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BARGAINING POWER ON BROADWAY: WHY CONGRESS SHOULD PASS THE PLAYWRIGHTS LICENSING ANTITRUST INITIATIVE ACT IN THE ERA OF HOLLYWOOD ON BROADWAY

*Ashley Kelly**

INTRODUCTION

The presence of “pic-to-legit musicals” on Broadway has been around for decades.¹ In recent years, Broadway has seen its share of motion pictures turned into musical hits² as well as

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¹ The industry term “pic-to-legit musicals” refers to motion pictures that become plays in “legitimate” theatre. See Gordon Cox, *Broadway’s “Blonde” Ambition*, VARIETY, Mar. 26, 2007–Apr. 1, 2007, at 39 (“‘Sweet Charity’ (1966) was based on ‘Nights of Cabiria,’ ‘Applause’ (1970) grew out of ‘All About Eve,’ and ‘Nine’ (1982) took its story from ‘8 ½’”).

² “‘The Lion King’ (1997), ‘The Producers’ (2001) and ‘Hairspray’ (2002) [were] among the winners at both the box office and at the Tonys.” *Id.* “The Lion King,” adapted from the 1994 animated Disney film, has won over thirty major theatre awards, including six Tony awards, and recently celebrated its tenth anniversary on Broadway. See Andrew Gans, *Empire State Building and Sardi’s to Honor Disney’s Lion King*, PLAYBILL, Nov. 8, 2007, available at <http://www.playbill.com/news/article/112596.html>. “The Producers,” adapted from the 1968 Academy Award-winning film, won twelve Tony awards, the most ever awarded to one show, and ran on Broadway for six years before

disappointments.³ The 2007–2008 Broadway season alone features four new musicals adapted from movies, including the Disney production of “The Little Mermaid” and the Mel Brooks adaptation of “Young Frankenstein.”⁴ In the coming seasons, hit films such as “Gladiator”⁵ and “Shrek”⁶ will also be turned into musical adaptations. For major motion picture studios, a musical based on a movie can be a windfall as it reduces the risk of investment.⁷ For critics, that same musical can provoke the fear that “cherished musical-theater traditions are being suborned to serve a disposable mass culture.”⁸ Outside of the studios and critics, however, a larger issue looms: Before a movie-musical ever hits a stage, there is a battle that audiences rarely think about—the

closing in April, 2007. See Kenneth Jones, *Broadway Record-Breaker The Producers Closes April 22*, PLAYBILL, Apr. 22, 2007, available at <http://www.playbill.com/news/article/107445.html>. “Hairspray,” adapted from the 1988 film, won eight Tony awards and is still running on Broadway. See <http://hairspraythemusical.com/>.

³ “Dirty Rotten Scoundrels,” a 2005 musical adapted from the 1988 film, “never quite recouped on Broadway,” “The Wedding Singer,” a 2006 musical adapted from the 1998 film “floundered,” and “High Fidelity,” another 2006 musical based on the 2000 film “as well as the book, barely opened.” See Cox, *supra* note 1.

⁴ Michael Kuchwara, *New Broadway Season: The Play’s the Thing*, ASSOCIATED PRESS, Sept. 30, 2007, available at www.newsday.com/entertainment/stage/ny-ftthe5391193sep30,0,161117.story.

⁵ See Mac Rogers, *From Screen to Stage: How to Turn a Movie into a Musical*, SLATE, May 23, 2006, <http://www.slate.com/id/2142258/>. “Gladiator,” won the 2001 Academy Award for Best Picture and grossed over 450 million dollars worldwide. See IMDB, *Gladiator*, <http://www.imdb.com/title/tt0172495/> (follow “Awards” hyperlink; then follow “Box Office/Business” hyperlink) (last visited Apr. 1, 2008).

⁶ John Weidman, *The Seventh Annual Media and Society Lecture: Protecting the American Playwright*, 72 BROOK. L. REV. 639, 644 (2007) (“The Shrek imprint represents a franchise of goldmine-like proportions.”) The first “Shrek” film grossed 455 million dollars and the first sequel grossed 880 million dollars. *Id.*

⁷ See Rogers, *supra* note 5 (“The beauty of the movie-musical is that the branding is already in place.”).

⁸ *Id.* “Their fear is that Broadway is becoming an adjunct to Hollywood, where desperation to reach a mass audience raised on movies and television” forces a dilution of traditional theatre. *Id.*

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battle for copyright control between the playwright and the studio.⁹

At the core of this battle is the recognition that playwrights and screenwriters deal in two distinct legal realities.¹⁰ This distinction centers on the work made for hire doctrine of the Copyright Act of 1976, which carves out an exception to the rule that copyright ownership vests in the party who actually created a work.¹¹ If a work is made for hire, the employer or hiring party is considered to be the author and owns the copyright “unless there is a written agreement to the contrary.”¹² Independent contractors are not employees under agency law,¹³ and their works may be “specially ordered or commissioned” under limited conditions, in which case the second clause of the work for hire doctrine applies and the commissioning party controls the copyright.¹⁴ In order to actually be a work made for hire under the second clause, two conditions must be met: (1) the work has to fall within one of nine specified categories,¹⁵ and (2) there must be a written agreement between the parties that states the work is a work made for hire.¹⁶ Screenwriters clearly fall into the “part of a motion picture or other audiovisual

⁹ See Weidman, *supra* note 6, at 645 (“The studio’s interest in maintaining control of the content of the stage version of [a movie] seems irreconcilable with the theatrical mandate which gives the playwright ultimate control of the work which he creates.”).

¹⁰ See *id.* at 641–42 (“A screenwriter is an employee. . . . From the beginning, he understands that everything he writes will immediately become the property of the studio which employs him The playwright is an independent contractor. He owns his own work and is free to dispose of it as he sees fit.”).

¹¹ *Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 737 (1989) (citing 17 U.S.C. § 102 (1989)).

¹² *Id.*

¹³ *Id.* at 751.

¹⁴ U.S. Copyright Office, *Circular 9.1104*, Nov. 2004, at 1, available at <http://www.copyright.gov/circs/circ09.pdf>.

¹⁵ The nine categories are (1) a collective work; (2) as a part of a motion picture or other audiovisual work; (3) as a translation; (4) as a supplementary work; (5) as a compilation; (6) as an instructional text; (7) as a test; (8) as answer materials for a test; or (9) as an atlas. 17 U.S.C. § 101 (2007).

¹⁶ U.S. Copyright Office, *supra* note 14, at 2.

work” category, meaning any work they do for a studio is owned by that larger entity.¹⁷ In contrast, plays, and more broadly, dramatic works, are not one of the nine categories and the work of playwrights may not be specially ordered or commissioned like a motion picture screenplay.¹⁸

This brings us back to the battle between studios and playwrights and the increasing presence of Hollywood on Broadway with movie-musicals. Movie studios are producing on Broadway in increasing numbers, but with the assumption that they are in control of playwrights’ works as works for hire.¹⁹ John Weidman, president of the Dramatists Guild,²⁰ warns against the dangers of allowing studios acting as producers on Broadway to make their own rules—in essence, “build[ing] a wall around them and keep[ing] them quarantined.”²¹ Weidman argues that while individual playwrights have been resisting the pressures to work under a work for hire regime, he admits that “with the appearance of more and more studio-produced musicals like ‘Tarzan’ and

¹⁷ See 17 U.S.C. § 101 (2007).

¹⁸ Alison Zamora, *Legislative Update: The Playwright Licensing Antitrust Initiative Act: Empowering the “Starving Artist” Through the Convergence of Copyright, Labor, and Antitrust Policies*, 16 DEPAUL-LCA J. ART & ENT. L. & POL’Y 395, 421 (2006) (“[A] playwright is not an employee of the producer, but rather an independent contractor.”); see 17 U.S.C. § 101; see also Dramatists Guild’s Business Affairs FAQ, http://www.dramatistsguild.com/business_fa.aspx (last visited Nov. 23, 2007) (“[Work made for hire] is not an acceptable condition for writing in the theater, where authors still are entitled to own and control their own work.”).

¹⁹ See Weidman, *supra* note 6, at 645 (“[T]he most aggressive of the movie studios [bring] with them . . . a desire to do business, not according to the theater model which put[s] the playwright in first position, but according to the Hollywood model, in which the producing studio own[s] the author’s copyright and writers [can] be hired and fired at will.”).

²⁰ The Dramatists Guild is an advocacy organization composed of playwrights, composers, and lyricists “who write for the first class theater and who represent the common interests of playwrights.” *Barr v. Dramatists Guild*, 573 F. Supp. 555, 561 (S.D.N.Y. 1983); Weidman, *supra* note 6, at 639 (“The Dramatists Guild is the only national organization representing the interests of playwrights, composers, and lyricists writing for the living stage.”).

²¹ Weidman, *supra* note 6, at 645 (“[A]s a general rule, what one producer gets, all producers want.”).

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‘Aida,’ [these] pressures [on playwrights to relinquish copyright] are only going to grow more intense.”²²

In light of these mounting pressures, Congress must intervene. Unlike screenwriters, playwrights are forced to negotiate with studios without the collective bargaining power of an organization like the Writers Guild of America (“WGA”)²³ because Congress has not granted the Dramatists Guild the right to collectively bargain on behalf of playwrights.²⁴ For years, senators and house representatives have proposed bills allowing the Dramatists Guild the ability to collectively bargain.²⁵ However, none of the bills have ever been put to a vote.²⁶

This Note advocates that now is the time for Congress to act on behalf of playwrights by passing the Playwrights Licensing Antitrust Initiative Act,²⁷ which would allow playwrights as a group to collectively bargain with the powerful Hollywood studios now producing on Broadway.²⁸ Part I addresses the functional differences between playwrights and screenwriters and the varied impact that the work made for hire doctrine has on playwrights and screenwriters. Part II discusses bargaining power in the entertainment industry, focusing on the negotiating power of the Dramatists Guild and the WGA. Part III looks at the past and current state of the Playwrights Licensing Antitrust Initiative Act.

²² *Id.* at 644.

²³ The WGA is a labor union and screenwriters’ collective bargaining representative in the motion picture and television industry. *Wellman v. Writers Guild of Am., W.*, 146 F.3d 666, 668 (9th Cir. 1998).

²⁴ See ROBERT M. JARVIS ET AL., *THEATER LAW: CASES AND MATERIALS* 80 (2004) (“Because producers typically have the upper hand in . . . negotiations, the [Dramatists] Guild has wanted to engage in collective bargaining but cannot do so—as a trade association rather than a labor union, its activities are not shielded from the federal anti-trust laws.”).

²⁵ Zamora, *supra* note 18, at 395.

²⁶ *Id.*

²⁷ Playwrights Licensing Antitrust Initiative Act of 2004, S. 2349, 108th Cong. (2004).

²⁸ *The Playwrights Licensing Antitrust Initiative Act: Safeguarding the Future of American Live Theater: Hearing on S. 2349 Before the Subcomm. on the Judiciary*, 108th Cong. (2004) [hereinafter *Hearing*] (statement of Senator Orin Hatch).

Part IV advocates for why, in light of past legislative arguments and the growing presence of Hollywood studios as producers, Congress should act now to bring a balance of bargaining power to Broadway by passing the Playwrights Licensing Antitrust Initiative Act.

I. AUTHORIAL CONTROL: WRITING FOR THE STAGE AND SCREEN

The Copyright Act of 1976 provides that copyright ownership “vests initially in the author or authors of the work.”²⁹ The Supreme Court generally considers the author to be “the party who actually creates the work, that is, the person who translates an idea into a fixed, tangible expression entitled to copyright protection.”³⁰ However, there is an exception to this rule, which is at the core of the legal division between screenwriters and playwrights: the work made for hire doctrine.³¹ Section 101 of the copyright law defines a “work made for hire” as:

(1) a work prepared by an employee within the scope of his or her employment; or (2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer materials for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.³²

If a work is created by an independent contractor, then the work may be “specially ordered or commissioned” and therefore

²⁹ 17 U.S.C. § 201(a) (2007).

³⁰ *Comty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 737 (1989) (citing 17 U.S.C. § 102 (2007)).

³¹ *See Weidman*, *supra* note 6, at 641–42; 17 U.S.C. § 201 (“In the case of a work-made-for-hire, the employer or other person for whom the work was prepared is considered the author . . . and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.”).

³² 17 U.S.C. § 101 (2007); *see* U.S. Copyright Office, *supra* note 14, at 1.

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falls under the second clause of the work for hire doctrine,³³ so long as two conditions are met: that the work falls within one of nine specified categories listed within 17 U.S.C. § 101(2) and that there is a written agreement that states the work is a work made for hire.³⁴ The fundamental difference between screenwriters and playwrights under the Copyright Act is that screenwriters write as “part of a motion picture or other audiovisual work,”³⁵ thereby working for hire, whereas playwrights do not fall into any of the nine categories and subsequently maintain control of their copyright.³⁶ John Weidman put it best when he said, “[t]he intermittent sense of suicidal desperation which playwrights and screenwriters sometimes share is about the only thing they share.”³⁷

A. Playwrights: Creators for the Great White Way

The Dramatists Guild defines a playwright as any bookwriter, composer, or lyricist who is involved in the initial stages of the theatrical collaborative process and whose contribution is an integral part of a play as presented in subsequent productions by other producers.³⁸ The playwright solely controls structure, dialogue, theme, and plot.³⁹

Additionally, as author of a play, the playwright owns the

³³ U.S. Copyright Office, *supra* note 14, at 2.

