

The Fragility of Labor Relations in the American Theatre

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As we look for examples of collective self-regulation in a gig economy, commercial theatre offers a century of experience. Playwrights, represented by the Dramatists Guild, and commercial theatre producers have negotiated collectively for nearly a century, but have done so under a cloud of legal uncertainty at the intersection of antitrust law and labor law that dates to the pre-New Deal era. The revival of theatre after the catastrophe of the pandemic provides an opportunity to reconsider the four longstanding but unnecessary assumptions about antitrust, labor law, and copyright law that have shaped organizational structures and mediated relations between stage producers and writers:

Assumption #1: Playwrights, unlike actors or directors, cannot unionize under the National Labor Relations Act because playwrights are independent contractors.

Assumption #2: Playwrights must have the legal status of independent contractors under federal labor law, lest they lose control of the copyrights in their work under the work for hire provisions of the 1976 Copyright Act.

Assumption #3: Unionization of playwrights is not merely unprotected by the National Labor Relations Act (see Assumption #1), but it is affirmatively prohibited by federal antitrust law.

Assumption #4: The precarious legal status of playwrights as outlined in Assumptions 1–3 is necessary to protect their creative autonomy. Whatever economic security and stability writers could attain if the Dramatists Guild were a union and if there were real collective bargaining would be at the cost of dramatists' creative freedom, independence, and ability to prevent the rewriting of their work. In

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short, to be a real artist, a dramatist necessarily must run the risk of being impecunious.

This Article offers a detailed history of the origin of these assumptions, and how writers, producers, and various mediators struggled to create a functional system in the face of legal doubt. The history shows why it is time to abandon the assumptions about antitrust, copyright, and labor law that have rendered relations between writers and producers vulnerable to litigation and to put theatre's system of self-regulation for freelance writers on a solid legal footing.

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I. INTRODUCTION

When the coronavirus pandemic shuttered the economy in the spring of 2020, theatres went dark across the United States and television and movie production halted.¹ Unions representing everyone involved in theatre, except playwrights, negotiated with the corporations that own theatres and produce plays to provide some industry-wide protections, mainly wage payments and health contributions, for out-of-work performers and craft and technical workers.² Playwrights' collective representative, the Dramatists Guild, was excluded from the negotiations and, in a few cases, playwrights were asked to bail out struggling theatres by returning money they had already been paid for productions that were cancelled.³ Meanwhile, over in Hollywood, the Writers Guild of America joined other unions and guilds representing workers in film and TV to negotiate with studios and production companies to devise collective approaches to cushion the impact of pandemic shutdowns.⁴

Why were writers left out of the collective negotiations in theatre but not in film and TV? Because dramatists are independent contractors, the Dramatists Guild is not a union, and Broadway's mediating stakeholders have insisted for nearly a century that federal antitrust law prohibits dramatists from bargaining collectively.⁵ Although the Dramatists Guild has bargained collectively for all that time, the collective agreement is unenforceable in court though widely honored in practice except when powerful stakeholders find it's not in their interest.⁶ Why are Hollywood writers, along with stage directors and actors, able

¹ Caitlin Huston, *Broadway Unions Band Together to Ask for City and State Relief*, BROADWAY NEWS (Mar. 18, 2020), <https://broadwaynews.com/2020/03/18/broadway-unions-band-together-to-ask-for-city-and-state-relief/> [<https://perma.cc/HX4L-B442>].

² *Id.*

³ Jonathan Handel, *Broadway's Emergency Relief Deal Doesn't Cover Playwrights*, HOLLYWOOD REP. (Mar. 24, 2020), <https://www.hollywoodreporter.com/news/broadway-emergency-relief-deal-doesnt-protect-playwrights-1286258> [<https://perma.cc/2GQU-KCPE>]. Indeed, some theatres responded to the economic crisis by demanding that playwrights return royalties they had received for productions that were cancelled. Michael Paulson, *Straining from Shutdowns, Theaters Ask Playwrights to Return Payments*, N.Y. TIMES (Mar. 19, 2020), <https://www.nytimes.com/2020/03/18/theater/lynn-nottage-annie-baker-coronavirus.html> [<https://perma.cc/2SYL-8HN6>].

⁴ See, e.g., *COVID-19 Resources*, WRITERS GUILD AM. W., <https://www.wga.org/members/employment-resources/covid-19-resources> [<https://perma.cc/V46J-Z2WY>].

⁵ Matthew T. Bodie, *Lessons from the Dramatists Guild for the Platform Economy*, 2017 U. CHI. LEGAL F. 17, 20–22.

⁶ See *id.*

to negotiate collectively for an enforceable agreement? Because all directors and actors, but only film and TV writers, are employees, not independent contractors, and their union has been bargaining collectively for almost a century.⁷ Only playwrights are left out.

Until recently, the intersection of labor law and antitrust law that has kept the Dramatists Guild in a state of legal uncertainty has been of interest mainly to scholars of theatre. But recent growth in the size and significance of the independent contractor workforce, and the business lobby's increased use of antitrust law to thwart unionization, have made dramatists' long legal struggles worthy of wider study.⁸ To an extent not seen since the 1930s, antitrust law has re-emerged as a significant weapon in efforts to fight unionization. Uber and the Chamber of Commerce used antitrust litigation to block a Seattle law allowing app-based ride-hailing drivers to unionize.⁹ App-based driver companies ensured that drivers in California cannot unionize by inserting a little-noticed provision into Proposition 22, the ballot measure that stripped employee protections from drivers and prohibits the state from authorizing them to unionize.¹⁰ The provision allows a company to terminate any driver who joins a union and also allows the company to deem any union that might form an antitrust violation that is unprotected by state law immunity.¹¹

Contemporary discussions of the employee-independent contractor statuses and intellectual property rights are shot through with arguments celebrating the importance of entrepreneurship and the value that creative and other workers place on their independence and their autonomy to control the when, where, and how they work.¹² In this vein, when playwrights insist upon their status as independent contractors, they do so because they believe it is necessary to retain

⁷ See generally CATHERINE L. FISK, *WRITING FOR HIRE: UNIONS, HOLLYWOOD, AND MADISON AVENUE* (2016) (exploring the history of collective bargaining by film and television writers).

⁸ See Bodie, *supra* note 5, at 20.

⁹ Chamber of Com. of the U.S. v. City of Seattle, 890 F.3d 769, 775 (9th Cir. 2018).

¹⁰ Proposition 22, enacted by California voters on November 3, 2020, added a new section 7465(c)(4) of California Business & Professions Code to prohibit the state legislature from enacting “[a]ny statute that authorizes any entity or organization to represent the interests of app-based drivers in connection with drivers’ contractual relationships with network companies, or drivers’ compensation, benefits, or working conditions.” CAL. BUS. & PROF. CODE § 7465(c)(4) (West, Westlaw through Ch. 14 of 2022 Reg. Sess.).

¹¹ See Brian Chen & Laura Padin, *Prop 22 Was a Failure for California’s App-Based Workers. Now, It’s also Unconstitutional.*, NAT’L EMP. L. PROJECT (Sept. 16, 2021), <https://www.nelp.org/blog/prop-22-unconstitutional/> [<https://perma.cc/9NCX-T6VF>]. On the obstacles antitrust law presents to contemporary union organizing, see Sanjukta M. Paul, *The Enduring Ambiguities of Antitrust Liability for Worker Collective Action*, 47 LOY. U. CHI. L.J. 969, 976 (2016).

¹² V.B. Dubal, *Wage Slave or Entrepreneur?: Contesting the Dualism of Legal Worker Identities*, 105 CALIF. L. REV. 65, 101 (2017); ORLY LOBEL, *TALENT WANTS TO BE FREE: WHY WE SHOULD LEARN TO LOVE LEAKS, RAIDS, AND FREE RIDING* 5 (2013).

ownership of copyrights and, therefore, creative control over their plays.¹³ As the Dramatists Guild announced to its members when explaining why the Guild could not join other talent unions in negotiating collectively with producers to help them navigate the pandemic crisis of unemployment,

the Guild still believes in the primacy of copyright. *Your work truly belongs to you. . . .* We feel so strongly about this principle that we've sacrificed the benefits of unionization available to conventional employees, like our Writers Guild colleagues in film and television, our fellow theatrical collaborators in the Society of Directors and Choreographers, and the United Scenic Artists union.¹⁴

Yet, playwrights and others recognize that what would also benefit creative workers—perhaps more than royalties and the possibility of huge success—is stability: a regular income, health insurance.¹⁵ Stability matters for creative reasons as much as for financial reasons because stability enables the possibility of long-term collaborations.¹⁶

As we look for examples of how a gig economy might function, it is important to understand how law has structured organizational relationships in sectors that have a long history of freelance work.¹⁷ For all its fragility, the century of dealings between the Dramatists Guild and the commercial theatre producers show the possibility of collective negotiation on a sectoral and nationwide basis. As theatre begins to rebuild after the end of the pandemic, it is worth noting that the crisis of 2020 provides an opportunity to reconsider the organizational structures that have constrained relationships between producers and writers for the stage. Although a few scholars have recently looked to the Dramatists Guild for lessons on legal regulation of collective action in the gig economy,¹⁸ the legal history of labor relations in commercial theatre has for the most part been untold.

Until recently, the legal scholarship on dramatists has been preoccupied with intellectual property rights.¹⁹ Without minimizing the role of copyright law

¹³ *Authors Should Maintain the Legal Rights to Their Work*, DRAMATISTS GUILD, <https://www.dramatistsguild.com/union> [<https://perma.cc/QTN6-G4CU>] [hereinafter *Authors Should Maintain*].

¹⁴ *Id.*

¹⁵ *See id.*

¹⁶ *See* TODD LONDON, BEN PESNER & ZANNIE GIRAUD VOSS, *OUTRAGEOUS FORTUNE: THE LIFE AND TIMES OF THE NEW AMERICAN PLAY* 279 (2009).

¹⁷ *See* BRENT SALTER, *NEGOTIATING COPYRIGHT IN THE AMERICAN THEATRE: 1856–1951*, at 188–90 (2022).

¹⁸ Bodie, *supra* note 5, at 33–34; *cf.* Jeffrey M. Hirsch & Joseph A. Seiner, *A Modern Union for the Modern Economy*, 86 *FORDHAM L. REV.* 1727, 1746–47 (2018).

¹⁹ Jessica Litman, *The Invention of Common Law Play Right*, 25 *BERKELEY TECH. L.J.* 1381, 1382–83 (2010); Carol M. Kaplan, *Once More unto the Breach, Dear Friends: Broadway Dramatists, Hollywood Producers, and the Challenge of Conflicting Copyright Norms*, 16 *VAND. J. ENT. & TECH. L.* 297, 298 (2014).

in structuring relations in theatre, we argue that the intersection of labor and antitrust law has been at least as significant as copyright to the power of writers and producers. Authorship on the American stage is constituted as much or more by labor law as it has been by copyright, and this aspect of authorship has been understudied.

To the twin ends of better understanding the construction of authorship by labor and antitrust law, and to offer a deeper history of how the Dramatists Guild has negotiated collectively to protect independent contractor writers, this Article offers a detailed history, based on previously unavailable archival sources. It explores the origins and evolution of four founding assumptions about the legal rights of playwrights and producers in commercial theatre and how those assumptions have influenced the organizational structures that have been more influential than intellectual property rights in shaping the industry:

Assumption #1: Playwrights, unlike actors, directors, or most other creative people involved in making theatre, cannot unionize under the National Labor Relations Act because playwrights are independent contractors.²⁰

Assumption #2: Playwrights must have the legal status of independent contractors under federal labor law, lest they lose control of the copyrights in their work under the work for hire provisions of the 1976 Copyright Act.²¹

Assumption #3: Unionization of playwrights is not merely unprotected by the National Labor Relations Act (see Assumption #1), but it is affirmatively prohibited by federal antitrust law.²²

Assumption #4: The precarious legal status of playwrights as outlined in Assumptions 1–3 is necessary to protect their creative autonomy. Whatever economic security and stability their representative, the Dramatists Guild, could attain if it were a union and if there were real collective bargaining would be at the cost of dramatists' creative freedom, independence, and ability to prevent the rewriting of their work. In short, to be a real artist, a dramatist necessarily must run the risk of being impecunious.

By excavating the origin and evolution of these founding assumptions of the American commercial theatre, we show why they are assumptions rather than essential truths or principles of law, why they have endured, and why they should be abandoned. Ever since powerful theatre owners and producers introduced the idea that collective negotiation by playwrights would violate antitrust law in the 1920s, producers and the Broadway League have insisted

²⁰ 29 U.S.C. § 152(3) (exempting independent contractors from protections of NLRA).

²¹ 17 U.S.C. §§ 101, 201(b) (employer is author of a work made for hire by an employee); *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 753 (1989) (holding that an entity that hired an independent contractor is not the author of a work made by the contractor that is one of several statutorily enumerated types and was specially commissioned).

²² See *infra* text accompanying notes 284–99.

not only that it does not want to negotiate but that it cannot legally do so.²³ The resilient Dramatists Guild has lived with this state of affairs, believing that independent contractor status is necessary to protect the integrity of the writers' work and their autonomy as authors.²⁴

Yet, the Dramatists Guild and the Broadway League have negotiated collectively over conditions of theatre work for a century. A series of industry-wide multi-employer collective agreements, the most recent of which underwent significant renegotiation in 1985 and is known as the Approved Production Contract, are standard contracts stating the minimum terms on which any Dramatist Guild member will work with any theatre producer.²⁵ In the APC and its predecessors, the Guild and the League developed some of the very provisions governing compensation and creative control that the four assumptions posit are legally impossible.²⁶ Their agreements have operated somewhat like those of unionized talent in Hollywood and of unionized athletes in professional sports. But the agreements have done so in the face of labor and antitrust law that both sides agree makes it unenforceable in court.²⁷ Yet, although both sides talk in extreme and rigid terms about what law allows them to do, they have not acted in the way that they say law compels them to act. Rather, in order to put aside the legal wrangling and make theatre, they've negotiated a flexible but fragile system that, generally, has worked for both sides.

The collective dealings have followed a pattern since the middle 1920s, with some variation. The Guild and the League, or particular producers, have conflict, often spurred by changes in the economics of commercial theatre. They reach a contractual settlement of the conflict.²⁸ A producer member of the Broadway League then institutes litigation insisting that the new contract is

²³ *Writers Deserve Collective Bargaining Power: Why the Guild Is Pro the PRO Act*, DRAMATISTS GUILD (Apr. 27, 2021), <https://www.dramatistsguild.com/news/why-the-guild-supports-the-pro-act> [<https://perma.cc/SFH8-VQS2>] [hereinafter *Writers Deserve*].

²⁴ *Authors Should Maintain*, *supra* note 13. Playwright Tony Kushner said in an interview at Yale that although unionization might improve the economic security of many playwrights, it would require them to give up ownership of their copyrights as film and television writers have done. Interview with Tony Kushner, *Collaboration and the American Theater*, in New Haven, Conn. (Mar. 9, 2018) (transcript on file with author). The focus on creative autonomy, notwithstanding the collaborative nature of creating for stage and screen has long been an article of faith for writers in both media. Film and TV writer David Milch said in an interview with one of the authors of this Article that "writers typically as outsiders are so ambivalent toward . . . the bosses. The presumption is that it's a hostile and pernicious relationship." Interview with David Milch, in L.A., Cal. (Dec. 6, 2013); *see also* Catherine Fisk & Michael Szalay, *Story Work: Non-Proprietary Autonomy and Contemporary Television Writing*, 18 TELEVISION & NEW MEDIA 605, 606–07 (2016).

²⁵ *Approved Production Contract for Broadway Musicals*, DRAMATISTS GUILD, <https://www.dramatistsguild.com/service/broadway-musicals-contract> [<https://perma.cc/S9ZL-L37N>] [hereinafter *Approved Production Contract*].

²⁶ *Id.*

²⁷ *See Writers Deserve*, *supra* note 23.

²⁸ *See, e.g., Approved Production Contract*, *supra* note 25.

invalid because labor and antitrust law prohibit collective bargaining.²⁹ The parties then renegotiate some aspects of the contract to settle the litigation.³⁰ The new contract endures for several years until the cycle of conflict, contract, litigation, and settlement repeats.³¹ These negotiations in the face of legal uncertainty, and the power that the League has as a mediator in the industry to suppress overt conflict, create conditions in which writers and producers can deal.

This Article has four parts, each of which focuses on a major moment of conflict and compromise between the Dramatists Guild and the Broadway League that created the current framework. The first, covered in Part II, occurred before, during, and just after negotiation of the first Minimum Basic Agreement in 1926. The powerful Shubert theatre organization took advantage of that era's aggressively anti-union antitrust law and, in a pathbreaking case, *Shubert v. Richman*, invalidated the 1926 agreement.³² But in the settlement following the litigation, the basics of the Basic Agreement remained in effect.³³

Part III covers the period after World War II when workers across the United States were renegotiating pre-war contracts. It was the first time in which the New Deal settlement of labor and antitrust issues suggested a much better legal environment for workers, including those working independently.³⁴ The producers fought back to build on the antitrust position they had first staked out in *Shubert v. Richman*.³⁵ They won a major victory in the Second Circuit in *Ring v. Spina*, cementing the position that collective bargaining by writers working independently is inconsistent with antitrust law.³⁶ And, yet, the Basic Agreement still guided the terms on which playwrights worked in New York.³⁷

Part IV explores the aftermath of the major revision of copyright law in 1976. By the early 1980s, the economics of Broadway production had also changed. Unionized Broadway directors had negotiated for royalties and the League created royalty pools which cut into author royalties.³⁸ The Dramatists Guild fought back, which led to a new round of antitrust litigation against the Guild.³⁹ As before, the Dramatists Guild and the Broadway League settled the litigation and signed a new contract—now known as the Approved Production

²⁹ See *infra* text accompanying notes 147–48.

³⁰ See *infra* text accompanying notes 163–64.

³¹ See discussion *infra* Part II.F.

³² See *infra* text accompanying notes 161–66.

³³ See *infra* text accompanying notes 208–12.

³⁴ See discussion *infra* Part III.A.

³⁵ See *infra* text accompanying notes 281–85.

³⁶ See discussion *infra* Part III.B.

³⁷ See *infra* text accompanying notes 342–45.

³⁸ See *infra* text accompanying notes 349–50.

³⁹ See discussion *infra* Part IV.C.

Contract—in 1985.⁴⁰ As before, the legality of the contract under antitrust law remains uncertain but mainly uncontested.⁴¹

Part V brings the story into the twenty-first century, beginning in the early 2000s with the repeated but unsuccessful efforts of playwrights and their allies in Congress to amend antitrust law to exempt playwright collective action.⁴² Broadway producers opposed the amendment, arguing that playwrights would use their exemption to stifle competition.⁴³ In the years since, on Broadway as in Hollywood, the talent guilds and unions have continued to seek power in the creative process and compensation for their work through collective action.⁴⁴ Stage directors and actors both negotiated for a percentage of royalties (which may cut into author royalties), while still retaining the weekly salary that provides economic stability to directors, actors, and everyone working in theatre.⁴⁵ Dramatists, however, continue to negotiate individually, though with the collectively bargained APC as a benchmark.⁴⁶

We show that, for almost 100 years, the threat of antitrust liability has been used effectively by producers (who themselves are a relatively small group of economic actors that coordinate their efforts) to weaken the Dramatists Guild. Producers work well in a state of legal uncertainty about the collective agreement because they wield the legal doubt about the contract as a sword. Whereas the use of antitrust law to challenge unions in professional sports is episodic,⁴⁷ and antitrust until recently has played only a bit part in Hollywood,⁴⁸ in theatre antitrust is a constant threat and a barrier to a collective solution of pressing economic problems. Copyright ownership no longer protects writer autonomy or economic security because, as we explain, it is not ownership but control of productions that gives power and allocates profit. Power is wielded by mediating stakeholders, especially theatre production companies. Although copyright ownership validates playwrights' sense of themselves as artists, to understand the political economy of theatre one must understand how mediating stakeholders negotiated in the shadow of antitrust and labor law.

II. THE FOUNDATION OF THE LABOR-ANTITRUST DILEMMA

The tangled web of contract, law, and custom that structures the relations between playwrights, producers, and others involved in making commercial

⁴⁰ See discussion *infra* Part IV.D.

⁴¹ See *infra* text accompanying note 400.

⁴² See discussion *infra* Part V.A.

⁴³ See *infra* text accompanying notes 442–48.

⁴⁴ See *infra* text accompanying notes 457–60.

⁴⁵ See *infra* text accompanying notes 474–75.

⁴⁶ See *infra* text accompanying notes 466–68.

⁴⁷ See *Brown v. Pro Football, Inc.*, 518 U.S. 231, 233–34 (1996).

⁴⁸ See Brandon Drea, Note, *The Current Antitrust Dispute Between the Writers Guild of America and Hollywood Talent Agencies: A Modern Retelling of a Favorite Hollywood Classic*, 9 ARIZ. ST. U. SPORTS & ENT. L.J. 98, 121–22 (2020) (describing dispute between Writers' Guild and talent agencies that package TV and film productions).

theatre in major American cities has its origins in nineteenth century copyright law, the abortive effort of playwrights to unionize in the early 1920s, and theatre producers' use of antitrust law to fight against writers' collective action.

A. *Copyright Law and Power in Commercial Theatre*

Many historians of theatre find the origins of the current legal system in the precarious position of playwrights after late-nineteenth century theatre managers had discovered that controlling a network of theatres and having a bankable star to anchor a national tour were more important to a play's financial success than the quality of the script.⁴⁹ The risk to playwrights was even greater with the advent of movies, as producers received generous offers from the movie studios to purchase the rights to their plays, or even to give the studio the right to control which plays were produced.⁵⁰ In this context, ownership of copyright and subsidiary rights is the crucial story in the legal disputes between theatre producers and dramatists. Not surprisingly, the legal literature on the relations between playwrights and theatre owners and producers focuses on copyright law. Jessica Litman explores how the rights that dramatists are recognized as having are "exceptional authors' rights . . . not tied to any statute or judicial decision," but are the product of customs that grew up around what writers and producers believed copyright and the standard industry-wide contracts allowed.⁵¹

There is certainly a basis for the emphasis on the copyrights in plays. Many provisions in playwrights' contracts, which are negotiated individually but in the shadow of a collective agreement that is today known as the Approved Production Contract (APC), concern literary rights.⁵² Both the APC for plays and the APC for musicals consist of three parts (basic terms, authorization of additional terms, and exhibits).⁵³ Under the APC basic terms, the playwright licenses the producer to use the play but does not transfer the copyright.⁵⁴ The producer makes option payments, and pays advances and royalties according to a schedule.⁵⁵ There are general provisions about attribution, changes to the

⁴⁹ T.J. Walsh, *Playwrights and Power: The Dramatists Guild's Struggle for the 1926 Minimum Basic Agreement*, in *ART, GLITTER, AND GLITZ: MAINSTREAM PLAYWRIGHTS AND POPULAR THEATRE IN 1920S AMERICA* 107, 112 (Arthur Gewirtz & James J. Kolb eds., 2004); GEORGE MIDDLETON, *THESE THINGS ARE MINE: THE AUTOBIOGRAPHY OF A JOURNEYMAN PLAYWRIGHT* 325 (1947).

⁵⁰ Litman, *supra* note 19, at 1418–19.

⁵¹ *See id.* at 1419, 1425.

⁵² *See generally, e.g.*, *DRAMATISTS GUILD, INC., APPROVED PRODUCTION CONTRACT FOR PLAYS* art. I (1985) [hereinafter *DRAMATIST GUILD, CONTRACT FOR PLAYS*].

⁵³ *See generally id.*; *DRAMATISTS GUILD, INC., APPROVED PRODUCTION CONTRACT FOR MUSICAL PLAYS* (1985) [hereinafter *DRAMATISTS GUILD, CONTRACT FOR MUSICAL PLAYS*] (each defining basic terms, allowing for the authorization of additional terms, providing attached exhibits).

⁵⁴ *See* *DRAMATISTS GUILD, CONTRACT FOR PLAYS, supra* note 52, art. I, § 1.01.

