

# LAW MEMO

## The Making of a Successful Collaboration

How times change. Fifty years ago, in Vichy France, opportunistic French collaborators were reviled as traitors.

Today, in contrast, collaboration is touted as the breakthrough process that will ensure the very survival of nonprofit organizations. Those who forge collaborative alliances are praised for their creativity and pragmatism (although we all know that working together does not necessarily save time or money).

The essential ingredients for creating and sustaining a successful collaboration are found in myriad books that discuss team-building, facilitation techniques, effective meetings, conflict resolution, and group dynamics.

Those ingredients include bringing together the right people, developing a shared goal, clarifying roles and a workable decision-making process, committing adequate resources, building trust by getting to work as a group (instead of simply meeting and planning), and frequent, honest communication.

When arts organizations or artists collaborate, there may be additional challenges revolving around credit, compensation, and control. Unfortunately, the law does not always coincide with how artists view their collaborative relationships.

This issue of *Arts Law Memo* explains the legal definition of joint authorship. It also demonstrates how an appropriate balance can be struck between copyright and contract law and how facilitators and mediators can help resolve disputes.

### JOINT AUTHORSHIP

Copyright protects "original works of authorship" that are fixed in a tangible medium of expression. It allows "authors" of artistic works to profit economically from their creative endeavors by reproducing or making copies of the work; distributing, selling or otherwise distributing copies; adapting

or creating derivative works; and performing and displaying the work in public.

These rights may be exercised only by the author (or by a person or entity to whom the author has transferred all or part of his rights). If someone infringes on the rights, the author can sue. In this sense, a copyright is a kind of property. And, like other types of property, it can be sold or otherwise exploited for the owner's benefit.

Joint authors are "tenants in common," with each having an independent right to use or license the work, subject only to a duty to account to the other co-author(s).

Unless there is a written agreement stating otherwise, each co-author is entitled to an equal share of the money generated by the work, just like a husband and wife each own 50 percent of their house.

Clearly, the consequences of creating a joint work are serious business.

### AMBIGUITIES

Exactly when and how do collaborators become joint authors for copyright purposes?

The copyright law says a joint work is "prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole."

But in 1991, the Second Circuit said that an intent on the part of each to "merge" his or her contribution into a "unitary whole" was not enough to make them co-authors.

According to the court, the joint authors must also "regard themselves as joint authors," or "entertain in their minds the concept of joint authorship, whether or not they understand precisely the legal consequences of that relationship."

The case, *Childress v. Taylor*, involved an actress, Clarice Taylor, who commissioned Alice Childress to write a

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VLAA helps artists and arts organizations solve and avoid legal and accounting problems by:

- Making referrals to lawyers and accountants;
- Mediating arts-related disputes;
- Publishing *Arts Law Memo* and concise how-to guides;
- Sponsoring seminars and public forums;
- Arranging for guest speakers;
- Maintaining a reference library;
- Operating an arts space clearinghouse;
- Supplying model contracts and other arts law and business materials;
- Facilitating meetings;
- Conducting and disseminating research on issues affecting the arts;
- Contributing articles to publications;
- Collaborating on arts advocacy initiatives;
- Matching volunteers with arts organizations seeking board members; and
- Providing access to the national VLA network.



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## Joint Authors' Agreements

Although business in the arts community is often conducted on a handshake and oral contracts may be binding, movie mogul Sam Goldwyn was right when he said: "A verbal contract is not worth the paper it is written on."

Putting it in writing clarifies the agreement, guards against forgetfulness, leaves less room for misunderstandings, serves as a record of the agreement for others who were not the original negotiators or signers, and provides reasonable assurance that the contract will be enforceable. The following are some of the important points that should be included in a joint authorship agreement.

1. Collaborators' Contributions. What will each collaborator contribute to the work? How will the collaborators work together?
2. Completion Date. What is the realistic deadline for completion of the work? What happens if the deadline is not met?
3. Quitting the Collaboration. If one author wants to quit the project, can the other(s) finish it? How will the former partner be compensated?
4. Division of Copyright Ownership. Will the collaborators divide their copyright interest in equal parts or by taking into account the quality and/or quantity of their contributions?
5. Credit. How will the authors' names be listed? Alphabetically or in some other way?
6. Negotiations and Decision-Making. Will all the collaborators conduct negotiations and make decisions as a team? Will one be authorized to act for the others?
7. Independent Parties. Do the collaborators really want to be "partners" as defined by law? If so, each will be responsible for all partnership debts and each one can make agreements that are binding on the other partner(s).
8. Money Management. How will expenses and royalties be handled?
9. Assignments. Can one collaborator find a substitute to take his place? Do the other collaborators need to give their consent?
10. Non-competition. Do the collaborators want to prevent each other from creating other works that could compete with the joint work?
11. Death or Disability. If a collaborator dies or becomes disabled, can the

a play based on the life of comedienne "Moms" Mabley. Taylor gave Childress her research and made suggestions for improving the script, but Childress was responsible for the structure of the play and the dialogue.

