

Theatre Shop Conference 2005

DESIGNERS' RIGHTS

IN AN INTERNATIONAL CONTEXT: TOURING AND NON STAGE USES

Led by legal expert James Wolsey
with presentation by Cecilia Friederichs, United Scenic Artists, USA

SIOBHÁN BOURKE: Good morning everyone, and a warm welcome to this, the 13th conference, where the emphasis is as always international opportunities for Irish theatre companies and artists.

We are delighted that so many international theatre people are here with us today. We have 35 international delegates and guests from countries like North America, France, Denmark, the Czech Republic, as well as a number of people from networks like the CCAT in Wales, the Balkan Express, and a large delegation from Scotland.

I would like to introduce our speakers. James Wolsey is a copyright lawyer based in Ireland. Cecelia Friederichs is a costume design member of United Scenic Artists. She currently works as Business Representative for Theatre and Director of Organising out of the national office in New York City. As Business Representative she administrates and participates in the negotiation of collectively bargained agreements with Broadway, the League of Resident Theatres, and other theatre, ballet and opera companies. As Director of Organising she is active in expanding the membership and the contracts under which they work. She holds an MFA from Pennsylvania State University, and has worked as a freelance designer, draper, and costume shop manager. She serves as the financial secretary on the national executive board of United Scenic Artists, a position held since 1996. She represents the union on the Council of Broadway Unions and Guilds, the Tony Awards Administration Committee, and the Broadway Council of the International Alliance of Theatrical Stage Employees'.

JAMES WOLSEY: I'm here to facilitate Cecilia Friederichs by painting the stage if you like for what she's about to say. I'm a lawyer specialising in the entertainment area. I've been dealing with designer's rights for many years, and I can assure you they're very complex. You'll be glad to hear I'm not actually going to be giving you a talk on copyright law or industrial law, but merely to paint the background to the rights that are enjoyed, both contractual and statutory.

Statutory rights, as you all know, are right given to various creators under copyright law or designs law. They are fixed by statute and specific. On the other hand you've got the contractual rights which you have been given under contracts with your employers, or third party production companies, which are variable and

negotiable. The balance of those two is sometimes not very even. For the most part the creative designer waives his rights and assigns them to the production companies, and it's the contract between the production companies and the designer that governs the money he or she makes and the terms of his employment.

Just to give a summary of where you stand in terms of statutory rights: many works are protected as artistic works, or works of artistic craftsmanship. But in order to get that protection they have to be fixed in a material form, so an idea or a concept is not protectable as a copyright. Also the works, once they are fixed, have to have a certain aesthetic appeal, which is the wording of the statutes, and a creative input. They can't be merely utilitarian. Therefore some works that theatre designers create, such as costumes – not all costumes would be protectable under copyright law. If it's merely a suit and this is a utilitarian article it wouldn't enjoy, necessarily, copyright protection on its own, whereas fabrics and designs of fabrics do. It's a complex area, and you find that sometimes lighting designers', sound designers' and other designers' works are not necessarily fixed, and because they are not fixed they can't enjoy protection.

That's very important because if you don't have a contract, or if your contract only covers certain types of uses, then you have to resort to your rights, and your rights aren't always certain. There was a new piece of legislation introduced in 2001 called the Industrial Designs Act, which gives certain protection for registered designs, but they're designs have to be in effect applied to products. Where designers have certain creative products, like puppets or masks, these might be registrable if they could be commercially manufactured as products. So, not all forms of creative works of designers are registrable as designs but some are.

I think the significance of this is that it's a very complex area of law, and you don't really want to have to go there if it's not necessary. It's much better to have covered what rights you have and what reward you're going to get for the services you perform in the contract which you negotiate with the production companies. Which is really where Cecilia comes in, because in the United States they have a very strong union and collective bargaining agreements, and designers are well represented and their rights are contractual rights. Cecilia is going to set the scene of what is happening in the United States. I think it's very interesting to us in Ireland, particularly as shows tour abroad and Irish designers work abroad and in the United States. There are means and methods where I think we could all improve our lot by entering into collective bargaining agreements.

So without further ado I'll hand over to Cecilia. Afterwards there'll be a question and answer session.

CECILIA FRIEDERICH: Good morning. As you have heard I am a representative of United Scenic Artists. United Scenic Artists is the labour union that represents theatrical designers, film designers, art directors, scenic artists, costume designers, set designers, lighting designers, and we recently undertook the representation of sound designers at their request. They joined our union, and we now include them in our contracts. The local union was founded in 1895 so we're over 100 years old. It started as an association of scenic painters or scenic artists and hence the name. We have had movements within the union to change it to

United Scenic Artists and Designers, but that spells USA, so we're not going to do that.

We consider when we use the term scenic artists to be all of those who create the scene, the artists who create the scene. Our contracts are in many fields rather than just in live performance. Theatre, opera, dance, industrial shows, museum exhibits, film and television, music videos and almost anything you can think of. In some cases we have collective bargaining agreements in these areas, and in some cases we also have what we term promulgated agreements, or union project agreements, which allow our members a great deal of flexibility in who they work for, and in having their work covered by a union contract for a huge range of production companies. Up to 1,500 different ones a year, that we could never actually have either the time or the resources to do as a separate collective bargaining agreement with all of those entities.

The reason why I was invited here today and I was happy to come, and James and I have had a conversation about this yesterday, is we really very strongly believe that a verbal contract is not worth the paper that it is written on. That for everyone's benefit, both the producer and the artist, you need to have a written contract that delineates what both parties expect, what the obligations of both parties are, and the remuneration that the artist can expect. Also, and as we get to the language that I handed out, a contract that actually sets limits on what the producer can do with the artist's work. We delineate fairly clearly in all of our contracts, work done in the United States for film and television is generally done as work for hire. A production designer on a film is paid a weekly salary, a very high weekly salary, and the work that they do is owned in its entirety by the production company of the film. Very few designers in film or television have any sort of direct royalty situation, or creative rights in the property once it is finished. In terms of live performance design, all of our contracts to one extent or another state and maintain and delineate that the creative rights in the property are solely the property of the designer, and that the producer's right in them is a licence for use that is limited by the terms of the contract.

