

BRICK BY BRICK: BUILDING SOCIAL CAPITAL THROUGH
ARTIST AGREEMENTS IN COMMUNITY THEATER

Naomi Anne Davidoff

Major paper submitted to the faculty of Goucher College in partial
Fulfillment of the requirements for the degree of
Master of Arts in Arts Administration

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ABSTRACT

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This paper highlights the importance of creating effective written agreements between authors, composers, lyricists, and nonprofit community theaters. Nonprofit community theaters, by assuming responsibility to produce agreements that benefit and protect both the artist and the arts organization, create relationships that strengthen social capital, supporting strong communities

and a development of the local creative economy. By addressing specific agreement protections for both the artist and the organization, community theaters can further their mission, establish trust, and avoid legal risk. Nonprofit community theaters can better serve their artists by reducing barriers for agreement negotiations through encouraging legal education, navigating power dynamics, and engaging in active listening. This paper cites research on social capital, copyright law, employed contracts in nonprofit and commercial settings, and creative economic development. The paper concludes with recommendations for nonprofit community theaters when engaging authors, composers, and lyricists in the creation of an original work.

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PREFACE

As a costume designer, arts educator, and arts administrator, I sit in a unique position between artist, arts educator, and management within the performing arts. My passion for building community within the field of the performing arts has allowed me to thoughtfully consider contract development from the perspective of both the artist and the producer.

This paper will focus on select elements of contracts. It does not cover all clauses to be considered, nor is it intended to be an all-encompassing legal resource. Agreements and legal arrangements should be carefully considered on a case-by-case basis depending on the needs of the parties. Community theaters and authors alike are encouraged to seek legal counsel when creating and negotiating contracts with one another.

This paper was an opportunity for me to explore how to best improve communications between artists and arts organizations, in order to benefit the creative community to the fullest extent. Social networks hold power in themselves, and learning how to harness and retain them is the most important step towards creating a culture of sustainability and growth within the arts community.

This paper is dedicated to my parents,
Penelope Anne Miller, Esq., and Ronald Stuart Davidoff, MFA,
to whom I owe my interest and passion for both law and the arts.

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This paper would not be possible without the support of my family, friends, and especially my partner, Aran. I have endless gratitude to those who have stuck by me through the long days and even later nights during the years studying in this program.

Lastly, I would like to acknowledge my local theater community, the Baltimore Rock Opera Society, for inspiring me to follow a career in the performing arts and arts administration, for giving me a supportive testing ground to take risks, accomplish the seeming impossible, and collaborate with the most inspiring artists I know.

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Introduction

The relationship between artists and arts organizations should resemble that of a symbiotic organism. Both groups have individual needs that must counterbalance and support each other. Arts organizations must work to fulfill their mission as they seamlessly implement programs and monitor their community impact, financial sustainability, and social responsibilities. Arts organizations have a public responsibility and must sustain a balance between fulfilling the needs of the nonprofit, the community, and the artists while engaging in creative collaborations.

Community theaters would not exist without the creators of their shows. Creatives need support for their work, including the opportunity, audiences, resources, and benefit from the social networks that grow from nonprofit theaters. These opportunities that arts organizations provide can help artists grow professionally and, ideally, should lead to sustainable relationships built on the foundation of mutual trust. This is especially important for artists who consider themselves self-employed, as the collaborating organizations may contribute significantly to artists' income and livelihood. In a recent National Endowment for the Arts report titled "Creative Placemaking", economists Ann Markusen and Anne Gadwa observe that, "Compared to the workforce as a whole, artists are more than five times as likely to be self-employed (45% self-employment vs. 8%

of workers overall, as of 2002), and they often create jobs for others" (Markusen and Gadwa 9). In 2017, Indiana University completed a study funded by the National Endowment for the Arts, which reported that the percentage of self-employed artists has steadily increased since 2002 (Woronkowicz and Noonan). A growing artist workforce calls for a closer look at how arts organizations can effectively engage in contracts with artists to build positive and lasting relationships while addressing the components needed to diminish legal risk when embarking on new projects.

Without union or legal representation, many artists, especially emerging artists, are not comfortable in their ability to communicate their needs effectively with arts organizations. It can be challenging for both parties to negotiate productively with one another while retaining a positive and mutually beneficial relationship (Holofcener). By developing a proactive approach to address both the organization's and artist's needs, artistic agreements can benefit both the individual and the community, advance the organization's mission, and produce a more enjoyable collaborative environment. This mutually beneficial relationship between artists and the organizations is critical to creating powerful artwork.

Nonprofit community theaters, by assuming responsibility to produce agreements that benefit and protect both the artist and the arts organization, create relationships that strengthen social capital, supporting strong communities and a development of the local creative economy. This can be achieved through agreements that build trust and promote clear lines of communication, while creating new opportunities for the artists and the organizations.

This paper will present legal considerations for small to mid-size nonprofit community theater companies. The scenarios outlined may relate to theater companies where the author or composer might be paid, but the actors are volunteer. This paper may be particularly useful for community theaters whose members would consider themselves emerging, mid-career, or established professionals, but are not represented by a local union. The American Society of Composers and Publishers (ASCAP) defines community theater productions in their Community Theatre License Agreement as:

... amateur theatrical productions limited to productions (a) presented by LICENSEE, which is an entity eligible to be exempt from Federal Taxation under 26 U.S.C §501(c) or is part of a U.S. military base located in the United States or United States territories; (b) that do not utilize performers that are members of Actors' Equity Association ("AEA") other than non-regular AEA guest performers; (c) at which food and beverages are not sold or provided other than light refreshments sold or provided (i) at counters and not through wait service, and (ii) outside of the actual performance time; (d) at which merchandise is not sold other than souvenirs related to the performance; and (e) that utilize seating through box office or ticket sales. ("ASCAP Community Theatre License Agreement")

The terminology above will be the basis of how community theater will be defined in this paper. Although the scope of creating a musical theater production

will include designers, performers, and musicians, this paper will focus only on agreements with authors, composers, and lyricists. These agreements precede additional artist agreements and are at the core of the creation of an original musical work.

This paper draws upon agreement examples from a community-based theater company, Cornerstone Theater Company. The cited mission-driven agreement guidelines are shared as an example for other nonprofit community theaters to follow, as they incorporate mutually beneficial terms while drafting agreements with creatives. This concept may be useful for both community-based theaters like Cornerstone and non-community-based theater companies that wish to utilize agreements as a tool to build relationships and further their mission while mitigating legal risk. Building strong relationships helps create community and economic development opportunities through the growth of social capital.

Chapter I SOCIAL CAPITAL

Four Definitions

Social capital has been historically defined by four perspectives: Bourdieu (1986), Coleman (1988), the World Bank (2011), and Putnam (1993, 2000) (Folland and Rocco). Social capital has been linked to both social and economic benefits, to the individual and to society at large. By understanding the concepts and implications behind the theory of social capital, nonprofit community theaters can gain perspective on how mutually beneficial written agreements may build positive relationships and social capital in the community.

In *The Economics of Social Capital and Health*, Sherman Folland and Lorenzo Rocco explore the importance of social capital as it relates to the health of a community and the individuals in those communities. This definition is explored by the French sociologist, Pierre Bourdieu, who argues that the way the individual takes advantage of the social opportunities is determined by his or her environment and the social connections available to them (Folland and Rocco). Bourdieu defined social capital as:

... the aggregate of the actual or potential resources which are linked to possessions of a durable network of more or less institutionalized relationships of mutual acquaintance and recognition — or in other words to membership of a group — which

provides each of its members with the backing of the collectivity-owned capital, a credential which entitles them to credit, in the various senses of the word. (qtd. in Folland and Rocco)

In simplified terms, Bourdieu defines social capital as the resources linked to social relationships of community groups, which are backed by the organizations or institutions. Folland and Rocco put it this way: "Bourdieu connects these ideas on social capital with ideas on class and social inequality, describing how an individual's ability to mobilize networks and social relationships determines the amount of his or her social capital" (Folland and Rocco). In a society based on socio-economic systems, the power of these social connections determines the worth of their social capital, and all individuals are not created equal.

In turn, James S. Coleman argues that groups who hold a certain level of trust and trustworthiness can accomplish significantly more than those who do not hold such trust. "Social capital is defined by its function," Coleman writes. "It is not a single entity, but a variety of different entities, having two characteristics in common: They all consist of some aspect of a social structure, and they facilitate certain actions of individuals who are within the structure" (qtd. in Folland and Rocco). Folland and Rocco assist our understanding of social capital by comparing the writing of Coleman and Bourdieu. Folland and Rocco observe, "Coleman's work represents a shift in thinking from Bourdieu's ideas on individual-based outcomes to a more society-based approach that focuses on groups, organizations, and institutions." Similarly, this comparison resembles the

World Bank's definition of social capital, which highlights the importance of the institution's effect on shaping social interactions and networks. Here is what the World Bank has to say: "Social capital refers to the institutions, relationships, and norms that shape the quality and quantity of a society's social interactions. ... Social capital is not just the sum of the institutions which underpin a society; it is the glue that holds them together" (qtd. in Folland and Rocco).

