The Playwright Licensing Antitrust Initiative Act: Empowering the "Starving Artist" Through the Convergence of Copyright, Labor, and Antitrust Policies

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I INTRODUCTION

In February 2005, Representative Howard Coble (R-NC) sponsored the Playwright Licensing Antitrust Initiative Act (hereinafter “PLAI”).1 Along with cosponsors John Conyers, Jr. (D-MI), Barney Frank (D-MA), and Henry Hyde (R-IL), Coble introduced the PLAI to the House Judiciary Committee.2 Several different versions of the bill have been introduced in the House and Senate since 2001, but it has yet to be put to a vote.3 The PLAI proposes to amend antitrust laws to enable playwrights to bargain collectively to create a new standard form

2. H.R. 532.
contract for licensing their plays to producers. The Dramatist Guild of America (hereinafter “the Guild”), an association of playwrights in the United States, has employed a standard form contract for many years, which has caused various controversies in the courts. Producers allege that this contract is a violation of antitrust laws. Both proponents and opponents of the PLAI agree that the Guild’s standard form contract is extremely outdated. However, the Guild is unable to update the contract because case precedent has held the contract, even in its outdated form, to be a restraint of trade. The PLAI would allow the Guild to update the standard form contract without violating federal antitrust law.

Part II of this article sets forth the background information necessary to understand the impact of the proposed legislation. First, it discusses the federal laws implicated by the PLAI. Next, it outlines the case precedent which has pushed the Guild to lobby for this legislation. Finally, it describes a comparable piece of state legislation that affects the medical industry.

Part III sets forth the legislative history of the PLAI. It discusses the pending legislation, including Senate testimony, to give a well-rounded explanation of the reasons behind the bill.

Part IV argues that although this piece of legislation may not be in conformity with the literal language of the applicable statutes, it does further the basic policies behind them. First it addresses copyright law, then labor law, and finally antitrust law. An analysis of the relevant cases follows and the similarities between the state legislation in the medical industry and the PLAI is also explored.

Part V sets forth some suggestions on how to obtain the passage of this legislation. Specifically, it recommends that the Guild

4. H.R. 532.
6. Ring, 148 F.2d at 650 (citing e.g., United States v. Trenton Potteries, 273 U.S. 392 (1970), explaining that under the Sherman Act, a contract covering a large part of an industry will be void and illegal if it contains various restrictive agreements, which when combined constitute a restraint of trade). As such, the contract is not currently used by the Guild.
concentrate on the specific policies fulfilled by the PLAI, and that lobbying efforts be redirected towards state government.

II. BACKGROUND

A. Applicable Federal Law

This article addresses three different areas of law: Copyright law, labor law, and antitrust law. The PLAI affects all three of these areas and, as this article will argue, also promotes the policies behind them.

1. Copyright Law

The United States Constitution recognizes the protection of copyrights "[t]o promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." Copyright law addresses two competing interests: the interests of authors in the fruits of their labor on the one hand, and on the other, the interest of the public in ultimately claiming free access to the materials "essential to the development of society." In some cases, Congress and the courts reconcile these two competing interests through statistical data or on the basis of theory, and in others, on the basis of an "informed hunch." But the point of decision in all of the cases is the same: "[c]opyright law’s overarching ambition to encourage the widest possible production and dissemination of literary and artistic works.

2. Labor Law

The area of law known as “Labor Law” was codified by the

7. U.S. CONST. art. I § 8, cl. 8.
10. Id.
National Labor Relations Act (hereinafter “NLRA”). The NLRA states:

The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedures of collective bargaining . . . [has] the intent or necessary effect of burdening or obstructing commerce. . . . It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce . . . .

The NLRA encourages the practice and procedure of collective bargaining and protects the exercise of workers’ freedom of association. It does this by promoting “self-organization . . . for the purpose of negotiating the terms and conditions of [the workers’] employment or other mutual aid or protection.”

Section 153 of the Act created the National Labor Relations Board to adjudicate cases that fall within the scope of the NLRA.

