Brief of Amicus Curiae the Dramatists Guild, Inc., in Support of Affirmance

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Lynn M. THOMSON, Plaintiff-Appellant,
v.
Allan S. LARSON, Nanette Larson and Julie Larson McCollum, Defendant-Appellees.

No. 97-9085.
November 17, 1997.

On Appeal from the United States District Court for the Southern District of New York

Brief of Amicus Curiae the Dramatists Guild, Inc., in Support of Affirmance

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RULE 26.1 STATEMENT OF PROPOSED* AMICUS CURIAE *THE DRAMATISTS GUILD, INC.

Pursuant to Rule 26.1 of the Federal Rules of Appellate procedure, proposed *amicus curiae* The Dramatists Guild, Inc. hereby states that it has no parent companies, subsidiaries, or affiliates that have issued shares to the public.

Dated: New York, New York November 10, 1997

CAHILL GORDON & REINDEL

(a partnership including a professional corporation)

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***i TABLE OF CONTENTS**

***ii TABLE OF AUTHORITIES**

Cases

Other Authorities:

1 *BRIEF OF* AMICUS CURIAE *THE DRAMATISTS GUILD, INC. IN SUPPORT OF AFFIRMANCE

This memorandum is respectfully submitted by The Dramatists Guild, Inc. (the "Guild") as *amicus curiae* in support of affirmance of the decision below. Judge Kaplan correctly determined that playwright Jonathan Larson was the sole author of the Pulitzer Prize- and Tony Award-winning musical, *RENT*, applying well-developed case law in this Circuit.

PRELIMINARY STATEMENT

Appellant Lynn Thomson ("Thomson") was hired by New York Theater Workshop ("NYTW") to render "dramaturgical assistance" to Larson for the workshop production of *RENT*. (A. 626) [1] At the time, Larson had been the author of *RENT* for more than six years. After working with Larson in her contractual capacity as dramaturg for several months, she sought to be recognized as a co-author based on her dramaturgical relationship with the author. Judge Kaplan determined after trial that there was no evidence that Larson ever intended to be a co-author with Thomson. Under this Court's controlling decision ***2** in *Childress v. Taylor*, 945 F.2d 500 (2d Cir. 1991) ("*Childress*"), the finding by the court below that there was no evidence of clear co-authorship intent by Larson required rejection of Thomson's claim. The Guild submits that Judge Kaplan's decision was correct. Any contrary result would have far-reaching consequences for the process by which plays are developed and would jeopardize many of the collaborative relationships on which creativity in the theater depends.

INTEREST OF AMICUS CURIAE

Established over seventy-five years ago, the Guild is the only professional association to advance the theatrical interests of playwrights, librettists, composers, and lyricists. The Guild has over 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, which currently includes such artists as Edward Albee (author of *Who's Afraid of Virginia Woolf, Tiny Alice, Three Tall Women*), Betty Comden and Adolph Green (*On the Town, Peter Pan, Will Rogers Follies*), Arthur Kopit (*Nine, Wings, Oh Dad, Poor Dad, Mamma's Have You in the Closet and I'm Feeling So Sad*), Marsha Norman (*Night, Mother, Secret Garden*), Wendy Wasserstein (*The Sisters Rosensweig, The Heidi Chronicles*), ***3** Sheldon Harnick (*Fiddler on the Roof*), and John Guare (*House of Blue Leaves, Six Degrees of Separation*). The current president of the Guild is Peter Stone (*Titanic, 1776, Woman of the Year*). Past Guild presidents have included Robert Sherwood, Richard Rodgers, Moss Hart, Oscar Hammerstein, Alan Jay Lerner, Frank Gilroy, Robert Anderson, and Stephen Sondheim. Past and present Guild members have also included Eugene O'Neill, George S. Kau??ar Tennessee Williams, Arthur Miller, Lillian Hellman, Frank Loesser, Frederick Loewe, and Alice Childress.

The Guild has a direct and substantial interest in the outcome of this case and in the preservation of clearly defined rules governing the ownership and use of copyrighted material. Thomson has attacked established law governing joint authorship 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 will have a far-reaching impact on the Guild and its membership.

ARGUMENT

I. *LARSON IS THE SOLE AUTHOR OF* RENT

In the case of almost any theatrical work, it is not uncommon for individuals who are *not* the author -- whether they be the director, the producer, the actors, the set and costume ***4** designers, or friends of the author -- to make suggestions, often quite specific and often involving contributions of language, for making the author's manuscript better. Even if such changes or suggestions are adopted by the author, this does not make the collaborator a co-author, particularly in situations where the author is the dominant author (as Larson indisputably was here).