⁵⁵ *See id.* art. II, art. III, art. IV.

script, casting, original cast albums (in the case of musicals), subsidiary rights, and merchandising rights.⁵⁶ The APC explicitly allows additional terms for individual productions and provides for arbitration of disputes.⁵⁷

Many terms in the APC originated in the first Basic Agreement of 1926, which is a floor, not a ceiling, on author protections.⁵⁸ The author-friendly provisions on attribution,⁵⁹ alterations,⁶⁰ casting, and rehearsals,⁶¹ and an expense account to monitor these processes,⁶² were all there in 1926. The 1926 Agreement also included minimum terms for the production and leasing of plays,⁶³ a significant problem for authors under previous customary arrangements where managers and agents often held onto works for indefinite periods.⁶⁴ The 1926 Agreement clarified subsidiary rights, including stock rights, amateur rights, radio rights, foreign language rights and adaptations, as well as more general foreign and, in particular, British rights.⁶⁵ An arbitration mechanism aimed to resolve disputes between authors and managers.⁶⁶ And the 1926 Agreement included complicated terms on the potentially lucrative matter of motion picture rights.⁶⁷ The contract framework was revised five times between 1926 and 1955, although most of the core 1926 terms were preserved.⁶⁸ Since 1955, however, it has been substantially altered only twice—in 1961 and in 1985.⁶⁹

⁵⁶ See generally *id.*; DRAMATISTS GUILD, CONTRACT FOR MUSICAL PLAYS, *supra* note 53, art. VIII, §§ 8.06–.19.

⁵⁷ See, e.g., DRAMATISTS GUILD, CONTRACT FOR PLAYS, *supra* note 52, art. XX. The exhibits, which include complicated terms for film rights and other things, are “so fraught with either ambiguity or incomprehensible conditions that the parties ignore them.” JOHN BREGGIO, I WANNA BE A PRODUCER: HOW TO MAKE A KILLING ON BROADWAY . . . OR GET KILLED 128 (2016). Breggio also describes article XXII as “a rider supplementing articles I through XXI” and “includes additional production terms that amend and supplement the basic form contract.” *Id.* at 117.

⁵⁸ See Minimum Basic Agreement Approved by the Dramatists’ Guild of the Authors’ League of America, Inc., and Producing Managers § 4, *reprinted in* AUTHORS’ LEAGUE BULLETIN, Apr. 1926, at 19, 20 [hereinafter Minimum Basic Agreement]. The original contract stated “nothing herein contained shall be construed to prevent the Author from obtaining better terms.” *Id.*

⁵⁹ *Id.* § 7.

⁶⁰ *Id.* § 8.

⁶¹ *Id.* § 9.

⁶² *Id.* § 10.

⁶³ *Id.* § 11.

⁶⁴ *Cf.* Minimum Basic Agreement (1926), *supra* note 58, § 11 (granting managers a six-month contract to produce and perform the play before rights revert to author).

⁶⁵ *Id.* § 12.

⁶⁶ *Id.* § 21.

⁶⁷ *Id.* § 12(H).

⁶⁸ Litman, *supra* note 19, at 1420; see also GEORGE MIDDLETON, THE DRAMATISTS GUILD: WHAT IT IS AND DOES . . . HOW IT HAPPENED AND WHY . . ., at 15–18 (5th ed. 1966) (describing the substantive changes in the successive amended agreements).

⁶⁹ Litman, *supra* note 19, at 1420.

Guiding the framework for the dramatists is a “fundamental principle” which is necessary “to protect their unique vision, which has always been the strength of the theatre”: dramatists “own and control their work.”⁷⁰ But at the same time, the Dramatists Guild is a trade association, not a union.⁷¹ Therefore, the Guild reviews playwrights’ and producers’ individual agreements, and certifies those that do not fall below the APC minimum terms, but it does not have a right to force producers to adhere to the APC terms when hiring writers.⁷² All it can do is expel from Guild membership any writer who agrees to an uncertified contract.⁷³ The Guild’s inability to force either dramatists or producers to accept the APC terms, and writers’ corresponding vulnerability to the market for their work, stems not from copyright law but from antitrust and labor law.

Antitrust law and labor law played a crucial role in creating the shared understanding about authors’ and producers’ rights in theatre. The important story is not just the system of authors’ rights that Litman has so carefully described, but also how the Guild and the League negotiated, agreed to disagree, strategically invoked litigation, and settled the litigation but left uncertainty. While others have explained the end result, we focus on the process.

B. *The Rhetoric of Free Competition in Early Twentieth Century Theatre*

In the early twentieth century, when dramatists debated whether to identify the Guild as a union or a professional association, the theatre had been undergoing several decades of debate over restrictions on competition by low-cost competitors. The Theatrical Syndicate expanded quickly between 1896 and 1904 by locking theatre managers and attractions into exclusivity deals: perform in Syndicate venues or not at all.⁷⁴ A rival organization of theatres controlled by the Shuberts devised a strategy to compete with the Syndicate by insisting that performers at its theatres need not sign exclusivity arrangements, that the Shubert network of fifty theatres “will be open to any play or player that is deserving of a public hearing,” and that the Shubert theatres offered an “open

⁷⁰ DRAMATISTS GUILD OF AM., THE DRAMATIST’S BILL OF RIGHTS, <https://www.dramatistsguild.com/sites/default/files/2020-01/DGBillofRightsBeforeandAfterIssue2020.pdf> [<https://perma.cc/V5QG-VHZT>].

⁷¹ DRAMATISTS GUILD, <https://www.dramatistsguild.com/> [<https://perma.cc/J9PL-3YEC>].

⁷² See MIDDLETON, *supra* note 68, at 24; BREGGIO, *supra* note 57, at 113.

⁷³ BREGGIO, *supra* note 57, at 113.

⁷⁴ See Monroe Lippman, *The History of the Theatrical Syndicate: Its Effect Upon the Theatre in America 70–91* (Apr. 1937) (Ph.D. dissertation, University of Michigan) (ProQuest) [hereinafter Lippman, *The History*] (discussing the Syndicate’s methods); Monroe Lippman, *The Effect of the Theatrical Syndicate on Theatrical Art in America*, 26 Q.J. SPEECH 275, 275 (1940); Monroe Lippman, *Battle for Bookings: Independents Challenge the Trust*, 2 TUL. DRAMA REV. 38, 39 (1958); Monroe Lippman, *The First Organized Revolt Against the Theatrical Syndicate*, 41 Q.J. SPEECH 343, 343 (1955).

door' to every worthy actor or play in the country."⁷⁵ Although the Shuberts presented a positive public image that championed openness and independence, in substance they had all the benefits of exclusivity that the Syndicate enjoyed.⁷⁶ If an attraction or theatre was excluded from Theatrical Syndicate resources, the only other option in a market of two major competitors was to deal with Shubert attractions or theatres in the first-class theatre market.⁷⁷

The Shuberts, with considerable financial backing to build new first-class theatres across the country, began to secure more booking rights for attractions and actors.⁷⁸ When acclaimed British actress Sarah Bernhardt toured the United States in 1906, the Shuberts publicized the fact that the Syndicate controlled the only first-class theatre in some towns by putting her performances in a tent.⁷⁹ Public interest was so high that when Bernhardt appeared in Austin, the Syndicate, which controlled the only first-class venue in the city, was compelled by the Attorney General of Texas to allow Bernhardt to appear in that theatre.⁸⁰ "Texas and Missouri passed anti-trust legislation designed to force the Syndicate to open its theatres to all attractions."⁸¹ "Legislators pushed similar laws in Indiana, Massachusetts and Washington, but to no avail."⁸² In 1907, a New York grand jury began an investigation of the Syndicate's activities and indicted members of the Syndicate for criminal conspiracy and restraint of trade based on the exclusivity arrangement that controlled hundreds of theatres across America.⁸³ Although the antitrust cases fizzled and nothing came of the New

⁷⁵ *Fifty Theatres in the New Circuit: Shubert Brothers Announce Plans for Independent Stars and Houses*, TRENTON TIMES, Mar. 26, 1906, at 10.

⁷⁶ Lippman, *The History*, *supra* note 74, at 112.

⁷⁷ *See id.*

⁷⁸ *See id.* at 113–14 (citing *Shuberts Acquire 18 New Theatres*, N.Y. WORLD, Oct. 16, 1905, at 7); *see also Shuberts Acquire 18 New Theatres*, TRENTON TIMES, Oct. 17, 1905, at 10 (discussing the same events); FOSTER HIRSCH, *THE BOYS FROM SYRACUSE: THE SHUBERTS' THEATRICAL EMPIRE* 57–59 (1998).

⁷⁹ Keene Sumner, *Sometimes You Fight Better If You're Driven to the Wall*, AM. MAG., Oct. 1921, at 20, 78; Lippman, *The History*, *supra* note 74, 115–16. *See generally* WILLIAM LAWRENCE SLOUT, *THEATRE IN A TENT: THE DEVELOPMENT OF A PROVINCIAL ENTERTAINMENT* 71, 75–82 (Ray B. Browne ed., 1972) (discussing the popularity of tent dramas at the turn of the century).

⁸⁰ Lippman, *The History*, *supra* note 74, at 116; *see also* C. Richard King, *Sarah Bernhardt in Texas*, 68 SW. HIST. Q. 196, 203 (1964) (collecting contemporary accounts).

⁸¹ Lippman, *The History*, *supra* note 74, at 118; *see* ALFRED L. BERNHEIM, *THE BUSINESS OF THE THEATRE* 59 (1932); 1907 Tex. Gen. Laws 456; MO. REV. STAT. §§ 10298–10301, 10318 (1909).

⁸² Lippman, *The History*, *supra* note 74, at 118–19; *see* BERNHEIM, *supra* note 81, at 59.

⁸³ *People v. Klaw*, 106 N.Y.S. 341, 341–42 (N.Y. Ct. Gen. Sess. 1907); *see also* Patricia Marks, *A Firestorm of Criticism: Metcalfe and the Theatrical Syndicate, 1904–1905*, 8 AM. PERIODICALS 15, 21 (1998) (discussing the power of the syndicate in New York and the number of theatres under its control).

York grand jury investigation, litigation was less significant than breathless news coverage of the dangers of the Syndicate's practices.⁸⁴

In a market with two major competitors, the Shuberts' promotional message about the virtues of openness was strategic, not a legal claim about competition, because everyone knew that the market was, at best, oligopolistic.⁸⁵ But the Shuberts' strategy captured the attention of the public and framed their attack on the Syndicate as being animated by altruistic notions of independence and the betterment of American theatre.⁸⁶ It also positioned them to be forceful critics of attempts by dramatists to use collective action.

C. *The Risks of Unionization in a Time of Antitrust Actions Against Labor*

The Dramatists Guild as it exists today was founded in 1919 after a forty-year effort to organize the writers as a functional collective.⁸⁷ In 1891, playwrights formed their "first effective group," an organization eventually known as the Society of American Dramatists and Composers, which successfully lobbied Congress to amend federal copyright law in 1897 to address rampant piracy of plays.⁸⁸ By 1909, when Congress overhauled copyright law, the Society was rallying against the "clever, astute, experienced men" to protect authors of dramas.⁸⁹ But still, dramatists had no real collective

⁸⁴ See Associated Press, *Law's Hand Falls on Theatre Trust*, L.A. HERALD, Feb. 1, 1907, at 2 ("Every business institution which develops to large proportions is in danger of being denominated a 'trust' and indictment for being a member of a trust seems to be the badge of success pinned on successful business men by their unsuccessful competitors." (quoting a statement issued by Al Hayman and Klaw & Erlanger in response to the indictment)); William Winter, *Recent Plays in New York: The Fad Movement*, PAC. MONTHLY, Apr. 1907, at 461, 464 ("[I]t has now been charged, in legal form, that some of the 'business' methods of the Theatrical Syndicate are illegal. . . . [T]he Theatrical Syndicate has been, for years, oppressing the theatres, practically throughout the United States, doing harm to the theatrical profession and the cause of dramatic art, and, therefore, injuring the welfare of Society. It is hoped that the ultimate result of the indictment of its members for criminal conspiracy will be the execution of Justice and the re-establishment of legitimate competition in the theatrical world."); ALLEN DAVENPORT, *THE THEATRICAL INDEPENDENT MOVEMENTS* 4 (Miscellaneous Pamphlet Ser. No. 1, Aug. 1907) ("The January Grand jury in this city (New York) indicted for conspiracy six chiefs of this organization.").

⁸⁵ See Lippman, *The History*, *supra* note 74, at 117–18.

⁸⁶ *Id.* (quoting Lee Shubert's characterization of the Shuberts' altruistic stance and discussing the public's engagement in the Shuberts' revolt against the Syndicate).

⁸⁷ See MIDDLETON, *supra* note 49, at 304–06; THOMAS J. WALSH, *PLAYWRIGHTS AND POWER: THE MAKING OF THE DRAMATISTS GUILD* 60–61 (2016).

⁸⁸ MIDDLETON, *supra* note 49, at 304; see Act of Jan. 6, 1897, ch. 4, 29 Stat. 481, 481–82 (amending section 4966 of the Revised Statutes relating to copyrights). See generally Zvi S. Rosen, *The Twilight of the Opera Pirates: A Prehistory of the Exclusive Right of Public Performance for Musical Compositions*, 24 CARDOZO ARTS & ENT. L.J. 1157 (2007).

⁸⁹ See WALSH, *supra* note 87, at 60–61 (quoting Plan and Scope for Reorganization of the Dramatists Club (1909)).

power, although a “dramatic sub-committee” of the Authors League of America formed in 1915 and negotiated weak agreements in 1915, 1917, and 1919.⁹⁰

After scenic artists and stagehands established a union, United Scenic Artists, in 1918, and a fierce Actors’ Equity strike shut down Broadway production for a month in August of 1919, dramatists decided to reorganize.⁹¹ They formed an autonomous committee of the Authors League in 1919 and named their new organization the Dramatists Guild.⁹² From the start, dramatists were ambivalent about the extent to which they should follow the lead of stagehands and actors in embracing their status as labor.⁹³ If they called the Dramatists Guild a union, they feared a loss of status.⁹⁴

Dramatists also feared, for good reason, the business and judicial hostility to unions. In the early nineteenth century, courts prosecuted worker collective action as criminal conspiracies.⁹⁵ Later, courts awarded huge civil damages and sweeping injunctions under federal and state antitrust law against unions and their members in railroads, steel companies, mines, and factories.⁹⁶ William Forbath estimated that courts issued more than 4,000 injunctions in labor disputes between 1890 and 1930, including 2,130 in the 1920s.⁹⁷ The success that the Shubert Organization had in invoking antitrust against the Syndicate posed a legal risk for the Dramatists Guild as well as a publicity risk.

Given the importance that antitrust has long played in dealings between theatre producers and the Guild, it is important to recall how a law enacted in 1890 to address the growing power of large national corporations and interlocking business arrangements known as trusts, should have come to be regarded as preventing playwrights from forming a union. The problem began with the broad language Congress enacted in a bill first introduced by Senator Sherman, that outlawed “[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States.”⁹⁸ Though it was aimed

⁹⁰ *Id.* at 71–89.

⁹¹ *Id.* at 90; MIDDLETON, *supra* note 68, at 5; *History*, UNITED SCENIC ARTISTS, <https://www.usa829.org/About-Our-Union/History> [<https://perma.cc/TLB7-RLLH>].

⁹² MIDDLETON, *supra* note 49, at 305–06.

⁹³ *See id.* at 306–07.

⁹⁴ *Id.* at 308. More generally, George Middleton and Thomas Walsh have written treatments on the history of the Dramatists Guild, with detailed coverage of the negotiations leading up to the adoption of the Minimum Basic Agreement on April 27, 1926. *See generally* WALSH, *supra* note 87; MIDDLETON, *supra* note 49, at 298–327.

⁹⁵ *See generally* Walter Nelles, *The First American Labor Case*, 41 *YALE L.J.* 165 (1931); Wythe Holt, *Labour Conspiracy Cases in the United States, 1805–1842: Bias and Legitimation in Common Law Adjudication*, 22 *OSGOODE HALL L.J.* 591 (1984); VICTORIA C. HATTAM, *LABOR VISIONS AND STATE POWER: THE ORIGINS OF BUSINESS UNIONISM IN THE UNITED STATES* 30–75 (1993).

⁹⁶ WILLIAM E. FORBATH, *LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT* 59–97 (1991).

⁹⁷ William E. Forbath, *The Shaping of the American Labor Movement*, 102 *HARV. L. REV.* 1109, 1249 (1989).

⁹⁸ *See* 15 U.S.C. § 1.

at business trusts, government officials concerned about the effect of strikes on the public welfare, and businesses targeted by union organizing and strike action, lost no time in using it against labor.⁹⁹ Indeed, the government's first Sherman Act prosecution was not against a trust but against a general strike in New Orleans.¹⁰⁰ Of the first thirteen antitrust judgments in American courts between 1890 and 1897, twelve were against unions and only one was a conspiracy among manufacturers.¹⁰¹

Labor leaders fought hard to win protection for labor organization in the Clayton Act of 1914, which declared that “[t]he labor of a human being is not a commodity or article of commerce;” that antitrust law does not prohibit the existence and operation of “labor, agricultural, or horticultural organizations;” and that federal courts could not issue injunctions against strikes or peaceful picketing “in any case . . . growing out of, a dispute concerning terms or conditions of employment.”¹⁰² But in *Duplex Printing Press Co. v. Deering*, the Supreme Court read the Clayton Act to protect only that labor conduct which was legal before the statute was enacted (which is to say very little labor conduct at all).¹⁰³ Thus, the Court upheld the use of antitrust to target a labor union that called a boycott of a printing press manufacturer in support of the workers’ demand for an eight-hour day, the union scale of wages, and union recognition.¹⁰⁴ Then in 1927, a union that had been locked out by Indiana limestone quarries after a negotiating dispute asked union members on construction sites in other states to refuse to handle the stone.¹⁰⁵ Although the trial court refused to enjoin the boycott, the Supreme Court reversed, finding it “beside the point” that there was no evidence that the employers had been

⁹⁹ See Forbath, *supra* note 97, at 1158–59.

¹⁰⁰ *Id.* at 1158. By striking, the judge said, labor activists “endeavored to prevent, and did prevent, everybody from moving the commerce of the country.” *United States v. Workingmen’s Amalgamated Council of New Orleans*, 54 F. 994, 1000 (C.C.E.D. La. 1893).

¹⁰¹ HERBERT HOVENKAMP, *PRINCIPLES OF ANTITRUST* 585 (2017). Although critics of these antitrust actions against workers argued that the major purpose of the Sherman Act was to protect consumers against rising prices and deterioration of quality enabled by business monopolies, defenders of antitrust suits against unions pointed out that during the congressional debates an amendment exempting labor unions was offered and defeated. Roscoe Steffen advocated this view, though his scholarly conclusions may have been influenced by his service in the Department of Justice Antitrust Division during the years when the government launched several antitrust prosecutions against labor union secondary boycotts in 1939–1940. See, e.g., Roscoe Steffen, *Labor Activities in Restraint of Trade: The Apex Case*, 50 *YALE L.J.* 787, 795–97 (1941). Critics of the use of antitrust labor insisted that the legislative history showed no intent to allow prosecutions of labor unions. See Louis B. Boudin, *The Sherman Act and Labor Disputes: I*, 39 *COLUM. L. REV.* 1283, 1285–93 (1939) (citing EDWARD BERMAN, *LABOR AND THE SHERMAN ACT* 51 (1930)).

¹⁰² 15 U.S.C. § 17; 29 U.S.C. § 52.

¹⁰³ See *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 469 (1921).

¹⁰⁴ *Id.* at 462, 478.

¹⁰⁵ See generally *Bedford Cut Stone Co. v. Journeymen Stone Cutters’ Ass’n*, 274 U.S. 37 (1927).

harmed, nor that “the ultimate result aimed at may not have been illegal.”¹⁰⁶ Rather, the Court concluded: “Where the means adopted are unlawful, the innocent general character of the organizations adopting them or the lawfulness of the ultimate end sought to be attained, cannot serve as a justification.”¹⁰⁷

In these and other antitrust actions against unions, courts hostile to worker collective action made much of the way that unions could coerce workers to adhere to union demands by threatening to deny them union membership and, thereby, the ability to earn a living.¹⁰⁸ Justice Sutherland, who wrote for Court in the limestone case, quoted a witness as saying that the union was “trying to force the Bedford to employ [its] members . . . irrespective of who it hurts,”¹⁰⁹ and individual workers “ha[d] no choice whatever” whether to honor the boycott but had “to follow the orders” of the union.¹¹⁰ On this analysis, an “open shop,” as the term was used by employers to mean a non-union operation, protected the freedom of individual workers and consumers to choose which products to buy or which terms of employment to adopt, and a “closed shop” (one that adhered to union standards) connoted coercion of workers and employers alike.¹¹¹

The federal courts’ language of free competition and the notion that collective action by labor is coercive provided the tool that the theatre producers needed to resist the demands of the Dramatists Guild. After all, the Shubert Organization had been touting for a decade the public interest in free competition for theatre talent.¹¹²

Yet, because of the concentrated power of theatre producers, especially the Shubert Organization, playwrights could see the benefits of unionization, as Actors Equity and the United Scenic Artists had done.¹¹³ And even the threat of unionizing provided leverage. Dramatists raised the possibility of unionization during the negotiation of a standard agreement in 1919–1920, when the threat alone of unionization “sent such shivers down certain [producers’] spines” because of the prolonged and expensive 1918–1919 labor disputes with actors and scenic artists.¹¹⁴ So, when the Dramatists Guild and producers commenced

¹⁰⁶ *Id.* at 55.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 43 (“Members found working on petitioners’ product, were ordered to stop and threatened with a revocation of their cards if they continued . . . even when it might be against the desire of the local union.”).

¹⁰⁹ *Id.* at 45.

¹¹⁰ *Id.* at 44.

¹¹¹ *See, e.g., Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 447, 462 (1921) (discussing the implications of “open” and “closed” shop terminology on workers and worker rights).

¹¹² *See* Lippman, *The History*, *supra* note 74, at 111.

¹¹³ *See* WALSH, *supra* note 87, at 90.

¹¹⁴ *See* MIDDLETON, *supra* note 49, at 306; SALTER, *supra* note 17, at 151 n.65. On the Actors Equity strike, see SEAN P. HOLMES, *WEAVERS OF DREAMS, UNITE!: ACTORS’ UNIONISM IN EARLY TWENTIETH-CENTURY AMERICA* 58–86 (2013). The dramatists sided with producers during the actors’ strike, much to the consternation of the actors. For an

negotiations for what became the Minimum Basic Agreement of 1926, both sides threatened to use the power of antitrust law.¹¹⁵

D. Negotiations for the Minimum Basic Agreement of 1926

The trigger for the effort to negotiate the first Minimum Basic Agreement (MBA) was playwrights' realization that their individual contracts with theatre producers varied widely from each other in terms of the writer's compensation, copyright ownership, right to control subsidiary uses (such as film adaptation), creative control, and rights to be credited as the author of the play.¹¹⁶ Most immediately, the trigger was several deals in which theatrical producers sold a play's film rights to studios.¹¹⁷ The Dramatists Guild hired Arthur Garfield Hays, a Wall Street lawyer who was also a noted advocate of civil liberties, to use his establishment connections and legal skill to mediate between the Guild and the producers.¹¹⁸ Hays characterized the Guild as seeking to protect theatre writers from the "chaotic conditions and . . . the whimsy of producers and movie magnates."¹¹⁹ This chaos and whimsy, he later said in defending the Guild against antitrust litigation, threatened the livelihood and autonomy of dramatists.¹²⁰ Collective negotiation would bring order and fairness to the economic terms on which writers worked, and would protect the theatre-going

example, see the damning attack on the dramatists and criticism of the concessions they made to the producers by the President of the Actors' Equity Association in John Emerson, *An Inspiring Address*, 28 AM. FEDERATIONIST 233, 234–35 (1921). The authors received considerable criticism from the actors for siding with the theatrical producers during the dispute between actors and managers. For the Guild's resolution opposing the Equity Shop of the Actors, see *The Dramatists' Guild and the "Equity Shop,"* AUTHORS' LEAGUE BULL., Feb. 1921, at 3, 3–5 (drawing the distinction between what they believed was a closed shop to their open policy: the dramatists emphasized how they thought the closed shop system would close doors in terms of play content approvals, cast approvals, and limited opportunities for playwrights in an already difficult market because of the restricted options in terms of cast in the third through the sixth of the anticipated conditions listed in the Guild's resolution).