³⁴ *Id.*

³⁵ See 17 U.S.C. § 101 (2007).

³⁶ Zamora, *supra* note 18, at 421 (“[A] playwright is not an employee of the producer, but rather an independent contractor.”). See 17 U.S.C. § 101 (2007). See also Dramatists Guild’s Business Affairs FAQ, *supra* note 18 (“[Work made for hire] is not an acceptable condition for writing in the theater, where authors still are entitled to own and control their own work.”).

³⁷ Weidman, *supra* note 6, at 641.

³⁸ Douglas Nevin, *No Business Like Show Business: Copyright Law, The Theatre Industry, and the Dilemma of Rewarding Collaboration*, 53 EMORY L.J. 1533, 1544 (2004).

³⁹ Charles Isherwood, *Go East, Young Writers, For Theater!* N.Y. TIMES, Nov. 13, 2007, at E1 (as opposed to the screenwriter whose work can be “parceled out among a dozen writers and script supervisors and subject to executive meddling”).

intellectual property.⁴⁰ These rights include the copyright of the play or musical.⁴¹ Because the playwright owns her work and is free to dispose of it as she sees fit, the playwright can grant a producer a defined package of performance rights for a limited time while reserving all other rights to herself.⁴²

Specified in most playwright licensing contracts with producers is that all changes made to the script, title, stage business, or performance of the play or musical also belong to the playwright.⁴³ Many licensing agreements between playwrights and producers also specify that the playwright shall receive a percentage of the gross box office receipts from the initial production of the work⁴⁴ and retain ownership and control over all subsequent productions.⁴⁵ Indeed, a playwright is the only creator in the theater industry who enjoys the exclusivity of retaining the right of copyright ownership.⁴⁶ Playwrights are not typically hired to write exclusively for an individual producer or Broadway theater.⁴⁷ Though occasionally a theater or producer will commission a play, most plays “are simply written—by someone, somewhere with an impulse and an idea.”⁴⁸ More importantly, playwrights do not

⁴⁰ See Richard Garmise, *Author's Bill of Rights*, DRAMATIST, Oct. 1993, available at <http://www.dramatistsguild.com/files/authbill.pdf>.

⁴¹ *Id.*

⁴² Weidman, *supra* note 6, at 641–42.

⁴³ Nevin, *supra* note 38, at 1540; see Garmise, *supra* note 40. Typically, a producer may make changes to the play with the playwright's consent, but regardless of whether the producer or the author composed the emendations, the intellectual property belongs to the playwright. *Id.*

⁴⁴ Typically between 5% and 7% of the gross weekly box office receipts. See Richard Garmise, *The Art of the Deal, Part 1: Money, Money, Money*, DRAMATIST, Nov. 1994, at 1.

⁴⁵ See *id.* at 2. See also Nevin, *supra* note 38, at 1540.

⁴⁶ Nevin, *supra* note 38, at 1540. See Weidman, *supra* note 6, at 642 (“[I]t is in the theater, and only in the theater, that [the playwright] . . . knows his own unique, idiosyncratic voice will be heard, unedited and uncompromised.”).

⁴⁷ See Zamora, *supra* note 18, at 421 (explaining that the relationship between a producer and a playwright is limited to “the time it takes to produce . . . one play” and if the producer wants to continue to work with the playwright, “a new contract would have to be devised”).

⁴⁸ Weidman, *supra* note 6, at 642.

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write plays as works made for hire.⁴⁹

A playwright is not an employee under the first clause of the work made for hire doctrine.⁵⁰ In *Community for Creative Non-Violence v. Reid*, the Supreme Court articulated a multi-factor test for determining under what circumstances a creator acts as an independent contractor and when she is an employee.⁵¹ The factors to consider are (1) the hiring party's right to control the manner and means by which the product is accomplished; (2) the skill required; (3) the source of the instrumentalities and tools; (4) the location of the work; (5) the duration of the relationship between the parties; (6) whether the hiring parties have a right to assign additional projects to the hired party; (7) the extent of the hired parties' discretion over when and how long to work; (8) the method of payment; (9) the hired party's role in hiring and paying assistants; (10) whether the work is part of the regular business of the hiring party; (11) whether the hiring party is in business; (12) the provision of employee benefits; and (13) the tax treatment of the hired party.⁵²

Applying the Supreme Court's test to the relationship between producers and playwrights, the factors demonstrate that playwrights are not employees of producers.⁵³ Producers do not control the manner and means by which a play is written or developed, rather, producers only become involved after a play has been completed.⁵⁴ The skill required is solely the playwright's specialized writing ability and talent and the source of the instrumentality is her own imagination.⁵⁵ The playwright uses her own workspace and the working relationship with the producer

⁴⁹ See Dramatists Guild's Business Affairs FAQ, *supra* note 18.

⁵⁰ 17 U.S.C. §101 (2007). Under the first clause of the work made for hire doctrine, a work qualifies as a work made for hire if it was "prepared by an employee within the scope of his or her employment." Weidman, *supra* note 6, at 641 ("The playwright is an independent contractor. He owns his work and is free to dispose of it as he sees fit.").

⁵¹ 490 U.S. 730, 751–52 (1989).

⁵² *Id.*

⁵³ Zamora, *supra* note 18, at 421.

⁵⁴ *Id.*

⁵⁵ *Id.*

encompasses only the time it takes to produce the play.⁵⁶ The play is only licensed to the producer.⁵⁷ Thus, the ability for a producer to assign additional projects to the playwright is irrelevant, as is the producer's discretion over the timeline the playwright works, since the relationship does not commence until after a play is completed.⁵⁸

The method of payment to the playwright is governed by the licensing agreement.⁵⁹ The playwright does not receive a salary, and the playwright hires her own dramaturges⁶⁰ if she requires them.⁶¹ There are no employment benefits bestowed upon the playwright and producers do not take taxes out of the playwright's share of the profits from the production.⁶² Rather than outright control by a producer, producers in the theater industry are rewarded for their investment through subsidiary rights.⁶³ In exchange for the initial risk of developing a play's first production, a producer is often entitled to a percentage of all subsequent licensing of the play and sometimes even a percentage of other rights such as film adaptations.⁶⁴ A playwright also does not come under the second section of the work for hire doctrine because dramatic works do not fall into one of the nine specified categories.⁶⁵

⁵⁶ *Id.*

⁵⁷ See Dramatist's Bill of Rights, http://www.dramatistsguild.com/about_rights.aspx (last visited Apr. 1, 2008) ("When a university, producer or theatre wants to mount a production of your play, you actually license (or lease) the public performance rights to your dramatic property to that entity for a finite period of time.").

⁵⁸ Zamora, *supra* note 18, at 421.

⁵⁹ See Garmise, *supra* note 40, at 1.

⁶⁰ See Thomson v. Larson, 147 F.3d 195, 197 n.5 (2d Cir. 1998) ("[T]he role of the dramaturg can include any number of the elements that go into the crafting of a play, such as actual plot elements, dramatic structure, character details, themes, and even specific language.") (internal quotations omitted).

⁶¹ Zamora, *supra* note 18, at 421.

⁶² *Id.*

⁶³ Nevin, *supra* note 38, at 1541.

⁶⁴ *Id.*

⁶⁵ A playwright's play is not "a contribution to a collective work, . . . a part of a motion picture or other audiovisual work, . . . a translation, . . . a supplementary work, . . . a compilation, . . . an instructional text, . . . a

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However, a playwright's ability to retain copyright is not absolute. A playwright may assign her copyright to a producer,⁶⁶ and indeed some contracts with producers require such provisions. For example, a contract may contain language stating that if the work is not a work made for hire, the playwright nonetheless irrevocably transfers and assigns the producer all rights, title, and interest therein, including all copyrights.⁶⁷ Unaware of the ramifications, playwrights often sign such contracts, without understanding that they are losing their rightfully entitled intellectual property for at least 35 years, at which point they may terminate the transfer of rights to the producer.⁶⁸ In an industry riddled with egoism, paranoia, and severe financial hardship,⁶⁹ playwrights are often blinded by "artistic euphoria and dreams of box office glory" and frequently fail to consider legal and business safeguards in their contracts.⁷⁰

Though playwrights enjoy the unique privilege of retaining copyright ownership, it is a right that must be safeguarded. Playwrights are considered at the bottom of the "financial totem pole" in the theater industry⁷¹ and accordingly have little bargaining leverage with producers, especially large motion picture studios acting as producers.⁷² Because standards in theater are low to begin

test, . . . answer materials for a test, or . . . an atlas." 17 U.S.C. § 101 (2007).

⁶⁶ See 17 U.S.C. § 201(d) (2007).

⁶⁷ The playwright, through a written conveyance, may transfer in whole or in part "any of the exclusive rights comprised in a copyright." See 17 U.S.C. § 201(d).

⁶⁸ See 17 U.S.C. § 203 (2007).

⁶⁹ Nevin, *supra* note 38, at 1540. Though a playwright may write many plays throughout her career, a play's production is expensive and complicated, but unless a play is produced, the playwright does not earn any money from her craft. Even if it is produced once, it is rare that it is optioned for additional productions. See Randolph N. Jonakait, *Law in the Plays of Elmer Rice*, 19 CARDOZO STUD. L. & LIT. 401, 403–04 (2007) ("A new play almost always has to be instantly successful to last more than a brief time, and if its initial production does not succeed, it is unlikely ever to be produced again.").

⁷⁰ Nevin, *supra* note 38, at 1540.

⁷¹ See Isherwood, *supra* note 39, at E1 ("[I]t is not easy to earn a good living strictly as a playwright."). See also Jonakait, *supra* note 69, at 403–04.

⁷² See Weidman, *supra* note 6, at 644.

with, the average advance against royalties for a 99-seat production is only between \$2,000 and \$5,000, with a 5% to 7% share in gross box office receipts post-recoupment.⁷³ If a playwright is successful enough to engage a Broadway production, the starting advance will be significantly higher but still not very lucrative, usually in the range of tens of thousands of dollars.⁷⁴

With such small returns and little safeguard against the bargaining strength of producers, playwrights are increasingly drawn to Hollywood to write for television and film, giving up their roles for those as screenwriters.⁷⁵ While they are more likely to earn enough money to support their writing careers,⁷⁶ they

⁷³ See Victor Knapp & Ralph Sevush, *The Money Flow*, DRAMATIST, July–Aug. 2001, at Newsletter 2–3. The advance that a small theater gives a playwright is non-refundable but recoupable from the royalties that the playwright earns from ticket sales of an entire production run. DONALD A. FARBER, *PRODUCING THEATRE: A COMPREHENSIVE AND LEGAL BUSINESS GUIDE* 196 (3d ed. 2006). The production contract usually will specify how many performances the play has been licensed for, but this typically does not alter the amount of the advance. *Id.* Recoupment occurs when all production costs incurred in presenting a play for a given production have been returned to the investors of the play. *Id.*

⁷⁴ See, e.g., HAROLD L. FOGEL, *ENTERTAINMENT INDUSTRY ECONOMICS* 468 (7th ed. 2001) (“The fees for rights for a major performance of [a show like Rodgers and Hammerstein’s musical “Oklahoma”] are customarily in the area of 8% of box-office gross, with an advance against royalties of \$18,000 or more.”). Though more than the advance for a small theatre production or Off-Broadway, this is still lower than the multi-million dollar advances seen by Hollywood screenwriters. See Dana Kennedy, *Screenwriters Adjust to Being Bit Players Again*, N.Y. TIMES, Dec. 9, 2001, at B15 (“The newcomer, David Benioff, was paid \$1.8 million upfront for ‘Stay.’”).

⁷⁵ Nevin, *supra* note 38, at 1569 (“Despite intermittent moments of excellence, the American theatre has faced a considerable challenge during the last few decades. Exciting and vital artists are decamping for the hills of Hollywood, taking with them the innovative approaches that define each generation of the theatrical movement.”); see also *The Playwrights Licensing Antitrust Initiative Act: Safeguarding the Future of American Live Theater: Hearing on S. 2349 Before the Subcomm. on the Judiciary*, 108th Cong. (2004) [hereinafter *Hearing*] (statement of Marsha Norman, Vice President, Dramatists Guild).

⁷⁶ See Isherwood, *supra* note 39, at E1 (“In theory a talented writer interested in making plays and making a living in other media should be able to

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ultimately sacrifice their intellectual property rights in Hollywood.

B. Screenwriters: All of the Money, None of the Control

In sharp contrast to playwrights, film and television screenwriters are almost always employees of a production, and their work product is normally characterized as work for hire.⁷⁷ In essence, screenwriters are paid to write. This includes plots, characters, twists, turns, and whatever else the studio desires.⁷⁸ Typically a screenwriter receives a large advance from her studio before she even begins writing and will receive additional sums of money as subsequent drafts are submitted.⁷⁹ A standard option payment for a feature film can range from \$10,000 to \$25,000.⁸⁰

From the 1920s until the late 1940s, movie studios had their own “stables of writers” composed of screenwriters tied exclusively to particular studios.⁸¹ These screenwriters were

do both. But in practice it doesn't seem easy. A lot of writers who head west never look back Young writers who win some acclaim for a first or second play will probably continue to head west before they have had time to develop, which means the theater is potentially losing important voices before they mature.”).