One of the most well-known theories behind social capital is provided by Robert D. Putnam in his groundbreaking book, *Bowling Alone: The Collapse and Revival of American Community*. The book focuses on the social and political habits of Americans since 1950 and concludes that healthy neighborhoods, a strong economy, personal happiness, and even a functional democracy depend on social capital. Putnam's definition of social capital is as follows: "While physical capital refers to physical objects and human capital refers to properties of individuals, social capital refers to connections among individuals — social networks and the norms of reciprocity and trustworthiness that arise from them" (Putnam 19). Trustworthiness is a key factor in developing successful relationships and accomplishing economic goals. Borrup supports this point, arguing that the vast majority of economists and sociologists support the idea that the growth of strong social capital directly relates to success in economic development (Borrupt 73). Although varying definitions have been put forth by other scholars, the work presented here is underpinned by Robert Putnam's theory of social capital.

Putnam also emphasizes the role of civic organizations in strengthening social capital, especially in volunteer run organizations, such as community theaters. François assists our understanding by defining volunteer organizations as, "... comprising individuals sharing common interests, inculcate values, such as concern for others and desire to share, that generate broader benefits for society at large" (François). In *Social Capital: A Theory of Social Structure and Action* by Non Lin, the author reinforces Putnam's theory, demonstrating that successfully leveraging social networks is integral to both individuals and groups in obtaining their objectives. This may be easier said than done, as this does rely on the good will and underlying intentions of others. "Thus," Lin warns, "norms, trust, sanctions, authority, and other structural features become important in sustaining social capital" (Lin 21–25).

Putnam describes the internal and external methods of social interactions as "bonding and bridging". "Bonding" relates to strengthening relationships, while "bridging" is defined by the process in which these relationships extend outwards to the greater society to share information. For example:

As Putnam observed, some social groups engage and reinforce the identities of like people, such as church groups and ethnic fraternities. These inward-looking groups are bonding groups. In contrast, bridging groups are those whose members reach out beyond themselves in order to link to assets outside the group and encourage the diffusion of information. (Folland and Rocco)

Folland and Rocco support Putnam's portrayal above, illustrating that, "Urban economists and planners naturally seek public projects that encourage residents to interact beneficially" (Folland and Rocco). Folland and Rocco also demonstrate that arts endeavors enable the building of these social networks, rather than the networks springing up on their own. "Social capital," they write, "... which might best be measured as one's network of personal bonds, is not constituted of the public projects themselves but is enabled by them" (Folland and Rocco).

All the theories above help support the idea that building social networks through an original collaboration supports the growth of strong creative communities. Nonprofit community theaters, by creating mutually beneficial agreements with authors, composers, and lyricists, build new opportunities, social networks, and social capital through trust and positive relationships with one another.

Establishing Trust

Some may argue that artists do not need written agreements to strengthen social capital, and that the creation of the artwork does this organically. Although the physical creation of artwork does support relationship building and the growth of social networks, participants should not overlook the benefits of establishing trust through strong lines of communication. As participants interact with one another, values, goals, and biases are innately observed and reacted to (Vukotich). Written agreements can be used as a tool to build understanding

between groups. In *Breaking the Chains of Culture: Building Trust in Individuals, Teams, and Organizations*, George Vukotich states:

The key is to act with everyone's best interest in mind. Otherwise, people begin to see us as untrustworthy and they become guarded in their interactions with us. This results in lower effectiveness, lower productivity, less job satisfaction, and less satisfaction with the people we work with, not to mention less personal and organizational success. We don't grow and the culture of mistrust builds. We need to consistently seek to create a solution that benefits everyone, and doesn't just protect us. (Vukotich)

Written agreements reinforce positive communication and trust by outlining the underlying priorities of the project with those involved. Lin observes that building trust and understanding between groups is essential to acknowledging that each participant carries its own motivations and, thus, poses a potential risk to the other party (Lin). The process of negotiating and outlining terms on paper can improve relationships between artists and staff members of organizations. Lin quotes the sociologist Georg Simmel in reflecting upon trust among individuals, and notes that, "... very few relationships would endure if trust were not as strong as, or stronger than, rational proof or personal observation" (qtd in. Lin 148) Here we see that this trust must be established not only through social exchanges, but through written agreements. "The functioning of complex societies depends on a multitude (*sic*) of promises, contracts, and arrangements" (Lin 148).

The trust that builds in response to these written agreements has an additional and massive benefit of mitigating legal risk. Writing a contract can bolster person-to-person trust by outlining legal protections for the parties. Adam Holofcener, Esq., Executive Director of Maryland Volunteer Lawyers for the Arts, highlights the importance of creating contracts where there are none:

Creating contracts is helpful for all artists because it demands they prioritize their communications with other members of the art community, so communication is just as important as art making. If you don't prioritize communicating with collaborators, arts organization, patrons, [and] supporters, you are not going to have a productive experience with any of those groups. Contracts are a way to make sure these communications have the same legal effect as the human effect you are trying to have. (Holofcener)

By understanding the components and types of contracts, artists and organizations can work to build trust, improve communications, and outline expectations before the creation of artwork begins.

Chapter II AGREEMENTS

A contract is defined as, “... a legally enforceable agreement or understanding reached between two or more parties about one or more subjects of interest to them” (Norwick et al. 69). A binding contract can be as simple as an exchange of letters, which can come before a formal agreement (Norwick et al. 73). However, a simple exchange of letters may not address the implied terms or underlying risks to both the artist and arts organizations. Complete agreements that address a series of scenarios can solve these issues and provide clarity to all parties involved.

In the case of for-profit theaters, unions provide a clear avenue for negotiating and protecting the artist and the company. Nonprofit community theater companies have the same needs as for-profit theaters to negotiate terms such as licensing, exclusive rights, royalties, performance details, and publicity with the contributing parties. However, many small community theaters do not have the resources to communicate their needs effectively with artists they are commissioning or licensing. Thus, these organizations may face unprecedented challenges when drafting agreements with artists.

When embarking on the creation of an original work, community theaters will want to consider adopting a series of agreements. Notably, these include collaboration agreements among artists, a commission agreement with a

community theater organization, production agreements, and licensing agreements. Nonprofit community theaters may want to consider researching and implementing additional agreements when working with musicians such as recording agreements and publishing agreements. It is advisable for a community theater to work with a lawyer to address all of their contractual needs.

Many of the agreement examples outlined in this paper contain clauses that may surface across a number of agreements. Therefore, it is important to understand each agreement's individual makeup and how to create an agreement that best suits the organization and the artist's needs. By understanding the nature of each agreement, arts organizations can use these document formats as a tool for improving communication and trust between the organization and collaborating parties. The benefit of this is not only in stability of the organization, but satisfaction of the artist's needs as well.

Verbal Agreements

Agreements can be verbal or written. Although verbal agreements are often used in the short-term, agreements in writing will protect both the artist and the arts organization in the long-term. Norwick observes, "Contracts are often stated in writing, but many valid and enforceable contracts are not. In fact, many contracts are not even expressed orally; they are simply understood or implied by the conduct of the parties or the established customs of their business" (Norwick et al. 69). Accountability can be an issue in verbal agreements, and there is a higher chance for breach of contract or the contract being unfulfilled. In addition,

not every understanding is regarded as a binding contract (Norwick et al. 70). Each party may interpret the agreement differently, especially if there is no tangible record of the agreement. Holofcener notes, “Most people have issues with each other because they don’t communicate well. They don’t prioritize communicating. Nobody remembers what they said or meant, and things can mean a lot of different things” (Holofcener). The purpose of any written agreement is to establish the intent of all parties before the creation of work begins. In *Stage Writer’s Handbook*, author Dana Singer highlights the importance of written contracts:

Contracts clarify your previous conversations. Since language is not precise, it is not uncommon for two people to end a conversation with different perspectives on what was resolved; this is often true where they don’t know each other well, when each is trying to impress the other, and when the talk is in broad strokes, not focused on details. Each party comes to the relationship with different expectations (and possibly even misconceptions) based on past experience, what friends and colleagues have said of their experience, myths, and so forth. Without the shared language of a contract, misunderstanding is almost inevitable. (Singer 146)

Verbal language is often a barrier to positive communication between groups. Even without the added complexity of understanding legal vocabulary, the inflections of speech, the omission of language, and the tone of voice can alter the perception of intent with verbal agreements. Remaining silent and not

participating in reviewing contracts can cause confusion as well. Singer writes, “While you may not raise an issue because you didn’t want to ‘rock the boat’ just when everything was coming together, your silence could easily be (mis)read as approval or assent, and that, too, could cause problems later on” (Singer 147). The language between two groups must be formalized in writing to achieve mutual understanding and to develop trust.

Collaboration Agreements

Artists often view written agreements between each other as unnecessary. Why should a group of long-time friends or collaborators feel the need to engage in a written contract? Collaboration agreements are important to outline the intent of the artists working together, before any work takes place.

Collaboration agreement terms may include: copyright, voting mechanism, deadlocks, merger, representatives, removal of a collaborator, addition of a collaborator, division of royalties, small/grand rights, credits, and sale of interest (Grippo 81–83; “Collaboration Agreement”). These agreements can save time, headaches, money, and legal issues down the road. Without this initial understanding between the artists themselves, conditions surrounding the completed work could be misinterpreted by each party, leading to further complications.