¹¹⁵ See MIDDLETON, *supra* note 49, at 313; *Dramatists Draft Plan to Join A. F. of L. to Balk Film Corner*, N.Y. HERALD TRIB., Dec. 6, 1925, at 1; *Play Writers May Join Union to Combat Fox*, SUN, Dec. 6, 1925, at 1; *Leading Dramatists May Join A.F. of L. To Protect Rights*, WASH. POST, Dec. 6, 1925, at 3; WALSH, *supra* note 87, at 115–18.

¹¹⁶ See MIDDLETON, *supra* note 68, at 7.

¹¹⁷ See *id.* at 8.

¹¹⁸ See MIDDLETON, *supra* note 49, at 314.

¹¹⁹ ARTHUR GARFIELD HAYS, CITY LAWYER: THE AUTOBIOGRAPHY OF A LAW PRACTICE 136–37 (1942). Hays also used those same skills mediating between activists and the establishment as counsel to the ACLU. See *Arthur Garfield Hays Dies at 73; Counsel to Civil Liberties Union*, N.Y. TIMES, Dec. 15, 1954, at 31.

¹²⁰ See Memorandum of the Defendant in Opposition to the Plaintiff's Motion for an Injunction Pendente Lite at 1–2, *Shubert Theatre Corp. v. Richman*, No. 16847 (N.Y. Sup. Ct. filed Apr. 29, 1927) (on file with New York Courts, Hall of Records, Box 008047634); MIDDLETON, *supra* note 49, at 313–14; HAYS, *supra* note 119, at 128–29; Walsh, *supra* note 49, at 97–99; BERNHEIM, *supra* note 81, at 89–90.

public's interest in high quality theatre that could only result from respecting the creative autonomy of writers.

The Dramatists Guild spent a great deal of effort to address the producers' argument that the Guild sought to create an anticompetitive "closed shop."¹²¹ Especially for dramatists, who were hired and worked individually, the biggest barrier to improving the situation of any single playwright was to ensure that no playwright would work for less than the minimum conditions that the Guild agreed upon.¹²² And that, in turn, required a closed shop because then the Guild could impose sanctions on members—including expulsion from membership—of those who agreed to work for less than the minimum conditions that all Guild members voted to insist upon.¹²³ The closed shop was a way of ensuring that workers would not undersell each other in their desperation to get a job.¹²⁴ The closed shop concept required conditions on both employer and employee: employers agreed to only hire members of the union and members of the union agreed to adhere to union standards.¹²⁵ The threat of loss of union membership kept both employers and workers from seeking competitive advantage by underselling.¹²⁶

To restrict who producers could hire, however, invoked the Shuberts' relatively recent fight with the Syndicate. William Brady, representing theatre managers, insisted that the "Right to Contract"¹²⁷ clause of the contract was a closed shop and "un-American."¹²⁸ In railing against an imagined dramatist-created closed market, some of the most powerful producers in the country—who had built empires based on controlling theatrical markets over the previous three decades—ignored the hypocrisy in their position.

The dramatists did not challenge the notion that they were establishing a closed shop; they tried to fortify their argument around its necessity. Guild leaders George Middleton and John Emerson both defended "the principle of the closed shop" and insisted the Guild would not "make any concessions on that question."¹²⁹ Emerson said the dramatists had learned from the Actors'

¹²¹ See Meeting Minutes from the Joint Meeting of the Committees of the Whole of Producers and Authors 5–22 (Mar. 11, 1926) [hereinafter PMA and DG Meeting] (on file with authors). At time of writing, the minutes for the meeting are part of a private collection of the Dramatists Guild of America in the process of being archived.

¹²² MIDDLETON, *supra* note 49, at 313–14; see HAYS, *supra* note 119, at 132.

¹²³ MIDDLETON, *supra* note 68, at 9, 12.

¹²⁴ See, e.g., HAYS, *supra* note 119, at 132 ("[T]he individual dramatist . . . gave away his shirt, if he had one, in order to get a production.")

¹²⁵ PMA and DG Meeting, *supra* note 121, at 9. The Taft-Hartley Act of 1947 prohibited a range of unfair labor practices including closed shops. 29 U.S.C. § 158; see Walsh, *supra* note 49, at 107 n.17. (who describes the closed shop in reference to "the Guild was agreeing to only work with producers who agreed to work exclusively under the Guild contract").

¹²⁶ MIDDLETON, *supra* note 49, at 320–21, 325.

¹²⁷ PMA and DG Meeting, *supra* note 121, at 5.

¹²⁸ *Id.* at 8.

¹²⁹ *Id.* at 9. Owen Davis later said for the dramatists, a closed shop was something "[w]e feel that we will have to get," and "cannot live without it." *Id.* at 517.

Equity agreement, which allowed some exceptions from the rule that one needed to be an Equity member to be hired.¹³⁰

If we allow every person who says, “I am eccentric and different from the ordinary run; I claim my rights and will not join anything,”—if we allow that principle to stand, our organization will not be worth a tinker’s curse, exactly the same as the Actors’ Equity organization was coming to the point of dissolution.¹³¹

When asked whether the requirement of Guild membership would apply to plays produced in London, Emerson responded bluntly, “No; because they have not been wise enough to get a closed shop; we are wiser than they are.”¹³² Anyone could join the Guild, Arthur Richman clarified, but all the best dramatists in America were Guild members.¹³³ Further, the writers pointed out that they agreed with the managers that any manager found to be in bad standing with cause after arbitration for “not living up to the basic agreement” could be blacklisted from working with any author in the United States.¹³⁴

In the end, the Minimum Basic Agreement of 1926 left uncertain whether the industry was operating under a closed shop, and the “Right to Contract” clause of the Basic Agreement was an amalgam of manager and dramatist demands. The managers agreed “to make no contract concerning” a play or musical with an author, playwright, or composer member not in good standing with the Guild without the consent of the Guild.¹³⁵ At the same time, writer members, with the exception of foreign writers or translators or adaptors of foreign works, could not enter into an agreement with a manager not in good standing with the Guild.¹³⁶ The Guild agreed to prevent blacklisting of writers or producers by granting Guild membership to any writer who paid dues and by promising to approve any deal with a producer who agreed to the MBA and offered terms consistent with it.¹³⁷ The dramatists denied that they formed a closed shop, because anyone could join the Guild, but the Shuberts would argue this is exactly what a closed shop was.¹³⁸

¹³⁰ *Id.* at 516–17.

¹³¹ *Id.* at 516.

¹³² *Id.* at 506.

¹³³ See *Final Contract Form Printed for Dramatists-Producers*, VARIETY, Apr. 21, 1926, at 19.

¹³⁴ PMA and DG Meeting, *supra* note 121, at 11.

¹³⁵ Minimum Basic Agreement (1926), *supra* note 58, § 1.

¹³⁶ *Id.*

¹³⁷ *Id.* § 2.

¹³⁸ See MIDDLETON, *supra* note 49, at 307; Memorandum of the Defendant in Opposition, *supra* note 120, at 4–5; Complaint at 10–11, *Select Theatres Corp. v. Rice* (N.Y. Sup. Ct. filed Jan. 1941) (on file with The Shubert Archive, General Correspondence Collection, Basic Agreement 1936–1941, Box 17).

The threats of unionization, coupled with broad support among leading and emerging dramatists,¹³⁹ led to nearly all producers eventually signing the agreement.¹⁴⁰ But when the Guild and most League members signed the Basic Agreement, that did not end the story. The Shuberts refused to sign it and attempted to construct their own contractual agreements with playwrights.¹⁴¹ In the second half of 1926, the Shuberts established what became known as a “dummy system” where a producer signatory to the Minimum Basic Agreement acted as a front for the Shubert Organization.¹⁴² The Dramatists Guild suspended Weiser and Perlman from membership and barred Guild members from submitting plays to Weiser.¹⁴³ Authors began refusing offers from the Shuberts to make adaptations or write for the organization.¹⁴⁴ The Shuberts, enraged by the circumstances, embarked on a new course of action.

E. The Producers Turn to Antitrust to Combat Guild Power: Shubert v. Richman

On April 29, 1927, the Shubert Theatre Corporation filed suit in New York against Arthur Richman, president of the Dramatists Guild, alleging that the dramatists had established an illegal monopoly under New York’s unfair business practices statute.¹⁴⁵ The complaint, drafted by the Shuberts’ long-time

¹³⁹ Key dramatists involved on the contract committee in the weeks leading up to the signing of the Minimum Basic Agreement included: Eugene O’Neill, John Emerson, Eugene Buck, Otto Harbach, George Kelly, Roi Cooper Megrue, Channing Pollock, J. Hartley Manners, Le Roy Clemens, George S. Kaufman, Rachel Crothers, Arthur Richman, and chairman George Middleton. See MIDDLETON, *supra* note 49, at 323.

¹⁴⁰ See *Producers Agree with Playwrights on Five-Year Peace*, N.Y. TIMES, Mar. 28, 1926, at 1; *Producers Bow to Playwrights on All Demands*, N.Y. HERALD TRIB., Mar. 28, 1926, at 1; *Managers Sign Tuesday*, N.Y. TIMES, Apr. 25, 1926, at 22; *Dramatists Guild Terms Ratified by Producers*, N.Y. HERALD TRIB., Apr. 28, 1926; *Producers’ League Signs 5-Year Peace*, N.Y. TIMES, Apr. 28, 1926, at 29; *Peace Effected in Fight of Dramatists and Producers*, VARIETY, Mar. 31, 1926, at 21; *Dramatists Lift Ban on Plays*, BILLBOARD, Apr. 10, 1926, at 9; *Final Contract Form Printed for Dramatists-Producers*, VARIETY, Apr. 21, 1926, at 19. Although even in late March there was still tension between the managers and writers: see *Brady Disputes Victory Claimed for Dramatists*, N.Y. HERALD TRIB., Mar. 29, 1926.

¹⁴¹ See Walsh, *supra* note 49, at 115–16.

¹⁴² See “Dummy” for Shuberts Suspended by Authors’ Guild, VARIETY, Nov. 3, 1926, at 44.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Shubert Theatre Corp. v. Richman*, No. 16847 (N.Y. Sup. Ct. filed Apr. 29, 1927) (on file with New York Courts, Hall of Records, Box 008047634). The suit received wide attention in the press. *Shuberts in Court Against Dramatists*, VARIETY, Apr. 27, 1927, at 43; *Shubert Firm Sues Dramatists’ Guild*, BILLBOARD, Apr. 30, 1927, at 8; *Decision Reserved in Shuberts-Authors Suit*, VARIETY, May 4, 1927, at 42; *Decision Reserved in Fight Between Shuberts and Authors*, BILLBOARD, May 7, 1927, at 6; *Shuberts Start War on Dramatists*,

counsel William Klein, alleged that the membership of the Dramatists Guild included “all the known and established authors, playwrights, writers and composers in the United States,”¹⁴⁶ and the Guild therefore controlled the price and supply of plays and playwriting services and “compelled, coerced or enlisted substantially all American producers and managers other than the plaintiff” into its “unlawful project,” the Minimum Basic Agreement.¹⁴⁷ The MBA and the Guild made it impossible for any author to “sell or dispose” of their work and services or for producers to acquire “dramatic and musical materials and services” except through the conditions as the Guild determined.¹⁴⁸ To make clear that the Guild was not a union of workers agreeing on the terms under which they would work, the Shubert complaint ignored precedent holding that theatre was not an activity of trade and commerce and the complaint analogized playwrights to manufacturers who sold a commodity to the theatre manager or producer as a consumer.¹⁴⁹ The Guild was a “monopoly and combination in restraint of trade” and the MBA was “an unlawful secondary boycott.”¹⁵⁰

The Dramatists Guild was defended by Arthur Hays, whose response to the complaint outlined the history of the Guild, the authors’ fight for legitimacy, and the legal justification for association.¹⁵¹ As to the allegation that the Guild was a monopoly, the Guild emphasized that the Agreement created a “dramatists shop” rather than a “closed shop.”¹⁵² The difference was this:

The “Dramatists’ Shop” is in no sense a “Closed Shop”, [sic] since any one can enter. They are not dealing with a managers’ organization but with individual managers. Since there can be no discrimination, they interfere with no one’s

N.Y. TIMES, Apr. 22, 1927, at 9; *Shuberts Declare Guild Guilty of Play Boycott*, N.Y. HERALD TRIB., Apr. 23, 1927; *Shuberts Seek Stay on Authors’ Guild*, N.Y. TIMES, Apr. 23, 1927, at 15; *Shuberts Bring Suit to Break Dramatists’ Pact with Producers*, N.Y. HERALD TRIB., Apr. 30, 1927, at 13; *Move to Enjoin Dramatists’ Guild*, N.Y. TIMES, Apr. 30, 1927, at 25.

¹⁴⁶ Complaint at 1–3, *Shubert Theatre Corp. v. Richman*, No. 16847 (N.Y. Sup. Ct. filed Apr. 29, 1927) [hereinafter *Shubert Complaint*] (on file with New York Courts, Hall of Records, Box 008047634).

¹⁴⁷ *Id.* at 3.

¹⁴⁸ *Id.* at 4–5.

¹⁴⁹ See *People v. Klaw*, 106 N.Y.S. 341, 354 (N.Y. Ct. Gen. Sess. 1907) (dismissing indictment against Theatrical Syndicate member Marc Klaw for attempting to monopolize the play booking business on the ground that theatre was not an activity of trade or commerce); see also HAYS, *supra* note 119, at 133.

¹⁵⁰ *Shubert Complaint*, *supra* note 146, at 7.

¹⁵¹ Memorandum of the Defendant in Opposition, *supra* note 120, at 1–3. Arthur Richman testified in his deposition that in all of the instances identified in Lee Shubert’s deposition, the Guild acted properly in seeking to ensure fair terms for writers. Deposition of Arthur Richman at 8, *Shubert Theatre Corp. v. Richman*, No. 16847 (N.Y. Sup. Ct. filed Apr. 29, 1927) (on file with New York Courts, Hall of Records, Box 008047634).

¹⁵² Memorandum of the Defendant in Opposition, *supra* note 120, at 4–5.

business except by exercising the legal right of a group of men to deal collectively.¹⁵³

Indeed, agreements about the specific issues of royalty rates, outright sales, and advances were subject to individual negotiation between managers and authors.¹⁵⁴ For Hays and the Guild, the Agreement standardized “the form of the contract” so the author would “know where he stands.”¹⁵⁵ It was an exercise in reducing costs through a standard contract and implementing arbitration procedures.¹⁵⁶ The Guild also offered the deposition of Guild leader George Middleton, who explained that many playwrights had not signed the Basic Agreement, and the Shuberts were free to sign an agreement with these writers on whatever terms they desired.¹⁵⁷

As for the Shuberts’ assertion that the dramatists engaged in illegal anti-competitive behavior by agreeing not to work for managers who refused to accede to the minimum terms of the Basic Agreement, Hays insisted that any manager had the right to sign the agreement, and any dramatist had the right to not work with a manager who was insistent about not wanting to deal with the collective¹⁵⁸:

It would be difficult to conceive of any reason why the principles laid down in labor union cases should not apply to any group of men, whether they directly sell the labor of their hands from day to day, or whether they sell or lease the result of the labor of their brains.¹⁵⁹

In reply, William Klein, for the Shuberts, emphasized an issue that would impede the Dramatists Guild for the next century:

The fundamental vice in the defendant’s contention lies in the attempt to portray the Dramatists’ Guild as a labor union of mere employees banded together in order to secure fair terms of employment from employers. It is, however, nothing of the sort. The dramatists (except in a few instances) are not employees. They write their plays for themselves.¹⁶⁰

¹⁵³ *Id.*

¹⁵⁴ Minimum Basic Agreement (1926), *supra* note 58, § 5.

¹⁵⁵ Memorandum of the Defendant in Opposition, *supra* note 120, at 5.

¹⁵⁶ *Id.*

¹⁵⁷ Deposition of George Middleton at 6, Shubert Theatre Corp. v. Richman, No. 16847 (N.Y. Sup. Ct. filed Apr. 29, 1927) (on file with New York Courts, Hall of Records, Box 008047634).

¹⁵⁸ See HAYS, *supra* note 119, at 132.

¹⁵⁹ Memorandum of the Defendant in Opposition, *supra* note 120, at 19–20.

¹⁶⁰ Plaintiff’s Replying Memorandum at 27, Shubert Theatre Corp. v. Richman, No. 16847 (N.Y. Sup. Ct. filed Apr. 29, 1927) (on file with New York Courts, Hall of Records, Box 008047634).

Antitrust law was a win-win for the Shuberts. The Guild could contract with producers as employees which meant the Shuberts would finally acquire control over the copyright as employers.¹⁶¹ Alternatively, if the dramatists continued to operate as independent contractors, and wanted to associate, they faced antitrust liability.

In presenting themselves as the avatars of openness and the victims of the dramatists' unlawful combination, the Shuberts obscured the hypocrisy of their own position. Having built a business that enabled them to dominate the industry through coordinated ownership and control of a huge chain of theatres, they insisted that the playwrights were the ones who dominated through combination: "Practically all the playwrights in the United States and Canada who have any appreciable commercial value are thus linked together."¹⁶²

In the end, these were matters that the court did not have to resolve. The parties abruptly dismissed the suit¹⁶³ and the Shuberts signed the Minimum Basic Agreement.¹⁶⁴ The Shuberts may have blinked because the dramatists once again threatened to join the American Federation of Labor.¹⁶⁵ It may have been that the cost of litigation was becoming onerous.¹⁶⁶ The Shubert brothers perhaps decided that a temporary retreat would allow them to hire Guild dramatists and perhaps later they would be in a stronger position to have the Guild declared to be an unlawful conspiracy.

F. *The Post-Shubert Settlement*

The 1926 MBA was set to expire after five years, ending on March 1, 1931.¹⁶⁷ In January 1931, the leading commercial producers began negotiating

¹⁶¹ *Id.* at 28.

¹⁶² Plaintiff's Replying Memorandum, *supra* note 160, at 31; *see also* Lee Shubert Deposition at 1, 4, Shubert Theatre Corp. v. Richman, No. 16847 (N.Y. Sup. Ct. filed Apr. 29, 1927) (on file with New York Courts, Hall of Records, Box 008047634).

¹⁶³ Stipulation and Order of Discontinuance, Shubert Theatre Corp. v. Richman, No. 16847 (N.Y. Sup. Ct. filed Apr. 29, 1927) (on file with New York Courts, Hall of Records, Box 008047634) (signed by both parties on July 8, 1927).

¹⁶⁴ *See Shuberts Going Heavy for Dramatic Pieces*, BILLBOARD, July 30, 1927, at 22; *Shubert Dispute with Dramatists Ends Peaceably*, N.Y. HERALD TRIB., May 20, 1927, at 14; *Shuberts at Peace with Dramatists*, N.Y. TIMES, May 20, 1927, at 22; *Shuberts Settle with Dramatists' Guild*, VARIETY, May 25, 1927, at 41.

¹⁶⁵ *See* MIDDLETON, *supra* note 49, at 331; *Dramatists May Join A. F. of L.*, N.Y. HERALD TRIB., May 6, 1927, at 14; *Dramatists Move to Join the A. F. of L.*, N.Y. TIMES, May 6, 1927, at 21; *Dramatists' Guild May Join A. F.-L. as Shubert Suit Result*, VARIETY, May 11, 1927, at 43; *Dramatists' Issues Labor Threat*, BILLBOARD, May 14, 1927, at 6. In the aftermath of the dispute between the Shuberts and Guild, the screen writers were observing the developments in the theatre, contemplating whether to join the A.F.L. *See Veteran Screen Writers May Seek Affiliation with A. F. L.*, VARIETY, June 29, 1927, at 9.

¹⁶⁶ MALCOLM GOLDSTEIN, *GEORGE S. KAUFMAN: HIS LIFE, HIS THEATER* 145 (1979).

¹⁶⁷ Minimum Basic Agreement (1926), *supra* note 58, § 24.

with the Dramatists Guild for a second Minimum Basic Agreement.¹⁶⁸ A schedule was established for the repayment of royalties, along with a provision that authors had to receive box office records on a daily basis,¹⁶⁹ and the Guild was to become a quasi-agent for those playwrights who permitted the Guild to collect royalties on their behalf.¹⁷⁰ The new agreement required that the copyright in dramatic musical compositions, lyrics, and songs be taken out by the author or composer rather than the producer.¹⁷¹ But whether these successes translated into substantive negotiating authority for the ordinary playwright in everyday transactions was less certain. A group of commercial producers was set on challenging the validity of the Basic Agreement and in the process were willing to engage the film industry in their cause.

By 1936, when the parties renegotiated the MBA, the number of theatrical companies and productions in New York and on tour had shrunk.¹⁷² But the film industry was offering astronomical amounts of money to adapt theatrical content.¹⁷³ On the eve of the expiration of the 1931 agreement, the Dramatists Guild announced a plan which, as reported, would “eliminate” the Broadway producers as the mediators between dramatists and the motion picture industry.¹⁷⁴ The dispute between theatrical producers and playwrights, described by the *Herald Tribune* as “one of the bitterest Broadway has seen,”¹⁷⁵ resulted in the League of New York Theatres rejecting a proposal by the dramatists to ratify the new contract.¹⁷⁶ The contract gave 100% ownership of picture rights to authors and only a small percentage of picture proceeds to theatre producers.¹⁷⁷ The dramatists pressed for further autonomy and

¹⁶⁸ In a memorandum of January 20, 1931, the Shubert Organization stressed their deep concerns with the new agreement: *See* Memorandum with Reference to Proposed Agreement between Dramatists Guild and Managers Filed on Behalf of Shubert Theatre Corporation (Jan. 20, 1931) (on file with The Shubert Archive, “Dramatists Guild,” General Correspondence, Box 17, fol. 11).

¹⁶⁹ Minimum Basic Agreement § 4 (1931) (on file with the Theater Guild Archive, Yale Collection of American Literature, Beinecke Rare Book and Manuscript Library, Box 1453, fol. 13737).

¹⁷⁰ *Id.* Further the Dramatist Guild “shall have the right at any time in its discretion to verify and authenticate any and all box office receipts from all sources whatsoever.” *Id.*

¹⁷¹ *Id.* at 6. Section 10 provides: “Any copyrights to the play taken out in any country shall be taken out in the name of the Author.” *Id.* at 14.

¹⁷² JACK POGGI, *THEATER IN AMERICA: THE IMPACT OF ECONOMIC FORCES: 1870–1967*, at 31 (1968); *See B'Way Production Record: 1899–1967*, *VARIETY*, June 7, 1967, at 67 (table shows how the number of new plays, musicals, and revivals on Broadway increased up to late 1920s and then steadily declined up to last entry of 1966–1967).

¹⁷³ *See, e.g., Theaters Fight Authors' Pact on Film Rights*, *N.Y. HERALD TRIB.*, Feb. 27, 1936, at 13.

¹⁷⁴ *See id.*; *Dramatists Bid for Hollywood Stage Subsidy*, *N.Y. HERALD TRIB.*, Feb. 28, 1936, at 12; *Stage War Looms over New Compact*, *N.Y. TIMES*, Feb. 27, 1936, at 22.

¹⁷⁵ *Theaters Fight Authors' Pact on Film Rights*, *supra* note 173, at 13.

