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Pandemic Theater: An Analysis of Issues that Arose During COVID-19 and the Solutions Applied

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Pandemic Theater: An Analysis of Issues that Arose
During COVID-19 and the Solutions Applied

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Abstract

The Coronavirus pandemic put a halt to the theater industry for almost eighteen months, and just now is the industry re-emerging with innovative ideas and suggestions for how it wants to distribute productions. A combination of the entertainment business and intellectual property law, the purpose of this review is to investigate the question of “what changes need to be made to CBAs and licensing laws to allow for this type of content to continue?” Through a content and legal analysis of emergency authorizations and agreements, as well as pre-existing copyright and distribution laws, this thesis outlines how the pandemic forced issues within the industry to come to the surface and how they were dealt with in the moment. The recommendations are suggestions based on previous problems and reactions to these changes.

Table of Contents

Abstract	1
Table of Contents	2
Introduction	3
COVID-19 Pandemic	4
Labor Union Issues	5
History	6
Issues Exposed During Pandemic	9
Where We Go from Here	11
Copyright Laws	13
History	14
Issues Exposed During Pandemic	18
Where We Go from Here	19
Direct-to-Consumer Theater	24
History	24
<i>Hamilton & Come from Away</i>	27
Issues Exposed During Pandemic	28
Where We Go from Here	30
Disclaimer	32
Conclusion	33
Works Cited	35

Introduction

The shutdown of Broadway and regional theaters around the country in March of 2020 sent a message that there would be no theater for the foreseeable future (until the pandemic was over), or at least until the industry found alternatives. And they did, broadcasting and streaming past recorded productions like The National Theatre's "At Home" program, local theaters doing Zoom productions of old and new works which allowed for all involved to stay safely at home, and other variations on these ideas that differed theater to theater and production to production being put on for an audience.

New agreements were made alongside these new formats for theater productions and new legal issues arose. SAG-AFTRA (Screen Actors Guild - American Federation of Television and Radio Artists) and AEA (Actors' Equity Association), the two main labor unions for actors with SAG-AFTRA representing film and TV and AEA representing on stage, struck a deal in late November of 2020 after several months of jurisdiction disagreements and complaints between the two that laid out parameters to last the duration of the pandemic (officially approved through December 31, 2021 unless an extension is agreed upon). These parameters laid out clear guidelines for "work that is recorded and/or produced to be exhibited on a digital platform, either as a replacement for a live theater production (see Paragraphs 2.a and 2.b, below) that cannot take place because of the pandemic or for a partially virtual/digital audience that supplements a live audience during the pandemic period" ("Agreement Between AEA and SAG-AFTRA"). Licensing companies, like Music Theatre International (MTI) have added streaming options to their licensing opportunities for productions like local theaters and high schools to continue to put on shows during the pandemic (mtishows.com). This became the makeshift theater industry

during the height of the pandemic, and it has been in place until recently when Broadway and regional theaters started to open and begin to put on live performances again. The issue becomes what to do about these options now. They were all implemented as emergency options for use during the pandemic in place of live performances and do not include a framework for what to do when the pandemic ends.

There is a common phrase that says, “necessity is the mother of invention,” coined by the philosopher Plato. There is no time in history other than the Coronavirus pandemic where this statement has been found to be true repeatedly. The pandemic forced everyone across all industries to experiment and innovate just to stay afloat, let alone continue to provide a product or service like theater to consumers. Now that the pandemic is ending and theater is coming back with in-person performances, the question becomes which of those innovations and agreements be kept as permanent fixtures in the theater industry. This paper will explore that question by looking at the history of three specific sectors of the industry, the issues that arose during the pandemic, and what to do with the pandemic solutions moving into the future.

COVID-19 Pandemic

The COVID-19 pandemic has been devastating for the theater and live performance industry. On March 12, 2020, The Broadway League (the industry’s trade organization) announced that all Broadway performances were canceled through April 12, 2020, due to the COVID-19 pandemic. The shutdown was later extended to June 7, 2020, then January 3, 2021, until it was announced on May 5, 2021, that Broadway was looking at a September 14, 2021,

return date (“Broadway Resumes Ticket Sales”), which was achieved. These shutdowns extended across the country, with touring and local theaters following suit and canceling performances through the end of the 2020-21 season and not relaunching productions until the summer or fall of 2021. This forced theaters to have to think differently, both about how to make enough money to survive the pandemic and come out the other side still in business, and to get theater and theater experiences to their patrons even with in-person events shut down. Thus came the innovation from all parts of the industry.

Out of these new ways to distribute theater to audience members came a disagreement based on which groups would be in charge. Modern technology and processes often come with unknown territories and little or no guidance on rules that need to be put in place to manage them. As most jobs and schools went online and used sites like Zoom to communicate, so did the theater industry. Industry readings happened over Skype, benefit concerts were performed from actors’ own homes, and live theater was no longer guaranteed to be live. The industry had to pivot and did so quickly, but certain parties had some catching up to do.

Labor Union Issues

A significant issue that arose during the COVID-19 pandemic is the debate over which labor union has jurisdiction over these new types of theater productions. A solution was reached, but it is only temporary and will need to be readdressed soon. There are two governing labor unions that were in conflict during the pandemic, The Screen Actors Guild - American Federation of Television and Radio Artists (SAG-AFTRA) and Actors’ Equity Association

(AEA). The two unions have had clear jurisdictions in the past and held firm boundaries over where the two unions fit in the entertainment industry, but when COVID-19 occurred, those previously agreed upon lines were thrown out the window as everyone tried to navigate through the first few months of restrictions and shutdowns. SAG-AFTRA and AEA both claimed the other was encroaching on their territory as theaters began to offer virtual or remote productions. This dispute led to stalled productions on both sides and potential loss of work and wages without a resolution, and with no end to the pandemic in sight in the fall of 2020, something had to be done to get the two unions to work together to get their members through the pandemic and out the other side as unscathed as possible.