Additionally, collaborators will want to create a separate agreement to cancel the collaboration before the work has been produced. Collaborators may want to explicitly acknowledge that their works are separate and not intended to

be a joint work if they wish to retain the individual rights as the sole creator (“Collaboration Agreement”). This may include provisions related to a merger. Once the elements are merged, elements may not be removed or used separately (“Collaboration Agreement”). In the absence of a written agreement, once the separate elements have been merged to a unified work which has been publicly performed or distributed, the unified work cannot later be dissolved, even if the collaborators are no longer on good terms (Grippo 91). This is due to the copyright standard of joint works, when the individual elements of the work are intended to be combined to a whole (Title 17 §101, 4).

A separate termination agreement provides a written record of terms and conditions for canceling the collaboration, and outlines each party’s rights to the work that is not produced or performed (Grippo 91). It outlines that each individual will not have the rights to elements which were not created by them, and that they may exploit only the work that they have created (“Agreement Canceling Collaboration”). It is important to have this agreement in writing so that if conflict were to arise, the agreement canceling the collaboration could prove each party’s intentions in court. This mutual, written understanding between artists is necessary prior to engaging with an arts organization in producing a new, original work.

Commission Agreements

Commission agreements outline the parameters of the relationship between the organization and the author or collaborators in the creation of a

work. Commission agreements are essential when there is an exchange of money for a completed work, and are important in outlining the time frame for the project, revisions, and payments to the contributors. In this type of agreement, the organization may negotiate terms for providing input on the creation of the new piece (Grippo 55). Agreement terms may include: commission fee, research and travel fees, deadlines, number of drafts, copyright, playwright's independent contractor status, commission formulas, abandonment, producer exercises his option, underlying rights, producer's rights, subsidiary rights, and artistic control (Grippo 56–58). The organization may want to consider drafting additional agreements with composers and musicians if the work is to be distributed or recorded following the premier of the show.

Production Agreements

Production agreements outline terms that pertain to producing the show. This can include, but is not limited to: the number of performances, duration, grant of rights, option period, option payment, timing of payment, recuperability, author's rights such as copyright ownership, right to attend rehearsals, script approvals, artistic approvals, royalties, billing credits, ownership and control (including physical elements), subsidiary rights, assignment, arbitration, and payment schedule (Singer; Richard). The production agreement is essential in outlining terms for the author to maintain specified artistic rights during a production period, and allowing authors to outline their needs, subject to negotiation. Production agreements may acknowledge contributions by other

production personnel such as the director, choreographer, designers, stage managers, actors, and partners (Richard).

It is recommended that organizations create two separate agreements for the commission and for the production terms, although it would be desirable to negotiate each agreement simultaneously between the playwright and producer (Grippo 55). Grippo encourages this separation, writing, “In order to maintain clarity and the most efficient documentation of the understanding between the parties, two separate instruments are best” (Grippo 55). The purpose of this is to provide clear expectations for each agreement.

Option Agreements

Presenters or authors may wish to negotiate re-mounting the work again, especially if the first production was successful. “This might take the form of extending the run of the first production with no hiatus, but such an extension is usually incorporated into the basic grant of rights” (Singer 182). This may also take the form of adapting the underlying work for a future production (“Commission Agreement”). To prepare for this scenario, the parties may want to consider the creation of an option agreement while negotiating terms for the production agreement. Grippo cautions, “Leaving the production option open to negotiation until after the play has been written and accepted invites uncertainty, misunderstandings, and, possibly, a collapse of the relationship” (Grippo 55). Thus, the arts organization should acknowledge and address the opportunity for re-mounting the work, before the premier, to avoid potential conflict.

Licensing Agreements

Licensing agreements are used when an organization would like to acquire the rights to present a play or to use music that has already been created. The play may have debuted elsewhere, or it may be brand new. Grippo defines this as, “Under a simple license, the theater is merely acquiring a one time, limited right to present the play at a date certain, upon easily negotiated royalties. The level of production is not such that the theater would be entitled to ask for or receive any ancillary or subsidiary rights in the play” (Grippo 49). A production license may include terms such as producer representations, the grant of rights, the royalty formula, script changes, author’s rights, and archival recordings (Grippo 49-50).

When working with established composers, the organization may have to license through a Performing Rights Organization (PRO) such as American Society of Composers and Publishers (ASCAP), SESAC, or Broadcast Music Inc (BMI) if the musician’s work has been published prior to performance with the organization. Additionally, there are clearance agencies dedicated to authors such as Theatrical Rights Worldwide (TRW) that license musical theater works (“About”). Knowing what licenses apply to the individual creative elements may be important to be aware of depending on the nature of the completed work.

Many nonprofit community theaters work with volunteers, sometimes in the creation of original work. When an organization is working with volunteers, unless an agreement is in place, the copyright of the work belongs to the

volunteer as the creator. As the author holds the exclusive rights to perform, distribute, reproduce and prepare derivative works as stated in the Copyright Act, the work should be licensed to the theater in order for legal protections to be in place as the theater produces and exploits the work. This is true for each copyrightable individual element, such as the script, musical composition, and lyrics. Thus, a licensing agreement should be implemented for each.

Chapter III

PROTECTIONS FOR THE ARTIST AND THE ORGANIZATION

Artists Rights and Copyright Registration

Nonprofit community theaters can be entrepreneurial and earn income while fulfilling the community's needs, without infringing on their artists' rights. When drafting agreements, community theaters must be aware of the legal protections provided to artists under the Copyright Act, along with copyright registration. When working with authors, composers, and lyricists, before the stage of entering into an agreement, it must be recognized that each individual owns the rights to his or her work. Agreements must first and foremost outline the distribution of rights in a creative project.

Whitney Levandusky, Attorney-Advisor in Public Information and Education at the US Copyright Office at the Library of Congress, highlights the fundamental implication of copyright law, in that, "Copyright protection exists the moment a work is created" (Levandusky). As outlined in the United States Copyright Act, the fundamental rights that belong to the copyright holder include the right to reproduce the work, to prepare derivative works, to distribute the work, to perform the work publicly, to display the work publicly, and to transmit the work digitally (Title 17 §101, 17). The artist owns the copyright and is in control of how the work is handled.

As soon as ideas are expressed in writing or in a recording, the work is “fixed” and protected by copyright (Singer 3–4). In the Copyright Act, “A work is created when it is fixed in a copy or phonorecord for the first time; where a work is prepared over a period of time, the portion of it that has been fixed at any particular time constitutes the work as of that time, and where the work has been prepared in different versions, each version constitutes a separate work” (Title 17 §101, 3). For works created after 1978, copyright protection exists from the date of the creation of the work, plus the term of the author’s lifetime, plus 70 additional years (Title 17 §302, 133). For a joint work, the rules are slightly different. The U.S. Copyright Office states, “For a ‘joint work prepared by two or more authors who did not work for hire,’ the term lasts for 70 years after the last surviving author’s death” (Title 17 §302, 133). Finally, the work must be an original expression created by the author (Norwick et al. 6).

Arts organizations that encourage artists to register their work with the Copyright Office are ensuring the artist’s rights are protected, keeping the artist’s best interests in mind. Although the nonprofit community theater may work to realize its mission and goals with the creation of a new work, the collaborating artist should not forego her copyright protections at this expense. Rosenthal puts it this way, “Charitable nonprofit organizations are intended to serve a public purpose rather than provide a private benefit for individuals, corporations, industries, and others” (Rosenthal 7). A nonprofit community theater may want to consider giving back to its community’s artists by way of protecting the artist’s rights when producing a new work. Once the work is registered with the

Copyright Office, the artist's name cannot be taken off of the registration (Levandusky). For the author to maintain full protections against infringement during her lifetime, registration should happen before a premier.

Registering a script or composition with the Copyright Office is advantageous for the author in multiple ways. By registering the work with the United States Copyright Office within three months of the work's publication, the author can ensure that the play can be published, performed, and distributed safely without the risk of infringement by an unauthorized third party. If infringement were to occur over the author's lifetime, the author could file a lawsuit and collect statutory damages and attorneys' fees ("Copyright Basics" 5). Levandusky elaborates, "Not registering is not an impediment to (the copyright owner) independently performing the work on their own. Registration allows them more control over other people using it. They have the inherent right to engage in exclusive rights. Registration allows them to enforce those exclusive rights" (Levandusky). The timing of registration should be considered as well. The U.S. Copyright Office states that, "A certificate of registration creates certain legal presumptions if the work is registered before or within five years after the work was first published" ("Copyright Basics" 7).

Composers, lyricists, and playwrights can register the independent elements separately or under one registration as a complete work in the performing arts category of copyright registration (Levandusky). Levandusky states, "Registering together creates a clear public record so there is no ambiguity or potential for future conflict" (Levandusky). Registering the work with

the Copyright Office does not preclude the author from creating written agreements amongst her collaborators, which is still encouraged. Singer explains it this way, “Regardless of which method of filing the collaborators decide to adopt, it’s important that the collaboration agreement remains clear in stating how and in whose names the copyright registration has taken or will take place” (Singer 33). For example, joint authors may wish to register together, and written agreements afterwards may elaborate in more detail what the ownership means. Singer states:

Registration fulfills certain legal requirements to afford the work the complete protections of the copyright law. … By contrast, the collaboration agreement defines and explains the substantive relationship between collaborators and the parameters of that relationship; specifics about how to structure the collaboration and how in practical terms to make it work are embedded in the agreement. It is important, however, that both the copyright registration and the collaboration agreement exist. (Singer 32)

Additionally, the arts organization may register the work on behalf of the artist. “Anybody can submit the registration who is an authorized agent. Sometimes publishers in the literary field will do this. In the literary agreement, the publisher arranges the registration. The person completing it doesn’t have to be the author. They are merely filling out the paperwork” (Levandusky).