This varies greatly from different parts of the industry. The rights in the Broadway contract, which is an older, more developed contract – contracts over time develop in odd ways sometimes, so they are not a straight linear process. Newer, more modern contracts that began at a later period after designers became more active in maintaining their creative rights have stronger and more clearly decipherable language as to who owns what. The most far-reaching contract that we negotiate, which we just did in June, is with an organisation called LoRT which stands for the League of Resident Theatres. It is a league of eighty theatres across the country of all varying sizes, from the Guthrie and the Mark Taper Forum in Los Angeles, down to the Arkansas Repertory Theatre.

This contract is one that has to encompass the needs and the resources of theatres with budgets of \$20, \$30 million down to theatres with budgets of \$1 million. I'm not exactly sure what the bottom level is. Within that they have made grades of theatres. In that contract the rights of the designer are very clearly delineated in a more modern manner because the contract began in 1986 and so it doesn't date back to the time when creative rights were not such an issue. And there's a very clear reason why these creative rights issues have become more

prominent. It used to be that in the good old days a theatre company did a show for the local audience and that was it. It was done. It was gone. You went there, you designed the show, and then that was the end of it. But what has developed over time and becomes more and more a pattern, and it is my understanding from some of the literature I was reading that was given to me by the Theatre Shop that these issues are also important here – it has almost become the business practice of the not-for-profit theatre sector, because money is tight, in order to stretch their limited resources to engage in what we call co-productions, or transfers of productions from one theatre to another. In opera they're very clearly called co-productions, and the opera companies arrange ahead of time that they are going to share the costs of the production, and they set up whatever their financial terms are in the background. In general we don't delve into that too much. But a contract is generally for an opera designer who is going to do co-productions that establishes how many opera companies are involved and how much the fee will be that the designer receives, and then for each proceeding opera company there's sort of a descending scale of a percentage of the fee originally received that the designer receives as the production moves from company to company. In general, those kind of contracts require the designer to be physically present at the first production, and at the second production, and beyond that any company involved that wants the designer to be there must actually pay them a day rate on top of the percentage of the fee that they receive. That group of opera companies then has the right to use those designs until the sets and the costumes fall apart. And they often do use them that long.

In the regional theatre the companies are less willing to admit up front that they have formed a business partnership for their own reasons, so instead they call them transfers, although they are clearly co-productions, and in the contract we just negotiated they are called 'transfers planned in advance', because they for some reason refuse to just use the word 'co-production'. And we argued about this for two days. But in the regional theatre contract the original fee is set for the designer, and then for each succeeding theatre that uses the design, the designers must be paid at least 40% of their original fee, and any time that the designers actually physically spend at Theatres 2, 3, 4, 5, 6, they must be paid at the daily rate on top of the 40% of the fee. Until it hits the point where they hit the fee they would have had to pay them to do an original production, and then they get to stop paying them the daily rate.

Because we feel very strongly that while the co-production is a necessity in the way of life of being able to manage to do larger productions, that for the designer it is somewhat detrimental in that the more co-productions that are done, the less jobs there are for designers. So if you take the same group of eighty theatres, if they're all producing six shows a year and half of those are co-productions you mathematically are reducing the number of design jobs. So instead of getting 200% of the money for every co-production a designer's getting only 140%. And these are not highly paid design jobs to start with in the regional theatres. We actually fought very hard to start instituting the idea that time is money. If you need the designer to be there physically when the production transfers you have to pay them more money. Otherwise they have to find another job in order to pay the rent, or the mortgage or whatever.

I have sort of a list of questions here that Jane sent me that I'm sort of going down. One of the questions was, what should designers expect in terms of royalties? The performance world in America is very clearly delineated into commercial theatre and what is known as not-for-profit theatre. I believe most of you who are here today are engaged in what we would term as not-for-profit theatre, which is a tax term actually. In the world of not-for-profit theatre in the United States, and in the LoRT contract which I will continue to refer to, designers do not receive royalties on top of their fees unless and until a production exceeds the subscription run that the theatre company originally planned. If a four-week run was planned and the show is so successful that it is extended for another month, then the designer receives royalties. The designer receives additional compensation if the show is revived; if you decide to take the show on a tour they receive additional compensation. A lot of companies do a Christmas production - you know, a lot of them do A Christmas Carol - that they invest a lot of money in, and then they run it for six or eight years. Each succeeding year the designer receives money and additional compensation if they have to come back in and re-fit the costumes on new people, or refurbish the scenery, or come back in and re-cue all the lighting, which happens every year.

On Broadway the royalty situation is very different. Royalties are mandatory on Broadway from the date of the first public performance, which would be the first paid preview on Broadway. You know, Broadway shows used to have a week of previews, now they can have two months of previews where the audience pays exactly the same amount of money to see it as they pay after it opens. The designers are paid from the date of the first public performance. For dramatic works the minimum royalty is \$275 a week. That is the floor.

Almost all of the contracts that we negotiate set the floor for design rates. Almost every one of them has specific language in it that states that nothing shall prevent the designer from negotiating better terms and conditions than are included in the contract. There are philosophical reasons that these contracts are made this way; one being that it is always the position of the producers that the rates need to be kept to a minimum because they need to be able to hire younger designers and that part of their mission as a not-for-profit organisation is to develop new talent, and so on and so forth. I only partly believe them that that's why. It used to be true in the United States that the regional theatre was where young designers got their start, and where there was a lot of freedom for young designers to work. As the business relationship between the regional theatres and the commercial producers on Off-Broadway and Broadway becomes tighter and tighter, what we have found over the last ten years is that very prominent Broadway designers will go out and design shows in regional theatres because the Broadway producers have put the money in to develop the product, and they are not willing to allow the regional theatre to hire some young unknown designer that they may not feel has the experience to actually successfully bring that show into Broadway. Not necessarily the creative experience, but once the show actually approaches Broadway there become huge issues of money, real issues where time is money, where you're paying stagehands to install things, where you're paying wardrobe people union wages to get the show installed in the theatre and through the dress rehearsal process. So they tend to impose the designers they want onto the regional theatres from the beginning of the project.