History

The Screen Actors Guild - American Federation of Television and Radio Artists (SAG-AFTRA) is a labor union whose members are “actors, announcers, broadcasters, journalists, dancers, DJs, news writers, news editors, program hosts, puppeteers, recording artists, singers, stunt performers, voiceover artists and other media professionals” (“SAG, AFTRA Members Approve Merger”). The union was created in 2012 with the merger of The Screen Actors Guild and The American Federation of Television and Radio Artists, with the purpose of creating a common vision for a single, new national union, and giving their members a stronger foundation and more negotiating power to improve their working conditions and wages. Being a member of SAG-AFTRA is required to get most of the professional on-screen acting jobs and provides many benefits, with the main one being collective bargaining

agreements that allow the union to “negotiate wages and working conditions to maintain minimum standards for its members” (“Benefits of Membership”). At its core, SAG-AFTRA has jurisdiction over filmed content, or “work in front of a camera” as SAG-AFTRA’s national executive director David White states. The most common jobs covered by SAG-AFTRA are commercials, television shows, and motion pictures.

Actors’ Equity Association (AEA) is the other labor union, and it represents actors and stage managers in the theatre. It was founded in 1913 and is affiliated with the International Federation of Actors as an international partner for performing arts actors. AEA offers many, if not all, of the same benefits as SAG-AFTRA, including minimum salaries, vacation and sick pay, resolution dispute, and contract negotiations (“About Equity”). To be a working actor or stage manager on Broadway, one must either be or become a member of AEA for their contract, and there are other theaters across the country that also have equity contracts, but it is not required to be a working actor in the US. The most essential component of AEA is that it covers live stage content, i.e., musicals and plays on Broadway and the coverage extends all the way down to local theatrical productions.

These two unions were never intended to cross paths. When they were founded, the film and television industry was separate from the theater industry, both in location and in practice. Over time the industries have blended and become more dependent on working with and adjacent to each other. This is due to a combination of technological advances and industry location shifts. Movies and television shows are now filmed all over the country and not just in Hollywood, CA thanks to tax incentives offered in various states and television studios headquartered in major metropolises like New York City. It is now easier to be both on stage and

screen, and many actors take advantage of this and are members of both labor unions to advance their careers. Technology has also forced these two unions closer together. They overlap consistently now; theater productions will film promotional videos or perform at sporting events and awards ceremonies. While these specific examples are covered under waivers and granted exceptions, they demonstrate just how close the two unions have become in the past few decades and how much closer they can still get in the future.

Pre-pandemic, SAG-AFTRA and AEA worked side by side and with each other, as many members of one union were also members of the other and due to the demand of industry professionals to be able to go back and forth between television, films, and commercials, and live theater. The most common example of the unions working together is what is known as Rule 9, or the “Do Not Work” list that both SAG-AFTRA and AEA have. This list is a collection of producers and production companies that have not come to an agreement with AEA and thus only offer non-equity contracts. Accepting or performing without an equity contract will result in union discipline, and members may lose their union membership, as doing so can affect AEA’s ability to negotiate with employers and fight for benefits and protection for their members. This rule extends to SAG-AFTRA as part of the Associated Actors and Artistes of America, which is a group of five unions including AEA and SAG-AFTRA that stand in support of each other when negotiating on behalf of their members (“Do Not Work”). Unions backing each other and working together gives their members a higher chance at getting the benefits they have been promised. But when the two major unions go up against each other for any reason, it can cause entertainment projects to reach a standstill.

Issues Exposed During the Pandemic

The COVID-19 pandemic shed light on how modern technologies and new ways to distribute theater create a gap between rules in place and unexplored territories and can cause disputes between otherwise civil parties. Out of these modern technologies and innovations came a dispute between SAG-AFTRA and AEA regarding who had jurisdiction over the recorded or streamed theater productions in place of live performances. Under normal circumstances, SAG-AFTRA holds exclusive jurisdiction over live broadcast media and recorded media, and AEA holds jurisdiction over stage performances. But when those stage performances are distributed as live broadcast or recorded media, the lines clearly drawn in the past become blurred, and jurisdiction becomes debatable.

About 6 months into the COVID-19 pandemic, on October 17, 2020 SAG-AFTRA, by way of Chief Operating Officer & General Counsel Duncan Crabtree-Ireland, filed a formal complaint with the Associated Actors and Artistes of America (4As) charging AEA with “infringement of its rightful and traditional jurisdiction and seeks protection from any further encroachment and appropriate remedial relief for violations that have already occurred” (Crabtree-Ireland 1). SAG-AFTRA alleged that AEA approached them requesting a waiver of jurisdiction over the recording and streaming of live theater productions for the duration of the pandemic to support AEA members and that SAG-AFTRA agreed provided AEA meet certain provisions, including acknowledging their “traditional jurisdiction and certain other provisions designed to assure such a waiver were a replacement and substitute for live theater, rather than a

disguised, permanent incursion into SAG-AFTRA's traditional jurisdiction” (Crabtree-Ireland 1). The complaint goes on to allege that AEA had rejected these provisions, and instead began its own campaign of misinformation and crossed over into SAG-AFTRA’s jurisdiction. In addition to this letter of complaint to the Executive Director/Executive Secretary of the 4A’s, SAG-AFTRA also sent a letter to the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) to alert them to the dispute and ask that they assist in the matter, as necessary. On the other side of the issue, AEA claimed that SAG-AFTRA had signed up to sixty live performances, cutting into their jurisdiction and making it more difficult for members of AEA to get what little work was out there, as they had to be members of SAG-AFTRA for those jobs (Sakoui). These initial talks between the two unions reached a standstill, which is when the official complaint by SAG-AFTRA was filed.