¹⁷⁶ *See id.*

¹⁷⁷ *Id.*

clarification on film-right sale procedures,¹⁷⁸ as they had during the negotiations for the 1931 agreement.¹⁷⁹ President of the Guild, Sidney Howard, stressed how previous agreements had been particularly onerous on younger authors.¹⁸⁰ The motion picture companies were continually maneuvering to assure an advantageous negotiation position for film rights by taking a 50% cut.¹⁸¹ When the sale of film rights went to market, the motion picture company could outbid other competitors since it already had a 50% stake in these rights.¹⁸²

The dramatists proposed a sliding scale of proceeds for theatrical managers and the sale of film rights, under which the manager's share would decrease from 42% for rights selling for \$30,000 to 28% for rights selling for \$150,000 or more.¹⁸³ Branding the dramatists' proposal as a disastrous and "grossly inequitable"¹⁸⁴ idea that ignored the contributions of producers in enabling authors to reach "their present position of prominence,"¹⁸⁵ the producers threatened not to purchase any plays under the new terms that restricted the sale of film rights.¹⁸⁶

The Dramatists Guild refused to compromise, and suggested even meeting would be unlikely to gain anything.¹⁸⁷ The Guild stated that they negotiated with producers as individuals, not as a group, although if any producers had "concrete suggestions" about the proposed changes, the Guild would be happy to take these suggestions into consideration.¹⁸⁸ The refusal even to contemplate negotiations was the last straw for the producers, who considered their role as mediators between Broadway and Hollywood to be critical.¹⁸⁹ The League

¹⁷⁸ See *id.*

¹⁷⁹ See *Dramatists Adopt New Basic Terms*, N.Y. TIMES, Feb. 28, 1931, at 22.

¹⁸⁰ See *Theaters Fight Authors' Pact on Film Rights*, *supra* note 173, at 13.

¹⁸¹ See *id.* Sidney Howard of the Guild stated that "picture rights may be sold in advance of play production if the contract for the play and screen right are executed simultaneously with knowledge of play producers, and if a minimum basic royalty contract has been agreed to between the Dramatists' Guild and the Hollywood producer, or producers." *Dramatists Bid for Hollywood Stage Subsidy*, *supra* note 174, at 12.

¹⁸² See *Dramatists Bid for Hollywood State Subsidiary*, *supra* note 174, at 12.

¹⁸³ *Id.* But see *Stage War Looms over New Compact*, *supra* note 174, at 22 where these figures vary: first \$15,000, 50%; next \$15,000, 33 1/3% and anything above is 25%.

¹⁸⁴ See *Dramatists Guild Angers Producers*, N.Y. TIMES, Mar. 13, 1936, at 26.

¹⁸⁵ See *Theaters Fight Authors' Pact on Film Rights*, *supra* note 173, at 13; see also *Stage War Looms over New Compact*, *supra* note 174, at 22.

¹⁸⁶ See *Producers Resent Authors' Demands*, N.Y. TIMES, Mar. 3, 1936, at 25; *Dramatists Guild Firm on Contract*, N.Y. TIMES, Mar. 10, 1936, at 27 (reporting that agents were cautiously critical of the strategy).

¹⁸⁷ See *Dramatists Decline to Meet Managers*, N.Y. TIMES, Mar. 20, 1936, at 28.

¹⁸⁸ *Id.*

¹⁸⁹ See *News of the Stage: The Managers Draw Up a Contract of Their Own and Prepare for a Serious War with the Enemy*, N.Y. TIMES, Mar. 25, 1936, at 25 [hereinafter *News of the Stage*]; *Dramatists' Lock Holds: Theatre Managers' Meeting Fails to Ease Row with Guild*, N.Y. TIMES, Mar. 31, 1936, at 16.

planned to ratify its own new agreement with dramatists, based on a 50/50 split of film rights, and thus end the ten-year reign of the Basic Agreement.¹⁹⁰

The League's threat worked. Dramatists Guild president Sidney Howard conceded that the proposed sliding scale of proceeds was probably "too complicated to operate," agreed to negotiate with the League, and proposed a 60/40 dramatist/producer split.¹⁹¹ But, over the next several weeks, the parties reached a stalemate.¹⁹² The press reported that Howard felt theatrical producers were bent on "smashing the Guild" by implementing their own agreement.¹⁹³ Impresarios who had built empires by controlling the rights to plays were determined to take back control of the mediation process between theatrical productions and lucrative subsidiary streams of exploitation.¹⁹⁴ In a *New York Times* op-ed, producer Brock Pemberton insisted that the Dramatists Guild's proposal would frighten motion picture capital out of the theatre altogether.¹⁹⁵ All foreign rights, he said, had been "taken over" by the dramatists, and movie rights, along with stock and amateur theatre rights, had been rebuilt on a sliding scale, followed by the 60/40 split.¹⁹⁶ But the jewel in the authors' crown, and source of greatest resentment for the producers, was that "the dramatist was to have sole charge of the sale."¹⁹⁷

The Dramatists Guild's Sidney Howard, by contrast, both minimized the significance of the disagreement and attempted to frame the argument around the stultifying influence of the motion picture industry on the theatre, which he claimed was now financing "[b]etween 20 and 30 per cent of [theatrical] productions."¹⁹⁸ "Movie control" of theatre, he explained, "can eventually mean only one thing: the virtual elimination of all plays which do not, on the face of things, offer promising picture material."¹⁹⁹ Therefore, he intoned, dramatists had "come to the realization that sooner or later relations between stage and screen must be set to rights ... and the authors have the only organization with the strength and unity to do it."²⁰⁰ In Howard's telling, the relationship between playwright and producer should be like that between the novelist and publisher:

¹⁹⁰ *Manager-Dramatist War: New Playwright Rulings Seen as End of Broadway Managers*, BILLBOARD, Mar. 7, 1936, at 18; see *News of the Stage*, *supra* note 189, at 25.

¹⁹¹ See *Dramatists Alter Stand on Film Sale*, N.Y. TIMES, Mar. 28, 1936, at 11; see *Producers to Set Play-Buying Terms*, N.Y. TIMES, Apr. 4, 1936, at 11.

¹⁹² See *Playwrights Vote on Contract Today*, N.Y. TIMES, Apr. 8, 1936, at 27; *Dramatists Accept a 60-40 Film Split*, N.Y. TIMES, Apr. 9, 1936, at 20.

¹⁹³ See *Plot to 'Smash' Guild Charged by Dramatists*, N.Y. HERALD TRIB., Apr. 27, 1936, at 10.

¹⁹⁴ SALTER, *supra* note 17, at 225–26.

¹⁹⁵ See Brock Pemberton, *On the Dispute Between Playwrights and Managers*, N.Y. TIMES, Apr. 12, 1936, at X2.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ Sidney Howard, *And Also the Dramatist's View*, N.Y. TIMES, Apr. 12, 1936, at X1.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

the publisher has “no voice in the price he accepts [for a film sale] or in any condition of his sale.”²⁰¹

Several weeks after the 1931 MBA expired, the producers’ League finally released the details of its alternative contract.²⁰² The proposed contract strengthened the producers’ positions on option money standards, British productions, subsidiary theatrical rights, and gave producers authority over the choice of director.²⁰³ With respect to motion-picture rights, the League proposed that for film sales of plays independently financed by a theatrical producer, the split would be “whatever percentage basis the author and manager agree,” with the producer’s share capped at fifty percent.²⁰⁴ For plays that had been financed by a film company, the League proposed three complicated alternatives about the division and timing of payments, all of which featured negotiation between the author, producer, and film studio.²⁰⁵ The system was said to “protect the author against the destruction of his motion-picture rights through the merging of the manager’s and the motion-picture company’s interests,”²⁰⁶ but it gave no role to the Dramatists Guild “since that body has to date refused to recognize any agreement but its own.”²⁰⁷

The producers must have believed there was no realistic chance of implementing their own agreement, because just over two weeks after proposing their alternative contract, they ratified a modified version of the MBA.²⁰⁸ The alternative contract was, however, an effective tool to secure more favorable terms in the 1936 MBA, which represented compromises on both sides.²⁰⁹ On the crucial issue of film rights, the 1936 MBA adopted an approach distinguished between independently produced plays and film-financed plays.²¹⁰ Where the initial agreement assigned complete control over the sale of film rights to the author, the compromised version provided that an independently produced play “shall be negotiated in the open market by an arbiter.”²¹¹ For film-financed productions, a detailed list of instructions would

²⁰¹ *Id.* at X2 (referring to Sinclair Lewis’s publisher as an example).

²⁰² See *Writers’ Guild Pact Rejected by Producers*, N.Y. HERALD TRIB., Apr. 24, 1936, at 16; *Producers Reveal Play Sale Terms*, N.Y. TIMES, Apr. 24, 1936, at 19.

²⁰³ *Producers Reveal Play Sale Terms*, *supra* note 202, at 19.

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.* (quoting a statement given by the managers).

²⁰⁸ Ratification by the League occurred on May 12, 1936. See *Producers Accept Drama Contract*, N.Y. TIMES, May 13, 1936, at 28; see also *Dramatists Sign Five-Year Pact with Theaters*, N.Y. HERALD TRIB., May 13, 1936, at 18.

²⁰⁹ See *Producers Accept Drama Contract*, *supra* note 208, at 28.

²¹⁰ *Id.*

²¹¹ *Id.*

now govern the sale, and arbiters would manage a bidding process that balanced the interests of the author, the producer, and the movie studio.²¹²

G. Using Antitrust Law as Negotiating Leverage

As the 1936 MBA neared its 1941 expiration date, Shubert lawyers William Klein and Adolph Kaufman once again set about the task of resisting the expansion of playwright authority, clause by clause and subsection by subsection.²¹³ They planned to challenge the Guild's power on some of the lesser-known clauses, such as those concerning foreign authors and foreign rights, to eliminate the requirement that producers file a bond with the Guild to remain in good standing, and to expand producer influence over copyrights in stock theatre and film rights.²¹⁴ Anticipating the advent of television, Kaufman also was troubled that producers had no stake in "any new performing rights [that were] discovered."²¹⁵ The Shubert lawyers also found "troublesome" the MBA provision that prohibited managers from making changes to scripts without author consent.²¹⁶ They also continued to resist the notion that playwrights should have discretion over casting and direction decisions, which they considered "strictly a producer's function."²¹⁷

The Shuberts, under the banner of the Select Theatres Corporation and Select Operating Corporation, filed suit in the New York Supreme Court against Elmer Rice, President of the Dramatists Guild, in January 1941.²¹⁸ The

²¹² *Id.*; *Dispute Settled on Play Contract*, N.Y. TIMES, May 26, 1936, at 27 ("For the screen rights to an independently produced play, the bidding will be open—just as it has been in the past—the rights going to the highest. For a play that has been produced with motion-picture company backing, the author and the arbiter will set what they feel is a fair 'asking price.' They will then name the figure to the participating company, giving it forty-eight hours to buy the play, or decline to buy it. After that time, the property goes on the open market, and to the concern offering the most. If no company wishes it, the author and the arbiter may meet again to set a new price, and repeat the process until the story is sold."); see *Theater League to Sign Pact with Dramatists*, N.Y. HERALD TRIB., May 23, 1936, at 9.

²¹³ See generally Memorandum from William Klein on Dramatists Guild Contract to Adolph Kaufman (June 13, 1940) [hereinafter 1940 Memorandum from Klein] (on file with authors); see also Memorandum from Adolph Kaufman on Minimum Basic Agreement to William Klein (Jan. 2, 1941) (on file with author).

²¹⁴ See 1940 Memorandum from Klein, *supra* note 213, at 1–3 (once again asking for a 50/50 split on film).

²¹⁵ *Id.* at 5.

²¹⁶ *Id.* at 2.

²¹⁷ *Id.* at 3.

²¹⁸ Complaint, *Select Theatres Corp. v. Rice* (N.Y. Sup. Ct. filed Jan. 1941) (on file with The Shubert Archive, General Correspondence Collection, Basic Agreement 1936–1941, Box 17) [hereinafter Complaint of Select Theatres Corp.]. The Select corporations were essentially holding companies formed after the liquidation of the Shubert Organization during the Depression. See Anthony Vickery, *Did the Shuberts Save Broadway?: The Corporate Producers*, in THE PALGRAVE HANDBOOK OF MUSICAL THEATRE PRODUCERS 69,

complaint resurrected the same argument the Shuberts had asserted in the litigation after the first MBA in 1926: the Guild and its Basic Agreement was a combination involved in a restraint of trade and was a conspiracy under New York law.²¹⁹ The complaint focused on the allegedly anticompetitive effects of the MBA restrictions on relationships with foreign authors, narrow minimum conditions for royalty payments, and playwright artistic control.²²⁰ Producer William Brady started a similar suit against Elmer Rice at the same time.²²¹

The case never went to trial, and by June 1941, the League of New York Theatres informed its members they had reached a compromise deal with the dramatists.²²² The new Basic Agreement, among other concessions, would not apply to non-resident foreign language authors but would apply to the American adaptor.²²³ The Guild needed to be more responsive to requests involving reductions in royalties, and keeping plays in production for longer periods.²²⁴ The dramatists also agreed to producer participation in motion picture rights after the initial ten-year period,²²⁵ and for a “more equitable arrangement” over producer access to subsidiary rights.²²⁶ “It was a cordial compromise, although, by the end of June 1941, the Shuberts had still refused to sign the new Basic agreement.”²²⁷ William Klein advised JJ Shubert that, “in view of your determination not to recognize the Dramatists’ Guild under any circumstances,” the Shuberts should simply “go along pretty much as you have in the past.”²²⁸

III. THE LABOR-ANTITRUST CONFLICT REVIVED

A. *The Lead-Up to and the Negotiations for the 1946 MBA*

As the Shuberts had found antitrust law to be a powerful weapon to challenge the power of the Dramatists Guild in 1927 and to try to undermine the MBA, so too it was in 1947. Except here the legal story is even more tangled.

79 (Laura MacDonald & William A. Everett eds., 2017). They acquired the Shubert assets—including twenty-eight theatres, performance rights, and scripts—at a bargain basement price with no other bidders. *Id.*

²¹⁹ Complaint of Select Theatres Corp., *supra* note 218, at 3; *see* Shubert Complaint, *supra* note 146, at 3. Contracts or agreements for monopoly or in restraint of trade are illegal and void. N.Y. GEN. BUS. LAW § 340 (McKinney 1999).

²²⁰ Complaint of Select Theatres Corp., *supra* note 218, at 4–7.

²²¹ Complaint, Brady v. Rice (N.Y. Sup. Ct. filed Jan. 1941) (on file with The Shubert Archive, General Correspondence Collection, Basic Agreement 1936–1941, Box 17).

²²² *See* Letter from James Reilly, Exec. Sec’y, The League of N.Y. Theatres, Inc., to the Members of the League of N.Y. Theatres, Inc. (June 10, 1941) (on file with author).

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ SALTER, *supra* note 17, at 174.

²²⁸ Memorandum from William Klein on Dramatists’ Guild to J.J. Shubert (June 25, 1941) (on file with author).

After *Shubert v. Richman*, the law of labor and antitrust changed dramatically. In 1932, Congress enacted the Norris-LaGuardia Act recognizing the right of workers to act collectively and stripping federal courts of the power to issue injunctions in labor disputes,²²⁹ thus eliminating the injunctive remedy of the Sherman Act as applied to labor. Although Norris-LaGuardia left state court remedies untouched, and thus would have no immediate effect on cases like *Shubert v. Richman*, that changed in 1935 when Congress enacted Senator Wagner's National Labor Relations Act, granting a federal right to unionize, strike, and bargain collectively.²³⁰ This appeared to remove the concerted activities of labor entirely from the realm of antitrust.

The huge wave of organizing that both preceded and followed the enactment of Norris-LaGuardia and Wagner Acts extended to workers in creative industries. In 1933, when the movie studios unilaterally imposed a fifty percent pay cut on all Hollywood workers (except the producers, of course, along with unionized craft workers who had collective bargaining agreements that studios couldn't unilaterally rescind), writers, directors, and actors began to abandon the studio-dominated company unionism of the Academy of Motion Picture Arts and Sciences and formed independent Hollywood-based unions as offshoots of Actors Equity (the Screen Actors Guild) and the Authors League and Dramatists Guild (the Screen Writers Guild).²³¹

Some of the founders of the Screen Writers Guild were veterans of the Dramatists Guild and sought to emulate the success of the 1927 MBA.²³² But because the movie studios since the beginning of the movie business in the 1910s had successfully made it a condition of hiring a writer or purchasing a script that the studio would own the copyright in it, for film writers the obstacle to embracing their status as employees was less than it was for dramatists.²³³ The studios had more compelling legal reasons to insist on owning the copyright to scripts, as they worried that if they only licensed the script, the copyright in the film might be vulnerable to challenge.²³⁴ And screen writers saw less reason to insist on ownership of the copyright because a script, most thought, was used only once—to make a single film. Plays, in contrast, could be performed repeatedly over many places and times. For Hollywood writers, who were used to the collaborative work relationships of film production and the loss of creative control it entailed, credit and compensation mattered more than copyright ownership.²³⁵ Moreover, Hollywood writers considered a

²²⁹ Norris-LaGuardia Act, 29 U.S.C. §§ 101–115.

²³⁰ 29 U.S.C. §§ 151–169.

²³¹ FISK, *supra* note 7, at 60; MIRANDA J. BANKS, *THE WRITERS: A HISTORY OF AMERICAN SCREENWRITERS AND THEIR GUILD 2* (2015); NANCY LYNN SCHWARTZ, *THE HOLLYWOOD WRITERS' WARS 12–19* (1982).

²³² FISK, *supra* note 7, at 60.

²³³ *Id.* at 55.

²³⁴ ROBERT H. AFT & CHARLES-EDOUARD RENAULT, *FROM SCRIPT TO SCREEN: THE IMPORTANCE OF COPYRIGHT IN THE DISTRIBUTION OF FILMS 12* (2011).

²³⁵ FISK, *supra* note 7, at 52–55.

contractually enforceable minimum wage as a crucial issue in 1933 because many writers were paid very little and the studios' unilateral pay cut for all non-unionized workers, including writers, directors, actors, clerks, set-builders, and drivers, drove home the significance of contracts.²³⁶ So writers decided, for economic reasons and embracing Popular Front politics of 1936, to embrace the status of employee and unionize.²³⁷

As regards screenwriters, although studios insisted that writers were employees for purposes of the work-for-hire doctrine of copyright, the studios attempted to argue that they were not employees entitled to unionize under the NLRA because they were creative, because they were educated, and because they—or some of them—had autonomy about when, where, and what they wrote.²³⁸ The NLRB rejected the studios' arguments about writers' employee status, emphasizing that studios insisted on controlling *what* writers wrote even if not (always) when and where.²³⁹ Hollywood writers often chafed against the lack of creative control. As screenwriter-turned-ethnographer Leo Rosten wrote in his study of Hollywood in the 1930s, the writer

is handed collaborators whom he dislikes. He is ordered to introduce a tap dancer into a story about an African safari. He is asked to “add a few jokes” to the scene he has fought to keep poignant; or to “speed up the story” at precisely the point where he wanted to develop the characters; or to invent a “smart” but unnatural opening, or a “sock” but phony climax. *He is an employee.*²⁴⁰

Even before Hollywood writers unionized, studios demanded their contracts of hire provide that they would work exclusively for the studio (except where the studio exercised its option to loan the writer to another studio).²⁴¹ The writer promised to “promptly and faithfully comply with all reasonable requirements, directions, requests, rules and regulations made by [the] Producer,” and not to work with “dramatic, radio, theatrical, or motion picture productions” except for the studio.²⁴² Given that individual contracts of hire already provided for such control, the Minimum Basic Agreement between the SWG and the Alliance of Motion Picture Producers defined a writer covered by the MBA as any person hired to “write literary material . . . where the Company has the right by contract to direct the performance of personal services in writing or preparing such

²³⁶ *See id.* at 60.

²³⁷ *Id.* at 213.

²³⁸ Metro-Goldwyn-Mayer Studios, 7 N.L.R.B. 662, 686–87 (1938).

²³⁹ *See supra* text accompanying note 12.

²⁴⁰ LEO C. ROSTEN, HOLLYWOOD: THE MOVIE COLONY, THE MOVIE MAKERS 307 (1941) (emphasis added).

²⁴¹ *See generally, e.g.*, James R. Webb Contract (Mar. 24, 1936) (on file with the Warner Bros. Archive, University of Southern California, Item 12631B).

²⁴² *Id.* at 5.

material or in making revisions, modifications, or changes therein.”²⁴³ That included people who wrote scripts and sold them to studios, as well as those who worked on the lots.²⁴⁴

Whatever the settlement of the employee issue in Hollywood, the situation was different in New York, where dramatists did not write by committee or rewrite each other serially and dramatists had retained their copyrights and the creative control that went with it. *Shubert v. Richman* had left unclear whether they were employees for purposes of the right to unionize because in 1927, nobody had a legal right to unionize.²⁴⁵ When workers began agitating again after World War II and sought to re-negotiate pre-War collective bargaining agreements or to unionize for the first time, employers made another run at restricting their right to do so.

When dramatists had threatened to affiliate with the American Federation of Labor in the 1920s, they thought it meant giving up their copyright—the one entitlement they enjoyed and whence came all their legal power and cultural authority. If they embraced their status as employees and formed a union, dramatists believed they would have to contract with producers as employees, and if they were employees, under the 1909 revision of federal copyright law, copyright in their work vested in the employer.²⁴⁶ Their fear was not irrational, but the conclusion that they could either unionize or hold onto their copyrights was not compelled by the law of that era. It was unclear in the 1940s as it had been in the 1920s, whether the same definition of “employee” applied to copyright law as applied to the NLRA.

The law has never clearly defined who is an employee. As historian Jean-Cristian Vinel shows, the term originated in France, migrated to England, and then to the United States in the nineteenth century, and in all three countries connoted “the idea of freedom and the lack of reciprocal obligations,” as distinct from the unfreedom and subservience suggested by the terms “master” and “servant.”²⁴⁷ In the absence of a consensus meaning of the term employee, it was unclear which persons were to be deemed employees for any given law in 1909 (when the Copyright Act was adopted), or 1914 (when labor organizations were exempted from antitrust) or 1919 (when the Dramatists Guild was founded) or 1935 (when employees gained the right to unionize). There is no legal definition of “employee” in the work-for-hire provision of the 1909 Copyright Act.²⁴⁸ Equally as important, in 1919 there was no law regulating

²⁴³ WRITERS GUILD OF AM., 2017 THEATRICAL AND TELEVISION BASIC AGREEMENT art. I, §§ B(1)(a), C(1)(a) (May 2017), <https://www.wga.org/uploadedfiles/contracts/mba17.pdf> [<https://perma.cc/6VDP-E7HZ>].

²⁴⁴ No distinction is made in the MBA between employees based on where and when they write or the actual exercise of supervision in writing or rewriting. *Id.*

²⁴⁵ 29 U.S.C. §§ 151–169 (the National Labor Relations Act was not passed until 1935).

²⁴⁶ Bodie, *supra* note 5, at 18–19.

²⁴⁷ JEAN-CHRISTIAN VINEL, *THE EMPLOYEE: A POLITICAL HISTORY* 22–25 (2013).

²⁴⁸ See CATHERINE L. FISK, *WORKING KNOWLEDGE: EMPLOYEE INNOVATION AND THE RISE OF CORPORATE INTELLECTUAL PROPERTY, 1800–1930*, at 225–26 (2009).

who could join a union, as there was no statutory protection for unionization.²⁴⁹ For over a century, workers who might be described (today) as contractors rather than employees had unionized. The Clayton Act immunized labor unions from antitrust liability (making no mention of employees in section 6), and even section 20, which prohibited injunctions in disputes between “employers and employees” did not define the terms.²⁵⁰

In 1935, when Congress did confer statutory protection on unionization, it protected the rights of “employees” to unionize but did not define the term; only in 1947 did Congress amend the statute to state that “independent contractors” and “supervisors” were not protected employees.²⁵¹ When screenwriters in Hollywood unionized in the early 1930s, everyone who wrote for the screen was treated as eligible to join the Screen Writers’ Guild, regardless of whether they worked on a studio lot under supervision or worked at home and sold finished scripts.²⁵² Although the studios resisted unionization of writers in 1938 by arguing that they were “artists” who could not belong to a union, the NLRB rejected the contention.²⁵³ It found unimportant that some writers were employed on a “free-lance basis under contracts providing for a week-to-week continuation of the employment or for the completion of a certain piece of work at a specified aggregate compensation,” because “there is no essential difference between a free-lance writer and a writer working under contract for a term in the manner in which they performed their work and that the only difference between the two is one of length and tenure of employment.”²⁵⁴

Business groups and employers launched a legal campaign to exclude certain categories of workers from the protections of the NLRA in the 1940s at the same time that they also argued that collective action by them was not only

²⁴⁹ See text accompanying *supra* note 245.

