UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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EDWARD EINHORN,	:	
Plaintiff,	:	05 Civ. 8600 (LAK)
- against -	:	
MERGATROYD PRODUCTIONS, JOANTHAN X. FLAGG, LLC, JONATHAN FLAGG and NANCY McCLERNAN,	:	
Defendants.	:	
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MEMORANDUM OF LAW OF
THE DRAMATISTS GUILD OF AMERICA, INC.
AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS

CAHILL GORDON & REINDEL
(a partnership including a
professional corporation)
80 Pine Street
New York, New York 10005
(212) 701-3000
Attorneys for The Dramatists Guild
of America, Inc. as *Amicus Curiae*

Of Counsel:

Ralph Sevush, Esq.
Rebecca A. Frank
The Dramatists Guild of America, Inc.
1501 Broadway, Suite 701
New York, New York 10036

This memorandum is submitted by The Dramatists Guild of America, Inc. (the "Guild") as *amicus curiae* to apprise the Court of industry practices and policy reasons for the positions taken herein by Jonathan Xavier Flagg, LLC d/b/a Mergatroyd Productions ("Mergatroyd"), its principals, Jonathan X. Flagg and Nancy McClernan ("McClernan"), the author of the play *Tam Lin* (collectively, "Defendants"). Application to file this memorandum is submitted to the Court herewith, on Friday, April 21, 2006.

I. PRELIMINARY STATEMENT

The Plaintiff is a stage director claiming copyright ownership in his "blocking" and "stage directions" of McClernan's play. His ideas, however, are not copyrightable as a matter of law. If a new "copyright in direction" was to be established by the Court, Plaintiff's written notes of his stage directions and blocking could only be deemed a derivative work of McClernan's play. Since Plaintiff created and registered the script with his notes without the author's permission, it violates the conditions for registering a derivative work[1] and, therefore, should not be recognized by the Court.

Regardless of whether the Court finds that Plaintiff has a valid claim in the copyright of his stage directions, or concludes that Plaintiff's direction constituted an independent work, or that Plaintiff's employment implied McClernan's permission for a derivative work, the Court should still reject Plaintiff's claim as contrary to settled standards in the theater industry and as a matter of public policy. Any contrary result would have far-reaching consequences for the process by which plays are developed and would jeopardize the central collaborative relationship of the author and director on which theatrical production depends.

[1] Only the owner of copyright in a work has the right to prepare, or to authorize someone else to create, a new version of that work. U.S. Copyright Office, Circular 14: Copyright Registration for Derivative Works.

The upholding of Plaintiff's claim would encumber the ability of authors to own and control their work; it would chill the licensing and presentation of theatrical works to the public; it would limit the ability of subsequent directors to stage future productions of plays by creating an ownership interest in the ideas of prior directors; and it would establish a "copyright in ideas" that would not only provide the basis for every other collaborator in the theatrical process to make an ownership claim against the playwrights' work, it would also establish a basis for such claims in all the other creative industries.

II. INTEREST OF AMICUS CURIAE

The Guild is the only professional association to advance the theatrical interests of playwrights, librettists, composers, and lyricists. The Guild has approximately 6,000 members nationwide, from beginning writers to the most prominent authors represented on Broadway, Off-Broadway and in regional theater.

The Guild is governed by an elected Board of Directors, who currently include such artists as Marsha Norman (*The Color Purple*, *'Night, Mother*), Edward Albee (*Who's Afraid of Virginia Woolf*, *Seascape*), Stephen Sondheim (*Sweeney Todd, Company*), Stephen Schwartz (*Wicked, Godspell*), John Guare (*House of Blue Leaves, Six Degrees of Separation*) and writer/directors Emily Mann (*Having Our Say*, *Execution of Justice*) and James Lapine (*Sunday In the Park with George, Into the Woods*). The current president of the Guild is John Weidman (*Assassins, Pacific Overtures*). Past Guild presidents have included Peter Stone, Robert Sherwood, Richard Rodgers, Moss Hart, Oscar Hammerstein, Alan Jan Lerner, Frank Gilroy and Robert Anderson. Past Guild members have also included Eugene O'Neill, George S. Kaufman, Tennessee Williams, Arthur Miller, Lillian Hellman, Frank Loesser, Frederick Loewe, Wendy Wasserstein and Alice Childress.