This symbiosis gets tighter and tighter all the time. There's a whole pattern of what we refer to as the income stream that is planned for a project. It's almost circular in some ways, in that the project can start in a regional theatre and be intended to come into Broadway - sometimes they're not intended to come into Broadway. Sometimes a producer will own the rights to a piece and they will throw some money at a regional theatre somewhere and let them do what they want, and just see if the piece is successful. Then they will take it from there. But it has become more and more true lately that this is how they're trying out Broadway musicals, and before the show ever opens in the regional theatre the Broadway stage is booked and the tickets are being sold. It is a way to produce a Broadway show more cheaply, and to not risk so much money up front.

It is helpful to the regional theatres of course in that they gain prestige, one hopes. They tell us that they don't gain money. But we tell them that then they are rules. Because they tell us that they take the money and they do the project without a guarantee of a cut of the action later on. I have a hard time imagining that you would do that, because it seems to me that that is the reason to do that kind of project. To bring finances into your theatre that will then allow you to do the more creative things that you might lose money on. That the trade-off for using your theatre basically as a tryout house for commercial production is to put money into the coffers to allow you to do more creative things that may not make any money for your theatre. If I were a theatre manager that's what I would do.

I was talking about royalties. The royalties on Broadway start at \$275 a week, and they are often negotiated above that; for straight plays probably the ceiling is around \$1000 a week. For musicals they more commonly now are done by the formation of a royalty pool, which works that all of the creative participants in a production, there is a certain amount of the profit set aside that are guaranteed to be distributed amongst those creative participants. It's generally around 30% of whatever the operating profits are, not the gross box office. Designers with clout used to actually have their royalties tied to the box office gross, which probably was a better idea. Since we have gotten participation in the royalty pool, some of the designers now regret that they pushed that issue. Royalty pools unfortunately lead to very creative accounting. Since the pool is your net profits and not your box office gross it is in the interests of the production company to show as little profit as possible. So there are actually some movements afoot amongst the various unions in New York to try and create and enforce a standard accounting amongst some of these production companies, to get a handle on the situation basically. But in a royalty pool the designer is given a weekly guarantee and then at the end of every five-week period they tote up the proceeds and then they distribute what are supposedly the profits. For a smash hit like 'The Producers' or something like that, this can be extremely lucrative for designers. For a show that is only being marginally successful, that's running but it's not being a smash hit like that, they often don't go above the guarantee. Because it is a sliding scale the guarantee is lower than a flat rate guarantee.

For smaller production companies, and for not-for-profit theatres where royalties are paid, they're generally paid at a flat rate per week that is negotiated either in the collective bargaining agreement, or by the designer and the production company on a project agreement basis. A lot of times royalties for a given production will go up after the show hits what we call recoupment which is a term

that says they've broken even. Recoupment will not be found in the dictionary and your spell checker will tell you it's wrong every time, but it is a commonly understood term in the world of commercial theatre.

There was a question about whether or not there were different terms for festival tours and theatre tours. I think what you would call a festival tour I would call a transfer. All of our contracts for theatrical design are predicated on the production being done for one company at one theatre. That what they have paid the designer for is to create a production to go into Theatre X for x number of weeks, for x amount of money and that that is the right that the designer has granted to their company for the use of their designs. Any time that that production goes anywhere else, whether it is extended, whether it goes on a road tour or whether it is being taken to be presented at a festival, or to be presented at another theatre in another city for another subscription run, the designer gets more money. On a road tour generally what the designer gets is an AWC, which is a royalty. Being a labour union, we don't talk about royalties. We talk about additional weekly compensation to the designer. For legal reasons that I'm not going to go into. So if you look at any of our contracts, where you see the term AWC you can read that as a royalty.

Generally for the festival work it works pretty much like what I described in the transfer for a LoRT show: that the designer generally gets a percentage of their fee and they are paid a daily rate if you want them to go to a festival somewhere and be on site to make sure that the scenery is put up properly. If you are taking a show to a festival, and it's going to be presented for two days or, you know, three performances, obviously the amount of money paid to the designer is not the same as if it is going to another theatre for another two month run. Generally those kinds of jobs are done under one of our project agreements more than under our collectively bargained agreements. The amount of money that that fee represents is negotiated between the producer and the designer.

When we allow our designers to work on project agreements, which are the non-collectively bargained agreements, there's a great deal of flexibility on the part of the parties as to what goes into that agreement as long as it does not violate certain specific basic rules. The designer and the theatre have to fill out a form that the union gives them that sets out what the compensation is. Our simplest agreement has only three mandatory terms on it; one of which is that the company has comprehensive liability insurance that covers the designer. One of the other premises of all of our contracts is that the designer is responsible for the visual look of the show only. That they are not engineers, that they are not safety people. If while lights are being hung for a designer's design in your theatre and an instrument falls and hits a stagehand on the head that you have insurance that covers that situation, and that the designer cannot be held liable. That's one of the basic terms. They all contain an arbitration clause, which is part of our basic union contract, that says that a dispute in regard to the terms of this contract will be settled under the rules of the American Arbitration Association and the union will represent the designer in that matter. Then they all allow for a rider to be attached to them, with other terms and conditions. Where there are collectively bargained agreements the rider cannot violate any of the terms of the CBA. It cannot impose lesser conditions on the designer. It's intended to contain the scheduling and better terms and conditions that have been negotiated between the parties.