On November 14, 2020, about a month after the initial complaint was filed, AEA and SAG-AFTRA reached an agreement. They agreed to updated terms for the duration of the pandemic, which extends through December 31, 2021, and longer beyond depending on the state of the pandemic at that time. The agreement also laid out specific parameters for AEA to work with theaters and participate in work that is “recorded and/or produced to be exhibited on a digital platform, either as a replacement for a live theater production . . . that cannot take place because of the pandemic or for a partially virtual/digital audience that supplements a live audience during the pandemic period” (“Agreement Between Actors’ Equity Association and SAG-AFTRA”). Additional parameters include that performances be distributed on an exclusive platform (needing tickets for access), distribution on paid streaming services like Netflix and Hulu is prohibited, digital audiences not exceed 300% of the size of the house of the theater for

the duration of the production's run, and does not include work that is more along the lines of television or film (content shot out of order, requires substantial editing, or has visual effects that could not be producing in a live performance). Any disputes that arose were to be dealt with by appointing a representative from each union to come together in good faith to resolve the issue. If there is no resolution, then it will go to a panel to determine if the agreement was violated. As stated, this agreement was initially approved for the pandemic period, which the parties have determined to be through December 31, 2021. Another issue that went hand in hand with this emergency agreement was that the overlap between the two unions did not extend to stage managers. Stage managers are members of AEA, with no equivalent role in SAG-AFTRA for them. This means that they were often excluded entirely, or given a small stipend for their work with the employment not being applied towards their health care, pension, and other benefits, all because the two unions were stepping on the other's territory without a plan or agreement in place to get everyone through the pandemic.

It is important to emphasize that this agreement was made for the emergency of COVID-19, and was always meant to be temporary. As theaters across the country start to have live performances with in-person audiences again, it is unlikely the pandemic period will be extended beyond December 31, 2021, and new parameters will need to be agreed to as many theaters would like to offer virtual productions in some form in addition to traditional live events.

Where We Go from Here

With the current emergency agreement between SAG-AFTRA and AEA set to expire on December 31, 2021, the unions will need to come back together to set new or continuing guidelines and agreements to avoid another jurisdiction complaint from either union. The agreement in place now for the duration of the pandemic period lays out a clear divide between the two unions, and it was reached after much compromise. As the industry moves out of the pandemic period, it is a reasonable agreement, yet it is doubtful that either union will agree to continue without some pushback on parameters laid out. In the permanent agreement, I would propose laying out clearer guidelines on what platforms a production may be released on, such as explicitly prohibiting the use of YouTube and related sites accessible for free, as well as sites that require a monthly subscription, including streaming services like Netflix, Hulu, Disney+, etc., and other content-specific streaming services like Broadway HD for recorded live productions. I would also recommend that the language be altered to state that virtual or streaming productions be in addition or in support of live performances, and not in replacement of which is the current language in the agreement. Finally, the current agreement states that recorded performances that include “minor editing” (“Agreement Between Actors’ Equity Association and SAG-AFTRA”) can fall within AEA’s jurisdiction. I propose that this parameter be changed and specified, and should instead stipulate that the only editing allowed on productions with Equity signatories be between camera shots, but all must be recorded at the same performance and no additional recording be used, to mimic a live, on-stage performance and experience. This should satisfy both SAG-AFTRA and AEA for the future, allowing SAG-AFTRA to keep a clear jurisdiction on filmed content while still allowing AEA to offer virtual or digital options for theaters to use in concurrence with previously established live performances.

As the entertainment industry grows and shifts away from traditional mediums and platforms, SAG-AFTRA and AEA will have to have ongoing conversations about where each union falls in the changes that occur. Members' livelihoods are at stake, and without these unions working together, or at least alongside each other, to allow for members to continue working successfully. Without cooperation from the two, the industry has the potential to come to a halt. So, to keep the two unions happy and their members working, they must come together to re-argue a post-pandemic agreement since there is no sign of the theater industry reverting back to solely pre-pandemic strategies. The innovation during the pandemic to get theater to audience members stuck in their homes will remain, so the new agreements need to accept that while protecting the integrity of live theater and the two unions. For both to be happy, there still needs to be a clear line between the unions and the territories they have jurisdictions over. These proposals can keep the two unions content while expanding theater to keep up with a shift to streaming content.

Copyright Laws

Copyright is a federally governed protection of original works such as literature, plays, musicals, songs, and other forms of authorship and exists once a work is considered "completed" and is in a fixed form. It gives the creator ownership and protection against others who may want to use these works without proper permission and payment towards the copyright holder. In theater, copyright is used to track who has legal ownership over the work and any decisions

made about the work, such as who can get a license to perform a show, or songs in a concert, or now with the evolution of distributing theater, a taped production for online viewing.

History

A new musical or play has a copyright that initially is held by the writers, but once it makes it to a professional production, the copyright often gets transferred to a company that will make it easier for rights to be managed, productions easier to put on, and gives the show more standing when dealing with copyright issues. For example, with the musical *Come from Away*, for the purpose of copyright and other laws, the author is CFA Live Holdings LLC (*Come from Away*, 2021).