⁷⁷ Nevin, *supra* note 38, at 1542. See Matthew J. McDonough, *Moral Rights and the Movies: The Threat and Challenge of the Digital Domain*, 31 SUFFOLK U. L. REV. 455, 473 (1997) (“Because of a significant disparity in bargaining power, directors and screenwriters are almost always employed or otherwise contracted for work pursuant to the work for hire doctrine, with the motion picture studio alone as copyright owner.”).

⁷⁸ Weidman, *supra* note 6, at 642.

⁷⁹ *Id.*

⁸⁰ STEPHEN BREIMER, *THE SCREENWRITER'S LEGAL GUIDE* 12 (3d ed. 2004). The option payment gives a producer exclusive control to use the screenwriter's work. When the option period expires, it can be exercised and the work can be purchased, at which time the screenwriter receives a purchase payment, which can be hundreds of thousands of dollars additionally paid to the screenwriter. *Id.* at 11–13.

⁸¹ *Id.* at 1. During this time, Hollywood ran on a “studio system,” with major studios (e.g., MGM, Paramount, etc.) producing movies on their own lots with creative personnel (directors, actors, and screenwriters) under long-term contracts. See Mark Weinstein, *Profit-Sharing Contracts in Hollywood: Evolution and Analysis*, 27 J. LEGAL STUD. 67, 71 (1998).

employees within the meaning of the 1909 Copyright Act and work for hire doctrine.⁸² However, as the large movie studios' empires began to crumble,⁸³ so did the practice of retaining in-house screenwriters.⁸⁴ Thus, when the Copyright Act came up for revision in the 1960s, movie studios were some of the most vocal lobbying forces in Congress.⁸⁵ Because of their efforts (and likely their financial resources), the studios were successful in having motion pictures included among the nine exceptions of the second clause of the work for hire definition.⁸⁶ Specifically, the works of screenwriters are characterized as "specially commissioned works" under 17 U.S.C. § 101(2), vesting all copyright ownership with the motion picture or television studio.⁸⁷

Under this scheme, the studio is considered the sole legal author of the script and may fully exploit a screenwriter's creation.⁸⁸

⁸² See 17 U.S.C. § 26 (1909). See also *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 748 (1989) (determining an employment relationship existed sufficient to give the hiring party copyright ownership whenever that party has the right to control or supervise the artist's work).

⁸³ Hollywood moved away from the studio system after the 1948 decision by the Supreme Court in *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948), which forced the major studios to dissolve their monopolies over vertically integrated exhibition, production, and distribution studio systems. See Weinstein, *supra* note 81, at 71.

⁸⁴ As the studio systems dissolved, the amount of writers under contract by the studios dropped. See Weinstein, *supra* note 81, at 89.

⁸⁵ See, e.g., *Copyright Law Revision, Part 5: 1964 Revision Bill with Discussion and Comments Before H. Comm. on the Judiciary*, 88th Cong. 298–309 (1965) (statement by the Motion Picture Association of America) [hereinafter MPAA Statement] ("We have indicated all along that provisions such as [the work for hire provisions] are the heart and soul of the operation of commercial and personnel relationships in our industry, without which there would be a very severe upset.").

⁸⁶ See Seth F. Gorman, *Who Owns the Movies? Joint Authorship under the Copyright Act of 1976 after Childress v. Taylor and Thomson v. Larson*, 7 U.C.L.A. ENT. L. REV. 1, 23 (1999).

⁸⁷ See 17 U.S.C. § 101 (2007). See also Gorman, *supra* note 86, at 23.

⁸⁸ BREIMER, *supra* note 80, at 4 ("[O]ur own laws have helped to reinforce the philosophy that the employed writer can be forgotten."); see Weidman, *supra* note 6, at 641 ("As legal author of the film, [the] studio can change the content of the screenwriter's script at will. His pirate captain can become a teenage runaway, his teenage runaway a Cocker Spaniel, his original story, set

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While playwrights do their own rewriting and have the last word on their scripts, Hollywood scripts do not remain in the hands of just one screenwriter and are almost always rewritten by another, if not many other screenwriters.⁸⁹ Moreover, because the studios own the copyright in scripts, they have “free reign to decide whether to modify the content of a film to suit [their] . . . needs.”⁹⁰ Though screenwriters have been known to balk at the creative control they forfeit to studios,⁹¹ Stephen Breimer—a well-known Hollywood entertainment attorney⁹²—advises screenwriters to “not bite the hand that feeds you. . . . [W]hine about [the system] and you will be labeled a whiner. . . . [T]he system is the system. It is unlikely to change.”⁹³ Because a screenwriter relinquishes all creative control over her screenplay, her name becomes her sole professional asset.⁹⁴ However, even the decision to credit a screenwriter by name is relinquished to the producer.⁹⁵

in Boston during the War of 1812, can be moved to the fifth moon of Jupiter.”).

⁸⁹ BREIMER, *supra* note 80, at 2.

⁹⁰ “Absent a contractual agreement to the contrary, filmmakers remain powerless to prevent a studio from making significant changes to a motion picture.” McDonough, *supra* note 77, at 477. Modern digital technology makes it possible for a studio to alter, delete, or add scenes to a film to make it more palatable to certain audiences. *Id.* at 476.

⁹¹ See, e.g., Sean Mitchell, *Written Out of the Script*, L.A. TIMES, Nov. 11, 2007, at M1 (“Regardless of the head-turning sums they can make, screenwriters are often treated like second-class Hollywood citizens, routinely replaced by other writers and often not even invited to the set of a movie they’ve written.”).

⁹² Stephen Breimer is a partner of Bloom, Hergott, and Diemer, LLP, in Beverly Hills, California. Prior to his legal career in entertainment law, he produced for film and television. See BREIMER, *supra* note 80, at xviii–xvix.

⁹³ *Id.* at 6.

⁹⁴ *Wellman v. Writers Guild of Am., W.*, 146 F.3d 666, 668 (9th Cir. 1998) (“The credit does not merely satisfy a writer’s longing to see his name in lights; it can propel him to other work—perhaps to the next blockbuster.”).

⁹⁵ *Id.*

II. BARGAINING WITH STUDIO PRODUCERS: WRITERS AND GUILD POWER

For a Hollywood studio, obtaining copyright ownership for the works it creates is perceived as essential in order to fully exploit the works regardless of whether the works are major motion pictures or pic-to-legit musicals.⁹⁶ Production and exploitation of a work often requires a studio to risk millions of dollars,⁹⁷ and if the studio did not have all rights in the work, expenses would drastically increase. For example, industry essentials such as marketing could be subject to a multitude of termination rights that would be difficult to overcome.⁹⁸ Not surprisingly, because the studio has a financial interest behind the work, it tries to ensure that it is holding the entire bundle of rights.⁹⁹

Generally, the work made for hire doctrine tips the negotiating scales in favor of the copyright holder.¹⁰⁰ To help promote more balance in Hollywood, a strong collection of guilds has formed to support the creative employees negotiating with big studios.¹⁰¹ For

⁹⁶ See Michael Carter Smith, *Work For Hire: Revision on the Horizon*, 30 IDEA: L.J. & TECH. 21, 29–30 (1989).

⁹⁷ According to the Motion Picture Association of America, major motion picture studios pay an average of \$106.6 million to produce and market a film. See Josh Friedman, *Movie Ticket Sales Hit Record; But a Report on the Industry's Health May Understate the True Cost of Making Films*, L.A. TIMES, Mar. 6, 2008, at C1.

⁹⁸ See Smith, *supra* note 96, at 31. Without sole ownership of all rights, the studio would be obligated to keep track of multiple licenses subject to termination, limiting not only their ability to exploit the work of the screenwriter but also the director and the many creative contributors to a film. For example, a producer may not be able to sell a film in a foreign market unless nationality vests in one author—the studio. *Id.*

⁹⁹ See Karen L. Gulick, *Creative Control, Attribution, and the Need for Disclosure: A Study of Incentives in the Motion Picture Industry*, 27 CONN. L. REV. 53, 66 (1994).

¹⁰⁰ *Id.*

¹⁰¹ Movie and television actors are represented by the Screen Actors Guild and the American Federation of Television and Radio Artists. MELVIN SIMENSKY, ENTERTAINMENT LAW 105 (3d ed. 2003). The writers are represented by the WGA. See *infra* Part II.A. The directors are represented by

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instance, film and television writers are represented by the WGA, which has the ability to collectively bargain with the studios.¹⁰² Within the context of Hollywood productions on Broadway, it is increasingly common for the studios to collectively bargain with the Actors Equity Association,¹⁰³ which represents live theater performers, and the Local One of the International Alliance of Theatrical Stage Employees (“IATSE”).¹⁰⁴ Playwrights, however, cannot participate in these types of collective bargaining conversations because, while they may be members of the Dramatists Guild, the Dramatists Guild is not enabled to enter into collectively bargained agreements.¹⁰⁵ Subsequently, while screenwriters gain a certain amount of bargaining power through their guild, playwrights are left without strong advocates.¹⁰⁶

the Directors Guild of America. SIMENSKY, *supra* note 101, at 105; *see also infra* note 136.

¹⁰² *Wellman v. Writers Guild of Am., W.*, 146 F.3d 666, 668 (9th Cir. 1998). *See also infra* Part II.A.

¹⁰³ Founded in 1913, Actor’s Equity Association is the labor union representing American actors and stage managers in the theatre. The organization collectively bargains on behalf of the actors and stage managers. *See* <http://www.actorsequity.org/AboutEquity/aboutequityhome.asp> (last visited Apr. 1, 2008).

¹⁰⁴ Local One of the International Alliance of Theatrical Stage Employees is the labor union that represents Broadway stagehands. The organization has the power to collectively bargain with producers. *See* <http://www.iatselocalone.org/about/aboutus.html> (last visited Apr. 8, 2008).

¹⁰⁵ The Dramatists Guild is a trade organization, as opposed to a labor union, and its activities are not shielded from federal anti-trust laws. *See* discussion *infra* Part II.B.

¹⁰⁶ *Id.*

A. *The Writers Guild of America: Formidable Opponent in Studio Negotiations*

Screenwriters are represented by one of the more powerful guilds in the entertainment industry.¹⁰⁷ When disputes between screenwriters and producers arise, the screenwriters turn to the Writers Guild of America, a labor union and the screenwriters' collective bargaining representative in the motion picture and television industry.¹⁰⁸ The WGA primarily represents screenwriters involved in work made for hire situations¹⁰⁹ and performs writing functions for employers engaged in the production of motion pictures and television.¹¹⁰ While screenwriters pay yearly dues to the WGA, the studios contribute as well, paying a percentage of pension, health, and welfare benefits to the WGA with respect to each writing assignment for which the studio employs a WGA member.¹¹¹

Since 1954, the WGA¹¹² has "negotiated and administered minimum basic agreements with major film producers and networks and stations, covering theatrical and television films, broadcast and cable television, documentary film and radio, public and commercial television."¹¹³ In recent years, the WGA has expanded its coverage

¹⁰⁷ In 2007, for example, the WGA was able to gain the support of the Screen Actors Guild, which represents the entertainment industries acting celebrities, and, as a coalition, forced the canceling of the annual Golden Globe Awards. See Patrick Goldstein, *It's a Writers Strike, But the Actors Play a Major Role*, L.A. TIMES, Jan. 10, 2008, at E1; see also, e.g., Damon Lindelof, *Mourning TV*, N.Y. TIMES, Nov. 11, 2007, at D13.

¹⁰⁸ *Wellman v. Writers Guild of Am., W.*, 146 F.3d 666, 668 (9th Cir. 1998).

¹⁰⁹ Almost all agreements between studios and screenwriters are work made for hire situations. Nevin, *supra* note 38, at 1540.

¹¹⁰ *Am. Broad. Co., Inc. v. Writers Guild of Am., W.*, 437 U.S. 411 (1978).

¹¹¹ BREIMER, *supra* note 80, at 215.

¹¹² The WGA is split into two divisions: WGA, East and WGA, West. See Writers Guild History, <http://www.wgaeast.org/index.php/articles/article/499?startnum=&sort=&letter=&wgc=109#> (last visited Apr. 8, 2008).

¹¹³ *Id.*

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to staff members of radio and television stations, “the latter group mostly in the news and documentary areas, including news writers and others at ABC and CBS and a number of major individual stations.”¹¹⁴

The agreements promulgated by the WGA dominate in the entertainment industry.¹¹⁵ Members of the WGA “enjoy the benefits, privileges and protections under the various national Minimum Basic Agreements in effect in the field of radio, television and motion pictures.”¹¹⁶ WGA protections are minimum protections and screenwriters are often able to negotiate better terms based on their previous work.¹¹⁷ Many major motion picture studios’ production agreements with screenwriters are governed by the WGA, and WGA writers write most television network programming.¹¹⁸ Studios’ use of WGA screenwriters is so pervasive and exclusive that the only opportunities for non-WGA screenwriters are in animation, low budget pictures, and some basic cable programming.¹¹⁹

Although the WGA originally ceded screenwriters’ copyrights to the studios in 1942,¹²⁰ the WGA has progressively wielded its bargaining power over the years to try to regain more rights for screenwriters.¹²¹ For example, in 1988, the WGA added a provision to its standard agreement, known as a reversion, that allows a screenwriter the limited right to regain control over his copyright under certain conditions.¹²² If the screenwriter’s script is original

¹¹⁴ *Id.*

¹¹⁵ BREIMER, *supra* note 80, at 287.