²⁵⁰ Clayton Antitrust Act, 15 U.S.C. §§ 12–27. In *Negotiating Copyright*, Salter uses derivations of the expression “collective bargaining” (the employer/employee bargaining relationship) to bring attention to the historically contested and fragile nature of categories throughout the history of the industry. SALTER, *supra* note 17, at 14, 149. See, for example, the use of “bargain collectively,” *id.* at 14, and used in the descriptive form “collective bargaining influence.” *Id.* at 149. Derivations of collective bargaining are both familiar yet disrupted as stakeholders attempt to shape the negotiating boundaries beyond the confines of the employer/employee relationship. And throughout the book more generally the expression “collective” is used to describe collective organization of different forms. See, e.g., SALTER, *supra* note 17, at 155, 158, 236–39. For Salter, the derivations are a reminder that collective bargaining is within the realm of possibility for the dramatist and is always potentially present.

²⁵¹ U.S. GOV’T ACCOUNTABILITY OFF., GAO-02-835, COLLECTIVE BARGAINING RIGHTS: INFORMATION ON THE NUMBER OF WORKERS WITH AND WITHOUT BARGAINING RIGHTS 1, 11–12 (2002).

²⁵² Hilary Swett, *The Screen Writers’ Guild: An Early History of the Writers Guild of America*, WRITERS GUILD FOUND., <https://www.wgfoundation.org/screenwritersguild-history> [<https://perma.cc/4Z9B-MEHE>].

²⁵³ *Metro-Goldwyn-Mayer Studios*, 7 N.L.R.B. 662, 692, 701 (1938); FISK, *supra* note 7, at 64.

²⁵⁴ *Metro-Goldwyn-Mayer Studios*, 7 N.L.R.B. at 687; see FISK, *supra* note 7, at 64.

unprotected by labor law but affirmatively prohibited by antitrust law.²⁵⁵ Creative and professional workers in New York, who unionized in significant numbers in the 1940s, were a major target of that campaign.²⁵⁶

Writers were only one of many types of worker who occupied a liminal position, as the Supreme Court said in 1944 in determining whether newspaper vendors were employees eligible to unionize, “between what is clearly an employer-employee relationship and what is clearly one of independent, entrepreneurial dealing.”²⁵⁷ The line varied from state to state and, importantly, even “within a single jurisdiction a person who, for instance, is held to be an ‘independent contractor’ for the purpose of imposing vicarious liability in tort may be an ‘employee’ for the purposes of particular legislation, such as unemployment compensation.”²⁵⁸ The Court emphasized the “broad solution” Congress sought to the problems of the workplace by enacting labor law, “one that would bring industrial peace by substituting, so far as its power could reach, the rights of workers to self-organization and collective bargaining for the industrial strife which prevails where these rights are not effectively established.”²⁵⁹ Accordingly, the Court asserted that commerce could be interrupted by strikes of “some who, for other purposes, are technically ‘independent contractors’” (here the Court cited a case about dairy delivery drivers), and “[i]nequality of bargaining power in controversies over wages, hours and working conditions may as well characterize the status of the one group as of the other.”²⁶⁰

In a footnote, the Court observed that collective bargaining “has for some time been common among such varied types of ‘independent contractors’ as musicians, actors, and writers, and such atypical ‘employees’ as insurance agents, artists, architects and engineers.”²⁶¹ NLRB decisions on whether certain allegedly independent workers were “employees” under the NLRA adopted a

²⁵⁵ See Robert D. Leiter, *Supervisory Employees and the Taft-Hartley Law*, 15 S. ECON. J. 311, 312 (1949) (discussing employer resistance to the categorization of supervisors as employees).

²⁵⁶ See generally SHANNAN CLARK, *THE MAKING OF THE AMERICAN CREATIVE CLASS: NEW YORK’S CULTURE WORKERS AND TWENTIETH-CENTURY CONSUMER CAPITALISM* (2021).

²⁵⁷ *NLRB v. Hearst Publ’ns, Inc.*, 322 U.S. 111, 121 (1944) (upholding NLRB’s determination that vendors were employees).

²⁵⁸ *Id.* at 122.

²⁵⁹ *Id.* at 125.

²⁶⁰ *Id.* at 127. The Court cited *Milk Wagon Drivers’ Union, Local No. 753 v. Lake Valley Farm Products, Inc.*, 311 U.S. 91, 103 (1940), which held that the Norris-LaGuardia Act denied federal courts jurisdiction to enjoin labor disputes even where the complaint alleged a violation of the Sherman Act. The dairy in that case insisted that the drivers were “vendors,” not employees and, therefore, there was no labor dispute because they were not eligible to join the union. *Drivers’ Union*, 311 U.S. at 98–99. There was dispute about those factual premises but, in any event, the Court deemed it irrelevant. *Id.*

²⁶¹ *Hearst*, 322 U.S. at 127 n.26 (citations omitted).

correspondingly broad understanding of the types of workers who met the statutory requirement.²⁶²

In the post-War wave of labor agitation, employers resisted the efforts of some employees to invoke the protections of law in organizing by asserting they were independent contractors.²⁶³ When Congress enacted the Taft-Hartley Act in 1947, it inserted a provision stating that independent contractors were not employees and referred in legislative history to its disapproval of *Hearst Publications*.²⁶⁴ But it did not define the terms, leaving the NLRB and the courts to sort it out.²⁶⁵

Meanwhile, employers launched a second front in their attack on labor agitation: they insisted that collective action by workers who were *not* employees under the newly narrowed NLRA violated antitrust law.²⁶⁶ For example, in 1937, when a wave of sit-down strikes swept manufacturing facilities, a union engaged in a month-long sit-down strike at a hosiery mill in Philadelphia.²⁶⁷ After the workers were forcibly ejected under the authority of a federal court injunction, the employer sued the union for treble damages under the Sherman Act, although the Supreme Court overturned the judgment in favor of the employer.²⁶⁸ But until the Court in a series of decisions made clear that antitrust law could not be invoked against union strikes, boycotts, and organizing efforts, employers were supported in the effort to quell unionism by a vigorous effort of the Antitrust Division of the United States Department of Justice between 1937 and 1941. Under the head of Thurman Arnold, the Antitrust Division adopted an historically unprecedented and never since equaled “faith in antitrust policy as the corrective” for labor disputes.²⁶⁹ Under Arnold’s leadership, DOJ launched a campaign to use antitrust law against what they deemed illegitimate union organizing and bargaining practices (a category that Harvard Law professor Archibald Cox condemned as unduly vague).²⁷⁰

²⁶² See *id.* at 130 n.34. Among the NLRB decisions which the Court in *Hearst* cited with favor were: *KMOX Broadcasting Station*, 10 N.L.R.B. 479, 483, 485 (1938) (finding to be employees all full-time and free-lance radio performers, including announcers, singers, actors, and musicians who were hired only occasionally and paid by the job); *Interstate Granite Corp.*, 11 N.L.R.B. 1046, 1051 (1939) (finding that a designer or draftsman is an employee and may be included in the same unit as granite cutters); and *Kelly Co.*, 34 N.L.R.B. 325, 328–29 (1941) (finding truck owner-operators who pay their own insurance and for whom the employer paid no Social Security taxes to be employees under the NLRA).

²⁶³ See Dubal, *supra* note 12, at 80–88 (discussing the division of workers between employees and independent contractors as a legal development driven in part by employer’s efforts to “evade the burdens of a unionized workforce”).

²⁶⁴ H.R. REP. NO. 80-245, at 18 (1947).

²⁶⁵ 29 U.S.C. § 152.

²⁶⁶ See generally *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940).

²⁶⁷ *Id.* at 481–82.

²⁶⁸ *Id.* at 480–81, 513.

²⁶⁹ Herbert Hovenkamp, *Progressive Antitrust*, 2018 U. ILL. L. REV. 71, 80.

²⁷⁰ Archibald Cox, *Labor and the Antitrust Laws—A Preliminary Analysis*, 104 U. PA. L. REV. 252, 261, 280–81 (1955).

DOJ went after unions engaged in jurisdictional disputes.²⁷¹ It attacked a union for excluding nonunion out-of-state contractors from the local construction market.²⁷² And it targeted a musicians' union for pressuring record companies to employ unionized musicians and for pressuring radio stations to play live rather than recorded music.²⁷³

In the early 1940s, the Supreme Court dismissed all these prosecutions and thus cut short the government's effort to use antitrust law against alleged abuses of union power.²⁷⁴ As the Court explained,

[s]o long as a union acts in its self-interest and does not combine with non-labor groups, the licit and the illicit . . . are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means.²⁷⁵

As Harvard Law professor Archibald Cox summed it up, the cases reflected what he hoped would be "wholehearted acceptance of the proposition that the antitrust laws should not be used to regulate the use of labor's economic weapons."²⁷⁶

But when the Taft-Hartley amendments to the NLRA removed independent contractors from the protection of labor law, employers saw a new opportunity to use antitrust law to quell unionization among them.²⁷⁷ This was a strategy employed both by the Broadway League and by advertising agencies confronted with a major unionization effort among the freelance writers who wrote and produced radio programs under contract with ad agencies on behalf of their clients, the radio program sponsors.²⁷⁸ The ad agencies' effort to use antitrust law to prevent unionization of freelance radio and TV writers ultimately failed because the agencies and producers insisted on the power to require writers to make revisions to scripts.²⁷⁹ To this day, employees under the MBA for television (which is the successor to the radio writers' contract) are those who "write literary material . . . where the Company has the right by contract to direct the performance of personal services in writing or preparing such material

²⁷¹ See *United States v. Hutcheson*, 312 U.S. 219, 220 (1941); *United States v. Bldg. & Constr. Trades Council*, 313 U.S. 539, 539 (1941) (mem.); *United States v. United Brotherhood of Carpenters & Joiners*, 313 U.S. 539, 539 (1941) (mem.).

²⁷² *United States v. Carozzo*, 37 F. Supp. 191, 194–95 (N.D. Ill. 1941), *aff'd sub nom. United States v. Int'l Hod Carriers' & Common Laborers' Dist. Council*, 313 U.S. 539, 539 (1941) (mem.).

²⁷³ *United States v. Am. Fed'n of Musicians*, 47 F. Supp. 304, 305–06 (N.D. Ill. 1942), *aff'd*, 318 U.S. 741 (1943) (mem.).

²⁷⁴ See *Hutcheson*, 312 U.S. at 241–42; Cox, *supra* note 270, at 257, 265.

²⁷⁵ *Hutcheson*, 312 U.S. at 232.

²⁷⁶ Cox, *supra* note 270, at 265.

²⁷⁷ FISK, *supra* note 7, at 220–23.

²⁷⁸ *Id.* at 220–25.

²⁷⁹ *Id.* at 224–25.

or in making revisions, modifications, or changes therein” regardless of whether the person is designated an employee or contractor for purposes of federal or state tax or other laws.²⁸⁰ As the president of the Radio Writers Guild later reflected, the power of ad agencies and producers to require a writer to make revisions—the right of control that galled many radio, film, and TV writers—proved to be key to their ability to bargain collectively.²⁸¹

B. *The Antitrust Attack on the MBA*

As before, the producers turned to antitrust litigation to gain leverage in the negotiations with the Guild. Before the 1941 MBA expired, but anticipating a renegotiation of it in 1946, a case developed that became the vehicle for the producers’ ambitions.

A lawyer named Carl Ring decided to produce (and invested about \$120,000 in) a play about Abraham Lincoln.²⁸² Ring got into a dispute with the playwrights, invoked the arbitration provision of the MBA and terminated the production contract.²⁸³ The producer sued the play’s three authors, their agent, the Dramatists Guild, and the Authors League, alleging that the MBA was void because collective action by the Dramatists Guild violated federal antitrust law.²⁸⁴ The antitrust suit revived the effort that the producers had dropped in *Shubert*. Like *Shubert*, *Ring v. Spina* came to a legally ambiguous conclusion but has effectively kept the Guild under a cloud of possible illegality for the last seventy years.²⁸⁵

In the initial proceedings in the Southern District of New York, reported widely in the press,²⁸⁶ Ring sought injunctive relief and treble damages under the Sherman Act.²⁸⁷ After losing in the district court before Judge Caffey and then Judge Rifkind,²⁸⁸ Ring, representing himself, appealed to the Second Circuit.²⁸⁹ Judge Clark, writing on behalf of the court, reversed the decision of

²⁸⁰ *Id.* at 224 (internal quotation marks omitted); WRITERS GUILD OF AM., *supra* note 243, at 9–10.

²⁸¹ FISK, *supra* note 7, at 224–25; ERIK BARNOUW, MEDIA MARATHON: A TWENTIETH-CENTURY MEMOIR 122 (1996).

²⁸² *Ring v. Spina*, 148 F.2d 647, 649 (2d Cir. 1945).

²⁸³ *Id.*

²⁸⁴ *Id.* at 649–50. The defendants were the authors of *Stovepipe Hat* (Harold Spina, Edward Heyman, and Walter Hannan), the Dramatists Guild, and the agent, Edmond Pauker.

²⁸⁵ See generally *id.*; *Ring v. Spina*, 166 F.2d 546 (2d Cir. 1948), *cert. denied*, 335 U.S. 813 (1948); *Ring v. Spina*, 84 F. Supp. 403 (S.D.N.Y. 1949), *cert. denied*, 341 U.S. 935 (1951); *Ring v. Authors’ League of Am., Inc.*, 186 F.2d 637 (2d Cir. 1951).

²⁸⁶ See *Producer Asks 434G in ‘Stovepipe’ Fiasco*, VARIETY, June 21, 1944, at 48; *‘Stovepipe’ Hearing Off Until July 18*, VARIETY, June 28, 1944, at 53; *‘Stovepipe Hat’ Producer Sues 3 of Show’s Authors: Ring Asks \$424,300, Four Times Amount He Invested*, N.Y. TIMES, June 17, 1944, at 9A.

²⁸⁷ Transcript of Record at 102, *Ring v. Spina*, 148 F.2d 647 (2d Cir. 1945).

²⁸⁸ *Id.* at 106.

²⁸⁹ *Ring*, 148 F.2d at 648.

the District Court, and remanded the matter for trial.²⁹⁰ The court expressed considerable doubt over the legality of the Minimum Basic Agreement, but did not definitively decide the issue because the case was on appeal from the denial of a temporary injunction.²⁹¹ First, the court stated that it was “now well settled that a contract covering a large part of an industry will be void and illegal under the Sherman Act.”²⁹² Identifying how the Basic Agreement prohibited different actions over subsidiary streams of revenue, the court held that there was a *prima facie* case that the Agreement was a restraint of trade,²⁹³ and a *prima facie* case of economic coercion.²⁹⁴ The Agreement “indicate[d] an attempt to control the industry,”²⁹⁵ and “a price-fixing combination is not saved by the high purpose for which it is conceived.”²⁹⁶

The Second Circuit rejected the Guild’s argument that it was a labor organization exempt from antitrust liability.²⁹⁷ The court found that the antitrust “exception will not apply unless an employer-employee relationship is ‘the matrix of the controversy.’”²⁹⁸ Reasoning that the relationship between writer and producer is relatively short, the writer is not paid salary or a wage but instead license fees for the play, and the producer does not control the writer’s working conditions or the creation of the play, the court held “the exception therefore inapplicable.”²⁹⁹

Shubert lawyers Klein and Weinberger wrote to J.J. Shubert declaring with apparent glee that “I am sure you will read this [the judgment] with interest.”³⁰⁰ The decision provided another opportunity to reject the Basic Agreement structure or at least make it difficult for the Guild to expand its authority in the ongoing negotiating process.

Although Ring won on appeal, the ruling was narrow and shed no further legal light on whether the Minimum Basic Agreement was unlawful.³⁰¹ The opinion was a preliminary ruling,³⁰² with “its main effect [being] to suspend arbitration proceedings pending adjudication of the validity of the contracts.”³⁰³ Guild Lawyer Sidney Fleisher wrote to George Middleton that the decision was “contrary to the modern trend of thought in monopoly suits” and that Sidney

²⁹⁰ *Id.* at 649, 654.

²⁹¹ *Id.* at 650, 654.

²⁹² *Id.* at 650.

²⁹³ *Id.*

²⁹⁴ *Id.* at 652.

²⁹⁵ *Ring*, 148 F.2d at 650.

²⁹⁶ *Id.* at 651.

²⁹⁷ *Id.* at 651–52.

²⁹⁸ *Id.* at 651 (quoting *Columbia River Packers Ass’n v. Hinton*, 315 U.S. 143, 147 (1942)).

²⁹⁹ *Id.* at 652.

³⁰⁰ Letter from Klein & Weinberger to J.J. Shubert (Mar. 22, 1945) (on file with author).

³⁰¹ *Ring*, 148 F.2d at 653–54.

³⁰² *Id.* at 654.

³⁰³ *Id.*

was thus “confident of ultimate success.”³⁰⁴ The resolution of the substantive issue, however, was delayed because on remand the defendants again moved to dismiss the case.³⁰⁵ Ring again appealed and won in the Second Circuit,³⁰⁶ and the Supreme Court denied review.³⁰⁷ The case was sent back down, and finally went to trial in 1948.³⁰⁸

In the years between the Second Circuit’s first decision of 1945 and the trial proceedings in late 1948 and early 1949, the Dramatists Guild and some producers negotiated and signed a new Minimum Basic Agreement.³⁰⁹ As with all previous iterations, the producers resisted the Agreement for months.³¹⁰ The new agreement eventually came into force in August 1946 but did not include either J.J. or Lee as signatories.³¹¹ George Middleton described the 1946 Minimum Basic Agreement as “radically” different from its predecessors, and most of the proposals were adopted without amendment, including consent required for changes to the content in revues.³¹² The authors now appeared to have expansive control over their work across different genres.

C. *The Post-Contract Litigation: Ring v. Spina*

Although the parties agreed to a new MBA in 1946, the *Ring v. Spina* litigation dragged on for another five years.³¹³ In 1949, the jury found that the Guild was not a labor organization, not exempt under antitrust law, and that the defendants had violated antitrust law, but it also found that neither the Guild, nor Spina, nor coauthor Heyman caused Ring any compensable injury.³¹⁴ The

³⁰⁴ See Letter from Sidney R. Fleisher to George Middleton (Mar. 23, 1945) (on file with the George Middleton Papers, Box 25, Library of Congress, Manuscript Division).

³⁰⁵ *Ring v. Spina*, 166 F.2d 546, 547 (2d Cir. 1948).

³⁰⁶ See *id.* at 550.

³⁰⁷ *Spina v. Ring*, 335 U.S. 813, 813 (1948); see also *Supreme Court Refuses to Act in Suit on Play*, VARIETY, Oct. 13, 1948, at 49.

³⁰⁸ See *Ring v. Spina*, 84 F. Supp. 403, 403 (S.D.N.Y. 1949).

³⁰⁹ *Theatre Pact Extended*, N.Y. TIMES, June 20, 1946, at 18.

³¹⁰ The *New York Times* reported that the producers and managers had “taken exception” to about forty-nine changes proposed by the dramatists. *Id.* The stakeholders reached a preliminary agreement in March 1946, subject to review over the next six months. See *id.*; Letter from Richard Rodgers to Producing Managers Signatory to the Minimum Basic Agreement (Feb. 15, 1946) (on file with The Shubert Archive, Dramatists Guild Collection, Re Basic Agreement: 19421955, Box 17).

³¹¹ See Letter from Klein & Weinberger to James A. Stabile (Aug. 21, 1946) (on file with The Shubert Archive, Dramatists Guild Collection, Re Basic Agreement: 1942–1955, Box 17) (executed by John Shubert); Transcript at 626, *Ring v. Spina*, 84 F. Supp. 403 (S.D.N.Y. 1949) (on file with the National Archives, New York City).

³¹² See MIDDLETON, *supra* note 68, at 15–16.

³¹³ See *Ring v. Spina*, 341 U.S. 935, 935 (1951).

³¹⁴ *Ring*, 84 F. Supp. at 405–06, 408. This was a result that the defendants perhaps always contemplated as possible. Alexander Lindey, who represented the Guild with Greenbaum, wrote to George Middleton: “I have practiced law too long and have been fooled

court thus dismissed the complaint on the issue of treble damages,³¹⁵ which left Judge Rifkind to decide the one remaining issue: whether to grant injunctive relief against arbitration as provided by the MBA and whether the Guild should be enjoined against efforts to enforce the MBA.³¹⁶ The grounds appeared to be limited, as Judge Rifkind found the production contracts were illegal, and Ring had no contractual rights in *Stovepipe Hat*.³¹⁷ But it did “not follow that the plaintiff is entitled to no relief.”³¹⁸ Judge Rifkind held that Ring had a “right to freedom from illegal restraint,” which entitled him to an equitable remedy of an injunction prohibiting the defendants from conspiring to interfere “with the plaintiff’s acquisition of any and all rights in plays, including *Stovepipe Hat*,” nor could the defendants grant him terms “less favorable than those offered any other producer,”³¹⁹ nor could he be compelled to sign the Minimum Basic Agreement as a condition of entering into agreements with Guild members.³²⁰ Rifkind enjoined the arbitration.³²¹

Both Ring and the Dramatists Guild and Authors League appealed.³²² Ring, now in a considerable financial hole, challenged the verdict’s failure to award damages, and the defendants challenged the injunction.³²³ The Guild appointed Arthur Garfield Hays to conduct the appeal.³²⁴ Hays, therefore, had come full circle; having been intimately involved in the formative years of the Guild, and its earliest antitrust disputes with the Shuberts, he was back seeking to protect it from destruction.³²⁵

too often by juries to venture a prediction as to the outcome.” Letter from Alexander Lindey to George Middleton (Dec. 18, 1948) (on file with the George Middleton Papers, Box 25, Library of Congress, Manuscript Division). See SALTER, *supra* note 17, at 188–202 for a detailed study of the trial proceedings which includes testimony by Carl Ring, the authors of *Stovepipe Hat*, and Lee Shubert.

³¹⁵ Transcript of Record at 105–06, *Ring v. Spina*, 84 F. Supp. 403 (S.D.N.Y. 1949).

³¹⁶ *Ring*, 84 F. Supp. at 406.

³¹⁷ *Id.* at 406–07.

³¹⁸ *Id.* at 407.

³¹⁹ *Id.*

³²⁰ *Id.*

³²¹ *Id.* For counsel for the Guild, it was particularly significant whether the court would order that “the Guild be enjoined from enforcing the [Minimum Basic Agreement].” See Letter from Alexander Lindey to George Middleton (Jan. 12, 1949) (on file with the George Middleton Papers, Box 25, Library of Congress, Manuscript Division).

³²² See *Ring v. Spina*, 341 U.S. 935, 935 (1951).

³²³ Letter from Herbert Kubly to Dramatists Guild Members (Aug. 17, 1949) (on file with the George Middleton Papers, Box 25, Library of Congress, Manuscript Division).

³²⁴ Letter from Luise M. Sillcox to George Middleton (Oct. 20, 1949) (on file with the George Middleton Papers, Box 25, Library of Congress, Manuscript Division).

³²⁵ “Hays was counsel in a 1927 dispute with Shuberts that was discontinued before trial.” SALTER, *supra* note 17, at 203 n.128; see Shubert Complaint, *supra* note 146, at 3. See generally Reply Brief for Defendant, Shubert Theatre Corp. v. Richman, No. 16847 (N.Y. Sup. Ct. filed Apr. 29, 1927) (on file with New York Courts, Hall of Records, Box 008047634).

