Testimony of

Dramatists Guild of America

April 28, 2004

Testimony Submitted for the Record
The Dramatists Guild of America
S. 2349 - The Playwrights Licensing Antitrust Initiative Act:
Safeguarding the Future of American Live Theater
Senate Committee on the Judiciary
April 28, 2004

The carefully crafted narrow exception to the anti-trust laws contained in S. 2349, The Playwrights Licensing Antitrust Initiative Act of 2004, is surgically designed to correct a singular anomaly in the case law relating to playwrights in the American theater. This testimony is designed to solely address the legal status of the playwrights with regard to labor and antitrust law.

As the result of a string of related decisions stretching back 60 years, playwrights, and their 90 year old organization, the Dramatists Guild, have operated under the constant threat of the application of the Sherman Act. In the Ring v. Spina line of cases, 148 F2d 647 (2d Cir., 1945); 84 F.Supp 403 (SDNY 1949); 186 F2d 637 (2d Cir. 1951), there emerged no clear resolution of the basic legal questions. Indeed, at the end of the day, the plaintiff obtained neither damages nor permanent equitable relief. But during the course of that arduous litigation, the decisional seeds for the succeeding five decades of uncertainty were sown. The first Circuit Court decision (148 F2d 647) held that plaintiff had made a prima facie showing of illegality under the Sherman Act sufficient to warrant issuance of a preliminary injunction (reversing the District Court). The decision suggested strongly that playwrights were not employees, and the Dramatists Guild, therefore, not a labor union entitled to the (60-year-ago- version of the) labor exemption to the anti-trust law. The Circuit Court did acknowledge that its decision was not a final adjudication [a point it emphasized in its decision denying rehearing:

" . . . the Court was making merely preliminary rulings . . . . and pointed out that final rulings both of fact and law must await a definitive hearing in the District Court" (148 F2d at p. 654).

The District Court (after a jury trial that found a violation of the anti-trust law but denied damages to the plaintiff) then held that the allegations made on the motion for a preliminary injunction had been proven, and that plaintiff was entitled to injunctive relief. (84 F.Supp. 403).

The Circuit Court, in 186 F2d 637, by Judge Learned Hand, modified the District Court's decision by discontinuing the injunction because of the absence of a "tangible probability that the wrong will be repeated". The Court noted: ". . . we hasten to add that we leave open all legal questions which such issues involve; we wish to make it entirely clear that we are not to be understood either to throw any doubt upon, or to affirm, what we said when we granted the temporary injunction . . . " (186 F2d at p. 643).

The lack of clear direction provided by The Ring v. Spina saga has been exacerbated by subsequent case law involving other artists involved in the American theater. In Jay Julien v. Society of Stage Directors and Choreographers, 1995 Trade Cas. 60541, 80 Labor Cas. 22,505 (SDNY 1975), a Sherman Act complaint was dismissed against the SSD&C. The Court found that the "directors" involved in that case were employees, " . . . in sharp contrast to the playwrights in the Ring case and the lyricists in the Bernstein case . . ." (80 LC at p. 22, 507). In Bernstein v. Universal Pictures 517 F2d 976 (2d Cir. 1975), the Court noted (in a complex procedural setting) that ". . . there is substantial evidence in the record tending to show that the (movie and television) composers are not in fact employees." (517 F2d at p. 980). Finally, in Theater Techniques Inc. v. United Scenic Artists Local 829, 671 F2d 493

(2d Cir. 1981) a jury verdict for defendant union (representing copyright holding scenic designers, costume designers and lighting designers) in an anti-trust action was affirmed in an unpublished opinion.

The legal framework for judging the propriety of dramatists acting through their Guild in a collaborative effort to refine a minimum standards form agreement, is exceedingly complex and arcane. It implicates the century old effort by our legal system to reconcile and accommodate two facially inconsistent national policies: labor and anti-trust. (See, e.g., Section 6 of the Clayton Act, 15 USC 17; Duplex Printing Press Co. v. Deering, 254 US 443 (1921); the Norris-LaGuardia Act; the National Labor Relations Act; United States v. Hutcheson, 312 US 219 (1941); Columbia River Packers Assn. v. Hinton, 315 US 143 (1942); Hunt v. Crumboch, 325 US 821 (1943); Allen-Bradley Co. v. Local 3, IBEW, 325 US 797 (1945); Local 189 v. Jewel Tea, 381 US 676 (1965); United Mine Workers v. Pennington, 381 US 657 (1965); American Federation of Musicians v. Carroll, 391 US 99 (1968); H.A. Artists v. Actors Equity Assn., 451 US 704 (1981).

This accommodation/reconciliation is a challenge in the abstract; it is a daunting challenge in the unique environment of the Broadway Theater - itself part of a unique industry, the entertainment industry. The effort to categorize dramatists as common law employees or independent contractors in the classic analytic mode is a far different exercise than that involving fishing boat captains. (See, Columbia River, supra). The Broadway Theater is not the New York City electric supply industry. (See, Allen-Bradley, supra). Death of Salesman is not a widget.

The proposed legislation is designed to resolve a sixty year old, but intractable, problem in a single, but nationally important, venue - the American theater. It is not intended to, nor does it, attempt to resolve - or even address - larger issues of antitrust or labor law.

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