The Guild, of which McClernan is a member, has a direct and substantial interest in the outcome of these proceedings and in the preservation of clearly defined rules governing the use and ownership of copyrighted material and the clearly defined prohibition against establishing a copyright in ideas. Plaintiff has attacked established industry practice and the very core of the collaborative process that leads to the ultimate creation of a work for the theater, and, as a result, the decision here may have far-reaching impact on the Guild and its membership.

III. STATEMENT OF FACTS

In the fall of 2004, Mergatroyd hired Plaintiff to direct an Off-Off Broadway theatrical production of McClernan's play, *Tam Lin*. Although a formal agreement was never signed, plaintiff alleges he arranged with Mergatroyd for a director's fee of $1,000. During the rehearsal period, the director's employment was terminated and Mergatroyd arranged for the assistant director, with McClernan's assistance, to finish directing the play. Plaintiff and Defendants discussed appropriate compensation for the rehearsals conducted by Plaintiff, but the parties reached no agreement. Plaintiff subsequently threatened Defendants with a cease and desist letter, created a revised script of McClernan's play without permission, and registered the infringing revised script with the U.S. Copyright Office. Plaintiff then instigated this action, claiming, amongst other things, a copyright in his direction. The Guild's statement of the facts is supplemented and further expanded as set forth in the Defendants' motions to dismiss.

III. ARGUMENT

A. A Finding in Support of the Director's Claim Would Create A "Copyright In Ideas" That Would Undermine Established Copyright Law.

The Plaintiff's direction, including his "blocking" and "stage pictures", constitutes a contribution of ideas, not expression, and as such are not the proper subject of copyright law.

Copyright law states that ideas are not copyrightable.[2] While plaintiff claims to own "blocking," "stage picture" and a variety of other elements, such as black light puppetry, none of these are expressed in the revised version of McClernan's script which plaintiff registered for copyright, except in the most summary of ways. Even if these elements were expressed there, these ideas are largely guided by the utilitarian needs of the play, and so the director's blocking lacks the requisite originality and fixation, and is generally comprised of movements within the realm of *scenes a faire.*

Furthermore, McClernan did not grant permission to Plaintiff to create or register a derivative work.

Even if the court were to establish a copyright in the ideas of stage directions, the Plaintiff's copyright in the written stage directions should merely protect his written words as they appear in the margins. Plaintiff's words would not be protected from a second individual reproducing the actual staging, or from a second person independently writing the same stage directions. Otherwise, once one director established a right to the obvious "blocking" of a play, that director could prevent future productions.

Congress extended copyright protection to choreography, but never to "blocking" or "stage directions." Choreographic works are defined as "the composition and arrangement of dance movements and patterns…intended to be accompanied by music…organized into a coherent whole."[3] Choreographic works may be submitted for copyright registration through a variety of standardized notation systems, such as Labanotation, Sutton Movement Shorthand, or Benesh Notation.[4]

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[2] 17 USC §102(b).
[3] U.S. Copyright Office, Compendium Of Copyright Office Practices §450.01, 450.03(a) (1984).
[4] U.S. Copyright Office, FL-119: Dramatic Works: Scripts, Pantomimes and Choreography.

Perhaps most relevant, the definition of choreography excludes simple steps. "Social dance steps and simple routines are not copyrightable…the basic waltz step, the hustle step… are not copyrightable…Social dance steps, folk dance steps, and individual ballet steps alike may be utilized as the choreographer's basic material in much the same way that words are the writer's basic material."[5] The words that Plaintiff added to McClernan's text, his "blocking" and "stage directions," do not rise to the level of copyrightable choreography.

The Guild believes the copyright registration plaintiff obtained does not permit him to pursue copyright remedies against Defendants, and endorses the arguments on these legal issues that are put forth in Defendants' previously submitted Memorandums of Law in support of their motions to dismiss.

