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**Copyrighting Stage Directions & the Constitutional  
Mandate to “Promote the Progress of Science”**

*Jessica Talati*



# Copyrighting Stage Directions & the Constitutional Mandate to “Promote the Progress of Science”

By Jessica Talati\*

*The art of the dramatist is very like the art of the architect. A plot has to be built up just as a house is built—story after story; and no edifice has any chance of standing unless it has a broad foundation and a solid frame.<sup>1</sup>*

¶1 In today’s theatre industry, copyright law protects the contributions of two main players—the original playwrights and the production companies that publicly perform the dramatic work for a period of time. The highly collaborative nature of the theatre stands in sharp contrast to most other forms of performing arts.<sup>2</sup> A successful production results from the winning combination of the producer’s resources with the artistic contributions of the playwright’s words, the director’s vision, the actor’s stage movement, and the designer’s visual imagery. This collaboration has increasingly spawned a desire by additional players, stage directors in particular, to assert and secure copyrights in their contributions to the dramatic works.

¶2 At first glance, the move may appear uncontroversial; but it has spawned rigorous debate and serves as an apt illustration of the problem created by granting copyrights at the fringe of otherwise statutorily protected works. Do we stop at directors? Or will there soon be claims from costume, set, and lighting designers? Or even the actors themselves?

¶3 Despite several opportunities, a court has yet to address squarely the issue of copyrighting stage directions, but this has by no means deterred commentary on the issue. Analyzing the problem under the rubric of the 1976 Federal Copyright Act (the “Act”) requirements, commentators have written impassioned pleas on both sides.<sup>3</sup> The debate thus far has largely asked whether stage directions satisfy the Act’s requirements of originality, work of authorship, and fixation.<sup>4</sup> The answer has been a resounding

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<sup>1</sup> BRANDER MATTHEWS, THE PRINCIPLES OF PLAYMAKING AND OTHER DISCUSSIONS OF THE DRAMA 39–40 (1919).

<sup>2</sup> Susan Etta Keller, Comment, *Collaboration in Theater: Problems and Copyright Solutions*, 33 UCLA L. REV. 891, 892 (1986).

<sup>3</sup> See e.g., Richard Amada, Note, *Elvis Karaoke Shakespeare and the Search for a Copyrightable Stage Direction*, 43 ARIZ. L. REV. 677 (2001); Beth Freemal, Note and Comment, *Theatre, Stage Directions & Copyright Law*, 71 CHI.-KENT L. REV. 1017 (1996); David Leichtman, *Most Unhappy Collaborators: An Argument Against the Recognition of Property Ownership in Stage Directions*, 20 COLUM.-VLA J.L. & ARTS 683 (1996); Jennifer J. Maxwell, Comment, *Making a Federal Case for Copyrighting Stage Directions: Einhorn v. Mergatroyd Prods.*, 7 J. MARSHALL REV. INTELL. PROP. L. 393 (2008); Talia Yellin, *New Directions for Copyright: The Property Rights of Stage Directors*, 24 COLUM.-VLA J.L. & ARTS 317 (2001).

<sup>4</sup> See *infra* Part I.

“maybe.” Why the uncertainty? This Comment suggests that in analyzing the viability of a copyright for fringe cases, like stage directions, an exclusive focus on the statutory requirements overlooks a key question—does granting the copyright fulfill the constitutional aims of copyright protection?

¶4 The commentaries notably lack a thorough discussion of the constitutional grant of copyright protection and the implications, if any, of the “promote the progress of science”<sup>5</sup> clause.<sup>6</sup> Does (or should) the progress clause serve as a limitation on Congress’ power to create a system for issuing copyrights? And if a limitation exists, would the existing statutory protection for a director’s copyright exceed it? This Comment answers both questions. Using the debate over stage directions as a guiding example, the Comment addresses the import of the progress clause on the question of whether a work merits copyright protection. After finding that the progress clause does present a limit on Congress’ power to issue copyrights, the Comment uses the stage direction debate to illustrate that the current copyright scheme does not sufficiently implement this limit. However, if the copyright laws were amended to address this limit (as the Comment suggests they should), the debate over fringe cases could be quelled and the answer to whether a stage director’s copyright should be recognized would be an unequivocal no.

¶5 Before addressing the constitutional issues, Part I sets the stage by examining the statutory requirements for copyrightable material and summarizing the arguments made on each side for recognizing a property interest in stage directions. It recognizes that on a technical analysis alone, stage directions may fulfill statutory requirements, making constitutional concerns more salient. Part II then lays out the historical origins of the copyright power and the various interpretations of the progress clause. It questions whether the clause should be regarded as the primary grant of power to Congress, a substantive limit on Congress’ more narrow authority to issue copyrights, or merely a preamble with no force. It concludes that the clause must be either a primary grant or a substantive limit because only those theories give the progress clause its due meaning. Finally, Part III takes this conclusion and applies it to the debate over recognizing copyright protection for stage directions, ultimately finding that recognizing a director’s copyright would not promote the progress of science.

¶6 The exclusive focus on the Act’s technical requirements, however, does not recognize the full import of the progress clause. Thus, under Congress’ current copyright system, a court charged with determining whether a new work qualifies for copyright protection will never adequately analyze the constitutional limit posed by the progress clause. Therefore, it must fall to Congress to explicitly recognize that the progress clause

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<sup>5</sup> It is fairly well settled that, at the time the clause was drafted at the Federal Convention, “science” was used in the sense of knowledge generally and thus would refer to the works of authors while “useful arts” refers to that of inventors. *See* *Graham v. John Deere Co.*, 383 U.S. 1, 6–7 (1966) (treating the reference to “useful arts” as applying to patents); 1 MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 1.03[A] n.11.2 (1963) (“This position is further supported by the internal logic of the Constitutional clause, in that in both the phrases ‘authors and inventors’ and ‘writings and discoveries’ the reference to copyright precedes the reference to patents. It is reasonable to suppose that the same order was intended in reference to ‘science and useful arts.’”).

<sup>6</sup> *See, e.g.*, Maxwell, *supra* note 3. This most recent analysis argues for copyright protection of stage directions and *assumes* that limits on copyright will ensure the promotion and advancement of the arts. However, the discussion fails to undertake a rigorous constitutional inquiry to support this assertion.

matters. Doing so ensures a more individualized, constitutional analysis of works like stage directions that reside at the fringe of copyrightable material.

#### I. TO RECOGNIZE OR NOT TO RECOGNIZE: A PROPERTY RIGHT IN STAGE DIRECTIONS?

¶7 Unlike many of their screenwriter counterparts in the film industry, playwrights are not employees of production companies. This independence represents something very real in theatre. The playwright unequivocally embodies the heart and soul of the theatre, and his play provides the bedrock upon which others make contributions. Traditionally, this has translated into an unspoken understanding that the playwright retains undisputed ownership of the play—both legally and artistically. Recently, however, the actions of certain contributors have challenged this “understanding.” Stage directors have begun to seek copyright protection for their very real artistic contributions to a dramatic work. Directors exert substantial artistic control in the performance of a play through their collaboration with designers on the visual expression of the work and with actors in the movement of the individuals across the stage.<sup>7</sup> These contributions, directors argue, are essential in making a play successful; thus, they seek remuneration for these efforts through copyright protection.