The collaborators never formalized their agreement and, when their relationship deteriorated, the dispute went to trial. The court characterized Taylor's contribution as "helpful advice" and said that "a playwright does not so easily acquire a co-author."

In other words, a sole author should not be denied exclusive authorship status simply because another person

rendered some form of assistance.

In a 1994 case, *Erickson v. Trinity Theatre, Inc.*, the Seventh Circuit went a step further by embracing a second test based on "copyrightability."

The case involved a familiar theatre scenario: Karen Erickson, a founder of the Trinity Theatre in Evanston, Ill., developed three new plays, working with the actors to improvise some material.

Erickson registered her copyright in the plays and licensed them to the theatre. When she left her staff job at Trinity, and after the expiration of the licensing agreement, she filed for a

preliminary injunction to prevent the theatre from continuing to perform her plays.

Trinity Theatre, opposing the injunction, claimed the performers' contributions made the actors collaborators in the creation of the plays and thus, joint authors. Since joint authors have equal rights in their creations, and the actors agreed to the Trinity productions, the theatre claimed there was no copyright infringement.

The court rejected Trinity's argument that the standard for determining the existence of a joint work was collaboration alone.

Instead, the court used a test requiring two criteria: 1) an intent, *at the time of creation*, by the parties to be joint authors and 2) the contribution of each author represents original expression that could stand on its own as the subject matter of a copyright.

The court found that the actors were not joint authors because they mostly contributed ideas, which are not protected by copyright, and because Erickson decided which of their suggestions would be incorporated into the final scripts.

The two-prong test proved to be crucial in a third case which pitted Lynn M. Thomson, the dramaturge who worked on *Rent*, against the family of the writer/composer Jonathan Larson, who died just before the Pulitzer and Tony-award winning play opened in 1996. Thomson was paid a fee to provide services that are typically performed by dramaturges, primarily making suggestions regarding structure, storytelling, and character development.

The dramaturge claimed that she also rewrote nearly half the script and recalled that Larson told her that he planned to reward her for her valuable contribution. His heirs reportedly offered Thomson a gift of one percent of the author's royalties. But their negotiations broke down, and the case went to court.

In her lawsuit, Thomson claimed that she was a co-author and sought a 16 percent share of the royalties. The Larson estate argued that he was the

sole creator of the smash hit musical.

Although Judge Lewis A. Kaplan agreed that Thomson made a major contribution to the show (some of which was copyrightable), she did not meet the other standard—intent. “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,” he said.

The judge noted that the billing—Larson was consistently known as the author, while Thomas was given credit as the dramaturge—was indication of the playwright’s state of mind. The judge also looked at the right of control. It was clear, he said, that Larson always retained decision-making authority by controlling the shape and content of the script and score.

#### WRITTEN AGREEMENTS

That Larson died suddenly of an aortic aneurysm just hours after the final dress rehearsal, and that so much royalty money was at stake, made the *Rent* case highly dramatic.

But in the end, what should be remembered about this case is that it underscored the importance of written agreements. Those agreements should clearly and specifically clarify and protect the rights and obligations of the collaborators whether they qualify as copyright owners or not.

Tony Kushner, for example, agreed to pay two dramaturges more than 15 percent of his royalties in recognition of their assistance with his Pulitzer Prize-winning play, *Angels in America*.

Under the Actors’ Equity Workshop Contract, which is used in developing new works (usually musicals) prior to an intended Broadway engagement, salaries are lower than the standard rates in exchange for a percentage of the gross box office receipts and subsidiary rights.

How about stage directors of world premieres? All would agree that their contribution to the development of the finished product often is monumental. However, ideas, blocking, and other stage business are not considered copyrightable subject matter. To

complicate matters even more, the director works for the producer, not the playwright.

So increasingly, directors are asking playwrights for an ownership interest in the plays that they help develop. Their union, the Society of Stage Directors and Choreographers, assists its members by distributing a form agreement, which some argue is unfair to authors.

A more equitable form was published in the *Columbia-VLA Journal of Law and the Arts* (Summer 1996). It is available from VLAA upon request.

#### RESOLVING CONFLICTS

Disputes are inevitable (and necessary) even when the collaborators are old friends. When two or more organizations decide to work together on a new project—perhaps motivated by the opportunity to seek additional grant funds—problems may arise.