B. A Finding in Support of Plaintiff's Claim Will Injure Settled Theater Industry Practice and Would Act Against The Public Interest.

i. Directors' Contributions

Far from minimizing the contribution of stage directors, playwrights recognize the centrality of their collaboration and the Guild recognizes the possibility of a stage director's contributions rising to the level of authorship. The Guild's Approved Production Contract ("APC") allows for the recognition of other collaborators in the creative process by expanding the definition of Author. "The term 'Author' shall include any person who is involved in the initial stages of a collaborative process and who is deserving of billing credit as an Author and whose literary or musical contribution will be an integral part of the Play as presented in subsequent productions by other producers. It shall not include a person whose services are only

[5] U.S. Copyright Office, Compendium Of Copyright Office Practices §450.06 (1984).

those of a literal translator."[6] In this way, directors who, in fact, make copyrightable contributions, participate in the subsidiary revenue streams derived from their contribution to the play.

In recent years, however, directors, who do not fit the APC's definition of co-authors, have become dissatisfied with their compensation. The director's union, The Society of Stage Directors and Choreographers ("SSDC"), has successfully negotiated with their employers, the producers, to receive a share of the producer's subsidiary rights revenues for Off-Broadway productions. The SSDC has failed to obtain such compensation for its membership with regard to Broadway productions. Therefore, Broadway directors have turned, at their union's urging, to the only other source of revenue available in a theatrical production...the play.

A few directors have begun a new trend of insisting that authors sign a "director agreement" as a condition of working on a play. These agreements tend to tie up the right to direct future productions and demand a share of the author's future revenues. The SSDC has even encouraged directors, who create unique and extensive additional material for a production, to memorialize it via detailed diagrams or notations, pictures or video recordings. The Guild, and even, we believe, SSDC, does not endorse directors simply notating their ideas in the margins of an author's play and submitting it to the copyright office for registration. Such a practice apparently seeks protection for every detail of a production, potentially wasting everyone's time with minutia. Here, obviously, the additional material is neither unique nor extensive; but the effect of these practices is potentially catastrophic for theatrical collaboration, for the public at large, and for the future of the collaborative ventures on which society as a whole depends.

[6] Approved Production Contract for Plays of The Dramatists Guild of America, Inc. and The League of American Theatres and Producers, §1.05 (1992).

ii. Established Practice; The Basic Contracts

The relationship between a playwright and a director is the most important artistic collaboration in a theatrical production. A director is hired by a producer (subject to the author's approval) to adapt the author's manuscript into a live performance. The director and writer must be in accord as to the nature of this adaptation, and there must be a degree of trust and cooperation between them throughout the process for the production to succeed on any level. Any proposed changes in the author's play, whether suggested by the director or any other collaborator, are subject to the author's approval. The approved changes become part of the author's play thereafter.

The Guild and The League of American Theatres and Producers (the "League") have agreed to the APC, the basic contract under which dramatists license their work to producers for first-class (i.e., Broadway) productions. All Guild members with a first-class production utilize the APC and all other Guild contracts are based on the principles established therein. These principles have been adopted as basic theatrical practice throughout the industry. Regional theater production contracts commonly reference the APC's definitions and provisions. Guild contracts have language substantially as follows: "No changes can be made in the Author's play (including the text, title and stage directions) without the Author's prior written permission, and all such approved changes shall become the Author's sole property, free of liens or encumbrances."[7]

In the basic agreement negotiated by the SSDC, producers agree that directors reserve their "property rights." The SSDC agreement binds only the producer. This can only be interpreted as a provision that allocates rights as between the producer and the director. It

[7] Approved Production Contract for Musical Plays of The Dramatists Guild of America, Inc. and The League of American Theatres and Producers, §17 (1992).

requires the producer to compensate the director for the producer's subsequent productions that replicate the direction. It does not and cannot require a producer to grant rights to a director that exceeds the scope of the license they've obtained from the author.

Unlike the right of directors, as employees, to unionize and collectively bargain for the terms of their compensation, a dramatist's sole substantive right is ownership and control of their play. Should the Court uphold the Plaintiff's claim, authors will have their rights over their works severely encumbered. Directors would then have the advantage of both unionization and a copyright interest in the author's work. Such an inequitable result is unjustifiable and unjust.

iii. The "chilling effect"

Directors are employees hired to turn a dramatist's script into an ephemeral experience for an audience. To accomplish this, a director gives ideas to the designers, to the actors, to the choreographer, and to the writers as well. Directors do not actually write the play, or design the sets, costumes or lighting, or act the roles, or choreograph the dance.

