion and control over the circumstances of our lives and work that the playwrights seek, there are lessons from copyright law and accounts from the playwrights that demonstrate how copyright ownership does *not* achieve these goals and instead how they can be accomplished in other ways.

Consider the case of *New York Times Co. v. Tasini* (2001).[15] At issue in *Tasini* was whether freelance writers, when granting publishing rights to newspapers and periodicals, included in that grant the right to republish the newspaper and periodical in an electronic database such as LexisNexis as part of a "collective work" under section 201(c) of the Copyright Act.[16] Freelancers said no—those rights were extra and needed to be separately licensed—and they sued to require the *New York Times* to relicense their work for digital databases and pay them extra fees.[17]

A majority of the Supreme Court sided with the freelancers, interpreting section 201(c) to strengthen authors' rights and "conclud[ing] that the 201(c) privilege [granted to publishers] does not override the Authors' copyrights."[18] The majority quoted a 2001 report from the Register of Copyrights as support for the author's rights approach that "freelance authors have experienced significant economic loss" due to a "digital revolution that has given publishers [new] opportunities to exploit authors' works."[19] Based on this, the Court read section 201(c) in light of digital age publisher domination and challenges to labor equity; its interpretation restricted publishers' "privilege" and benefitted authors through expanded republication rights.[20] On one reading, the *Tasini* opinion is an interpretation of the Copyright Act that admirably attempts to protect freelance authors (at the expense of publishers and media outlets like the *New York Times*) from the dwindling paid opportunities in the digital age for

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[14] For a summary and analysis of the literature and the concept, see generally Julie E. Cohen, *Property as Institutions for Resources: Lessons from and for IP*, 94 TEX. L. REV. 1 (2015), and Michael A. Carrier, *Cabining Intellectual Property Through a Property Paradigm*, 54 DUKE L.J. 1 (2004).

[15] New York Times Co. v. Tasini, 533 U.S. 483, 483 (2001).

[16] *Id*. at 487.

[17] *Id.*

[18] *Id.* at 493.

[19] *Id.* at 498 n.6.

[20] *Id.* at 498.

copying and reproducing their freelance work, which increasingly disseminates online for free.

But what has happened since the *Tasini* opinion? Freelancers are not any better off; and, in fact, by many accounts (including those in the Salter and Fisk article), they are in a more precarious professional position than ever.[21] In fact, the *Tasini* dissent predicted just this slide toward increased inequality and loss of market power despite the majority's broadened scope of copyright, thereby implying that more or stronger copyright for freelancers was not the root of (or solution to) the problem. Dissenting in *Tasini*, Justice Stevens wrote that, among other problems, the majority's rule "in favor of authors [today] may have the perverse consequence of encouraging publishers to demand from freelancers a complete transfer of copyright"[22] for no more money in the future. Justice Stevens presciently recognized in 2001 that more or broader copyright did not give the freelancers more or stronger bargaining power. This prediction has come true, with publishers demanding a complete transfer or unlimited use of authors' work for no higher fees or more control than before. Publishers demand more for the same fee (or less) because freelancers need the work and publishers can insist on the terms.[23]

The *Tasini* decision may have been honorable in its approach strengthening authors' copyright as a matter of historical necessity and dignity, but in doing so it failed to ensure equal opportunity to wield a stronger copyright and thus was an incomplete solution to the problem of inequality in the publishing industry. *Tasini*'s reasoning left authors to negotiate on their own without real bargaining power against aggregators and publishers who continued to grow their leverage and market power against independent writers. In sum—and this is part one of the counter-narrative to the dramatists' insistence on retaining their copyright by remaining independent contractors—copyright doesn't grant power, and thus it also doesn't provide the negotiating leverage to demand the autonomy and control that writers seek.

And why should it? What writers really want, according to the Salter and Fisk article, is "stability[,] a regular income, health insurance . . . [and] long term collaborations."[24] This is part two of the first new story: copyright is incidental to the goals the writers seek. They are not looking for a financial jackpot (as if copyright would predictably provide that anyway), but instead

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[21] *See* Salter & Fisk, *supra* note 4, at 273.

[22] *Tasini*, 533 U.S. at 520 n.17 (Stevens, J., dissenting).

[23] I analyze the *Tasini* opinion in more detail in chapter 2 of my book: JESSICA SILBEY, AGAINST PROGRESS: INTELLECTUAL PROPERTY AND FUNDAMENTAL VALUES IN THE INTERNET AGE 87–155 [hereinafter SILBEY, AGAINST PROGRESS].