Not all authors or community theaters may be interested in copyrighting the finished work. However, community theaters that honor the practice of

encouraging copyright registration creates a professionalism and a precedent for the organization to provide support and legal protection to the parties involved. Maintaining this practice builds public trust when working with artists, and contributes to the charitable service to the public as a nonprofit institution serving the public's best interest. Authors are more likely to work with theaters that keep their best interests in mind. The community theater can benefit by attracting more collaborators for future productions. Additionally, by supporting the author in obtaining a copyright for her original play, nonprofit community theaters can provide a service that supports the artist beyond the life of the production run.

Collaboration and Co-Authorship

The topic of collaboration and co-authorship is important when addressing community-driven work, as community voices often shape the script development process. The success of communal expression relies on collaboration between individuals with creativity coming from the group (Cohen-Cruz 92).

There are many structures and motivations behind creating community theater, one example being a theater with a socially driven mission. Cornerstone Theater Company, a community-based theater in Los Angeles, works directly with local communities to share their stories and explore current issues in society. Its mission is to create, "... new plays with and about communities", with a vision that, "... access to a creative forum is essential to the wellness and health of every individual and community" ("About"). The theater company has been established for over 30 years, commissioning more than one hundred

playwrights. According to Cornerstone, its work has impacted, “tens of thousands of community members across the country, many experiencing theater for the first time” (“History”).

The company’s methodology of show development has evolved and changed depending on the communities they partner with and serve. The company engages with members of the community to learn about their experience, and hires a playwright to interpret their stories into a script (Donnelly). In the book, *Staging Social Justice: Collaborating to Create Activist Theatre*, authors Daniel-Raymond Nadon and Norma Bowles describe the importance of collecting community narratives:

Over the years, we have come to see that col-laborating (*sic*) with a diverse coalition of individuals and organizations is crucial as doing so helps us grapple with the complex issues involved in the projects we take on and navigate the institutional and attitudinal minefields we need to traverse in order to reach our target audiences. (Nadon and Bowles 4)

As theater is a distinctly collaborative art form, this method of creating a script by collecting and quilting individual voices flips the hierarchical structure of traditional playwriting upside down. As a community-based theater, Cornerstone’s inherent mission is to give power to the community members in shaping the narrative of the work. Cohen-Cruz explains this concept by writing, “The hierarchical structure of most theater, however, gives the bulk of the power to the producer, playwright, and director, whereas community-based

performance, at least theoretically, asserts a model of power shared among the various artists and community partners" (Cohen-Cruz 92). These shared creative powers can begin from the initial collaboration between the community and authors, composers, and lyricists. Lewis describes this idea like this:

Collaboration can be difficult, but that's what makes the art so good. A community collaboration requires artists to allow—even encourage—the influence of others into their work. The playwright's methods can include incorporating material generated in community gatherings and workshops, as well as public readings of drafts followed by discussions, or distributing scripts to participants for their responses, and even leaving copies of scripts in public places (public libraries, bars, etc.) for review. In order to incorporate input from as many community participants and company members as possible, the script continues to evolve throughout the production process, sometimes right up to opening night. (Lewis 45)

In this type of theater practice, as well as for non-community-based theater groups, there must be a clear understanding at the start of a collaboration of the intent of the artists and contributors. This needs to stay consistent from the conception of the show to opening night. In the example of Cornerstone Theater Company, the story and the specifics of the narrative may undergo revision as community members give feedback and contribute to the narrative. Lewis writes, "In order to tell a community's story, its feedback must be intertwined with the

writer's own process, and that requires constant revision. The writer's voice continues to be shaped and enriched by the voices of the community" (Lewis 41). Mutually beneficial agreements should address contributions and authorship in order to avoid conflict.

For collaborative writing processes, it must be made clear to contributors at the beginning of a process that ideas or contributions, unless otherwise noted, will be merged with the script written by the author, with the author retaining copyright. This could be done with a simple, one-page agreement outlining other terms of participation, which the organization has the community members sign. This simple clause can clarify any confusion that may come from contributors during the show development process.

Joint Works

In the absence of agreements, there is a legal standard when creating work with multiple artists when the final work is intended to become one work. In this case, one is to assume a work as "co-authored" or a "joint work". As stated in the Copyright Act, "A 'Joint Work' is a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole" (Title 17 §101, 4). Thus, the standard is to assume an equal division of interest in the work. Furthermore, each collaborator has equal control in the rights of the work. Norwick highlights the importance of clarifying collaboration arrangements:

In the absence of an agreement providing otherwise, the collaborators' rights in the work will be set forth in the Copyright Act. Many collaboration relationships contemplate different arrangements, which makes it imperative that the collaborators agree on such issues and reduce their agreements to a written contract. (Norwick et al. 79–80).

In the 2006 case of *Caffey v. Cook*, District Judge Richard J. Holwell ruled that in the case of a joint work the artists would have equal rights to the work. The artists, "... would then be entitled to 'Equal undivided interests in the whole work' – i.e., 'the right to use or to license the work as he or she wishes, subject only to the obligation to account to the other joint owner for any profits that are made'" (*Caffey* 23). The court also cites the *Thomson v. Larson* case, referencing *Childress v. Taylor*, that "... joint authorship will not turn solely on 'the parties' own words or professed state of mind,' but on 'factual indicia of ownership and authorship, such as how a collaborator regarded herself in relation to the work in terms of billing and credit, decision making, and the right to enter contracts.'" (qtd. in *Caffey* 25). Thus, the legal implication behind creating joint works must be understood by any artist when entering into a collaboration with other artists, as it affects who holds the rights to the work, and who has control of those rights.

A prevailing legal standard surrounding the question of joint authorship was first reflected the 1991 trial of *Childress v. Taylor*. Childress, an experienced playwright, sued Taylor for violating her copyright in the work, *Moms: A Praise Play for a Black Comedienne*. Taylor, performing in a dramaturgy role,

“... suggested the idea of the play to Childress, and claimed to be a joint author with Childress” (Biederman). However, Childress wrote the script and registered the script with the Copyright Office. Taylor sought to formalize her role in the play by creating an agreement that noted the finished play would be equally owned (*Childress*). They exchanged contracts, Childress’s agent would not agree to a co-ownership agreement, and the parties’ relationship crumbled. Afterward, Taylor hired writer Ben Caldwell to create another play featuring characters from Childress’s play, that Taylor felt were her contributions. This sparked a dispute over Childress’s play, and the two parties went to court for copyright infringement. Without evidence that Childress accepted crediting the play as a co-author with Taylor, Taylor’s claim of co-authorship was rejected (Biederman).

In both of the above cases, billing credits were a key window into the intent of the author. These written examples of accreditation are used as proof for whether or not a joint authorship was intended. Holwell illustrates this in the case of *Caffey v. Cook*:

An author’s attribution of the work to himself alone “is persuasive proof... that [he] intended this particular piece to represent [his] own individual authorship” and is “prima facie proof that [the] work was not intended to be joint.” The numerous playbills accompanying defendants’ performances as the Three Mo’ Tenors prominently identify the Show as being “conceived and Directed by Marion J. Caffey.” Interestingly, the playbills do not refer to Caffey as the author; however they make absolutely no mention of the

defendants' involvement in creating, writing or authoring the Show in any matter. Defendants failed to produce any evidence indicating that they objected to the ways in which the parties were billed and credited. Accordingly, the Court further finds that the manner in which Caffey listed himself as the conceiver of the Show supports the view that he regarded himself as the sole author. (qtd. in *Caffey* 27–28)

Additionally, contributors hired by the organization do not have co-authorship rights unless, “... (i) they’ve collaborated with you from the play’s inception, (ii) they’ve made a copyrightable contribution to the play, and (iii) you have agreed in writing that they are a co-author” (“Dramatists Guild”). This must be firmly understood by participating contributors.

In many cases of collaboration and joint authorship, the parties engage in verbal agreements. As illustrated above, verbal agreements can be risky since they do not outline the expectations of the parties in writing, which does each party a disservice if they ever find themselves in court. Singer writes, “If a misunderstanding arises and no contract exists, the parties will be left to fight it out, which is certainly not conducive to achieving the best possible production” (Singer 147). Thus, written agreements are always more reliable as proof of intent if something goes awry.

Exclusivity

Whether the copyright holder is a single person or multiple people, the copyright holder should permit the organization, through a license, to produce, perform and distribute the work by granting them the rights for a period of time. Exclusivity is determined whether one entity (exclusive) or multiple entities (non-exclusive) is agreed to hold the rights to the work (Singer 156). Setting a time frame for the duration of exclusivity is important when negotiating terms. An end date for exclusivity, or ensuring non-exclusive rights, would allow the rights of the work to revert back to the author post-performance. In sample agreements provided to their members, the American Association of Community Theatre (AACT) recommends licensing the show on a non-exclusive basis in their simple production license (“Simple Production License”). Community theaters should negotiate agreements with authors regarding the maintenance of non-exclusive rights to the characters, the story, or music composition of the registered work, depending how the arts organization or artist wishes to use the work in the future.