Ordinarily, where there is more than one author, the authors enter into a written collaboration agreement prior to a production of the play, and the collaboration agreement sets forth the terms of the collaboration, including allocation of profits, co-authorship credit, and approvals required for licensing the work. Here, it is undisputed that there was no written agreement of any kind between Larson and Thomson, much less a written collaboration agreement, and the only agreement that Thomson is able to point to is the contract between Thomson and the NYTW. However, the NYTW was not Larson's agent, was not the copyright owner, and could not grant authorship rights in a work that it did not own.

Ultimately, Thomson's claim reduces itself to a claim that she is entitled to co-authorship because she -- along with others -- helped to improve Larson's original work. But improvement is not the test of co-authorship. As the dominant ***5** author, Larson maintained ultimate control over all changes made to his manuscript and exercised authorial control over all of the artistic elements of his play. He jealously guarded the manuscript, determined what changes he would permit, and made those changes himself on his word processor. (T. 489) Every draft of *RENT* that was introduced into evidence at trial identified Larson as the sole author. (T. 741) The playbills for the NYTW and Broadway productions state that *RENT* is “by Jonathan Larson”. (T. 741) Moreover, Thomson herself has never claimed that she was entitled to billing credit as co-author of *RENT* (A. 1827), and when Larson was alive, Thomson identified her relationship to the work solely as “dramaturg” (T. 798).

A. *The Court Below Properly Found That Thomson Failed to Establish Co-Authorship Under the* Childress *Test*

In *Childress*, this Court recognized that despite the collaborative nature of theater, it is the playwright who is the author. “Care must be taken . . . to guard against the risk that a sole author is denied exclusive authorship status simply because another person

rendered some form of assistance." 945 F.2d at 504. Under *Childress*, the fact that two collaborators intend their contributions to be merged into "inseparable parts of a unitary whole" will *not* support a finding of co-authorship if *both* did not intend that *each* would be ***6** a co-author. *Id*. at 507-08. Intent "at the time the writing is done" is the "touchstone". *Id*. at 509 (citing House and Senate Reports).

Childress reflects the long-standing understanding and custom in the theater that joint authorship -- which entitles each co-author to equal undivided interests in the copyright -- arises only when both collaborators share a common intent to be co-authors. As the Court instructed in *Childress*: "Focusing on whether the putative joint authors regarded themselves as joint authors is especially important in circumstances . . . where one person [here, Larson] is indisputably the dominant author of the work and the only issue is whether that person is the sole author." *Id*. at 508. Here, "whatever thought of co-authorship might have existed in [the collaborator's] mind was emphatically not shared by the purported co-author". *Id*. at 509.

Thomson consistently ignores the *Childress* requirement of mutual co-authorship intent and argues that all that is necessary to create co-authorship is an intent that the contributions would be inseparably merged. (App. Br. at 15-16, 22-23) *Childress* flatly rejects this argument, holding that the test is not the unitary nature of the finished work, but ***7** whether both collaborators regarded themselves as joint authors. As Judge Newman wrote in *Childress*:

"Examination of whether the putative co-authors ever shared an intent to be co-authors serves the valuable purpose of appropriately confining the bounds of joint authorship arising by operation of copyright law, while leaving those not in a true joint authorship relationship with an author free to bargain for an arrangement that will be recognized as a matter of both copyright and contract law. Joint authorship entitles the co-authors to equal undivided interests in the work, *see* 17 U.S.C. § 201(a); *Community for Creative Non-Violence v. Reid*, 846 F.2d 1485, 1498 (D.C. Cir. 1988), *aff'd without consideration of this point*, 490 U.S. 730, 109 S. Ct. 2166, 104 L.Ed.2d 811 (1989). That equal sharing of rights should be reserved for relationships in which all participants fully intend to be joint authors. The sharing of benefits in other relationships involving assistance in the creation of a copyrightable work can be more precisely calibrated by the participants in their contract negotiations regarding division of royalties or assignment of shares of ownership of the copyright, *see* 17 U.S.C. § 201(d)." 945 F.2d at 508-09.

