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Devised (Collaborative) Theatre Productions

Adapted from *The Stage Producer's Business and Legal Guide, Second Edition,* by Charles Grippo

In traditional theatre, a single playwright writes a script, either of their own initiative or because a producer has commissioned them to do so. Then a production company presents the play.

Devised theatre is a collaborative system in which a group of artists work together to create a work. Many companies create new works in this way. Improvisational theatre, such as that created by Second City, generally involves two or more actors creating a piece on the spot, in front of an audience, usually based on a particular topic or idea. True improvisations are not written down in script form. Usually all that is reduced to writing is an outline of the direction in which the piece is to go. Sometimes even those writings don't occur.

In another form of devised theatre, a group of artists will develop a piece with the specific intention of reducing it to a formal script. This is a classic case of collaboration.

Devised theatre is experimental and exploratory. It's often physical, similar to commedia dell'arte and street theatre. It's also a way to create a more immediate and direct relationship with the audience.

Characteristics:

- The creative team starts with an idea, question, song, or other stimulus.
- They research, create, develop, rehearse, and perform.
- The final product is a combination of each collaborator's unique perspective.
- It can help audiences overcome group differences and share a common experience.
- It can help artists see possibilities they might not have considered on their own.

FIVE WAYS TO CREATE

There are generally five ways in which such works are created:

1. Each member of the ensemble contributes material as an equal joint author.
2. The ensemble devises the raw materials of the piece, but they bring in a playwright to turn their work into a cohesive whole.

3. A producer, director, or other artist gathers together a group of actors and gives them her premise for a project, which they improvise into a piece.
4. An ensemble divides up the work of creating a new play.
5. The ensemble creates the work, but they bring in another party, who transcribes their material to written form.

LEGAL (AND OTHER) PERILS

It sounds simple, but in practice—as with other creative endeavors—it can get complicated if the created work may be performed again in the future.

There are numerous legal pitfalls into which the would-be collaborators may fall. There may be clashes of ego, battles for control, broken relationships among friends, and a host of other issues which can lead inevitably to lawsuits.

It is best if all of the potential parties give careful legal thought to the project upon which they are embarking before work begins. Unfortunately, many groups do not consider the legal consequences of what they are doing until either they are too far along in the process to stop or the members have a falling out among themselves and someone calls in a lawyer. That's when the project becomes subject to the presumptions of the copyright laws. Those presumptions may not be what the parties intended.

For just these reasons, it is crucial that the members decide all of the major issues at the outset. Then they must reduce their agreement to a formal, written contract.

It may be sticky to bring up the need for a contract, especially since the members may be good friends. Also, people may be enthusiastic and eager to contribute their artistic ideas. They may not want to pause long enough to negotiate a contract. Nevertheless, they would be foolish not to do so.

AN UPFRONT OPTION

As the bulk of this article will demonstrate, joint ownership is complex, and time-consuming to bring to fruition. If the creators are willing, ownership (and copyright) can be given to the producing theatre, itself. The theatre would then have the ability to make the work available to others, and collect any royalties.

Like any other property, all or part of the rights in a work may be transferred by the owner(s) to another owner. According to the United States Copyright Office, in its circular, “Copyright Basics,” section on "Transfer of Copyright," the transfer generally must be made in writing and signed by the owner(s) of the rights to be conveyed, or by the owner’s authorized agent. Transferring a right on a nonexclusive basis does not require a written agreement.

You can “record” a transfer of copyright ownership with the Copyright Office through its Office

of Public Records and Repositories. Although recording is not required to make a valid transfer between parties, it does provide certain legal advantages

There are no forms provided by the Copyright Office to effect a copyright transfer. The Office does, however, keep records of transfers submitted to it. If you have executed a transfer (preferably with the help of an attorney) and wish to record the document, see Copyright Office Circular 12, Recordations of Transfers and Other Documents, for detailed instructions.

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THE "SOON TO BE FAMOUS PLAYERS"

To help illustrate the legal concepts and pitfalls of creating a work of devised theatre that the creators themselves will own, let's use the fictitious theatre company, the "Soon to Be Famous Players (If We Don't Kill Each Other First.)" Its members are recent graduates of the John Wilkes Booth College of the Performing Arts. They are-and hope to remain-friends.

Cast of Characters

Actors: Max, June, Phil, Susan, Art, Elaine, Neil
Director: Ross
Music and Lyrics: George
Choreographer: Melinda
Costumes: Leonardo
Scenery: Pamela
Lighting Designer: Oscar
Producer: Agnes

THE PLAN

Max has an idea for a two-act romantic comedy, with two songs, called *The Corpse Came C.O.D*. The Soon to Be Famous Players ensemble will create the work in a series of improvisational workshops which Ross will direct.

"AUTHOR" DEFINED

For copyright purposes, an author is a person who creates material and fixes -it into a tangible medium of expression. This includes writing, a musical composition, an audiovisual work, a graphic (such as a drawing or a photograph), choreography, and any of the other kinds of copyrightable intellectual property.

The work must be original.

IDEAS OR CONCEPTS

Mere ideas or concepts are not copyrightable. It is only when those ideas or concepts are expressed in a particular way and fixed in a permanent form that they may be copyrighted.