One of the parts of the handout here is some language that I thought I would provide for people as to what generally goes into a design contract for both tours, and for subsequent use especially since that was the main focus of what we were talking about here today. The language that I handed out is from a promulgated contract that we have which is called the Independent Not-For-Profit Theatre Agreement. It is a contract that we are encouraging more and more theatre companies, primarily on the East Coast to use this document. What we did in writing this document was that we tried to take one of our other collectively bargained contracts and take out everything that was about subsequent use, tours, video, all of that, and actually extract it from all of the weird places it might exist, and put it in the end as an addendum that was cohesively about subsequent use issues. So in the body of the contract there are – and this is generic language, and I thought that would be best rather than the specifics of the Broadway contract or the LoRT contract which have their own oddities.

This is the language that we encourage all designers to put into their contracts. It starts by saying ‘all rights in and to the design as conceived by the designer in the course of his/her services hereunder shall be upon its creation, and will remain, the sole and exclusive property of the designer’. This is a big issue for designers in America. They insist that their work for live performance venues is their property and it is licensed to the producer, for the producer’s use within certain parameters. ‘The theatre or its licensee’, which would indicate who you might send the show to as a transfer, ‘shall not use the design of the scenery, the scenery as a whole, the designs for the costumes, the complete set of costumes, the design for the lighting, the design for the sound or the sound tapes, discs or other sound media in any live stage production or electronic reproduction of the play, without the permission of, and additional compensation to the designers’. Because there are no negotiated terms here, it simply states that ‘compensation for additional use or licence of the design by the theatre shall be subject to additional agreement between the theatre and the designers’.

We would then encourage designers to not only incorporate this language but then, if they think it is a production that has legs, that may move, that may move to a series of places, that they actually negotiate ahead of time what the compensation will be for these other uses, so that they don’t end up in the position of, suddenly a show is successful and six other producers want to have it come to their theatre and they are then put in a position of at that point having to negotiate how much money is due them for this subsequent use. The standard in the industry is between 40% and 50% of the original fee for the show to transfer. That is fairly generally accepted in the design community, and in the theatrical community that that is the standard.

We require notification that the producer absolutely must inform the designer and negotiate with them. They’re supposed to inform the union also, though that doesn’t happen as often. It’s hard to police with the really large number of companies that we deal with. That terms for subsequent use will be negotiated, and if you’re going to have subsequent use, then you additionally come under all the different subsequent use possibilities that might happen – the revivals, the transfers or the tours. In both our collectively bargained agreements, and in our promulgated agreements we do differentiate between the not-for-profit and the commercial theatre world. One thing that we insist on is that, should a show be

done in a not-for-profit theatre that is picked up and brought to Broadway, the minute that happens the Broadway contract takes precedence and overrides everything else.

The other piece of language that I have provided here is on recording of the production. I understand that this is an issue for designers here. It's an issue for designers everywhere, and I'm sure for production companies. There is such a vast array of possibilities for digital recording, electronic recording. Every time we write a contract we have to revamp the language of what kind of recording could be made, so generally it just now says, by any means electronic or otherwise recorded, so as not to exclude anything. I have a lot of people who call me and say, I did this show, I did this opera and they said they were recording it for PBS and I see that the DVDs are being sold in Europe in this catalogue. This happens all the time now. It used to be, and we are in the constant process of trying to keep the terms and the language up to what the marketing is of the creative work of everybody in this room. We feel very strongly that all of the artistic participants and the production companies, if there's going to be a commercial sale of this product that everyone needs to be getting a cut of it. What happens unfortunately some of the time is that in a not-for-profit situation a producer of videos will come in and film the work and somehow documents get signed that make it so that neither the theatre or the designers or the actors really ever see any part of the profit from this. The things that are filmed for PBS, Public Television in the States, our contracts say that their rights to this are for three broadcasts. In commercial broadcast the payments are generally for one broadcast, but most theatre is not recorded for commercial broadcast. It rarely appears anywhere but on PBS. For them we have always allowed that one broadcast means three airings during a one-week period. They'll show it on Sunday night and Tuesday afternoon and Thursday evening, and that is considered one broadcast. But what has happened is that anything of any sort of importance at all that is filmed for PBS now, they'll take a break in the middle and they'll be selling it on DVD. So this is an issue that we struggle with in order to keep up with all of the different permutations.

Our preferred method of contractually dealing with this is that the designers have a royalty from the sales, just like if it was a recording, a music recording. That the designer should have part of the royalties. What practically happens more of the time now is that the production company, the filming company will buy out the designer's continuing rights. For a filming of a Broadway show the standard going rate is about \$15,000 to do that. The advantage to that of course is that an individual, and even the union, we don't have the means to be tracking the sales of DVDs around the world to make sure and guarantee that the designer's actually getting their royalties. So a buyout situation, if it is a fair price, is a fair alternative and so we do allow those also.

Another big issue for designers in this whole income stream that is now connected with what can happen to a production is, what if you are the designer who designs the show at the Arkansas Rep that is then picked up to come to Broadway, and they say thank you very much but we're going to hire new designers? This is a big bone of contention. Most of our collectively bargained agreements do not include complete right of first refusal for the designer. The Broadway contract says that for any tour that is sent out from Broadway, any production within the United States, anything produced by the same producer or licence, they must allow the original

designers to continue to design the show. But what happens in the regional theatre-to-Broadway model is that they would often jettison some of the designers in favour of designers that have a Broadway track record. This happens especially to lighting designers. The reason is that they usually want to bring the physical scenery and the physical costumes that they've already paid for, but they're going to have to do new lighting plot for a new theatre anyway, so it doesn't really cost them as much money to get a different lighting designer and one who is their choice probably, rather than the regional theatre's. We encourage, and many designers, especially designers who have good agents get right of first refusal language in their contracts, and I've put a sample of that here too. It basically says that for each subsequent production if any – and often that becomes an issue. Is it the same production? So the right of first refusal language will actually define the production by if it is directed by so-and-so, choreographed by so-and-so and the scenery is by so-and-so, it's the same production and I get to do the lighting for it. 'For each subsequent production of the director/choreographer directed production of the play produced under the licence of the company, the designer shall have the right to provide the designer's designs pursuant to the terms set forth herein'. And then there's usually terms of the notification and acceptance time periods. When they do that, if the show should be successful and it moves, and the succeeding producer does not want to use the original designers, they have to buy them out. If a show moves to Broadway, that generally means they have to pay them the minimum Broadway fee that they would have had to pay them if they were going to use them anyway. This is something that, again, probably the more clout you have as a designer, the more likely you are to have really hard and fast right of first refusal language in your contract. All of our contracts are based on the fact that if you use the design you must continue to pay the designer. This language says even if you are going to change the design, you have to let me design the show, and that is a different subject matter.

