

Testimony of

Gerald Schoenfeld

April 28, 2004

STATEMENT OF GERALD SCHOENFELD,
Chairman of The Shubert Organization, Incorporated
And
Chairman of The League of American Theatres and Producers

Before The United States Senate
Committee on the Judiciary
Orrin G. Hatch, Utah, Chairman

For the hearing entitled:
"The Playwrights Licensing Antitrust Initiative Act:
Safeguarding the Future of American Live Theater"

Wednesday, April 28, 2004
2pm
Room SD-226
Dirksen Senate Office Building

My name is Gerald Schoenfeld. I am Chairman of the Board of The Shubert Organization, Incorporated, and also Chairman of The League of American Theatres and Producers, the legitimate theatre's trade association.

The Shubert Organization is the owner and/or operator of twenty first class legitimate theatres and one Off-Broadway theatre in the United States located in the cities of New York, Washington, DC, Philadelphia and Boston. It is also a producer of plays and musicals. Among its most recent productions are: Cats, Amour, The Heidi Chronicles, Sunday in the Park with George, Passion, The Ride Down Mount Morgan, Indiscretions, Dirty Blonde, An Inspector Calls, Amadeus, The Grapes of Wrath, The Life and Adventures of Nicholas Nickleby, Jerome Robbins' Broadway, The Most Happy Fella, Children of a Lesser God, Bob Fosse's Dancin', Whoopi Goldberg, Pygmalion, Chess, Dreamgirls, Ain't Misbehavin', The Gin Game, A Streetcar Named Desire, Lettice & Lovage, Skylight, Closer, Les Liaisons Dangereuses, Amy's View, Little Shop of Horrors, The Blue Room, and Dance of Death.

I have occupied my present position for thirty-two years and have been engaged in the negotiation of all of the various contracts involved in a theatrical production as well as in the collective bargaining agreements with the industry's unions and guilds. I am personally familiar with the Dramatists Guild and many of its members and have personal knowledge of the matters hereinafter referred to.

Obviously, the Dramatists Guild must believe it is subject to the anti-trust laws of this country, otherwise it would not be seeking an exemption from its provisions. It is also obvious that an exemption from the anti-trust laws is rarely granted. I submit that the Guild is not an organization that is deserving of exemption.

I was significantly involved in the defense of the predecessors of The Shubert Organization in an action instituted by The United States in February, 1950 claiming alleged violations of the anti-trust laws. This case was settled by a Consent Decree entered in February, 1956.

Contractual relations between legitimate theatre producers and the Guild's members, who are the writers of dramatic plays and musicals, are incorporated in a "suggested" contract known as the Approved Production Contract [APC]. Such has been the case since 1985. Prior to 1985, an antecedent agreement incorporating many of the same provisions was promulgated by the Guild as a mandatory, rather than suggested, contract and was known as the Minimum Basic Production Contract.

The APC sets forth minimum terms and conditions regarding the production of plays and musicals written by Guild members. These terms, among other things, relate to fees and advances against royalties, territorial restrictions, participation in subsidiary rights such as stock and amateur performances, motion picture, television and radio performances, foreign productions both in English and in foreign languages. The APC is a license agreement which grants the producer the right to produce the play as written by the dramatist without any right to make any changes of any kind in the text, lyrics and/or music. It also grants the dramatist the right to approve the director, the cast, the designers and all other creative elements of the play such as the scenic, costume and lighting designers.

The territory granted by the license is restricted to The United States, Canada and The British Isles. The APC also limits the period of time that the licensed rights may be exploited by the producer as well as the duration of the producer's right to participate in subsidiary rights. The exploitation of all subsidiary rights is reserved by the dramatist as are all other rights not specifically granted to the producer pursuant to the provisions of the APC. In the event that a play or musical is initially presented in a non-profit or Off-Broadway venue in The United States or in a foreign country, the license agreement governing such presentations usually contains a provision that in the event the play or musical is thereafter presented as a first-class production in the United States it shall be subject to all of the terms, covenants and conditions contained in the APC.

Membership in the Guild is a coveted status since members will derive the benefits of the APC.

Dramatists are represented by agents who conduct the negotiations on their behalf. Certain negotiated provisions are added to the APC such as billing, per diems, travel arrangements and accommodations, types of transportation, the number of house seats, approval of venues, managers, press agents, attorneys, accountants, and certain additional financial provisions. Since the promulgation of the APC in 1985, and in order to accommodate changing economic conditions involved in the production of plays and musicals, a form of compensation for royalty participants such as authors, directors, designers, and producers was created and is known as the "royalty pool". The royalty pool provides for a certain percentage of the weekly net profits to be allocated to the royalty participants in the following manner: the total of all of the royalty percentages is the denominator of a fraction whose numerator is the percentage paid to each royalty participant, so that for example;

? if the royalty pool participants are to receive 35% percent of the weekly operating profits

? and the total royalties amount to 15%

? and the dramatist's royalty amounts to 6%,

? the dramatist would receive $\frac{6}{15}$ of 35% of the weekly net profits.

? The dramatist and all royalty participants are entitled to receive an agreed amount of money weekly for each royalty percent regardless of whether there is any weekly net profit.

The Guild has unilaterally decreed that in no event shall the dramatist receive less than a certain specified percentage of the total weekly net profits regardless of what the dramatist might otherwise receive as a royalty pool participant. Of course, this has an impact on the ability of the producer to negotiate with other pool participants since they too are expected to receive pari-passu treatment with the dramatist.

Unfortunately, these provisions of the APC are not left to the negotiations between the agent and the producer. The ultimate party that is granted the right to approve the terms and conditions of the agreement negotiated between the producer and the dramatist(s) is reserved exclusively to the Guild. The approval process is subject to what is known as the Certification Process pursuant to which the Guild must certify that the APC, as negotiated at arm's length, conforms to the minimum terms and conditions of the APC. If the Guild does not certify, the APC provides that the agreement between the dramatist and the producer nevertheless may proceed provided that the dramatist, simultaneously with the submission of the APC to the Guild for certification, submits a letter of resignation to the Guild. This has resulted in a unilateral re-negotiation of the APC compelling compliance with its provisions upon pain of dismissal.

I know of no agreement amongst producers regarding the terms and conditions to be included in an APC. In public

offerings relating to the production of plays and musicals, the significant provisions of a dramatist's agreement are set forth in the offering documents. They demonstrate no uniform provisions manifesting the existence of a conspiracy on the part of producers. Indeed, all dramatists are not equally talented yet they must receive at least the same terms and conditions of the APC.

The Guild, its members and their agents, by requiring compliance with the APC and its certification process, have had an impact upon the producer's ability to enter into a negotiation on equal terms with the Guild members. The Guild is not a labor union and thereby exempt by statute from the anti-trust laws. If they are granted exemption, then all inventors, researchers, and creators of literary property other than employees for hire would also be entitled to exemption.

Suffice it to say the conduct of the Guild and its members do not deserve an exemption but should continue to be subject to the strictures of the anti-trust laws. They are the owners of their work and the copyright holder. To

ask for immunity is to seek a shield from both prior and prospective anti-trust law violations. If there are any restraints upon the production of plays and musicals they are imposed by the Guild and its members and not the producers or the venue operators.

In addition, please accept the attached letter from The League of American Theatres and Producers.