Community theaters may seek temporary exclusive rights in order to remain the sole entity with control in performing and distributing the work. This would ensure that the work was not being performed elsewhere during the duration of the performance dates, allowing for profitability for the arts organization. However, it is best practice for permanent ownership of the copyright and intellectual property to remain with the author, with or without registering with the US Copyright Office. According to the Dramatists Guild,

“Authors in the theatre business do not assign (*i.e.*, give away or sell in entirety) their copyrights, nor do they ever engage in ‘work-for-hire’” (“Dramatists Guild”). For example, the American Association of Community Theatre’s commission agreement asserts, “At all times during the term of this agreement, the Playwright will be an independent contractor, over whom the Producer will not exercise any supervision or control” (Commission Agreement). Additionally, the author owns, “all approved revisions, suggestions, and contributions to the script made by other collaborators in the production, including actors, directors, and dramaturgs” (“Dramatists Guild”). “The Dramatists Guild Bill of Rights” outlines the expectations that fall within the scope of author’s rights, which are relevant to the creation of commission, production agreements, and option agreements:

1. ARTISTIC INTEGRITY

No one (e.g., directors, actors, dramaturgs) can make changes, alterations, and/or omissions to your script – including the text, title, and stage directions – without your consent. This is called “script approval.”

2. APPROVAL OF PRODUCTION ELEMENTS

You have the right to mutually approve (with the producer) the cast, director, and designers (and, for a musical, the choreographer, orchestrator, arranger, and musical director, as well), including their replacements. This is called “artistic approval.”

3. RIGHT TO BE PRESENT

You always have the right to attend casting, rehearsals, previews and performances. (“Dramatists Guild”)

Arts organizations should keep these practices in mind while drafting agreements with authors. Authors may ensure that their work retains integrity and that they can better control how the work is used. Additionally, physical ownership of the work itself, including a written play, does not permit the owner the rights to present the play or perform the work publicly. The 1976 Copyright Act provides:

... (1) that “transfer of ownership of any material object,” including the original work of art, “does not of itself convey any rights in the copyrighted work embodied in the object,” and (2) conversely, that “transfer of ownership of a copyright or of any exclusive rights under a copyright” does not “convey property rights in any material object.” (qtd. in Norwick et al. 33)

Thus, written agreements are important to engage in with authors.

Additionally, “The Dramatists Guild Bill of Rights” stresses that the author of a performance work has subsidiary rights, and that proceeds of future successes with the production are not obligated to the theater that first produces the work. It states:

You are not obligated to sign over any portion of your project’s future revenues to any third party (fellow artist, advisor, director, producer) as a result of a production, unless that production is a

professional (*i.e.*, Actor's Equity) premiere production (including sets, costumes and lighting), of no less than 21 consecutive paid public performances for which the author has received appropriate billing, compensation, and future option. Rather than granting the theatre the right to share in future proceeds, you may choose to grant a nonexclusive option to present another production of your work within six months or one year of the close of the initial production. No option should be assignable without your prior written consent. ("Dramatists Guild")

Addressing the option agreement before a work premieres acknowledges that the artist has potential for remounting the production, and allows for the production to have additional opportunities to impact lives outside of the first performance. Remounting a completed work will encourage the expansion and bridging of social connections, broadening the shared impact of the completed work.

Nonprofit community theaters must acknowledge and respect copyright law and best practices for authors, composers, and lyricists in order to create a positive working environment for all involved. Authors that are privy to the importance of subjects such as copyright and exclusivity place themselves in a position of confidence when negotiating written agreements. Holofcener stresses, "If you care about having control and making money, this stuff is non-negotiable, you've got to know about it. And, the artists who are good at this – some are better at making money than making art" (Holofcener). Community theaters that

prioritize maintaining a reciprocal relationship with artists in turn support a healthy arts ecosystem of mutual benefit.

Revenue and Royalties

In order for collaborators to share in financial benefits from the finished production, proceeds from the distribution of the work must be addressed before the creation of a new work. However, since community theater is inherently a socially driven art form, the financial motivations behind creating community theater may be secondary in comparison to the motivations in a commercial setting. Since community impact is often a large factor behind the motivations for a community production, and many community theaters are small or mid-size in scale, there is often little money to go around to pay royalties to authors, composers, and lyricists.

For example, community theaters have far less opportunity to earn revenue from their productions than subscription theaters. Actors may be volunteers, and cannot meet the demanding performance schedule that commercial theaters require. Thus, limited runs equate to limited ticket sales (Norwick et al. 109). Ultimately, the artist in a community setting cannot expect financial gains from the work parallel to working in a commercial setting. Royalties or additional profits may not be financially available for the playwright of a community theater production. This must be understood by any author who wishes to engage in community-driven, nonprofit work.

However, to prepare for financial gain, addressing royalties ensures that collaborating authors, composers, and lyricists receive fair compensation for the success of their work. This practice promotes sustainability in the creative economy, as proceeds from the work may benefit the artists livelihood, and not just that of the organization. The American Association of Community Theatre encourages royalty payments in their sample simple production license for authors, and musical composition license for composers. In the musical composition license, royalty payments are outlined first as a flat fee, and second in a set amount per performance based on the ticket prices and number of performances (“Musical Composition License”). Each of these terms notes payment to be disbursed prior to the first performance. The agreement also notes that music and lyrics may not be printed, published or distributed to audience members without additional licenses and fees (“Musical Composition License”). The sample option agreement outlines royalty payments on a weekly basis and percentages for the book writer, composer and lyricist, prior and after recoupment (“Option to Produce Play”). Additionally, royalty payments should be addressed if an agreement is made to distribute the music from the musical through digital streaming or physical sales during or after the production run.

There is no standard rule to assigning royalties (Singer 33). Establishing percentages is often the easiest method to arrive at a suitable outcome. Singer highlights that all money earned from a project should be shared by the collaborators. This idea is not limited solely to theater or musicals, but includes adaptations across any media (Singer 33). However, complications may arise

when dividing revenue through percentages, as there are many unknown factors and variables when embarking on a project. Singer elaborates:

Sometimes establishing percentages means fairly allocating the risk that contributions may turn out to be a little different than originally envisioned, since no one can predict with precision. The true goal is to arrive at percentages which, given natural fluctuations over the life of the collaboration, might fairly and reasonably reflect total contributions, and with which the collaborators can work comfortably. (Singer 35)

In the case of creating the script, music, and lyrics from multiple collaborators, the authors, composers and lyricists must decide at the beginning of a collaboration if money will be shared by everyone, regardless of whose work appears, or if money will be shared solely by the artists whose work is used (Singer 40). For example:

Separate music and lyrics means the music and lyrics are used outside the context of the complete musical work (i.e. book, music and lyrics). The two most obvious examples are the cast album (although a small amount of dialogue might be used for continuity between songs) and when a performer wants to record a particular song from the musical. ... It is assumed that the composer and lyricist will share these earnings. Thus, the core issue is whether the book writer will share in any money that flows from the use of

the separate music and lyrics. This is freely negotiable between collaborators... (Singer 39)

Further examples presented by Singer include the case of the published version of the musical containing the book and the lyrics, but not the score. In this case, the money earned from the book and the lyrics is shared by the author and lyricist. Singer explains, "A book writer might have a harder time making the argument for a share of the separate music and lyrics money if he or she is not also willing to share publication earnings" (Singer 39). It is in these types of scenarios that conflict may arise. "A composer could argue either that it's not unfair to exclude the book writer from separate music and lyrics money, since she or he is excluded from the publishing money, or that there should be equal/bilateral sharing in both areas," Singer writes (Singer 40). If the nonprofit plans to publish and distribute the finished work in any way, these details will need to be worked out before complications in payment arise.

The National Writers Union advocates for copyright defense, establishing industry standards, challenging unfair contracts, legally contesting copyright violations, and fair pay ("Copyright Defense"). These same issues face writers working in nonprofit settings, yet the author without representation has far less ability and traction to navigate these issues. Nonprofit community theaters that are familiar with the best practices in use by unions and Performing Rights Organizations can create fair contracts that are in the best interests of not only the theater company, but the authors, composers, and lyricists providing their show content.

Performing Rights Organizations such as American Society of Composers and Publishers (ASCAP) and Broadcast Music Inc (BMI) ensure that composers receive fair compensation and royalties from their published work (“ASCAP Payment System”). In order to retain full protections for their work, the authors and theater companies may want to consider membership with a Performing Rights Organization in order to earn additional income through royalties. This may be beneficial if songs from the finished community production are subsequently aired on city radio or television stations or through other commercial distributions after the world premiere of the work with the nonprofit. Writers are eligible to join ASCAP, “... if you’ve written or co-written music or lyrics for at least one musical work that is available to the public” (“Resource Center”). This includes through live performance, recordings, or songs available online. Nonprofit organizations can also join ASCAP as publishers, in which case the publisher can also collect a share of performance royalties (“Resource Center”).