Then the question was posed to me, how does a collectively bargained agreement work? In US labour law a collectively bargained agreement is a defined thing. It means that the employer has recognised the union as the official labour representative for a group of employees who do certain work. The regional theatre contract covers set designers, costume designers, lighting designers and sound designers. It does not cover assistant designers except at the big LoRT theatres in New York City itself. The Broadway contract covers lighting, set and costume designers and all of their assistants. Usually a collective bargaining agreement has a list of both the job titles that it covers, and then it also will have what we call scope language, which is the actual work that is done by the people who are listed. Scope language can be a paragraph or it can be six or eight pages long, covering down to who sharpens the pencils and so on and so forth. Most of ours are fairly brief, with the exception of the Broadway one which is about four pages long. The ones in the film contracts tend to be rather lengthy because there are so many different departments working on a film that it's important for the producers to have the what is covered by which unions contract fairly closely delineated to avoid dispute.

Generally our collective bargaining agreements where possible, contain what is called a security clause. This is a statement, and your members who have come to work in New York on Broadway understand that they are expected to join the union when they come there and do this. The security clause states that upon being

hired or after 30 days, or in the case of the regional theatres they have a security clause that says the fourth show that you do over the entire 80 theatres, you are then obliged to make application to the union. James tells me that these would not be legal in Ireland. They're not legal in parts of the United States, where there are things called Right to Work states, which we on our side of the bargaining table refer to as Right to Work for Less states. If you actually look statistically in every Right to Work state in the United States people make a lot less money than they do where a union contract is enforceable.

Then the CBA as we call them, would contain rates, whether they be fees, or wages. For us they can term AWC - royalty - provisions. They are generally minimum-term contracts, as I say, where the designer is allowed to bargain above the terms. We try to make sure they contain provisions for transfers, tours, sales, rentals, filming and taping. So they can sometimes be fairly lengthy documents by the time you get all of that in.

One of the things we do as a union that is probably of equal importance with maintaining the collective bargaining agreements is that for designers, and for freelance designers particularly, the union is how they get their health insurance, and how they get their pension benefits and their other retirement benefits through the union contracts. This is of primary importance to our membership. All of our contracts contain provisions wherein the employer is required to make contributions into the benefit funds on top of the wages, for the health benefits, and for the eventual retirement benefits of the designer. We are very strongly of the opinion that old artists should get to retire just like everyone else and not have to work until they're 85 years old. Some of them do, but then that's their choice, and it shouldn't be a necessity. These benefit funds are governed by a federal law called ARISSA, which are multi-employer benefit funds. Hundreds of different employers contribute into the fund, and it is jointly administered by a board that is three union representatives and three employer representatives who actually run the fund, and it is separate from the union. It's money that no one can get their hands on, except for the purposes that it is intended for. It works well for us, this kind of fund, because designers do work for many, many different employers throughout the course of a year, and no one employer would be able to provide these benefits. So if each employer is paying into the fund then we are able to provide the designer with health insurance, and eventually with retirement benefits.

The other things that go into the contracts are working conditions such as when overtime is applied. Assistant designers are paid on a weekly wage basis or on an hourly wage basis. Designers are almost exclusively in live performance paid a flat fee for their work, but assistant designers actually in some instances do get paid overtime. Other things that are in our contracts are turnaround time. You can't keep somebody at a theatre until 4am and require them to be back at 6am, and if you do then there are penalties involved. Especially for designers some of the other important terms that are put into the contracts are housing conditions, travel conditions and the amount of per diems you have to pay for living expenses while a designer is on the road. Then the last element – and this is like a five-minute generalisation – is the grievance and arbitration procedures that would be used and are in place if there are violations of the contract. Not just on the side of the producer, but producers can bring grievances also. They will call you and say so-and-so did not show up and we can't finish our show so we're firing them. When

they are right, they're right, and so the contract protects them too. We are not going to finish paying them, and we want you to send the benefit money back. So the contract protects in two directions.

The last subject that was broached to me was: would Irish designers benefit from joining United Scenic Artists? Being a very strong believer in labour unions - and I came to this late in life; I mean, I started out as a designer. Not late in life. Mid-life. I started as a designer out there trying to scrape together enough money to eat, doing tiny little shows hither and yon and eventually I got a job in one of the major costume shops in New York, and I did various things there until I was the assistant to the owner, at which point my design career simply ended because there's only so many hours in a week. When I was ready to leave that job, coincidentally the entire governing body of my union was being thrown out of office and I was asked to run with the people who were taking over. We through the bums out and we all took over. Actually I kind of did it because I didn't have anything else planned.

In the last ten years I have been working for the union in various capacities and been on the board of the union, and I have come to believe very strongly that this is an absolute necessity for designers; because you are so alone out there. You know, there's three or four designers on a show but you don't work together until you actually get into the theatre. The costume designer and the sound designer, you know - if there's not body mics involved, may never see each other.

