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ALL THE WORLD'S A STAGE, BUT WHAT IS A DRAMATIC WORK?

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Modern conceptions of dramatic entertainment have expanded to include diverse and previously inconceivable forms. The elements of apparent spontaneity in popular television shows like *MasterChef*, *The Amazing Race* and *The Voice* appear to be at odds with the traditional requirements of a predetermined script—which is commonly understood to be necessary for copyright protection of a "dramatic work". Other forms of performances such as improvisation theatre, animal acts, fireworks and synchronised drones only add to a cacophonous collection that do not fit into our current state of copyright law that demands categorical recognition of works. This article explores, through a comparative analysis of developments in a number of Commonwealth common law jurisdictions, what may and should qualify as a dramatic work in Singapore in the 21st century.

I. INTRODUCTION

Modern conceptions of dramatic entertainment have expanded to include diverse and previously inconceivable forms. The lack of precedent dealing with dramatic works, including choreographic shows, makes the application of copyright law a challenging endeavour for any potential claimant. For instance, technological developments in television production have allowed entertainment creators to muster "nationwide audience participation".[1] Unsurprisingly, the recent decades have seen an unprecedented popularisation of formatted television shows.[2] However, the elements of apparent spontaneity in well-known television shows like *MasterChef*, *The Amazing Race* and *The Voice* appear at odds with traditional requirements of a predetermined script.[3] Furthermore, dramatic entertainment has evolved beyond live actors on

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1 Charlotte Hinton, "Can I Protect My TV Format?" (2006) 17(3) Ent LR 91 at 92.

2 See Ted Magder, "Television 2.0 The Business of American Television in Transition" in Susan Murray & Laurie Ouellette, *Reality TV: Remaking Television Culture* (New York: New York University Press, 2009) 141 at 141, 142 ("[d]ramatic programming is no longer the *sine qua non* of prime time programming . . . 'unscripted' programming has become a television staple in the most coveted time slots").

3 Kathy Bowrey, "The Manufacture of 'Authentic' Buzz and the legal relations of MasterChef" in Dan Hunter *et al*, eds, *Amateur Media: Social, Cultural and Legal Perspectives* (London: Routledge, 2012) 73 at 78 ("[t]he process of awarding copyright to dramatic works creates obstacles for 'unscripted' content and interactive narratives").

a stage.[4] Since 2009, The Finger Players, a Singapore-based theatre company, has staged *Poop*, a play without human actors that utilises puppetry integrated with black light theatre.[5] In 2012, a troupe of dogs (and their trainers) known as *The Olate Dogs* won *America's Got Talent* by impressing audiences with their dog-trick routines.[6] In 2017, humanoid robots appeared on *Amazing Chinese*, a Chinese game show, and treated the audience to a visual spectacle of Kung-Fu moves performed in unison.[7] Significantly, modern society has come to embrace the performative value in technologically sophisticated visual displays[8] such as the fireworks display that assumed the shape of footprints walking across the sky during the 2008 Beijing Olympics Opening Ceremony, which evoked an emotional response.[9] Recently, at the 2018 PyeongChang Winter Olympics Opening Ceremony, the audience witnessed 1218 drones assembling to form the contours of a moving snowboarder.[10] The commercial value in these productions underscores the need to recognise ownership rights in dramatic entertainment created by new innovators. Accordingly, clarifying the nature and scope of protection for dramatic works will pave the way for such entertainment creators to better exploit an authorial right of ownership.

Although a thorough study of copyright subsistence, infringement and defences is essential for determining the precise scope of copyright protection afforded to entertainment creators, this article will only focus on the threshold issue of subsistence in order to determine the legal definition of a "dramatic work" in Singapore and, potentially, in other Commonwealth common law jurisdictions. After a survey of approaches in various jurisdictions, the authors propose that courts should consider adopting a three-part test. Concerns that the copyright balance would otherwise tilt too far in favour of creators resulting in an amorphous tort of misappropriation are ameliorated by the fact that courts may still withhold thick copyright protection for certain types of dramatic works at the infringement inquiry.

II. Copyright Subsistence in Dramatic Works—Legislative and Theoretical Frameworks

The use of categories in intellectual property has been observed to be "ubiquitous", in particular "to denote differences between subject matter of a certain type" and "to denote systems of subject matter by sorting every member of a certain type that

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4 Sarah Bellingham, "Explosive Drama: Exploring the Boundaries of Copyright Subsistence in Dramatic Works" (2011) 22 AIPJ 106 at 109, 110.

5 Helmi Yusof, "When the Poop! Hits the Fan", *The Business Times* (27 October 2017), online: Business Times <http://www.businesstimes.com.sg/lifestyle/arts/when-the-poop-hits-the-fan>.

6 Jim Merritt, "Olate Dogs, 'America's Got Talent' winners, come to Port Washington", *Newsday* (5 January 2017), online: Newsday <https://www.newsday.com/entertainment/long-island-events/olate-dogs-america-s-got-talent-winners-come-to-port-washington-1.12871460>.

7 CGTN, "108 Robots Perform Chinese Kung Fu", *EBL News* (17 June 2017), online: EBL News <https://eblnews.com/video/108-robots-perform-chinese-kung-fu-130485>.

8 Bellingham, *supra* note 4 at 111.

9 *Ibid* at 115.

10 Intel, News Release, "Intel Drone Light Show Breaks Guinness World Records Title at Olympic Winter Games PyeongChang 2018" (9 February 2018), online: Intel <https://newsroom.intel.com/news-releases/intel-drone-light-show-breaks-guinness-world-records-title-olympic-winter-games-pyeongchang-2018/>.

exists".[11] The categories of subject matter in Singapore copyright law can arguably be said to operate in the same manner in which the categories in English and Australian copyright law operate: as a statutory acknowledgement that there exist specific types of authorial works—such as literary, dramatic, musical and artistic works—"that are substantively, ontologically, different, and that must therefore be distinguished";[12] unlike the open-ended approach in the United States, an authorial creation must fall within the defined types of works or subject matter listed in the Singapore *Copyright Act* in order to attract copyright protection. The Singapore *Copyright Act* stipulates that a "dramatic work" must satisfy four legal requirements for copyright to subsist in the work.[13] First, the work must be connected with Singapore.[14] Secondly, the work must be original.[15] Thirdly, the work must be reduced to some material form.[16] Finally, the work must fall within a recognised category of subject matter.[17] In this regard, section 7(1) of the Singapore *Copyright Act* defines a dramatic work to include a choreographic show or dumb show.[18] While there are, across the Commonwealth common law jurisdictions, minor variations on the precise ambit of a "dramatic work"—*eg*, the United Kingdom ("UK") *Copyright, Designs and Patents Act 1988* uses the term "dance" instead of "choreographic show" within the definition of a "dramatic work"[19]—the case law surrounding the determination of a "dramatic work" exhibits certain common salient characteristics.

Parliamentary reports reveal that Singapore's copyright regime is underpinned by a utilitarian rationale that seeks to promote the creation and propagation of cultural works. During the second reading of the *Copyright (Amendment) Bill*, Professor S Jayakumar emphasised that the proposed amendments to the Singapore *Copyright Act* would "further [the] efforts to make Singapore . . . a global centre for innovation and creative industries".[20] In the third reading of the *Copyright (Amendment) Bill*, he reiterated that it was inherent in the design of the proposed statute to take into account the need for a copyright regime which was responsive to fast-changing technology.[21] However, the Singapore *Copyright Act* has yet to articulate the elements of a "dramatic work" or a "choreographic show". It is commonly understood that a dramatic work refers to a theatrical performance on a stage such as a play, mime or pantomime (the latter two often crudely called a "dumb show"), while dance performances are referred to as choreographic shows. This article will focus only

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11 Justine Pila, *The Subject Matter of Intellectual Property* (Oxford: Oxford University Press, 2017) at 11 [Pila, *The Subject Matter of IP*].

12 *Ibid* at 83.

13 *Copyright Act* (Cap 63, 2006 Rev Ed Sing) [Singapore *Copyright Act*].

14 *Ibid*, s 27(1)–(3).

15 *Ibid*, s 27. See also *Flamelite (S) Pte Ltd v Lam Heng Chung* [2001] 3 SLR(R) 610 (CA); *Virtual Map (Singapore) Pte Ltd v Suncool International Pte Ltd* [2005] 2 SLR(R) 157 (HC).

16 Singapore *Copyright Act*, *supra* note 13, s 16(1).

17 *Ibid*, s 27. See also *Real Electronics Industries Singapore Pte Ltd v Nimrod Engineering Pte Ltd* [1995] 3 SLR(R) 909 (HC).

18 Singapore *Copyright Act*, *supra* note 13, s 7.

19 *Copyright, Designs and Patents Act 1988* (UK), c 48, s 3 [UK *Copyright Act*].

20 *Parliamentary Debates Singapore: Official Report*, vol 78 at col 1051 (16 November 2004) (Professor S Jayakumar).

21 *Parliamentary Debates Singapore: Official Report*, vol 48 at col 959 (26 January 1987) (Professor S Jayakumar).

on an analysis of the kind of theatrical performances that may qualify as dramatic works.

However, new and technologically sophisticated forms of theatrical entertainment tend to stretch the traditional norms of drama, and to categorise such works as "dramatic works" would require significant explication. Whereas it is intuitive that the script of Shakespeare's *Hamlet* would naturally comprise a "dramatic work", the acceptance of unconventional dramatic forms (such as improvisation—or "improv"—theatre and light shows) demands theoretical justifications.