3. Antitrust Law

Antitrust law primarily addresses the economic harms caused by various restraints of trade, including price-fixing and monopolies. It was codified in the Sherman Antitrust Act (hereinafter “Sherman Act”), which states, “Every contract . . . or conspiracy, in restraint of trade or commerce . . . is declared to be illegal.

Section 17 of the Sherman Act amended the antitrust laws, making them inapplicable to labor organizations (consistent with the NLRA):

12. Id. § 151.
13. Id.
14. Id.
15. Id. § 153.
17. Id. § 1.
The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purpose of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws. 18

Various non-economic concerns have been recognized as social policy behind the antitrust laws. 19 Encompassed in those social policies are concerns that competitors be treated fairly; concerns with the dispersion of social power; and concerns with the promotion of equal opportunity. 20 Debates on the Congressional intent behind the Sherman Act show that "Congress condemned . . . monopolies because they had enough power to raise prices and 'unfairly' extract wealth from consumers. . . ." 21

B. Applicable Case Precedent

Copyright, labor, and antitrust laws converge in several cases involving collective bargaining by trade associations in the entertainment industry. 22 The courts have held that when it comes

18. Id § 17 (sometimes referred to as Section 17 of the Sherman Act, other times referred to as the Clayton Act. In Ring v. Spina, it is referred to as the former, and so for the purposes of this article, and in the interests of consistency, it will continue to be referred to as Section 17 of the Sherman Act).
20. Id.
22. See cases cited supra note 5.
to licensing agreements (copyright law), only certain associations will be categorized as labor unions (labor law). If associations are not deemed labor unions, the Sherman Act prohibits them from collectively negotiating the terms of licensing agreements (antitrust law).

1. Ring v. Spina

The Ring saga began in 1945, when the Second Circuit considered the issue of whether an association of playwrights could collectively decide the terms of a standard form contract for licensing agreements. After clarification of that issue, the case was remanded to the district court for an assessment of damages. That decision was later appealed in the Second Circuit again.

The defendants in Ring were the authors of a play, their agent, and the Guild. At issue in the case was the Guild’s Minimum Basic Agreement (hereinafter “Agreement”), which a producer or manager must sign before any members of the Guild may license their works to that producer or manager. The Agreement fixes the minimum terms of the license concerning the pricing of advances and royalties. It also limits contracts to those made under its terms and to those managers and members who are in good standing with the Guild. Furthermore, it provides for the adjudication of all disputes through arbitration.

The plaintiff was a producer who had assumed the rights of another producer. The previous producer had already entered into a Production Contract (hereinafter “Contract”) with the authors.

24. Bernstein, 517 F.2d 976; Ring, 148 F.2d 647; Barr, 573 F. Supp. 555.
25. Ring, 148 F.2d 647.
27. Ring v. Author’s League of America, Inc., 186 F.2d 637 (2d Cir. 1951).
29. Id.
30. Id.
31. Id.
32. Id.
that was subject to the provisions of the Agreement.\textsuperscript{33} The plaintiff maintained that he was coerced into the rescission of the Contract put in place for the original producer, and had agreed to accept the terms of the Agreement as the sole governing document, merely to protect his initial investment of $50,000.\textsuperscript{34}

After the plaintiff had invested an additional $75,000, a dispute arose over changes he wanted to make to the play.\textsuperscript{35} The defendants asserted that the plaintiff had breached the Agreement by altering the work without their consent, and considered the contract terminated.\textsuperscript{36} The play was forced to close and the authors requested arbitration pursuant to the Agreement's arbitration clause.\textsuperscript{37} The plaintiff filed a lawsuit, claiming that the defendants had violated the Sherman Act by creating a monopolistic contract through collective bargaining among the members of the Guild.\textsuperscript{38} He sought enjoin the defendants both from proceeding with the arbitration aimed at enforcing the Agreement and from interfering with his production of the show.\textsuperscript{39} He also requested that royalties be withheld pending assessment of damages.\textsuperscript{40} The district court denied the plaintiff's motion for a temporary injunction, stating that he did not present enough facts to show that the Agreement was void under the Sherman Act.\textsuperscript{41}

