

HAPPY ENDING: On December 5, 2011, five and a half years after it was so ordered by Judge Lewis A. Kaplan, the fraudulent, insubstantial and litigation-inspired "blocking and choreography" script registration filed by Edward Einhorn has been cancelled! Much thanks to Ralph Sevush, Executive Director of the Dramatists Guild, and the Guild itself for their diligent efforts to bring about this happy ending. [See a .jpg of the screen cap of the cancelled registration here](#)

THE STRANGE CASE OF Edward Einhorn v. Mergatroyd Productions

The case was tried in Federal District Court, Southern District of Manhattan, by Judge Lewis A. Kaplan April 24 - 26, 2006. I was a defendant, along with my production partner Jonathan Flagg. We were represented by Toby M. J. Butterfield of Cowan, DeBaets, Abrahams & Sheppard. Edward Einhorn was represented by his brother, David Einhorn of Anderson Kill & Olick PC.

Nancy McClernan

Although I've always been a booster of the Dramatists Guild, considering it good sense for playwrights to band together, I never thought I would end up working so closely with the Guild in its fight to protect authors' rights. But when a director registered an unauthorized derivative copyright based on my play, and then sued me when I produced the play, claiming I was infringing his "blocking and choreography script," I immediately turned to the Guild for help.

What happened was this: in October 2004 my partner Jonathan Flagg and I, through our company Mergatroyd Productions, produced my play TAM LIN off-off Broadway for the second year in a row. We hired Edward Einhorn to direct. Then we had differences with him and fired him. We planned to pay him for his services, but disagreed with him on the amount. He thought he deserved one thousand dollars, which he would have been due had he completed the project. We felt he deserved less.

I was actually in favor of paying him a thousand dollars just so he would go away and I would never have to have any dealings with him ever again, but Jonathan

disagreed, because Einhorn hadn't finished the work. We had fired him in part because he had stopped working and, in the words of the judge, "basically sulked." After we fired him he emailed the cast and crew in an effort to sabotage our show. In the email he implied that we didn't intend to pay the actors and told them to demand their payment immediately. Fortunately the actors ignored him. And we did pay them exactly what we said we would, when we said we would. In fact, we've never had an issue with paying anybody, ever, except this one director.

Einhorn himself had a funny attitude about paying actors. His feeling was that [actors do their work for the glory of it](#) and hardly needed to be paid at all. We originally advertised for a director and offered \$500 - remember, this is a typical off-off Broadway production with a shoe-string budget. Einhorn answered our ad, but then said he wanted \$1000. When we objected on the grounds that our budget couldn't handle paying him more, he suggested that we pay the actors less and pass the savings onto himself. In the end we stretched the budget to pay him more without paying the actors less.

So Jonathan was adamant that Einhorn didn't deserve to be paid \$1000. We offered to negotiate with him, but he refused.

Instead he had his brother David Einhorn, an intellectual property lawyer at the firm of Anderson Kill & Olick, PC [send us a "cease and desist" letter](#). In the letter they demanded \$2,000 (rather than the original \$1000), and said if we didn't pay up, and continued with the show, we would be infringing Einhorn's "blocking and choreography" copyright, and would be liable for \$150,000 per performance. We had never heard of a blocking copyright, we knew that Einhorn had not created any choreography, and I was well aware of the Dramatist Guild's attitude towards a director's copyright, so we ignored the letter and continued with the show.

We produced the play again in 2005. Thanks to the bad experience with Einhorn in 2004, I directed the show myself in 2005, with a revised script and a completely new set. In the second week of that production, we were served with a summons from Edward Einhorn. The lawsuit said that the current production was infringing Einhorn's copyright. Now since Einhorn had had absolutely nothing to do with the 2005 production, which was completely different from the 2004 production, and yet still claimed we were using his blocking and choreography, it was clear that Einhorn intended to stake a claim in any and all future productions of TAM LIN.

