# Comments on Issues Involving Orphan Works Under Current Copyright Law

by Brad Hathaway on behalf of the American Theatre Critics Association

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We at the American Theatre Critics Association took a look at the list of participants in your public roundtable on orphan works and noticed that no one spoke for the interest of the greater theater community.

There were participants representing all sorts of the "useful arts" including our colleagues in the motion picture, recording, television and digital genres that produce the kind of story-based programming that was once only available on a stage. But no one spoke for the interests of those who create live theater using texts and designs which are subject to copyright protection.

As theater critics, we are often the proponents of the interests of the greater theater community … of theater itself. Great critics have championed the cause of the importance of theater as an institution as well as of the importance of quality in the theater.

Therefore, we step into the breach – not so much to advocate one or another solution to one or another complication of current law – as to ask that whenever any

change is contemplated, its impact on the practitioners of live theater be carefully evaluated.

Theater is not a monolithic thing. It encompasses huge commercial entities, small community companies, single creators struggling for even a small audience, and all manner of collaborations, combinations and cooperations. Each has its own set of interests, as well as sharing the interests of the wider community.

For example, theater as an institution has elements that would benefit from long periods of protection of intellectual property and others that would benefit from shorter periods. We needn't side with either in this discussion since the duration of protection is not the issue under consideration here.

The current lengthy period of protection is, however, a significant contributor to the problem of orphan works, for works today have so much more time to become orphans than they once did.

Creators of theatrical works (playwrights, producers, directors, choreographers, designers as well as performers) often think of their creations as their children – but parents have to send their offspring out into the world at some point. Once upon a time a work entered the public domain at an age somewhat akin to that of a child (remember, copyright began with a fourteen year period of

protection … a play was practically a teenager when it was free!).

Back then, a work emerging into the "adult world" of the public domain was more likely to still be considered relevant to a contemporary audience than one that had to wait a lifetime following the lifetime of its author to see the light of day.

The extension of the period of protection may well have been a boon to some in the greater theater community who have interests in the notable, well known and commercially viable sliver of the output of theater artists over the years. Rights holders of theatrical works that are financially successful from the start will most likely remain easy to find. There will be every incentive for their owners to keep their whereabouts well known – at least so people will know where to send the checks.

It is the works that, when new, fail to find an audience (and, hence, a market) which disappear into the ever-growing collection of potential orphanhood. It is these that represent a potentially rewarding treasure for the public if only they could be both more easily discoverable and more easily associated with an accurate indication of the ownership of the rights. Here is the challenge.

The extension of the protection period has had the bizarre effect of extending the period of obscurity for plays that fail

to achieve notable artistic or financial success – or at least notoriety – in their first exposure.

The law of unanticipated consequences has come into play with the adoption of lengthy periods of protection. The period has created a chilling effect that can last beyond the century in which a play was created without producing a noticeable benefit for anyone: playwright, producer, designer or the general public.

Much has been written and said about the advisability of applying the concept of "abandonment" such as you would find in real property law to intellectual property law including copyright. If one "abandons" his real property, he can lose the right to control it. But if one lets intellectual property lie fallow, he continues for as long as the copyright protection runs to have the right to prohibit its use.

This may have made good sense in the days when the period of protection often coincided with the active career of the playwright – it let her keep products found to be at least economically and possibly artistically not up to her best work from doing damage to her reputation and, thus, her marketability.

However, it is difficult to detect a benefit for the public or for the creators of extending the period of protection long after the author's reputation could benefit from this

anonymity – especially for the seven decades following the author's death.

Theater – and the general public from which it draws an audience – should be able to be near unanimous in support for making existing but previously unavailable works available for production, presentation, adaptation and transformation, at least in the abstract.

There are theaters that would dearly love – or at least be tempted – to dig into the body of work that has fallen off everyone's radar and disappeared under  mounds of mold, undisturbed and unremembered for decades.

It is in the the technical details of the legal approach that differences in interest will come into play and, thus, differences in opinions will occur.

It is important to the theater community, and, we presume, to many other segments of the creative world, that the details of proposed legislative provisions be made available for examination and analysis well in advance of final action.

One aspect of the issue of orphan works which may well be of more relevance to the interests of the theater than of some other forms of intellectual property, such as works of imagery or visual arts, is the question of joint ownership of rights for collaborative works. After all, theater can be among the most collaborative of the arts.

The collaboration of a book writer, lyric writer, composer, director, choreographer and other creators can result in works of art that are of immense potential value to the public as an enrichment of our common culture, but which are withheld from the public domain for such a long period of time that the trail of rights ownership become complicated and obscure.

With fractional shares of rights transferring either through contractual arrangements or through the demise of the owner, what was a complicated situation at the start can become nearly indecipherable.

This can result in even one who thinks he or she owns a portion of the rights to a work and would like to pursue its resurrection, revival, revision or re-imagining might find it easier, or at least less problematic, to abandon the thought and move on to other projects.

The public may well benefit from those "other projects" of course, but what a loss the abandonment may be as well!

Therefore, the legal standard for what constitutes a diligent search for the rights holders should take into consideration the complexity of the task.

Theater does have many interests in common with all other genres of the useful arts. For example, we all would benefit from more certainty in the definitions of a

"reasonably diligent search" and from those definitions being reasonably applicable to the "state-of-the-art" in search capacities of the latest technologies.

It is devoutly to be hoped that any developments in this area of intellectual property law could accommodate not just developments in technology which have been introduced since the last change in the law, but the developments which are sure to come in the years ahead.

Foresight in technological endeavors is a tremendously challenging concept, but surely flexibility and an improved process for considering change are to be supported.

A further potential phenomenon involving the rescue of theatrical orphans which needs your consideration is that of the prominence that a successful resurrection could be expected to create and its impact on the hopes that would drive those who would create new productions of orphan works. So long as the orphan work lies unrecognized in the mass of previously unrecognized works, it becomes a chore requiring "reasonably diligent search" to have even a ghost of a chance of bringing the rights-holder and the interested potential user into touch with each other.

Should the work be undertaken, however, the resulting press coverage (including the reviews my colleagues write) will alert any such rights holders to the new effort and, if there is any indication of financial success for the new use of the work, this will give the previously unknown

and presumably uninterested owners the incentive to get in touch.

It is the fear of a demand letter arriving unexpectedly making un-envisioned and un-budgeted demands upon a newly successful production which lies at the heart of the damage that generations-long enforced obscurity does to the artistic community and to the interests of the public whose domain has shrunk so dramatically in the last century.

Theater would be directly impacted by whatever changes in intellectual property law result from the examination you have begun. We applaud the initiative and hope for your success in properly identifying the problems the creators of the useful arts have under current law and devising workable solutions for the consideration of the Congress.

We do ask, however, that concrete proposals be set forth and that the views of affected parties including those in the theater community be solicited prior to final consideration by the Congress.