Whether or not our organisation would be the organisation that Irish artists should participate in is something that we could explore, but I do think that there is an absolute benefit to organising yourself. I am told that you have a constitutional right in this country to form a labour union. For certain reasons, such as, and I wrote it down here specifically: the advantage of being a union. There's not an advantage in joining a union. You have to be the union. There's a rather clichéd phrase that they use in classes and stuff that you are the U in union. But that is really true, because a union is absolutely only as strong as the membership makes it. The power that is granted to me when I sit down to negotiate at a table - and this happened this year at our LoRT negotiation. The LoRT theatres have always, when we sit down to negotiate with them, they refer to the designers as 'our' designers, and they indicate that they know the designers far more closely than the union does because they work with them every day, and in some ways that's true. But they managed to tick off every designer that worked for them in the last year.

They sent us a proposal ahead of time that called for a five year wage freeze for designers, who consider themselves to be hideously underpaid in the not-for-profit theatre sector. This started a firestorm. We sat down at the table with a letter signed by 475 designers out of a possible maybe 500 designers who work in the world of LoRT, saying we want you to know that these people represent us when they sit down at this table with you, and that we're sitting in the back row behind them. It was not actually mentioned at the table, but everyone on the production side of it knew that they maybe had made a tactical error in really riling these folks up. That gave us the position to demand what would be called out-of-pattern raises. They had only give the actors a 2% raise, or whatever, and we got 4.5% in four years for our members, as well as much improved terms in the whole transfer situation.

So a union and the people who represent the union are really only as strong as the members make the union. The advantage of being in a union besides that is that there's somebody watching your back. There's somebody setting a standard. One of the pieces of paper that I handed out is a promulgated rate sheet that we call the Regional Resident rate sheet, and it works with a promulgated document called The Designers' Resource Book, which you can download off of our website. These rates I've handed out to you are not negotiated with anyone, but they are a standard that we established, that designers enforce themselves. We do not demand that theatres stick to them, but they are out there as a standard that is being set for people to go forward.

What my job is, and I was telling somebody that it's not the world's easiest job because almost no one calls you to tell you that they're having a good day. They call you because they've been fired, or they haven't been paid, or all sorts of reasons. Their show is being sold on DVD across America and they're not being paid. But that's our job as the union reps, to be there and to help people. Their union dues pay my salary, they pay for the rent, they pay the salaries of all the people who work for the union. The union gives you a collective power. It gives you people that are there to watch your back contractually. It sets up terms whether collectively bargained or promulgated. Also, if there is a problem, then one of the union members' rights is that the union provides legal services. If you have to take a contract violation to arbitration yourself, or to sue - this is why we prefer arbitration, to keep the disputes out of the courts, and to settle them through binding arbitration. Part of what you pay for when you pay your union dues is for these services, and for your participation. It's a collective. All of the money that is deposited as benefits goes into a fund. If you qualify then you participate in the fund, you and every other union member equally. We pool our money through our union dues so that when there's a legal battle to be fought we fight it collectively.

But there are obligations to being in a union also. It truly requires commitment on people's part. It requires that you make a commitment to not undercut your brothers and sisters. Even if it's not bargained, if the going rate at a theatre is \$5000 for a show and you walk in and say, don't hire him, I'll do the show for \$1000, it becomes an issue. So part of our job is to push the rates up, and try to facilitate designers making a decent living. It's a very, very hard way to make a living, as I'm sure you're all aware.

Then there are financial obligations to a union. Our members pay about \$400 a year to belong to the union, and it's associated international, which is the International Alliance of Theatrical Stage Employees, which would include all of the stagehands and everybody who works on a film, and so on and so forth. Then they pay 2% of gross income for all of the work that they do under covered employment. That's the money that runs the union.

I think everyone should have a union. Yes, I do. What union you should have is something that I think you should talk about amongst yourselves. But I think that the advantages of organising is it can only help you; it can't hurt you. At this point in time, if you are out there working without a net on your own, where do you have to go but up?

JAMES WOLSEY: Brilliant. Thank you very much Cecilia. That is such a clear explanation of what you're up to. I do feel that here we're sort of sitting in our allotment looking over the fence at somebody's very nice manicured garden. There's a lot of things that we can do to improve our situation if we organised ourselves properly.

I'm sure that there are some of you who would like to ask Cecilia some questions or would have specific questions of interest, so please fire ahead.

SPEAKER 1 (MARK YEOMAN): Hello Cecilia. My name is Mark Yeoman. I run a festival in Holland called the Noorderzon. Obviously there's quite a lot of difference between the States and Europe. I have two questions. You talked about the relationship between the designer and the producer, and you talked about the sort of follow-on rights, transfer rights to festivals for example. In the States, is the producer the company or the festival?

CECILIA FRIEDERICHS: Either. I don't deal with festivals that much, and the theatre festival is not such a big thing in the United States as it is here. There are some. But generally the theatre entity taking the work to the festival is the producer; that the festival is simply a venue where the producers come to produce their work, and to show their work. A designer is paid not by the festival, but by the theatre company that is participating in the festival. Maybe that's not true in your festival.

MARK YEOMAN: It varies a lot. There's quite a lot of confusion in Europe at the moment because different countries have different approaches around this. I would point out for example what's happened with French companies. There's a union in France called the SACD who have now approached most of the live performing artists in France, and most live artists and companies now when you make a contract, like if I as a Dutch festival make a contract with a French company, I have a negotiation. I know that it's coming now, but at the end when we get a contract, or when a contract is there on the table, suddenly we have rights put in of between 10% and 13% on top of everything that's been discussed. It's quite a lot of money, 10-13%, and this is all rights on that production, authors, music rights, I presume design rights if they exist and so on. It comes at the very end. I have actually personally refused to sign a contract because it was too much extra on top of a fee that was already very, very high.

CECILIA FRIEDERICHS: You pay the fee to the French company?