We tried to reach a settlement on the case, but Einhorn's initial settlement demand was for \$35,000 plus a fee for every future production of TAM LIN. Then throughout settlement negotiations, Einhorn kept offering to grant me licensing rights to produce my play. Jonathan and I considered this absurd. Einhorn didn't hold any licensing rights over my play and we would never pretend that he did.

Einhorn's "blocking and choreography script" was included with the summons, and we couldn't believe what he was claiming as a copyrightable work. In some cases his "blocking and choreography" was literally a restatement of my original stage directions.

For example, in my original script there was a stage direction that read:

(Dunbar shakes Aberdeen's hand.)

The director's blocking and choreography script reads:

D & A shake hands.

Other examples include basic stage right/stage left directions, and in one case he specified that a book of unspecified color was a red book. His claim to choreography rested on blocking a few dance steps - based on stage directions that called for dance steps.

Even if his work had been less insubstantial, Einhorn should never have been allowed to register a copyright for his "blocking and choreography" script at all, but he exploited a weakness of the United States Copyright Office. He registered his script as a "derivative work" copyright. As the [Copyright Office's Circular 14 on derivative copyrights](#) explains:

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.

As the owner of the copyright of the original work, I never authorized a "blocking and choreography script" and so the registration was invalid. But the Copyright Office doesn't ask for proof of authorization.

And so, thanks to an ill-gotten copyright registration of a negligible "blocking and choreography script," what was a squabble over essentially a few hundred dollars became a federal case that could impact the future of American theatre.

In the January 29, 2006 New York Times article by Jesse Green entitled [Exit, Pursued by a Lawyer](#) Green wrote:

But many playwrights, including Ms. McClernan, feel that a more dangerous threat is lurking in Einhorn's copyright claim: the kidnapping of their plays. As a result, the famously collaborative process of theater-making is now shadowed by questions. Are directors engaged in anything akin to the kind of authorship protected by copyright laws? If so, what's to stop them from

demanding payment whenever a play they once directed is revived? And what would that mean to the free flow of ideas in an art form that borrows heavily from all available sources? John Weidman, president of the Dramatists Guild of America and the author of the books for "Pacific Overtures" and "Assassins," argued in American Theater magazine that "if a directors' copyright is ever established, it will drastically limit a playwright's ability to control the work which he creates." Such copyrights, he added, "would clearly operate as liens on a playwright's play" and have "a potentially devastating effect on the facility and vitality of theatrical production."

As soon as we were served the lawsuit I contacted the Dramatists Guild. I explained the situation to Ralph Sevush, Executive Director of the Guild. He agreed that Einhorn's claims were outrageous and brought Rebecca Frank, the Guild's legal advisor, onto the case.

The Guild, supported by voluntary dues and fundraising, couldn't afford to foot our legal bills, but we understood that. Our concern was finding a lawyer who fully appreciated the issues of the case. Rebecca sent us to Toby Butterfield of Cowan DeBaets Abrahams & Sheppard LLP. Cowan DeBaets specializes in intellectual property rights and entertainment law, and as soon as we met Toby, we knew we were in good hands. Toby has years of experience in this particular area of the law and is smart and charming, and his associates Mason Weisz and Lisa Digernes are dedicated and hard-working.

During the trial, Ralph Sevush took the stand as our expert witness and together with the law firm of Cahill Gordon & Reindel LLP wrote an amicus brief for our case. Rebecca Frank attended the trial all three days and offered her support and analysis.

Einhorn never received my explicit authorization to register his derivative copyright, so his argument was that since I knew he took notes in his capacity as director, I was granting tacit permission for him to create this "blocking and choreography script." He even subpoenaed the stage manager and claimed that her note-taking was part of the preparation for his script.