One of the main copyright issues that arise when looking at live theater is the ability to license shows for local amateur theaters to produce. This refers to elementary/middle/high schools, colleges, and regional theaters doing productions of licensable shows each year. There are a few licensing companies, with the main one being Music Theatre International (MTI) that will acquire the rights of a musical or play as they have premiere productions, to give theaters one place to look for licenses and take the work and pressure off the original copyright owners, as the licensing rights continue long after a Broadway run ends and an individual production staff that would work on licensing requests has dispersed. MTI will acquire worldwide licensing rights to shows like *Mean Girls*, *Annie*, *Avenue Q*, and more during their initial runs and then hold on to those licensing rights for the foreseeable future (“Licensing an MTI Musical”). When a regional theater or high school wants to put on a show that MTI holds the rights for, they go

through them, and MTI then sends any previously agreed upon royalty payments to producers and authors of the show.

There are several rules that licensees must follow when obtaining the rights from a company like MTI to put up a production. The licensee must give MTI all the information they request for MTI to give a proper quote and, if approved, license offer/contract. Once approved, the production must be performed on the requested dates and only those dates. Often theaters getting approved to put on a particular show is dependent on if any other companies in the same area want to do the same show at the same time. And then there are rules for actually putting on the production once you have been approved and all the contracts are signed, and the payment is received. The biggest two restrictions are that a show is licensed “as is,” so changes cannot be made without prior written permission from MTI and the authors of the show. Any changes made violate the author’s copyright on the material. The second is that under no circumstance may the production be recorded for any reason. Recording the production infringes on the author’s copyright, as they often have granted film rights to a third party with an exclusive contract, so by recording the work you would also be infringing on that third party’s rights (“FAQs”). Most of the time a licensee can add a video license to their initial contract to be able to record for archival or promotional purposes, but that is production specific and not always a guarantee when requesting a license. One of the other key provisions in licensing a show is that the licensee cannot change any text without the author and the licensor’s prior written permission. That is stipulated in license agreements that are signed when putting on a production. At this point it is a universal clause in all license agreements, and even goes as far as being within copyright laws, stating “the unauthorized adaptation of a work may constitute copyright infringement” (“Circular

14: Copyright in Derivative Works and Compilations”). Something worded similarly is included in all licensing agreements.

To give an example of how a licensing agreement like this is used in practice, during my senior year of high school I produced a production of “The Room Full of Annie” by Annika Rosenvinge for a senior project. I licensed the rights to the play from Playscripts, Inc., and on receipt of the order and payment came a full licensing agreement that outlined what I as the licensee could and could not do based on which rights I had paid for. This production was part of my Senior Capstone project on collaboration in theater, and because it was a school project, I had to not only purchase performance rights, but also an Archival Video License. The license agreement granted me “nonexclusive and nontransferable license to produce and perform three total Amateur Performance(s) of the Play” and also stipulated the dates the performances will take place between (“Licensing Agreement”). The agreement went into the definition of Amateur Performances, the Limitation of Licensing, Author, and other required Credit, as well as the two main copyright rules mentioned earlier - Restriction of Alterations and Video Rights.

The agreement reserves two clauses to alteration of the work. It states that the licensee “shall not delete, alter, or make changes of any kind to the Play, including the changing of character gender, the cutting of dialogue, or the alteration of objectionable language, unless granted express written permission by Playscripts. The User shall not alter the title of the Play” and that it can only be presented “as it appears” in the scripts published by Playscripts (“Licensing Agreement”). This, as mentioned, is a fairly standard clause in licensing agreements,

as it is against federal copyright law to change or otherwise alter registered copyrights without explicit and prior authorization.

At the end of the agreement is the archival video rights, as it is an additional right available to licensees but not everyone elects to purchase those rights. For Playscripts' Archival Video Rights, the agreement granted "non-exclusive right to videotape a single performance and to make one (1) copy per cast/crew member" with additional provisions. These provisions included the recording be for "a non-commercial venture for archival purposes" - sales, leases, or rentals not permitted, the recording be from one stationary camera with "no attempt to create an artistic work", the recording not be utilized in "any other manner, including but not limited to, Facebook, YouTube, Vimeo, etc.", and included a very strong reminder that "ANY VIDEO RECORDING MADE OF THIS PERFORMANCE IS AUTHORIZED FOR PERSONAL, AT-HOME, NON-COMMERCIAL USE ONLY. THE SALE OR DISTRIBUTION OF SUCH RECORDING IS STRICTLY PROHIBITED UNDER FEDERAL COPYRIGHT LAW" ("Licensing Agreement"). This was a quite simple and straightforward licensing agreement for an amateur production, but demonstrates what is commonly found in copyright-based agreements and contracts, as the most important part of licensing out productions is to ensure the copyright is protected.

There are two levels of copyright violations: minor edits that do not alter the plot or intention of the author, and major edits that change the core of the work. Minor edits include removing swears or changing a sports team's name to one in the region the production is occurring, whereas major edits are ones like omitting songs and switching a character's gender. The former does not really have a consequential effect on the work. The majority of the author's

work is still there as it was written originally, and parts that were changed are not noticeable unless those watching knew the show inside and out. There is no damage to the structure of the play or musical, and the message and integrity are still there. The latter has the opposite effect; instead, it can lead to the very core of a show changing at its worst, and altering the plot along the way at the least. Both kinds of violations are grouped together when they have distinct levels of effect on the work that is presented.