At this point, Max only has an idea. Thus he is not an author of the piece yet. He will contribute material, such as dialogue and plot, in a fixed form. Therefore, ultimately, he will become an author.

JOINT AUTHORS

The ensemble expects to become joint authors of the work. That is certainly possible. Even the designers (Leonardo, Pamela, and Oscar), the choreographer (Melinda), the producer (Agnes), and the composer/lyricist (George) may become joint authors. That is because each of them may create intellectual property that may be protected by copyright. Whether they will become joint authors of *The Corpse Came C.O.D.* remains to be seen.

COPYRIGHT LAW

Under the Copyright Act, a joint work is created when it is "prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole."

There are two essential elements at work here:

1. Each party's contribution must be copyrightable.
2. The parties must intend to create a joint authorship.

Intent

Note the second factor: "The parties must intend to create a joint authorship."

There is a world of difference between participating in a work of devised theatre versus actually becoming its joint author. One may take part in the process yet not become a joint author unless the intent of creating a joint authorship is there.

To determine intent, the courts look to five factors:

1. Do the parties have equal decision-making authority toward the work? This includes deciding on the final form of the work; selection of an agent; marketing; production; contract signing; and other indicia of ownership.
2. How are the parties billed in stage bills, publicity, advertising, and so forth? For that matter, does a particular party receive billing at all?
3. Do they have a written collaboration agreement, in which they identify themselves as joint authors?
4. Have they behaved as joint authors toward each other and toward third parties? Have they exercised joint authorship control and authority over the project? For instance, if there have been press interviews, have they referred to each other as a joint author or collaborator?
5. Have they intended for their respective contributions to merge with each other such as to create a single, unified work?

MERGER

Before we proceed any further, let's deal with the concept of merger, which many playwrights tell me is the single most confusing legal concept in devised theatre and collaborative efforts of any kind. As you might expect, it follows that it is also the most important to understand.

Put simply merger occurs when two or more elements, which could exist independently of each other, join together to form a unified whole. Once those elements link with each other, they cannot be separated without damaging the unified whole thing they have formed.

Merger Outside of the Theatre

By jumping out of the theatre element for a moment, we can clarify merger very easily. If John Jones and Mary Smith marry, they have merged with each other. Until the marriage ceremony declaring them "man and wife" (or whatever is politically correct this week), John and Mary have led independent lives. They existed separately. However, their marriage vows join them together into one unified whole, emotionally, sexually, and legally. John and Mary have become a couple who are now indivisible. (Oh, all right, until divorce makes them independent again!)

The United States of America was originally a group of independent colonies and territories until, one by one, they all joined together-merged-to form one union, which now consists of 50 states.

If you decide to build a house on land you own, you hire a carpenter who brings lumber, an electrician who brings wiring, a brick layer who brings bricks, a plumber who brings pipes, and so forth. Each trades person dumps his individual materials on your land. At this point, all of the elements exist separately from each other. If, for instance, you fire the carpenter, he can haul his lumber away to another construction site.

However, once construction begins, each element—wiring, pipes, bricks, lumber—is joined with the other elements to form one unified structure. Once the house is built, you can't remove the bricks or the pipes without damaging the finished product.

Merger in Playwriting

Merger works the same way in the writing of a play or musical. Each collaborator brings to the project elements which exist separately from each other until they join together to form a finished show.

In the case of *The Corpse Came C.O.D.,* Max had the original idea, which is the basis of the play. Susan contributes the female lead, whose actions drive the plot. Phil offers many one-liners. June contributes the second-act speech that transforms the play. The others contribute their own individual ideas. (We're oversimplifying, of course. In truth, usually it is difficult to determine who contributed what, especially in the case of a nonmusical.)

All of these individual ideas and elements come together to form a unified whole—that is, the finished script.

Deciding When Merger Takes Effect
As part of their agreement, the collaborators must decide "When do we want merger to take place?"

In other words, when do all of the individual contributions become so intrinsically linked to one another that removing one or more of them would destroy the entire fabric of the piece?

Merger never happens on its own in an arbitrary fashion. Merger occurs only when the collaborators say it happens.

At some point, the piece must exist on its own, without regard to what its collaborators are doing or how they are getting along. The piece must cease to be merely a collage of independent elements. It must become a unified whole, just like all the construction materials must join together to form a house.

If the collaborators fail to decide this point, disaster is sure to follow.

Consequences of Failing to Specify Merger
Let's suppose *The Corpse Came C.O.D.* is up and running. The reviews are great. Performances are sold out. The show is sure to run a long time. Other producing theatres have heard about its success, and are interested in staging it, as well.

But the collaborators failed to decide when merger was to occur.

Susan, who has created a wonderful character who drives the piece, has a falling out with producer Agnes. In a snit, Agnes fires her.

"Fine," Susan says, "and I'm taking my character with me!"

Oh, boy, is the company in trouble!

Since merger never took place, Susan's character never became part of the unified whole. The character belongs to her. If she leaves the show, she can take the character with her. The problem is, since the show revolves around Susan's character, the whole enterprise collapses.