In his appeal to the Second Circuit, the plaintiff alleged that the Agreement's provisions for compulsory arbitration and price fixing, as well as the clause that forced producers to deal only with Guild members, constituted restraints of trade.\textsuperscript{42} The Second Circuit held that the Agreement did constitute a restraint of trade.\textsuperscript{43} In doing so, the court rejected the Guild's contention that it was a labor union that fell within the exception of Section 17 of the

\textsuperscript{33} Id.
\textsuperscript{34} Ring, 148 F.2d at 649.
\textsuperscript{35} Id.
\textsuperscript{36} Id.
\textsuperscript{37} Id.
\textsuperscript{38} Id.
\textsuperscript{39} Id.
\textsuperscript{40} Ring, 148 F.2d at 649.
\textsuperscript{41} Id. at 650.
\textsuperscript{42} Id.
\textsuperscript{43} See supra note 6.
Sherman Act. The court also emphasized that the plaintiff was exactly the type of individual whom the Sherman Act sought to protect. The court reversed the denial of the plaintiff's motion for a temporary injunction and remanded the issue of damages back to the district court.

On remand, the District Court for the Southern District of New York found that just because the plaintiff had failed to prove any measurable damages, it did not mean that he was unlikely to suffer them in the future. The court held that equitable relief was appropriate, and that an injunction, lasting for a reasonable time, would prevent the defendants from continuing to enforce the Agreement and "employing the power of the conspiracy" with respect to the play. Essentially, both parties lost - the plaintiff was left without rights in the play, and, if the defendants still desired to license it to him, they would have to do so without the Agreement and its restrictive provisions. Both the plaintiff and the Guild appealed to the Second Circuit - the plaintiff on the dismissal of damages and the Guild as to the injunction.

In the second appeal, the Second Circuit addressed the issue of the injunction. The district court had specifically stated that should the plaintiff wish to produce the play, and should the authors still agree to license it to him, the authors could not offer the plaintiff terms that were any less favorable than those offered to any other producer. The Second Circuit held that to be an error, stating that once it was decided that plaintiff had no rights in

44. Ring, 148 F.2d at 651.
45. Id. at 653. ("[The] plaintiff is precisely the type of individual whom the Sherman Act seeks to protect from combinations fashioned by others and offered to such individual as the only feasible method by which he may do business."
46. Id. at 654.
47. Ring v. Spina, 84 F.Supp. 403, 407 (S.D.N.Y. 1949). (Reasoning that the monetary damages that the plaintiff for which the plaintiff asked were too speculative as the show had not yet opened.)
48. Id. (referring to the illegal collusion of the Guild in restraint of trade.)
49. Id.
50. Ring, 186 F.3d 637.
51. Id at 642.
52. Id.
the play, he was entitled neither to bid for a second production contract nor to seek an injunction which would secure such a right.\textsuperscript{53} According to the Second Circuit, if the Agreement was repudiated for unlawfulness, it was repudiated in full; the plaintiff could not keep the right to produce the play but excise the terms the authors had conditioned upon their promise.\textsuperscript{54} It also held that, to support an injunction, a plaintiff must show a dangerous probability that such injury will happen again.\textsuperscript{55} In this case, the plaintiff was not a producer by trade, he was a lawyer.\textsuperscript{56} He never asserted that he would, especially after this experience, seek to produce another play, or that now, after seven years, the authors were likely to revive it.\textsuperscript{57} In conclusion, the Court affirmed the dismissal of monetary damages, but held the imposition of an injunction to be error.\textsuperscript{58}