Issues Exposed During Pandemic

As mentioned previously, with the COVID-19 pandemic coupled with the advancement of technology and the rise of streaming, theater has gone digital in the past 18 months. This makes the latter restriction impossible to follow because all theater recently has been recorded. To make up for this, MTI and other licensing companies have started to offer streaming, remote, and online options. MTI now offers six rights options, traditional, live stream, scheduled content, video on demand, remote performance, and online rights. Traditional rights are just that - live, in-person performers with the audience in the venue. Live stream rights are performers in person on stage, with a mix of in-person and remote audience members, with a performance captured and streamed in real-time. Scheduled content rights are a pre-recorded performance, live on stage at the time of recording, with a remote audience at a specific airtime. Video on demand is the same as scheduled content, except the performance is available to rent for a pre-specified period of time. Remote performance has remote actors pre-recorded and edited together, usually using zoom recorded from their homes, to be shown to a remote audience. And online is a shorter

version of a show, optimized to be recorded remotely and distributed remotely via zoom (“Streaming FAQ”). All that taken into consideration, there was only so much within copyright laws theater productions could do during the pandemic, and most new options only were allowed because of the pandemic.

These new options also exposed how vulnerable it made theaters under copyright laws. Previously the only way for copyright violations was in the form of altering works. This meant that the production would have to be reported by someone who knew what was changed. But now it is much easier to inadvertently report a production because more people across the country can see a show. It is no longer audience members who live in the area. Now I can live in New York and see a Boston production that changes a portion of the show, and then mention it at work the next day while sitting next to the playwright’s cousin who alerts the playwright of the license agreement violation. The risk of getting caught has increased because the reach of one production has spread thanks to the pandemic.

Where We Go from Here

In order to figure out what to do moving forward, we must take a step back and look at past copyright violations. One of the most common copyright violations when it comes to theater is performing a play or musical without acquiring the rights to said show. For many community theaters, rights can be expensive and cost a substantial portion of their budget, so depending on the theater and the show they want to put on, foregoing the licensing of rights is sometimes an option. But that can backfire, and the costs can add up very quickly if caught. Music Theatre

International filed a complaint against Theaterpalooza Community Theater Productions in Virginia in July of 2018, alleging that the theater had put on at least 16 well-known shows without acquiring licenses for the productions, and began to pursue legal action after “repeated requests to cease the unlicensed performances made to Theaterpalooza owner Teresa Walker went ignored over a period of more than three years” (Culwell-Block). Theaterpalooza was found to have known about MTI’s copyrights on these shows as early as 2015, but because they continued to present unlicensed productions, they “willfully infringed on MTI's protected works” (Culwell-Block). MTI was awarded \$450,000 plus attorney's fees by the United States District Court for the Eastern District of Virginia in January of 2015 for the copyright violation.

There have also been several instances of copyright violations by way of illegally altering content within a play. In November 2001, playwright David Grimm attended a production of his play *Kit Marlowe* at Studio Theatre’s Secondstage in Washington DC. The director of this production, Mike Chamberlin, elected to split one of the characters, Walsingham, into “three parts: Walsingham himself, plus two ominous henchmen” (Pressley). Chamberlin also included a character speaking a line or so of Spanish, despite Grimm having never written any Spanish dialogue. A few days later, Secondstage received a cease-and-desist letter from the Dramatists Play Service, the organization that licenses *Kit Marlowe* out to theaters, which resulted in the theater postponing the final three performances. Grimm also penned a letter that appeared in the Washington Post expressing his anger towards the situation. While it may appear that Grimm could have been a little nicer and more sympathetic towards Secondstage and talked to them instead of immediately involving lawyers and the press, the actions taken by the theater were very clearly in violation of their licensing agreement, so Grimm can be as forceful and stand

behind his legal team as much as he wants to. Many involved in the theater and licensing rights industry all repeat more or less the same phrase: it is the law. Playwright Ernie Joselovitz even went as far as to state that “this has been a contract in the theater that everyone knows” (Pressley) since its inception over 70 years prior.

Sometimes, a copyright violation is caught before performances begin, meaning an entire play’s run ends up being canceled. In 2003, the Grove Theater in Utah had their rights for *Rumors* revoked by playwright Neil Simon when the theater refused to include the as written profanity they wanted to cut from their production. After the theater was reported, Gayliene Omary, producer and owner, received a letter from licensing firm Samuel French Inc that they had to return the script to the original text in order to move forward with their production. Omary responded with a request to alter the play, specifically to remove the profanity, which was denied by Simon’s attorney, Gary DaSilva along with the comment, “You must present the play as written or not at all” (Snider). Omary acknowledged that she was in the wrong in this situation based on the licensing agreement that was signed, and reminded other theaters that it is against copyright law to alter the content of plays without explicit permission.

Other theaters take changing a play to the extreme. Playhouse in the Square in Memphis tried to put on a production of *Steel Magnolias* in 1996, but in this production the character of Truvy, a woman, was going to be played by Mark Chambers, a man. This change was not approved by Dramatists Play Service or Robert Harling, the author of the work, who very strongly opposed this change. The director tried to appeal the denial “stressing the importance of

a director's artistic freedom” (Yellin), but the decision was not overturned. The production opened three weeks later with a female in the role of Truvy, as was written.