But Judge Lewis A. Kaplan of the Southern District Court of New York didn't buy that argument. In his decision he said:

Einhorn took the script of the show written by Ms. McClernan and he prepared what he calls a blocking and choreography or blocking script... He inserted into Ms. McClernan's script, in italics, stage directions or blocking notes -- terms I use synonymously - that he claims are original and

copyrightable and property of his, that is to say, he claimed that. I find that no such script existed before Einhorn was fired from the show, nor was there any intention on anybody's part that any such script ever be created.

Einhorn and his legal team kept comparing his case to the case of Mantello v. Hall. The Dramatists Guild amicus brief explains that case:

In Mantello, a Florida theater that sought to re-create the Broadway production of Terrence McNally's play Love, Valour, Compassion was sued for infringement of a copyright obtained by the director, Joe Mantello. Mantello conceived the idea to begin the production with a dollhouse on the stage (which author McNally described as "bare"). McNally agreed to this modification of his stage directions. Accordingly, the scenic designer designed the dollhouse, the lighting designer lit it, and the produce paid for it. Mantello, however, claimed sole ownership of the idea.

Although Edward Einhorn was not a member of the Society of Stage Directors and Choreographers (SSDC), the SSDC's executive board president, Pamela Berlin, took the stand for him as an expert witness. In her statement for the court she also compared our case to Mantello and said:

"Ultimately the federal court in that case ruled that Joe's (Mantello) copyright was presumptively valid, and the theatre paid him a full license fee."

But the Guild's amicus brief countered:

Plaintiff's reliance in this case on Mantello v. Hall... is wholly misplaced. The Court in Mantello held only that the director's copyright registration created a presumption of validity; the Court, however, had no occasion to determine whether, on the facts of that case, the presumption should hold, or whether the stage directions at issue were entitled to copyright protection.

In other words, the Mantello case was settled out of court and so could not stand as a legal precedent.

In her statement for the court, Ms. Berlin also said:

"It is my view and the view of the SSDC that choreography and often stage directions amount to intellectual property of the creator."

But the Guild's amicus brief countered:

If directors are able to copyright their ideas, the consequences for the theater are both far-reaching and disturbing. Ironically, the first victims that would suffer from the establishment of a copyright in a director's blocking or "stage pictures" 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 ensure that his version did not in some way employ ideas similar to those in another put up by a director years earlier, it would stifle and ultimately strangle the ability to direct any play. In addition, theatres, when confronted by claims of stage direction copyrights by directors of prior versions of the play, may decide to cancel a production - or decline to produce the play in the first place - because of the threat of litigation by the directors of the prior versions. There are only a limited number of ways of writing stage directions for a character to exit ("exit left" or "exit right" are the two most common), and it boggles the mind to think that if the playwright's manuscript simply says that the character "exits," but the director's blocking notes say "exit left," the director has a copyrightable interest in the stage direction. The chilling effect resulting from the assertion of such tenuous claims will work to the detriment not only of authors and future directors, but also of the theater-going public and society as a whole.

Einhorn's copyright case fell apart during re-cross examination. As Toby questioned him, it became clear to Judge Kaplan that Einhorn had registered a copyright as a scheme to get us to pay him a large sum of money. According to the trial transcript:

BUTTERFIELD: When you said that you wanted defendants to cease using your blocking and choreography, was it your intent that they would have to change every entrance or exit?

EINHORN: My intent was that I get paid for the work that I did. I actually had no desire to stop the show. My - I mean, my intent was for them to, you know, pay me for doing my work. It was obviously impossible for them to change all the blocking, not just the exits but everything about it. And since they were using my work and had to use my work in order to do the show, I wanted to be paid for it.

JUDGE KAPLAN: So this was a hold-up, straight and simple, right?

EINHORN: No. Of course not.

JUDGE KAPLAN: You went to your brother, the lawyer, who was representing you for nothing, to send a demand letter saying pay me \$2000 or the show can't go on. That's the sum and substance of your case, isn't it?

And so the trial ended when Edward Einhorn agreed to cancel the "blocking and choreography script" registration. The judge agreed with us, that Einhorn did not deserve \$1000 (much less \$2000 or \$35,000) and granted him \$800, which was very close to what we had been prepared to pay him if he had deigned to negotiate with us.