Intent to merge the respective contributions of the parties is not the test because, as the *Childress* Court explained:

"[A]n inquiry so limited would extend joint author status to many persons who are not likely to have been within the contemplation of Congress. For example, a writer frequently works with an editor who makes numerous useful revisions to the first draft, some of which will consist of additions of copyrightable expression. Both intend their contributions to be merged into inseparable parts of a unitary whole, yet very few editors and even fewer writers would expect the editor to be accorded the status of joint author, enjoying an undivided half interest in the copyright of the published work." *Id*. at 507.

***8** If, as Thomson argues, the only intent necessary to establish co-authorship is an intent to merge the contributions of all who contributed to a work, this would mean that anyone who had made any non-*de minimis* contribution would be a joint author unless otherwise compensated. As the Court in *Childress* recognized, such a result was not contemplated by the Copyright Act of 1976, and would inevitably transform most copyrightable works by sole authors, past and present, into works of joint authorship. 945 F.2d at 507.

Despite Thomson's efforts to circumvent or downplay the *Childress* requirement of co-authorship intent, this rule has been widely followed in this Circuit and elsewhere. *See, e.g.*, *Design Options, Inc. v. Bellepointe, Inc.*, 940 F. Supp. 86, 90 (S.D.N.Y. 1996) ("*both* parties must have intended, at the time of creation, that the work be jointly owned") (emphasis in original); *Papa's-June Music, Inc. v. McLean*, 921 F. Supp. 1154, 1157 (S.D.N.Y. 1996) ("The requisite intent to create a joint work exists when the putative joint authors intend to regard themselves as joint authors. . . . It is not enough that they intend to merge their contributions into one unitary work."); *Aymes v. Bonelli*, 30 U.S.P.Q.2d 1718, 1719 (S.D.N.Y. 1994) ("participants must have regarded themselves as joint authors of the work"). *See also Erickson v. Trinity Theatre, Inc.*, 13 F.3d 1061, 1068-69 (7th Cir.

1994) (follows ***9** *Childress* by looking beyond mere collaboration to parties' intent); *Cabrera v. Teatro Del Sesenta, Inc.*, 914 F. Supp. 743, 764 (D.P.R. 1995) (same).

The court below painstakingly analyzed this Court's *Childress* pronouncements (T. 736-40) and then applied the *Childress* standards to the evidence adduced at trial. The court below stated:
"I find here that plaintiff has failed to prove that Jonathan Larson entertained the necessary intent, whatever permutation of the [*Childress*] list that I just read off might be adopted. There simply is no proof persuasive to me that Jonathan Larson ever intended, despite all his warm feelings and high regard for Lynn Thomson, that she have the sort of interest in the product that is necessary, in my view, to have made her a joint author." (T. 741)

The reasoning below is entirely consistent with *Childress*, and the conclusions Judge Kaplan reached on the facts, which are not clearly erroneous, lead inexorably to the conclusion that Larson is the sole author.

Thomson argues that *Childress* does not apply where the collaborator's contribution is more than *de minimis* or where there are "distinguishing characteristics" that distinguish the collaborative relationship at issue from that of editors, research assistants, and the like (App. Br. at 31). Thomson's attempt to limit *Childress* only to situations where ***10** there is a *de minimis* contribution by the putative co-author (*see* App. Br. at 31) finds no support in the decision itself, and the cases following *Childress* do not make this distinction. *See, e.g.*, *Clogston v. American Academy of Orthopaedic Surgeons*, 930 F. Supp. 1156 (W.D. Tex. 1996) (no joint authorship where photographer had contributed more than 90% of photographs to medical textbook). In *Childress*, the limited contribution made by Taylor was merely one element in the determination of intent. Evidence of some characteristic "distinguishing" a collaborator from, for example, an editor would not, under *Childress*, establish co-authorship in the absence of mutual co-authorship intent. *Childress* requires that the parties must "entertain in their minds the concept of joint authorship." 945 F.2d at 508.

It is significant here that Larson steadfastly refused suggestions that he accept the assistance of a book-writer, who, in the custom of the theater, would ordinarily have been entitled to co-authorship status. Judge Kaplan found that Larson's "rejection of a book writer . . . speaks to Mr. Larson's intent . . . [and] is part of a broader pattern that persuade me that Mr. Larson never intended a joint authorship relationship." (T. 744) Judge Kaplan's finding of fact that Larson never intended co-authorship with Thomson, his dramaturg, finds support in the record and is not clearly erroneous. ***11** There is no question that under *Childress*, a dominant author can, if he or she chooses, enter into agreements with non-authorial collaborators to compensate them for their contributions. The dominant author can voluntarily give co-author credit to a collaborator. But Larson did neither here, and *Childress* rejected the notion that a co-author relationship could arise by operation of law, whether as an *in terrorem* incentive to compel the dominant author to buy peace with all potential claimants, or as a penalty for failing to do so.