[24] Salter & Fisk, *supra* note 4, at 221. I investigated this claim and showed it to be true in large part in THE EUREKA MYTH: CREATORS, INNOVATORS, AND EVERYDAY INTELLECTUAL PROPERTY, which was based on an empirical study of creators and innovators for whom IP was at best only a partial solution to the problems they face in their professional lives. *See generally* THE EUREKA MYTH, *supra* note 1.

they seek steady, meaningful work.[25] They also seek creative independence and the ability to prevent the rewriting of their work[26] – a professional autonomy that respects their creative contributions. Notably, these goals are harmonious with their recognition that collaborations among artists within the theater community results in their plays being adapted and transformed by the very artists that celebrate them. Copyright retention does not assure the non-transformation of their work by others; the director, producer, actors, set designers, etc. will insist on creative autonomy too!

What structures or rules assure the production of good work, at a steady pace, under conditions of mutual respectful creative collaborations? Professional relationships and norms within the industry, along with certain contract or licensing provisions that are negotiated in light of those norms, assure playwrights both creative autonomy and meaningful control to see their work produced with integrity. As Salter and Fisk explain at the end of the article: "the fact relationships have endured and theater continues to be made under such a fragile framework says something rather profound about the desire of all stakeholders to find a compromise in order to achieve the shared goal of actual production."[27]

Copyright does not guarantee professional norms of respect and deference to expertise. It doesn't guarantee job stability, quality theater, or the continuance of long-term collaborations. Copyright's existential crisis for independent authors is that it is largely impotent in the face of industry power that structures the terms of work, including the production and dissemination of creative expression.[28] The story that the playwrights assume to be true is of the solitary romantic author and the power of the author's copyright as potent capital.[29] But the story they live consists of supportive professional relationships and collaborations across various dimensions of theatrical production (among actors, set designers, directors, musicians, composers) that assure relative creative autonomy, respectful collaborations, and quality theater. The one piece of the puzzle that gives them trouble is the relationship with producers and theater owners—those with most of the money and outsized influence because of their land holdings that determine the venues.[30] But copyright can't reshape this piece of the puzzle. And this leads to the second new story that needs to be told.

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[25] THE EUREKA MYTH, *supra* note 1, at 274.

[26] Salter & Fisk, *supra* note 4, at 222.

[27] *Id.* at 276–77.

[28] *See generally* Jessica Silbey, Eva E. Subotnik & Peter DiCola, *Existential Copyright and Professional Photography*, 95 NOTRE DAME L. REV. 263 (2019).

[29] This is another way of phrasing the authors' explanation that "employee status and intellectual property rights are shot through with arguments celebrating the importance of entrepreneurship and benefits of self-regulation." Salter & Fisk, *supra* note 4, at 278.

[30] *Id.* at 270. "[T]he challenge for playwrights negotiating individually 'as the ownership of theatres and production of plays has become increasingly dominated by corporate interests.'" *Id.*

New story #2: Copyright by itself does not create collective power. Copyright is only a weak status symbol of authorship and origination and assures no financial or professional success or institutional power. Fetishizing copyright and diminishing other organizational or institutional norms or priorities leads to isolation and the neglect of background structures, attention to which could support the regular accomplishment of good work through collective action and consensual community formation.

This story is a hard pill to swallow for author's rights advocates who regularly champion stronger and broader copyright to support the so-called struggling author.[31] But, really, this is an old story in new clothes. It resembles the one told in 1710 in England, in which publishers used authors as a shill to maintain their publishing privilege to enact the Statute of Anne, the first copyright statute naming authors as beneficiaries but which mostly kept publishers in positions of power.[32] It also resembles the story told in 1998 in the United States, in which wealthy musical celebrities argued ostensibly on behalf of all musicians and other copyright authors (but also for Disney Corporation) about the devaluation of copyright in the digital age and thus the need for perpetual copyright rather than a limited term copyright.[33] The Copyright Term Extension Act was passed in 1998 providing 20 more years of term to all future and existing copyright owners on the theory that longer and stronger copyright would more fully compensate all copyright owners. But the only owners that benefited from the extension were those for whom the last twenty years of a life plus seventy year term translates into any fees at all (which is no one except the mega-stars and their business partners).[34] Dramatists are caught telling a similar story asserting the importance of copyright for the independent authors' professional livelihood when in fact that "independent contractor" status serves to augment the power of the producers and theater owners who control the production of the dramatists' plays. Copyright isn't helping them much; and it may be hurting them.