¶8 In a number of recent cases, stage directors have argued that their creative input (when sufficiently substantial and distinct from the underlying play) requires recognition and compensation if intentionally appropriated by directors, producers, or others.<sup>8</sup> The directors, through their union, the Society of Stage Directors and Choreographers, deny that these actions in any way make claims against playwrights or their royalties.<sup>9</sup> To the playwrights, however, these are empty words. In their eyes, a director’s copyright represents a drastic limitation on their ability to exercise control over the work they create and would “undermine the spirit of trust and openness which is essential to the collaborative process.”<sup>10</sup> For both sides, then, the issue of copyrighting stage directions gets at the heart of their economic livelihood and artistic worth.

¶9 While a court has yet to rule on the merits of a case arguing for copyrightable stage direction, the analysis would surely begin by asking whether the work satisfies the technical requirements for copyright laid out in the Federal Copyright Act. This Act, and its predecessors, provides statutory copyright protection<sup>11</sup> for “original works of authorship fixed in any tangible medium of expression.”<sup>12</sup> Those seeking copyright protection must satisfy three primary statutory elements: (1) originality; (2) work of authorship; and (3) fixation.

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<sup>7</sup> Freemal, *supra* note 3, at 1018.

<sup>8</sup> *See, e.g.*, *Einhorn v. Mergatroyd Prods.*, 426 F. Supp. 2d 189 (S.D.N.Y. 2006); *Mantello v. Hall*, 947 F. Supp. 92 (S.D.N.Y. 1996); *Gutierrez v. DeSantis*, No. 95-1949 (S.D.N.Y. filed Mar. 22, 1995).

<sup>9</sup> Ted Pappas, *Protecting the Director*, AM. THEATRE, Feb. 1999, at 6, 6.

<sup>10</sup> John Weidman, *No Copyright for Directors*, AM. THEATRE, Sept. 1999, at 6, 6.

<sup>11</sup> This comment addresses the permissibility of statutory copyright protection for stage directions only. Common law copyright, though largely eliminated with the advent of the Copyright Act of 1976, does still exist in the narrow cases where granting it would not be subject to federal preemption by § 301(a) of the Act. See 1 NIMMER & NIMMER, *supra* note 5, § 101[B], for a full discussion of when common law rights under state law are subject to preemption.

<sup>12</sup> 17 U.S.C. § 102 (2006).

*A. The Originality of Stage Directions*

¶10 “Originality remains the *sine qua non* of copyright.”<sup>13</sup> This element “calls for independent creation, not novelty.”<sup>14</sup> The originality requirement can be satisfied so long as the work is found to originate with the author, regardless of whether it shares substantial similarity with another work. Viewed in this light, the standard is not an especially demanding one. For example, while similarity may be sufficient to find patent infringement, similarity in the absence of direct copying will be insufficient to constitute copyright infringement.<sup>15</sup>

¶11 Given the low standard for originality, many have argued that stage directions easily satisfy this first requirement.<sup>16</sup> Stage directions, while often nominally substantive in an individual context (e.g. cross stage left), nonetheless reflect a minimal degree of creativity.<sup>17</sup> Therefore, proponents of recognizing copyright interests in stage directions argue that while elements individually may be insufficiently original to qualify for protection, the selection and arrangement of those elements will satisfy the requirement.<sup>18</sup> An analogy to choreography, which the Act explicitly recognizes as copyrightable subject matter,<sup>19</sup> advances this argument.

¶12 In choreography, dance steps and simple routines are not copyrightable. Rather, individual dance steps are regarded as the building blocks that combine to form a series of movements. This series, presented as a coherent whole, provides the required level of creativity.<sup>20</sup> At least one commentator of this building blocks theory argues that “stage directions are a ‘composition and arrangement’ of movement, much like choreography” and that “the movements of individual stage directions are ‘organized into a coherent whole.’”<sup>21</sup> Thus, while individual stage directions do not support copyright protection, they become entitled to protection when incorporated as a whole.

¶13 However, two problems arise with a finding that stage directions satisfy the originality requirement. First, the immensely collaborative nature of the theatre industry complicates the determination of what stage directions actually originated with the director. In addition to the director, there are several players involved in the process, including the actors and playwright. Actors, for example, are often instructed to go through a scene without guidance to see how the characters play off one another. The resulting performance may be shaped by the director’s notes, but it would be wrong to assert that the directions originated solely with the director.<sup>22</sup> Additionally, some amount

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<sup>13</sup> Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 348 (1991).

<sup>14</sup> 1 NIMMER & NIMMER, *supra* note 5, § 2.01[A].

<sup>15</sup> Alfred Bell & Co. v. Catalda Fine Arts, Inc., 191 F.2d 99, 102–03 (2d Cir. 1951) (“All that is needed to satisfy both the Constitution and the statute is that the ‘author’ contributed something more than a ‘merely trivial’ variation, something recognizably ‘his own.’ Originality in this context ‘means little more than a prohibition of actual copying.’”).

<sup>16</sup> See Amada, *supra* note 3, at 686; Douglas M. Nevin, Comment, *No Business like Show Business: Copyright Law, the Theatre Industry, and the Dilemma of Rewarding Collaboration*, 53 EMORY L.J. 1533, 1558 (2004) (“The requisite modicum of originality [for stage directions] is easily satisfied.”); Yellin, *supra* note 3, at 331.

<sup>17</sup> Amada, *supra* note 3, at 686.

<sup>18</sup> *Id.*

<sup>19</sup> 17 U.S.C. § 102(a)(4) (2006).

<sup>20</sup> U.S. COPYRIGHT OFFICE, COMPENDIUM OF COPYRIGHT OFFICE PRACTICES § 450.01 (1984).

<sup>21</sup> Yellin, *supra* note 3, at 331.

<sup>22</sup> Freemal, *supra* note 3, at 1026–27.

of stage direction originates exclusively with the playwright. “[Copyright Office] guidelines state that a copyright on a dramatic work ‘usually include[s] spoken text, plot, and *directions for actions*.’”<sup>23</sup>

¶14 Second, the building blocks argument relies, to a great extent, on the analysis in *Feist Publications* that applied the factual compilation theory.<sup>24</sup> This theory, however, is inapplicable to stage directions.<sup>25</sup> “A factual compilation is eligible for copyright if it features an original selection or arrangement of facts, but the copyright is limited to that particular selection or arrangement.”<sup>26</sup> The underlying elements in stage directions are not “facts” in this sense, and compilation theory has never been applied to non-facts. Moreover, should a court accept the compilation theory as applied to stage directions, the *Feist* holding suggests the copyright protection that would be afforded would be very “thin.”<sup>27</sup> A copyright in a compilation does not protect its author from a second comer appropriating the constituent blocks. “The very same facts and ideas may be divorced from the context imposed by the author, and restated *or reshuffled* by second comers.”<sup>28</sup> This suggests that while a sequence of stage directions may be copyrighted, there is nothing to prevent another director or producer from appropriating or reshuffling individual elements of the direction.

¶15 Nevertheless, courts have generally been lenient in ruling on the originality requirement. Thus, despite the difficulties, a court may find that stage directions satisfy the originality requirement. This, however, is only step one.