A "dramatic work" is unique and, in one aspect, notably different from a literary work, a painting or a musical composition. This is because numerous stakeholders—such as authors, directors, and audiences—determine a dramatic work's constitutive elements. Four theories stand out as being most useful for the purpose of ascertaining what constitutes a dramatic work. Sarah Bellingham proposes that "*formalist* properties of the dramatic work, . . . the *objective intention* of individual authors, and the *view of society* with regards to the nature of the works" must be considered.[22] To these three theories we add a fourth: the *common intention of collaborators* or the collaborative theory.

Under the formalist theory, the proper characterisation of a "dramatic work" depends on the existence of the standard "features that are visible, audible or otherwise discernible" in the dramatic work.[23] Justine Pila argues that the true appreciation of a dramatic work begins with analysis of the "non-relational properties intrinsic to the [work]".[24] Consequently, the courts "have constructed a framework whereby a dramatic work is understood in terms of key elements",[25] one element being the requirement of a storyline.[26] Pila observes that the English Court of Appeal's decision in *Norowzian v Arks Ltd (No 2)*[27] supported a correspondingly formalist view of dramatic works.[28] By defining a dramatic work as a work of action that is capable of being performed before an audience,[29] Nourse LJ understood dramatic works to be "arrangements of . . . behavioural elements that are stable . . . when presented in performance".[30] While Bellingham affirms the current primacy of the formalist

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22 Bellingham, *supra* note 4 at 110 [emphasis added].

23 Frank Sibley, "Aesthetic Concepts" (1959) 68 Philosophical R 421 at 424. See also Justine Pila, "Copyright and its Categories of Original Works" (2010) 30 Oxford JLS 229 at 231 [Pila, "Original Works"]; Bellingham, *supra* note 4 at 107; Kendall Walton, "Categories of Art" (1970) 79 Philosophical R 334 at 338, 339; Viola Elam, "Sporting Events as Dramatic Works in the UK Copyright System" (2015) 13 Ent & Sports LJ 1 at 3, 13.

24 Pila, "Original Works", *ibid* at 231. Pila, *The Subject Matter of IP*, *supra* note 11 at 13 also notes that the essential properties of the categories of authorial works are "their possession of a certain expressive form" and "the history of their production".

25 Brent Salter, "Taming the Trojan Horse: An Australian Perspective of Dramatic Authorship" (2009) 56 J Copyright Society of USA 789 at 822.

26 *Seltzer v Sunbrock* 22 F Supp 621 at 628 (SD Cal 1938) [*Seltzer*]. See also US, The US Copyright Office, *Compendium of US Copyright Practices, Third Edition* (2017) [US *Copyright Compendium*] at 804.1 (defining a dramatic work as "a composition generally in prose or verse that portrays a story that is intended to be performed for an audience").

27 [2000] ECDR 205 [*Norowzian (No 2)*].

28 Pila, "Original Works", *supra* note 23 at 236.

29 *Norowzian (No 2)*, *supra* note 27 at 209.

30 Pila, "Original Works", *supra* note 23 at 236.

theory, she acknowledges that the other two theories are equally important in the modern understanding of drama.[31]

The second theory is the authorial theory, which posits that an author's intention to have the work performed before an audience is crucial in ascertaining the existence and nature of a dramatic work.[32] Performative intention is particularly useful for sifting out genuine dramatic works from those works which only incidentally or superficially satisfy the formalist requirements of drama.[33] For example, public demonstrations and newscasts—which might involve some action—would not qualify as dramatic works due to the absence of performative intention. In a decision that appeared to endorse this approach, the English High Court in *Nova Productions Ltd v Mazooma Games Ltd*[34] held that a video game was "not a work of action which is *intended* to be . . . performed before an audience".[35] Subsequently, the UK Supreme Court in *Lucasfilm Ltd v Ainsworth*[36] reviewed a similar theory in the context of "artistic works" and held that the court should not set itself up as an arbiter of artistic merit, but should be concerned instead with discerning the presence of an "artistic purpose" in the creation of a sculpture as a type of protectable artistic work.[37] Lionel Bently and Brad Sherman are of the view that under English law today, courts are more likely to protect the work if an object was created with an artistic purpose in mind.[38]

However, the foregoing theory should not be overstated in the light of the collaborative theory, which considers the perspective of non-playwrights such as directors who interpret the fixed writings of authors. Specifically, this theory emphasises how drama is an intrinsically collaborative endeavour that unites the static text with the dynamic performance. During the 16th and 17th Centuries, ownership in popular plays vested in performing troupes rather than individuals, owing to the English Crown's grant of royal patents to performing houses that hosted plays.[39] As such, the troupes exercised *de facto* control over these performances, tweaking their performances every night. This system accorded minimal status to the playwright, who received limited royalties on selected days of the opening run.[40] Courts also struggled to bifurcate the contributions of non-playwrights from the text because performative value mainly derived from non-writers such as actors and directors. It is therefore no surprise that in the early 19th Century decision of *Murray v Elliston*, counsel argued

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31 Bellingham, *supra* note 4 at 108. See also Justine Pila, "Works of Artistic Craftsmanship in the High Court of Australia: The Exception as Paradigm Copyright Work" (2008) 36(3) Fed LR 365; Justine Pila, "An Intentional View of the Copyright Work" (2008) 71 Modern LR 535 [Pila, "An Intentional View"].

32 Pila, "An Intentional View", *ibid* at 544.

33 Bellingham, *supra* note 4 at 108; Pila, "Original Works", *supra* note 23 at 237, 238 and 241.

34 [2006] RPC 379 [*Nova*].

35 *Ibid* at 401 [emphasis added].

36 [2012] 1 AC 208 [*Lucasfilm*].

37 *Ibid* at 37.

38 Lionel Bently & Brad Sherman, "Copyright Aspects of Art Loans" in Norman Palmer, *Art Loans* (Alphen aan den Rijn: Kluwer Law International, 1997) 239 at 267. See also Simon Stokes, *Art and Copyright*, 2d ed (Hart Publishing, 2012) 165. See also David Tan & Chan Yong Neng, "Copyright Subsistence in Contemporary Times: A Dead Shark, An Unmade Bed and Bright Lights In An Empty Room" (2013) 25 Sing JLS 402 at 416-418.

39 Derek Miller, *Copyright and the Value of Performance, 1770–1911* (Cambridge: Cambridge University Press, 2018) at 31.

40 *Ibid* at 33.

that "[p]ersons go [to a theatre], not to read the work, or to hear it read, but to see the combined effect of poetry, scenery, and acting".[41] In modern copyright law, the debate between playwrights and directors plays out in the copyright doctrines of joint authorship and the definition of a dramatic work.[42] Ultimately, in any collaborative endeavour, the resulting product must be sufficiently certain so as to distinguish one work from another.

Finally, the audience theory emphasises the importance of the audience's perception in the appreciation of a dramatic work. Under this theory, "the audience is integral to the shared meaning of the performance" and "accepted normative propositions of experiencing and representing the world are disregarded".[43] By giving weight to social perceptions, the audience theory adapts to changes in performative technology and aesthetic tastes. As society is increasingly exposed to new modes of performative expression, its willingness to embrace these as legitimate forms of theatrical entertainment can often extend beyond those conceived by Parliament under prevailing copyright law.[44] Consistent with the audience theory, Lord Denman CJ in *Russell v Smith*[45] held that "any piece which, on being presented . . . to an audience, . . . produce[d] emotions" would amount to a "dramatic piece" under the *Copyright Act 1842*.[46] Similarly, Ian Jeffery and Dominic Farnsworth propose that a work's ability to "convey meaning to an audience" ought to be decisive in the evaluation of a dramatic work.[47] However, as judges are rarely qualified or equipped to adjudicate subjective aesthetic standards, the better approach would be to accord prominence to expert opinion in the determination of a dramatic work, akin to what David Tan and Chan Yong Neng recommended in the context of "works of artistic craftsmanship".[48] Melville Nimmer also argues that "[i]f a work might arguably be regarded as a work of art by any meaningful segment of the population . . . then the work must be considered a work of art for copyright purposes".[49] In any event, expert testimony from playwrights, audiences and critics would not only be useful for verifying the work's status in the theatrical sphere, but would also be useful for identifying the formal properties of the work and for ascertaining the performative intention of the creator, especially where the creator is no longer alive.

At this juncture, we stress that all four theories are integrated into our proposed test at Part III of this article. Primacy is given to the formalist theory because the elements of action, performability, certainty and unity constitute the observable properties of the work. The element of "intention" in our proposed definition evidently incorporates the authorial dimension, while the flexible notion of "certainty"

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41 *Ibid* at 50, quoting *Murray v Elliston* (1822) 106 ER 1331 at 1332.

42 *Martin v Kogan* [2020] ECDR 3; *Brighton v Jones* [2004] EWHC 1157 (Ch) at paras 68, 69.

43 Bellingham, *supra* note 4 at 112.

44 *Ibid*.

45 (1848) 116 ER 849 at 857. See also Susanna Leong, *Intellectual Property Law of Singapore* (Singapore: Academy Publishing, 2013) at paras 04.060, 04.065.

46 (UK), 5 & 6 Vict, c 45.