¹¹⁶ Writers Guild History, *supra* note 112.

¹¹⁷ BREIMER, *supra* note 80, at 8.

¹¹⁸ *Id.* at 287.

¹¹⁹ *Id.* Some of the contested issues in the 2007 WGA strike were gaining guild jurisdiction over animation and basic cable programming. WGA Contract 2007 Proposals, http://www.wga.org/contract_07/proposalsfull2.pdf (last visited Apr. 1, 2008).

¹²⁰ See Mitchell, *supra* note 91, at M1 (“The agreement reached with the newly founded Writers Guild in 1942 contained the defining clause that survives to this day: ‘The studio, hereinafter, referred to as the author . . .’ making it clear where the writer stood after the sale of his work—or service, as it were.”).

¹²¹ See BREIMER, *supra* note 80, at 42–43.

¹²² *Id.*

and not adapted from any pre-existing material, the screenwriter may reacquire copyright of the script five years after either (1) the studio's purchase or license of the material or (2) the last draft is written so long as the material is not in active development and the studio still owns the first draft.¹²³ Because it is incredibly rare to see a basic reversion term in a studio contract with a screenwriter, this WGA provision is the only way for a writer to have a chance at getting back his material.¹²⁴

Today, the WGA aggressively advocates on behalf of screenwriters and continues to bargain with studios to keep the terms of the WGA Minimum Agreement on pace with technological advancements in the entertainment industry.¹²⁵ This past winter, the WGA engaged in a 100-day bargaining struggle with studios over the future of digital media residuals for writers.¹²⁶ Every three years, the collectively bargained WGA Minimum Basic Agreement is renegotiated with the Alliance of Motion Picture and Television Producers ("AMPTP").¹²⁷ After three months of contentious negotiations went sour and the expiration of the most

¹²³ See 2004 Writers Guild of America—Alliance of Motion Picture & Television Producers Theatrical and Television Basic Agreement, at § 16.A.8, available at http://wga.org/uploadedFiles/writers_resources/contracts/MBA04.pdf [hereinafter WGA Basic Agreement]. See also BREIMER, *supra* note 80, at 42–43.

¹²⁴ BREIMER, *supra* note 80, at 43 (“The best thing about the WGA provision is not just that it exists, which is a major accomplishment in itself, but that it covers commissioned works as well as material that is purchased.”).

¹²⁵ See, e.g., Richard Verrier & Claudia Eller, *Hollywood Writers Strike As Talks Fail; The Studios and the Guild Prepare for a Long Work Stoppage*, L.A. TIMES, Nov. 5, 2007, at A1.

¹²⁶ See *id.*; see also Richard Verrier & Claudia Eller, *Strike Report; And That's a Wrap! Walkout to End; After 100 Days and Untold Losses, Writers Vote Overwhelmingly to Get Back to Work*, L.A. TIMES, Feb. 13, 2008, at C1. Digital media residuals are derived from Internet downloads, straight-to-internet content, on-demand online distribution, and video on demand. See Verrier & Eller, *supra* note 125, at A1; see also Lindelof, *supra* note 107, at D13 (“[F]or more than 50 years, writers have been entitled to a small cut of the studios' profits from the reuse of our shows or movies; whenever something we created ends up in syndication or is sold on DVD, we receive royalties. But the studios refuse to apply the same rules to the Internet.”).

¹²⁷ See, e.g., WGA Basic Agreement, *supra* note 123.

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recent contract on October 31, 2007,¹²⁸ the WGA membership authorized a screenwriters' strike¹²⁹ which went into effect on November 5, 2007.¹³⁰ The contentious issues were DVD residuals,¹³¹ union jurisdiction over animation¹³² and reality television,¹³³ and residuals for new media.¹³⁴ More than 12,000 writers "traded their laptops for picket signs."¹³⁵

In January, 2008, after eleven weeks of picketing and stalled negotiation, tensions between the WGA and AMPTP broke and talks resumed in the wake of an agreement made between the AMPTP and another industry guild, the Directors Guild of America.¹³⁶ A month later, on February 12, 2008, the members of

¹²⁸ Michael Cieply, *To Strike or Not? Hollywood's Next Drama*, N.Y. TIMES, Sept. 1, 2007, at B7.

¹²⁹ Richard Verrier, *Writers Guild Votes 90% In Favor of Strike*, L.A. TIMES, Oct. 20, 2007, at C1.

¹³⁰ Michael Cieply & Brooks Barnes, *With Resolution Unlikely, Writers Guild Sets Strike for Monday*, N.Y. TIMES, Nov. 3, 2007, at C1.

¹³¹ In April of 2004, the New York Times reported that studios made \$4.8 billion in DVD sales versus \$1.78 billion at the box office. Sharon Waxman, *Swelling Demand for Disks Alters Hollywood's Arithmetic*, N.Y. TIMES, Apr. 20, 2004, at E1. The WGA claims that DVD residuals are necessary to a writer's income to cover periods in between employment, which is common in the industry. The WGA wants the residual rate to double from what amounts to 4 cents per DVD sold up to 8 cents per DVD sold. WGA Contract 2007 Proposals, *supra* note 119.

¹³² According to the WGA, 100% of animated screenplays in 2005 were written by at least one WGA member. However, the Minimum Basic Agreement currently does not include animation. *See* WGA Contract 2007 Proposals, *supra* note 119.

¹³³ The WGA argues that the process of creating interesting scenarios and shaping raw material into a narrative with conflict and character arc should fall under WGA contract. They advocate for the creation of "Story Producer" and "Supervising Story Producer" as acceptable forms of credit. *See id.*

¹³⁴ *See* Verrier & Eller, *supra* note 125, at A1. The WGA proposes that all television and theatrical content re-used on non-traditional media like the Internet or phones will earn a residual payment of 2.5% of the distributor's gross. *See* WGA Contract 2007 Proposals, *supra* note 131.

¹³⁵ David Carr, *New Media, New Values, Old Trouble*, N.Y. TIMES, Nov. 5, 2007, at C1.

¹³⁶ *See* Richard Verrier & Claudia Eller, *Strike Report; Writers, Studios to Revive Negotiations; the Directors Accord Opens the Door to Ending the*

the WGA voted overwhelmingly to end the strike.¹³⁷ The deal struck between the writers and the producers provides writers with residual payments for shows streamed over the internet and secures the WGA's jurisdiction for programming created for the internet.¹³⁸ The WGA strike proved that there are opportunities to exploit the vulnerability of studios in negotiations.¹³⁹ Because playwrights are deprived of the opportunity to collectively bargain in the same way that their screenwriting peers can, playwrights are denied an invaluable opportunity to attempt to close the gap in bargaining leverage in negotiations with Hollywood studios producing on Broadway.

B. The Dramatists Guild: The Toothless Voice of Playwrights

While screenwriters have a strong labor union fighting for them, playwrights have no union to argue on their behalf. Instead, playwrights must rely on advocacy groups to collectively represent their interests. The most prominent of these groups is the Dramatists Guild—an advocacy organization representing the common interests of playwrights, composers, and lyricists involved in theater.¹⁴⁰ The Dramatists Guild was started in 1919 under the umbrella of the Authors League of America.¹⁴¹ The

Nearly 11-Week Old Strike, L.A. TIMES, Jan. 19, 2008, at C1. The Directors Guild deal doubled residual payments for television shows and films sold online and extended union contracts to Web shows.

¹³⁷ See Verrier & Eller, *supra* note 126, at C1.

¹³⁸ See Verrier & Eller, *supra* note 126, at C1.

¹³⁹ At the start of the strike, it was predicted that without screenwriters, an entire season of television would be lost, and no pilots would be shot in the spring. See Lindelof, *supra* note 107, at D13. When the strike ended in February 2008, it “proved to be far more economically damaging than the studios had expected, shutting down more than 60 TV shows, hampering ratings and depriving networks of tens of millions of advertising dollars.” Verrier & Eller, *supra* note 126, at C1.

¹⁴⁰ *Barr v. Dramatists Guild*, 573 F. Supp. 555, 561 (S.D.N.Y. 1983). See Mission Statement of the Dramatists Guild, http://www.dramatistsguild.com/about_mission.aspx (last visited Apr. 1, 2008).

¹⁴¹ The Authors League of America includes the Authors Guild, which solely represents book authors and the Dramatists Guild. See History of the

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purpose of the Dramatists Guild is to “protect and promote the professional interests of playwrights” by advocating “to improve the conditions under which their works are created and produced.”¹⁴² The Dramatists Guild not only represents the interests involved in theatrical productions, but also “those broader concerns which affect directly or indirectly the role of the theatre in society.”¹⁴³

As an advocate for playwrights, the Dramatists Guild advocates for the enhancement of playwrights’ bargaining power by encouraging playwrights to negotiate for terms the Dramatists Guild pushes as minimum standards producers should meet, promulgating model agreements for use by members,¹⁴⁴ and advising members on standard industry terms concerning advances, royalties, billing, and script changes.¹⁴⁵ For first-class productions, such as a large-scale Broadway musical or play, playwrights that are members of the Dramatists Guild are encouraged to use a guild

Dramatists Guild of America, http://www.dramatistsguild.com/about_history.aspx (last visited Apr. 1, 2008) (“Matters of joint concern to authors and dramatists, such as copyright and freedom of expression, remain in the province of the [Authors] League, other matters, such as contract terms and subsidiary rights, are in the province of the [g]uilds.”).

¹⁴² *Barr*, 573 F. Supp. at 563.

¹⁴³ Mission Statement of the Dramatists Guild, *supra* note 140 (the Dramatists Guild claims it carries out its mission by “[f]ormulating production contracts; [p]romoting and protecting playwrights through these contracts . . . ; [e]xpressing a public opinion . . . on issues which affect the role the [playwright] plays in the theatre and in society in general; [w]orking with other theatrical institutions to educate them to the primacy of the author in theatrical production; [and] [i]dentifying emerging trends in theatre, and responding affirmatively and actively on an institutional basis to such trends.”).

¹⁴⁴ JARVIS, *supra* note 24, at 80 (“[These agreements are] respectively known as the ‘Approved Production Contract for Plays’ and the ‘Approved Production Contract for Musicals.’”).

¹⁴⁵ Members of the Dramatists Guild are encouraged to meet with the Director of Business Affairs when they are approached with production agreements to discuss the contracts before signing and to learn about how they can advocate for better terms. However, it is the playwright who must negotiate on her own with a producer, not the Dramatists Guild on her behalf. See Dramatists Guild Member Benefits, Business Advice, http://www.dramatistsguild.com/mem_benefits_business.aspx (last visited Apr. 1, 2008).

certified Approved Production Contract (“APC”).¹⁴⁶ The APC is a licensing agreement which sets forth minimum terms relating to fees, advances against royalties, territorial restrictions, and subsidiary rights for stock and amateur performances as well as motion picture rights.¹⁴⁷ Moreover, the APC grants the producer the right to produce the play as written by the playwright, but protects the playwright by preventing the producer from making any changes to the text, lyrics and/or music.¹⁴⁸ The playwright additionally retains the right to approve the director, the cast, and all other creative elements of the play such as the scenic, costume and lighting designers.¹⁴⁹ The APC is negotiated between the playwright’s agent and the producer, who is often supported by the League of American Theaters and Producers.¹⁵⁰ The APC then goes through a certification process by the Dramatists Guild, to ensure that the negotiated contract conforms to the minimum standards of the Dramatists Guild.¹⁵¹ If an APC does not conform to these terms, the playwright is asked to leave the guild.¹⁵²

For all the goals that the Dramatists Guild strives for, however, it cannot really enforce the APC as a requirement of the theatre industry, leaving playwrights to ultimately negotiate their own

¹⁴⁶ *The Playwrights Licensing Antitrust Initiative Act: Safeguarding the Future of American Live Theater: Hearing on S. 2349 Before the Subcomm. on the Judiciary*, 108th Cong. (2004) [hereinafter *Hearing*] (statement of Gerald Schoenfeld, Chairman of The League of American Theaters and Producers).

¹⁴⁷ *Id.*

¹⁴⁸ See ALEXANDER LINDSEY & MICHAEL LANDAU, *Approved Production Contract for Plays*, in 5 LINDSEY ON ENTERTAINMENT, PUBLISHING, & THE ARTS § 11:8 (3d ed. 2008) [hereinafter APC]. Article VIII, Section 8.02(b) requires that any changes that are made shall be the property of the playwright.

¹⁴⁹ *Id.* at Art. 1, § 1.01(b).

¹⁵⁰ See *Hearing*, *supra* note 146 (statement of Gerald Schoenfeld, Chairman of The League of American Theaters and Producers).

¹⁵¹ See APC, *supra* note 148, at Art. XVI.

¹⁵² *Id.* Playwrights are not required to use an APC as an industry requirement; rather, the Dramatists Guild requires use of an APC for membership. A playwright is free to leave the Dramatists Guild and negotiate on her own if she is willing to take less favorable terms than those promulgated under the APC.