All three of these situations brought up an interesting thought about copyright violations in regard to altering a play in some way. In each situation, it was made apparent that without someone having notified either the play’s author or licensor, the theater wouldn’t’ve been caught, and they could have presented the play as they wanted to. Eric Schaeffer, artistic director of Signature Theatre, recalled a production of "Oklahoma!" that he had seen where the director had cut the number "Pore Jud Is Daid" out of the show altogether. "They got away with it because they were in the boonies... but if someone had reported it, they wouldn't have gotten away with it” (Pressley). Arden Heide, head of Samuel French’s royalty’s department, remarked that he and the rest of the team are aware that many community theaters change dialogue without proper permission, but “there’s nothing he can do about it” if they are not made aware of it happening (Snider). And Jackie Nichols, executive producer at Playhouse in the Square, even said himself that he had “never checked with a publishing house on who I cast before. We do a lot of nontraditional casting here and we don't ask, for instance, if we can cast a black actor in a role traditionally played by a white person” (Yellin). This issue is widespread, with the only way for the violation to be caught is for it to be reported by someone, or for it to be seen in real time. This leads to many smaller theaters taking the risk and making, usually inconsequential, changes to dialogue to better fit the production they are putting on. Many do not get caught, although that has the potential to change with the addition of new ways to view live theater.

Copyright laws are already in place to license rights for video recordings of performances, with several options already available to licensees at the moment. These options

provide adequate royalties to the creators of the work — while giving theaters more ways to get their productions up and out to potential audiences. I recommend that these options still be available, with the exception being that streamed performances are only available during a specified set of dates, similar to how performances rights stipulate performances are done during a predetermined set of dates. I also recommend that streamed video productions be captured during one performance, with the possibility of using multiple camera angles edited together, but again, all recording must take place at the same performance. This will mimic a live performance for audience members and licensors, giving regional theaters more potential patrons to reach, whether it be because they are not comfortable attending live events yet, or just the ability to see theater from cities they cannot travel to, while also securing the rights of the authors and licensors as would be during a live performances-only production.

The licensing agreements that require prior permission to alter content make perfect sense: the point of copyrights is to provide protection to the creators of these works. They put the time and effort into creating a story, often from scratch, which is an impressive feat on its own, and these creators should be applauded and rewarded for their work. But on the other side, theater companies putting on these works know their market, so if they know what will interest audience members and get them into the theater to see the show, why shouldn't they be allowed to make some changes without the owner's permission? To incorporate both viewpoints, I propose that licensing agreements be altered to allow for minor changes in amateur productions (such as high schools and community theaters) when it may be needed to fit the theater. For example, a local children's theater putting on a production of *Pippin* should be allowed to change the line "That's not a duck, dumbass!" (Stephen Schwartz, Roger O. Hirson 57) given by a

six-year-old to a line without the word “dumbass”. Many audience members might feel uncomfortable seeing a six-year-old swear on stage, even if the word in question is a mild swear, and changing the word to “dummy” or something similar does not affect the play and is an inconsequential change. Under this proposed licensing agreement change, theaters would still not be able to make large plot changes like changing characters from male to female without permission as Playhouse in the Square tried to do. This would also not allow non-amateur productions to make any changes on their own, they need to follow the same rules as they always have, requesting and being granted prior permission from the author. The argument against allowing small and inconsequential changes is the idea of moral rights from Copyright Law established during the Berne Convention, specifically the Right of Integrity. The Right of Integrity gives the author the ability to “object to any changes to their work that may harm their reputation as an author” (“Moral Rights in U.S. Copyright Law”). An understandable protection granted by the U.S. Copyright Office, but this clause is not applicable to changes of the proposed nature, because these changes would have to be so minute and ineffective that any changes that caused harm to reputation would not be allowed as was true in the past. This would allow creators and owners to keep the protective hold on their works that they deserve to, but also give a little more freedom to theaters to make minor changes that will help them sell tickets and have a more successful production.

Direct-to-Consumer Theater

History

Before we get into the industry's shift to virtual theater productions during COVID-19, it is important to understand where the idea from streaming live productions direct to consumers came from, as the idea of streaming content is still a new one. The first streaming company, Netflix, was founded in 1997 but did not start offering a streaming service until 2007. Even though consumers were able to stream movies and television shows through the internet starting in 2007, it wasn't until 2013, with the premiere of *House of Cards* and Netflix's other original programming, that the practice of streaming exploded (Hosch). Netflix was soon followed by Hulu, which launched the following year, and the success of the two streaming services coupled with the growth of YouTube led other media organizations to jump onto the boat. Now consumers have tens of services to choose from, with seven main streaming services (Netflix, Hulu, Disney+, HBO Max, Peacock, Amazon Prime Video, and Paramount) emerging as the frontrunners and most popular services (Lamare).

Over the past few years, and especially over the coronavirus pandemic, streaming has grown exponentially. And streaming doesn't just mean traditional streaming services - like Netflix, Disney+, Apple TV+, and more — it also refers to video premieres on YouTube, content livestreamed through services like Twitch or Zoom, and other online content distributed over the internet directly to the consumer. This has allowed the theater industry to reach new audience members in new ways, especially with the COVID-19 pandemic shuttering theaters for almost two years. But pre-pandemic, recorded theater was not as common or considered as an option.

Most people think about seeing theater as seeing a live production—going into a theater or performing arts space, getting a ticket, sitting down, and watching a live performance. That could mean a play, musical, staged reading, dance production, concert, or something else, the

core is still there — physically being in a space and watching performers on a stage in front of the audience. Initially, the alternative to seeing a production live was a movie adaptation, popularized during the late 1950s, such as *West Side Story* (United Artists, 1961) and *Singin' in the Rain* (Metro-Goldwyn-Mayer, 1952). It wasn't until *New York Playhouse* premiered on PBS on October 7, 1972, with taped productions of *Antigone* and *The Rimers of Eldritch* that staged productions became available to viewers beyond audience members sitting in the theater (O'Connor 87). In the years that followed, PBS received large grants from the Exxon Corporation to provide twenty-five or so regional theater productions, dance, and music evenings as part of the newly named *Great Performances* program on the television station to continue what started and make the performing arts more widely available to the public (Brown 49). These programs have continued to the present-day. Currently, *Great Performances* has expanded their episode lineups both in number, with some years having thirty programs, and in kind, now offering operas, television adaptations of play, documentaries, and concert events. But with time comes new demand and modern technology allowing for taped live productions to reach audience members in a modern way. The three most common ways now are proshots, live streams, and a mix of the two.