Each of the cases now relied on by Thomson in support of her argument that *Childress* was wrongly decided (App. Br. at 22-28) predates *Childress*. The *Childress* court was aware of these cases and discussed the relevance of each in its opinion. None of the cases relied on by Thomson supports reversal here, and none provides any basis for questioning the correctness and continuing vitality of *Childress*.

Community for Creative Non-Violence v. Reid, 490 U.S. 730 (1989), involved a dispute as to whether a particular work was created for hire. The Supreme Court did not make any law on the issue of whether a joint work had been created, and up-held a remand to a lower court for determination on that issue. Surprisingly, despite Thomson's contention that *Reid held* "that co-authorship can be found among contributors who each intend ***12** to be the sole authors under the copyright statute and the sole owners of rights to the work in question" (App. Br. at 30), the Court actually stated that it had "no occasion to pass judgment on the applicability of the Act's joint authorship provisions to this case". 490 U.S. at 753 n.32. [2]

In *Maurel v. Smith*, 220 F. 195 (S.D.N.Y. 1915), *aff'd*, 271 F. 211 (2d Cir. 1921), the dominant author was the writer of the book and lyrics of an opera. She had a written agreement with her collaborators and was also identified as a co-author in the

copyright registration for the opera and in a separate contract between one of her collaborators and a music publishing company. On these facts, the District Court (Learned Hand, J.) found, and this Court affirmed, that the author and her two collaborators were co-authors of the opera.

Unlike *Maurel*, where there was clear evidence of co-authorship intent by the dominant author, here Judge Kaplan found no evidence of co-authorship intent by Larson. Unlike *Maurel*, where there were writings evidencing co-authorship intent, ***13** including the copyright registration, here Larson never referred to Thomson as his co-author. Thomson is not mentioned as "co-author" in the copyright notice, the NYTW and Broadway playbills, or any other writing. Throughout her entire collaboration with Larson and NYTW she was content to describe herself as "dramaturg", and the engagement of a dramaturg -- whatever meaning may be ascribed to the term in ordinary theater parlance -- cannot by itself establish co-authorship intent on Larson's part.

In *Edward B. Marks Music Corp. v. Jerry Vogel Music Co.*, 140 F.2d 266 (2d Cir. 1944), the question was whether a lyricist and composer were co-authors when the lyricist wrote the lyrics for a song intending that someone else would write the music. A composer later wrote the music, and the song was copyrighted. On these facts, the Court (Learned Hand, J.) held that the music and the lyrics were a joint work, and that the lyricist and composer were co-authors. *Marks* involved a totally different situation from that here. In *Marks*, there was overwhelming evidence of co-authorship intent by the lyricist (since he intended that someone else would write the music), and there could be no song without the music contributed by the composer. Here, unlike *Marks*, there was no evidence of co-authorship intent by Larson, and no reason for Larson to think that his dramaturg, any more than his director or the actors in ***14** his workshop production, would later claim co-authorship. As Judge Newman wrote in *Childress*, co-authorship intent "requires less exacting consideration in the context of traditional forms of collaboration, such as between the creators of the words and music of a song," 945 F.2d at 508, where there is an expectation of co-authorship. In the theater community, however, there is generally no expectation of co-authorship in the playwright-dramaturg relationship.

The court correctly found that Thomson had not satisfied the *Childress* test, and that finding mandates affirmance of the decision below.

B. Childress *Reflects Existing Theater Practice*

1. *The Nature of the Collaborative Process in Theater*

In theater, as in every area of collaborative endeavor, suggestions and contributions are offered with the hope that they will be taken, and accepted with the understanding that they may be used. Collaboration is intrinsic to theater, and all involved must be able to offer and accept such contributions freely. The *author* of the play -- in the public's understanding and as a professional matter -- is the dramatist or playwright at whose initiative and with whose labor a text has ***15** been created.[3] Until this case, we are not aware of any instance in which a non-dramatist collaborator has sought to be declared a playwright by operation of law because he or she claimed to have contributed a non-*de minimis* amount of independently copyrightable material. If Thomson were to prevail here, the effect would be to cede to a collaborator broader rights than any author would normally cede to another author, because co-authorship permits each author to act without even consulting the other author.