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deals with producers.¹⁵³ This is because the Dramatists Guild is a trade organization rather than a labor union, and therefore, its activities are not shielded from federal anti-trust laws.¹⁵⁴ In fact, over the last sixty years, the Dramatists Guild has been involved in numerous disputes regarding the applicability of restrictions under the Sherman Act.¹⁵⁵

The first major dispute involving a standard contract certified by the Dramatists Guild was brought before the United States Second Circuit Court of Appeals in 1945.¹⁵⁶ The plaintiff, a

¹⁵³ JARVIS, *supra* note 24, at 80. The playwright must ultimately decide to hold her ground and only accept APC terms, and thus stay within her membership requirements as set by the Dramatists Guild, or negotiate for less favorable terms and choose to lose the benefits of being a member of the Dramatists Guild. For many, the opportunity to be produced at all outweighs the harm of taking less than favorable terms. However, the more playwrights unable to acquire APC terms, the greater the dilution to the bargaining power of all playwrights.

¹⁵⁴ “The term ‘antitrust laws’ has the meaning given it in section (a) of the first section of the Clayton Act, 15 U.S.C. § 12 (2007), except that such term includes section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 (2007), to the extent that such section applies to unfair methods of competition.” See Playwrights Licensing Relief Act of 2002, S. 2082, 107th Cong. (2002). The purpose of the Sherman Act is to prevent economic harm caused by restraints of trade, such as price-fixing. 15 U.S.C. §§ 1–7 (2007) (“Every contract . . . or conspiracy, in restraint of trade or commerce . . . is declared to be illegal.”). Setting minimum standards in a contract, such as the APC, has been interpreted as a form of price-fixing. See *Ring v. Spina (Ring I)*, 148 F.2d 647, 650 (2d Cir. 1945).

Anti-trust laws seek to ensure that competitors be treated fairly, promote equal opportunities, and to disperse economic and social power. See THE SEDONA CONFERENCE WORKING GROUP SERIES, COMMENTARY ON THE ROLE OF ECONOMICS IN ANTITRUST LAW 3 (2006), available at http://www.thesedonaconference.org/content/miscFiles/2_06WG3Report.pdf; see also Zamora, *supra* note 18, at 399 (“If associations are not deemed labor unions, the Sherman Act prohibits them from collectively negotiating the terms of licensing agreements . . .”).

¹⁵⁵ *The Playwrights Licensing Antitrust Initiative Act: Safeguarding the Future of American Live Theater: Hearing on S. 2349 Before the Subcomm. on the Judiciary*, 108th Cong. (2004) [hereinafter *Hearing*] (statement of the Dramatists Guild of America).

¹⁵⁶ *Ring I*, 148 F.2d 647 (2d Cir. 1945).

producer, took over production of a play from another producer who had already signed the Dramatists Guild's Minimum Basic Agreement (a pre-cursor to the APC) with the defendants, the authors of the play.¹⁵⁷ When the replacement producer attempted to make changes to the play without the authors' consent, the authors brought a breach of contract claim for failure to obtain their consent.¹⁵⁸ The Second Circuit held that the new producer made a *prima facie* showing of illegality, emphasizing that the producer was exactly the type of person whom the Sherman Act sought to protect.¹⁵⁹ Though the producer was not awarded any damages and the injunction which required the authors to offer the producer the chance to produce the play was later discontinued,¹⁶⁰ the decision strongly suggested that playwrights were not employees, and the Dramatists Guild, therefore, was not a labor union entitled to the labor exemption to the anti-trust law.¹⁶¹

Subsequent case law involving the theater further exacerbated the tenuous position of the Dramatists Guild.¹⁶² In *Bernstein v.*

¹⁵⁷ *Id.* at 649.

¹⁵⁸ *Id.* The authors requested arbitration pursuant to the agreement, but the producer sued, claiming that the authors and the Dramatists Guild had violated the Sherman Act by creating a monopolistic contract through collective bargaining among members of the Dramatists Guild. *Id.* The Dramatists Guild argued it was a labor union and should come under the § 17 exemption of the Sherman Act. *Id.*

¹⁵⁹ *Id.* at 653. The court argued that the Sherman Act seeks to protect an individual from "combinations fashioned by others and offered to such individual as the only feasible method by which he may do business." *Id.*

¹⁶⁰ The issue of damages was remanded to the District Court, which held that since the allegations made on the motion for a preliminary injunction had been proven, the producer was entitled to injunctive relief. *Ring v. Spina (Ring II)*, 84 F. Supp. 403, 408 (S.D.N.Y. 1949). Both the producer and the Dramatists Guild appealed. In a decision by Judge Learned Hand, the Second Circuit discontinued the injunction because of the absence of a "tangible probability that the wrong [would] be repeated." *Ring v. Spina (Ring III)*, 186 F.2d 637, 643 (2d Cir. 1951). See also *Ring I*, 148 F.2d at 649; *Ring II*, 186 F.2d at 643.

¹⁶¹ See *Ring II*, 84 F. Supp. at 408; *Ring III*, 186 F.2d at 643.

¹⁶² *Hearing, supra* note 155 (statement of the Dramatists Guild of America).

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Universal Pictures,¹⁶³ the Second Circuit held that movie and television composers were independent contractors rather than employees, and thus violated the Sherman Act by collectively bargaining with producers.¹⁶⁴ The same year, however, the court in *Julien v. Society of Stage Directors and Choreographers, Inc.*,¹⁶⁵ found that stage directors are employees and not independent contractors like playwrights or composers.¹⁶⁶ The contrary decisions regarding other creatives' statuses as either independent contractors or employees,¹⁶⁷ using playwrights as a comparison,¹⁶⁸ left the Dramatists Guild exposed to more antitrust litigation.

Almost forty years after *Ring v. Spina*, the League of New York Theaters and Producers ("the League") again brought the Dramatists Guild's Minimum Basic Production Contract ("MBPC") under fire.¹⁶⁹ Richard Barr, the president of the League, alleged a conspiracy among playwrights and the Dramatists Guild "to restrain trade and commerce in the sale of authors' works for

¹⁶³ 517 F.2d 976 (2d Cir. 1975) (antitrust dispute between Composers and Lyricists Guild of America ("CLGA") and a group of television and motion picture producers asking whether composers are employees or independent contractors). The CLGA and the Dramatists Guild are similar in status and purpose. Both organizations are advocacy groups composed of creators that are independent contractors but whom wish to negotiate collectively with producers. *See id.*

¹⁶⁴ *Id.* at 980. ("[A]ntitrust jurisdiction cannot be declined simply because independent contractors masquerade as a union."). The *Bernstein* decision, by ruling against another group of creators who are not protected by a labor union, strengthened producers' ability to assert antitrust claims against the Dramatists Guild. *See, e.g., Barr v. Dramatists Guild*, 573 F. Supp. 555 (S.D.N.Y. 1983).

¹⁶⁵ No. 68 Civ. 5120, 1975 WL 957 (S.D.N.Y. Oct. 14, 1975) (plaintiff, a stage producer, brought an antitrust action against defendant, an organization of directors and choreographers in violation of the § 1 of the Sherman Act, 15 U.S.C. § 1 (1974)).

¹⁶⁶ *Id.*, at *3. The court argued that a producer has a significant amount of control over the stage director, unlike the limited amount of control the producer has over the playwright. Because the producer has final control over every aspect of the director's job, the court held that stage directors are employees. *Id.*

¹⁶⁷ *See Bernstein*, 517 F.2d at 976; *Julien*, 1975 WL 957, at *3.

¹⁶⁸ *Julien*, 1975 WL 957, at *3.

¹⁶⁹ *Barr*, 573 F. Supp. at 555.

legitimate theatrical attractions¹⁷⁰ by agreeing not to license plays to producers except upon the minimum terms in the MBPC.¹⁷¹ The Dramatists Guild counterclaimed against the producers, alleging that it was the League¹⁷² that violated the Sherman Act by setting non-competitive maximum levels of compensation for playwrights.¹⁷³ The court only decided the producers' motion to dismiss or stay the contingent counterclaim, holding that the Dramatists Guild could bring a counterclaim.¹⁷⁴ The competing antitrust claims produced a deadlock that eventually resulted in an amicable settlement and a renegotiated APC satisfactory to both sides.¹⁷⁵ However, the threat of antitrust litigation remained and the APC has not been revised since that settlement in 1983.¹⁷⁶

Even though the above cases date back several decades, the same problems remain as the Dramatists Guild continues to be prevented from renegotiating the APC by collective bargaining.¹⁷⁷ The APC no longer reflects the best terms for either playwrights or producers,¹⁷⁸ yet the Dramatists Guild is powerless to improve the situation.¹⁷⁹ Legislation must be passed to allow the Dramatists

¹⁷⁰ *Id.* at 557.

¹⁷¹ *Id.*

¹⁷² Specifically, the Dramatists Guild alleged that the Shubert Organization and the Nederland Organization, which at the time controlled about 70% of the first-class theaters in New York, were in violation of the Sherman Act. *Barr*, 573 F. Supp. at 558. *See also infra* note 231.

¹⁷³ *Barr*, 573 F. Supp. at 558. The claim concluded that if and to the extent that the MBPC was an antitrust violation, it was one in which the theater owners and producers had used their monopoly power to force the Dramatists Guild to agree to what became maximum, not minimum, terms set at artificially low prices by the dominant party. JOHN G. KOELTL & JOHN KIERNAN, *THE LITIGATION MANUAL: PRETRIAL* 55 (1999).

¹⁷⁴ *Barr*, 573 F. Supp. at 563.

¹⁷⁵ KOELTL & KIERNAN, *supra* note 173, at 55.

¹⁷⁶ *Hearing*, *supra* note 155 (statement of the Dramatists Guild of America).

¹⁷⁷ *Id.*

¹⁷⁸ Like any industry, economic realities of the theatre industry have evolved since the APC was last revised.

¹⁷⁹ *Hearing*, *supra* note 155 (statement of the Dramatists Guild of America).

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Guild and other peer groups of playwrights to collectively bargain with groups of producers. The ability for playwrights to negotiate with the support of the Dramatists Guild in the same way that screenwriters negotiate with the support of the WGA is especially important now as more Hollywood studios migrate to Broadway to do business with playwrights.¹⁸⁰

III. THE PLAYWRIGHTS LICENSING ANTITRUST INITIATIVE ACT

The power to negotiate as a group is not limited to screenwriters and other employees of Hollywood studios.¹⁸¹ Along with the recent screenwriters strike, in November 2007, stagehands represented by the Local One of IATSE¹⁸² went on strike after negotiations broke down with the League of American Theaters and Producers.¹⁸³ The strike caused the shutdown of 27 shows on Broadway and a loss in revenue of approximately \$17 million per day.¹⁸⁴ The strike lasted for 19 days and was the longest union-supported strike in the theater industry since a musicians' strike in 1975.¹⁸⁵

In both the WGA and IATSE strikes this past year, issues arose regarding the negotiation of current and future contracts.¹⁸⁶ It should logically follow that playwrights should have the same right to strike in negotiations, yet, this is not the case.¹⁸⁷ Current

¹⁸⁰ See, e.g., Borys Kit, *Marvel Spins Spider-Man into Broadway Musical*, HOLLYWOOD REPORTER.COM, Apr. 20, 2007, at 2.

¹⁸¹ See, e.g., Campbell Robertson, *Broadway's Showdown: The Lowdown*, N.Y. TIMES, Nov. 14, 2007, at B1.

¹⁸² *Id.* at B1 (describing the Local One of IATSE as "the most powerful of Broadway unions").

¹⁸³ *Id.*

¹⁸⁴ Campbell Robertson, *On Broadway, Gloom Hangs Over Holidays*, N.Y. TIMES, Nov. 20, 2007, at A1.

¹⁸⁵ Campbell Robertson, *On Broadway: Deal Reached by Stagehands*, N.Y. TIMES, Nov. 29, 2007, at A1.

¹⁸⁶ See Verrier & Eller, *supra* note 126; see also Robertson, *supra* note 185.

¹⁸⁷ See *Hearing*, *supra* note 155 (statement of the Dramatists Guild of America).

antitrust laws¹⁸⁸ prevent playwrights from collectively negotiating a standard form contract for the production of their works.¹⁸⁹ This puts playwrights at a distinct disadvantage in bargaining with producers.¹⁹⁰ With this disadvantage in mind, Congress has attempted to amend antitrust laws and enable playwrights to bargain collectively under the Playwright Licensing Antitrust Initiative Act, which, although sponsored numerous times in the House and Senate, has yet to be put to a vote.¹⁹¹

A. Precursors to the Playwrights Licensing Antitrust Initiative Act

On December 19, 2001, Congressmen Henry Hyde and Barney Frank introduced the Fair Play for Playwrights Act of 2001 to the House of Representatives.¹⁹² The bill's purpose was to "modify the application of the antitrust laws to authorize collective negotiations among playwrights and producers regarding the development, licensing, and production of plays."¹⁹³ The bill would modify antitrust laws to allow associations of playwrights¹⁹⁴ to establish and enforce "minimum terms and conditions on which the works of such playwrights could be developed, licensed, or produced," and allowed playwrights and producers to have

¹⁸⁸ See *supra* text accompanying note 154; see also *Hearing, supra* note 155 (statement of the Dramatists Guild of America).