The theater industry accepting and transitioning to using virtual and online spaces has been long and slow. Ken Davenport, a Tony Award winning producer, has said repeatedly that theater “is famously about 10 years behind every other industry out there... it takes us a little bit longer to respond to technology” (Petrilla). Regional theaters and individual productions would consistently use video services as promotional tools, posting show clips and advertisements to YouTube and other social media sites, but not ever go beyond using these sites as a marketing

tool to convince people to purchase tickets. Even when Broadway productions were recorded and released, it was not until recently that they were released on anything besides on television, in movie theaters, and on video and on demand. In October 1998, a recorded version of the London production of *Cats* went direct-to-video in the UK and the US, with it premiering on PBS in the U.S. early in November of the same year. *Rent: Filmed Live on Broadway*, a live recording of the final performance of the original Broadway production, had a limited one-week theatrical release in the US before its release on DVD and Blu Ray in 2008. It wasn't until *Disney's Newsies: The Broadway Musical* that shows started to be released primarily digitally. That production was filmed live on stage and given a three-day theatrical release before it was made available digitally and on demand, and later in the same year released on Netflix until it switched to Disney+ when the latter service was released. This system of release proved to be a success for Disney. Coupled with the pandemic forcing both live theater and movie theaters to be shuttered, there began a major shift towards releasing professional content digitally and on streaming services directly, bypassing traditional distribution.

Hamilton & Come from Away

The two most successful productions to go straight to streaming both occurred during the coronavirus pandemic. The mega-hit musical *Hamilton: An American Musical* premiered on Disney+ on July 4, 2020, with no theatrical or DVD release prior and after it had been filmed back in 2016 (Chow). The original plan was to give *Hamilton* a theatrical release in 2021, but the pandemic changed those plans and forced Disney to go direct to streaming or wait and see, and it

elected to go with the former. The other musical hit of the year was *Come from Away* on AppleTV+. *Come from Away*'s path to streaming was a little different, with the tech giant announcing a September 10, 2021 streaming release in honor of the 20th anniversary of the Twin Tower attacks after a May 2021 filming. But compared to *Hamilton*, because *Come from Away* was planned and filmed during the pandemic, the intention was always a streaming release to get the production to audience members watching from their homes.

Issues Exposed During Pandemic

Not every theater or production has the resources to do what *Hamilton* and *Come from Away* did during the pandemic. Regional theaters had to find a different approach to get productions to potential audience members, as well as have enough of a cash flow to sustain them through the duration of the pandemic before theaters could start having in-person performances again. Classic Stage Company in NYC offered its "Classic Conversations," a series of discussions with industry professionals, online for free to keep supporters engaged, as well as held a virtual concert of *Assassins*, the next show in its season before they had to shut down, to drum up donations and excitement for when theater came back. Other theaters like Commonwealth Shakespeare Company (CommShakes) in Boston did zoom productions of its planned shows. CommShakes in normal years does a production of a Shakespeare play on the Boston Common for free with donations appreciated. What CommShakes elected to do instead when the show was canceled was to postpone their official production of *The Tempest* from summer of 2020 to summer of 2021, but also put up an online, prerecorded, script in hand

production of that same show, with actors performing from their homes with scripts (“The Tempest Online Script-in-Hand Performance”). Many theaters did other similar yet unique things; Lyric Stage Company of Boston produced “Walking Plays,” which were essentially audio plays instead of putting on zoom productions to keep audiences involved and subscribers engaged. Productions like these were able to retain audience members over the 18 months the theaters were shut down and provide a reasonably steady cash flow for theaters.

As shows begin to start again, theaters are figuring out how much of productions they want to go back to being in person, or if virtual services like streaming performances with a ticket purchase should be part of their model going forward.

Where Do We Go from Here

One of the most common forms of virtual theater we are seeing now as live performances start up again is the use of digital streaming tickets. A theater will put on a live production, as they always have, but also record a performance for at-home viewing. Barrington Stage Company had Tony Award winner Aaron Tveit in concert in August of 2021. The concert sold out very quickly, and because of this, Barrington Stage elected to film the concert live and later make it available to “stream an unlimited amount of times on your personal BSC account” (“Aaron Tveit LIVE! Virtual Concert”). With the purchase of a ticket for the virtual concert, an audience member would be able to watch the video as many times as they wanted between September 9–12, 2021, the dates set by Barrington Stage Company for viewing. Other theaters are doing variations on this strategy. Speakeasy Stage Company in Boston closed its first

post-pandemic production, *The Sound Inside* by Adam Rapp, in October 2021. To accompany these live performances, Speakeasy offered an option for patrons to “exchange their tickets into a specially recorded version” if they were still uncomfortable attending in-person events, as well as offering tickets for the “digital version” (“The Sound Inside”). Options like these are becoming increasingly popular amongst regional theaters for a few reasons. One, it is fairly easy to add a virtual component when acquiring a license to put on a production, especially since that additional fee is added to the total royalties an author is going to receive. And two, it allows theaters to reach audience members who may still feel uncomfortable attending live performances, or those who may have moved or not be able to travel to see a production in person, making the added cost to acquire video rights worth it monetarily.