If the merger of two more than *de minimis* contributions were to be held to create joint authorship, the collaborative process necessary to the development of producible and successful plays would simply break down. Most theatrical works, like *RENT*, are the result of a gestation measurable in ***16** many years and involving the contributions of many people, from the development and refinement of the initial idea to the creation of scenes and dialogue and the structuring and placement of musical numbers.

In a sense, anybody who contributes, whether in a small way or a more actively, is a collaborator. Indeed, some contributors may be attached to the project in a professional capacity such as a director or dramaturg. But even when professionals join this creative process, the focus of the effort remains the author who must ultimately decide which contributions to take, adjust

the existing language to the new elements, and maintain the authorial perspective on the work. No author expects or intends, by engaging in this process, to place his or her ownership and control of his work at risk. As the Seventh Circuit has noted, "Those seeking copyrights would not seek further refinement that colleagues may offer if they risk losing their sole authorship." *Erickson v. Trinity Theatre, Inc.*, 13 F.3d at 1069.

In many cases, works are developed not at one theater, but at several, and it is possible in each instance over a number of years that a number of collaborators, including more than one dramaturg, might be utilized. While Thomson claims credit for certain lines and other potentially copyrightable ***17** material, a finding of co-authorship will inevitably open the door to claims not only against the dominant author by other collaborators, but against those subsidiary contributors by subsequent claimants. What assurance, under Thomson's analysis, will any author or deemed co-author have that an earlier or later collaborator in the developmental process will not claim tripartite or quadripartite authorship?

2. *There Is No Expectation of Co-Authorship in the Playwright-Dramaturg Relationship*

The testimony offered at trial by *both* sides indicated that dramaturgs -- like all other non-authorial collaborators -- are not generally recognized as authors and up until now have never sought, or been granted, co-author credit. (A. 1746-47, 1853-55; T. 148-49, 199-201, 215, 223-24, 374-75) Indeed, *none* of the expert witnesses called by Thomson -- and sympathetic to her claims for compensation from the Larson family -- cited any occasion in which a dramatist had given co-author credit or co-ownership of the copyright to the dramaturg. [4] Under the theory now advanced by Thomson, however, any dramaturg (or other collaborator) who contributed any non-*de* ***18** *minimis* copyrightable material to a play -- and who had not clarified their rights in advance -- would automatically become a co-author. It is significant that the playwrights who testified on Thomson's behalf at trial testified that even when they voluntarily made payments to dramaturgs with whom they worked, they nonetheless viewed themselves as sole authors of their plays, did *not* credit their dramaturgs as co-authors, and retained sole ownership of the copyright. (A. 219-22, 374-75)

3. *The Approach Urged by Thomson Would Interfere with the Exercise of Authorial Prerogatives*

Any finding that co-authorship arose between an individual who had labored for seven lean years (Larson) and another, hired by a third party to help assist in preparing for an immediately foreseeable production (Thomson), would seriously and adversely impact all areas of authorial prerogative. These authorial rights -- which include not only the right to share in all income, but also the right to make all artistic decisions about the work, and to make further changes -- are central to the author's functioning in theater and distinguish the dramatist, as copyright holder, from the television or screen writer who works for hire. The importance of these authorial rights, inextricably linked to copyright ownership, was recognized by Larson in his proud statement, cited by Judge ***19** Kaplan, that in theater, "the writer is king." (T. 744; A. 784-91)

If Thomson's argument were accepted here, playwrights would have to be cautious in accepting contributions from any collaborator, including producers, directors, agents and teachers. Theater would be changed from a collaborative enterprise into a potentially adverse relationship. Paper trails would be created for the purpose of a judicial audit in anticipation that the attribution of even single lines could be significant for later legal claims.

Decisions to take on co-authors are typically made with great deliberation, and the testimony at trial established that it is difficult if not impossible to imagine that Larson would have made such a determination without discussions with his agent, attorney or other confidants. (*E.g.*, A. 1774, 1846, 1857-58, 1875) In most instances of co-authorship, a clear understanding is reached from the beginning as to how the various responsibilities and rights of authorship will be apportioned. In this respect, billing, cited by the Court in *Childress* and Judge Kaplan below (T. 741), is in the professional lives of authors not merely *an* index of ownership, but the most important attribute of authorial rights. Intense discussions between authors and among authors and producers as to billing may ***20** be as significant a part of any negotiation as royalty payment. The sharing or apportioning of

billing is hardly a simple matter, and may involve complex issues of precedent, attribution and detail which are typically long-discussed and negotiated between those who intend themselves to be co-authors.