¹⁸⁹ *Hearing, supra* note 28 (statement of Senator Orin Hatch) ("As a result, playwrights—who are frequently at a substantial bargaining disadvantage—are forced to accept contracts on a take it or leave it basis.").

¹⁹⁰ *Id.* Though playwrights in theory maintain control over their intellectual property, they must defend against producers taking control of their works contractually. With the swell of powerful movie studios flooding Broadway as producers, it is getting harder for playwrights to fight to keep their intellectual property in solo negotiations. See Weidman, *supra* note 6, at 644 ("[T]he pressures are intense, and with the appearance of more and more studio-produced musicals . . . those pressures are only going to grow more intense.").

¹⁹¹ Zamora, *supra* note 18, at 395. See, e.g., Playwrights Licensing Antitrust Initiative Act of 2004, S. 2349, 108th Cong. (2004).

¹⁹² Fair Play for Playwrights Act of 2001, H.R. 3543, 107th Cong. (2001).

¹⁹³ H.R. 3543.

¹⁹⁴ E.g., the Dramatists Guild.

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discussions “for the purpose of negotiating, implementing, or enforcing a standard form contract or other collective agreement governing the terms and conditions on which playwrights’ works will be developed, licensed, or produced.”¹⁹⁵ Although the bill was referred to the House Committee on the Judiciary, it never reached the voting stage.¹⁹⁶

In another attempt to push similar legislation, Senators Orrin Hatch and Chuck Schumer introduced the Playwrights Licensing Relief Act of 2002 to the Senate.¹⁹⁷ This bill proposed that antitrust laws should not apply to “any joint discussion, consideration, review, action, or agreement for the express purpose of, and limited to, the development of a standard form contract containing minimum terms of artistic protection and levels of compensation for playwrights.”¹⁹⁸ This second attempt made clear that the collective negotiation powers would be limited to the creation of a modern APC.¹⁹⁹ Unfortunately, the bill met a similar

¹⁹⁵ H.R. 3543.

¹⁹⁶ The House bill was referred to the House Committee on the Judiciary on December 19, 2001. See GovTracks for H.R. 3543, <http://www.govtrack.us/congress/bill.xpd?bill=h107-3543> (last visited Apr. 1, 2008). Failure to act on the bill essentially kills it until it can be reintroduced in the next Congress. See Government 101: How a Bill Becomes Law, http://www.votesmart.org/resource_govt101_02.php (last visited Apr. 1, 2008).

¹⁹⁷ Playwrights Licensing Relief Act of 2002, S. 2082, 107th Cong. (2002), available at <http://www.govtrack.us/congress/bill.xpd?bill=s107-2082> (last visited Apr. 1, 2008).

¹⁹⁸ S. 2082; see Statements on Introduced Bills and Joint Resolutions, Senate, Apr. 10, 2002 (Senator Hatch’s introduction of S. 2082 before the Senate), available at <http://thomas.loc.gov/cgi-bin/query/F?r107:2:./temp/~r107NIwQ2g:e0> (“Playwrights and their voluntary peer membership organization, the Dramatists Guild, operate under the shadow of the antitrust laws, and substantially without the ability to coordinate their actions in protecting their interests. This has impeded playwrights’ ability to act collectively in dealing with highly-organized and unionized groups, such as actors, directors, and choreographers, on the one hand, and the increasingly consolidated producers and investors on the other.”).

¹⁹⁹ S. 2082. The bill revised the language of Section 2 of the bill to specify that antitrust laws shall not apply to “joint or collective voluntary actions for the *limited* purposes of developing a standard form contract by playwrights or their representatives.” *Id.* (emphasis added).

fate as the one sponsored in the House—it was read twice and once again was referred to the Committee on the Judiciary where it died.²⁰⁰

Continuing to fight for playwrights, Senator Hatch, along with Senator Edward Kennedy, again introduced the bill to the Senate, using the same language but with a new title—the Playwrights Licensing Antitrust Initiative Act of 2004 (“PLAI”).²⁰¹ The new bill gathered more momentum than its predecessor and hearings were held before the Senate Judiciary Committee on April 28, 2004.²⁰² The committee heard testimony from famous playwrights Wendy Wasserstein,²⁰³ Stephen Sondheim,²⁰⁴ and Arthur Miller,²⁰⁵ representatives of the Dramatists Guild,²⁰⁶ and representatives from the League of American Theaters and Producers,²⁰⁷ as well as opening remarks from Senator Hatch.²⁰⁸

²⁰⁰ See S. 2082.

²⁰¹ Playwrights Licensing Antitrust Initiative Act of 2004, S. 2349, 108th Cong. (2004).

²⁰² *The Playwrights Licensing Antitrust Initiative Act: Safeguarding the Future of American Live Theater: Hearing on S. 2349 Before the Subcomm. on the Judiciary*, 108th Cong. (2004).

²⁰³ Author of Tony Award and Pulitzer Prize winning play “The Heidi Chronicles.” See Charles Isherwood, *Wendy Wasserstein Dies at 55; Her Plays Spoke to a Generation*, N.Y. TIMES, Jan. 31, 2006, at A1.

²⁰⁴ Author of works such as “Follies” (1971), “A Little Night Music” (1973), “Pacific Overtures” (1976), “Sweeney Todd” (1979) and “Merrily We Roll Along” (1981). See Internet Broadway Database, <http://www.ibdb.com/person.asp?ID=12430> (last visited Apr. 1, 2008).

²⁰⁵ Author of “Death of a Salesman” (1949) and “The Crucible” (1953). See Internet Broadway Database <http://www.ibdb.com/person.asp?ID=4316> (last visited Apr. 1, 2008).

²⁰⁶ See *Hearing*, *supra* note 75 (statement of Marsha Norman, Vice President, Dramatists Guild).

²⁰⁷ See *The Playwrights Licensing Antitrust Initiative Act: Safeguarding the Future of American Live Theater: Hearing on S. 2349 Before the Subcomm. on the Judiciary*, 108th Cong. (2004) [hereinafter *Hearing*] (statement of Roger Berlind, Producer).

²⁰⁸ See *Hearing*, *supra* note 28 (statement of Senator Orin Hatch).

1. Testimony in Support of PLAI

First, Senator Hatch noted that the PLAI would enable playwrights, through the Dramatists Guild and any other peer organizations, to collectively deal with “other industry groups that operate both under and behind the bright lights of the American stage.”²⁰⁹ He emphasized that the bill only covered collective adoption and implementation, as opposed to collective enforcement, of an updated APC.²¹⁰ Such a distinction is important because the functional purpose of the PLAI is to allow for the emendation and modernization of the APC, which individual playwrights can then use as a template in individual negotiations.²¹¹ Such collective deal making was important because, as playwright Wendy Wasserstein testified, the voice of the playwright “has become much more challenged as the ownership of the theaters and the production of plays has become increasingly dominated by corporate interests.”²¹²

Ms. Wasserstein emphasized that every other creative contributor to the theater had union representation and is able to bargain collectively, leaving playwrights at a distinct disadvantage.²¹³ Importantly, she stated that the purpose of the PLAI was not to “force a producer to produce a play,” but rather, to develop a standard form contract so that the playwright’s copyright would be “respected throughout the production of [a play].”²¹⁴

²⁰⁹ *Id.*

²¹⁰ *Id.* (“My hope is that the basic ability to update the standard form contract as well as provisions ensuring that certain artists’ rights are respected in the production of their plays will encourage young, struggling playwrights to continue working in the field.”).

²¹¹ See *The Playwrights Licensing Antitrust Initiative Act: Safeguarding the Future of American Live Theater: Hearing on S. 2349 Before the Subcomm. on the Judiciary*, 108th Cong. (2004) (statement of Wendy Wasserstein, playwright).

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.* Wasserman echoes the concerns of Dramatists Guild president John Weidman, who foresees the fight for control between the playwright and major

Similarly stressing the need for improved future relations, Stephen Sondheim, former president of the Dramatists Guild²¹⁵ and current member of its Council,²¹⁶ emphasized that the bill was not necessarily for the benefit of established playwrights like himself, but rather it was for the younger generation of playwrights struggling to negotiate with ever-powerful producers.²¹⁷ To illustrate the extent of a playwright's struggle, he told the Committee an anecdote about his play "Merrily We Role Along," written to go backwards in time, starting at the end and proceeding to the beginning.²¹⁸ At one time, a producer demanded that Mr. Sondheim reverse the order of events—completely contrary to his artistic invention.²¹⁹ Mr. Sondheim pointed out that while he was able to maintain the integrity of his intellectual property because of his status in the theater industry, many young unknown playwrights do not have the same leverage when negotiating with producers.²²⁰

Some of the testimony before the Committee focused more on the detrimental after-effects that would likely come from continued strained relations between playwrights and producers. In his

motion picture studios acting as producers (Wasserman's "corporate interests") as a "slippery slope down which the playwright's copyright [control] runs the risk of sliding into oblivion." Weidman, *supra* note 6, at 645.

²¹⁵ Sondheim served as president from 1973 to 1981. *The Playwrights Licensing Antitrust Initiative Act: Safeguarding the Future of American Live Theater: Hearing on S. 2349 Before the Subcomm. on the Judiciary*, 108th Cong. (2004) [hereinafter *Hearing*] (statement of Stephen Sondheim, playwright). During his tenure as president, he founded the Young Playwrights, Inc. which supports the work of playwrights under the age of eighteen. See Sondheim on YPI, <http://www.youngplaywrights.org/from%20Steve.htm> (last visited Apr. 1, 2008).

²¹⁶ The Board of Directors of the Dramatists Guild is called the Council. The general management, direction, and control of the Dramatists Guild vests with the Council and the Council would have the authority to negotiate a new APC if the PLAI were passed. See Constitution of the Dramatists Guild of America, Inc., Art. V, Sec. 1, available at http://www.dramatistsguild.com/about_constitution.aspx (last visited Apr. 1, 2008).

²¹⁷ *Hearing*, *supra* note 215 (statement of Stephen Sondheim, playwright).

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.*

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testimony, playwright Arthur Miller argued that “American theater risks losing the next generation of playwrights to other media and opportunities as the pressures on playwrights increase and their power to protect their economic and artistic interests diminish.”²²¹ Mr. Miller emphasized that with the growing pressures of corporate interests in the theater, “only one entity does not have a seat at the bargaining table: the playwrights.”²²² He explained that the PLAI would allow the APC to be updated to “take account of today’s market realities and intellectual property protection climate.”²²³

Vice president of the Dramatists Guild, Marsha Norman, agreed with Mr. Miller that young playwrights were being lost “to television and other unionized venues which pay them in advance and don’t quibble over the price.”²²⁴ She noted that half of her students in the Julliard playwriting program in 2004 left for California to talk to television-show runners and producers and argued that once writers leave the theater, they rarely return.²²⁵ Ms. Norman contended that without a standard contract for young and mid-career playwrights to rely upon, they would continue to leave the theater and lose the creative rights afforded to them as playwrights in exchange for being guaranteed a paycheck in Hollywood.²²⁶

²²¹ *The Playwrights Licensing Antitrust Initiative Act: Safeguarding the Future of American Live Theater: Hearing on S. 2349 Before the Subcomm. on the Judiciary*, 108th Cong. (2004) (statement of Arthur Miller).

²²² *Id.*

²²³ *Id.* Miller notes that the APC has not been updated since 1982. Since that time, intellectual property has increasingly come under the control of corporate interests like major motion picture studios, and Miller advocates that the PLAI should be passed so that the APC can meet and counter the demands of these powerful corporate interests. *Id.*

²²⁴ *Hearing, supra* note 75 (statement of Marsha Norman, Vice President, Dramatists Guild).

²²⁵ *Id.* (“[W]e try to warn the writers about the dangers of work for hire, but at the moment, the Broadway arena is offering them little reason to stay.”).

²²⁶ *Id.* Unlike the guaranteed paycheck in Hollywood, few playwrights’ works are ever produced, so while they maintain their intellectual property, it has no real value for the struggling playwrights. *See Weidman, supra* note 6, at 642; *see also Jonakait, supra* note 69, at 403–04.

In addition to the testimony given before Congress by these prominent playwrights, the Dramatists Guild of America submitted its own statement for the hearing record.²²⁷ The official statement addressed the string of decisions involving the Dramatists Guild and its resulting inability to collectively bargain.²²⁸ The Dramatists Guild argued that the cases attempted to reconcile labor and anti-trust issues, but face “a daunting challenge in the unique environment of the Broadway Theater.”²²⁹ Moreover, it pointed out that the PLAI was not an attempt to reconcile larger issues of anti-trust and labor law, but rather a simple solution to the small but important arena of American theater—the ability to renegotiate and modernize the APC without breaking the law.²³⁰

2. Testimony in Opposition to PLAI

Not all parties at the Committee hearing, however, were supportive of the proposed legislation. Representing the opposition to the PLAI were the producers, backed by the Broadway League.²³¹ Gerald Schoenfeld, Chairman of both the Shubert Organization²³² and of the Broadway League,²³³ testified in

²²⁷ *Hearing, supra* note 155 (statement of the Dramatists Guild of America).