While virtual versions of performances being available are becoming more popular now, they did exist before the pandemic. The Tin Can Bros, a comedy trio based out of Los Angeles, and Team Starkid, a theater company founded at University of Michigan, have been using digital tickets for most of their productions the past several years. In the 2016 production of the new musical *Spies Are Forever*, the Tin Can Bros offered digital tickets to patrons at a discounted cost. These digital tickets were a one camera, recorded live performance that was sent out to ticket holders to view at their convenience within a specified amount of time. The Tin Can Bros use digital tickets for all of their live productions as a way to reach more potential audience members from across the country and around the globe. And many other theater companies are starting to see the benefits of offering some form of digital ticket, whether it be live or at a later date.

Broadway is not a stranger to streaming live performances, although it has only occurred once so far. Roundabout Theater's revival of the musical *She Loves Me* in 2016 made history when it was the first Broadway performance live streamed in June of 2016 on streaming service Broadway HD. This live-streamed event proved to be a success, with the recording later being aired on PBS, similar to how the 1998 recording of *Cats* was. Despite this, the industry turned to previously used methods of recording and distributing plays and musicals, mainly due to the upfront costs of mounting a recording (Vincentelli). Broadway has not embraced live streaming and digital tickets in the way regional theaters have and many had hoped it would.

Copyright laws are already in place to license rights for video recordings of performances, with several options already available to licensees at the moment. These options provide adequate royalties to the creators of the work - while giving theaters more ways to get their productions up and out to potential audiences. I recommend that these options still be available, with the exception being that streamed performances are only available during a specified set of dates, similar to how performances rights stipulate performances are done during a predetermined set of dates. I also recommend that streamed video productions be captured during one performance, with the possibility of using multiple camera angles edited together, but again, all recording must take place at the same performance. This will mimic a live performance for audience members and licensors, giving regional theaters more potential patrons to reach, whether it be because they are not comfortable attending live events yet, or just the ability to see theater from cities they cannot travel to, while also securing the rights of the authors and licensors as would be during a live performances-only production.

Disclaimer

These advancements within the theater industry are promising, but there are a few dangers that come attached to the new options available. For one, with a new agreement being a more permanent one, there is a risk that SAG-AFTRA and AEA would not be able to come to an agreement in a timely manner, putting the middle ground between film and theater into limbo while waiting for a compromise between the two unions. The purpose of each labor union is to represent their members, and with the danger of the other encroaching on their territory, it becomes more likely that each union will become more protective of their established and presumed territory to the point of causing a stalemate in negotiations. This would, at a minimum, provide uncertainty for the unions' members, and at its worst, resort to strikes on either side. Both would prove bad for the entertainment industry, causing instability across both film and theater. While both unions working for their members is an important thing, without clear intentions and a commitment from the two to reach a new and permanent agreement in a timely manner, the risk of not reaching said agreement must remain in the back of members' minds to ensure that they keep their representatives in the negotiations.

During the pandemic, most parties involved acted on the assumption that the steps taken were temporary and adopted just to get the industry through the duration of the pandemic. This attitude towards agreements made may cause parties to act selfishly when discussing more permanent options moving forward. Many of the decisions made in the industry are made by the people with the most power and money, which puts others further down the chain at the mercy of

those in charge. There is a risk, while unlikely due to the unions having to sign off and the possible uproar on social media regarding any unfair decisions, that these decision-makers will take the opportunity to make calls that allow them to take advantage of those without a say in the process. Coupled with this issue, there is always a chance that any decisions, no matter how well-intentioned they may be, will be consumed by the market as time goes on and theater picks up again. Theaters are opening and operating under mostly the same circumstances as they were when live performances were shut down in March of 2020, but after about eighteen months of having to adapt and make due, many actors, crew members, and patrons have become accustomed to the way theater was done during the pandemic, and are at least expecting some version of theater that takes from both pre-pandemic times and the innovations made during those eighteen months away. There are two main possible circumstances that may arise: the industry rejects changes and evolves back almost completely to how theaters operated pre-pandemic, or the industry swings so far in the other direction that the allure of live theater is lost, and many patrons choose to consume the media virtually. These are both unlikely as they are the extreme options, but it is most likely that the industry will settle somewhere in the middle after some time of stumbling back to more normal operations. The most likely scenario, if it came to changes that were ignored, is that as the industry takes the time and tries to figure out what it wants to be in the future, larger organizations will swoop in for their benefit and dictate the future for the theater industry.

Conclusion

With the pandemic still going on, but live, and particularly theater, events going back to a state of semi-normal, the near future is a bit unsure for several aspects in the theater industry. There was evolution during the eighteen months of theaters being dark around how theaters want to get their content to audience members. Measures were put in place to allow regional theaters to continue to make art, and emergency agreements were authorized to keep the theater industry alive while live events were not allowed to take place. But as the pandemic, or at least the previously agreed upon pandemic period, comes to a close, new measures need to be discussed, and the emergency agreements be made permanent. Productions are already offering new modes of viewing their shows, but they are still new opportunities and not used widespread yet. It will first take the industry some time to recover from having been dark for almost eighteen months, followed by a state of flux as it decides what it wants to be going forward, leaving those involved in a sort of limbo for the time being. Many of the changes instituted during the pandemic will be left behind as the industry moves forward, but there are several innovations and implemented adaptations that better the theater community. These changes, like the SAG-AFTRA and AEA pandemic agreement and new streaming options for productions, help push theater into the future and towards a stronger industry overall. It will take effort from all members of the theater—union leaders, actors, crew members, front-of-house staff, administration, writers, and even the audience—to grow into a new, and better, version of the theater industry. The question now becomes what else we can do to reach that goal.

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