2. \textit{Bernstein v. Universal Pictures, Inc.}

As discussed above, Section 17 of the Sherman Act, referred to briefly in \textit{Ring}, amended the antitrust laws, making them inapplicable to labor organizations.\textsuperscript{59} The labor exemption, as read in conjunction with the NLRA, is applied only to labor unions consisting of employees, and not independent contractors.\textsuperscript{60}

\begin{itemize}
\item \textsuperscript{53} \textit{Id.}
\item \textsuperscript{54} \textit{Id.}
\item \textsuperscript{55} \textit{Id.}
\item \textsuperscript{56} \textit{Ring}, 186 F.2d at 643.
\item \textsuperscript{57} \textit{Id.}
\item \textsuperscript{58} \textit{Id.}
\item \textsuperscript{60} 15 U.S.C. § 1 (2005); 29 U.S.C. § 151 (2005). The general test that the Supreme Court has used to define the term “employee” can be found in Nationwide Mut. Ins. Co. v. Darden, 503 U.S. at 322-23 (1992): “... when Congress has used the term ‘employee’ without defining it, we have concluded that Congress intended to describe the ... relationship as understood by common-law agency doctrine ...” The test for determining whether a hired party is an employee is:
\begin{quote}
[We] consider the hiring party’s right to control the manner and means by which the product is accomplished. Among other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the
\end{quote}
\end{itemize}
Bernstein v. Universal Pictures, Inc. and Julien v. Society of Stage Directors and Choreographers, Inc., address the distinction between employees and independent contractors with respect to the entertainment industry.61

In Bernstein, the Second Circuit, in an appeal from the Southern District Court of New York, found evidence suggesting that movie and television composers were not employees, but independent contractors.62 The case involved a Minimum Basic Agreement63, created by the Composers and Lyricists Guild of America (hereinafter “CLGA”), and signed by several producers, some of whom belonged to the Association of Motion Picture and Television Producers (hereinafter “AMPTP”).64 Here, unlike in Ring, the CLGA argued that it was not a labor organization.65 The allegations were further distinguished from Ring in that CLGA was trying to prove collective bargaining by the producers in violation of the Sherman Act.66 In doing so, CLGA attempted to have the issue heard before a federal court rather than the National Labor Relations Board (hereinafter “NLRB”), asserting that the NLRB did not have jurisdiction because they were independent contractors and not employees.67 The producers argued that the subject matter was within the primary and exclusive jurisdiction of

work; the duration of the relationship between the parties; whether the hiring parties have a 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 the employee benefits; and the tax treatment of the hired party.


62. Bernstein, 517 F.2d at 980.
63. A standard form contract similar in nature to the Guild’s Agreement.
64. Bernstein, 517 F.2d at 978.
65. Id. at 979.
66. Id. (emphasis added).
67. Id.
the NLRB, and the district court agreed.68

The composers appealed to the Second Circuit.69 They argued that the NLRB’s exclusive jurisdiction depended on the status of the composers as employees or independent contractors.70 Referring to the NLRA, they argued that labor organizations are collections of employees, a term whose definition excludes independent contractors. Thus, the NLRB had no jurisdiction.71 The district court decided that because the CLGA had acted as a labor union for over twenty years, by electing bargaining representatives and engaging in collective bargaining, it would treat them as such.72 The Second Circuit, however, found that did not resolve the issue. It held that “antitrust jurisdiction cannot be denied simply because independent contractors masquerade as a union.”73 Instead, the Second Circuit applied the traditional tests74 for determining whether or not a party is an employee.75 It found substantial evidence that the members of the CLGA were independent contractors and not employees.76 It noted that composers contract for a specific output, work at their own pace at home, and are not subject to day-to-day supervision by the producers.77 The Second Circuit also stressed that the producer had no right to control the manner in which work was performed.78 However, as the NLRB was already in the advanced stages of proceedings on the matter, in the interest of efficiency and predictability, the Second Circuit held that the official decision should be left to the NLRB.79

68. *Id.*
69. *Id.*
70. *Id.*
71. *Bernstein*, 517 F.2d at 979.
72. *Id.* at 980.
73. *Id.*
74. See supra note 60.
75. *Bernstein*, 517 F.2d at 980.
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.* at 982.