### B. Stage Directions as a Work of Authorship

¶16 The Act’s second element requires a work of authorship. As with originality, Congress did not define the terms “works of authorship.” The House Report indicates that this omission was intentional so as not to “freeze the scope of copyrightable subject matter at the present stage of communications technology, or . . . allow unlimited expression into areas completely outside the present congressional intent.”<sup>29</sup> The report does suggest, however, two categories of works that prove useful for understanding what Congress intended to protect with the statute. The first type of work includes those in which “scientific discoveries and technological developments have made possible new forms of creative expression that never existed before.” The second category includes those works that have been “in existence for generations or centuries [but that] have only gradually come to be recognized as creative and worthy of protection.”<sup>30</sup> In his leading treatise on copyright law, Melville B. Nimmer postulates that, to fall within the second category, the works must either be explicitly described in one of the Act’s eight enumerated subject matter categories<sup>31</sup> or be included by a new statutory amendment.<sup>32</sup>

<sup>23</sup> *Id.* at 1027 (emphasis added).

<sup>24</sup> *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991).

<sup>25</sup> *Id.* at 350–51.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 349.

<sup>28</sup> Jane Ginsburg, *Creation and Commercial Value: Copyright Protection of Works of Information*, 90 COLUM. L. REV. 1865, 1868 (1990) (emphasis added).

<sup>29</sup> H.R. REP. NO. 94-1476, at 51 (1976).

<sup>30</sup> 1 NIMMER & NIMMER, *supra* note 5, § 2.03 (quoting H.R. REP. NO. 94-1476, at 51).

<sup>31</sup> The Act’s eight types of work include: literary works; musical works, including any accompanying

¶17 Nimmer's interpretation of works of authorship presents a significant hurdle for proponents of copyrightable stage directions. These proponents do not suggest that stage directions are a new form of expression as a result of scientific discovery or invention. Therefore, under Nimmer's interpretation, absent a future statutory amendment to expressly include them, stage directions must fall within one of the eight pre-existing categories to make a valid claim for protection. Two of these categories—choreography/pantomime and dramatic works—have been posited as encompassing stage directions.

¶18 Some argue that, like dance, stage directions represent the silent movement of people across a stage because they instruct actors on their physical movement throughout the course of the play. This analogy to choreography could sufficiently bring stage directions within a protected category of works.<sup>33</sup> However, analogy alone would not satisfy Nimmer's interpretation of the House Report, which requires that a work be *explicitly described* in the Act's categories in order to be protectable. Stage directions, like choreography, were clearly around at the time the statute was enacted, yet Congress chose not to expressly include them within the enumerated categories. Moreover, there are some commentators who have explicitly rejected the idea of grafting the concept of mere movement onto the term choreography. "The term 'choreography' has a limited meaning . . . . Movement is generic and has a broad meaning, encompassing not only dance steps and patterns, but also any kind of stage business. Movement, then, in and of itself cannot be the basis for copyright."<sup>34</sup> Thus, it is debatable whether a court would accept such an attenuated analogy to the choreography category, which has not been fully defined by the statute nor conclusively interpreted by case law.

¶19 An alternative argument suggests that stage directions fall within the dramatic works category. Yet again, Congress omitted a definition of dramatic works from the statute, indicating only that the terms "had fairly settled meanings" as of 1976.<sup>35</sup> Supporters of a copyrightable stage direction argue that, just as an unspoken scene could be considered a dramatic work,<sup>36</sup> stage directions should likewise be entitled to protection under the category. Others, however, submit that stage directions, standing alone, would not be protectable as a dramatic work. This argument relies on a long line of cases that have rejected recognizing protection under this category for comparable parts of dramatic works.<sup>37</sup> Courts have found the following not copyrightable: "stage effects, theatrical dances, character types, sounds, gesture and posture, descriptions of scenery and props, locale, and most significantly, stage business."<sup>38</sup> Moreover, case law prior to 1976 had recognized protection for elements of dramatic works only when those elements,

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words; dramatic works, including any accompanying music; pantomimes and choreographic works; pictorial, graphic and sculptural works; sound recordings; and architectural works. 17 U.S.C. § 102(a)(1–8) (2006).

<sup>32</sup> 1 NIMMER & NIMMER, *supra* note 5, § 2.03.

<sup>33</sup> Freema, *supra* note 3, at 1023.

<sup>34</sup> Joseph Taubman, *Choreography Under Copyright Revision: The Square Peg in the Round Hole Unpegged*, 10 J. ARTS MGMT. & L. 219, 242–43 (1980).

<sup>35</sup> H.R. REP. NO. 94-1476, at 53–54 (1976).

<sup>36</sup> *Daly v. Palmer*, 6 F. Cas. 1132, 1135 (C.C.S.D.N.Y. 1868) (No. 3,552).

<sup>37</sup> Leichtman, *supra* note 3, at 697–98.

<sup>38</sup> *See id.* at 697–98 nn.66–73 (collecting body of case law supporting the proposition that these other parts of dramatic works were found to not be copyrightable).

considered separately from the rest of the play, described a connected story or series of events.<sup>39</sup> If this was the settled meaning alluded to in the House Report, and the one Congress had in mind when it passed the statute, then it seems stage directions were not to be included in the definition of dramatic works.<sup>40</sup>

### C. *Can Stage Directions Be Fixed?*

¶20 The final element of statutory copyright protection requires that the form of expression be fixed in a tangible medium.<sup>41</sup> Unlike the first two requirements, the Act does define fixation. “A work is ‘fixed’ in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.”<sup>42</sup> The fixation requirement may pose the greatest hurdle to those arguing for copyrightable stage directions because it is not only a statutory requirement but also a “constitutional necessity.”<sup>43</sup> To be considered a “writing” within the meaning of the Constitution, the work must be amenable to being reduced to a tangible form.<sup>44</sup> Two primary arguments have been advanced to demonstrate that stage directions can be fixed within the Act’s meaning.

#### 1. Fixation by Prompt Books

¶21 The first mode of fixation relies on the creation of a prompt book. These books reflect the stage manager’s collection of the director’s descriptions of movement for the actors adjacent to the line on which the actor is moving. The book is used for rehearsing understudies; thus, some contend that the prompt book sufficiently “fixes” the work because it allows for “reproducing” the stage directions.<sup>45</sup>

¶22 In *Gutierrez v. Desantis*, the court considered a dispute involving a copyright registration for a prompt book.<sup>46</sup> In that case, Gutierrez, the director of a 1991 revival of the musical “The Most Happy Fella,” sued the director of another venue’s reproduction of the musical. Gutierrez argued that the other director had viewed his revival performance on videotape and used the same stage directions.<sup>47</sup> Gutierrez asserted rights in the production and submitted a registration of his stage directions written on a copy of the script.<sup>48</sup> The case settled for an undisclosed amount, precluding a court’s ruling on the merits. Nonetheless, the litigation revealed evidence of the Copyright Office’s interpretation of the fixation requirement in prompt books. In a letter to one of the attorneys, the Office stated:

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<sup>39</sup> Fuller v. Bemis, 50 F. 926, 929 (S.D.N.Y. 1892) (“[T]elling no story, portraying no character, and depicting no emotion is not a dramatic composition within the meaning of the copyright law.”).

<sup>40</sup> Leichtman, *supra* note 3, at 699.