47 Ian Jeffery & Dominic Farnsworth, "No Joy in Anticipation" (1998) 20 Eur IPR 474 at 477.

48 Tan & Chan, *supra* note 38 at 407. See also Glen Cheng, "The Aesthetics of Copyright Adjudication" (2012) 19 UCLA Ent LR 113 at 147.

49 Melville B Nimmer & David Nimmer, Nimmer on Copyright: A Treatise on the Law of Literary, Musical and Artistic Property, and the Protection of Ideas (New York: Matthew Bender, 1980) at §2.08[B][1].

reflects the collaborative perspective. Finally, a rejection of any human and narrative requirement reflects the audience perspective and gives weight to changing perceptions among audiences regarding the performative value of new productions.

III. "Dramatic Works" Under the Copyright Act

Section 7(1) of the Singapore *Copyright Act* provides a non-exhaustive definition of a dramatic work:

> "dramatic work" includes—
> (a) a choreographic show or other dumb show if described in writing in the form in which the show is to be presented; and
> (b) a scenario or script for a cinematograph film,
> but does not include a cinematograph film as distinct from the scenario or script for a cinematograph film;[50]

This provision is similar to the definitions contained in section 4(1) of the UK *Copyright Act*,[51] section 10 of the Australian *Copyright Act 1968*,[52] and section 2 of the New Zealand *Copyright Act 1994*.[53]

A. *Approaches to the Definition of "Dramatic Work" in Various Jurisdictions*

The Singapore courts have yet to articulate a test for a "dramatic work" under section 7(1) of the Singapore *Copyright Act*. On the other hand, courts in various jurisdictions have proposed a plethora of legal tests. Surprisingly, the uncertainty that arises from such divergent tests has not been acknowledged or discussed by commentators in any great depth.

In Singapore, there have been no judicial decisions on dramatic works, but there are at least two commentators who have proposed definitions for dramatic works. Ng-Loy Wee Loon identifies "two features within this common thread: first, the element of performance and secondly, the presence of a plot or theme which unifies the dance steps, gestures, movements or words".[54] Susanna Leong identifies three

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50 Singapore *Copyright Act*, *supra* note 13, s 7(1).

51 *Supra* note 19. However, the important distinction between the UK and Singaporean definition is that the Singaporean definition excludes a cinematograph film from protection: see the UK *Copyright Act*, *ibid*, s 3(1), which defines dramatic work to include "a work of dance or mime".

52 *Copyright Act 1968* (Cth), s 10 [Australian *Copyright Act*]. The distinction between the Australian and Singaporean definition is that the Singaporean definition requires a choreographic show or dumb show to be reduced in writing. Nevertheless, Professor Ng-Loy has noted that "insisting that a dance or mime must be recorded in writing or some other visible form of notion, is somewhat archaic": Ng-Loy Wee Loon, *Law of Intellectual Property of Singapore,* 2d ed (Singapore: Sweet & Maxwell, 2014) at para 6.1.18.

53 *Copyright Act* 1994/143 (NZ) [NZ *Copyright Act*]. Like the UK statute, the New Zealand statute does not expressly exclude a cinematograph film from protection as a "dramatic work": see the NZ *Copyright Act*, *ibid*, s 2, which defines dramatic work to include "(a) a work of dance or mime; and (b) a scenario or script for a film".

54 Ng-Loy, *supra* note 52 at para 6.1.20.

elements in a dramatic work:

> (a) a work or a composition that needs to be performed by acting and setting of sceneries in the production, with or without words or music; (b) the main features in the work or composition must possess sufficient unity to be capable of performance before an audience; and (c) the performance of the work or composition evokes responses of human emotions from the audience such as laughter, sadness, anger, excitement, fear and suspense, to name a few.[55]

In the UK, courts have, over a period of three decades, articulated at least three tests for a dramatic work without properly attempting to reconcile them. The leading authority is *Green v Broadcasting Corp of New Zealand*,[56] which concerned a claim for a dramatic work in the format of a talent contest show *Opportunity Knocks*. In a perfunctory decision, the Privy Council held that the claimed television format was "conspicuously lacking in certainty" and that the features claimed as constituting the format lacked "sufficient unity to be capable of performance".[57] Lord Bridge, delivering the unanimous judgment, found it difficult to isolate a number of allegedly distinctive features of a television series from the changing material presented in each separate performance in order to identify the existence of an "original dramatic work".[58] Notwithstanding the lack of specification regarding certainty and unity,[59] the English High Court applied a two-part test in the subsequent decisions of *The Ukulele Orchestra of Great Britain v Clausen*[60] and *Banner Universal Motion Pictures Ltd v Endemol Shine Group*.[61] In *Ukulele Orchestra*, Hacon J noted that it is possible to claim copyright protection for a TV format and each case will turn on its own facts.[62] In contrast, the English High Court in *Creation Records Ltd v News Group Newspapers Ltd*[63] adopted a different test, holding that a photoshoot scene for a music album cover was not a dramatic work because it was "inherently static, having no movement, story or action".[64] A third strand of UK decisions originates from *Norowzian (No 2)*, which concerned a film, *Joy*, with no dialogue and made

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55 Susanna Leong, *Intellectual Property Law of Singapore* 1st ed (Singapore: Academy Publishing, 2013) at para 04.065.

56 [1989] 2 All ER 1056 [*Green*].

57 *Ibid* at 1058 (citing *Tate v Fullbrook* [1908] 1 KB 821 at 832, 833 [*Tate*]).

58 *Ibid*.

59 Pascal Kamina, "British Film Copyright and the Incorrect Implementation of the EC Directives" (1998) 9 Ent L Rev 109 at 112 [Kamina, "British Film Copyright"].

60 [2015] EWHC 1772 at para 104 [*Ukelele Orchestra*].

61 [2017] EWHC 2600 (Ch) at paras 35, 44 [*Banner*]. In *Banner*, the UK High Court appeared to lay down the twin requirements of 'certainty' and 'unity':

> [C]opyright protection will not subsist unless, as a minimum, (i) there are a number of clearly identified features which, taken together, distinguish the show in question from others of a similar type; and (ii) that those distinguishing features are connected with each other in a coherent framework which can be repeatedly applied so as to enable the show to be reproduced in recognisable form.

62 *Supra* note 60 at para 104. It was found that there was "uncertainty about the number of musicians, the precise nature of their formal attire, the particular music played (any will do and in any order), which songs are to be sung and in what order and what is to be spoken by way of jokes or otherwise".

63 [1997] EMLR 444 [*Creation Records*].

64 *Ibid* at 448.

with a "jump cutting" film editing technique; the whole action of the finished film consists of one man performing a peculiar dance to music in a surreal setting.[65] In holding that the film could also amount to a dramatic work, Nourse LJ provided a distilled synthesis of what he regarded to be the "natural and ordinary meaning" of a dramatic work: "a work of action, with or without words or music, which is capable of being performed before an audience".[66] This test was subsequently applied in *Nova*.[67]

Based on the scant authorities, a divergence of approaches presently exists in Australia. Tamberlin J in *Aristocrat Leisure Industries Pty Ltd v Pacific Gaming Pty Ltd*[68] held that a dramatic work must have a "minimum requirement of some type of *performance*", although "this performance need not . . . be that of human beings".[69] Contrastingly, Hill J adopted a different test in *Nine Network Australia Pty Ltd v Australian Broadcasting Corp*,[70] where one broadcasting network sought an interlocutory injunction restraining its competitor from broadcasting the fireworks at Sydney's New Year celebrations.[71] Denying the applicant relief, Hill J held that "the question really is whether the setting off of the fireworks spectacular . . . is a 'dramatic work' in the ordinary sense of those words" and, more precisely, whether the fireworks show possessed "dramatic unity and interest".[72] In a different copyright infringement case concerning television formats, Tamberlin J held that a dramatic work would extend beyond the text and "take into account the expression of themes and ideas embedded in the production if they are sufficiently substantial".[73] Thus it seems that Australian courts are open to moving towards a "far more ambulatory notion of the property protected in unscripted television"[74] and perhaps also receptive to recognising more unorthodox forms of dramatic works for copyright protection.

In contrast, the courts in the United States ("US") have consistently maintained that a dramatic work must possess "a story—a thread of consecutively related events" which must be "narrated or presented by dialogue or action".[75] Modern jurisprudence confirms the existence of this requirement, since a Californian District Court held that modelling work done at a photoshoot could not amount to a dramatic work for the lack of a story.[76] Given that the US *Copyright Act of 1976*[77] regards choreographic

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65 *Norowzian (No 2)*, *supra* note 27 at 207, 208.

66 *Ibid* at 209.

67 *Supra* note 34 at 401.

68 [2000] FCA 1273 [*Aristocrat Leisure*].

69 *Ibid* at para 61 [emphasis in original].

70 [1999] FCA 1864 [*Nine Network*].

71 *Ibid* at paras 1–8.

72 *Ibid* at para 20.

73 *Nine Films & Television Pty Ltd v Ninox Television Ltd* [2005] FCA 1404 at para 48.

74 Bowrey, *supra* note 3 at 79.

75 *Seltzer*, *supra* note 26. See also *Universal Pictures Co v Harold Lloyd Corp*, 162 F.2d 354 at 359 (9th Cir 1947); *Fuller v Bemis*, 50 F 926 at 929 (CCSDNY 1892) [*Fuller*]; Paul Goldstein, *Copyright: Principles and Practice*, 3d ed (Illinois: Aspen Publishers, 2005) at para 2.9.1 [Goldstein]. See also US *Compendium*, *supra* note 26 at para 804.1, (which defines a dramatic work as "a composition generally in prose or verse that portrays a story"); Nimmer & Nimmer, *supra* note 49 at §2.06[A] (which proposes a two-part definition for a dramatic work: "(1) that it relate to a story, and (2) that it provide directions whereby a substantial portion of the story may be visually or audibly represented to an audience as actually occurring, rather than merely being narrated or described").