The Second Circuit, in an opinion by Chief Judge Learned Hand, affirmed the verdict on damage, which meant Ring recovered nothing.³²⁶ The court accepted the District Court's determination that Ring had no right or title in *Stovepipe Hat*.³²⁷ Whatever interest obtained by Ring through contract "was unlawful because it was a part of the unlawful conspiracy."³²⁸ Ring's repudiation of parts of the contract left him with no interest in the play.³²⁹ The issue on which the Second Circuit diverged from the lower court was whether Ring should have the opportunity "to bid for the right to 'produce'" the work in the future on the same terms as other producers.³³⁰ Here the court proceeded with caution to avoid casting more doubt than necessary on the Guild and the MBA.³³¹

The court stated that to provide Ring the opportunity to bid for the right to produce, it would have to decide that the "'Agreement' in fact was a conspiracy forbidden by the Anti-Trust Acts."³³² Although it could make a ruling on this crucial issue, it was "equally true" it "need do so only so far as" it was "necessary to a disposition of the suit."³³³ The court found it unnecessary because "there must be some tangible probability that the wrong will be repeated to justify an injunction . . . and the plaintiff at bar did not prove anything more than the most tenebrous probability."³³⁴ Given Ring's unfortunate experience, there was no reason to suppose he would produce again.³³⁵ On the other hand, the court explained, the Authors League "vigorously protests its innocence and its beneficence; it is conscious of no wrongdoing, and asserts that its existence is essential to the protection of authors and composers."³³⁶ The Guild's worthy aims would "not protect it" if it was a "combination in restraint of trade," "but they are relevant in deciding whether we should decide issues in which the plaintiff has only the most shadowy interests."³³⁷ Thus, the Second Circuit lifted the injunction and avoided deciding in 1949 the same issue it avoided in 1945: whether the Guild and the MBA violated antitrust law.³³⁸

D. *The Post-Ring Settlement*

The jury's verdict that the defendants had violated antitrust laws was the only direct pronouncement on the antitrust issue in any of the proceedings—

³²⁶ Ring v. Authors' League of Am., Inc., 186 F.2d 637, 642 (2d Cir. 1951).

³²⁷ *Id.* at 642.

³²⁸ *Id.* at 641.

³²⁹ *Id.* at 642.

³³⁰ *Id.*

³³¹ See SALTER, *supra* note 17, at 205.

³³² Ring, 186 F.2d at 642.

³³³ *Id.*

³³⁴ *Id.* at 643.

³³⁵ *Id.*

³³⁶ *Id.*

³³⁷ *Id.*

³³⁸ Ring, 186 F.2d at 643; *see also* Ring v. Spina, 148 F.2d 647, 654 (2d Cir. 1945).

trial or appellate level—and it was vacated because of the absence of damages.³³⁹ There had been some preliminary judicial pronouncements, and there were some illuminating but unpublished internal memoranda between Chief Judge Learned Hand and other Second Circuit judges that suggested that the Guild and its Basic Agreement had violated antitrust law.³⁴⁰ But they were not holdings, and some were not known to the public at the time.³⁴¹

The position of the Guild and League did not substantially alter in the seven years of the *Ring* litigation (1944–1951).³⁴² At the end, the writers gestured towards a sense of hope, remarking that dissolution of the injunctions “dispels the stigma of illegality cast upon the Minimum Basic Agreement.”³⁴³ The decision opened the door to renegotiate the Basic Agreement.³⁴⁴ On the other side, the producers’ ever-present bargaining tool had survived: the resolution of the litigation allowed producers to challenge the legality of the Guild and the MBA whenever they desired.³⁴⁵

IV. THE NEW COPYRIGHT REGIME AND THE OLD ANTITRUST DILEMMA FOR THE DRAMATISTS GUILD

A. *Rising Costs and the Stage Directors Unionize*

By the mid-1950s commercial productions had become reliant on external “angel” funders, as production costs were by some estimates 500% higher than on similar plays produced between twenty years before.³⁴⁶ Higher production

³³⁹ See *Ring*, 186 F.2d at 639, 642.

³⁴⁰ Memorandum from Learned Hand, C.J., 2d Cir., to Harrie Chase, J., 2d Cir., and Thomas Swan, J., 2d Cir. (Dec. 14, 1950) (on file with Harvard Law School Library); Memorandum from Harrie Chase, J., 2d Cir., to Learned Hand, C.J., 2d Cir., and Thomas Swan, J., 2d Cir. (Dec. 15, 1950) (on file with Harvard Law School Library); Memorandum from Thomas Swan, J., 2d Cir., to Harrie Chase, J., 2d Cir., and Learned Hand, C.J., 2d Cir. (Dec. 17, 1950) (on file with Harvard Law School Library); see also SALTER, *supra* note 17, at 205.

³⁴¹ See SALTER, *supra* note 17, at 203.

³⁴² *Id.* at 207.

³⁴³ *Ring Decision Favorable*, AUTHORS LEAGUE NEWS, Jan. 1951, at 1.

³⁴⁴ SALTER, *supra* note 17, at 207.

³⁴⁵ See *id.* at 208. Ring sought certiorari in April 1951. *Id. Variety* reported that Ring claimed the Minimum Basic Agreement had crippled the success of the production and prevented the novice producer from changing the work. *Carl Ring Takes 7-Yr.-Old Case vs. Dramatists Guild ‘Monopoly’ to High Court*, VARIETY, Apr. 11, 1951, at 58. However, the Supreme Court denied Ring’s certiorari petition. SALTER, *supra* note 17, at 208.

³⁴⁶ MIDDLETON, *supra* note 68, at 16. In 1955, the Supreme Court ruled on whether antitrust law necessitated breaking up the control that the Shuberts had over houses across the country. See *United States v. Shubert*, 348 U.S. 222, 223–24 (1955). Producers had to book their shows exclusively in Shubert houses contrary to the expansive rhetorical “open door policy” of the organization in the first decades of the twentieth century during their battle with the Syndicate. See *id.* at 225; SALTER, *supra* note 17, at 211 n.2. As a result of

costs meant increased risk for investors and delayed returns.³⁴⁷ In 1955, therefore, playwrights made their first of many compromises over royalty structures so that investors had a greater chance of recouping their investment.³⁴⁸ The new Agreement included terms that guaranteed authors upfront payments rather than royalties and in return investors and producers received a greater interest in subsidiary streams of revenue.³⁴⁹ In the decade that followed, including in the new iteration of the MBA in 1961, further concessions aimed to reduce the risk for investors, such as reducing author royalties by half for a certain number of weeks or until the production recouped its initial investment.³⁵⁰ In return, playwrights were supposed to receive higher advances or renegotiated terms on subsidiary rights.³⁵¹

In 1959, the Society of Stage Directors and Choreographers (SSDC) had formed as a union representing directors and choreographers nationwide, and in 1962 the SSDC signed a Basic Agreement with the Broadway League.³⁵² But the issue of whether the SSDC was able to organize collectively as a union was not settled. In 1966, the SSDC commenced arbitration proceedings against producer Jay Julien for refusing to pay royalties for a tour of the production *Hostile Witness*.³⁵³ The SSDC was successful in the proceedings, and when Julien refused to pay the royalties, the Union placed him on its Unfair List, which is the way unions signal that people should refuse to deal with employers who refuse to adhere to collectively negotiated terms.³⁵⁴ Although Julien eventually paid the royalty, he also filed an antitrust suit against the SSDC.³⁵⁵ At the center of the dispute in *Julien v. Society of Stage Directors and Choreographers* was the familiar antitrust allegation, but this time the antitrust claim was directed at the SSDC and its Basic Agreement with the League.³⁵⁶

the litigation, Select Theatres stopped its booking services, and the Shuberts had to sell off about twelve theatres in six cities and the UBO (the booking office) also ceased operations. SALTER, *supra* note 17, at 211 n.2.

³⁴⁷ See MIDDLETON, *supra* note 68, at 16.

³⁴⁸ *Id.* at 16.

³⁴⁹ *Id.* at 17–18.

³⁵⁰ *Id.* at 17.

³⁵¹ *Id.* at 17–18.

³⁵² Louis Calta, *Directors Form New Stage Group: Unite with Choreographers on Working Conditions—Emlyn Williams Delayed*, N.Y. TIMES, Feb. 11, 1959, at 48; Sam Zolotow, *Directors' Union Enters Broadway*, N.Y. TIMES, Feb. 21, 1962, at 55; *Directors' Union Wins Broadway Contract*, N.Y. HERALD TRIB., Feb. 21, 1962, at 22.

³⁵³ Elizabeth Miller, *Finding Their Light: A Timeline of the Society of Stage Directors & Choreographers and the Major Battles in Our Union's History*, 21 J. STAGE DIRS. & CHOREOGRAPHERS 6, 10 (2009).

³⁵⁴ *Id.*; J. James Miller, *Legal and Economic History of the Secondary Boycott*, 12 LAB. L.J. 751, 752 (1961) (describing the origin and judicial treatment of the labor unions' "we don't patronize" list in attaining union goals).

³⁵⁵ See *Julien v. Soc'y of Stage Dirs. & Choreographers, Inc.*, No. 68 Civ. 5120, 1975 WL 957, at *1 (S.D.N.Y. Oct. 14, 1975).

³⁵⁶ *Id.*

Julien argued, relying on *Ring*, that stage directors are independent contractors and the SSDC therefore did not fall within the labor exemption to antitrust.³⁵⁷ After protracted proceedings—the case was not resolved until 1975, nearly a decade after it was filed—the district judge ruled that “directors are employees of producers and not independent contractors” and thus fell within the labor exemption.³⁵⁸ Distinguishing *Ring* and the later case of *Bernstein*³⁵⁹—which found that lyricists were independent contractors and thus not exempt from antitrust—Judge Stewart found a “sharp contrast” between writers and lyricists, on the one hand, and directors on the other.³⁶⁰ As an SSDC leader observed many years later, *Julien* “was a tremendous victory for the Union and set the precedent on which SSDC continues to base its existence.”³⁶¹

B. The 1976 Copyright Act and Emerging Claims of Non-Writer Collaborators

In 1976, Congress significantly revised copyright law, which presented an opportunity for theatrical stakeholders to reshape their relationship. After 1976, copyright protection became automatic for authors who “fixed” their work “in any tangible medium of expression.”³⁶² The 1976 Act extended the term of copyright to “the life of the author and fifty years after the author’s death,”³⁶³ and also expanded the scope of copyright to allow the author to license or assign any part of the exclusive right that they owned.³⁶⁴ This system appeared to prioritize the playwright as the theatrical author because it was playwrights who reduced their work to a tangible medium of expression. But it also created opportunities for non-writer collaborators to assert their rights. Artists other than playwrights advanced their claims to authorship under the 1976 Act because many expressed their work in a tangible form.³⁶⁵

Stage directors, whose union had won a first collective bargaining agreement in 1962 in return for not pursuing copyright protections,³⁶⁶ now could have it all: the security of labor union status, exemption from antitrust, and new avenues to explore what rights they may possess under an evolving federal

³⁵⁷ *Id.*

³⁵⁸ *Id.*

³⁵⁹ See generally *Bernstein v. Universal Pictures, Inc.*, 517 F.2d 976 (2d Cir. 1975).

³⁶⁰ *Julien*, 1975 WL 957, at *3.

³⁶¹ Miller, *supra* note 353, at 10.

³⁶² Copyright Act of 1976, Pub. L. No. 94-553, § 102(a), 90 Stat. 2541, 2544–45 (codified at 17 U.S.C. § 102).

³⁶³ *Id.* § 302(a).

³⁶⁴ *Id.* § 201(d)(2). Regarding the divisibility of copyright into subsidiary streams of revenue and the exclusivity arrangements that have been controlled by mediating publishers, see Shane D. Valenzi, *A Rollicking Band of Pirates: Licensing the Exclusive Right of Public Performance in the Theatre Industry*, 14 VAND. J. ENT. & TECH. L. 759, 775–76 (2012).

³⁶⁵ See, e.g., *Original Appalachian Artworks, Inc. v. Toy Loft, Inc.*, 684 F.2d 821, 824 (11th Cir. 1982) (concerning copyright infringement of soft-sculpture dolls).

³⁶⁶ Zolotow, *supra* note 352, at 55.

copyright framework.³⁶⁷ In the 1990s and 2000s, high profile cases began to appear in the courts involving copyright claims of a range of theatre collaborators, including directors,³⁶⁸ designers and choreographers,³⁶⁹ and dramaturgs.³⁷⁰ Most settled with non-writer collaborators negotiating a greater stake in the future of the works.³⁷¹ And they could do this under the framework of unionism, with enforceable collective bargaining agreements, rather than as trade associations whose collective contracts, like the Dramatists Guild's, were vulnerable to antitrust attacks.³⁷²

Meanwhile, the commercial theatre industry continued to develop new models for pooling royalties and distributing subsidiary revenues to placate external investors.³⁷³ Thus, the concerns that led to the Dramatists Guild's 1955 Basic Agreement deepened in the late 1970s and early 1980s.³⁷⁴ The result was a collision between antitrust and larger organizational issues over who was entitled to a stake in the life and afterlife of original productions.³⁷⁵

Royalty percentages for plays and musicals enshrined in the first Basic Agreement were calculated on gross profits.³⁷⁶ Royalties, therefore, represented another expense and indeed, could be a highly variable one based on box office takings.³⁷⁷ And by the early 1980s, there were multiple other parties beyond

³⁶⁷ See Jessica Litman, *Copyright in the Stage Direction of a Broadway Musical*, 7 COLUM. J. ART & L. 309, 334 (1982); Richard C. Reuben, *New Clout for Stage Directors: Copyright Protection Available for Creative Work*, A.B.A. J., Oct. 1995, at 32.

³⁶⁸ See *Mantello v. Hall*, 947 F. Supp. 92, 95–96 (S.D.N.Y. 1996); Complaint, *Gutierrez v. Desantis*, No. 95-1949 (S.D.N.Y. filed Mar. 22, 1995); *Einhorn v. Mergatroyd Prods.*, 426 F. Supp. 2d 189, 191, 193 (S.D.N.Y. 2006); see also Jesse Green, *Exit, Pursued by a Lawyer*, N.Y. TIMES (Jan. 29, 2006), <https://www.nytimes.com/2006/01/29/theater/newsandfeatures/exit-pursued-by-a-lawyer.html> [<https://perma.cc/N5LC-52FX>]; Jennifer J. Maxwell, Comment, *Making a Federal Case for Copyrighting Stage Directions: Einhorn v. Mergatroyd Productions*, 7 J. MARSHALL REV. INTELL. PROP. L. 393, 394–95 (2008).

³⁶⁹ See generally Complaint for Declaratory Judgment at 12, *Mullen v. Soc'y of Stage Dirs. & Choreographers*, 2007 WL 2892654 (N.D. Ill. 2006) (No. 06 Civ. 6818) (regarding the play *Urinetown*); Complaint for Declaratory Relief at 6–7, *Carousel Dinner Theatre, LLC v. Carrafa*, No. 06 CV 2825 (N.D. Ohio filed Nov. 22, 2006).

³⁷⁰ See *Thomson v. Larson*, 147 F.3d 195, 197 (2d Cir. 1998) (involving a non-profit theatre that workshopped new plays where, as outlined, a dramaturg developed a play with a playwright: that musical being the extraordinarily successful *Rent*).

³⁷¹ See, e.g., Green, *supra* note 368.

³⁷² For example, director Edward Einhorn's 2006 suit for breach of contract and copyright infringement survived a motion to dismiss but the directors' rights issue was ultimately never tested. See *Mergatroyd Prods.*, 426 F. Supp. 2d at 194, 196; see also Green, *supra* note 368; Maxwell, *supra* note 368, at 394–95.

³⁷³ See BREGGIO, *supra* note 57, at 84–88.

³⁷⁴ See *id.* at 82–83.

³⁷⁵ See *id.* at 114–15.

³⁷⁶ See Joel Bassin, *The Minimum Basic Agreement of the Dramatists' Guild: A History of Inadequate Protection*, 25 J. ARTS MGMT. L. & SOC'Y 157, 168 (1995); BREGGIO, *supra* note 57, at 38.

³⁷⁷ SALTER, *supra* note 17, at 215.

writers who had a royalty stake in the production.³⁷⁸ Investors, for example, had always received payment out of profits, so the bigger the royalty expense, the smaller the profit, and the longer it would take investors to recoup their investment or make a profit.³⁷⁹ Productions such as the *Woman of the Year*, starring Lauren Bacall, brought the investor issues to a head when it was revealed that investors probably would not receive a return on their investment in the smash hit for two years.³⁸⁰ A considerable percentage of the gross in the show was being divided between the creators, including Bacall, which in turn delayed payment to the investors.³⁸¹

The *Woman of the Year* narrative was a compelling argument that Broadway could not survive if investors, the critical source of capitalization on Broadway, had little incentive to invest. Stakeholders in that production renegotiated their arrangement to pay royalties out of a capped percentage pool taken from operating profits rather than gross.³⁸²

As the number of claimants to royalties increased, the royalty rates and variety of theatrical stakeholders was constantly reshaped in each production.³⁸³ Thus, producers wanted to be able to also negotiate agreements on a case by case basis and inevitably the playwrights resisted, asserting that their Basic Agreement with the League prevented this kind of case-by-case negotiation of writer compensation.³⁸⁴ The producers, therefore, returned to what was becoming an incredibly useful way to establish a more flexible negotiating framework: threatening the Guild that it operated as an illegal monopoly.³⁸⁵

C. The Pre-Contract Disputing and Settlement

The antitrust litigation involving independent producer and president of the New York League of Theatres Richard Barr against the Dramatists Guild and three of its member officers in 1982 became a forum for all parties to articulate

³⁷⁸ See Sandra Salmans, *Why Investors in Broadway Hits Are Often Losers*, N.Y. TIMES (Nov. 22, 1981), <https://www.nytimes.com/1981/11/22/theater/why-investors-in-broadway-hits-are-often-losers.html> [<https://perma.cc/8ZUE-UH DU>].

³⁷⁹ See *id.*

³⁸⁰ BREGGIO, *supra* note 57, at 82–83; Salmans, *supra* note 378.

³⁸¹ Salmans, *supra* note 378.

³⁸² SALTER, *supra* note 17, at 215.

³⁸³ *Id.* at 219.

³⁸⁴ See *id.* at 179, 216.

³⁸⁵ In the period where there was a significant gap between the renegotiation of the Basic Agreement (1961–1985), producers continued to gesture towards the illegality of Basic Agreement framework under antitrust law. See *id.* at 216–19. See, for example, Hobe Morrison, *Authors Win ‘Pippin’ Dispute: Consider Anti-Trust vs. Guild*, VARIETY, Nov. 14, 1973, at 63, for comments of the League of New York Theatres and Producers in relation to a 1973 dispute between composer-lyricist Stephen Schwartz and producer Stuart Ostrow over Australian-New Zealand rights with respect to the production of *Pippin*. The article concludes: “The legal position of the playwrights-composers organization has actually been uncertain for about 30 years, or since the so-called [sic] ‘Ring Case.’” *Id.* at 66.

their frustrations.³⁸⁶ Royalty pools, tensions over minimum standards, encroachments on royalties, and investor interests were some of the many issues in which all parties were seeking clarity.³⁸⁷ The Basic Agreement had not been renegotiated for almost twenty years, and as efforts to address these intractable issues bogged down the negotiations, the producers turned to the law.³⁸⁸ As always, the producers claimed that the Guild had conspired to fix minimum prices and other terms under the standard agreement.³⁸⁹ This time the dramatists counterclaimed, arguing that the producers had also been involved in an antitrust conspiracy against authors.³⁹⁰

Barr framed the complaint around how the producer creates value in the production. For Barr, the author's work is "integral and indispensable," but upon completion of the rehearsals, the work takes on a new life in which the producer becomes central.³⁹¹ Producers thus have the resources and networks to transform intellectual creation into a material production, but they do so at considerable risk.³⁹² The claims for relief covered various grievances producers had with writers since the first Agreement of 1926: restrictions on the ability to modify work, the coercion of authors to conform to minimum Guild standards, and the restriction of access to subsidiary rights.³⁹³ Barr sought a declaration that the MBA violated Section 1 of the Sherman Act and an injunction against the use of the MBA and against Guild interference with direct negotiations between producers and playwrights.³⁹⁴

The dramatists' strategy, led by counsel Floyd Abrams, was to reframe the antitrust conversation in the answer and counterclaim by focusing on vertical integration in the industry.³⁹⁵ Shubert and the Nederlanders, the counterclaim alleged, controlled seventy percent of first-class theatres, dominated the League, and ultimately set the terms on which playwrights worked in the industry.³⁹⁶ These monopoly theatre owners had an interest in productions and conspired to fix the compensation received by playwrights and "to enforce unfavorable terms and conditions in the contracts that are offered to playwrights by

³⁸⁶ See generally SALTER, *supra* note 17.

³⁸⁷ See generally Bassin, *supra* note 376 (documenting the rise of tensions and litigation surrounding royalties and minimum standards between playwrights, producers, and investors).

³⁸⁸ SALTER, *supra* note 17, at 216.

³⁸⁹ Barr v. Dramatists Guild, Inc., 573 F. Supp. 555, 557 (S.D.N.Y. 1983).

³⁹⁰ *Id.* at 557–58.

³⁹¹ Complaint at 3–4, Barr v. Dramatists Guild, Inc., 573 F. Supp. 555 (S.D.N.Y. 1983) (No. 82 Civ. 4876).

³⁹² See *id.* at 3, 5.

³⁹³ *Id.* at 5–9.

³⁹⁴ *Id.* at 10–11.

³⁹⁵ Defendants' Amended Answer, Counterclaim and Third Party Complaint at 11, 18, Barr v. Dramatists Guild, Inc., 573 F. Supp. 555 (S.D.N.Y. Apr. 28, 1983) (No. 82 Civ. 4876).

³⁹⁶ *Id.* at 11–12.

[producers].”³⁹⁷ In short, Abrams wrote for the Guild: “We want to deal with the economics of this industry.”³⁹⁸

After lengthy pretrial proceedings, the district judge denied the producers’ motion to dismiss or stay the counterclaim.³⁹⁹ The pretrial proceedings in the *Barr* litigation provided the leverage both the League and the Dramatists Guild sought to force negotiation over a new industry-wide basic agreement. They settled the litigation when they entered a new contract which became known as the Approved Production Contract (APC).⁴⁰⁰ But in settling the litigation, they left unresolved whether the Dramatists Guild or the League was violating federal antitrust law.

D. *The Contract Settlement*

The APC of 1985 is an expansive and convoluted agreement, which *Variety* declared to be a “sweeping overhaul” of the Basic Agreement that had last been negotiated in 1961.⁴⁰¹ It was and is an agreement for the entire industry negotiated by a handful of stakeholders.⁴⁰²

Under the Agreement, the playwrights received “a sharp reduction” in gross box office receipts in return for higher advances and options.⁴⁰³ As Norman Kean, chair of the League’s production committee, explained, the APC would “increase the investors’ opportunity of recouping and earning profit more quickly.”⁴⁰⁴ In place of the flat 10% on net gross previously received by play authors (6% for the combined authors of musicals), the APC gave writers 5% before recoupment and 10% after.⁴⁰⁵ If the show was an early hit and was still in its recoupment stage, writers would not benefit from the early success but investors would recoup their money in less time.⁴⁰⁶

³⁹⁷ *Id.* at 15.

³⁹⁸ See Transcript of Hearing before Judge Werker at 3, *Barr v. Dramatists Guild, Inc.*, 573 F. Supp. 555 (S.D.N.Y. 1983) (No. 82 Civ. 4876) (on file with National Archives and Records Administration: Northeast Region, New York City, Records of District Courts of the United States, Record Group 21).

³⁹⁹ *Barr*, 573 F. Supp. at 561.