In addition, virtually all collaboration and production contracts among writers also provide as a matter of course that, should the authorial contributions fail to merge into a unified whole, then each contributor will own his or her own material; virtually all such agreements provide that if the materials do not merge, then the individual contributions shall not in any event be considered a joint work. The conditions precedent to merger are in practice negotiated -- often heavily so -- between co-dramatists, and merger typically does not occur until an agreed-upon level of production has been achieved within a reasonable time frame. The resolution of such issues is important to the collaborators because, unless the requisite production has occurred within such time period, each dramatist will recapture his or her respective contribution for their own subsequent use. Once merger occurs, the elements are bound together. Judicially imposed declarations of merger would annihilate the value of precisely those contractual negotiations advocated by the Court in *Childress* in an area where such negotiations are often quite sensitive.

21 4.** ***True Co-Authors Apportion the Risks and Benefits of Ownership

Although Thomson now claims co-authorship, there is no indication that she ever took any of the risks or obligations -- even during her period of work with Larson -- that a co-author almost invariably undertakes. Co-authors are typically involved with outlays of money and time during a lengthy and frustrating developmental process, and are aware that any project of moment requires an unforeseeable period of endeavor which will represent, should the project fail (as most do), significant years of unrecoverable opportunity costs. Because true authors recognize the investment involved in their commitment to work together, agreements among collaborators not only apportion risks and obligations (including agreements to indemnify the other author as to the originality of their respective contributions), but also provide, when a more recent collaborator enters the picture, a fair recognition of the prior work done which is factored into the new agreement.

Although Thomson now insists that the role of the dramaturg was “open and evolving” (A. 305) to the extent that she could become a co-author, there is no indication that she ever informed Larson or the NYTW of her purported view, or that Larson thought so. When her dramaturgical role allegedly changed and she began “writing,” Thomson did not go back to ***22** NYTW, her only employer, and ask for additional compensation; Larson, who was never asked by Thomson for *any* payment, and who clearly understood that NYTW had arranged the terms for Thomson's employment, could not have understood that he would ever have any *obligation* to pay Thomson.[5] To credit Larson's expressions of thanks and gratitude to Thomson, personally and for her contributions, as an intent to share his income and credit from the work in a perpetual commitment, much less to create from such gratitude the indicia of authorship, would be to convert compliments and appreciation frequently seen in all collaborative endeavors into inchoate, but binding, contracts.

Because Thomson did not, and cannot, support a claim that Larson ever made, much less breached, a promise which could be compensated under contract law, Thomson asks this Court to declare that Larson's penalty for failing to hold out such a promise, and Thomson's “remedy” for her failure to demonstrate such a breach of promise, must be this Court's determination ***23** that -- at an unknown and unknowable date -- the future fortunes of Larson and Thomson were nonetheless indissoluably merged. Such an approach makes no more sense than asking a court to declare, in an action where the plaintiff does not assert (and cannot show) breach of a promise to marry, that the remedy should be the declaration that the plaintiff and defendant had in fact become married on a date determined by the court.

C. ***Abandonment of the*** **Childress** ***Rule Would Create Confusion in the Commercial Development of Playwrights' Works***

If this Circuit reverses the court below or retreats from *Childress*, each of the arguments used by Thomson to justify her failure to seek a contract with Larson (*see* App. Br. at 10) -- despite explicit advice from her long-time friend and collaborator, playwright Craig Lucas, that she do so (T. 365) -- as well as her claim that she retained the right to grant an explicit license to Larson before he could use any such copyrightable material, will be used to subject playwrights to claims for unforeseen “contributions”

both by past and future collaborators (and their heirs) claiming that they had been deprived of the benefits of joint authorship. Because theater is so intimately collaborative, and because dramatists, secure in their authorship, frequently and publicly thank all who contribute ***24** to their success, such a result is hardly fanciful, and, Thomson's protestations notwithstanding (App. Br. at 45-47), will create an insurmountable disincentive for all other putative contributors to reduce their claims in advance to an agreement. Because, as the facts of this case illustrate, all claims of co-authorship cannot be foreseen in advance, the intention of the playwright must remain as the index of authorship. As Robert Brustein, who teaches theater at Harvard and was the founder of the Yale Repertory Theater, testified:

"A dramaturg, like a creative, forceful editor, is in a position to propose to an author lines, passages, and other ideas and suggestions, but in the last analysis, the play belongs to the playwright unless the playwright has clearly agreed to a different arrangement. Dramaturgs are an important part of the creative and collaborative process in the theater which I endorse, applaud, teach and promote, but if they want to receive credit as playwrights, they must either have prior agreements, or write a play themselves." (A. 1747)

Because plays in particular commonly go through significant changes up to -- and sometimes after -- the official opening, and because playwrights are not copyright attorneys, it would be virtually impossible to determine in advance all possible claims of co-authorship. [6]

***25** Throughout Thomson's brief, allusions are made to statements that Larson was not a "playwright" (implying that he was not a sufficiently good author of the story line or "book" of the musical), [7] and that by providing "structure" and copyrightable material, Thomson herself became a playwright. This ignores the finding by Judge Kaplan that "Jonathan Larson was the dominant creator of *RENT*," and that "the overwhelming share of the credit for the success and acclaim that *RENT* has won belongs to Jonathan Larson, and that the show is a tribute to his talent and his perseverance." (T. 736) It is nonsense to assert that Thomson should be deemed a co-author because the lines of the play that originated with her were, as Judge Kaplan found, "certainly not zero", but not the 9% that Thomson has claimed. [8] (T. 735) Those contributions cannot be said to make Thomson a "playwright" any more than can the contributions ***26** of the client who works closely with a designer to revise his house's floor plans be said to be an architect. Adding together one or a number of merely more-than-*de minimis* contributions in a work of more than 2,500 lines cannot create a joint authorship merely because the more-than-*de minimis* contributions were merged with the existing text.

Had the critical reception for *RENT* been less than overwhelming -- as is more frequently the case in theater -- Larson, had he survived, would have had to be free to modify the work, change dramaturgs, or add a co-dramatist. Under Thomson's theory, however, once the more-than-*de minimis* contribution of hers had "merged" with Larson's, Larson would have been unable to make such changes without the prospect that Thomson, or any other statutory joint author, would have had the right to countermand his decisions or separately license without further changes.

In the current commercial market, only the grant of exclusive rights to a producer is of any commercial value; no producer can obtain investors or otherwise pay for a right which can be licensed simultaneously to a competing producer, or for a competing license in a different venue or medium. Moreover, virtually all agreements between authors and producers contain a representation that the author has the *sole* right ***27** to dispose of the property as set forth in the contract, and is aware of no possible competing or adverse claims.

To allow putative collaborators to assert belated claims of co-authorship only after a play is produced to critical acclaim and the author (or here the author's estate) and the collaborator could not agree on the amount of a voluntary payment to the collaborator would only result in more cases like this one. Joint authorship was not intended by Congress to be, and cannot be made to serve as, a means of allocating proportional risks in theatrical works absent any contractual agreement, although Thomson suggests as much in her brief. (App. Br. at 24) If such contributions, which are currently freely made and innocently accepted, must in each instance hereafter be accounted for after the fact, the incentive to create copyrightable material will be stifled. As Thomson's testimony at the trial demonstrated (T. 411-414), in the complex interactions which characterize theatrical production it may

be virtually impossible to recall or determine at the moment of creation who contributed what specific element to a larger copyrightable work; even if all the parties agree at the moment of creation as to the respective contributions, there is no guarantee that, thereafter, their recollections will not change.

***28** Thomson claims that it is solely the circumstance of Larson's untimely demise which has brought the matter to litigation. To the contrary, under Thomson's theory, even if Larson had survived, she would have a claim based on her "contribution" of independently copyrightable material, and under her reading of *Childress*, she would be entitled to co-authorship as a matter of law. Such a result would stand *Childress* on its head and create a presumption that any collaborator able to show a non-*de minimis* contribution was a co-author. The courts would be invited to do what the *Childress* Court rejected -- impose *ad hoc* collaboration agreements on parties who did not voluntarily enter into such agreements and who did not share mutual co-authorship intent. Under Thomson's theory, a work might easily be found to have numerous "authors", and it would be up to the federal courts to allocate royalties and other rights among them.

II. *CHILDRESS DID NOT CREATE A "BLACK HOLE" IN THE COPYRIGHT LAWS*

Thomson raises the chimera that the result below, and therefore this Circuit's analysis in *Childress*, creates a "black hole" in the copyright laws that will permit Thomson to block all future use of the portions of *RENT* she contributed. (App. Br. at 42-45) The argument is simply wrong as a matter ***29** of law. No such hole exists because Thomson does not have the rights she postulates.