Chapter IV

REDUCING RISK FOR THE ARTIST AND THE ORGANIZATION

Copyright Infringement

Nonprofit community theaters and authors, composers, and lyricists must prepare for the risk of copyright infringement in their contracts. If a community theater performs the play outside of the terms outlined in the production agreement, or violates the exclusive rights of the creator, the company would be breaching contract or infringing on the author's copyright. This could lead to legal action by the author, putting the nonprofit at risk for a lawsuit. Infringement could also occur by a collaborator, if an author uses music or lyrics in the play again, without other collaborators' consent, or during the period when the organization holds the exclusive rights to the play. Norwick puts it like this: "Plainly, a copyrighted work would be infringed by reproducing it in whole or in any substantial part and by duplicating it exactly or by simulation. It is also clear that adapting a copyrighted work into a different medium (e.g., basing a movie on a novel) will also constitute infringement" (Norwick et al. 43).

Artists who wish to bring suit against an organization for infringement must register with the US Copyright Office and show a certificate of copyright registration in order to collect damages. As stated in *Caffey v. Cook*, "A certificate of copyright registration constitutes *prima facie* evidence of the validity of the claimed copyright, as well as the originality of a work" (*Caffey* 18). In addition, they must show that the work was copied with intent, show "substantial similarity"

in the works, or a large amount of appropriation of the work – “more than *de minimus*” (*Caffey* 29–30).

As a community-based theater with the public’s interest in mind, Cornerstone Theater Company includes a clause in their playwright agreement protecting the artist if the organization were to infringe on their rights. Cornerstone’s playwright agreement states, “The rights licensed to Cornerstone hereunder are special and unique and in the event of any breach of any provision of this agreement by us, you shall have the right to immediate injunctive relief in addition to all other rights and remedies you may have” (“Example of Playwright Agreement”). By including a clause that addresses protections for the artists in the case of infringement by the organization, Cornerstone is putting the best interests of the author first. An author who reads this clause in the contract may be more inclined to work with the company, as she can see in writing that the nonprofit theater’s intentions are based in public good will. Although this clause does not necessarily protect against the risk of lawsuit, these types of clauses build trust between the parties.

Boilerplate Language

To provide additional protections to the parties, nonprofit community theaters must acknowledge the necessity of boilerplate legal language when discussing the importance of contracts. A contract does not need boilerplate language to be enforceable. However, if there is a lawsuit, the absence of boilerplate clauses will require that the court utilize its own interpretation of the

agreement, often to the dismay of the parties (Grippo xv). Neglecting to include boilerplate language may also extend the period of litigation and raise legal costs (Grippo xv).

A common boilerplate agreement clause for reducing risk and providing protections for both parties addresses representations, warranties and indemnification (Feinstein). Singer stresses, “The essential purpose of these provisions is for the writer and the producer to make certain fundamental statements and promises to each other and to allocate responsibility for certain problems that could arise” (Singer 150). Cornerstone Theater Company outlines this clause in their playwright agreement on both the organization’s side and the author’s side, with author and producer representations. Under the author representations, the author agrees:

(A) The Play is an original work except for stories derived from story circle participants that she has the right to license the rights herein granted to the Producer; that there are no obligations and/or commitments outstanding with respect to the Play which might interfere with the Producer's full exercise of said rights by the Producer; will not violate or infringe upon any copyrights, rights of privacy or any other rights of any party whatsoever; and the Author holds the Producer harmless from any finally adjudicated claim or dispute arising from the exercise of the rights granted herein.

(B) Author agrees to indemnify and hold harmless the Producer and its officers, directors, employees and agents from and against all claims, demands, liabilities, losses, damages, judgments, suits, costs, and expenses (including reasonable outside attorney's fees) which may be incurred by the Producer by reason of any finally adjudicated breach by the Author of any of his warranties and representations under this Agreement. ("Example of Playwright Agreement")

This clause protects the arts organization from any copyright infringement due to the author. It also ensures that the author does not hold the producer accountable for any breach of the contract by the author.

Similarly, Cornerstone's playwright agreement outlines a clause for the producer to hold harmless the author from any liabilities, losses, or expenses arising from the production of the play and script materials. It covers breach or non-performance by the producer, in the case that the arts organization does not follow through on any clause in the agreement ("Example of Playwright Agreement"). By creating representations, warranties and indemnification clauses for both parties, both the author and the nonprofit community theater can be mutually protected from risk arising from one another's actions.

Disputes & Termination

A community theater will want to ensure there is a clause for resolving disputes and avoiding a conflict escalating to a lawsuit. Arbitration is often used

as an efficient alternative to litigation, and encourages communication through a third-party mediator. These clauses are often found in collaboration agreements (Norwick et al. 75). For those with limited financial resources, arbitration is typically a more affordable option than going to court. This process encourages the parties to resolve their issues in a productive manner with arbitrators that have experience in the industry (Norwick et al. 74). However, “Disadvantages are that arbitrators are not bound by legal precedents and can render almost any decision they consider appropriate and that a party unhappy with an arbitrator’s decision cannot appeal it” (Norwick et al. 74). These arbitrators have the power to mediate, interpret and resolve the dispute. At this stage of conflict, it is advised that each party consult a lawyer, but it is not required (Norwick et al. 74).

In the *Stage Writers Handbook*, Singer elaborates on the necessity of contracts to address potential conflicts at the beginning of a creative project between collaborators or arts organizations:

Contracts do not taint a relationship. It is far better to address issues, even difficult ones, reach a resolution, commit them to writing and be able to focus on a production and its artistic needs than to try to avoid discussing potential conflicts. Ignoring areas of disagreement will not make them go away, nor will it enhance the relationship. (Singer 147)

Similar to an agreement clause canceling collaboration between artists, the arts organization will want to include a clause addressing the termination of the project in their agreement. A termination may be called for if there is a breach

of contract of any kind. To maintain balance and fairness, the same type of clause should be made available to the artist, who may terminate the agreement with the organization due to a breach of contract, as well. Including a termination clause ensures that each party has a way out of the agreement if something goes awry.

Chapter V

THE ORGANIZATION'S ROLE IN CREATING CONTRACTS

Furthering the Mission

Community theaters that assume responsibility to produce agreements can ensure protection of the mission, values, and programmatic goals of the organization, while avoiding risk and promoting legal protections. Many artists do not understand the financial and community needs of a nonprofit, and may omit important terms such as addressing exclusive rights, disputes, and additional protections and benefits for each party. Organizations that assume this responsibility may tailor each agreement template to meet their unique needs.

Organizations that believe it is the responsibility of the artist to provide the organization with an agreement are at a disadvantage in a number of ways. As illustrated by Cornerstone, there is a missed opportunity for incorporating the arts organization's values and strategic mission into the agreement. Paula Donnelly, the Director of Engagement at Cornerstone Theater Company, reinforces this practice: "Our agreements are standard playwright agreements. What is unique in them is the expectation that the playwright is going to be responsive to the community they are collaborating with" (Donnelly). Cornerstone's agreements support the social and community values within the arts organization, furthering their mission to tell community stories, acting as a catalyst for activism and social

change. This example can be used as a model for other arts organizations in creating agreements that are proactive towards achieving their company goals.

To further the theater company's values, Cornerstone Theater Company includes a clause in its composer agreement that ensures the artist works in harmony with its mission statement. The clause outlines:

You have read and understood Cornerstone's mission/vision statement and agree to carry out your responsibilities in its spirit to the best of your ability: Cornerstone Theater Company makes new plays with and about communities. By combining the artistry of people with many levels of theatrical experience, we act upon the conviction that artistic expression is civic engagement and that access to a creative forum is essential to the wellness and health of every individual and community. ("Example of Composer Agreement")

Similarly, Cornerstone's Playwright Agreement states, "Producer requests that the Author bear in mind Cornerstone's mission 'to make plays with and about communities,' and that the company aims to use the creative process to bring people together in celebration of community" ("Example of Playwright Agreement").

Cornerstone Theater Company reinforces the mission and company values by sharing a guide, "Community Collaboration Handbook: A Method", with authors, creators, and personnel of a show. This original handbook, unique to the theater company, outlines methodology surrounding the creation of an original

work in line with the values of the organization. Topics in this methodology handbook include building community partnerships, assembling the production team, finding spaces to rehearse and perform, getting to know the community, development of the script, community participation in script writing, production design, casting, rehearsals, directing, and more (Lewis). “The Artistic Director also has a conversation with the playwright about the unique challenges and company values with regard to writing both in general and for the particulars of the individual community [and] project”, states Donnelly. Community theaters can collaborate more effectively with authors by communicating their needs at the beginning of a creative project.

Encouraging Legal Education

Nonprofit community theaters must keep in mind that most artists are not copyright experts and may not know their basic rights as copyright holders. One of the biggest issues facing artists is that without legal knowledge, it is easy to be taken advantage of, either by individuals or by institutions. Only authors or composers represented by agents, lawyers or unions may feel comfortable to negotiate terms. Community theaters must remove barriers for artists in negotiating terms by introducing the idea of personal, legal education, to their artists before signing an agreement with the art organization.

Introducing legal resources to creatives can promote personal and professional development. Holofcener stresses the importance of artists understanding the contracts they are signing, and that all artists must become

comfortable in negotiating with organizations in order to become successful members of the arts community.

We live in a world with a rigid legal system. Every artist should take note of that. It is not just money that is at stake, it is also the control of your artwork. Sometimes the control is more important than any kind of money available. If you get good at dealing with contracts, good at coming to agreements, good at communicating, you have become a much more productive member of the arts community.