After all, as Michael Winer and Karen Ray note in *The Collaboration Handbook*, the organizations bring different preferences, histories, communication patterns, and experiences with decision-making to the collaborative effort.

Improved communication is the key to resolving most disputes. More specifically, Winer and Ray offer this conflict management advice:

- **Clarify the Issues.** Collaborators should identify the problem by asking open-ended questions such as who, what, when, and where. Sources of conflict may include power struggles, the wrong mix of people, lack of trust, a vague vision or lack of focus, and/or absence of clear authority. Once the problem is clearly defined, it can be addressed in a systematic fashion.

- **Create a Conflict Resolution Process.** Collaborators should make a commitment to resolve their differences during their meetings. They should focus on issues, interests, and common needs rather than on personalities or positions. They should listen, encourage new ideas, and accept responsibility for taking prompt remedial action.

- **Resolve the Unresolvable.** Collaborators should try to break impasse by agreeing to disagree, asking influential outsiders to intervene, or

alerting donors.

- **Seek Outside Help.** Sometimes disputing parties need outside assistance. A trained facilitator can make sure that everyone is heard, turn hostility into constructive dialogue, help clarify contentious issues, encourage creativity and cooperation, and bring closure to long-standing debates. Universities, arts councils, and VLAA can help identify qualified facilitators.

#### MEDIATION WORKS

Additionally, VLAA encourages artists, arts administrators, and their attorneys to include a mediation clause in their contracts. Mediation is an innovative and informal process in which trained neutral mediators help disputing parties communicate directly with each other in order to create their own solutions (rather than going to a judge or arbitrator for a ruling).

The mediation process is private and confidential. It is faster and much less expensive than other avenues for resolving disputes, such as litigation or arbitration. More importantly, mediation often enables parties to continue working together or to end their working relationship with mutual respect.

VLAA offers mediation through its Arts Resolution Services program. VLAA staff contacts the second party, assigns mediator(s), and schedules the mediation session(s).

Arts Resolution Services also can provide a mediator to facilitate the initial contract negotiations. The presence of a neutral party at the beginning of the collaboration can identify major contract issues, raise underlying concerns, and ensure that the contract reflects the intent of all parties involved.

#### Sample Mediation Clause

All disputes arising out of this Agreement shall be submitted to mediation in accordance with the rules of the Arts Resolution Services, a program of the St. Louis Volunteer Lawyers and Accountants for the Arts.

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## The arts are a collaboration model in the corporate world

Partnerships and collaboration also are in vogue in the corporate world. Top MBA programs have revamped their curriculums to reflect the new emphasis on cooperation, and bookstore shelves are lined with business bestsellers designed to help managers understand and develop the systems necessary to implement a team-based approach to delivering services and producing products.

Ironically, the arts, which are maligned for not being business-like, are frequently held up as a model when collaboration is discussed. For example, the first chapter of *Organizing Genius* by Warren Bennis, one of the nation's most respected experts on leadership, mentions the Bauhaus School, the Guaneri Quartet, Walt Disney's studio, the thirteen assistants who worked with Michelangelo on the Sistine Chapel, the synergistic French Impressionists, Braque and Picasso giving birth to Cubism, filmmakers, the maestro-free Orpheus Chamber orchestra, Pilobolus, the Harlem Renaissance, the Bloomsbury Group, the wry Alquonquin Hotel circle, and the Grateful Dead.

The characteristics of what Bennis calls "Great Groups" are often found in artistic endeavors:

- They are made up of greatly gifted people, "mission maniacs," who frequently give up their normal lives.
- They are most successful when undertaking tangible projects. When the project is finished, the group often spins apart. Postpartum depression can be fierce.
- They can be a goad, a check, a sounding board, and a source of inspiration, support, and even love.

- They are engaged in creative problem-solving, often racing against a deadline.
- They rarely have morale problems. The members are intrinsically motivated.
- They tend to do their work in spartan, even shabby, surroundings.
- They have extraordinary leaders who have a keen eye for talent. As a corollary, they tend to lose their way when they lose their top leadership.
- They tend to be collegial and non-hierarchical, peopled by young individuals who often have an anti-authoritative streak. Group members don't want to be managed; they want to be led.
- They are fueled by curiosity and have hungry, urgent minds.
- They are pragmatic dreamers.
- They often have a dual administration—a visionary leader and a "suit."
- They have members who emerge with a sense of ownership, and dissent is encouraged because it serves the spirit of discovery.
- They experience their moments of near despair, but are more often raucous with laughter.