²²⁸ *Id.*; see *Ring I*, 148 F.2d 647 (2d Cir. 1945); *Julien v. Soc’y of Stage Directors & Choreographers*, No. 68 Civ. 5120, 1975 WL 957, at *3 (S.D.N.Y. Oct. 14, 1975); *Bernstein v. Universal Pictures, Inc.*, 517 F.2d 976 (2d Cir. 1975).

²²⁹ *Hearing, supra* note 155 (statement of the Dramatists Guild of America). The Guild argues that because the Broadway theater industry is unique in the way that it conducts business, it is difficult to categorize dramatists as common law employees or independent contractors in the same way those labels are used in more traditional labor scenarios. *Id.* Because of this difficulty in categorization, the Dramatists Guild argues the PLAI is necessary as an appropriate remedy. *Id.*

²³⁰ *Id.*

²³¹ See *Hearing, supra* note 146 (statement of Gerald Schoenfeld, Chairman of The League of American Theaters and Producers); *Hearing, supra* note 207 (statement of Roger Berlind, Producer).

²³² The Shubert Organization is the oldest and largest theater owner on Broadway, owning and operating seventeen Broadway theaters and one Off-Broadway theater. The Shubert Organization not only owns the theaters, it also

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opposition to the bill.²³⁴ Above all, Mr. Schoenfeld expressed his concern that because producers had to worry about the evolving demands of theatre, they needed the flexibility to respond to situations, as they arose, through individual negotiations.²³⁵ Specifically, he explained that under the APC, it had been necessary for producers to draft addendums to each individual agreement since 1985 in order to meet the demands of modern theater, e.g., the creation of royalty pools.²³⁶ However, Schoenfeld argued that the negotiating power of producers would be hindered if producers were required to negotiate using the terms of the APC and comply with Dramatists Guild certification.²³⁷

produces plays and controls almost all Broadway ticket sales through its subsidiary Telecharge. See Shubert Organization homepage, <http://www.shubertorganization.com> (last visited Apr. 1, 2008). The Dramatists Guild contends that the Shubert Organization has kept a harsh grip over the theater industry for years, not only controlling 70% of the first-class theaters but also dominating the Broadway League by dictating the terms on which they will produce playwrights' plays. See *Barr v. Dramatists Guild*, 573 F. Supp. 555, 558 (S.D.N.Y. 1983).

²³³ The Broadway League, formerly the League of American Theaters and Producers, is the national trade association for theater owners, producers, and general theater managers. See Broadway League homepage, <http://www.broadwayleague.com/> (last visited Apr. 1, 2008).

²³⁴ *Hearing*, *supra* note 146 (statement of Gerald Schoenfeld, Chairman of The League of American Theaters and Producers) ("If there are any restraints upon the production of plays and musicals they are imposed by the [Dramatists] Guild and its members and not the producers or the venue operators.").

²³⁵ *Id.*

²³⁶ Because the form APC was last negotiated in 1985, it is necessary to add terms that were not common practice 25 years ago, such as forms of press, approval of venues, and royalty pools. *Id.* A royalty pool provides for a certain percentage of the weekly net profits to be allocated to the royalty participants (producers, playwright, director, among others) by creating an equation where the total of all of the royalty percentages is the denominator and the numerator is the percentage paid to each royalty participant. *Id.* As Schoenfeld explains, if the royalty pool participants receive 35% of the weekly operating profits, the total royalties are 15%, and the playwright's negotiated royalty is 6%, then the playwright in the pool receives 6/15 of 35% of the weekly net profits. *Id.*

²³⁷ *Id.* Schoenfeld reargues the stance of the Broadway League in *Barr v. Dramatists Guild*, 573 F. Supp. 555 (S.D.N.Y. 1983), that the APC restrains trade by imposing minimum terms. *Id.* However, Schoenfeld fails to consider

Similarly, Broadway producer Roger Berlind testified that freeing playwrights from the restraints of antitrust laws would be detrimental for both competition and playwrights.²³⁸ Because there are so many variables in producing a play, producers needed flexibility in the terms they set.²³⁹ He stressed that if the PLAI were passed, it would destroy the free market of theater producing and instead place the Dramatists Guild as the “gatekeeper” to pre-agreed terms.²⁴⁰

Ultimately, while the PLAI of 2004 made it to the hearing stage, the Senate never put it to a vote and the bill died yet again.²⁴¹ A strong handful of supporters for the proposed legislation remained, however. A few months after the bill died in the Senate, the identical bill, again entitled the PLAI of 2004, was introduced in the House on June 18, 2004, sponsored by Representatives Howard Coble, John Conyers, Jr., Barney Frank, and Henry Hyde.²⁴² The bill once again failed to be taken to a vote.²⁴³ Not to be dissuaded, less than a year later, Representatives Coble, Conyers, Frank, and Hyde again attempted to introduce the PLAI of 2005 in the House.²⁴⁴ Predictably, with the language of the bill

that the PLAI allows for the renegotiation and revision of the APC and therefore does not force acceptance of the contested terms.

²³⁸ *Hearing, supra* note 207 (statement of Roger Berlind, Producer).

²³⁹ Berlind argues that all producers do not agree on having the same structure, price, or terms so it is a misstep to assume that all playwrights agree on the same standards either. *Id.*

²⁴⁰ Berlind comes from a Wall Street investment banking background and draws parallels between producing theater and taking investment risks. *Id.* He argues that he has a fiduciary obligation to investors and that allowing the playwrights to set minimum terms would infringe upon his ability to make a profit. *Id.*

²⁴¹ See Playwrights Licensing Antitrust Initiative Act of 2004, S. 2349, 108th Cong. (2004), available at <http://www.govtrack.us/congress/bill.xpd?bill=s108-2349> (last visited Apr. 1, 2008).

²⁴² Playwrights Licensing Antitrust Initiative Act of 2004, H.R. 4615, 108th Cong. (2004), available at <http://www.govtrack.us/congress/bill.xpd?bill=h108-4615> (last visited Apr. 1, 2008).

²⁴³ See H.R. 4615.

²⁴⁴ Playwrights Licensing Antitrust Initiative Act of 2005, H.R. 532, 109th Cong. (2005), available at <http://www.govtrack.us/congress/bill.xpd?bill=h109-532> (last visited Apr. 1, 2008).

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unchanged, it again died on the floor without a vote.²⁴⁵ Though the proposed bills up until this point have been unsuccessful in making it to the voting stage, advocates have not yet given up and continue to lobby for the PLAI. Over the past year, the Dramatists Guild has been lobbying in both the House and the Senate for an exception from labor laws, as embodied in the PLAI bill, so that they may collectively bargain without violating antitrust laws.²⁴⁶ Meanwhile, the Broadway League has been successfully spending their time and money lobbying Congress to stall on the Dramatists Guild's legislative proposals.²⁴⁷

IV. WHY CONGRESS SHOULD ACT NOW

Given the competing agendas and continued struggle between playwrights and producers, the PLAI represents a worthwhile attempt to address and correct the disparate bargaining power between the parties.²⁴⁸ It is undeniable that producers on Broadway are very financially strong,²⁴⁹ and the Broadway League, controlled by the Shubert Foundation, has at times resembled a monopoly.²⁵⁰ Nevertheless, with the ever-growing influx of Hollywood studios producing on Broadway²⁵¹ and the subsequent mounting pressure to do business according to a Hollywood model, as with screenwriters,²⁵² the gulf in bargaining strength between playwrights and powerful studios as producers has grown even wider.²⁵³

²⁴⁵ See H.R. 532.

²⁴⁶ E-mail from David Faux, Director of Business Affairs, Dramatists Guild, to Ashley Kelly (Oct. 17, 2007, 14:25:17 EST) (on file with author).

²⁴⁷ *Id.*

²⁴⁸ See Zamora, *supra* note 18, at 428.

²⁴⁹ For example, the Shubert Organization gives out millions of dollars worth of grants to attract shows to its theaters. See N.R. Kleinfield, *I.R.S. Ruling Wrote Script for the Shubert Tax Break*, N.Y. TIMES, July 11, 1994, at A1.

²⁵⁰ See *Barr v. Dramatists Guild*, 573 F. Supp. 555, 558 (S.D.N.Y. 1983). See also *supra* text accompanying note 232.

²⁵¹ See, e.g., Kuchwara, *supra* note 4.

²⁵² Weidman, *supra* note 6, at 644.

²⁵³ *Id.*

A. Battling the Giants: Hollywood Studios on Broadway

The influx of Hollywood producers to Broadway was, in a way, entirely foreseeable. For large motion picture studios with a hit film, a move to adapt a pic-to-legit musical for Broadway has an added advantage over other straight Broadway productions.²⁵⁴ As opposed to an original musical like “Avenue Q”²⁵⁵ that must build a reputation by word of mouth,²⁵⁶ people already have an interest in “Spider-Man the Musical”²⁵⁷ or “The Little Mermaid”²⁵⁸ because they saw, and likely enjoyed, the films.²⁵⁹ Because the branding for a pic-to-legit musical is already in place,²⁶⁰ Broadway has become yet another arena for movie studios to expand their successful franchises.²⁶¹ Inevitably, this is why almost every major studio is making its mark on Broadway, including Fox Theatricals producing “Legally Blonde The Musical,”²⁶² Dreamworks

²⁵⁴ See Rogers, *supra* note 5.

²⁵⁵ “Avenue Q,” the surprise winner of the 2004 Tony award for Best Musical, started out in a small Off-Broadway theater before transferring to Broadway after a year. See Jesse McKinley, “Avenue Q” Tony Coup is Buzz of Broadway, N.Y. TIMES, June 8, 2004, at E1.

²⁵⁶ See Rogers, *supra* note 5.

²⁵⁷ The musical adaptation of the 2002 *Spider-Man* film produced by Sony Pictures is currently in development stages. See Ernio Hernandez, *Spider-Man Musical to Take Gotham in Upcoming Reading*, PLAYBILL, Apr. 16, 2007, available at <http://www.playbill.com/news/article/107378.html>.

²⁵⁸ The musical adaptation of the 1989 animated Disney film opened on Broadway on January 10, 2008. See Ben Brantley, *Fish Out of Water in the Deep Blue Sea*, N.Y. TIMES, Jan. 11, 2008, at E1.

²⁵⁹ See Rogers, *supra* note 5.

²⁶⁰ *Id.*

²⁶¹ See, e.g., Kuchwara, *supra* note 4. The Shrek franchise is an apt example, with the forthcoming musical joining the revenue streams from toys, t-shirts, and more film sequels. See Weidman, *supra* note 6, at 644. In the recent review of “The Little Mermaid” musical, Ben Brantley remarked that the show felt like a cynical reversal of art and commerce: “It used to be that the show came first, followed by merchandising tie-ins. Thoroughly plastic and trinketlike, this show seems less like an interpretation of a movie musical than of the figurines and toys it inspired.” Brantley, *supra* note 257, at E1.

²⁶² See Cox, *supra* note 1, at 39.

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Animation producing “Shrek The Musical,”²⁶³ Sony Pictures Entertainment producing “Spider-Man The Musical,”²⁶⁴ and of course Disney, which hopes to mimic past Broadway successes “Beauty and the Beast” and “The Lion King” with new productions of “Mary Poppins” and “The Little Mermaid.”²⁶⁵

Successful branding and automatic audiences, however, are not the only things that Hollywood producers attempt to bring with them to Broadway. Studios also come prepared to do business with playwrights in the same manner they do business with screenwriters²⁶⁶—intending to contract with playwrights in such a way as to maintain control of their valuable franchises, including copyright control.²⁶⁷ In the same way that the studios argue that their financial interests behind a film entitle them to control over authorship, they are attempting to secure intellectual property rights from playwrights as well.²⁶⁸

The clearest example of this growing disparity in bargaining power is illustrated by the studios’ attempts to apply the work for hire doctrine to playwrights, and the playwrights’ inability to effectively fight back against the studios.²⁶⁹ While a playwright may challenge a work for hire clause as playwrights are neither employees of the theatre or the Hollywood studio,²⁷⁰ nor among the nine categories of works that can be specially ordered or commissioned,²⁷¹ most playwrights do not have the financial

²⁶³ See BWW News Desk, *Shrek Musical Announces Creative Team, ‘08 Debut Potential*, BROADWAY WORLD, Oct. 12, 2006, available at <http://www.broadwayworld.com/viewcolumn.cfm?colid=12880>.

²⁶⁴ See Kit, *supra* note 180, at 2.

²⁶⁵ See Weidman, *supra* note 6, at 645. See also Kuchwara, *supra* note 4.

²⁶⁶ See Weidman, *supra* note 6, at 645.

²⁶⁷ See *id.*

²⁶⁸ See Gulick, *supra* note 99, at 66.

²⁶⁹ See Weidman, *supra* note 6, at 644 (“[T]he most aggressive of the movie studios [bring] with them . . . a desire to do business, not according to the theater model which puts the playwright in first position, but according to the Hollywood model, in which the producing studio own[s] the author’s copyright and writers [can] be hired and fired at will.”).

²⁷⁰ See Weidman, *supra* note 6, at 641–42.

²⁷¹ See 17 U.S.C. § 101 (2007).

resources to raise such a challenge in court.²⁷² Even assuming the work for hire clause could be contracted around, studios are still frequently able to exercise their superior bargaining power in obtaining assignments from playwrights,²⁷³ effectually taking away the playwrights' creative property rights anyway.