76 *Coyle v O'Rourke,* No 14-7121, 2015 US Dist LEXIS 585 (CD Cal, 2015) at *10.

77 Pub. L. No. 94-553, 90 Stat. 2541, 17 USC §101++ [US *Copyright Act*].

works and mimes as subject matter independently protectable apart from dramatic works,[78] it is therefore unsurprising that courts have also refused to classify dances as dramatic works.[79] However, reform is long overdue, as Paul Goldstein observes that it "seems unlikely that, in passing the 1976 Copyright Act, Congress intended to freeze the definition of dramatic works around these nineteenth-century aesthetic conventions".[80] It should be noted that because "dramatic works" and "choreographic works" exist as separate categories under US law, different tests are used for each category; in Singapore, however, a "dramatic work" *includes* a "choreographic show".

In Canada, the requirement of a story was affirmed in *Hutton v Canadian Broadcasting Corp*.[81] However, a number of cases has emerged focusing on the concept of "predictability" in dramatic performance. A liberal construction of what constitutes a dramatic work was adopted in *Kantel v Grant.*[82] Notwithstanding that the manuscript was departed from on a daily basis, the Exchequer Court held that the outline for a daily children's sketch qualified as a dramatic work because the manuscript "grouped a series of predetermined incidents, songs, and . . . talks, in a fixed sequence".[83] On the other hand, the Federal Court of Appeal in *FWS Joint Sports Claimants v Canada (Copyright Board)*[84] denied copyright protection in a sports game due to "the unpredictability of the action" even though "sports teams may seek to follow the plays as planned by their coaches".[85] Subsequently, Thomas J held that hockey-training drills were equally unpredictable because they were "more akin to a dynamic game than a strictly choreographed . . . set of motions . . . in ballet or ice dancing".[86]

B. *A Proposed Test for "Dramatic Work" in Singapore*

The decisions in *Green*, *Norowzian (No 2)*, *Banner* and *Nova* are particularly relevant authorities for ascertaining the suitable test for a dramatic work in Singapore because section 3(1) of the UK *Copyright Act* and section 2(1) of the NZ *Copyright Act* are *in pari materia* with section 7(1) of the Singapore *Copyright Act*.[87] On a proper synthesis of these cases, the authors contend that the following three-part test best encapsulates the reasoning in these decisions and should therefore be considered by

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78 *Ibid*, §102.

79 *Fuller*, *supra* note 78 at 929.

80 Goldstein, *supra* note 78 at para 2.9.1.

81 [1990] CLD 121 at paras 217-221. See also the Canadian *Copyright Act*, RSC 1985, c C-42, s 2, which defines dramatic work to include "(a) any piece for recitation, choreographic work or mime, the scenic arrangement or acting form of which is fixed in writing or otherwise, (b) any cinematographic work, and (c) any compilation of dramatic works".

82 [1933] Ex CR 84 at para 11 [*Kantel*].

83 *Ibid*.

84 [1992] 1 FC 487 [*FWS*].

85 *Ibid* at paras 9, 10.

86 *Gold in the Net Hockey School Inc v Netpower Inc* [2008] AWLD 934 at para 28. See also Elam, *supra* note 23 at 2, 3, 6, 7.

87 The UK *Copyright Act*, *supra* note 19, s 3(1) defines "dramatic work" to include "a work of dance or mime". Similarly, the NZ *Copyright Act*, *supra* note 53, s 2 defines "dramatic work" to include "(a) a work of dance or mime; and (b) a scenario or script for a film".

Singapore courts:

(1) **Natural and Ordinary Meaning**: Does the work fall within the *natural and ordinary meaning* of the expression "dramatic work", that is, "a work of *action intended* for and capable of *performance*"?
(2) **Certainty**: Does the work possess "*certainty*", such that there are a number of clearly identified features which, taken together, distinguish the show in question from others of a similar type?
(3) **Unity**: Does the work possess "*unity*", such that the distinguishing features are connected with each other in a coherent structure that can be repeatedly applied to reproduce the show in recognisable form?

1. *Natural and ordinary meaning*

An analysis of the English decisions confirms that the natural and ordinary meaning of a dramatic work is indeed "a work of action intended for and capable of performance".[88] Contained within this first element are three limbs of action, intention and performability.

The requirement of action is derived from *Norowzian (No 2)*, where Nourse LJ defined a dramatic work to be "a work of action capable of being performed before an audience".[89] Pascal Kamina also argues that a dramatic work is "a work created in order to be communicated in motion, that is, through a sequence of actions, movements, irrespective of the technique by which this movement is retrieved or expressed".[90] Action is not limited to physical acting or dancing,[91] since Nourse LJ implicitly accepted that animated cartoons would satisfy the requirement of action.[92] The requirement of action is justified by principle and policy. First, any risk of overbroad protection is sufficiently counterbalanced by the other two requirements of intention and performability. Secondly, action is a necessary (though insufficient) requirement that distinguishes a "dramatic work" from artistic, musical and literary works. Finally, a broader test of action is consistent with how "the concept of dramatic arts has evolved well beyond those traditional genres of tragedy, comedy and satire".[93] Writing extra-judicially, Sir Richard Arnold opines that lantern shows should be recognised as dramatic works.[94] Several commentators have also made

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88 *Norowzian (No 2)*, *supra* note 27 at 209; *Nova*, *supra* note 35 at 401.

89 *Norowzian (No 2)*, *ibid*.

90 Pascal Kamina, "Authorship of Films and Implementation of the Term Directive: The Dramatic Tale of Two Copyrights" (1994) 16 Eur IPR 319 at 320. This was cited with approval in Jon Holyoak & Paul Torremans, *Intellectual Property Law*, 8th ed (Oxford: Oxford University Press, 2013) 206. Furthermore, this coheres with the outcome of *Creation Records*, *supra* note 63 at 448 [Holyoak & Torremans] (where a photoshoot scene for a music album cover was held not to be a dramatic work because it was "inherently static, having no movement").

91 Kamina, "British Film Copyright", *supra* note 61 at 112; Holyoak & Torremans, *ibid*.

92 *Norowzian (No 2)*, *supra* note 27 at 210.

93 Bellingham, *supra* note 4 at 110.

94 It was contended that lantern shows should only be dramatic works insofar as they involve some element of "action". See Richard Arnold, "Joy: A Reply" (2001) 4 IPQ 10 at 12.

proposals to recognise firework shows in the same category,[95] but Hill J in *Nine Network* commented that "there are certainly difficulties it seems to me with the argument" whether "the setting off of the fireworks spectacular, ephemeral as it is, is a 'dramatic work' in the ordinary sense of those words".[96]

The second requirement of performative intention emanates from the English High Court decision of *Nova*. In concluding that a video game was not a dramatic work, Kitchin J modified the formulation in *Norowzian (No 2)* and defined a dramatic work to be "a work of action which is *intended* to be ... performed before an audience".[97] The US Copyright Office guidelines also stipulate that a dramatic work must be "intended to be performed" as a condition for registration.[98] Similarly, the English Court of Appeal in *Lucasfilm* highlighted the importance of authorial purpose, albeit in the determination of an "artistic work".[99] Reference to the definitional principles of "artistic works" for the purpose of defining "dramatic works" is apropos for three reasons. First, the two categories of subject matter are underpinned by similar aesthetic theories.[100] Secondly, consistent with the intentional theory of drama, performative intention would exclude from copyright protection those works which superficially satisfy the physical requirements of a dramatic work but intuitively lack that element of "drama".[101] Thirdly, the performative intention inquiry obviates the need for judges to pronounce on the aesthetic merits of a dramatic work.[102] Unsurprisingly, numerous commentators have affirmed the relevance of performative intention in the definition of a dramatic work.[103]

The third limb of performability derives from the test in *Norowzian (No 2)* that a dramatic work must be "a work of action ... *capable of being performed* before an audience".[104] In arriving at this formulation, Nourse LJ implicitly rejected the lower court's narrow formulation that a dramatic work must be capable of being *physically* performed before an audience.[105] By implication, the performability

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95 See below for a further discussion on the "human performer" requirement. See generally, Bellingham, *supra* note 4; Anthony Reese, "Copyrightable Subject Matter in the 'Next Great Copyright Act'" (2014) 29(3) Berkeley Tech LJ 1489 at 1528. In the US, copyright registration was granted for a fireworks display as a "dramatic work: "Thunder over Louisville" (dramatic) Zambelli Fireworks Manufacturing Company Inc, USA PAu002818325 (5 April 2004), online: US Copyright Office <https://cocatalog.loc.gov/cgi-bin/Pwebrecon.cgi?Search_Arg=pau002818325&Search_Code=REGS&PID=HIn7CZf9Tn6hKJJxFn3UwCG&SEQ=20200708054057&CNT=25&HIST=1>.

96 *Nine Network*, *supra* note 73 at para 20.

97 *Nova*, *supra* note 34 at 401.

98 US *Copyright Compendium*, *supra* note 26 at para 804.1.

99 *Lucasfilm*, *supra* note 36. For a discussion on authorial purpose, see generally, Tan & Chan, *supra* note 38; Pila, "Original Works", *supra* note 23.