There is no "black hole" because *Childress* establishes that unless a contributor is found to be a co-author, the dominant author, the playwright, remains the sole *author* of the work. Neither *Childress* nor any of the cases that follow it restricts the sole author from fully exercising all of his or her rights in the work as a whole, even when the work incorporates contributions by a non-authorial contributor.

There is also no "black hole" because even if, despite *Childress*, the sole author is not the copyright owner of materials contributed by others, the sole author has an implied license to use those materials, and any use of those materials by the sole author cannot constitute infringement. By voluntarily offering material to the sole author without conditions, the collaborator cannot later assert infringement against a sole author who incorporates that material in his or her work.

Here, Thomson never restricted Larson's use of any of the "contributions" that she claims to have made to *RENT*. She never sought to limit the reproduction and performance of the work with her contributions. Her dramaturgical relationship to the work created an implied license for Larson to use what she created as dramaturg. There is no requirement that a non- ***30** exclusive copyright license be in writing. 1 P. Goldstein, *Copyright* § 4.2.1, at 4:13 (2d ed. 1997). Given the collaborative nature of theater, any "contribution" of copyrightable material should be understood as conveying with it to the playwright a non-exclusive license to use the collaborator's material in the work, absent some other arrangement in writing.

Crediting Thomson's claim that explicit licenses are required in such collaborations will place all editors, agents and other collaborators (including those who work together in writers' collectives and critique each other's work) in precisely the situation which Thomson asserts is uniquely hers. Many editors are not employees but often work as independent contractors to create structure and text. Similarly, literary agents often make similar contributions, and while paid a percentage of the author's income, typically do not have in their agreements any transfer of their copyright to the author. Thomson no more started with a blank page than does any editor of an unwieldy text, and notwithstanding the differences that may exist among different types of collaborators, it is the author's initial vision, and the creative work of molding and shaping material through countless drafts before any other individual is involved, which distinguishes an author's work from that of an editor or dramaturg or other non-authorial assistant.

***31** *CONCLUSION*

For the reasons stated above and in the Brief of Appellees, this Court should affirm the decision below that Jonathan Larson is the sole author of *RENT* and that Thomson has no ownership interest in the copyright for that play.

Footnotes

1 References in this brief are as follows: “A. __” is to the Appendix; “T. __” is to the trial transcript; and “App. Br. __” is to the Brief of the Plaintiff-Appellant.

2 *Easter Seal Soc. for Crippled Children & Adults, Inc. v. Playboy Enterprises*, 815 F.2d 323 (5th Cir. 1987), *cert. denied*, 485 U.S. 981 (1988), cited by Thomson as inconsistent with *Childress*, was cited by the *Reid* Court as establishing a conflict among the circuits on the work for hire issues that *Reid* was intended to resolve.

3 “Dramatist” and “playwright” are often used interchangeably. In a musical such as *RENT*, there are typically three roles: composer, lyricist and “bookwriter” or librettist (who is the author of the actual spoken text not accompanied by music). Depending on the circumstances, all such roles may be taken by the same individual -- as Jonathan Larson did in *RENT* -- or by different individuals. In theater, as opposed to film and television, dramatists retain copyright to their work, are independent contractors and most often, as was true of Larson, work for many years on a project without the offer or guarantee of production or compensation. They are compensated by royalties which reflect a percentage of ticket sales, and so also assume the risk that their play, even if produced, may never yield any significant income.

4 The testimony of Thomson's experts addressed the fairness and desirability of collaboration agreements or compensation arrangements entered into willingly by both parties. Here, of course, there is no such agreement.

5 It would not be unusual for Larson to assume that Thomson would continue to look to NYTW or the commercial producer (as she in fact subsequently did (T. 451)) for any additional compensation. Dramatists are themselves independent contractors, neither employees or employers. Clearly Larson would have known that NYTW would contractually participate in a percentage of his royalties from any future productions or, alternatively, a percentage of the box office from any successful commercial production.

6 Larson and Aronson, who recognized each other as co-authors from the beginning until their separation in 1991, agreed in advance on the specific amount and type of material contributed by Aronson, and established the criteria which could guide the future determination of Aronson's economic participation.

7 *See* App. Br. at 4-6.

8 Thomson's “contribution” consisted principally of line changes not unlike those made by an editor. These contributions (unlike Aronson's) were not shown to have any independent meaning or structure outside of Larson's copyrighted work.

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