Take a musical example. No doubt much of the enduring appeal of *Mame* is due to Jerry Herman's songs. Suppose, however, that in creating the show, Herman and book writers Jerome Lawrence and Robert E. Lee failed to select a date when merger was to occur. Now, half a century later, Herman decides to yank his title song out of the score. He doesn't need a reason. He just got up on the wrong side of the bed. Without merger, he has the right to take back his song. However, the market for Mame would probably dry up.

Of course, Herman, Lawrence, and Lee were Broadway professionals, with experienced attorneys and agents. No doubt they addressed merger in their collaboration agreement. Besides, Herman didn't get where he is by being dumb. Even if he has the right to withdraw his title song, he's far too smart to do so.

Merger Keeps the Show Alive

Merger keeps the show living, no matter what the collaborators are doing or how their relationship changes over time. Disagreements, personal strife, death, and disability don't affect the show's ability to go on and earn money for its authors.

But you must address merger in your collaboration agreement. Membership in a theatre company is usually not permanent. Artists move on to other things. However, if you've created a show together, you must have the ability to continue that show as long as the market demands.

When Merger Occurs

When does merger occur? Whenever the authors say it does. On Broadway, it is usually the first press preview. Your company can decide for itself. Perhaps it is the final technical rehearsal before opening. Perhaps it is your opening night. The choice of date doesn't matter so much as actually choosing a date.

Want a simple guideline? Merger occurs whenever removing any material would seriously undermine the fabric of the show.

There is an exception, however. (Are you surprised?) In the case of a musical, certain elements can exist outside of the unified whole.

Are you thoroughly confused yet?

Let's take a real life example: *Guys and Dolls.* Abe Burrows wrote the book (based on stories by Damon Runyon), and Frank Loesser wrote the music and lyrics.

Up until merger occurred, the Burrows book and the Loesser songs existed independently of each other. (For that matter, Runyon's stories-the underlying works also existed independently of Burrows's book and Loesser's songs until all three elements merged together.) Suppose, during this time, Burrows and Loesser had an argument that was so serious they decided to go their separate ways. This means that Burrows could collaborate with a different composer-lyricist, and Loesser could take his songs into another show.

Here's why this part of the concept is so important. Merger affects only that material which the authors intend to be part of the show on the date that merger occurs. Any other material-even though created specifically for the show-does not become part of the unified whole. It belongs to its creator, who may do with it what she pleases.

This situation exists with the carpenter who has brought lumber for the house. Once the house is finished, he may take his leftover lumber with him and use it for another project.

With musicals, collaborators often create more material than winds up in the final show. Most often, this material consists of additional songs. Once merger occurs, the authors can take any excess material and use it in any way they choose. For instance, Jerry Bock and Sheldon Harnick wrote 36 songs for F*iddler on the Roof,* yet only 13 remain in the final score. Only those 13 merged with Joseph Stein's book to create the unified whole show. Bock and Harnick were free to take their excess 23 songs anywhere they wanted.

There is an additional twist to musicals. Songs can exist independently of the book. Although at present, few songs out of musicals make it outside of the show, for decades, show songs were recorded over and over by many different artists. (Think of how many show songs Frank Sinatra recorded on his albums over the years.)

Yet musical books (scripts) rarely exist, in any effective way, without the score. Imagine the book for *South Pacific* without "Some Enchanted Evening."

Here's another crucial reason your company absolutely must agree on merger. Broadway producers and Hollywood film companies demand it. They won't even consider your show unless you can show explicit agreement on merger. No one wants to produce a show if a collaborator can remove her material at any time.

Intent Revisited
Now that you understand merger, remember that it is one of the factors that indicate intent to create a joint authorship of a work.

POTENTIAL PROBLEMS OF JOINT AUTHORSHIP

Joint authors become joint owners of the property- that is, each owns 100 percent of the property. To illustrate the kinds of problems this may create, let's jump out of the theatre once again and into the world of property ownership.

Suppose Ed and Diane buy a property together for $300,000. (To keep our example simple, we'll make it an all-cash deal, so we don't have to bring third-party mortgage lenders into the picture.) Ed contributes $75,000 to the purchase price, while Diane kicks in the remaining $225,000. They have not drawn up an ownership agreement between them. Instead, they have become joint owners—that is, each owns 100 percent interest in the property.

Ed decides he wants to tear out the in-ground swimming pool and instead build a garage in its place to house his collection of mummified rats. He takes these steps without asking Diane for her input. Diane loves to take a refreshing dip in the pool after a hard day at work. She wants to keep it. As a 100 percent owner of the property, Ed legally can rip out the pool and replace it with a garage, despite Diane's opposition.

Diane is so upset she decides to sell the house for $400,000. However, Ed is entitled to one-half of the proceeds-$200,000-even though he only paid $75,000 toward the purchase price. Joint owners share equally in the proceeds of the property regardless of what they have contributed toward it.

Diane refuses to give Ed one-half of the proceeds. She feels he is entitled to a return of only his $75,000. Unfortunately, she needs Ed's signature on the deed, transferring ownership to the new buyer. Ed won't sign. He doesn't want to sell. If he did agree to sell, he wants $200,000.

Now, all of Diane and Ed's problems could have been avoided if they had negotiated an agreement between themselves prior to their original purchase, setting out exactly how they wanted to handle such matters as remodeling, a sale, and division of proceeds.