<sup>41</sup> 17 U.S.C. § 102 (2006).

<sup>42</sup> 17 U.S.C. § 101 (2006).

<sup>43</sup> 1 NIMMER & NIMMER, *supra* note 5, § 2.03[B].

<sup>44</sup> *Id.*

<sup>45</sup> Yellin, *supra* note 3, at 328–29.

<sup>46</sup> No. 95-1949 (S.D.N.Y. filed Mar. 22, 1995).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

The copyright law protects the expression of an author fixed in any tangible form. With regard to stage directions, this expression will generally be in the form of literary authorship. Reference to “stage directions” in an application, however, does not imply any protection for a manner, style, or method of directing, or for the actions dictated by them. The authorship on the application in this case is “text of stage directions.” We understand this to represent a claim in the text.<sup>49</sup>

Some have argued that the statement is contradictory in that the Office indicates that stage directions will often be fixed in “the form of literary authorship,” but, nonetheless, finds that the protection would not extend to the actions dictated by the text. This interpretation contradicts the idea that copyright protection for choreographic notations extends to the movement itself, not just the notation for it.<sup>50</sup> Thus, supporters argue that, because stage directions are analogous to choreography, the prompt book should satisfy the fixation requirement and extend to the actual movement indicated by the directions.<sup>51</sup> Others, however, insist that fixation by prompt book is based on the underlying text of the play, which the director does not own.<sup>52</sup> The work on its own must be fixed, but the “work” represented by the prompt book is not just the stage directions but the text of the play as well.<sup>53</sup> And a director cannot fix his work in relation to another work that he does not own.

## 2. Fixation Through Video Recordings

¶23 A second argument maintains that video recordings of the performance represent a sufficient means to fix the stage directions. This argument relies on an analogy to live broadcasts in which the Act specifically allows the work to be fixed “if the fixation of the work is made simultaneously with its transmission.”<sup>54</sup> However, not everyone shares the conviction that this method appropriately fixes the work. “The only way to reproduce the stage direction of one production, for use in another production, is to fix the movement in relation to the script. . . . [T]his cannot be done without violating the rights of the script owner.”<sup>55</sup> Additionally, directors do not independently take this action to fix their contributions as videotaping serves primarily archival purposes only.<sup>56</sup>

¶24 It appears, then, that the fixation requirement could be met through prompt books or video recordings; but these methods are not without controversy.<sup>57</sup>

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<sup>49</sup> Leichtman, *supra* note 3, at 724 (citing Letter from Joseph Miranda, Supervisory Examiner, Performing Arts Section, United States Copyright Office, to Harold Orenstein, Attorney for Jo Loesser (June 22, 1995)).

<sup>50</sup> Yellin, *supra* note 3, at 328–29.

<sup>51</sup> *Id.*

<sup>52</sup> Freemal, *supra* note 3, at 1029.

<sup>53</sup> *Id.*; see also Leichtman, *supra* note 3, at 691 (stating that the prompt book is a collection of contributions from many people and cannot be said to be representative of the sole work of the director).

<sup>54</sup> 17 U.S.C. § 101 (2006).

<sup>55</sup> Freemal, *supra* note 3, at 1029.

<sup>56</sup> Leichtman, *supra* note 3, at 691.

<sup>57</sup> Some commentators have raised more general concerns with the ability of any method to appropriately fix stage directions. See Amada, *supra* note 3, at 686 (arguing that stage directions are general and often entail a variety of ways to accomplish the direction; thus it may be debatable as to whether they may truly be fixed especially given the lack of guidance by Congress regarding the level of

¶25 This brief review of the technical requirements for granting copyrights illustrates that the current legislative scheme *could* feasibly support granting copyright protection to stage directions. Thus, when a court finally does reach the merits of this issue, creative arguments and attenuated analogies may convince a court that stage directions fall within the subject matter that Congress intended to cover under the Act. Regardless of how attenuated the arguments, however, a court’s acceptance of statutory copyright protection for this type of work suggests that the statutory scheme itself may betray the constitutional mandate of promoting the progress of science.

## II. HISTORY AND VARYING INTERPRETATIONS OF THE PROGRESS CLAUSE

¶26 Article I, Section 8 of the Constitution grants Congress the authority to pass copyright legislation like the Federal Copyright Act of 1976. The clause reads “Congress shall have Power . . . 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.”<sup>58</sup>

¶27 The Supreme Court has been inconsistent in its discussion of the “promote the progress of science” clause,<sup>59</sup> likely reflecting the Court’s discernible purpose of avoiding broad interpretive statements about the Constitution unless absolutely required for resolving the precise case before it. Against this inconsistent treatment by the Court, a brief review of the history of the clause and the varying interpretations afforded to it will be helpful in understanding the role the clause may play if and when the issue of copyrighting stage directions finally does reach a court on the merits.

### A. *The Federal Convention—Madison and Pinckney Proposals for an Intellectual Property Clause*

¶28 There was little debate amongst committee members in the Federal Convention when adopting the intellectual property clause; thus, historical records from that time provide scant evidence of original intent for this legislative power. However, the records do contain examples of some of the different proposals for phrasing the clause. Convinced of the necessity for providing enumerated powers in the Constitution, the Framers, Madison and Pinckney in particular, submitted varying proposals to define the grant of power for intellectual property rights. Two of Madison’s proposals read: “To secure to literary authors their copyrights for a limited time” and “To encourage by premiums & provisions, the advancement of useful knowledge and discoveries.”<sup>60</sup>

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specificity required for fixation); Nevin, *supra* note 16, at 1559 (stating that the director is most often credited with “the acting styles, the pace, the overall ‘feel of the piece,’ [which] are often elusive and incapable of being fixed”).

<sup>58</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>59</sup> *Compare* *Deepsouth Packing Co. v. Laitram Corp.*, 406 U.S. 518, 530 (1972) (“The direction of Art. I is that *Congress* shall have the power to promote the progress of science and the useful arts.”), *and* *Graham v. John Deere Co.*, 383 U.S. 1, 5–6 (1966) (“The clause is both a grant of power and a limitation. This qualified authority . . . is limited to the promotion of advances in the ‘useful arts’ . . . . The Congress in the exercise of [its] power may not overreach the restraints imposed by the stated constitutional purpose.”), *with* *Eldred v. Ashcroft*, 537 U.S. 186, 211 (2003) (discussing the “preambular language” of the promote the progress of science clause).

<sup>60</sup> III THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 477–78 (Max Farrand ed., 1937).