MARK YEOMAN: That's right. We as a festival, as a presenter, are then required by the French union to act in that respect at least as the producer. It's actually contributed to quite a drop off in the employment of French companies in countries such as the Netherlands, where we are anyway priced lower than the French market in general. Then on top of that, because of the union saying to all the French artists, you must be protected – I understand that of course, you must be protected. So there's actually quite a lot of confusion at the moment between different countries, because in France it's a different system. In France everyone knows it's there, it's built into their financial structures differently. In France they expect that, so a festival will know that that's coming and that's built into their financial structures. I was just interested in the States, if that was a big discussion between say presenting structures and producing structures?

CECILIA FRIEDERICHS: Generally who is considered the producer is the contractual party, whereas the presenter is not. If a tour goes into Theatre X, Theatre Y and Theatre Z clearly the producer is moving along with the production. It is generally who is considered the producer that we would deal with. Sometimes, and in some contracts, as a production moves from venue to venue, the obligations of the contract move from producer to producer. What we try to do is have it clearly delineated that, for instance, if you are an opera company and you are selling a production to another company or renting it to them, in our contracts the opera company that owns that opera must delineate the obligations and the receiving company must agree to assume the obligations of the designers' contract in order for that transaction happen. But I'm not sure about your situation. It seems to me that you need to clarify who absorbs the costs, and then if you're paying that production company a fee, those fees should be delineated ahead of time. That in addition to the fee that you pay us, there is an additional cost of 14% to cover the artists' insurance? I'm not quite clear on what that percentage is for.

MARK YEOMAN: It's very specific in France. Just in Europe we have, in the context of this discussion, there's still quite a lack of clarity between different countries and different systems. Well, I wanted to throw that in anyway.

My second question was, you talked about rights of, if a production is to be repeated, the right of the designer to have a first right of refusal. What would be your union's approach towards the question of bad design?

CECILIA FRIEDERICHS: Well, here's the thing. You can always get another designer, but in certain instances where a designer has the right of first refusal you just have to pay the first designer to get rid of him. Bad design is a subjective thing. Were they drunk on the job? Did they show up rehearsals? Did you approve the design as it went along? Did you allow them to put the design on stage, approving it along the way? Did the director like it? Who says it's bad design? That's an artistic judgement. I don't legislate art. I legislate contractual terms. If you have a reason for firing a designer because they did not do their job, then that is something that would be discussed, and perhaps you are justified.

What the right of first refusal does is that it protects designers especially when a new work is being created. It's a brand new script. It's never been done before. The director and the actors and the designers create something. Now you don't like that designer, you chuck that designer, you bring in a new designer who's a friend of yours that you do like, and it is virtually impossible, I believe, for that designer's concepts not to still be present when the work is moved. How do you completely redesign the lighting if the scenery has not changed, the costume has not changed, the blocking has not changed, the direction has not changed? They have made an artistic contribution and therefore they should have a right to continue forward with it, especially if there is the possibility that maybe this will be that one show where they're going to make a lot of money that they can put in the bank for the next rotten year they're going to have. So no, in our contract you can't fire somebody because you don't like the design.

MARK YEOMAN: Who is allowed not to like it in your way of seeing it? There's a whole decision taking process in there with, as you say, who is to say it. But there needs to be somebody who can say it. It's an artistic process.

CECILIA FRIEDERICHS: It should have happened before the show opened.

MARK YEOMAN: But before the show opened the design they make is not yet visible. I ask this because I had an interesting experience recently. I went to the theatre in Holland, and a very fine performance of 'Waiting for Godot', and everything was very, very wonderful apart from the lighting design which was thoroughly awful. Everybody agreed it, but it was then going to go on a two month tour with that lighting design because it was not possible to change it because of these issues. It was no longer discussable. I found that a strange situation.

CECILIA FRIEDERICHS: But it's probably the exception and not the rule.

MARK YEOMAN: You haven't been to Holland.

SPEAKER 2: I just wondered about late payments. If an employer or client was several months late with a payment would the designer have any recourse to compensation for instance for interest charges?

CECILIA FRIEDERICHS: That would be a tough one. Our contracts basically set up a payment schedule. I would tell you that sometime designers are their very own worst enemies, because the payment schedules that are in our contracts dictate that you're supposed to get – they generally go in thirds, some of them are in quarter payments. You're supposed to get the first payment when you sign the contract. You're of course not supposed to work until you've signed the contract and have a signed deal in place, which prevents somebody like Mark from saying I don't like your work, you're out of here. You don't give them anything of value until you have your signed contract and your money, your first money. Then the second payment is due when the designs are presented and approved by the producer, and then the third payment is due either on the first public performance or on the date of the official press opening.

The thing is that rather than trying to collect the money late and try to impose some kind of penalties we just try to encourage people that if the money is not presented on the day it's supposed to be presented, that's when you're supposed to call me. Then I call the producer and say, these designers are not giving you these sketches until you cough up this money. Do you not have the money? If you don't have the money then you need to, you know. Because what happens is that the designer will continue to work, and they'll get to opening night and then it's like, oh by the way we don't really have the money this week. We'll probably have it next week. By that time it's too late. You've already given them the thing of value and they have it on stage. But no, I've never seen a contract that allowed for penalty payments for late payment. Our benefit funds, the health benefit fund – employers who pay late, they do charge them interest.

SPEAKER 3 (LOUGHLIN DEEGAN): Hello, I'm Loughlin Deegan from Rough Magic Theatre Company. I've two questions for you. I'm kind of intrigued to see on the

example design rates that you don't differentiate in terms of fee between costume designers, set designers and lighting designers, that they're essentially similar rates. I think the practice here is generally that set designers are paid more than costume designers, who are paid more than lighting designers.

CECILIA FRIEDERICHS: I would tell you that there has been in our union a huge concerted effort, and there's actually a motion in place enforcing the negotiation of contracts in our union that regardless of – every contract we negotiate, every collective bargaining agreement we negotiate there's a committee of members that is involved who work in that area. No matter what the committee wants, it is mandatory that the contract negotiation include the attempt to bring costume design rates in parity with set design rates. This is a huge issue with costume designers. Why should they be paid less? Unfortunately they are paid less, and they are paid less dramatically in the film and television business. In theatre we have been far more successful in achieving parity in the base rates for costume and scenic designers.