The same thing happens when two or more persons become joint authors of a work. Absent an agreement, they each own 100 percent of the piece. Each may change, add, or subtract material-even material she didn't create-from it. All share equally in the proceeds, regardless of their specific contributions. All must consent to any contracts affecting the work, something that may be difficult if there are a lot of joint authors who each have their own opinions and goals.
The solution to this problem is to create an agreement among the authors, which sets forth all of their respective rights, obligations, and duties.

George the Composer
Max and the others envision *The Corpse Came C.O.D.* only as a sweet comedy with two songs, which George is to write. Indeed, George writes the songs the parties agreed upon-a title song and a romantic act two ballad called "Last Night I Dreamed You Smelled of Formaldehyde." However, he decides to turn it into a musical and writes a total of 14 songs for it. Without the knowledge and consent of the others, he changes the book, taking out pages and pages of dialogue, to accommodate his songs.

When his fellow Soon to Be Famous friends discover this, they are furious. But, remember, George has created material which, by itself, is subject to copyright protection—his musical compositions. Therefore, absent an agreement to the contrary, George is a joint author. Legally, he is a 100 percent owner of the show. Therefore, he may alter the show as he wishes.

Agnes the Producer
Although Max and the others believe the setting of the show should be New York City, Agnes suggests it would work better if it took place in her hometown of Toledo, Ohio. The others reject her idea.

By suggesting a change of setting, does Agnes become a joint author? No.

Merely contributing an idea does not give rise to a claim of authorship. Remember, the copyright code requires that the idea must be expressed and fixed in a tangible form.

In addition, the parties must intend joint authorship. There has been no action, expressed or implied, that Agnes will become a joint author.

Melinda the Choreographer
Melinda is excited about George's title song. She envisions a full-fledged production number, set in Times Square, with the entire cast singing and dancing. She prepares a choreographic sketch of the number, detailing the exact steps that each of the show's characters will perform on every beat. She plans two choruses of the title song, followed by 48 bars of highly energized dancing, finishing up with a final chorus guaranteed to bring the house down.

All of the other authors share her enthusiasm and agree immediately to adopt it as part of the piece.

Has Melinda become a joint author?

Melinda has expressed her ideas in a tangible form. According to the Copyright Office, choreography is "the composition and arrangement of a related series of dance movements and patterns organized into a coherent whole .. Ordinary motor activities, social dances, commonplace movements or gestures, or athletic movements commonly do not carry a sufficient amount of authorship to qualify for copyright protection." Moreover, she intends her work "to be executed by skilled performers before an audience." Thus, Melinda's choreography qualifies for copyright protection, thus satisfying the first test for joint authorship. The other collaborators have embraced her contribution. They intend for it to merge with the finished work. She will receive the same billing credit as the others. Therefore, Melinda is a joint author.

Oscar the Lighting Designer
The collaborators believe the show they are creating is a romance, whose lighting requirements should be modest, even in Melinda's big production number.

Oscar believes differently. He creates a lighting plot that is straight out of a comic book superhero movie. His lighting will be sudden bursts of colors-with strange combinations of red, green, and purple. For one key scene he intends no special lighting at all-just the theatre's work lights. The collaborators realize the scene will be so dark half the audience simply won't be able to see it.

Is Oscar a joint author?

Well, his lighting plot is an expression of ideas. He has fixed it into tangible form. It may be copyrighted. But the collaborators have rejected it. They do not intend for it to merge with their show. They do not intend for Oscar to become a joint author.

Ross the Director
Ross has been directing the improvisations and workshops in which the ensemble has been developing the piece. But his role has been to ask questions. He has tried to get the actors to think about their characters. With respect to plot, he has asked, "What if (this) happened? What if (that) happened? Where would the story go?" He has helped the actors realize scenes and incidents that may not work on the stage. He has pointed out gaps, holes, or inconsistencies in the material.

Is Ross a joint author?

While his input has been helpful, he has not expressed ideas in a tangible form. The collaborators have given no indication they want him to be a joint author. His actions have been normal functions of his role as director.

The Collaborators Have a Major Problem
Although they have been improvising scenes, dialogue, and characters, they realize their work has no shape. It needs a narrative arc. It needs to be pulled together into a cohesive script.

After much discussion, the collaborators decide to bring in the well-known playwright Sheila Badpenmanship to help them.

But now they must make choices about Sheila.

- Will Sheila become a mere transcriber of their words, characters, and plot, with no responsibility to add material of her own? In that case, she may not become a joint author. Then again, she may.
- Will she provide some additional material, in which case she may own her contributions, but will not become a joint author? The others will reserve the right to alter her work as they see fit, but they will be the only joint authors.
- Will she be taken in as full ensemble member (for purposes of the particular work) and therefore become a full joint author?
- Will Sheila actually take over as full author of the piece? She will lead the others in their workshops, improvisations, and so forth. She will gather up all the material and then synthesize it together into the full piece. She may add material of her own. In that case she may become a joint author.

The Soon to Be Famous Players' Decision
After much discussion, the Soon to Be Famous Players decide there will be 10 collaborators: Max, June, Phil, Susan, Art, Elaine, Neil, George, Melinda, and Sheila. Now, they must negotiate a collaboration agreement among them.

COLLABORATION AGREEMENTS

When two or more persons agree to jointly author a work, they become collaborators with each other.