In this sense, directors are interpretive, rather than creative, artists in the way of an orchestra conductor. A conductor interprets a piece of music by working with an orchestra to achieve a particular rendition of the work. In the same way that conductors do not claim ownership in their versions of Mozart, directors should not claim ownership of their versions of authors' work.

The chilling effect on theatrical production of such a claim is evidenced in the case of *Mantello v. Hall*[8], where the Broadway production of Terrence McNally's play *Love, Valour, Compassion* was re-created by a theatre in Florida. Joe Mantello, the Broadway director, applied for a copyright registration in his direction and the SSDC sued the Florida theatre on his behalf.

[8] 947 F.Supp. 92 (S.D.N.Y. 1996).

Mantello had the idea to begin the production with a dollhouse on the (author instructed) bare stage. McNally agreed to this modification of his stage directions, so the scenic designer designed the dollhouse, the lighting designer lit it, and the producer paid for it. Yet the director claimed sole ownership of that idea and brought suit against the theater for replicating it. Ultimately, the case was settled and the Court was only able to make the generic comment that a copyright registration is presumptively valid.

If directors are able to copyright their ideas, theatres will inevitably decide to cancel a production because of the threat of litigation by previous directors of a work. The chilling effect on theatrical licensing will work to the detriment not only of authors, but also of the theater-going public and to our society as a whole.

iv. The Impact on the Public Domain

Plays in the public domain, from Shakespeare to Sophocles, are freely available. If a director could establish a property right in his production of *Romeo and Juliet*, then the courts would protect thousands of versions of *Romeo and Juliet.* A director who chose to place *Romeo and Juliet* in a private girls' school, using a cast of all women, would hold a monopoly on all women versions of *Romeo and Juliet*. Producing the play would become increasingly problematic. Ultimately, the creation of such a copyright interest could render works in the public domain unavailable, in direct conflict with the purpose of the Copyright Act.

v. Impact on Theatrical Collaboration

Establishment of a new copyright in "blocking" or "stage picture", a right that is independent of the play itself, would have the same effect of a grant of co-authorship to the

dramaturg in *Thomson v. Larson*[9]. The chilling effect on future productions would also drastically limit a playwright's ability to control the work that he creates, and thus it will inevitably have a deeply disruptive effect on theatrical production generally.

Ironically, the first victims that would suffer from the establishment of a directors' copyright would be other directors. Every director strives to be free to direct a play in the way he best conceives it. If a director had to check that his version did not in some way employ similar ideas to those in another version put up by a director years earlier, it would stifle and ultimately strangle the ability to direct any play.

The Plaintiff claims "blocking" as a form of choreography and the creation of "stage pictures" in order to bootstrap his ideas into an acceptable form of copyrightable expression. Happily, the script in which he claims ownership contains such elementary additions that they can and should be dismissed as not rising to the level of a copyrightable work and which are unoriginal from a dramatic perspective. If Plaintiff's claims are successful, all other theatrical collaborators could have similar claims. In such a universe, playwrights would be best served to give up the theatre altogether and write for film or television, where writers are well compensated for the loss of control over their work.

Once such a Pandora's Box has been opened, how would one limit its application to theatrical enterprises alone? Surely all other creative enterprises, from filmmaking in Hollywood to computer programming in Silicon Valley, would be tossed into the same kind of chaos that could well be in store for the theatrical industry, should the Plaintiff's claims be upheld in this case.

IV. CONCLUSION

[9] 147 F.3d 195 (2d Cir. 1998).

For the reasons stated above, and for the reasons stated in defendants' pre-trial memorandum of law, the Court should hold that Nancy McClernan is the sole author of *Tam Lin* and that the Plaintiff has no ownership interest in the copyright of her play, nor any independent ownership in its stage directions.

Dated: New York, New York
April 21, 2006

CAHILL GORDON & REINDEL
(a partnership including a
professional corporation)

By:_____
Laurence T. Sorkin (LS3906)
80 Pine Street
New York, New York 10005
(212) 701-3000
Attorneys for The Dramatists Guild of America, Inc. as *Amicus Curiae*

Of Counsel:

Ralph Sevush, Esq.
Rebecca A. Frank
The Dramatists Guild of America, Inc.
1501 Broadway, Suite 701
New York, New York 10036