Pinckney’s proposals included: “To grant patents for useful inventions;” “To secure to Authors exclusive rights for a certain time;” and “To establish public institutions, rewards, and immunities for the promotion of agriculture, commerce, trades, and manufactures.”<sup>61</sup> Through the use of terms like “advancement of useful knowledge and discoveries,” rather than Pinckney’s specific language of granting patents and securing exclusive rights to authors, Madison’s proposals can be seen as offering the broader construction of the delegated power. The Framers’ choice of the final language—“To promote the progress of Science and the Useful Arts by securing for limited times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries”—appears to incorporate a specific legislative ability to grant copyrights and patents alongside a broader construction like Madison’s that focused the power on the “advancement of useful knowledge and discoveries.”<sup>62</sup>

¶29 It follows from this historical evidence that the “To promote the Progress of Science and useful Arts” language cannot be a mere preamble devoid of substantive meaning.<sup>63</sup> Both specific and broad language proposals were submitted to the Convention. Committee members had the option of phrasing the clause such that it read, for example, “Congress shall have the power to grant patents and copyrights.” Yet, the Convention did not adopt such a specific grant of power. It chose, instead, to incorporate the particular ability to grant copyrights and patents along with the additional promotion and progress language, which is very similar to Madison’s “advancement of useful knowledge and discoveries.” The inclusion of this “something more” must have some significance—either as the primary grant of power or as a material limitation on the power to issue copyrights and patents. If the Framers intended there to be the power to grant copyrights and patents without restriction, they would have accepted the Pinckney proposals that phrased the power in that specific language. History tells us that they did not choose that course.

### B. *Varying Interpretations of the Copyright Clause*

¶30 While history suggests that the clause cannot merely be a preamble, it is clear that the progress language has been subject to various interpretations by the courts, Congress, and leading academics in copyright law.<sup>64</sup> The principal interpretations put forth include: (1) the clause as a meaningless preamble devoid of any material effect on Congress’ power;<sup>65</sup> (2) the clause as a preamble outlining the purpose of the power against which Congress must legislate for its actions to be considered constitutional;<sup>66</sup> and (3) the clause as the primary grant of power—Congress’ power is to promote the progress of science.<sup>67</sup>

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<sup>61</sup> *Id.*

<sup>62</sup> EDWARD C. WALTERSCHEID, *THE NATURE OF THE INTELLECTUAL PROPERTY CLAUSE: A STUDY IN HISTORICAL PERSPECTIVE* 111–12 (2002).

<sup>63</sup> *See infra* Part II.B (discussing one interpretation of the “to promote” language as “meaningless surplusage”).

<sup>64</sup> *See, e.g., infra* Part II.C (arguing that based on the historical backdrop described in Part II.A above, it is wrong to interpret the court’s position in *Eldred v. Ashcroft* as sounding the death knell for the progress clause).

<sup>65</sup> 1 NIMMER & NIMMER, *supra* note 5, § 1.03.

<sup>66</sup> Orrin G. Hatch & Thomas R. Lee, “*To Promote the Progress of Science*”: *The Copyright Clause and Congress’s Power to Extend Copyrights*, 16 HARV. J. L. & TECH. 1 (2002).

<sup>67</sup> *Deepsouth Packing, Co. v. Laitram Corp.*, 406 U.S. 518, 530 (1972) (“The direction of Art. I is that

¶31 The preamble argument advanced in the first two interpretations appears to cut in two directions. The first considers the “promote the progress” language to be essentially meaningless, in that the grant of power resides specifically in the “by securing” language of the clause.<sup>68</sup> Nimmer advances this argument; he finds the clause to be merely a preamble, descriptive only of the purpose for granting Congress the power to bestow copyrights and patents, but not serving as a substantial limit on the power itself.<sup>69</sup> Under this theory, the benefit that inures to the public as a result of the creative activities of authors justifies giving Congress the power specifically to grant limited monopolies through copyrights. This interpretation characterizes the progress of science language as a mere explanation of the attendant benefits of granting copyrights.<sup>70</sup> As discussed above, however, this construction of the clause ignores the fact that the Convention had the opportunity to accept such a narrowly defined power but ultimately rejected it in favor of a broader proposal.<sup>71</sup>

¶32 The meaningless preamble theory advanced in the first interpretation likewise contradicts a standing practice by courts of giving full merit to every word in the Constitution. “In expounding the Constitution of the United States, every word must have its due force, and appropriate meaning; for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added.”<sup>72</sup> This echoes the rule of statutory construction, where courts generally do not find particular language to be superfluous. Indeed, if a certain interpretation may render a section or clause meaningless, a court would likely reject that interpretation in favor of an alternative one that gives the language some meaning.<sup>73</sup>

¶33 Moreover, the meaningless preamble theory does not explain why the Framers chose to include a purpose statement only for this clause. No “preambular” statement accompanies any other enumerated power in Article I, Section 8.<sup>74</sup> Proponents of the meaningless preamble theory fail to provide an adequate answer as to why the intellectual property power is inherently different from the other enumerated powers so as to require a purpose statement. If the Framers intended the clause to be interpreted as meaningless surplusage, there would have been no harm in including similar purpose statements for the other powers.

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*Congress shall have the power to promote the progress of science and the useful arts.”); see also Eldred v. Reno, 239 F.3d 372, 381 (D.C. Cir. 2001) (Sentelle, J., dissenting) (“It is a grant of power to promote progress.”).*

<sup>68</sup> *Eldred*, 239 F.3d at 378.

<sup>69</sup> 1 NIMMER & NIMMER, *supra* note 5, § 1.03 (“Therefore, the phrase ‘To promote the progress of science and useful arts . . .’ must be read as largely in the nature of a preamble, indicating the purpose of the power but not in limitation of its exercise.”).

<sup>70</sup> *Id.*

<sup>71</sup> See *supra* Part II.A.

<sup>72</sup> *Richfield Oil Corp. v. State Bd. of Equalization*, 329 U.S. 69, 77–78 (1946).

<sup>73</sup> *Raven Red Ash Coal Corp. v. Absher*, 153 Va. 332, 335 (1929) (“If this be construed to give to the employee unconditional compensation for three hundred weeks, then the phrase ‘from the date of the injury’ is meaningless. This violates a fundamental rule of construction. Every part of an act is presumed to be of some effect and is not to be treated as meaningless unless absolutely necessary.”).

<sup>74</sup> See Edward C. Walterscheid, *The Preambular Argument: The Dubious Premise of Eldred v. Ashcroft*, 44 IDEA 331, 347 (2004) [hereinafter Walterscheid, *The Preambular Argument*] (discussing the eighteen clauses in Article I, Section 8 and the legally operative grant of power bestowed by the verb beginning each clause).

¶34 Another variation on the preamble argument, one advanced by the second interpretation above, similarly defines the clause as an introductory preamble but also believes it constitutes a substantive limit on Congress' legislative power. Senator Orrin Hatch, the sponsor of the Copyright Term Extension Act ("CTEA") at issue in *Eldred v. Ashcroft*, supports this "preamble with substantive limit" theory.<sup>75</sup> Hatch argues that in enacting the CTEA, Congress weighed the competing interests of all relevant parties and rationally found that the extension would promote the progress of science by encouraging improvements in the dissemination and preservation of existing works.<sup>76</sup> Hatch's approach does not define progress narrowly as meaning only incentivizing new creation. Rather, this theory more fully defines progress as encouraging improvements in the continuing publication and rehabilitation of existing works as well.<sup>77</sup> According to the preamble with substantive limit view, legislative action under the copyright power can only be considered constitutional if it is shown that Congress rationally determined that the statutory scheme would result in promoting the progress of science.<sup>78</sup>

¶35 The third and final interpretation of the clause abandons the preamble theory altogether and holds that the clause itself is the substantive grant of power. A leading commentator on the historical origins of intellectual property law has argued that the clause must be seen as granting Congress specifically the power to "promote the progress of science and useful arts."<sup>79</sup> Whether the "by securing" language is the only means by which Congress can carry out this power, or whether that clause provides one of many means available to the legislature, is still open to much debate among proponents of this theory.<sup>80</sup> Judge Sentelle of the D.C. Circuit explained the "clause as substantive grant of power" interpretation in his dissent in *Eldred v. Reno*.