Throughout theatre history, there have been many famous collaborations: Rodgers and Hammerstein, Kaufman and Hart, Gilbert and Sullivan, Lerner and Loewe, and Kander and Ebb, as well as many lesser-known partnerships. In fact, some of the greatest shows have been created through collaborations. Musicals, in particular, most commonly are written by several people-a book writer, a composer, and a lyricist.

Often these are ongoing partnerships. Two or more artists join together to create more than one show, like Rodgers and Hammerstein. In other cases, the parties collaborate to create one specific show.

With the growth of regional theatre companies over the last decades, it has become quite common for the members of a particular company to create their own works-as the Soon to Be Famous Players have decided to do. In devised theatre, the parties become collaborators, regardless of whether they use that word or think of themselves as such. Therefore, their efforts are governed by the law of collaboration. The agreement they draw up among themselves is a collaboration agreement.

Here are the terms the Soon to Be Famous Players must include in their written agreement.

Copyright

Since copyright always belongs to the author—and the parties have agreed to be joint authors—copyright will be taken in all 10 names. It is unusual to have so many copyright holders, but it is perfectly legal. A better alternative, however, might be to create a corporation and hold copyright in the corporation's name. Each collaborator will receive shares in the corporation, the exact number of shares per collaborator to be agreed upon.

To Register for Copyright or Not to Register

At common law, an author automatically owns all of the rights in a play (or any work of art) as soon as she creates it. This includes the right to authorize its production, publication, or conversion into film. The author does not have to formally register the work with the US Copyright Office to own or maintain ownership in her material.

There is a school of thought that authors need not register until and unless they have to file a suit for infringement, thus saving the copyright fees. If there is an infringement, you must file for copyright before you can proceed with suit. A lawyer would strongly disagree with this concept. It is penny wise and pound foolish. Registering the work with the Copyright Office gives the author rights that are so valuable it is foolhardy not to register. The registration procedure is simple. Most works now can be registered online in minutes at any time of the day or night. The fees are very low, compared to the benefits bestowed on the registrant.

If someone infringes on the author's copyright, the author must prove that (a) they were the original author of the piece and (b) they created it before the act of infringement took place. Without copyright registration, this proof may be difficult, if not impossible, to establish. She will need witnesses to prove they read or viewed a staged reading of the material before the act of infringement occurred. The witnesses may not be available, or their memories might be faulty. Even if witnesses can be found (without undue expense), the author must still persuade a judge and jury she created the work first.

However, when an author registers a work, the Copyright Office issues a certificate of copyright. This certificate is the strongest possible proof that the author created the work first. As long as the author registers the work before or within five years of its first publication, the court must accept the registration as valid.

Timely registration gives the owner in a copyright infringement case the right to recover attorneys' fees and costs—which can be substantial.

It is frequently hard to prove the amount of damages the owner has suffered when their copyright has been infringed. Timely registration gives them the right to statutory damages, which can be as high as $30,000 per infringement. If the infringement was willful, the owner can recover damages up to $150,000 per infringement.

Do you understand now why registration is such a smart move?

Just make sure you register the work in a timely fashion. If you have not published the work, you must register before the act of infringement occurs. If you have published the work, you gain important benefits if you register within three months of first publication.

Under current law, the term of copyright, for works created since January 1, 1978, lasts for the rest of the author's lifetime, plus an additional 70 years after the author's death. Then it will fall into the public domain.

When a work is created by two or more authors (as in the case of the company-created work—i.e., the collaboration), the term of copyright lasts for 70 years after the death of the last surviving author. (They must not have created the work for hire—i.e., as employees.) That can be a pretty long time.

Billing

Billing is not simply a matter of ego. In the theatre, billing can open doors and advance careers.

When two or more authors create a work, billing should be fair to all. Equal billing is usually fairest. The order of billing is often determined alphabetically by last name.

Occasionally, there are sound reasons for unequal billing. For instance, Sheila may be a playwright of national repute. Her name sells tickets and attracts media attention. The members of the company are still relative unknowns. It may be wise to let Sheila's billing stand out and ride on her coattails. For instance:

> THE CORPSE CAME C.O.D.
> A play by SHEILA NATIONALLY KNOWN PLAYWRIGHT
> With contributions by ART, ELAINE, GEORGE JUNE, MAX, MELINDA, NEIL, PHIL, and SUSAN

Besides, if Sheila is well known, she may demand separate billing anyway.

There may be strong feelings whether billing is horizontal or vertical.

All of the authors should receive billing whenever the others do. Unless, again, you have one author whose name means more than the others, the size and typeface should be the same for all.

For our purposes, we will say that Sheila has no better or greater reputation than the others. Therefore, what applies to everyone applies equally to Sheila. Also, we will refer to the entire company as the authors, or the collaborators, since that is their intent.

Decision-Making

Determining which of the parties makes decisions for the group may be the toughest issue to address. Someone has to make the many artistic and business decisions that will affect any piece the members of your company create. The absolute worst case occurs when one person decides, unilaterally, to be decision maker for all. At the outset, all parties may be comfortable with this arrangement. Sooner or later, however, bad feelings may develop. Unpopular decisions may be made. Sides may be taken. Disaster may result.