(Holofcener)

A number of visual arts organizations have recognized the importance of connecting legal resources to artists by facilitating discussions with local volunteer lawyers. In 2011, the Anacostia Community Museum in Washington, DC, held a forum called Why Do I Need a Lawyer? which focused on common legal issues facing creative enterprises. The discussion presented pitfalls and how to overcome them for emerging and existing arts entrepreneurs, with the goal to educate audiences about protections (“Free Legal Forum”). Maryland Art Place (MAP) is a visual arts organization located in Baltimore that has also adopted the practice of periodically hosting Maryland Volunteer Lawyers for the Arts to provide legal counsel to assist artists in the state. In these sessions, titled Art Law Clinics, artists may sign up for a five-dollar private appointment with a volunteer attorney to cover questions about copyright basics or contracts (“Events”). Additionally, artists can access a wealth of information from their

homes by visiting the online circulators and additional resources of the United States Copyright Office¹.

Community theaters that encourage legal education or provide access to legal resources can instill trust with authors and negotiate more positively and effectively with them. Community theaters should persuade authors to approach a volunteer attorney to review contracts if collaborators do not understand the legal language and to seek professional advice.

Holofcener illustrates that one problem facing artists is that nonprofit staff members may not actually understand the terms in their organization's contracts. Staff members may not understand what the agreement states, nor how this agreement will be fair or consequential to the artists involved.

Arts organizations need to know what their contract says and how to negotiate with artists, in a way that accurately reflects their needs. ... I think organizations are used to continually, accidentally, taking advantage of these artists. If the artists really knew, they might be pushing back more in negotiating. Many artists have come to me saying, I got this contract from a big arts organization and I don't understand it or agree with it. (Holofcener)

Community theaters must educate their staff on the legalities surrounding contracts and agreements, so that they can feel confident in communicating and negotiating the terms effectively. If creating agreements is new for an organization, theater companies can seek educational resources to assist in the creation of agreements.

¹ See <https://www.copyright.gov>.

National member organizations and local volunteer legal groups can fill the resource gap by guiding nonprofit organizations by way of standard form agreements to use and to alter as necessary to meet their needs. The American Association of Community Theatre provides theater companies with standard agreements, as made available to members on their website (“Networking”). If the community theater does not wish to pursue membership with AACT in order to access their agreement templates, there are a number of publications available for purchase that come with templates of standard agreement examples, such as *Business and Legal Forms for Theater*, by Charles Grippo. Additionally, the organization, Volunteer Lawyers for the Arts (NY) has compiled a national directory of chapters of volunteer legal groups specializing in the arts, publicly accessible on the web². These types of organizations typically do pro bono or very affordable work with artists and arts organizations to help them meet their needs.

Reducing Legal Language

Nonprofit community theaters must understand that the length, depth, and legal language provided in contracts can be deterrents for authors to work with the organization. Agreements do not have to be long, but should contain all necessary protections that the organization deems relevant (Singer 148). “If someone breaches a contract nobody wins. The best way for this to happen is if someone signs a contract that they don’t fully understand,” states Holofcener. Staff members must be prepared to have an honest discussion with authors to

²See <https://vlany.org/national-directory-of-volunteer-lawyers-for-the-arts/>.

explain what each clause in the agreement means. Simplifying the language in agreements can improve understanding between groups.

In the book, *The Lawyer's Guide to Writing Well*, authors Tom Goldstein and Jethro Lieberman acknowledge the importance of writing legal documents using language that is appropriate for the audience. "The principal audiences for legal writing are judges, other lawyers, clients, and other nonlawyers," they write, "Because these audiences differ in background, knowledge, and experience, they have diverse expectations when they read a piece of legal writing" (Goldstein and Lieberman). Since the reader may be a community member or a judge, it will be necessary to be detailed enough to create an effective document suitable for court, yet simple enough that someone without a law degree can understand the premise of the terms. Thus, removing complex legal jargon while still maintaining the integrity of the clause's intent is essential to promoting understanding between groups.

Goldstein and Lieberman support this effort of language simplification by referencing a memorandum on plain English by Homer E. Moyer, Jr. of the US Department of Commerce. In this memorandum, Moyer states:

Avoid legalisms. Latin phrases, abbreviations, and other legalisms are the badges of legal writing. However, they are commonly redundant, usually pretentious, and invariably unnecessary. When legalisms punctuate a paragraph, readability suffers. Like lavish capitalization, frequent exclamation marks, and underscoring for emphasis, legalisms serve as crutches when plain English would

nicely suffice. The addition of “supra,” “arguendo,” or “inter alia” rarely amplifies a thought. Even more dispensable are “therein,” “hereinafter,” “provided, however,” and similar rhetorical baggage.

In almost all instances, “herewith” is redundant, as in “a copy is enclosed herewith.” (qtd in. Goldstein and Lieberman)

Some authors, composers or lyricists may feel uncomfortable or intimidated to negotiate terms, and community theaters must make a goodwill effort to eliminate barriers by simplifying legal language in contracts to promote positive communication between groups.

Navigating Power Dynamics

Nonprofit community theaters should consider power dynamics when working with artists and negotiating mutually beneficial agreements. The arts organization will typically have the upper hand when working to negotiate with artists, especially organizations of a larger size or longer institutional history. Holofcener reinforces, “The organization has access to resources, capital, prestige, and publicity. ... The artist usually has limited recourse available to them. ... People with power, money, and resources always have the power dynamic in their favor and the legal system greatly favors people with more power” (Holofcener). Subsequently, for emerging authors, composers and lyricists, contracts are a reminder that, “... an offer of production is not a gift, ... there is an inherent imbalance of power in the relationship and, therefore, in the negotiations” (Singer 149).

When negotiating with authors, the community theater must first and foremost consider fairness and balance in its agreements (Singer 148). “It shouldn’t be an issue to try to come to an agreement,” states Holofcener. The breakdown of trust is a possible unfortunate outcome, and theater companies need to be aware of this. The best thing for the community theater to do is to be transparent about the needs of the nonprofit when negotiating with artists, as well as listening to fully understand the artist’s needs.

In order to begin creating successful agreements with each another, Holofcener encourages coordinating a one-on-one connection with the artist and a staff member of the organization, even without the introduction of lawyers. His recommendation is, “Negotiate, and come up with as many terms as you can together, and be as specific as you can. Figure out what you want to do. Then, work with attorneys on both sides to memorialize. That builds trust” (Holofcener). Staff members must make themselves available to engage in this process of contract review, active listening, negotiation, and revision.

Active Listening

To establish trust and encourage lasting relationships, parties must engage in an active listening process to better understand each other’s needs. For example, Cornerstone Theater Company engages in a thorough listening process with the local community before producing a project. In reference to Cornerstone, Ferdinand Lewis writes:

The principle of respect refers to valuing community input in all matters, and appreciating the lives and stories of community partners and participants in whatever way possible. It is our experience that when this sort of respect is a factor in creative and administrative decisions collaborators are more likely to contribute their truest selves to the work. Respect creates the conditions in which an essential joy-in-creating is released, which in turn engages collaborators in extraordinary ways. (qtd. in Cohen-Cruz 94)

This listening process ensures that the community is being represented in a way that is reflective of its identity. Trust may not come naturally; however, this first step is key to developing positive relationships, since "... both parties know that the actions of one party can materially affect the other" (François). Thus, an active listening process can establish respect and trust while negotiating agreement terms.

In order to navigate power dynamics effectively and ensure that both parties benefit from the agreement, the four rules of active listening must be engaged. The four rules of active listening are, "1. Seek to understand before you seek to be understood 2. Be non-judgmental 3. Give your undivided attention to the speaker 4. Use silence effectively" ("Active Listening"). To ensure a positive experience in the negotiation process, staff members of community theaters must be empathetic listeners, and should remember to, "... avoid sharing our judgment until we have learned their judgment" ("Active Listening"). Body

language can have an effect on the active listening process as well. Eye contact can incite either positive or negative response, and a wide range of emotion. In agreement negotiations with authors, eye contact must promote understanding. Active listening helps staff members understand the author's needs before memorializing the final agreement.

Staff members of community theaters that refuse to listen to artists or take into consideration the artist's needs can create an underlying tension with the creators supplying content for their shows. If institutions cannot support artists by creating agreements based on mutual understanding, trust, and fairness, social connections cannot be sustained productively between individuals and institutions, and the benefits of social capital cannot be established.

Through acknowledging power dynamics, negotiating positively, encouraging legal education, and engaging in active listening, nonprofit community theaters can produce agreements that encourage a safe and mutually beneficial environment for the author, composer and lyricist to create an original work. This will enable the organization to build a positive foundation for relationships with the community members, strengthening social capital between individuals. In response, the community and local creative economy can benefit.

Chapter VI

BUILDING STRONG COMMUNITIES AND A CREATIVE ECONOMY

Social Capital and Community Revitalization

Successful collaborations between artists and arts organizations may build community identity, stimulate job creation, and attract cultural tourism. In 2003, through a survey related to activities contributing to social capital, Robert Putnam and Lewis Feldstein similarly concluded that the arts were a key under-utilized asset in community rebuilding in the United States (Borrup 12). Tom Borrup has written numerous books on methods of integrating the arts into urban planning, civic engagement, community building, and economic development ("My Profile"). Borrup affirms Putnam and Feldstein's findings, writing that, "America's cultural institutions and the people who work in them have much potential to 'create opportunities for political expression, community dialogue, shared cultural experiences and civic work – all with an eye toward making citizen participation fun'" (Borrup 12). The correlation between civic engagement and engaging in the arts has stemmed from supporting studies focused on social drives and motivational factors for arts participation (Nichols 2). These final, and impressive, community benefits all have one thing in common: they began by producing successful programs with artists, on the basis of establishing trust, clear lines of communication, and mutual benefits for all parties involved.