⁴⁰⁰ Abrams did not want to formally settle until the new APC was formally adopted. Affidavit of Floyd Abrams ¶ 3, *Barr v. The Dramatists Guild, Inc.*, 573 F. Supp. 555 (S.D.N.Y. 1983) (No. 82 Civ. 4876) (on file with National Archives and Records Administration: Northeast Region, New York City, Records of District Courts of the United States, Record Group 21).

⁴⁰¹ Richard Hummler, *B’Way Recasting Authors’ Deal: Lower Weekly Royalty in Return for Upfront Coin*, VARIETY, Feb. 27, 1985, at 1.

⁴⁰² BREGLIO, *supra* note 57, at 115.

⁴⁰³ Hummler, *supra* note 401, at 1.

⁴⁰⁴ *Id.*

⁴⁰⁵ DRAMATISTS GUILD, CONTRACT FOR PLAYS, *supra* note 52, § 5.05(a)–(b). And for musical, these rates were 4.5% pre recoupment and 6% post. See DRAMATISTS GUILD, CONTRACT FOR MUSICAL PLAYS, *supra* note 53, § 506(a)–(b).

⁴⁰⁶ Bassin, *supra* note 376, at 167.

More important, however, was the new way to calculate royalties.⁴⁰⁷ The calculation of royalties went from essentially a gross amount on box office receipts to a percentage of weekly operating profits.⁴⁰⁸ The compromise was supposed to be that writers would receive a higher rate in the future after recoupment.⁴⁰⁹ The writer of a play, therefore, went from a flat 10% on net gross whether the production lost or made money to a new system where before recoupment they received 5% of weekly operating profits.⁴¹⁰

As the APC shifted the industry to a model based on weekly operating profits, it did not address the other evolving industry practice of royalty pools. The total “royalty” that came out of the weekly operating profit was shared among a pool of multiple participants, including the producers.⁴¹¹ No minimum standards were established as for who received what percentage of the total pool of royalties.⁴¹²

Economic changes in commercial theatre in the late 1980s put further pressure on the fragile position of dramatists. For example, the dramatists were deeply concerned movie studios, that adapted film properties for the stage, would want to replicate the writer/producer film model with stage writers: “in which the producing studio owned the author’s copyright and writers could be hired and fired at will.”⁴¹³

Another change in the structure of the broader industry came from the fact that regional theatre became a major source of productions, income, and creative focus for playwrights over the course of the second half of the twentieth century.⁴¹⁴ The League of Resident Theatres (LORT)—a coalition of regional theatres across the country including New York—operates in a complex environment of developing new works (in a tax-exempt status) with the possibility of transferring a work to Broadway, which offers potentially lucrative streams of revenue.⁴¹⁵

The regional theatres, through LORT, sought contractual flexibility in how a work moved from the original author to the regional stage and into subsidiary streams of exploitation, which inclined them to circumvent the cumbersome

⁴⁰⁷ DRAMATISTS GUILD, CONTRACT FOR PLAYS, *supra* note 52, § 5.01; DRAMATISTS GUILD, CONTRACT FOR MUSICAL PLAYS, *supra* note 53, § 501.

⁴⁰⁸ Bassin, *supra* note 376, at 168.

⁴⁰⁹ *See id.* at 167.

⁴¹⁰ *Id.*

⁴¹¹ *See id.* at 167–68.

⁴¹² *See* BREGGIO, *supra* note 57, at 116.

⁴¹³ John Weidman, *Protecting the American Playwright*, 72 BROOK. L. REV. 639, 644 (2007); Kaplan, *supra* note 19, at 312–33 (showing how the producers and dramatist have come to an agreement of sorts honoring logocentric theatre ownership models).

⁴¹⁴ *See generally* Mel Gussow, *Regional Theater Prospering*, N.Y. TIMES (Sept. 1, 1987), <https://www.nytimes.com/1987/09/01/theater/regional-theater-prospering.html> [<https://perma.cc/UWQ6-T5GS>].

⁴¹⁵ *See* BREGGIO, *supra* note 57, at 132–35.

APC.⁴¹⁶ The Dramatists Guild tried to protect writers by negotiating a uniform agreement with LORT, but LORT resisted.⁴¹⁷ Exactly as commercial producers had long done, LORT threatened antitrust litigation: The Guild was not a union and thus not shielded from antitrust law.⁴¹⁸ The Guild's effort to negotiate a uniform contract with LORT was even resisted by some playwrights who had built long-term relationships with particular theatres and were resistant to a uniform agreement.⁴¹⁹ By late 1990, the protracted negotiations over a uniform agreement had ended.⁴²⁰ Although the regional theatres declared that collective bargaining would undermine their relationships with playwrights, it was also clear that the regionals had gateway access to the industry and thus considerable influence over negotiations with emerging writers.⁴²¹

In sum, by 1990, it was clear to the Dramatists Guild, and to some scholars, that the compromises that playwrights had long tolerated were no longer working.⁴²² The APC had reduced the money playwrights could earn, even on successful New York plays.⁴²³ The royalties some collected for successful plays overshadowed the absence of any guaranteed income for unsuccessful writers.⁴²⁴ Economic changes in the theatre meant many playwrights could not negotiate as individuals from a position of strength. Playwrights had tolerated doubt about their legal rights to negotiate collectively when their economic and cultural power in the industry had enabled some to negotiate effectively and when the power of the Guild was not significantly undermined by legal doubts about the basic agreement and the Guild. But those days were gone. The artistic control playwrights secured through copyright ownership meant more to some than to others, but increasingly copyright ownership seemed unable to deliver financial security.

V. PLAYWRIGHTS, THE DRAMATISTS GUILD AS A UNION, AND THE LAW

By the turn of the twenty-first century, playwrights began to recognize that the interlocking legal regimes of labor law, copyright law, and antitrust law were compromising their interests. Playwrights' inability to bargain collectively under the NLRA, and vulnerability to antitrust litigation, enabled both New York and regional theatre producers to reduce writers' share of profits of

⁴¹⁶ Richard Hummler, *Major Playwrights Threaten No Show at Nonprofits*, VARIETY, Oct. 15, 1990, at 3, 96.

⁴¹⁷ One of arguments for adoption was because the Dramatists Guild was needing new sources of funding and the nonprofits provided the new avenue in which to derive a revenue from a percentage of royalties in the wake of play production shifting off Broadway. See Walsh, *supra* note 49, at 201.

⁴¹⁸ See Hummler, *supra* note 416, at 96.

⁴¹⁹ Walsh, *supra* note 49, at 202–03.

⁴²⁰ *Id.* at 202.

⁴²¹ See *id.* at 201–03.

⁴²² See Bassin, *supra* note 376, at 166–69.

⁴²³ *Id.* at 167.

⁴²⁴ See *id.*

successful productions. Owning the copyrights in their plays provided little financial security or artistic control. Royalty pools had become central to the profit-sharing from commercially successful productions but the rules for how they operated did not feature at all in the APC, so dramatists as a group had no minimum standards for this crucial aspect of their compensation.⁴²⁵ Over time, moreover, producers and investors tinkered with royalty pools and compensation arrangements for plays that were developed in regional theatres and for those that premiered on Broadway, and the Dramatists Guild had limited power in these negotiations.⁴²⁶ In short, copyright ownership was supposed to compensate for the absence of bargaining rights and the risks of antitrust liability, so it was the one right that writers insisted upon, but increasingly it could not deliver either creative control of the behemoth commercially successful plays or a significant share of profits. The precarious legal status of playwrights hindered creative autonomy and delivered a great deal of economic vulnerability.

Recognizing that antitrust law posed a formidable obstacle to any effort to negotiate a collective solution to these pressing problems, playwrights made a sustained effort over several years to persuade Congress to change the law. We begin by exploring that failed effort. We then turn to the enduring significance of the political economy of the four assumptions about the legal regime governing playwrights. Finally, we distill from this legal history some insights about the failures of law to protect gig workers beyond the lights of Broadway.

A. *The Failed Effort to Amend Antitrust Law*

In 2001, the Dramatists Guild went to Congress for a solution. A bill first introduced as the Fair Play for Playwrights Act in 2001, and then as the Playwrights Licensing Relief Act in 2002, and then as the Playwrights Licensing Antitrust Initiative Act in 2004 and again in 2005, were proposed to “modify the application of the antitrust laws to permit collective development and implementation of a standard contract form for playwrights for the licensing of their plays.”⁴²⁷ The legislation, which was pushed by the Dramatists Guild and was introduced in both the House and the Senate in its various iterations over five years, was aimed at resolving the uncertainty created by the inconclusive resolution of the litigation that producers had filed against the Guild going all

⁴²⁵ See *id.* at 168; BREGLIO, *supra* note 57, at 116.

⁴²⁶ See Bassin, *supra* note 376, at 166–69.

⁴²⁷ Fair Play for Playwrights Act of 2001, H.R. 3543, 107th Cong. (2001); Playwrights Licensing Relief Act of 2002, S. 2082, 107th Cong. (2002); Playwrights Licensing Antitrust Initiative Act of 2004, S. 2349, 108th Cong. (2004); Playwrights Licensing Antitrust Initiative Act of 2004, H.R. 4615 108th Cong. (2004); Playwrights Licensing Antitrust Initiative Act of 2005, H.R. 532, 109th Cong. (2005).

the way back to the 1920s.⁴²⁸ It would create a narrow statutory exception to antitrust law, “designed to solely address the legal status of the playwrights with regard to labor and antitrust law,”⁴²⁹ so as to allow “associations of playwrights” to exist (i.e., the Dramatists Guild) and to allow the negotiation and enforcement of minimum terms of employment.⁴³⁰

The bill did not pass.⁴³¹ This left the dramatists in the same tenuous position they had occupied for decades. The continued uncertainty about whether the dramatists could negotiate as a collective meant the producers retained the eighty-year bargaining tool that they could invoke whenever playwrights wanted to expand their protections during negotiations. Indeed, the producers tried to use the legislative hearings to ensure that the playwrights were in a worse position. As Gerald Schoenfeld, Chair of the Shubert Organization and Chair of the League, insisted in his Senate testimony, “[o]bviously” the Dramatists Guild believed it was subject to antitrust law “[o]therwise, it would not be seeking an exemption from its provisions.”⁴³² This was a clear effort to build an argument that failure of the legislation to pass would mean that the law was settled that the Guild and the APC were unlawful, rather than just in a state of legal uncertainty.

When Senator Hatch introduced the bill in 2002, he explained that the dramatists “and their voluntary peer membership organization, the Dramatists Guild, operate under the shadow of the antitrust laws,” which “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.”⁴³³ The legislation, especially as modified when introduced the third time as the Playwrights Licensing Antitrust Initiative Act, emphasized the limited

⁴²⁸ See Ashley Kelly, Note, *Bargaining Power on Broadway: Why Congress Should Pass the Playwrights Licensing Antitrust Initiative Act in the Era of Hollywood on Broadway*, 16 J.L. & POL’Y 877, 889–90, 907–08 (2008); see also *supra* note 427 (listing the various iterations of the House and Senate bills over the years).

⁴²⁹ *The Playwrights Licensing Antitrust Initiative Act: Safeguarding the Future of American Live Theatre: Hearing on S. 2349 Before the S. Judiciary Comm.*, 108th Cong. 36 (2004) [hereinafter *Hearing on S. 2349*] (statement of The Dramatists Guild of America); see H.R. 532, 109th Cong. (1st Sess. 2005).

⁴³⁰ Fair Play for Playwrights Act of 2001, H.R. 3543, 107th Cong. § 2(1)(A)–(B) (2001).

⁴³¹ See Kelly, *supra* note 428, at 881 (describing the history of efforts to amend antitrust to protect playwrights); Alison Zamora, *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. 395, 395–97 (2006) (advocating for the introduction of the new amendment, but also focusing the strategy on a state-based approach, and making comparisons between playwrights and doctor independent contractors).

⁴³² *Hearing on S. 2349*, *supra* note 429, at 9 (statement of Gerald Schoenfeld, Chairman of The League of American Theatres and Producers).

⁴³³ *Playwrights Licensing Relief Act of 2002: Statements on Introduced Bills and Joint Resolutions on S. 2082 Before the S. Judiciary Comm.*, 107th Cong. S2486 (2002) (statement of Sen. Hatch).

powers of coordination the bill would give. It would simply exempt from antitrust “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.”⁴³⁴

The Dramatists Guild emphasized in their statement in support of the bill that the legislation was narrow and important to the survival of American theatre. The bill, they said, was “surgically designed to correct a singular anomaly in the case law relating to playwrights in the American theater.”⁴³⁵ For the previous sixty years, the Guild wrote, the dramatists “have operated under the constant threat of the application of the Sherman Act” and there was “no clear resolution of the basic legal questions.”⁴³⁶

Explaining the goals of the bill in Senate hearings, several Guild members testified about the anomalous position of playwrights, among all theatre creators, and the importance of allowing writers to retain the copyrights while still negotiating collectively. Wendy Wasserstein, author of the Tony-winning and Pulitzer Prize-winning play *The Heidi Chronicles*, testified about the challenge for playwrights negotiating individually as the ownership of the theatres and “the production of plays [has become] increasingly dominated by corporate interests.”⁴³⁷ Renowned playwright Arthur Miller also emphasized the growing power of corporations in the theatre and said that “American theatre 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.”⁴³⁸ Stephen Sondheim, award-winning composer and lyricist and former president of the Dramatists Guild, emphasized how few writers had the power to protect their artistic vision through individual negotiations.⁴³⁹ Sondheim told how a producer tried to rewrite his musical, *Merrily We Roll Along*, which innovatively tells the story by beginning at the end and going backwards in time; the producer thought reversing the order “would be easier for the audience to understand.”⁴⁴⁰ Sondheim explained that “[b]ecause I was a recognized name in the theater and had a certain amount of what is known as clout, I was able to protect the piece and stop the production, thus preserving the integrity of my intellectual property. Not every playwright is so lucky.”⁴⁴¹

The producers opposed the proposed legislation on the same grounds that producers had been asserting in litigation since the 1920s. One was that

⁴³⁴ H.R. 532 § 2(a).

⁴³⁵ *Hearing on S. 2349*, *supra* note 429, at 36 (statement of The Dramatists Guild of America).

⁴³⁶ *Id.*

⁴³⁷ *Hearing on S. 2349*, *supra* note 429, at 12 (statement of Wendy Wasserstein).

⁴³⁸ *Id.* at 48 (statement of Arthur Miller).

⁴³⁹ *Id.* at 15, 17 (statement of Stephen Sondheim).

⁴⁴⁰ *Id.* at 17.

⁴⁴¹ *Id.*

collective negotiation by writers was unsuitable.⁴⁴² As Schoenfeld, Chair of the Shubert Organization and Chair of the League, put it, “all dramatists are not equally talented.”⁴⁴³ A uniform agreement on author compensation did not reflect the value of the author in each circumstance. A second objection to the bill focused on the need for flexibility.⁴⁴⁴ Noting that it had been necessary to draft addenda to the APC for every play since 1985 in order to address the demands of modern theatre, including royalty pools, Schoenfeld attributed the inflexibility of the APC to the Guild’s intransigence.⁴⁴⁵ (The Guild, of course, blamed the producers for refusing to negotiate a new contract.⁴⁴⁶)

The third argument was the same one producers had been making since the Shuberts in the 1920s: unionization would destroy the free market in theatre and would give the Guild a gatekeeper role and the power to monopolize talent.⁴⁴⁷ The producers were not monopolists, both Schoenfeld and Broadway producer Roger Berlind insisted, and the Dramatists Guild should not be one either.⁴⁴⁸

The legislative record does not reveal why the bills never passed.⁴⁴⁹ The failure left the parties in the same stalemate where they’ve been since the 1920s—the Guild may or may not be illegal, and the APC may or may not be unenforceable.⁴⁵⁰ Playwrights continue to own the copyright in the play and to negotiate individually over compensation for each production.⁴⁵¹ But economic changes in theatre have continued, and others involved in making plays—directors, actors, choreographers—have increased their leverage by claiming copyrights in their contributions to productions along with the salaries they are paid for their labor pursuant to their collective agreements.⁴⁵² The power of producers has grown, and fights over how to divide the pool of money available to pay royalties have continued.⁴⁵³

In the years since the failed effort to gain legal recognition of the right of playwrights to negotiate collectively, other creators have continued to expand their rights to share in the wealth of successful productions, or for collective approaches to weather the bad times.⁴⁵⁴ As noted above, stage directors (who are unionized) have been very successful in negotiating collectively for directors

⁴⁴² See, e.g., *id.* at 11 (statement of Gerald Schoenfeld).

⁴⁴³ *Hearing on S. 2349, supra* note 429, at 11 (statement of Gerald Schoenfeld).

⁴⁴⁴ *Id.* at 14 (statement of Roger Berlind).

⁴⁴⁵ See *id.* at 10–11 (statement of Gerald Schoenfeld).

⁴⁴⁶ *Id.* at 17 (statement of Stephen Sondheim).

⁴⁴⁷ *Id.* at 14 (statement of Roger Berlind); SALTER, *supra* note 17, at 172–73.

⁴⁴⁸ See *Hearing on S. 2349, supra* note 429, at 15 (statement of Roger Berlind).

⁴⁴⁹ See generally *id.*

⁴⁵⁰ See *Writers Deserve, supra* note 23.

⁴⁵¹ Kelly, *supra* note 428, at 883–84.

⁴⁵² Margit Livingston, *Inspiration or Imitation: Copyright Protection for Stage Directions*, 50 B.C. L. REV. 427, 429 (2009).

⁴⁵³ Kelly, *supra* note 428, at 880–81; see also BREGGIO, *supra* note 57, at 115–16.

⁴⁵⁴ See Michael Paulson, *Landmark Broadway Deal Gives Actors a Piece of the Profits*, N.Y. TIMES (Feb. 8, 2019), <https://www.nytimes.com/2019/02/08/theater/broadway-profit-sharing.html> [<https://perma.cc/YZ8U-N8RH>] (actors and stage managers).

to have royalty rights.⁴⁵⁵ Although stage directors' rights are tied to specific productions, which has been an issue for directors continuing to advance an argument in the courts about their authorship in the work, the rights nevertheless matter.⁴⁵⁶ As it stands, any subsidiary right that a director is able to negotiate with the producer will end when the producer no longer has a relationship with the writer.⁴⁵⁷ So the writer author will continue to profit from revivals/adaptations of the work into the future but not the director (except in the very limited situation of a writer agreeing to be a joint author with a director—but that would be a joint author in the text, not stage directions).⁴⁵⁸ In 2019, Actors Equity successfully negotiated for a percentage of royalties for workshops, giving actors who play a part in developing roles through labs or who play supporting roles a ten-year contractual right to royalties for shows that recoup the investors' expenses.⁴⁵⁹ Actors were successful under a union structure negotiating for something that resembles a royalty, on top of the weekly salary they are guaranteed under the Actors Equity Basic Agreement.⁴⁶⁰

B. The Endurance of the Four Assumptions and the Path Forward for Dramatists

Even before the global pandemic shuttered theatres in 2020, dramatists struggled in an environment of legal uncertainty about their rights to negotiate with producers and the fragility of the 1985 APC.⁴⁶¹ As Ralph Sevush, Executive Director of the Dramatists Guild, explained in a 2015 interview, it would “absolutely” be desirable for the Guild and the Broadway League to renegotiate the APC to address the significant changes in the business since 1985.⁴⁶² But, although the Guild has asked the League to open negotiations, “they’ve refused because of what they claim are anti-trust issues, which is just a convenient way of saying, ‘No, we don’t want to talk to you and we don’t have to talk to you.’ And they don’t have to talk to us, so why should they?”⁴⁶³

So the system continues as it long has. In negotiating with a playwright over the terms for licensing a copyright to produce a play, the producer may insist on terms that fall below the minimum stated in the 1985 APC.⁴⁶⁴ The writer may agree.⁴⁶⁵ As required by the APC, the producer then submits the agreement to

⁴⁵⁵ Litman, *supra* note 367, at 318.

⁴⁵⁶ Livingston, *supra* note 452, at 442.

⁴⁵⁷ *Id.* at 431–32.

⁴⁵⁸ *Id.* at 452.

⁴⁵⁹ Paulson, *supra* note 454.

⁴⁶⁰ *Id.*

⁴⁶¹ Litman, *supra* note 19, at 1421 n.257.

⁴⁶² The Producer’s Perspective Podcast with Ken Davenport, *Ralph Sevush*, at 32:30 (Aug. 30, 2015), https://www.theproducerperspective.com/my_weblog/2015/08/podcast-episode-35-ralph-sevush.html [<https://perma.cc/3YQA-QT2S>].

⁴⁶³ *Id.* at 32:32.

⁴⁶⁴ Kelly, *supra* note 428, at 900–01.

⁴⁶⁵ *Id.*

the Dramatists Guild for certification, which then will reject the contract or insist it be modified, in the name of protecting a Guild member from working on terms contrary to Guild minimum standards.⁴⁶⁶ The Guild is therefore a vulnerable adjunct removed from the initial negotiation between writer and producer. It is an inherently defensive role that plays out after the fact where the Guild has to renegotiate “up” to meet minimum standards; it puts the Guild in a vulnerable position by having to negotiate in the shadow of the agreement which the producer and writer have already accepted. Although producers have lambasted the 1985 APC almost since the ink dried, claiming it is inflexible and does not serve the interests of producers,⁴⁶⁷ writers, investors, or the public, they have refused to renegotiate it because they fear dramatists would demand a greater share of the profits of productions, and producers insist that the profits are already spread thin among them, their investors, and unionized actors, directors, choreographers, set designers, and other technical workers.⁴⁶⁸

In the face of this vulnerability, the Dramatists Guild remains a forceful advocate for the importance of playwright ownership of copyrights.⁴⁶⁹ The dramatists view themselves “as property owners who license the use of their property, rather than employees entitled to collectively bargain for the conditions of their labor.”⁴⁷⁰ The Dramatists Guild’s Bill of Rights provides for a right to “Artistic Integrity” where “[n]o one . . . can make additions, deletions, alterations, and/or changes of any kind to your script—including the text, title, and stage directions—without your [the writer’s] prior written consent.”⁴⁷¹

The irony of the Guild’s insistence that playwrights are independent contractors who benefit from ownership of copyrights is that they insist, as a matter of artistic autonomy, on the conditions that make them vulnerable in matters of labor and antitrust. The more precarious the legal status of playwrights has become on account of the economic power of mediators with influence, including major producers, the more the Dramatists Guild insists on copyright ownership as the most important protection law gives playwrights.⁴⁷² Yet, copyright ownership seems increasingly to provide neither economic security nor creative autonomy. Fearing that pursuit of a legal right to bargain collectively would be fruitless, would fail to deliver economic security and stability for writers but would jeopardize the only legal right most have—the right to prevent rewriting of their work, the Dramatists Guild embraces the assumption that to be a real artist, a dramatist necessarily must run the risk of being impecunious.⁴⁷³

⁴⁶⁶ *Id.*

⁴⁶⁷ BREGGIO, *supra* note 57, at 116.

⁴⁶⁸ *See Hearing on S. 2349, supra* note 429, at 10–11 (statement of Gerald Schoenfeld).

⁴⁶⁹ *Authors Should Maintain, supra* note 13.

⁴⁷⁰ *Id.*

⁴⁷¹ DRAMATIST’S BILL OF RIGHTS, *supra* note 70.

⁴⁷² *See Authors Should Maintain, supra* note 13.

⁴⁷³ *See id.*

Yet, others have suggested that what would benefit creative workers more than royalties and the possibility of huge success is stability. As Todd London has argued, what playwrights have long wanted is stability: a regular income, health insurance.⁴⁷⁴ Stability is important for creative reasons as much as for financial reasons, because stability enables long term collaborations.⁴⁷⁵ It seems that everyone other than playwrights is making arguments on behalf of playwrights about independence and artistic integrity/autonomy.

The path forward is to rethink the connection between being an independent contractor for purposes of the work-made-for-hire provision of the 1976 Copyright Act, and being an independent contractor for purposes of the National Labor Relations Act, and antitrust law restrictions on collective bargaining by independent contractors. Those are three quite distinct legal issues, and neither the language of the three statutes, nor their purposes and history, nor copyright, labor, and antitrust policy is served by linking the three.