The collaborators must agree how decisions are to be made. Majority vote is often desirable, but the parties must understand that, occasionally, they will be outvoted. Decisions will not always go their way.

Unanimity is the other alternative. But what if the parties can't reach full agreement? Much time may be wasted while the collaborators argue. And what if they can't ever reach agreement? Deadlock will result, making a bad situation worse. Emotions may get out of hand. The parties may fail to think with rational, clear minds.

There is no right or wrong answer to how decisions should be made. Your group must consider the possibilities that exist within itself. You may discover that making a decision about making a decision will be your first serious bone of contention. If that is the case, ask everyone to step back and consider how much tougher it will be to resolve other issues if you can't figure out this one.

But what happens if the parties can't agree, and they become hopelessly deadlocked? In that case, it is wise to provide in your collaboration agreement that you will leave the decision-making to a neutral third party—preferably someone whom all the collaborators can respect.

Your agreement should provide for arbitration and mediation in the event of disagreement. This process is less expensive than litigation, but it's recommended only if all else fails. It is still time consuming and can hold up your show.

If you are creating a musical, some members of your company may be responsible only for contributing certain elements of the project-that is, the book or the music or the lyrics. Commonly, the composer and lyricist should retain decision-making power over the musical elements-such as the arrangers, orchestrations, and musicians. The book writer should have decision-making authority over the book. If your project lends itself to this kind of decision-making, it simplifies your agreement.

In the case of *The Corpse Came C.O.D.,* a straight play, the collaborators have decided they will make the artistic decisions by a majority vote. Each artist will have one vote equal to the others. Their attorney, Charley Loophole, will make all of the business decisions.

Royalties
In the case of a straight play, like *The Corpse Came C.O.D*., royalties are usually divided equally among all the collaborators. Some theatre companies try to determine who contributed what and how much. (Max, for instance, might argue that since it was his original idea, he should receive slightly higher royalties.) This may become a fruitless effort, especially if your company is generating a script out of improvisation workshops.
How do you measure individual contributions in a straight play? By the time one invests in it?

All right. Let's go down that road. Suppose, in our example, all of the parties, except June, attend every workshop and put in the same number of hours. By the measurement of time, they are entitled to a greater share of the royalties than June.

However, although June misses five out of the seven workshops, she contributes an idea, a character, or a speech that singlehandedly transforms a modest show into a blockbuster hit. (Don't think that can't happen. Remember what the title song did for *Hello, Dolly!)* Maybe June didn't give as much of her time as the others. Yet her brainstorm may mean a movie sale, as well as hundreds of thousands of dollars in additional licensing fees. Does June have an argument for a greater share of the royalties?

Even in a musical, it may become difficult to quantify the individual elements. No one can put a percentage on which element is the most important-the book, the music, or the lyrics. The book contains the underlying elements-character, incident, and story—out of which the songs are created. Yet, by its definition, a musical is not a musical without the music. And the tunes need the lyrics to advance the story and illuminate character. And, again using the *Hello, Dolly!* example, what if you have one song that completely defines the show?

With a musical, it's best to treat each element as a separate component. Therefore each element receives its own share of the royalties. If one person creates more than one element, such as a book writer who also writes the lyrics, she receives separate royalties for each element.

With a straight play, it is fairest to divide the total money earned into as many equal shares as there are collaborators. Give each collaborator one share.

Removal of a Collaborator
Collaborators often don't remain with a project to completion.

An actor/collaborator may leave the company for greener pastures. Personality conflicts may cause one or more persons to leave. The producer may decide an actor/collaborator does not fit with the company.

Since the actor is also a joint author of the show, they have certain rights, regardless of the circumstances of their departure. If they leave after merger has occurred, their material remains with the show. They are still entitled to royalties, authorship credit, and voting privileges. By the same token, they cannot take their material out of your script.

But you must prepare for removing and replacing a collaborator *before* merger occurs. This system must be fair and applicable to all. If the departure is voluntary, the other collaborators are entitled to reasonable notice and an opportunity to determine how to replace them. If they are asked to leave, they are entitled to notice, as well as the reasons they are being terminated. In case you wish to ask a joint author to leave, you must agree on who makes the decision. The fairest way would be for a vote of the collaborators. In addition, you must set specific criteria, so that all of the authors know the standard to which they will be held. Specific criteria also help the collaborators determine when a party has fallen short.

When an actor/collaborator leaves before merger occurs, two issues arise. First, the material they have already contributed must be considered. At this point, they have the right to take this material with them. But do they want to? Is it of any value to them outside of the immediate project? Do the collaborators want to give up those contributions?

If the collaborator wants to leave their material in and the others wish to keep it, appropriate arrangements must be made for compensation, voting rights, billing, and so forth. Otherwise, depending on the people involved, either side could hold the other hostage. This could create high emotions and result in great expense. There may be great pressure to meet deadlines, especially if the show is already on the schedule.

The second issue involves bringing in a replacement. Suppose the Soon to Be Famous Players have voted Susan out of the company, yet they want to retain some of her material for *The Corpse Came C.0.D.* To complete her work, they want to hire Thelma.