Perhaps because Edward Einhorn's brother is his lawyer, and so he has free access to the legal system; and because Einhorn's belief in the director's copyright is strongly supported by the SSDC, he felt it would be worth his while to attempt to establish a legal precedent for a director's copyright, rather than quibble over a few hundred dollars with us. He still believes in the cause, and after the trial posted an essay on his web site called "A Case for the Stage Director's Copyright" in which he states:

A director's work is no threat to a playwright. Copyrighted blocking should no more take away from a playwright's royalties than copyrighted choreography takes away the royalties of the composer or lyricist. It's simply a separate entity. If the text is used, the playwright will get royalties. If the staging is used, the director will get royalties.

<http://www.untitledtheater.com/DirectorsCopyright.htm>

Incredibly, this is the director who demonstrated through his own actions exactly why his argument is wrong. He says "If the staging is used, the director will get royalties."

But who is to determine if the director's staging is being used? Einhorn claimed that I used his staging in the 2005 production, and demanded royalties, even though I directed the play myself using an entirely new staging concept. If Einhorn could claim that that was an example of using his staging, then virtually any subsequent production would be open to demands for royalties by him.

That was the very reason we could not settle the case and had to go to trial - to remove any and all encumbrances on the play TAM LIN. And please note: Einhorn did not direct the world premiere of TAM LIN. It had two prior productions, one a staged reading, and one an Equity Showcase, with a different director each time. If Einhorn deserved royalties, what about the other two directors?

And of course if I had known that Edward Einhorn was such a big advocate of a director's copyright, I never would have allowed him to get within 50 feet of my play. Why would any playwright want the possibility of future encumbrances on a play such as Einhorn envisions?

So Edward Einhorn still believes in the cause of a director's copyright, and undoubtedly the SSDC hasn't changed its mind. So did all this sound and fury signify anything? Other than Jonathan and I being forced to pay over a hundred thousand dollars in legal fees, which we are still paying.

We believe that something positive did come out of the case. Judge Kaplan did not address the issue of a director's copyright directly, but the comments in his opinion may be useful for future cases. From the court transcript of his decision:

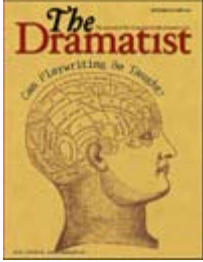
The claimed (blocking and choreography script) consisted of movements of actors and positioning of actors. There is a very lively question, I suppose, as to whether that is an appropriate subject of the copyright as to which I express no opinion. If it is, however, the deposit copy certainly didn't cover it because it is impossible to discern with precision from the deposit copy just exactly what the movements were and what the positioning was.

We believe that with these words Judge Kaplan has set the bar for a director's copyright higher than has ever yet been established in court. The next time a director tries to claim a copyright, he or she will have to provide something that makes it possible to discern with precision the actors' movements and positions, and not, as Edward Einhorn attempted to do, merely restate the stage directions, add "stage left" when the script says "exit" and claim creator's rights. Judge Kaplan has brought the law, at least incrementally, closer to established practice, and closer to the legal recognition of directors as interpretive artists. As the Guild's amicus brief observes:

Directors are employees hired to help 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, and their role in the collaborative process is not unlike that of an orchestra conductor. A conductor interprets a musical composition by working with an orchestra to achieve a particular rendition of the work. Unlike Plaintiff, who has claimed ownership of his interpretation of the playwright's work, no conductor, to our knowledge, has had the temerity to claim ownership in his or her version of

a Mozart symphony.

It is because of cases such as these, along with the advocacy for a directors' copyright by the SSDC, that we need the Dramatists Guild. If you're an American playwright, you need to be a member of the Guild.



The preceding text, sans hyperlinked annotations, also appeared in the September-October, 2006 issue of the Dramatists Guild magazine THE DRAMATIST.