Salter and Fisk demonstrate that copyright rules are no match for labor and antitrust law, which dominate the conditions of work for writers and other

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[31] This is essentially what *Tasini* was about. *See generally* Jane C. Ginsburg, *The Author's Place in the Future of Copyright*, *in* COPYRIGHT IN AN AGE OF EXCEPTIONS AND LIMITATIONS (Ruth Okediji ed., 2017) (exploring various avenues of protecting an author's full range of interest, with or without copyright).

[32] MARK ROSE, AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT 4–5 (1993).

[33] *See* Eldred v. Ashcroft, 537 U.S. 186, 186 (2003); *see also* JESSICA LITMAN, DIGITAL COPYRIGHT 23–49 (2017) (providing a history of the 1998 copyright legislation and the skewed legislative dynamics favoring industry over individual authors). For a history of the CTEA (and the DMCA), see generally BILL D. HERMAN, THE FIGHT OVER DIGITAL RIGHTS: THE POLITICS OF COPYRIGHT AND TECHNOLOGY (2013).

[34] *Eldred*, 537 U.S. at 254–55 (Breyer, J., dissenting) ("[I]f, after 55 to 75 years, only 2% of all copyrights retain commercial value, the percentage surviving after 75 years or more (a typical pre-extension copyright term)—must be far smaller . . . a 1% likelihood of earning $100 annually for 20 years, starting *75 years into the future*, is worth less than seven cents today.").

creators. They describe how labor and antitrust laws (not copyright) shape the opportunities for fair, sustainable pay as well as the nature and form of firms that are employers. Copyright held by these firms may be consequential. But copyright held by individuals working for these firms is not.[35] Caught up in the symbolism of copyright as designating independence in a master/servant relationship, playwrights overlook the possibility that being an employee or being less independent as member of a group is not necessarily a condition of unfreedom but of power. Playwrights are stuck believing that maintaining their professional status as dramaturgs requires retention of an impotent copyright, while simultaneously copyright diminishes their power to demand a sustainable living from theater owners because of collective bargaining rules. And thus, dramatists fail to focus where they should: on the establishment or maintenance of professional norms and organizations that shape quality and mutual respect among all the collaborators necessary to produce a show, which organization and structure could be the basis of resistance to the monopolistic power of the theater owners and producers.

I've seen this same problem play out among digital photographers in the internet age. In the mid-1990s and early 2000s, professional photographers experienced the consolidation of publishing and media outlets that came on the heels of the dot-com bubble.[36] Losing revenue from on-line readership, media companies started cutting photography staff and insisting on broad licensing terms for use of photographs but for no more money despite the wider audience on the internet.[37] Without collective power, the photographers who were desperate to continue working agreed to contract terms that diminished their pay but extended the licensees' rights in their photographs.[38] Those photographers who insisted on and secured more money and better terms at the outset were not hired again because media firms like Condé Nast, who were growing exponentially in size by acquiring smaller outlets, could easily find another photographer to work for less money down the road.[39] Professional photographer organizations, such as Editorial Photography and American Society of Media Photographers (ASMP), could not convince its members to collectively insist on contract terms that would maintain sustainable wages. And younger photographers who were not yet members or who had not yet

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[35] Molly Van Houweling describes this problem as "atomism"—"the proliferation, distribution, and fragmentation of the exclusive rights bestowed by copyright law" —for which one solution is to "to restrict, consolidate, unify, and standardize" the rights as through the work-for-hire doctrine, so the copyrights are held by a single entity. Molly Shaffer Van Houweling, *Atomism and Automation*, 27 BERKELEY TECH L.J. 1471, 1474 (2012); *see also* Molly Shaffer Van Houweling, *Author Automony and Atomism in Copyright Law*, 96 VA. L. REV. 549, 632 (2010) (suggesting "coordinating instead of consolidating" as one way to preserve autonomy in the face of inevitable atomism of copyright in the internet age).

[36] *See* Silbey, Subotnik & DiCola, *supra* note 28, at 298.

[37] *See id.* at 292–94.

[38] *See id.* at 292–99.