That clause empowers the Congress to do one thing, and one thing only. That one thing is "to promote the progress of science and useful arts." How may Congress do that? "By securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." The clause is not an open grant of power to secure exclusive rights. It is a grant of a power to promote progress.<sup>81</sup>

Thus, despite the fact that there may be more than one way for Congress to promote progress, anything it does with respect to copyrights and patents must meet the progress requirement. "Promoting the progress of science" in this view means providing incentives for new creation only,<sup>82</sup> and does not contemplate improvements in rehabilitation or dissemination as the "preamble with substantive limit" theory does. Rather, the substantive grant of power theory holds that if a copyright grant would not

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<sup>75</sup> Hatch & Lee, *supra* note 66, at 23.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> Walterscheid, *The Preambular Argument*, *supra* note 74, at 334.

<sup>80</sup> *Id.*

<sup>81</sup> *Eldred v. Reno*, 239 F.3d 372, 381 (D.C. Cir. 2001) (Sentelle, J., dissenting).

<sup>82</sup> Walterscheid, *The Preambular Argument*, *supra* note 74, at 374 ("I suggest that it meant and was intended to mean, the idea of advancement in science . . . , including through the efforts of writers . . . in creating new writings.").

stimulate new creation, it should fail as an illegitimate exercise of Congressional authority under the Constitution.

¶36 The structure of the intellectual property clause in relation to the other enumerated powers lends strong support to the substantive grant of power theory. Article I, Section 8, provides a list of Congress' enumerated powers in eighteen clauses. Each clause begins with the same grammatical structure, "consist[ing] of a series of infinitive verb forms, declaring the specific powers given to Congress. In each instance, the infinitive verb form is the legally operative grant of power."<sup>83</sup> These are all broad grants of power, which Congress is given great deference in carrying out. President Monroe first espoused the structure argument supporting this theory, which Justice Story later adopted as well.

The order generally observed in grants (of power), an order founded in common sense, since it promotes a clear understanding of their import, is to grant the power intended to be conveyed in the most full and explicit manner; and then to explain or qualify it, if explanation or qualification should be necessary. This order, has, it is believed, been invariably observed in all the grants contained in the constitution.<sup>84</sup>

Initially, in *Deepsouth Packing*, the Supreme Court appeared to adopt this view when it stated that "[t]he direction of Art. I is that Congress shall have the power to promote the progress of science and the useful arts."<sup>85</sup> As one commentator has pointed out, however, the Supreme Court may have shown signs of abandoning the "clause as substantive grant of power" view in *Eldred v. Ashcroft*, when it upheld the constitutionality of the CTEA. The Court found that Congress acted rationally in enacting the challenged legislation because the justifications offered for the copyright term extensions, including the encouragement of restoration and public dissemination, were sufficiently tailored to the purpose of promoting the progress of science.<sup>86</sup>

### C. *The Eldred v. Ashcroft Decision—Deciphering the Court's Current Take on the Significance of the Progress Clause*

¶37 The Court's most recent treatment of the copyright clause appeared in its 2003 *Eldred v. Ashcroft* decision.<sup>87</sup> The Court's interpretation of the progress language in this case proves instructive of the future direction that courts may take when faced with the question of determining whether stage directions qualify for copyright protection.

¶38 The petitioners in *Eldred* challenged the constitutionality of the CTEA by arguing that the "promote the progress" language of the clause should be used to balance the specific copyright power granted to Congress.<sup>88</sup> In other words, to the extent that

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<sup>83</sup> *Id.* at 346. Examples of the structure of other enumerated powers include: "to lay and collect taxes," "to provide and maintain a navy," and "to constitute tribunals inferior to the Supreme Court." U.S. CONST. art. I, § 8, cl. 8.

<sup>84</sup> *Id.* at 347 (citing James Monroe, *Views of the President of the United States on the Subject of Int'l Improvements (May 4, 1822)*, in II MESSAGES AND PAPERS OF THE PRESIDENTS, 1789–1908, at 144, 163 (James D. Richardson ed., 1909)).

<sup>85</sup> *Deepsouth Packing Co. v. Laitram Corp.*, 406 U.S. 518, 530 (1972).

<sup>86</sup> See *infra* Part II.C for a discussion of the *Eldred v. Ashcroft* case and the Court's findings.

<sup>87</sup> 537 U.S. 186 (2003).

<sup>88</sup> *Id.* at 211–12.

Congress legislates in the copyright arena, they must do so against the goal of promoting the progress of science. Thus, they argued that because the Act's extension of existing copyrights "does not stimulate the creation of new works but merely adds value to works already created," the Act could not promote the progress of science.<sup>89</sup> The petitioners conceded (likely for strategic reasons) that the clause was not a substantive grant of power.<sup>90</sup> Nonetheless, their argument heavily relied on the substantive grant theory's definition of progress as advancement through the creation of new works only.<sup>91</sup>

¶39 In response, the Court acknowledged that it had previously described the copyright clause as "both a grant of power and a limitation,"<sup>92</sup> and that "[t]he constitutional command' is that Congress, to the extent it enacts copyright laws at all, create a 'system' that 'promotes the progress of science.'"<sup>93</sup> However, the Court went on to stress that it is Congress' role to determine how best to pursue this objective.<sup>94</sup> The Court found several justifications for why Congress could rationally have believed that passing the Act would promote the progress of science.<sup>95</sup> To begin with, aligning U.S. copyright law with a 1993 European Union directive would ensure that American authors abroad would receive the same level of protection provided to European authors.<sup>96</sup> Second, longer terms were thought to encourage existing copyright holders to invest in restoring and publicly disseminating their works.<sup>97</sup> Lastly, extended terms allow existing holders to earn income from their finished works, enabling them to create new works without financial compromise.<sup>98</sup>

¶40 Interpreting the Court's dicta in *Eldred* depends, to a large extent, on which definition of progress one uses. The court in *Eldred* signaled a more expansive definition of progress than proponents of the third theory would support. Those who believe the substantive grant of power is to promote the progress of science equate progress with advancement. Defined in this way, only those actions that incentivize new creation can be said to promote progress.<sup>99</sup> In *Eldred*, the Court inherently rejected this narrow definition. By accepting other justifications, the Court alluded to an expanded definition of progress, which includes encouraging restoration and public dissemination of existing works as well as providing incentives for new creation.<sup>100</sup> It is the acceptance of this

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<sup>89</sup> *Id.*

<sup>90</sup> Walterscheid, *The Preambular Argument*, *supra* note 74, at 337.

<sup>91</sup> *See supra* Part II.B.

<sup>92</sup> *Graham v. John Deere Co.*, 383 U.S. 1, 5 (1966).

<sup>93</sup> *Eldred*, 537 U.S. at 212.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 213.

<sup>96</sup> *Id.* at 206.

<sup>97</sup> *Id.* at 207.

<sup>98</sup> *Id.* at 208.

<sup>99</sup> Walterscheid, *The Preambular Argument*, *supra* note 74, at 374.