100 Tan & Chan, *ibid* at 406-408.

101 A news broadcast would be excluded. See Hugh Laddie, Peter Prescott & Mary Vitoria, *The Modern Law of Copyright and Designs,* 4th ed (New York: LexisNexis, 2011) at para 3.44.

102 Tan & Chan, *supra* note 38 at 412.

103 Staniforth Ricketson & Christopher Cresswell, *The Law of Intellectual Property: Copyright, Designs & Confidential Information,* 3d ed (Freshwater: LBC Information Services, 2017) at para 7-3104; Irini Stamatoudi, "'Joy' for the Claimant: Can a Film also be Protected as a Dramatic Work?" (2000) 3 IPQ 117 at 122; Bellingham, *supra* note 4 at 111.

104 See *Norowzian (No 2)*, *supra* note 27 at 209 [emphasis added].

105 See also Yin Harn Lee, "Play Again? Revisiting the Case for Copyright Protection of Gameplay in Videogames" (2012) 34 Eur IPR 865 at 872; Hamish Porter, "A 'Dramatic Work' Includes ... a Film" (2000) 11 Ent LR 50 at 52; Bellingham, *supra* note 4 at 111.

requirement abandons the view that a dramatic work must involve human performers. However, commentators have argued that *Norowzian (No 2)* cannot stand for the foregoing proposition because the work in that decision—a film of a dancer performing super-human gyrations—was still physically represented by a human dancer.[106] Nevertheless, this objection cannot stand in light of Nourse LJ's observation that animated cartoon scripts, which do not involve human performers, would be dramatic works.[107] A more forceful rebuttal might be that *Norowzian (No 2)* has limited relevance in Singapore given that the Singapore *Copyright Act* expressly excludes cinematograph films from the scope of dramatic works.[108] But even so, Australian decisions dealing with an identical statutory exclusion[109] have unambiguously stated that a dramatic work of performance "need not . . . be that of human beings".[110] Indeed, such an approach coheres with the audience theory of drama, as society has come to embrace dramatic entertainments exclusively featuring non-human actors. Any restriction otherwise would inappropriately exclude puppet shows.

2. *Certainty*

In *Banner*, Snowden J defined "certainty" as requiring "a number of clearly identified features which, taken together, distinguish the show in question from others of a similar type".[111] Hitherto, other decisions had applied the requirement of certainty without defining its meaning.[112] We propose to include within this second element of certainty two separate limbs of "clearly identified features" and "distinguishing features".

The first limb of "clearly identified features" requires the elements of a dramatic work to be predetermined.[113] In this regard, "clearly identified" might be used interchangeably with the term "predetermined". Since copyright law grants its owner a monopoly, creators must demarcate the boundaries of a claimed work with 'certainty' to give notice to other copyright users and "avoid injustice to the rest of the world".[114] Where protection is claimed for an undetermined element such as an improvisational scene, the work would be insufficiently certain. In this situation, copyright protection cannot "extend to verbal alterations and additions which vary from week to week,

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106 Ian Jeffery & Dominic Farnsworth, "No Joy in Anticipation" (1998) 20 Eur IPR 474 at 476.

107 See *Norowzian (No 2)*, *supra* note 27 at 211, where the English Court of Appeal affirmed that the film "'Joy', just like many cartoon films, is, without being a recording of one, a dramatic work in itself". Buxton LJ also gave a broad interpretation to the expression "capable of performance" by observing that "a cinematographic work. . . [is] capable of being performed before an audience by the showing of the film".

108 The UK statute does not expressly exclude cinematograph films as dramatic works. See Singapore *Copyright Act*, *supra* note 13, s 7(1), where a "'dramatic work'. . . does not include a cinematograph film as distinct from the scenario or script for a cinematograph film".

109 See Australian *Copyright Act*, *supra* note 52, s 10, where a "dramatic work" is defined to "not include a cinematograph film as distinct from the scenario or script for a cinematograph film".

110 *Aristocrat Leisure*, *supra* note 72 at para 61.

111 *Banner*, *supra* note 64 at para 44.

112 Kamina, "British Film Copyright", *supra* note 61 at 112; *Tate*, *supra* note 59 at 832, 833; *Green, supra* note 58 at 1058; *Ukulele Orchestra*, *supra* note 62 at paras 100-104.

113 *Green, ibid* at 1058; *Banner, supra* note 64 at para 43; *Aristocrat Leisure, supra* note 72 at para 62; *Kantel*, *supra* note 85 at para 11.

114 *Green*, *ibid*; *Tate, supra* note 59 at 832, 833.

and possibly from night to night" because the author of the improvisational scene would be the *actor* and not the writer of that scene.[115] Tamberlin J made a similar point in *Aristocrat Leisure* in deciding that video game races were not dramatic works because "there is no apparent plot . . . and there is a strong element of unpredictability and randomness".[116]

On the other hand, where protection is claimed for the predetermined elements comprising the "structure" or "format" of a dramatic work, it has been argued that copyright protection is possible because the uncertain elements—which might attract separate copyright or performers' rights protection—can be "severed" from the main structure.[117] Admittedly, the Privy Council in *Green* had "difficulty [with] the concept that a number of allegedly distinctive features ... can be isolated from the changing material presented in each separate performance".[118] However, thirty years later, the English High Court in *Banner* confirmed otherwise:

> [I]t is at least arguable, as a matter of concept, that the format of a television game show or quiz show can be the subject of copyright protection as a dramatic work. This is so, even though it is inherent in the concept of a genuine game or quiz that the playing and outcome of the game, and the questions posed and answers given in the quiz, are not known or prescribed in advance; and hence that the show will contain elements of spontaneity and events that change from episode to episode.[119]

In *Banner*, the claimant argued that the document containing the *Minute to Win It* television gameshow format was a dramatic work and that the defendants who were involved in eight episodes of the game show as broadcast had infringed copyright.[120] Snowden J opined that the contents of the document containing the show format did not qualify for copyright protection, observing that "those contents are both very unclear and lacking in specifics, and even taken together they did not identify or prescribe anything resembling a coherent framework or structure which could be relied upon to reproduce a distinctive game show in recognisable form".[121] In particular, the format did not "prescribe where the action is to take place" or "the type of one-minute tasks that are required to be performed in any such a way that

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115 *Tate, ibid* at 832.

116 *Aristocrat Leisure, supra* note 72 at para 62. However, the written specifications for the Aristocrat Games were found to be original literary works (see paras 40-55).

117 See Kevin Garnett, Gillian Davies & Gwilym Harbottle, eds, *Copinger & Skone James on Copyright*, 17th ed (London: Sweet & Maxwell, 2016) at para 3-94, which states that where the author has "left the performer to improvise without direction from the author", then "the improvisation may be part of the dramatic structure of the work". However, where the improvisation "constitute[s] the entire performance", then "what the actor actually does while improvising cannot, it is suggested, be part of the original dramatic work."

118 *Green, supra* note 58 at 1058.

119 *Banner, supra* note 64 at para 43 [emphasis added]. For a summary of the arguments for and against copyright protection in television formats, see Lionel Bentley & Brad Sherman, *Intellectual Property Law*, 4th ed (Oxford: Oxford University Press, 2014) at 70. The authors ultimately conclude in favour of copyright protection for television formats.

120 *Banner, ibid* at paras 1, 2.

121 *Ibid* at para 46.

might be regarded as forming a recognisable or repeatable structure".[122]

Allowing the protection of a work's "structure" as a dramatic work recognises the creative and commercial interests of individuals who have conceptualised the "format" of improvisational, reality and aleatoric shows.[123] Such an approach is consistent with the US Copyright Office's practice of allowing registration of works involving improvisation.[124] But the jury is still out on improvisational theatre as a genre of protectable dramatic works since the spontaneous or unpredictable elements may dominate a performance, thus rendering the existence of a structure difficult to discern with sufficient certainty. Commentators have pointed out that "*some* modern participatory theatre, where the content changes with audience participation from performance to performance, *may be excluded* from copyright protection".[125]

To be clear, the determination of certainty is not affected by the errors that performers make during a performance, since the existence of a dramatic work depends on the presence of a predetermined plan and not on the precision of what is executed on stage.[126] This distinction gives conceptual clarity to the division between copyright and performers' rights.[127] Furthermore, this comports with the view in *Kantel* that "in the presentation of a dramatic work ... it is open to the performer to depart from the literal text of the work".[128] However, not all have fully adhered to this principle.[129] It appears that Hacon J in *Ukulele Orchestra* was not entirely correct to state that a dramatic work "is the performance itself" as opposed to the script.[130] In *FWS*, the Canadian Federal Court of Appeal suggested that the playing of an adversarial sports game like football would not attract copyright protection due to the "unpredictability of the action".[131] While sports games should not be dramatic works because they lack distinguishing features and often may not satisfy the requirement of performative intention, it may not be accurate to focus the analysis on the nature of the live performance rather than on the existence of a predetermined plan.

As a note of caution, we emphasise that "fixation should be addressed as a separate question from the fundamental identification of the work itself and should not be allowed to confuse the issue".[132] Although "works may be evidenced by their

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122 *Ibid* at paras 48, 49.

123 Elam, *supra* note 23 at 16 (defining "aleatoric works" as works where "many elements of the composition are left to chance or dependent on the performers' or even the audience's interpretation. See, for example, works by the composer John Cage, or by the dramatist Alan Ayckbourn").