[39] *See id.*

appreciated the norms of professional photographers were willing to work for free or failed to see the benefit of old contract terms in a new internet world. The result has been stagnant wages for photographers over two decades of work in an internet ecosystem in which photographs play outsized cultural and informational roles but make money for people and entities other than the photographers.[40]

The difference between the digital photographers and freelance playwrights appears to be the central figure of the Dramatists Guild. As an organization to which most playwrights dutifully belong, it could play a much more powerful role in the lives of its members if it could stop fetishizing copyright as the key to its members' wellbeing and success. According to Salter and Fisk, the Dramatists Guild has succeeded in the face of legal uncertainty and constant threat for over almost 100 years to insist on the independence of its members.[41] Perhaps it's time to recognize their members' mutual *dependence* and to demote independent copyright as the key to the kingdom and to insist instead on the substantive terms of working conditions that will bring fairer profits and meaningful authorial control to theater productions. If this revised allocation of profit and control was possible with directors, actors, choreographers, as Salter and Fisk explain it was, it can be possible for dramatists as well.[42]

Standing in the way of this transition are the producers and theater owners, whose consolidated power set the terms of the debate and facilitated the skewed perception of the dramatists as a monopoly. The third story exposes the theater owners' story as based in avarice and not in creative production to which copyright aims.

New Story #3: Contrary to the theater owner's assertions, authors' independence is not a prerequisite to the production of diverse expression or healthy competition for plays. The rhetoric of competition and independent contractors serves only the greed of the theater producers who seek to maximize profits by preserving their own consolidated market in theater production.

Salter and Fisk explain that the colossal size and scope of the producers' empire distorts by controlling the market for dramatists' work.[43] As such, it makes sense that the producers resist the Dramatists Guild's advocacy on behalf of playwrights and the possibility of their collective bargaining because strengthening the Guild will make the producers less money. Producers allege

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[40] For more description and analysis of the case of digital photographers, see generally Jessica Silbey, *Control over Contemporary Photography: A Tangle of Copyright, Right of Publicity, and the First Amendment*, 42 COLUM. J. L. & ARTS 351 (2019), and Jessica Silbey, *Justifying Copyright in the Age of Digital Reproduction: The Case of Photographers*, 9 U.C. IRVINE L. REV. 405 (2019). *See also* SILBEY, AGAINST PROGRESS, *supra* note 23, at 25–87.

[41] *See* Salter & Fisk, *supra* note 4, at 225.

[42] *Id*. at 271. "[E]conomic changes in theatre have continued, and others involved in making plays—directors, actors, choreographers—have increased their leverage by claiming copyrights in their contributions to productions along with the salaries they are paid for their labor pursuant to their collective agreements." *Id.*

[43] *Id.* at 235.

that keeping writers independent will produce competition among plays—the idea being that competition elevates quality (more on this below).[44] But really producers seek to keep writers "independent" to keep them powerless and pay them less in order to guarantee larger profits on the producers' investments in the shows. Turning big profits is more difficult today, according to the Article, because since the 1980s more contributors to theater (such as directors, actors, musicians, and choreographers) have negotiated claims to the theatrical profits.[45] Keeping the writers "independent" is critical to producer's profit margin because a dramatist's contract price is a last input on which producers have significant negotiating power.

To keep writers "independent" and without strong bargaining power, theater producers argue that unions coerce their members, denying them meaningful choices over their work. But "freedom of individual workers and consumers" is anti-union rhetoric that serves neither theatrical workers nor its audiences. It only keeps writers in the precarious position of independence and without collective power, exactly what producers need to negotiate one-sided contract terms that keep writers weak and unable to easily improve their circumstances. It is particularly inapt as rhetoric when the subject is creative production.

In tandem, producers argue that independent writers create a "free market in theatre" and unionization "would give the Guild a gatekeeper role and the power to monopolize talent."[46] The idea that independent contractor status is essential to expressive diversity is laughable, especially if that independent status produces struggling rather than thriving writers. The notion that one needs to be poor and hungry to produce great writing is both quaint and cruel. The related notion that cutthroat competition elevates standards and generates the best work is specious. And if it was true, wouldn't it apply as much to producers and theater companies—whose power and institutional structure is consolidated in a few entities—as to the writers?

The arguments made by the producers ostensibly on behalf of the writers and theatrical audiences about competition among playwrights and the importance of dramatists' independent status for choice and control is some of the most self-serving rhetoric within copyright industries that I've studied. The arguments are transparently about maintaining the producers' own power and profits and are not about the good of theater community as a whole. The arguments are also based on false factual premises. The empirical evidence overwhelmingly shows that what drives authors to do good work is not competition but, among other things, sustainable and predictable working conditions and respectful and challenging professional relationships.[47] Many

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[44] *See id.* at 225.