<sup>100</sup> The Court did not specifically address the definition of progress but several commentators have posited different theories. The greatest tension centers on whether progress should be defined to mean "advancement" or whether it means "dissemination and spread." Compare Malla Pollack, *What Is Congress Supposed to Promote?: Defining "Progress" in Article I, Section 8, Clause 8 of the United States Constitution, or Introducing the Progress Clause*, 80 NEB. L. REV. 754, 769 (2001) (arguing that the most prevalent use of "progress" in 1787 was to signify spread or "some other type of physical movement"), and Hatch & Lee, *supra* note 66, at 8–10 (stating that "[f]ounding-era dictionary definitions of 'progress' focus predominantly on a notion of physical movement or dissemination" and arguing that this includes the dissemination and preservation of existing works not just new creations), with Walterscheid, *The*

expanded definition of progress that has prompted some to interpret the decision as sounding the death knell for the “promote the progress” language.<sup>101</sup>

¶41 However, I submit an alternative reading of the *Eldred* case that does not take such a dismal view of the Court’s analysis. In its decision, the Court had the opportunity to follow one of the varying theories of the progress clause described above. Could the Court find the clause to be a meaningless preamble? Or a substantive limit on Congress’ power where progress is defined as incentivizing new creation *and* encouraging the restoration and distribution of existing works? Or the substantive grant of power to Congress where progress means incentivizing new creation only?

¶42 In *Eldred*, the Court dismissed the argument that the CTEA does not promote science by finding that the justifications for the Act survive a rational basis review. By undertaking the rational basis review, the Court can be said to have summarily dismissed the meaningless preamble theory. If the progress clause has no limiting effect on what Congress may do, then there is no need for the Court to entertain any rational basis analysis; but the Court did undertake this analysis and, in doing so, implies that the clause may reflect a substantive limit on Congress’ power. The Court’s analysis suggests that congressional action under the copyright power will survive rational basis review if the justifications offered for promoting the progress of science relate both to the creation of new works *and* the encouragement of dissemination and restoration of existing works. Thus, the Court’s analysis greatly mirrors the “preamble-with-substantive-limit” view. Moreover, these two goals are not mutually exclusive. The Court in *Eldred* alluded to a standard that would best reflect and incorporate the two dominant meanings of what the term progress meant in the founding era. Far from rendering the language meaningless, then, the Court gave full effect to the term as the Founders understood it to mean.

¶43 Under this analysis of the *Eldred* case, the Court, rather than finding the Progress Clause devoid of meaning, instead charged Congress to meet rational basis review in respecting this constitutional requirement. Thus, in any congressional copyright scheme, copyright grants that frustrate the limiting aspects of the progress clause must be rejected.

### III. RECOGNIZING COPYRIGHT PROTECTION FOR STAGE DIRECTIONS FRUSTRATES THE CONSTITUTIONAL PURPOSE OF PROMOTING THE PROGRESS OF SCIENCE

¶44 To understand how granting copyright protection to stage directions runs afoul of Congress’ mandate to promote the progress of science, it is necessary to first parse the language of this clause to better understand the Court’s interpretation of the clause’s two key terms—“promote” and “progress.”

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*Preambular Argument*, *supra* note 74, at 375–78 (suggesting progress means advancement in terms of increasing the quality or quantity of new works).

<sup>101</sup> Walterscheid, *The Preambular Argument*, *supra* note 74, at 379 (“While it is not clear that the *Eldred* Court actually interpreted the “to promote” language de jure as placing no constraints on the copyright power, there is little doubt that [the Court viewed it] so expansively as to render it meaningless for almost all intents and purposes as a constraint or limitation on the copyright power of Congress.”).

### A. Understanding the Promote and Progress Limitations

¶45 The term “promote” has not been subject to much debate. “As employed, the term[] ‘to promote’ [is] synonymous with the words ‘to stimulate,’ ‘to encourage,’ or ‘to induce.’”<sup>102</sup>

¶46 The term progress as discussed above, however, has not enjoyed the same consistent treatment.<sup>103</sup> Nevertheless, the *Eldred* decision provides the most recent interpretation of the term and, thus, represents the Court’s current understanding of the clause’s significance. This Comment proposes a reading of the *Eldred* case to hold that the term progress can be interpreted as encompassing not only an increase in the quantity or quality of new works, but also an improvement in the dissemination and preservation of works already in existence.<sup>104</sup> This builds upon the narrow definition offered by some scholars that progress means only the advancement in the quantity and quality of new works.<sup>105</sup> Armed with this expanded definition of progress from *Eldred*, the next section outlines the reasons why granting copyright protection for stage directions fails even this new broad construction of progress.

### B. Copyrighting Stage Directions Does Not Incentivize New Creation or Encourage Dissemination of Existing Works

¶47 Allowing directors to secure copyright protection decreases the financial incentive for playwrights to create new works. A director’s copyright “will drastically limit a playwright’s ability to control the work which he creates.”<sup>106</sup> By having to share licensing fees amongst directors as well as producers, the playwright’s share of the pie becomes much smaller. This operates against one of the justifications used by the court in *Eldred* to support its finding that the congressional enactment of the CTEA met rational basis review.

¶48 In arriving at its conclusion that the CTEA does promote the progress of science, the Court articulated several justifications. One of these justifications found that the provision of income from existing works allows authors to continue creating without worry of financial difficulty.<sup>107</sup> Playwrights create the dramatic works, but they are the ones whose share of income would decrease with a director’s copyright. Thus, this justification is lost in the context of copyrighting stage directions—the result would decrease the flow of income from existing works, not stimulate it.

¶49 More importantly, granting a director’s copyright would hinder the dissemination of existing works. Regional theatre houses are significantly relied upon to bring the latest Broadway theatre to a greater share of the American public.<sup>108</sup> To do so, they must pay licensing fees to any copyright holders of the original production. These fees become

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<sup>102</sup> Goldstein v. California, 412 U.S. 546, 555 (1973).

<sup>103</sup> See *supra* Parts II.B–C.

<sup>104</sup> *Supra* Part II.C.

<sup>105</sup> Walterscheid, *The Preambular Argument*, *supra* note 74, at 378 (maintaining reliance on the narrow definition by arguing that the court in *Eldred* wrongly abandoned previous case law interpreting the “promote the progress” clause as the substantive grant of power to Congress).

<sup>106</sup> John Weidman, *The Seventh Annual Media and Society Lecture: Protecting the American Playwright*, 72 BROOK. L. REV. 639, 646 (2007).

<sup>107</sup> *Eldred v. Ashcroft*, 537 U.S. 186, 212 (2003).

<sup>108</sup> Freemal, *supra* note 3, at 1034.

increasingly expensive as additional parties like directors ask to be compensated.<sup>109</sup> The process could be further frustrated if one of the copyright holders tries to hold out for a higher licensing payout, resulting either in prohibitively expensive fees or the complete abandonment of a project due to failed bargaining.