Suppose Susan and Thelma contribute material in uneven proportions. Remember, in the past, Susan received equal billing, as well as equal royalties and an equal vote. But now Susan is gone. Yet some of her material remains. Thelma replaces her. So how much of a share does Thelma receive? The others balk at giving Thelma an equal share, because this would reapportion everyone's share. Instead of one-tenth, each person would receive one-eleventh. Yet Susan is entitled to something for her material. And so is Thelma.

You must ask these questions: Where is the work in the development process? How much work still needs to be done? How far away from opening night are we? What kind of emotional situation are we facing? Has the company divided into a "Susan" camp and a "Thelma" camp?

In addition, how are decisions to remove and replace to be made? Should we set forth objective criteria in our agreement? But this means a measurable standard, to which everyone must adhere. How do you quantify such a standard? Is it even possible to do so? Should we count up hours devoted to the project? But June missed most of the workshops, yet contributed the stunning idea that put the show up over the top.

Oh, the questions are tough, aren't they?

You know what? If you don't decide at the outset, if you wait until crisis time, they get impossible.

And there are no perfect answers. You have to discuss each of these issues, one by one, and decide the answers for yourself.

Death of a Joint Author

Just when you thought things couldn't get any thornier, they can, The truth is, all of the collaborators are gonna die at some time during the life of the copyright. Remember, we said that under present law, the copyright exists for the remainder of the author's life, plus 70 years. The author's life refers to the last of the authors to die.

For the Soon to Be Famous Players Company, this is good, It means their copyright does not expire until 70 years after the last of them dies. This may stretch into a lot of years.

While that may seem a long way off, you've got to consider all the ramifications now. Just about everyone wants their heirs to benefit from the work they have accomplished during their lifetime. If there are no direct heirs, such as spouses, children, siblings, or parents, people usually want a favorite charity or close friend to benefit.

It’s unlikely you know of anyone who, if they thought about it, actually wants their property to escheat (pass) to the state upon their death.

The problem is that often people procrastinate planning their estates. Young people, in particular, think death is just so far off into the future.

However, your company is now creating a work of value. Especially at the outset, no one can quantify that value. Each collaborator, regardless of age or health, must protect her ownership interest in the copyright.

Estate Planning for Collaborators
As producer, you should strongly urge your joint authors to see an estate planning attorney, regardless of what other assets they may have. This should be done contemporaneously with the drafting of the collaboration agreement.

If the holder of an interest in a copyright dies without designating, by properly prepared will or trust, to whom she wants her interest to go, the state of her residence at the time of her death will make the determination for her. Each state has its own laws of descent and distribution. These determine how property passes when its owner dies without a will or trust {intestate).

A collaborator may designate in their will or trust to whom they want their interest in the show to go. They also can designate who will take over their voting rights. Sometimes the two are the same. Sometimes a spouse or children may inherit the property, while an attorney or a bank will act as the executor or trustee who will make the decisions.

Estate Pitfalls for the Collaboration
Without careful planning, the death or disability of a joint author can create pitfalls for the collaboration. Designees who take over voting rights are rarely artists. They may not have the same knowledge as the deceased. Chances are, they will not share the deceased's artistic vision (which may have been in perfect sync with the rest of the company).

In addition, if a collaborator dies while the work is only partially finished, they must be replaced. The deceased's designee may not be qualified to vote on an appropriate replacement. It's wise to explicitly cover this contingency in the collaboration agreement, designating the remaining collaborators as the decision makers for the work-at least artistically. However, you must bring in the deceased's heirs or legal representative into any business matters.

Disability of a Collaborator
Suppose Elaine has an automobile accident in which she suffers brain injuries or Max is felled by a stroke, which affects his reasoning capabilities. In both instances, the doctors predict that Elaine and Max will live long lives; however, they are incapable of managing their affairs, as well as participating in the artistic and business decisions of *The Corpse Came C.O.D.*

Unless Elaine and Max have properly prepared for these contingencies while they were still mentally able to do so, the courts will intervene. A judge will appoint a guardian to take care of their physical persons, as well as a conservator of their respective estates. (An "estate" is all the

property a person owns or in which she has an interest.) This includes their respective interests in *The Corpse Came C.O.D.*

Now here's the major difficulty: absent a written direction from Elaine or Max, the judge may appoint anyone he chooses as conservator. He doesn't have to appoint Elaine's friend or relative, or Max's friend or relative. The conservator may be someone whom Elaine or Max would not have chosen themselves. In fact, the court very likely may appoint a complete stranger to Elaine, Max, and the Soon to Be Famous Players.

Many courts are required to appoint a state official known as the public guardian (or conservator) for persons deemed incompetent to manage their own affairs. Other courts appoint conservators from a list of (often politically connected) professional conservators. Although Elaine and Max will continue to receive the income from their respective shares of the show (net of the conservator's fees and costs), which may be necessary for their care, the conservator will step into their voting and decision-making shoes with the rest of the collaborators.

In other words, your company will have to deal with a complete stranger whom no one would have chosen. The stranger may not know or care about theatre or what you are doing. He may be a career bureaucrat.