[45] *See id.* at 271.

[46] *Id.*

[47] *See* THE EUREKA MYTH, *supra* note 1, at 287–99; *see also* MIHALY CSIKSZENTMIHALYI, CREATIVITY: FLOW AND THE PSYCHOLOGY OF DISCOVERY AND INVENTION 127–51 (1996); TERESA M. AMABILE, CREATIVITY IN CONTEXT: UPDATE TO THE SOCIAL PSYCHOLOGY OF CREATIVITY 203–43 (1996). *See generally* HOWARD E. GARDNER,

are intrinsically motivated and would work without the carrot of copyright or the stick of withholding pay.[48] The producers arguments about what motivates quality creative work are dead wrong. The new (or is it old?) story of the producers' monopolistic power and self-serving greed at the writers' expense underlies some of the assumptions that constrain the dramatists in the triadic legal regime described in the Article. Exposing this story will further remind audiences that cutthroat competition and precarity is not necessary for exquisite creativity.

It is amazing under these conditions of both precarity and outsized power that live theater continues to thrive today. It bears repeating that Salter and Fisk remind us, "that these relationships have endured and theatre continues to be made under such a fragile framework . . . says something rather profound about the desire of all stakeholders to find a compromise in order to achieve the shared goal of actual production."[49] I wouldn't be so kind to the stakeholder producers, such as the Shuberts, as they are described in this Article. But I am in awe of the persistence of creative workers within this precarious ecosystem, which is testament to their devotion to the work itself despite whatever financial rewards they earn, and which persistence we have witnessed during the pandemic when theater existed online without traditional producers or theatrical spaces. This passion thrives despite the voraciousness of producers who use theatrical productions as investment vehicles and fail to consider all employees and independent contractors as equally worth sharing in the wealth.

To this, I understand producers will say they take all the risks and therefore should control the allocation of rewards. But this position undermines their arguments about the benefits of independence and competition (writers inhabit risky positions as well!). And it ignores the fact that producers' risks are minimized when they can spread it around, as they do, to the hundreds of theaters they own in the manner of a hedge fund or investment bank. In the end, the producers' argument boils down to "we paid for it, so we get to reap the rewards." But to my ears, this is just fodder for collective action on behalf of those who in fact create the art that audiences pay to see and celebrate for years afterwards. The producer's specious argument further exposes the real stand-off between two sorts of value – capital and creativity. If creativity is the end goal, not capital (and that is, in fact, what copyright claims), then the producers have the argument all wrong.

These new stories are not really new, they have just been hidden under the ideology of cost-benefit analyses of intellectual property law's explanation of its balance between rights and access, between exclusivity and promoting the public good. We say without hesitation (and often without factual proof): exclusive rights that enable rent-seeking are necessary to produce creative or

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CREATING MINDS (1993); DANIEL H. PINK, DRIVE: THE SURPRISING TRUTH ABOUT WHAT MOTIVATES US (2009).

[48] *See* THE EUREKA MYTH, *supra* note 1, at 287–99.

[49] Salter & Fisk, *supra* note 4, at 276–77.

innovative work. But copyright turns out not to help dramatists. Their exclusive rights have generated instability and financial uncertainty. Instead, we might draw on these new stories to identify the contours of a different kind of critical balance embedded in intellectual property law (copyright in particular) determined by social values other than wealth aggregation. To be sure, earning and accumulating money to live and to take care of loved ones is an important social good. But there are other social goods. When copyright doesn't provide that necessary wealth for those contributing to the creative ecosystem, we need to ask what it's really for and whose interests it's serving. The stories underlying the assumptions that bind the dramatists in a web of copyright, antitrust, and labor law helpfully expose other values that frame copyright and debates about creative labor – of mutual interdependence, professional norms, equal treatment, and distributive justice.[50] The dramatists' distressing situation as described by Brent Salter and Catherine Fisk is an example of copyright law's misdirection. New stories revitalized with these other social values can help set copyright on a path working for more authors in our complicated but thriving creative communities.

[50] SILBEY, AGAINST PROGRESS, *supra* note 23, at 4–5 (describing these values as the emerging dominant frameworks to debate intellectual property law in the internet age).