The first step is to de-couple independent contractor status under copyright law and labor law. As the Second Circuit has recently held, whether a writer is an employee for purposes of the work-for-hire doctrine under copyright law has no bearing on whether the Guild has a legal right to bargain collectively under the NLRA.⁴⁷⁶ The court rejected an argument that a writer's membership in the Writers Guild (a union) had established, or even was a major factor in showing, that the writer was an employee whose script was a work made for hire owned by the movie production company with which he had contracted to write a script.⁴⁷⁷ The court explained: "That labor law was determined to offer legal protections to independent writers does not have to reduce the protections provided to authors under the Copyright Act."⁴⁷⁸ The Second Circuit recognized that the Copyright Act and the National Labor Relations Act do not use the same version of the employee-independent contractor test.⁴⁷⁹ While it is true that both use what the courts and the NLRB call the "common law test," they use different versions of it. The version the Supreme Court used for the Copyright Act in *Community for Creative Non-Violence v. Reid* emphasized the right of the hiring party (CCNV) to control the creative process and the parties' expectations and practices about the creative process, the skill Reid used as a sculptor, the fact that CCNV is not in the business of producing sculptures, and the tax treatment of Reid—all of which are logical considerations to determine whether a sculptor

⁴⁷⁴ London and his coauthors write: "Many writers . . . are quick to point out that they aren't looking for a pot of gold, or even for a particularly high standard of living. Often they are simply looking for places they can work and live, for health care, and for ways to raise a family. It sounds remarkably humble." See LONDON, PESNER & VOSS, *supra* note 16, at 63.

⁴⁷⁵ *Id.* at 56.

⁴⁷⁶ *Horror Inc. v. Miller*, 15 F.4th 232, 242, 244 (2d Cir. 2021).

⁴⁷⁷ *Id.* at 248.

⁴⁷⁸ *Id.* at 247.

⁴⁷⁹ *Id.*

or the nonprofit organization providing services and advocacy for homeless people owned the copyright in a sculpture.⁴⁸⁰

In contrast, the NLRB uses at least two different versions of the common law test, depending on whether a Democratic or Republican president appointed the majority of the members. Under the most recent GOP-dominated Board, a list of factors similar but not identical to the *CCNV v. Reid* list is considered, but workers are independent contractors if they have entrepreneurial opportunity for gain or loss, and the putative employer does not exercise control over when and how they work.⁴⁸¹ The NLRB during the Obama era insisted that the independent contractor exclusion should be construed “narrowly” and applied a version of the test that emphasized whether the workers genuinely had entrepreneurial opportunity and were “in fact, *rendering services as part of an independent business*,” a factor that the current NLRB finds insignificant when considering whether delivery drivers are employees of a company whose primary business is delivery.⁴⁸²

The differences between the various versions of the so-called common law test are highlighted by the fact that the Supreme Court includes five factors on its version of the common law test for the work-for-hire doctrine that do not appear on the NLRB’s list: “the location of the work”; “the provision of employee benefits”; “the tax treatment of the hired party”; “whether the hiring party has the right to assign additional projects to the hired party”; and “the hired party’s role in hiring and paying assistants.”⁴⁸³ In contrast, the current NLRB includes two factors not on the *CCNV v. Reid* list: “Whether or not the one employed is engaged in a distinct occupation or business” and “Whether or not the parties believe they are creating the relation of master and servant.”⁴⁸⁴

⁴⁸⁰ *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 752–53 (1989). The Court enumerated the test as follows:

In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party’s right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party’s discretion over when and how long to work; the method of payment; the hired party’s role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party. No one of these factors is determinative.

Id. at 751–52 (citations omitted).

⁴⁸¹ *SuperShuttle DFW, Inc.*, 367 N.L.R.B. No. 75, 2019 NLRB LEXIS 15, at *4–7 (Jan. 25, 2019).

⁴⁸² *FedEx Home Delivery*, 361 N.L.R.B. 610, 610, 619 (2014), *vacated*, *FedEx Home Delivery v. NLRB*, 849 F.3d 1123 (D.C. Cir. 2017).

⁴⁸³ *Cnty. for Creative Non-Violence*, 490 U.S. at 751–52.

⁴⁸⁴ *SuperShuttle DFW, Inc.*, 2019 NLRB LEXIS 15, at *5.

The Second Circuit canvassed the differences between the *Reid* factors and the NLRA and noted the different origins of the rules regarding whether screenwriters are employees under the NLRA and whether writers are authors for purposes of the work for hire doctrine or other copyright rules. The court held that union membership is not even a significant factor in assessing copyright ownership.⁴⁸⁵ All the same arguments could be made about dramatists. They sought to unionize at the same time and for the same reasons as screenwriters.⁴⁸⁶ Many work independently on a project basis, just as film writers do.⁴⁸⁷ The arguments about whether they should own the copyrights in their work may be in some respects similar—the issues of separate ownership of a script and of termination of transfer rights could be as vexing for many plays as they are for movies. And there may be differences. But whether they should be able to organize like a union, be exempt from antitrust, but still maintain their freedom to contract as independent writers has no more relationship to copyright ownership in scripts written for the stage than for scripts written for the screen.⁴⁸⁸

The NLRB, with new members appointed by an administration less obviously hostile to unions, could determine that the economic vulnerability of playwrights and the power exercised by mediating stakeholders, along with the pervasive unionization of every other creative and technical workers involved in commercial theatre, and the long history of unionization and collective bargaining among autonomous screenwriters in Hollywood, make clear that writers are employees within the meaning of the NLRA regardless of copyright ownership. The DOJ and the FTC could likewise decide that collective bargaining by playwrights is not an antitrust violation and that the Dramatists Guild fits squarely within the Clayton Act exemption for labor, agricultural, and horticultural organizations.

As we discuss below, the question of whether antitrust law should prevent collective action by workers has become a hot topic again, after years in which it was of interest only to a small set of antitrust scholars and sports lawyers.⁴⁸⁹ Of course, litigating such a case could result in a definitive ruling that the dramatists cannot organize as a union. But the fact that these relationships have endured and theatre continues to be made under such a fragile framework also

⁴⁸⁵ *Horror Inc. v. Miller*, 15 F.4th 232, 242, 244 (2d Cir. 2021).

⁴⁸⁶ See Bodie, *supra* note 5, at 20–22.

⁴⁸⁷ *Id.*

⁴⁸⁸ See *Am. Fed. of Musicians v. Carroll*, 391 U.S. 99, 105–06 (1968). See, for example, Uber drivers' ongoing dispute with Uber to unionize: *Uber Drivers*, LICHTEN & LISS-RIORDAN, P.C., <http://uberlawsuit.com/> [<https://perma.cc/QLV5-QKM9>] (which includes latest litigation updates across the country). See also Bodie, *supra* note 5, at 17–19 (describing workers that fall between employees and contractors that provide services in an evolving economy). See generally Dmitri Iglitzin & Jennifer L. Robbins, *The City of Seattle's Ordinance Providing Collective Bargaining Rights to Independent Contractor For-Hire Drivers: An Analysis of the Major Legal Hurdles*, 38 BERKELEY J. EMP. & LAB. L. 49 (2017).

⁴⁸⁹ See discussion *infra* Part V.C.

says something rather profound about the desire of all stakeholders to find a compromise in order to achieve the shared goal of actual production.⁴⁹⁰

The second step is to eliminate from theatre the legally dubious assumption that any worker who is not an employee under the NLRA is necessarily barred by antitrust law from collective bargaining. Dramatists, alone among the array of artists and technical talent who create commercial theatre, are prohibited from collective action.⁴⁹¹ Actors, stage directors, choreographers, set designers, musicians, composers, lighting designers, costume designers—all of them can and do negotiate collectively, through their unions, with the Broadway League or LORT.⁴⁹² And, when playwrights work on productions that are intended to be filmed rather than *only* performed live, they can negotiate collectively through the WGA.⁴⁹³

The strategy that the producers and managers have found so effective to prevent unionization of dramatists since the 1920s, but especially in *Ring v. Spina*, has now spread to companies throughout the low-wage labor market. They aim to prevent unionization by misclassifying the workforce as independent contractors, and then use threats that would violate the NLRA combined with the threat of aggressive antitrust litigation to punish incipient unionization.⁴⁹⁴

Delinking copyright from labor and from antitrust would have a number of benefits for playwrights, producers, and others involved in creating or consuming theatre, and for scholars studying it. From a scholarly standpoint, it would respond to the concerns expressed by many, including Christopher Sprigman, to understand areas of law that impact control and compensation over creativity beyond copyright and other intellectual property regimes.⁴⁹⁵ Much of the legal literature on theatre has emphasized the role of copyright law, but as Brent Salter has shown in other work, and we have shown in a briefer way, copyright and allied regimes (including the common law play right studied by Jessica Litman) have been less significant in the history of playwright-producer relations than the organizational structures created in the shadow of antitrust and labor law.⁴⁹⁶

From the more significant practical standpoint, delinking ownership of copyrights from eligibility for legal protection for collective self-regulation from prohibition on worker collective action would remove the cloud of legal

⁴⁹⁰ See generally SALTER, *supra* note 17.

⁴⁹¹ See Bodie, *supra* note 5, at 26.

⁴⁹² See FISK, *supra* note 7, at 52.

⁴⁹³ Kelly, *supra* note 428, at 881.

⁴⁹⁴ See Bodie, *supra* note 5, at 28–29.

⁴⁹⁵ See Christopher Jon Sprigman, *Copyright and Creative Incentives: What We Know (And Don't)*, 55 HOUS. L. REV. 451, 455 (2017); Kal Raustiala & Christopher Jon Sprigman, *When Are IP Rights Necessary? Evidence from Innovation in IP's Negative Space*, in 1 RESEARCH HANDBOOK ON THE ECONOMICS OF INTELLECTUAL PROPERTY LAW 309, 310 (Ben Depoorter, Peter S. Menell & David Schwartz eds., 2019).

⁴⁹⁶ See generally SALTER, *supra* note 17.

uncertainty from the process of sector-wide collective self-regulation that has been going on for nearly a century. This would enable the parties to renegotiate the 1985 APC, which all agree needs updating to respond to the changes in the business. It would remove the incentives to resort to litigation as a way of undermining agreements reached. It would enable playwrights and production companies to negotiate collective solutions to collective issues, including division of profits from successful productions, economic security for writers, access to health insurance, the possibility of steady income in good times, and how to manage economic bad times.⁴⁹⁷

C. Labor and Antitrust Law as Barriers to Self-Regulation in Gig Work

The contemporary discussions of employee status and intellectual property rights are shot through with arguments celebrating the importance of entrepreneurship and the benefits of self-regulation. In the pages of law reviews, and in courts and legislatures across the country, people are contending over whether antitrust law should prohibit collective action by workers.⁴⁹⁸ The sentiment in law reviews runs overwhelmingly against antitrust prohibition on worker collective action, arguing that it is inconsistent with statutory language, history, or purpose and serves neither the interests of consumers nor the interests of workers.⁴⁹⁹ The court results are less favorable to workers.⁵⁰⁰ And legislation

⁴⁹⁷ Dramatists could possibly negotiate collectively with managers as “copyright employees” within the meaning of copyright law and under a collective bargaining agreement insist that the agreement require the producer to transfer the copyrights to the dramatist under section 201(b) of the Copyright Act. As the work would be made for hire, the issue of whether stakeholders lose the right to terminate the transfer after thirty-five years arises. 17 U.S.C. § 203. This, however, may not be a practical issue of concern as the industry has traditionally based relationships on *licenses* for specific periods and specific productions that usually expire long before the thirty-five-year termination deadline. We are deeply grateful for exchanges with Jessica Litman on these issues of work made for hire transfers and terminations.

⁴⁹⁸ See *infra* notes 499–501.

⁴⁹⁹ See generally Hiba Hafiz, *Structural Labor Rights*, 119 MICH. L. REV. 651 (2021); Sanjukta Paul, *Antitrust as Allocator of Economic Coordination Rights*, 67 UCLA L. REV. 378 (2020); Sanjukta Paul, *Fissuring and the Firm Exemption*, 82 L. & CONTEMP. PROBS. 65 (2019); Sandeep Vaheesan, *Accommodating Capital and Policing Labor: Antitrust in the Two Gilded Ages*, 78 MD. L. REV. 766 (2019); Jacob Aleknavicius, Note, *On-Demand Drivers and the Right to Collective Bargaining: Why Seattle’s Ordinance Does Not Violate Federal Antitrust Laws*, 95 CHI.-KENT L. REV. 299 (2020); Ronald C. Brown, *Ride-Hailing Drivers as Autonomous Independent Contractors: Let Them Bargain!*, 29 WASH. INT’L L.J. 533 (2020); Sandeep Vaheesan & Nathan Schneider, *Cooperative Enterprise as an Antimonopoly Strategy*, 124 PENN ST. L. REV. 1 (2019); Henry H. Perritt, Jr., *Don’t Burn the Looms—Regulation of Uber and Other Gig Labor Markets*, 22 SMU SCI. & TECH. L. REV. 51 (2019); Jeffrey M. Hirsch & Joseph A. Seiner, *A Modern Union for the Modern Economy*, 86 FORDHAM L. REV. 1727 (2018); Marina Lao, *Workers in the “Gig” Economy: The Case for Extending the Antitrust Labor Exemption*, 51 U.C. DAVIS L. REV. 1543 (2018).

⁵⁰⁰ Chamber of Com. of the U.S. v. City of Seattle, 890 F.3d 769, 776 (9th Cir. 2018).

allowing collective action by various stripes of independent workers—news content creators, professionals, app-based workers, and many others—remains pending, not enacted.⁵⁰¹

Large companies are intently focused on ensuring that law restricts the efforts of workers to build countervailing power through collective action, touting instead the benefits of unilateral corporate programs to protect worker and consumer welfare. In California, for example, after the state high court ruled that a broad swath of workers are employees entitled to the protections of law and the legislature codified and extended that ruling by a statute known as AB 5, Uber, Lyft, and other app-based delivery and transportation companies spent a record sum (more than \$200 million) to secure enactment of an initiative that stripped their workers of the protections of AB 5, declaring them to be independent contractors.⁵⁰² A little-noticed provision of the initiative prevents the California legislature from authorizing any form of collective action by the workers.⁵⁰³ This provision exists *solely* because antitrust law allows collective action beyond the bounds of the labor exemption only if it is pursuant to state legislation and state regulatory supervision.⁵⁰⁴ Nearly a decade ago, these companies wanted to make sure that driver efforts to unionize would not get the legal protection in the State of Washington and the City of Seattle, and so have

⁵⁰¹ A raft of state laws propose to allow collective bargaining for particular occupations, or other action to reduce antitrust risks of collective action by workers or their organizations. Assemb. B. A4699, 2019–2020 Leg., Reg. Sess. (N.Y. 2019) (establishing antitrust exemption for certain horse racing organizations). California Assembly Joint Resolution 24 in California urges the FTC, DOJ, and Congress to change federal antitrust law to reduce emphasis on price increases as the criterion used to judge whether potentially anticompetitive acts harm consumers. Assemb. J. Res. 24, 2019 Leg., Reg. Sess. (Cal. 2019). Hawai'i legislators have introduced multiple bills to study whether physicians should be able to negotiate collectively with health plans. S. Con. Res. 102, 30th Leg., Reg. Sess. (Haw. 2020); H.B. 2105, 30th Leg., Reg. Sess. (Haw. 2020); S.B. 2540, 30th Leg., Reg. Sess. (Haw. 2020). New Jersey proposed legislation to do the same thing. A.B. 2001, 219th Leg., Reg. Sess. (N.J. 2020). The State of Washington enacted H.B. 2691, 66th Leg., Reg. Sess. (Wash. 2020), in April 2020 to allow collective bargaining by language access providers, making the governor the employer of record for these workers, much as California a decade ago made a state agency the employer of record for home care providers paid with public funds.

Two federal bills propose to allow coordination rights. S. 1700, 116th Cong. (2019), or to narrow the definition of independent contractor, which would also broaden the antitrust exemption, although not challenge the false equivalence between employee status under the NLRA and antitrust exemption. S. 664, 116th Cong. (2019).

⁵⁰² Kate Conger, *California's Gig Worker Law Is Unconstitutional, Judge Rules*, N.Y. TIMES (Aug. 23, 2021), <https://www.nytimes.com/2021/08/20/technology/prop-22-california-ruling.html> [<https://perma.cc/A233-CP5Y>].

⁵⁰³ *Id.*

⁵⁰⁴ See Robert P. Inman & Daniel L. Rubinfeld, *Making Sense of the Antitrust State-Action Doctrine: Balancing Political Participation and Economic Efficiency in Regulatory Federalism*, 75 TEX. L. REV. 1203, 1270–71 (1997).

spent years and millions in attorneys' fees quashing unionization through antitrust litigation.⁵⁰⁵

Without the looming threat of antitrust, the stakes in worker classification would matter a great deal less, at least for those sectors that have the institutional structures available to enable collective solutions to labor market problems. In the case of creative workers in commercial theatre, for example, it may matter much less whether workers are entitled to minimum standards such as minimum wage, than that they be in a position to negotiate over issues of profit-sharing, compensation in cases of work-related injury, unexpected cancellations of performances, and so forth.

VI. CONCLUSION

Debates over legal regulation of labor markets have swirled around whether wealth and wellbeing of workers, enterprises, and the public are better served by legal regimes enabling economic coordination by labor and management to enable collective self-regulation, as labor law protection for unionization does, or economic coordination solely within firms and individual entrepreneurship on the labor side, as antitrust law prioritizes.⁵⁰⁶ Most sectors of commercially successful arts and entertainment—film, television, sports, and most of stage—have adopted self-regulation through collective action on both sides (unions and multi-employer bargaining).⁵⁰⁷ But dramatists, like increasingly broad swaths of workers, including platform based low-wage workers like Uber drivers, have been forced into the situation where economic coordination is allowed only within the boundaries of corporate conglomerates, not across the sector. Dramatists are not employees with a statutory right to unionize and they deal with hiring entities who use antitrust law aggressively to prevent collective action. Writers accepted this state of affairs because they owned the copyrights in their plays and used the copyrights as leverage.

We have told a story that is part glass half-full and in part glass half-empty. For most of the twentieth century, playwrights and theatre producers negotiated around the shadow of antitrust and created a quasi-collective bargaining framework. A series of collective agreements between the Broadway League and the Dramatists Guild structured the terms on which playwrights dealt with producers. Notwithstanding the vulnerability of this system under antitrust law, it has operated for nearly a century, showing that collective bargaining by freelance workers who embrace their legal status as independent contractors can work, even without federal labor law rights. As the Dramatists Guild says, playwrights are “property owners who license the use of their property, rather than employees entitled to collectively bargain for the conditions of their

⁵⁰⁵ See Marshall Steinbaum, *Antitrust, the Gig Economy, and Labor Market Power*, 82 *LAW & CONTEMP. PROBS.* 45, 59–60 (2019).

⁵⁰⁶ See *supra* note 385; *infra* note 510 and accompanying text.

⁵⁰⁷ See *supra* note 255 and accompanying text.

labor.”⁵⁰⁸ In one sense, they have both the rights of owners and some of the practical benefits of collective bargaining. The producers have dealt for nearly a century with a Guild that, they insist, is an illegal conspiracy.

But the glass is also half empty. In the 1920s, the 1940s, and a few times since, most recently in the 1980s, the producers resorted to antitrust litigation as leverage in their collective negotiation with dramatists.⁵⁰⁹ The litigation always settled with the parties agreeing to abide by a collective contract that the producers’ litigation position insisted was unlawful.⁵¹⁰ In the last 30 years, however, transformations in the business practices in commercial theatre put increasing strain on the collective framework. As changing business practices in theatre steadily reduced the artistic control of many playwrights, especially on Broadway, and reduced the writers’ share of the profits, dramatists hung on ever harder to the symbolic significance of copyright ownership.

The catastrophe of 2020–2021 has put even greater strain on the fragile organizational framework that structures dealings between playwrights and producers. Everybody’s income dried up, almost overnight.⁵¹¹ Actors and directors lost their weekly wage.⁵¹² Playwrights, who have no weekly wage, not only lost the license fees they hoped to receive, but some were asked to return money they’d already been paid for a production that was cancelled.⁵¹³ While unemployed stage actors and directors turned to their unions to negotiate collectively over some kind of support, and then, as employees, could apply for unemployment benefits, the resilient Dramatists Guild could offer no such assistance to its members. Rather, it had to engage in “political engagement initiatives,” secure access to emergency grants and assistance, seek donations of support, and tell members how to apply for pandemic unemployment assistance benefits for independent contractors.⁵¹⁴

As we have shown, the assumption that dramatists must choose between owning the copyright in their work and collective negotiation over the conditions of their labor is not necessary and the legal uncertainty has made the collective framework fragile. As the crisis over the past two years deepened, the Dramatists Guild has highlighted the ongoing fragility of their organizational existence, “NOT employees . . . [but] intellectual property owners who license our property for others to use . . . [A] trade association of independent contractors, not a labor union of employees . . . [where] collective action can

⁵⁰⁸ *Authors Should Maintain*, *supra* note 13.

⁵⁰⁹ *See supra* Parts II–III.

⁵¹⁰ *See supra* Parts II–III.

⁵¹¹ *See supra* notes 1–4 and accompanying text.

⁵¹² *See supra* notes 1–4 and accompanying text.

⁵¹³ *See supra* notes 1–4 and accompanying text.

⁵¹⁴ *A Letter from The Political Engagement Initiative: Healthcare for Dramatists*, DRAMATISTS GUILD (Oct. 2, 2020), <https://www.dramatistsguild.com/news/letter-political-engagement-initiative-healthcare-dramatists> [<https://perma.cc/7QKF-MSU3>]; *COVID-19 Resources*, DRAMATISTS GUILD, <https://www.dramatistsguild.com/covid-19-resources> [<https://perma.cc/6CSJ-CXNU>].

expose the Guild to anti-trust liability, so there are legal limits on what we can do or say as an organization.”⁵¹⁵ The Guild has encouraged passing of the “Protecting the Right to Organize (PRO) Act” as a potential way to organize and negotiate as a collective and for the dramatists to retain copyrights in their work.⁵¹⁶ Ongoing issues surrounding the filibuster complicates the passage of the PRO Act. In late December 2021, the Guild joined a “Coalition of Creators”—groups of freelance and independent-contracting creators—to propose three legislative changes, including amendments to the NLRA, that would allow these groups to collectively bargain.⁵¹⁷ The Guild’s gesturing toward such initiatives, however, is a reminder of the urgency of the moment for the industry.

⁵¹⁵ *Writers Deserve*, *supra* note 23.

⁵¹⁶ H.R. 842, 117th Cong. (2021) (now before the Senate as S. 420, 117th Cong. (2021)).

⁵¹⁷ *Coalition of Creators Requests Collective Bargaining Rights from FTC and DOJ*, AUTHORS GUILD (Dec. 22, 2021), <https://www.authorsguild.org/industry-advocacy/https-authorsguild-org-industry-advocacy-creators-request-collective-bargaining-rights/> [<https://perma.cc/X865-NZEQ>]. The group consists of Alliance of Women Film Composers, Authors Guild, Dramatists Guild of America, Graphic Artists Guild, Music Creators of North America, National Press Photographers Association, National Writers Union, Romance Writers of America, Society of Composers and Lyricists, and Songwriters Guild of America. The group outlines that “their proposals are, in order of priority: (1) an amendment to the National Labor Relations Act that would add ‘professional creative workers’ to section 7 of the NLRA (the provision that allows ‘employees’ to bargain collectively and engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection); (2) a stand-alone antitrust exemption for professional creative workers; and (3) amendments to section 101 of the 2021 Protecting the Right to Organize (PRO) Act (H.R. 842) to cover professional creative workers.” *See* Letter from Coalition of Creators, to Lina Khan, Chair, Fed. Trade Comm’n., and Jonathan Kanter, Assistant Att’y Gen., Dep’t of Just. (Dec. 20, 2021).