This is a grim scenario, indeed, yet well within the realm of possibility. It is still another reason each collaborator must consult his own estate planning attorney. There are several possible solutions, provided action is taken in advance. Using an instrument called a power of attorney for financial affairs (which is available in most states), a collaborator appoints a friend, relative, or co-collaborator as their attorney in-fact to make business and artistic decisions in their place if they are unable to do so. (The collaborator can have a separate power of attorney for their financial affairs other than the collaboration, if they choose, naming a different attorney-in-fact.) Or, the collaborator could convey their interest into a living trust, with themself as trustee. The collaborator names a successor trustee to take management of their affairs if they die or is disabled such that they cannot manage their own affairs themself. Most attorneys will recommend both the living trust and the power of attorney for financial affairs.

Similarly, the collaborators should provide in their collaboration agreement for this kind of contingency. The collaborators must decide how they wish to handle the death or disability of one of their members if the death or disability occurs while the work is still being written. The same considerations apply as in the removal of a collaborator. However, since the death or disability was not caused by any fault of the person, they may not wish to treat this as a true removal. Yet it may be necessary to bring in another collaborator to finish the work.

There are no easy answers. Each group must discuss these issues in depth and create a solution that works for its particular membership.

Representation
Under the copyright laws, all of the authors have an equal right to grant nonexclusive licenses for the material. However, if everyone can be out there marketing nonexclusive rights, confusion can result. Moreover, commercial producers would likely refuse to become involved in a show which ten collaborators are hustling at the same time.

It greatly simplifies matters to designate one person as the representative for the work. In the case of a company-created piece, an agent may be the most likely choice. The representative must present all offers to the others for vote before binding the project. Sometimes it's desirable to place the work on an exclusive basis with one agent. It facilitates negotiations with third-party producers or film companies.

If several of the collaborators have agents, it is permissible for all to represent the work. (In musicals, for instance, usually the book writer, the composer, and the lyricist have different agents.) This is distinguishable from the case in which all of the authors market the work themselves at the same time. Unlike artists, agents are accustomed to working with other agents both in marketing scripts and in negotiating production contracts. Producers are equally accustomed to working with multiple agents on a project.

Expenses
All projects incur expenses. The parties must decide how expenses will be handled. Usually, it makes sense to give the representative authority to incur expenses, in their discretion, up to a certain dollar amount without having to first seek permission from all the collaborators. The parties should decide on that dollar limit.
Once the representative reaches that limit, the parties must put into place a mechanism so they can obtain permission to incur additional expenses, if the need arises. If one party advances expenses out of expected future income, how is that party to be reimbursed? What if the future income never materializes? Should the company establish a petty cash fund out of which expenses can be withdrawn? Until money starts to flow from the project, how will the group fund the petty cash account? How much initial capital may be needed? What will be the sources of that capital? Logically, it would seem the collaborators should kick in something. But how should the parties apportion each collaborator's contribution to petty cash?

Changes
No changes may be made in the script without the consent of all of the other authors. If the show is a musical, no changes may be made in the book without the consent of all the book writers. No changes may be made in the music and lyrics without the consent of the composer and lyricist.

Representations and Warranties
All of the collaborators represent and warrant (guarantee) to the others that all material they contribute shall be original with them. They own the material and therefore have the right to put it into the show. This material does not violate or infringe on the copyright of anyone else. It

also does not defame any person, product, or entity. Finally, it does not invade anyone's right of privacy. Representations and warranties are discussed in n chapter 5, "Producing Original Plays."

Emphasize the meaning of this clause to all the collaborators. This is an important undertaking. If any collaborator violates this clause-that is, passes off someone else's copyrighted material as their own—they could be liable in damages to the others.

What are these damages? Well, if your finished product contains someone else's copyrighted material, all of the collaborators will be sued by the aggrieved party. All may be held liable for financial damages, even though only ~me of them appropriated another person's work. All will have to pay attorney fees and court costs. Under this clause, the "truly guilty" party must reimburse the others for all their expenses.

And, as we have said, the aggrieved party will sue the third-party producer also. The third-party producer will sue all of the collaborators together and severally.

Option to Purchase Collaborator's Interest
It may happen, down the line, that one of the collaborators wants out. They need money. They want to sell or pledge or lease or otherwise dispose of some or all of their interest. The others may not want a third party to purchase these rights, They don't want a partner they don't know suddenly stepping into the arrangement. Or they simply would prefer to own these rights themselves.

Establish a mechanism so that the selling party must give the other collaborators a chance to buy the rights themselves. She must give advance notice. This notice must be in writing and delivered to the others by registered mail. The notice must set forth the terms on which she wishes to sell. These terms should be determined by the price and other particulars which a third party has offered for the rights. The other collaborators have an option to match those terms and purchase the rights themselves. Set a time limit during which they must exercise the option; a reasonable time might be 14 days after receipt of the notice. If they fail to exercise the option, the selling party is free to accept the third party's offer.

If you have a lot of collaborators, this may get sticky. What if each of the others wants to buy the selling party's interest for themselves? This could lead to friction or a bidding war. You must decide upon a fair system. Perhaps you can require that the selling party notify all the others at the same time. The first one to match the other offer can purchase the rights. Or perhaps you do want a bidding war. There is no right way to go.

ABOUT THOSE FORMS

In the AACT Resource Library, you'll find fill-in-the-blanks collaboration agreements for both nonmusicals and musicals. All you have to do is agree on the specific terms you want to include your particular agreement. (You must be signed in to the AACT website in order to access these forms.)