A hypothetical will further illustrate the impact of a work-for-hire clause, as well as the unequal bargaining between the parties. Consider the following: A writer with both a playwrighting and screenwriting background receives a Writers Agreement from a large motion picture studio to adapt a non-fiction book. The contract combines screenwriting services with an additional clause called "Playwright Services," granting the writer the first opportunity to write the musical based on the screenplay he was hired to write. The clause could include the language "these services shall be rendered on a 'work-for-hire basis' for copyright purposes," meaning that the writer signs over both his copyright of the screenplay, as well as the copyright in stage rights. More specifically, the contract may grant the studio rights that are very broad: "for all time, exclusively and throughout the world, all rights to use the Property as the basis of or in connection with stage plays (straight plays or musicals) and other live theatrical productions, and all ancillary and subsidiary rights related thereto."

Under this language, the studio, before the screenplay has even been written, takes control of the stage rights, using the language "work for hire" to do so. Further, the contractual language may also include a tagline such as, "and if this is not a work-for-hire, then it is an assignment." While the writer may attempt to negotiate with the studio to license his stage rights, he unfortunately must handle the negotiation because, unlike the WGA, the Dramatists Guild is not able to negotiate minimum terms without violating antitrust laws. Likely, the writer will be told by the studio that altering the stage rights is a deal-breaker. Desperate to not lose the deal, the writer will often sign away all of his rights.

²⁷² Additionally, the Dramatists Guild as a trade organization is not in a position to give legal aid to individual members.

²⁷³ Smith, *supra* note 96, at 30. Contracts will often state that if the work is not a work made for hire then it is an assignment, acting as a catch-all for the studio in securing all necessary rights. *Id.*

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As the presence of motion picture studios on Broadway grows stronger, agreements like the hypothetical are becoming more common. Playwrights need the power and protection of the Dramatists Guild now more than ever to balance the current inequities in bargaining power and the growing threat of exploitation. Indeed, “playwrights may often be so desperate to get their play produced and seen by audiences, that they will accept terms that are detrimental to their own interests.”²⁷⁴ If Congress passed the PLAI, the Dramatists Guild could start to regain ground in bargaining power and playwrights could begin to feel secure in their choice to stay in the world of theater rather than migrating to the world of screenwriting.

Certainly the above demonstrates the extent to which major studios may strip playwrights, and screenwriters, of their ultimate rights. As noted, unlike screenwriters, playwrights do not have the backing of an organized guild that may bargain collectively on their behalf. The recent strikes of both the WGA²⁷⁵ and IATSE on behalf of Broadway stagehands²⁷⁶ illustrates that guilds can effectively assert bargaining power over powerful producers.²⁷⁷ Fairness requires that Congress level the playing field for playwrights as they are the last remaining group of creative professionals that must bargain alone²⁷⁸ without the support of a guild with collective bargaining authority.²⁷⁹ It is because of the strength that the screenwriters have through the power of the WGA and the stagehands through the power of IATSE that they were able to successfully stand up against studios and producers in 2007 and 2008 and continue to negotiate effectively today.²⁸⁰ Congress should no longer favor the power of studios, producers

²⁷⁴ Zamora, *supra* note 18, at 428.

²⁷⁵ See Verrier & Eller, *supra* note 126, at C1. The WGA secured coveted residuals for new media.

²⁷⁶ See Robertson, *supra* note 185, at B1.

²⁷⁷ See Verrier & Eller, *supra* note 126, at C1; Robertson, *supra* note 185, at B1.

²⁷⁸ See *supra* Part II.B.

²⁷⁹ *Id.*

²⁸⁰ See Verrier & Eller, *supra* note 126, at C1; Robertson, *supra* note 185, at B1.

and their money, but rather, embrace a policy that stimulates creativity by ensuring protection of young playwrights.

B. Following Legislative Precedence

Congress can protect young playwrights by passing the PLAI. Congress has repeatedly demonstrated its concern for motion picture studios, which argue that the work for hire doctrine protects their financial well-being.²⁸¹ Throughout the revision process of the Copyright Act of 1978, Congress argued that work for hire was appropriate in light of the power of the WGA²⁸² and operated under the assumption that the Dramatists Guild's playwrights "take care of themselves."²⁸³ Today, however, these two assumptions are in tension with one another given the influx of motion picture studios into the realm of Broadway. The power of the studios, which can be managed with the power of a collectively bargaining guild, is not a legally viable option for playwrights without the PLAI.

²⁸¹ See MPAA Statement, *supra* note 85, at 302 ("[W]e have indicated all along that provisions such as [the work for hire provisions] are the heart and soul of the operation of commercial and personnel relationships in our industry, without which there would be a very severe upset. Such remains true today and will be the cornerstone of our position with Congress."). See also *Copyright Law Revision, Part 2: Discussion and Comments on Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law Before H. Comm. on the Judiciary*, 88th Cong. 358–59 (1964) (statement of Motion Picture Association of America, Inc.).

²⁸² See, e.g., H.R. REP. NO. 2237, at 115 (1966) (rejecting proposed "shop right" doctrine changes to the work for hire doctrine because "[w]hile the change might theoretically improve the bargaining position of screenwriters and others as a group, the practical benefits that individual authors would receive are highly conjectural.").

²⁸³ *Copyright Law Revision, Part 5: 1964 Revision Bill with Discussion and Comments Before H. Comm. on the Judiciary*, 88th Cong. 239 (1965) (statement made by Irwin Karp, on behalf of the Authors League of America) ("The Dramatists Guild represents the very few professional playwrights in the United States whose work is presented on Broadway and who are able to take care of themselves.").

1. How the Revision Process of the Work for Hire Doctrine from 1956 to 1976 Informs on Congressional Attitudes Towards Bargaining Power of Writers

The revision of the Copyright Act in 1976 was the culmination of two decades of research acquired from the testimony of approximately 200 witnesses before the Subcommittee on Copyrights.²⁸⁴ One of the major issues considered was the work for hire definition, specifically, the category of works prepared on special order or commission.²⁸⁵ The preliminary draft of the revision defined works made for hire as excluding all works made on special order or commission, but the first draft was met with “strenuous opposition from . . . motion picture companies.”²⁸⁶

The motion picture studios asserted that exclusion of specially ordered works or commissioned works would create insurmountable obstacles and major economic dislocation.²⁸⁷ Moreover, the motion picture studios argued that because they exercised creative control over a composite of screenwriters’ works, they should be considered the author for copyright purposes.²⁸⁸ While writers argued that the burden of bargaining

²⁸⁴ Smith, *supra* note 96, at 26–27.

²⁸⁵ *Id.*

²⁸⁶ Anne Marie Hill, *The “Work For Hire” Definition in the Copyright Act of 1976: Conflict Over Specially Ordered or Commissioned Work*, 74 CORNELL L. REV. 559, 581 (1989).

²⁸⁷ See *Copyright Law Revision, Part 4: Further Discussions and Comments on Preliminary Draft for Revised U.S. Copyright Law Before H. Comm. on the Judiciary*, 88th Cong. 274 (1964); see also *Copyright Law Revision, Part 2: Discussion and Comments on Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law Before H. Comm. on the Judiciary*, 88th Cong. 153 (1964) (“It must be borne in mind that motion picture producers may and do risk millions of dollars in the production and exploitation of a film, and by their efforts and expenditure substantially enhance the value of the story, novel, or play which is the basis of the picture.”).

²⁸⁸ Hill, *supra* note 286, at 568. Saul Rittenberg of MGM commented: “If I commission a work from a man, ordering a work specially for my purposes, and I pay for it, what difference does it make whether I put him under my employment contract or establish an independent contractor relationship?”

should be placed on the party with more ready access to legal advice,²⁸⁹ the motion picture studios countered that the writers were represented by guilds, lawyers, and accountants, and therefore bargaining power was equal.²⁹⁰

Another main issue in contention was the writers request for something similar to the “shop right” doctrine in patent law, which would give the commissioning party the right to use the writer’s work to the extent needed but allow the writer to retain all other rights as long as she did not authorize a competing use.²⁹¹ The motion picture producers also challenged this right, arguing that the costs would be too much to bear for producers.²⁹² Specifically, the producers argued that while they took on a number of substantial financial risks, motion picture writers were insulated from loss, and writers already receive shares of producers’ revenue under collective-bargaining agreements set forth by the WGA.²⁹³

Ultimately, Congress had to decide between excluding commissioned works and “possibly crippling the production of . . . composite works” like films²⁹⁴ or jeopardizing the rights of writers by including commissioned works in the work for hire definition.²⁹⁵ In the end, Congress accepted a compromise: in exchange for concessions from the commissioning parties for termination of transfer rights in limited circumstances,²⁹⁶ the writers consented to the second clause of the work for hire doctrine, which classified nine specific categories of works, including motion pictures, as works for hire if the parties expressly agreed in writing.²⁹⁷ The “shop right” proposal was altogether rejected as “mere conjecture”

Gorman, *supra* note 86, at 23.

²⁸⁹ Smith, *supra* note 96, at 26–27.

²⁹⁰ *Id.*

²⁹¹ H.R. REP. NO. 2237, at 115 (1966).

²⁹² H.R. REP. NO. 2237, at 115.

²⁹³ H.R. REP. NO. 2237, at 115. The writers receive their advance and option payments no matter what, but the producers take on the risk of loss if the film was not successful.

²⁹⁴ See *supra* text accompanying note 98.

²⁹⁵ Hill, *supra* note 286, at 569–70.

²⁹⁶ See 17 U.S.C. § 203 (1976).

²⁹⁷ Gorman, *supra* note 86, at 23.

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as to its ability to bring a benefit to writers.²⁹⁸

2. Later Attempts at Revision

While the writers may not have been as successful as they had wished with the Copyright Act of 1976, they continued to argue that the writing requirement—that a work for hire clause specifically be in contractual language—offered virtually no protection because of their inherent lack of bargaining power to exclude such a clause.²⁹⁹ Joining their cause, Senator Cochran subsequently attempted to revise the work for hire doctrine by regularly introducing a series of bills addressing writers' concerns of a disadvantaged bargaining position.³⁰⁰ Of note, however, is that in the language of these bills Senator Cochran proposed to eliminate every category of works that may be specially ordered or commissioned *except* motion pictures.³⁰¹ He argued to Congress that motion pictures were uniquely collaborative works requiring a work for hire relationship and employees in the motion picture industry were sufficiently protected by union and guild contracts and therefore less likely to be the victims of overreaching.³⁰² None of Senator Cochran's bills made it out of committee,³⁰³ and the

²⁹⁸ H.R. REP. NO. 2237, at 115 (“The presumption that initial ownership rights vest in the employer for hire is well established in American copyright law To exchange it for the uncertainties of the shop right doctrine would not only be of dubious value to employers and employees alike, but might also reopen a number of other issues and produce dissension.”).

²⁹⁹ Hill, *supra* note 286, at 569.

³⁰⁰ See Smith, *supra* note 96, at 21 n.8 (citing S. 2044, 97th Cong. (1982); S. 2138, 98th Cong. (1983); S. 2330, 99th Cong. (1986), S. 1223, 100th Cong. (1987); S. 1253 101st Cong. (1989)).

³⁰¹ See S. 2044; S. 2138; S. 2330; S. 1223; S. 1253.

³⁰² See Smith, *supra* note 96, at 41. Cochran fails to recognize, however, that the guilds were formed out of necessity to fight overreaching. Victimization of employees in motion pictures is still quite pervasive even with the guilds. The guilds struggle every day to try and prevent pervasive overreaching.

³⁰³ See, e.g., Library of Congress tracking report for S. 1253, <http://thomas.loc.gov/cgi-bin/bdquery/z?d101:s01253>: (last visited Apr. 1, 2008).

Senate never adopted his proposal.³⁰⁴

Congress previously enacted work for hire legislation which led to studios retaining control over motion pictures by accepting arguments about equal bargaining strength between screenwriters (and their union) and studios. Congress should also fortify the American playwrights against the bargaining power of the motion picture studios as Broadway producers by passing the PLAI, thereby empowering groups of playwright to collectively bargain. Additionally, as a matter of policy, copyright law strives to protect and motivate individuals whose creativity produce works that will enhance the culture and development of society.³⁰⁵ By passing the PLAI, Congress will strengthen the bargaining power of the next generation of playwrights by giving them an assurance through the Dramatists Guild and any other voluntary peer organization that their rights are respected and their agreements include fair compensation.

CONCLUSION

Young screenwriters in Hollywood do not have to negotiate with large motion picture studios alone.³⁰⁶ As members of the WGA, they enter agreements with the collective voice of all screenwriters and strive for fair compensation for all.³⁰⁷ With the ever-expanding migration of Hollywood studios to Broadway, young playwrights increasingly face negotiations with these same motion picture studios—studios that are looking to do business in the same way that it is done in Hollywood.³⁰⁸ Congress must not leave these playwrights to negotiate alone and without any support. By passing the PLAI and allowing for the modernization of the Dramatists Guild's APC, Congress will increase the strength of American playwrights' bargaining power and ensure that the vibrancy of American live theater continues for years to come.

³⁰⁴ Hill, *supra* note 286, at 569.

³⁰⁵ Hill, *supra* note 286, at 580.

³⁰⁶ *See supra* Part II.A.

³⁰⁷ *Id.*

³⁰⁸ *See supra* Part IV.A.