124 US *Copyright Compendium*, *supra* note 26 at §805.3(C).

125 Kevin Lindgren, Warwick Rothnie & James Lahore, *Copyright and Designs,* 3d ed (New York: LexisNexis, 2004) at para 6050 [emphasis added].

126 See, for example, *Brighton v Jones* [2004] EWHC 1157 (Ch) at paras 68, 69, where the English High Court held that "the draft opening script was itself a dramatic work".

127 Garnett, Davies & Harbottle, *supra* note 124 at para 3-94 (noting that while the work may enjoy protection as a dramatic work, "the performance of actors may give rise to quite separate rights" in performance).

128 *Supra* note 20 at para 11.

129 See, for example, Elam, *supra* note 23 at 7; Neil Yap, "The Proof is in the Plating: Copyright Protection of Culinary Arts and Reform for the Categories of Authorial Works" (2017) 39 Eur IPR 226 at 233.

130 *Ukulele Orchestra*, *supra* note 64 at para 99. See also Yap, *ibid*.

131 *Supra* note 88 at paras 9, 10. The court reasoned that while "sports teams may seek to follow the plays as planned by their coaches, as actors follow a script, the other teams are dedicated to preventing that from occurring", and "what transpires on the field is usually not what is planned".

132 Jeffery & Farnsworth, *supra* note 47 at 477.

material fixations, they are created and exist independent of those fixations".[133] Unfortunately, numerous commentators have conflated the requirement of certainty with fixation.[134] This was not helped by the fact that the New Zealand Court of Appeal in *Green*[135] and the English High Court in *Ukulele Orchestra*[136] took the policy rationale of certainty as articulated in *Tate*—that is, the need to prevent injustice to the rest of the world[137]—and applied it to the requirement of fixation. Indeed, there is no compelling policy rationale in modern copyright law which requires a play to be written down before it can constitute a dramatic work.[138]

Separate from the requirement of "predetermined features", the second limb of certainty requires the work to have "distinguishing features". When taken together, the show's features must distinguish the work in question from others of a similar type.[139] Specifically, what is "distinguishing" requires sufficient detail.[140] To some extent, the distinguishing features inquiry serves as the gatekeeper of protectable expression, invoking the trite principle that copyright law does not protect the copying of general ideas but only the expression of detailed ideas sufficiently developed. By excluding undeveloped concepts from the scope of dramatic works, copyright law prevents the granting of a monopoly over ideas in the public domain. Accordingly, where the features of a dramatic work are merely commonplace, such a work does not possess 'certainty'.[141] However, not every constituent feature of a work must be distinguishing; the features need only be distinguishing when taken as a whole.[142]

Where the dramatic work is claimed for a show's format or structure, the "work" would, more often than not, merit only "thin copyright protection" akin to a compilation work; such was the approach taken by the Singapore Court of Appeal in *Global Yellow Pages Pte Ltd v Promedia Directories Pte Ltd* when evaluating compilation works requiring *near-wholesale taking* in order to find infringement.[143] Generally, "the more detailed a format is, the more likely it is to attract copyright protection as a dramatic work".[144] Adding character development and plot-twists to a simple plot idea may enable that idea to crystallise into protectable expression once the features are "sufficiently distinctive to be capable of protection as a dramatic work".[145] Granted, the line between the commonplace and the "distinguishing" is difficult to

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133 Pila, "Original Works", *supra* note 23 at 231. See also Lee, *supra* note 112 at 38-44.

134 See Bob Tarantino, "'I've Got this Great Idea for a Show . . . '—Copyright Protection for Television Show and Motion Picture Concepts and Proposals" (2004) 17 IPJ 189 at 218; Simon Stokes "Categorising Art in Copyright Law" (2001) 12 Ent LR 179 at 185.

135 *Green*, *supra* note 58 at 502.

136 *Ukulele Orchestra*, *supra* note 64 at para 100.

137 *Tate*, *supra* note 59 at 832, 833.

138 Garnett, Davies & Harbottle, *supra* note 124 at para 3-91.

139 *Banner*, *supra* note 64 at para 44.

140 *Green*, *supra* note 58 at 497.

141 *Banner*, *supra* note 64 at para 46.

142 *Ibid* at para 44 (the features must be distinguishable when "taken together"). See also Elam, *supra* note 23 at 12 (noting that even if single basic ideas cannot be protected because they violate the idea-expression dichotomy, "nevertheless, the arrangement and combination of these ideas into an entire routine may constitute the authorial contribution, which warrants copyright protection").

143 [2017] 2 SLR 185 (CA) at paras 15, 16 and 49. See also David Tan, "Intellectual Creations in Compilations: No Sweat Required" (2018) 40 Eur IPR 338.

144 Jonathan Blair & Juliane Althoff, "High Court confirms TV formats can be protected as dramatic works" (2018) 29 Ent LR 62 at 64.

145 David Rose, "Format Rights: a never-ending drama (or not)" (1999) 10 Ent LR 170 at 171.

draw, as "there can never be any hard and fast rules on where the threshold of protectability lies".[146] In *Ukulele Orchestra*, the dramatic work comprising nine to ten elements in the Ukulele Orchestra's presentation format (such as the use of ukuleles, the singing, and the delivery of monologues)[147] did not satisfy the requisite degree of detail because there was "at the least, uncertainty about the number of musicians, the precise nature of their formal attire, the particular music played, which songs are to be sung, and in what order and what is to be spoken by way of jokes or otherwise".[148] Similarly, in *Banner*, Snowden J held that the elements of the popular variety show *Minute To Win It*—the title, the phrase 'one minute to win', the performance of time-sensitive tasks, and the recording of participant's reactions—were "commonplace and indistinguishable from the features of many other game shows".[149] On the other hand, *Wilson v Broadcasting Corporation of New Zealand*[150] represents the high watermark of "sufficient detail", since that case concerned a 57-page feasibility study for a children's television format that included 20 pages of detailed story lines and drawings.[151] Charlotte Hinton also recounts a Brazilian decision in which the proprietors of the *Big Brother* television show format, Endemol, succeeded in an infringement claim against the makers of a Brazilian copycat show *Casa Dos Artistas*. Hinton observes that "the *Big Brother* format was protectable as it was sufficiently detailed. For example, it included technical details about the layout of the house and the positioning of cameras and microphones".[152]

3. *Unity*

A concept which was previously undefined, "unity" now requires the "distinguishing features [of a dramatic work to be] *connected* with each other in a *coherent framework* which can be repeatedly applied so as to enable the show to be reproduced in recognisable form".[153] In essence, the test examines whether the distinguishing elements, taken together, are central or important enough to constitute the structure of the work. Whether the distinguishing elements are sufficiently central requires both a qualitative and quantitative inquiry. If there are only a few distinguishing features and these are merely peripheral to the dramatic work, then the features cannot comprise the structure of the work, and the work would correspondingly lack unity. "Unity" in a dramatic work is necessary to prevent authors from arbitrarily severing different components of a dramatic work and claiming copyright protection over a potentially limitless permutation of those fragments.[154]

In the application of "unity", the cases provide limited guidance because the courts have yet to examine a dramatic work that satisfies the unity requirement. In *Banner*, Snowden J held that even if the show's title, the phrase "one minute to win", the

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146 *Ibid* at 171.
147 *Ukulele Orchestra, supra* note 64 at para 105.
148 *Ibid* at para 104.
149 *Banner, supra* note 64 at para 46.
150 [1990] 2 NZLR 565 at 568.
151 Ute Klemet, "Protecting television show formats under copyright law—new developments in common law and civil law countries" (2007) 29 Eur IPR 52 at 55, 56.
152 Hinton, *supra* note 1 at 92.
153 *Banner*, *supra* note 64 at para 44 [emphasis added].
154 *Green*, *supra* note 58 at 1058.

performance of time-sensitive tasks, and the recording of participant's reactions were distinguishing features, they "did not identify or prescribe anything resembling a coherent framework or structure which could be relied upon to reproduce a distinctive game show in recognisable form".[155] Similarly, in *Green*, the Privy Council held that the title, the catchphrases, the clapometer device which measured audience reactions, and the use of sponsors to introduce competitors were all "accessories" and "lack[ed] that essential characteristic" of unity.[156]

For the sake of conceptual clarity, the requirement of unity should not be conflated with other related concepts. Prior to *Banner*, the English courts applied the test of unity without defining its meaning, thus engendering unnecessary ambiguity. Some equated "certainty" with "unity".[157] Others conflated "unity" with the performability requirement.[158] Having now clarified the meaning of "unity", *Banner* would appear to represent the correct approach. In any event, "unity" cannot refer merely to the thematic connection between the features of a dramatic work because this inappropriately requires the court to adjudicate on the aesthetic merits of the show in question. A requirement of thematic unity could prematurely exclude postmodern theatre, a genre of drama that typically comprises a pastiche of thematically disparate scenes, from copyright protection.[159]

C. *Summary*

Despite the divergent authorities, we contend that the proposed test is well supported by policy, theoretical justifications and established principles of copyright law. Moreover, the principles distilled from the relevant authorities are bolstered by the four perspectives of drama. Consistent with a formalist perspective of drama, courts give primacy to the natural and ordinary meaning of the statutory expression "dramatic work". In addition, the judicial focus on performative intent gives weight to the intentional theory of drama. The rejection of the human performer requirement corresponds to an increasingly relativist audience theory. Finally, the flexible notion of certainty reflects a growing recognition of the collaborative theory in theatre and attempts to recalibrate the balance between playwrights and directors.