So the costume design community in our union is very, very strong on getting parity in their rates. In the LoRT contract it took us a five-year contract cycle. The rates started like this and while the scenic designers continued to get a percentage raise every year over five years the costume designers went up more, until at the end of five years they were equal to the scenic designer. So believe strongly in the parity for costume and scenic design. Lighting design rates are generally 75-80% of the scenic design rates, and our parity effort now is focussed on achieving parity between lighting designers and sound designers, which we will achieve next year in the LoRT contract. Sound designers have only been in it for five years.

LOUGHLIN DEEGAN: My second question was that I know that United Scenic Artists have nothing to do with photographers, but is it your understanding that photographers copyright works in a similar way in the States to designers' contract, in that the ownership of the design rests with the photographer and it's relicenced for transfers?

CECILIA FRIEDERICHS: I have very limited knowledge of this subject, but it is my belief that a photographer's copyright is almost absolute. A photographer's copyright is one of the strongest that there is. You absolutely must pay a photographer, and put their credit on almost anything with it.

SPEAKER 4 (JULIE ELLEN): I'm from the Playwrights' Studio, Scotland. I noticed that even in the smaller capacity, less than 200 seats, you've got separate rates here for scenic and costume design. It's not uncommon – I'm not certain about Ireland, but certainly in Scotland and in England – for those roles to be combined in smaller productions, and I wondered if you have a method for managing that, or if somebody would literally get both payments?

CECILIA FRIEDERICHS: Our belief is that if you do both jobs you should be paid twice, or double the rate. If you design the scenery and costumes on Broadway or in a LoRT theatre you're paid twice. What you have in front of you are suggested rates. I actually think smaller theatres as opposed to bigger operations generally actually pay what they can. So even in our LoRT contract the D theatres, which is the

lowest financial category in LoRT theatres, there's no actual rates in the contract at all. We've just left them out because they would have been so low that we didn't want anyone to actually hold the designer to them. So there's no rate in there; it's just individual negotiation. But no, if you are paying one person to design all the sets, the lights, and the costumes it would be our position that you should pay them triple the money. You should pay them the same money that you would pay to hire three separate designers.

SPEAKER 5 (BRÍD DUKES): Bríd Dukes from the Civic Theatre in Tallaght. Just a question about touring. If a not-for-profit venue puts on a play and the contract is for the play to do two weeks there, and one week in five other venues. The initial contract. Where does that leave the payment to the designers and everyone else?

CECILIA FRIEDERICHS: So it's actually going on a road tour, basically? Generally the designer is paid the fee for the original production and then they're paid the weekly royalty for the weeks of the tour. Unless you expect them to actually travel with the show to each place. They should be paid extra for that. Our royalties and our transfer fees – the transfer fee when I say 40% transfer fee, our position is that that's 40% for you to use the designer's work. If they have to pick up a pencil to redesign the show to fit it into the other theatre, then you should be paying them in addition to the 40%. The 40% is a licensing fee to licence the designer's work for a second theatre.

BRÍD DUKES: But even though the whole thing has been contracted initially from the beginning and they have the plans of all the venues?

CECILIA FRIEDERICHS: Well, if you give me a job to design for your theatre, I design it for that theatre, especially if I'm a scenic designer or a lighting designer. It's a little different for costume designers. If you give me the job to design a show that will fit into seven different theatres, that's a bigger job. If there's been a negotiated fee that takes into account that I have to design a lighting plot that will fit into seven different theatres then, you know, that's what I would negotiate with you up front.

BRÍD DUKES: Yes, and there would be a relight fee. That would be normal for here. I was just querying the design one. I think our rates are better than these.

CECILIA FRIEDERICHS: Your rates? Good. I'm glad to hear that. I just grabbed that particular sheet off the shelf. Those are not negotiated rates. They're just sort of promulgated, generic rates. I hope each and every one of you pay more than that. They are the minimums.

JANE DALY: Can I thank James and Cecilia. I think that was really interesting. Taking on the whole issue of designers, or Irish designers, or designers resident in the Republic of Ireland, I just wanted to alert you all to an exciting project that is coming up in June 2007. Some of you may be familiar with this. This is the Prague Quadrennial of Scenography and Theatre Architecture. It is the key international event for theatre design. It would be the equivalent of the Venice Biennale for theatre designers.

Ireland has never participated in this event since it was set up in 1967. Earlier this year a planning group got together which was coordinated by Cathy Leaney and Enrique Corcone at the UCD Drama Studies Department. The group also comprised Lynne Parker from Rough Magic, Phelim Donlan who many of you will know as a former Drama officer of the Arts Council, Colm Ó'Briain who's the director of the National College of Art and Design, Denis Looby who is an architect working here in Ireland, and designers Joe Vanek and Monica Frawley. I joined the group later in order to try and put some management structure on it.

I'm delighted to say that Culture Ireland has supported this project, and there will be Irish representation at the Prague Quadrennial in 2007. Theatre Shop will be managing and delivering this project, and we're going to need help from the theatre and dance sector. It also includes opera. We will be writing to you in the next week to alert you to the project in more detail. The representation will comprise designs that have been realised professionally within the past five years. Essentially work that has been done between the time of the last Quadrennial and the next one. We'll be soliciting information from production companies and individual designers around work that has been of visual significance, and been imaginative and that will adequately represent Ireland at the Prague Quadrennial in 2007.

It's a huge opportunity for us, and for our community of artists here. About fifty companies appear at this, it lasts twelve days, and it really is the focus of international theatre design. So when you get your emails and your snail mail letters next week I would really encourage you to think around how you might be able to assist us to put this project together and to make it a really impressive representation in Prague in June 2007. It's also such a beautiful city to visit, and it's cheap to get there now as well, so we hope that lots and lots of people from the Irish theatre community will participate in a number of ways.