¶50 Moreover, regional producers face an administrative burden of having to determine and locate all of the copyright owners. Doing so is “extremely difficult, time consuming, and cost prohibitive.”<sup>110</sup> The transaction costs of this process skyrocket as the number of parties from which a license must be sought increases. Additionally, if copyrighting stage directions were allowed, regional companies will realize the very real possibility that they may be unable to determine precisely all of the copyright owners with a stake in the production. As a naturally risk-averse industry, “the day [would] inevitably come—and soon—when a theatre decides to cancel a production simply because they have been threatened by a director who perceives—rightly or wrongly, it doesn’t matter—that the theatre’s production will infringe on a version which belongs to him.”<sup>111</sup>

¶51 Despite these practical considerations, many would argue that, given the collaborative nature of the theatre and the special reliance on the director, the creative contributions by these individuals should not be overlooked. Plays cannot be performed without a director. If this group believes it has no protection against the deliberate copying of its contribution, the industry could stand to lose talented artists. The same fear, then, that too many copyright holders would strangle the financial incentive for playwrights to create has equal impact when one considers that uncompensated and disenfranchised directors could stymie the successful performance of the original works. In either case, the industry suffers.

¶52 What this view fails to take account of, however, is the appropriate avenue that stage directors should take to protect their contributions. There are several alternatives that the industry can explore to protect the varying interests.<sup>112</sup> First, contract law provides several flexible options. Through contracts, directors can negotiate remuneration for their contribution to the overall success of the original show and fashion agreements that allow them to re-direct the play if the company revives the production or chooses to go on tour. As a second option, the initial production could be deemed a derivative work, awarding copyright ownership proportionately based on contribution while maintaining the playwright’s copyright in the original script.<sup>113</sup> Lastly, the model applied in the film industry of work-for-hire agreements could be instituted in the theatre industry as well, which would result in more definite statements of ownership.

¶53 This Comment demonstrates that bestowing copyright protection to stage directions will not promote the progress of science. Copyrighting stage directions fails to encourage new creation of the underlying art by playwrights. Additionally, the new property right, if granted, will actually inhibit the dissemination of existing works. Because copyright protection of stage directions will neither increase the quantity or quality of works, nor improve the dissemination and preservation of existing works, this grant of protection

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<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> Weidman, *supra* note 106, at 650.

<sup>112</sup> This Comment suggests alternative arrangements but it is beyond its scope to analyze the feasibility of each option.

<sup>113</sup> Keller, *supra* note 2, at 934.

does not meet the standard of progress as applied in *Eldred*. Because it fails *Eldred*'s broad construction of progress, it necessarily fails the narrow definition as well. Thus, given the practical limitations, other alternatives to granting original copyright in stage directions must be explored.

*C. Weighing the Alternatives—Why Congress Must Act to Protect the Constitutional Limitation on Copyright Protection*

¶54 For Congress to have acted within its scope of copyright power when passing the Federal Copyright Act, it could only have legislated in line with the constitutional directive specified in the progress clause. Therefore, even if Congress did not explicitly say that “protectable copyrights are those that promote the progress of science,” we assume that this limitation underlies Congress’ grant of copyright protection under the Act. Non-adherence to this limitation would mean that Congress acted outside its constitutional authority by passing copyright protection legislation that does not promote the progress of science. Because we assume that Congress does not act outside of its constitutional limits,<sup>114</sup> we ought to interpret copyright law in a way that respects the limits. Analyzing a director’s copyright with this limit in mind should lead to a denial of copyright protection—regardless of the technical requirements—because providing copyright protection to stage directions will not promote the progress of science. Copyright protection for stage directions does not provide incentives for playwrights to create new works, nor does it encourage the dissemination and restoration of existing works. The problem, however, is that the Act neither specifies this limit nor allows courts to address the issue.

¶55 As this Comment has illustrated, when a court reaches the issue of copyrighting stage directions on the merits, it will face the difficult dilemma of either accepting statutory protection for stage directions, despite the fact that doing so will not promote the progress of science, or declining statutory protection in the face of attenuated arguments proving that the statutory requirements have been met. Courts are not proxies for the legislature and should not be placed in the quandary of having to act as if they were. So the question remains, what should be done?

¶56 Some may argue that there is nothing to do. Congress has spoken through the Copyright Act, and the courts must adhere to Congress’ chosen policy. Those taking this position may argue that the Act already contemplates the progress limitation by affording copyright protection to those works not explicitly delineated at the time of the Act’s passage. Because Congress foresaw the potential for scientific discovery and advancement to create additional works of authorship, it did not preclude these future works from the realm of copyright protection, so long as they satisfy the Act’s other requirements. Such a theory, however, reads too literal a definition of progress. The works of authorship requirement referencing technological advancement does not reflect the type of progress that the constitutional language contemplated. Progress in the constitutional sense, as *Eldred* and others suggest, means creating incentives for new creation and encouraging the dissemination and restoration of existing works. This progress can take place through new technology, but can also be accomplished by other

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<sup>114</sup> *Eldred v. Ashcroft*, 537 U.S. 186, 205 n.10 (2003) (“Rational-basis review—with its presumptions favoring constitutionality—is a paradigm of judicial restraint.”).

means, as the CTEA illustrates. This Comment has demonstrated the fallacy in the do-nothing approach. Maintaining the status quo simply perpetuates a copyright system that, when applied to some works, like stage directions, does not satisfy the constitutional mandate. Again, the problem is that the system Congress created does not get to the right question, nor does it allow courts to do so.

¶57 It must be Congress that redresses the broader policy issue. In doing so, it has two options. Congress can amend the Act to explicitly exclude stage directions from copyrightable material, or it can include a broader statement that the progress language in the copyright power matters, and simultaneously provide a statutory definition of progress that is consistent with the broad or narrow constructions of the term.

¶58 The first option seems less than practical. While a temporary fix for stage directions, this will leave courts in the same quandary when evaluating other fringe works, like the contributions of lighting, set or costume designers, to name a few.

¶59 The second option creates a better structure and provides clear direction to the courts. Congress should include language that expressly indicates its intent that works only enjoy copyright protection when doing so comports with the constitutional copyright directive of promoting the progress of science as defined by either the narrow or broad constructions of the term. Ideally, Congress should define progress, but even without defining progress, if Congress recognizes the importance of every copyright grant satisfying the progress requirement, it will permit the courts to reach the question for individual copyrights. Stage directions, and other fringe works, require such an individualized progress analysis.

#### IV. CONCLUSION

¶60 The present statutory scheme for seeking copyright protection does not permit the courts to make a case-by-case application of the constitutional mandate that Congress promote the progress of science when exercising its constitutional power to issue copyrights. While the Supreme Court recognizes great deference to Congress in fashioning a copyright system, it nonetheless requires that the system comport with this constitutional directive. Taking the debate over copyrightable stage directions as one example, this Comment has shown that Congress' existing scheme may permit copyrights to be issued in situations that frustrate the purpose of this mandate. Fringe cases, like stage directions, should alert Congress to the necessity of clarifying its statutory protection for copyrights in light of this constitutional goal. Protecting copyrights for stage directors would not incentivize new creation by playwrights nor would it encourage the dissemination of existing dramatic works. Therefore, in light of well-crafted arguments that could support a director's copyright under the 1976 Copyright Act, Congress should amend the Act to be clear that the promote the progress language presents a limit to granting copyrights that cannot be exceeded. Such an amendment would not only specifically quell the debate of a stage director's copyright but would also remedy the larger problem inherent in the current Copyright Act by guaranteeing that constitutional limitations of the copyright power assert their due force.