Unlike literary, artistic or musical works, the "dramatic work" is a complex confluence of a various creative elements—such as acting, scenery, characters, stage directions, dialogue and plot—which are unified in a single performative enterprise. Therefore, it is no surprise that concepts of certainty and unity which define a "dramatic work" at a higher level of abstraction—at the structural level—are necessary to determine whether a dramatic work exists for the purpose of copyright protection. Additionally, the complexity of the test can be attributed to the nuance required to

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155 *Banner*, *supra* note 64 at para 46.

156 *Green*, *supra* note 58 at 1058.

157 See for *eg*, *FWS*, *supra* note 88 at para 10 ("it is necessary for copyright not to have 'changing materials' that are 'lacking in certainty' or 'unity'").

158 The Privy Council's statement in *Green* that "a dramatic work must have sufficient unity to be capable of performance" was construed by the English High Court in *Norowzian (No 2)*, *supra* note 27 at 87 to mean that "unity" was equivalent to "capable of performance".

159 See generally, William S Haney II, *Postmodern Theater and the Void of Conceptions* (Newcastle: Cambridge Scholars Publishing, 2006).

balance the rights of creators and users in the context of changing technological and aesthetic perspectives.[160] Indeed, the proposed definition might even be criticised for being excessively reductionist in omitting to define "choreographic shows" and "dumb shows", categories that the Act expressly identifies as falling within the ambit of "dramatic works", but perhaps it is not possible to have a one-test-fits-all approach to evaluate all genres of performance.

IV. Is the Proposed Test for "Dramatic Works" Workable?

An application of the proposed test to two familiar works of entertainment demonstrates how the test might assist the courts in ascertaining the existence of a dramatic work under the Singapore *Copyright Act*. The two works—*Whose Line Is It Anyway?* ("*Whose Line*") and Intel's Winter Olympics Drone Show—have been selected for their unique combination of elements which are representative of different genres of dramatic entertainment involving humans and non-humans.

A. *Whose Line Is It Anyway?*

Whose Line is a well-known American television show hosted by Drew Carey that first premiered in 1998. Crucially, it exemplifies improvisational theatre with deliberately unscripted segments, being a short form improv comedy whose entertainment value is derived from its intentionally unscripted format. The American show consists of a panel of four performers who invent characters, scenes, and songs on the spot, in the style of short-form improvisation games, where topics for the games are based on either audience suggestions or prompts from the host Carey, who would set up a game and situation that the performers would improvise.[161] Some scenes include "voicing over a clip from a movie without the soundtrack, inventing a song from words suggested by audience members, and using props in amusing ways".[162] At the conclusion of each episode, a winner or several winners were chosen arbitrarily by Carey. It has been said that *Whose Line* was quintessential in introducing improv theatre to the masses.[163] This improv theatre format has been performed live in theatres all around the world with a panoply of variations from the *Whose Line* format.

Whose Line falls within the natural and ordinary meaning of a "dramatic work" because it satisfies the requirements of action, performative intention, and performability. The show involves an abundance of action, with "many of the games encourag[ing] physical interplay".[164] The elements of performative intention and

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[160] David Bainbridge, *Intellectual Property*, 9th ed (London: Pearson, 2012) 59.

[161] "Whose Line Is It Anyway" (29 March 2014), online: Retro Junk <http://www.retrojunk.com/content/child/description/page/4984/whose-line-is-it-anyway>.

[162] "WSN Case Study: Whose Line Is It Anyway?" (20 February 2018), online: Hat Trick International <http://hattrickinternational.co.uk/newsitem/WSN_Case_Study_Whose_Line_is_it_Anyway>.

[163] Conversations with Ross: Featuring Colin Mochrie <http://www.rosscarey.com/2011/07/28/episode-40-featuring-colin-mochrie/>.

[164] Emily Ashby, "Whose Line Is It Anyway?", online: Common Sense Media <https://www.commonsensemedia.org/tv-reviews/whose-line-is-it-anyway>.

performability are present, as the show is performed live in a television studio and targeted for performance before a television audience. Despite the presence of improvisation, and hence an element of spontaneity and uncertainty, copyright protection over the *structure* or *format* of the show is likely to subsist because *Whose Line* is sufficiently "certain", though this is likely to result in thin copyright protection.

First, certainty requires the identification of predetermined features.[165] While the number and type of games played varies from episode to episode (and not all are played each episode), there tends to be a menu of recurring games. *Whose Line* comprises of several elements fixed in a predetermined sequence. The opening act begins with the host announcing the tagline: "Welcome to *Whose Line is it Anyway*, the game show where everything is made up and the points don't matter". The host then introduces the "cast of four comedians" before returning to the desk at the side of the stage.[166] Subsequently, the four performers play five improvisational games between two to five minutes long from a menu of up to twenty-four games.[167] At the beginning of each game, the host explains the rules. After each game, the performers return to their four chairs and banter with the host. For the closing act, the host instructs the four performers to act out a scene as the end credits roll out. Reviewers have observed that "over the years . . . the format itself has barely changed".[168]

Secondly, copyright protection would subsist over these predetermined elements because taken together, the features distinguish *Whose Line* from other improv theatre game shows. Notably, the cast of four comedians who play the improv games based on thematic suggestions from the host and live studio audience,[169] the seating arrangement of four chairs facing the audience, and the awarding of arbitrary points by the host are three particularly distinguishing features of the show. As previously mentioned, copyright protection cannot "extend to verbal alterations and additions which vary from week to week, and possibly from night to night"[170] as this would be too *uncertain*. For instance, it would not be possible to assert copyright protection individually for games as such as "Scenes from a Hat" or "Props".

Finally, *Whose Line* possesses sufficient "unity". Snowden J in *Banner* held that unity requires the distinguishing features to be sufficiently central to constitute a coherent structure. Here, the aforementioned distinguishing features are sufficiently central to *Whose Line* because the three features, when taken together, are indispensable in facilitating the flow and rhythm of the show. Given that all three elements are satisfied, *Whose Line* arguably falls within the definition of a "dramatic work" under the Singapore *Copyright Act*. Essentially, the subject matter of protection is the television format. Formats of other television programmes today such as *MasterChef*, *The Amazing Race*, *The Voice*, *Survivor* and *Got Talent* are multi-billion-dollar franchises which can be licensed for production in different countries, and it is important that the *original creators* are able to secure copyright protection for their works.

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165 *Banner*, *supra* note 71 at para 44.

166 Ashby, *supra* note 171.

167 *Ibid*.

168 Ryan McGee, "Whose Line Is It Anyway?" (16 July 2013), online: AVTV Club <https://tv.avclub.com/whose-line-is-it-anyway-1798177388>.

169 Ashby, *supra* note 171.

170 *Tate*, *supra* note 59 at 832.

B. *Intel's Winter Olympics Drone Show*

Intel's Drone Light Show at the 2018 PyeongChang Winter Olympics ("the Drone Show") is an example of how a dynamic visual display can qualify as a "dramatic work". During the Opening Ceremony rehearsals, the audience witnessed an unprecedented 1218 drones morphing into the shapes of a moving snowboarder, the five interlocking Olympic rings and a flying dove.[171]

The Drone Show falls within the natural and ordinary meaning of a "dramatic work". Replicating "the most intricate moves of living creatures", the Drone Show is replete with action.[172] Performative intention is also satisfied, as the Intel Drones are "specifically designed for entertainment purposes" and are "equipped with LED ... colour combinations ... for any animation".[173] Intel aims to "creat[e] immersive opportunities for viewers" by marrying technology and performative art.[174] Finally, akin to the display of moving pictures on a screen that was held to satisfy the performability requirement,[175] the Drone Show likewise satisfies the performability requirement because the drones are projected as aerial pixels in the 3-D image against the night sky. Since performability does not require human actors, the absence of human actors in the Drone Show does not have a bearing on performability.[176]

Furthermore, the Drone Show is sufficiently certain. First, the Drone Show comprises three predetermined animated segments: the moving snowboarder, the five Olympic-shaped rings and the flying dove. Recounting the creative process, Intel representatives explained that the three animations were drawn up "using 3-D design software" and "made possible by careful coding".[177] Despite the fact that technical difficulties arising from strong wind, cold weather and logistical changes "kept Intel from performing its drone show live during the opening ceremonies for the 2018 Winter Olympics",[178] this does not affect the predetermined nature of the work. Secondly, the three animated segments, though perhaps commonplace on their own, are fairly distinctive when considered in totality. Lastly, no issue of 'unity' arises

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171 Intel, News Release, "Intel Drone Light Show Breaks Guinness World Records Title at Olympic Winter Games PyeongChang 2018" (9 February 2018), online: Intel Newsroom <https://newsroom.intel.com/news-releases/intel-drone-light-show-breaks-guinness-world-records-title-olympic-winter-games-pyeongchang-2018/> [Intel, "Intel Drone Light Show"].

172 Adam Ottke, "BTS: The Incredible 2018 Pyeongchang Winter Olympics Drone Light Show" (13 February 2018), online: Fstoppers <https://fstoppers.com/bts/bts-incredible-2018-pyeongchang-winter-olympics-drone-light-show-221780>.