In *The Creative Community Builder's Handbook*, Borrup illustrates that the development of social connections stimulates additional community benefits, such as community revitalization.

The activities of small cultural groups stimulate community revitalization less through direct economic impact and more through building the social connections between people. They motivate neighbors and help them visualize and make changes in their community. They increase connections among neighborhoods of different ethnic and economic groups. Community arts organizations stimulate broader civic engagement, expand residents' sense of efficacy, and strengthen the bridges between neighborhoods. (Borrup 12)

Borrup emphasizes the positive effects of providing access to cultural experiences within a place. He cites a Chicago-based study on cultural organizations in 2003 which concluded, "... that cultural organizations had three overarching results: they build social relationships, enable problem solving, and provide access to resources" (Borrup 12). The study also found, "... that the presence and work of small cultural groups promote neighborhood stability, enable a sense of belonging, create productive uses of underutilized spaces, create links to nonlocal resources, provide space for cross-cultural dialogue, and provide a safe haven and opportunities to learn new skills" (Borrup 12).

Nonprofit community theaters build relationships by linking people together through a shared experience. Community theaters are an avenue for

individuals to participate and connect with each other towards a common goal, whether it be creative in nature or through a shared experience along the way. The positive outcomes are made possible by thoughtful artist and community collaborations, which allow space for social bridging and bonding.

In the example of Cornerstone Theater Company's script development process, the act of listening and exchanging personal narratives of community members can impact the community's perception of itself (Lewis 35). "In the sense that communities know themselves by their stories, storytelling often has the power to clarify and even strengthen community identity" (Lewis 35). The final performance of the production has a visual and cultural aesthetic unique to the artistic collaborators. The impact of the finished work may alter others' perceptions of the identity of the area, which can impact cultural tourism and spark interest in neighborhood investment.

"In many cases a destination's image, perception, or identity is largely based upon some aspect of the arts in that respective area."

"In cities where the arts flourish," ... "there is a distinct understanding and appreciation of their contribution to the community's quality of life and economic vitality. This understanding fosters civic participation—not as an obligation, but as a matter of choice." (qtd. in Larson 88)

In addition to the potential for growth in community identity, the benefits of successful agreements between artists and arts organizations extends to the creation of jobs and financial sustainability within communities.

Supporting Creative Economic Development

In relationship to growing creative economies, “Sociologists have long emphasized the role played by culture in facilitating economic interaction and recently economists and historians have joined in” (François). Examples of this include the recent attraction by developers to creative placemaking initiatives³. In 2010, The National Endowment for the Arts published a report highlighting how placing cultural activities within communities generates economic returns. Visitors will spend more money within the community on entertainment and cultural experiences, which supports the recirculation of wealth in the local economy and creative industries (Markusen and Gadwa 7).

Agreements that foster mutually beneficial arrangements between each party can purposefully address circulating wealth back into their community. A 1993 letter between Cornerstone Theater Company and the Washington Drama Society, Inc., outlines the agreement surrounding a joint production. In order to encourage financial benefits to the community, the agreement had a “Miscellaneous Items” clause that focused on providing hourly wages, paid internships, ticket vouchers to performances, investigating subsidized or free transportation to performances, and encouraging ongoing relationships with the community members, “... in the hope of encouraging the continuation of theatrical activities within their community” (Gutwillig). These types of clauses reinforce the

³See <https://www.arts.gov/sites/default/files/CreativePlacemaking-Paper.pdf>.

organization's mission and prioritize giving back to the communities making the shows possible.

Economist Ann Markusen, who notably co-authored the NEA report on creative placemaking in 2010, illustrates that artistic communities are not the consequence of successful businesses, but are instead the reasons for economic growth within a place. Artists influence the success of industries of all kinds, and, "... traditional studies of the economic impact of the arts underestimate the full contribution an artistic community makes to a regional economy." Markusen also writes that, "... they fail to trace the many ways in which creative talent contributes to productivity" (Borrup 7). Markusen draws correlations between the rise in productivity and earnings to the increase of artists in an area, arguing, "... that artists are more cause than result of a successful economy" (qtd. in Borrup 7).

The artistic support provided by creative communities allows for cultural institutions and industries to flourish. Additionally, "New products and services sprout in districts where skilled creative workers congregate by day and night. ... Creative places nurture entrepreneurs, expanding the ranks of self-employed artists and designers and related workers who market their creations far afield and often employ others in whole or part" (Markusen and Gadwa 8). Cultural planners, economists, and community builders alike have pursued the arts as a means to transform blighted neighborhoods into desirable places to live.

Agreements that allow the production to have a life outside of the nonprofit community theater can provide a number of community and economic benefits.

After the close of the premier, additional opportunities to collaborate on the production allow for the creation of new social networks, as creators seek new talent to collaborate with or employ within the community. The production may be remounted independently, through other nonprofits or cultural institutions, or commercially.

The success and community impact of these endeavors are often reinforced by quantitative data points, such as the economic impact of the arts on an area, the number of volunteers engaged, or the number of audiences reached by the final performance. Yet, the crux of any theater experience is most notably qualitative – for example, the personal fulfillment created through shared experience, or the work serving as a catalyst for social change, which may support cross cultural understanding. Cohen-Cruz writes, “Cultural performances also provide emotional and intellectual linkage between our individual lives, those who have come before, and those who will come after” (Cohen-Cruz 84). Engaging in nonprofit community theater as a creator, volunteer, actor, or audience member, encourages individuals to better understand one another through a shared performance narrative.

Conclusions and Recommendations

The growth of social capital begins with successful individual relationships. Community theaters that work to build these relationships can foster positive experiences with their community members and encourage ongoing participation in the company. On attending theater performances, author Joanne Scheff Bernstein states, “People choose to pursue or repeat an activity or not based on the feelings, impressions, and experiences that are packaged together in a memory” (Bernstein 47). Similarly, artists choose to pursue or repeat an experience with a community theater based on the positive experiences they have had with the company’s administration and their collaborators on a project. Cultural institutions that have positive, reciprocal, ongoing relationships with their artistic community will see local economic benefits.

In order to grow social capital and economic benefits, nonprofit community theaters should adopt a series of best practices before engaging with artists to create a new work. Legal protections for both the artist and the arts organization must be prioritized. Community theaters should have a conversation to survey authors, composers and lyricists about their wants and needs before the commission, production, option, or licensing agreement is created. Artists may feel more comfortable negotiating with staff members if they are approachable from the start. If the staff members have limited time available to sit down with

artists, distributing a written survey can be another effective way to gather feedback from artists about their needs. By learning about the wishes of the artist before, during, and after the production run, community theaters can better craft agreements tailored to the parties and build respect and trust. Organizations will fully understand how the author is interested in using the work after the production ends and what option agreements may be on the table.

Community theaters may benefit from creating agreements that incorporate language stemming from the organization's strategic mission, values, and program initiatives. This mission-driven language may be woven into the agreement terms to better serve the community. In order to promote clear lines of communication on greater organizational initiatives, arts organizations can provide authors with an overview of the values and goals of the organization as it relates to producing a new work. The ultimate purpose is for both parties to communicate their needs effectively before the creation of an agreement, and to have a positive experience working and negotiating with one another while they work to achieve their goals.

Community theaters may want to take advantage of agreement templates and free legal resources as they begin to build their own customized library of agreements. Staff members may benefit from researching best practices in the commercial theater industry and nonprofit theater settings of all kinds. This exercise encourages staff members to broaden their perspective on how agreement terms have been implemented when creating original work with theater professionals in the industry. This knowledge may inform how community

theaters decide to draft their agreements, and what protections may be most relevant to the authors, composers, lyricists, and the organization.

Authors should educate themselves about their rights before signing an agreement with others. In addition, the community theater's staff members will need to fully understand agreement components to better negotiate and engage with the author's questions and concerns. Organizations should encourage the author to register the work with the Copyright Office before the premiere, so that the author can retain copyright protections if any legal conflict arises over the author's lifetime. In addition, community theaters should encourage the artist to seek legal resources if they are uncomfortable signing an agreement.

To ensure an effective negotiation process, arts organizations should create agreements with language that community members can understand. This may include simplifying legal jargon. If using contract templates, staff members must understand what the contract says for both parties and have the ability to communicate this to collaborators. Community theaters should encourage dialogue with authors surrounding negotiation of terms and be in close communication with authors to review the agreements through an active listening process. Both artists and arts organizations should consider legal aid that can advance their interests in negotiations.

The most important thing a nonprofit community theater can do is be proactive and transparent when working with artists of all disciplines. By establishing mutually beneficial agreements with authors, these creators will feel comfortable in doing what they do best: collaborating with each other and the

greater community to envision an exciting new narrative. Establishing clear lines of communication between artists and arts organizations will lead to the organic growth of strong social networks. Community theaters that understand this can grow their pool of talent over time while furthering their mission. Trust building, furthering artistic excellence, financial value, and social value may expand out of this positive experience, through achieving a common goal—producing a story that the world may be missing.

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