173 Intel, "Intel Drone Light Show", *supra* note 171; Chaim Gartenberg, "Intel's Winter Olympics light show featured a record-breaking 1218 drones" (9 February 2018), online: The Verge <https://www.theverge.com/2018/2/9/16994638/winter-olympics-2018-intel-drone-show-world-record> [Intel, "Intel's Winter Olympics"].

174 Intel, "Intel's Winter Olympics", *ibid*; Brian Barrett, "Inside the Olympics Opening Ceremony World-Record Drone Show" (9 February 2018), online: WIRED <https://www.wired.com/story/olympics-opening-ceremony-drone-show/>.

175 *Norowzian (No 2), supra* note 27 at 211.

176 *Norowzian (No 2)*, *ibid* at 209. See also *Aristocrat Leisure*, *supra* note 71 at para 61.

177 Barrett, *supra* note 181.

178 Ultimately, the pre-recorded rehearsal version was aired to television audiences. See Rani Molla. "Intel's drone light show never got off the ground for the 2018 Winter Olympics opening ceremony" (10 February 2018), online: Recode <https://www.recode.net/2018/2/10/16998652/drones-guinness-world-record-pyeongchang-2018-winter-olympics>.

because the three animated segments comprise the entirety of the work, and therefore it necessarily follows that the three animated segments are sufficiently central to comprise the structure of the work. Given that the three elements are satisfied, the Drone Show would qualify as a dramatic work.

Such an outcome coheres with the views of commentators who have canvassed proposals to recognise fireworks as dramatic works.[179] Barring protection for visual displays like the Drone Show would create a potential lacuna that may skew the copyright balance too far against creators. Drone-powered light shows are unlikely to receive copyright protection as "artistic works" given their ephemeral nature.[180] Although the underlying computer software code may receive copyright protection as "literary works", the weight of authority suggests that imitators would not be liable for infringement because they can substantially reproduce the Drone Show without copying the text and structure of the software code.[181]

V. Epilogue: Choreographic Shows

The authors acknowledge that the proposed test is more suited for a theatrical performance by human and non-human actors such as a play, mime, pantomime or dumb show, or for a television format, where there is some form of narrative. Although the proposed test was applied to the example of Intel's Drone Show, one may credibly argue that the performance is more of a "choreographic show". The Singapore *Copyright Act* does not define "choreographic shows" but simply lists this category as a protectable form of dramatic works.[182] The Singapore courts have yet to consider the definition of choreographic shows, but in the US, courts have been grappling with this category for decades. Prior to the statutory inclusion of "choreographic works" as a separate category in 1976, US courts attempted to fit choreographic shows within the jurisprudence of dramatic works (which required some plot or narrative),[183] but contemporary dance presents a challenge to such an approach. Dance choreographers such as George Balanchine, Bob Fosse, Jerome Robbins and Martha Graham revolutionised dance in their own distinctive styles, expanding the definition of choreography beyond classical ballet. In particular, Martha Graham, frequently referred to as the mother of modern dance for her revolutionary style, pioneered "a distinct style of movement all based on a form of breathing inspired by contraction

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179 See generally, Bellingham, *supra* note 4; Reese, *supra* note 102.

180 A fireworks display does not naturally fall within any of the categories of "artistic work". See Ng-Loy, *supra* note 53 at para 6.3.20 (commenting that artistic works must "involve some tangible medium").

181 Courts have affirmed the proposition that copyright protection is limited to the design and structure of the codes written by the programmer and not the functions of the code. See *SAS Institute Inc v World Programming Ltd* [2011] EWHC 1829 (Ch) at para 232.

182 Singapore *Copyright Act*, *supra* note 13, s 7.

183 The US *Copyright Act*, *supra* note 81, §102(a)(4), lists "choreographic works" as a separate category from "dramatic works" eligible for copyright protection. See also *Martha Graham School & Dance Foundation Inc v Martha Graham Center of Contemporary Dance Inc*, 380 F.3d 624 (2d Cir 2004); *Fuller*, *supra* note 78; *Martinetti v Maguire*, 16 F Cas 920 (CCD Cal 1867); Katie M Benton, "Can Copyright Law Perform the Perfect Fouetté?: Keeping Law and Choreography on Balance to Achieve the Purposes of the Copyright Clause" (2009) 36 Pepperdine LR 1; Kathleen Abitabile & Jeanette Picerno, "Dance and the Choreographer's Dilemma: A Legal and Cultural Perspective on Copyright Protection for Choreographic Works" (2004) 27 Campbell LR 39.

and release" often performing in an abstract manner without a plot or narrative.[184] For example, in her iconic *Lamentation*, Graham sits on a bench in a cloth tube that she stretches with her body in numerous ways to depict the intense grief of a woman.[185]

Such unconventional choreographic shows may not fit well into the three-part test proposed by the authors for dramatic works. In the US, the decision of the Second Circuit Court of Appeals in *Horgan v Macmillan*[186] explored the meaning of a choreographic work. In *Horgan*, George Balanchine's estate sued Macmillan, a photographer who published a book about *The Nutcracker* ballet, including sixty photographs of Balanchine's production, for copyright infringement. The Second Circuit relied on the *Compendium of Copyright Office Practices* which defined "choreographic works" as such:

> Choreography is the composition and arrangement of dance movements and patterns, and is usually intended to be accompanied by music. Dance is static and kinetic successions of bodily movement in certain rhythmic and spatial relationships. Choreographic works *need not tell a story* in order to be protected by copyright.[187]

Balanchine's *The Nutcracker* has a clear narrative based on a 19th Century folk tale and would fit well within the broader "dramatic works" category because it satisfies the requirements of performability, certainty and unity. However, Balanchine's other more abstract works which are choreographed without any intentional story or plot, such as *Serenade*—or Paul Taylor's *Duet*, Merce Cunningham's *Scenario* and Graham's *Lamentation*[188]—may need to be evaluated under a different framework for "choreographic shows". These works may satisfy the elements articulated in Circular 52 on *Copyright Registration of Choreography and Pantomime* issued by US Copyright Office. Circular 52 identifies common elements of choreographic works, including:

(1) Rhythmic movements of one or more dancers' bodies in a defined sequence and a defined spatial environment, such as a stage;
(2) a series of dance movements or patterns organised into an integrated, coherent, and expressive compositional whole;
(3) a story, theme, or abstract composition conveyed through movement;
(4) presentation before an audience;
(5) a performance by skilled individuals; and
(6) musical or textual accompaniment.[189]

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184 Kara Krakower, "Finding the Barre: Fitting the Untried Territory of Choreography Claims into Existing Copyright Law" (2018) 28 Fordham IP, Media & Ent LJ 671 at 693, 694.

185 *Ibid* at 693.

186 789 F.2d 157 (2d Cir 1986).

187 US Copyright Office, *Compendium II: Compendium of Copyright Office Practices* (1984) at para 450 [emphasis added]. *Compendium II* is a document issued for guidance by the US Copyright Office.

188 Krakower, *supra* note 191 at 699-702.

189 US Copyright Office, *Copyright Registration of Choreography and Pantomime: Circular 52* (revised September 2017), online: US Copyright Office <https://www.copyright.gov/circs/circ52.pdf [https://perma.cc/P3LF-BURH]>. See also Krakower, *supra* note 191 at 702, 703.

If these guidelines are followed, then the *avant garde* or abstract works such as *Scenario* and *Serenade* would arguably qualify for copyright protection in the absence of unity. This is where the American experience could be beneficial to Singapore.

VI. Conclusion

Consistent with the objectives of Singapore's copyright regime, modern theories of drama and established case law, the proposed test seeks to strike the proper balance between countervailing objectives and policies in copyright law. Copyright law must balance the need to protect proprietors of new creative enterprises while acknowledging the consumer interest in expanding the availability of works. It should be noted that European copyright law adopts a more expansive view of copyright subsistence in an expressive production of an author that focuses on the presence of "sufficient formative freedom" and "personal touch", and "whether a subject matter *is* such a production depends on more than its possession of a certain expressive form".[190] A study of *Whose Line* and Intel's Drone Show has demonstrated how new genres of dramatic entertainment can and should qualify as "dramatic works"; all the world's indeed a stage and dramatic works need not be confined to the proscenium stage. Copyright law ought not to prejudice innovative creators through applying inflexible and antiquated notions of dramatic works limited to the tradition of Shakespeare, Henrik Ibsen, Neil Simon or Arthur Miller.

But even if concerns of overprotection persist, one must not lose sight of the fact that the scope of protection afforded to creators of dramatic entertainment—assuming that the other subsistence requirements have been made out—are subject to the additional hurdles of proving infringement and the availability of the fair dealing or fair use defence. At the infringement stage, courts will have to exercise greater scrutiny in determining the scope of protection for the dramatic work where the substantial similarity inquiry is concerned, carefully applying the idea-expression dichotomy in filtering out non-protectable elements of the dramatic work. Moreover, Singapore's current open-ended fair dealing exception[191] will have a quintessential role to perform in this balancing exercise, as fair dealing preserves the ability of newcomers to draw inspiration from and reference previous works. And the shows must go on . . .

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[190] Pila, *The Subject Matter of IP*, *supra* note 11 at 150, 151 (referring to *Painer v Standard Verlags GmbH* [2011] ECR I-12533, c C-145/10 at para 92).

[191] Singapore *Copyright Act*, *supra* note 13, s 35(2). See also David Tan & Benjamin Foo "The Unbearable Lightness of Fair Dealing: Towards an Autochthonous Approach in Singapore" (2016) 28 Sing Acad LJ 124.