In contrast to Bernstein, the Julien court found that stage directors were employees and not independent contractors. In this case, the District Court for the Southern District of New York noted that while there are numerous tests for whether a party is an independent contractor or an employee, "the general test is found in an analysis of 'the nature and amount of control reserved by the person for whom the work is done.'" 8

In analyzing both Ring and Bernstein, the Julien court found a sharp distinction between the status of playwrights and composers and the status of directors in the same industry. A producer has a great deal of control over the work that is done by stage director, unlike the very limited amount of control a producer has over playwrights. In dealing with directors, the producer may add or delete scenes, attend auditions, select the cast, redesign sets, choose costumes, determine the length of rehearsal time, and decide locations of where the play will be performed. The producer may do all of these things (and more) over the objections of the director, as part of his control over the artistic direction of the play. The court found that the producer had final control over every aspect of the director's job and therefore held that stage directors were employees.


In 1983, the District Court for the Southern District of New York once again addressed a dispute over the Guild's Minimum

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81. Id. The Court is basically finding that, of all of the factors generally applied to the traditional Supreme Court test (see note 60), this factor is the one it finds to be the most compelling.
82. Id at *3.
83. Id.
84. Id.
85. Id.
86. Id.
Basic Production Contract ("MBPC"). In *Barr v. Dramatists Guild, Inc.*, the plaintiff, president of the League of New York Theaters and Producers, Inc. (hereinafter "League"), alleged that there was a conspiracy stemming from the MBPC. He sought a declaration that the alleged conspiracy was a violation of the Sherman Act as well as an injunction against any such contracts. The complaint also sought to enjoin the defendants, the Guild, from involving themselves in the negotiations between an author and a producer of licensing terms. The defendants filed a counterclaim alleging that it was the League which had violated the Sherman Act by conspiring to fix the compensation received by playwrights at an artificially low and non-competitive level. 

The sole issue before the court was the League's motion to dismiss the counterclaim. In support of its counterclaim, the Guild argued that if the court held that playwrights may not combine to negotiate the terms and conditions of their employment, then neither could the producers combine to negotiate the terms on which they would deal with those playwrights. The counterclaim alleged that two of the members of the League controlled about seventy percent of the first-class theaters and had a monopoly in New York City, thereby dominating the League and dictating the terms under which they would produce a playwright's work. In particular, the League had used the same MBPC minimum terms, but had converted them into maximum terms.  

The League argued that the Guild did not have standing to sue under antitrust laws because it was an association and not a labor union. After analyzing the federal statutes and case law, the

88. *Id.* at 557.  
89. *Id.*  
90. *Id.*  
91. *Id.* at 558.  
92. *Id.* at 557.  
94. *Id.*  
95. *Id.*  
96. *Id.* at 561.
court rejected this argument.\textsuperscript{97} It held that while associations may not sue for treble damages stemming from antitrust violations, they may sue for injunctive relief.\textsuperscript{98}

The Supreme Court has traditionally held that "an association may bring an action on behalf of its members for injunctive relief even when no injury to the association is alleged."\textsuperscript{99} The Barr court noted that in deciding whether an association has standing, many courts have applied a test set forth by the Supreme Court in \textit{Hunt v. Washington State Apple Advertising Commission.}\textsuperscript{100} Under \textit{Hunt}, an association has standing to seek injunctive relief if: "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit."\textsuperscript{101} The Guild satisfied all three elements.\textsuperscript{102} Thus, the court denied the League's motion to dismiss the Guild's counterclaim.\textsuperscript{103}

\textbf{C. Comparative Law in the Medical Industry}

In the medical industry, a similar battle has ensued over antitrust issues and collective bargaining. Doctors have repeatedly sought the enactment of federal legislation which would allow them to collectively negotiate on contract terms with large hospitals and large insurance plans such as HMOs.\textsuperscript{104} While the United States

\begin{itemize}
    \item \textsuperscript{97} \textit{Id.} at 558-563.
    \item \textsuperscript{98} \textit{Id.} at 561-562. The typical remedy in antitrust lawsuits is treble damages. However, section 4 of the Clayton Act, 15 U.S.C. \S\ 15, does not allow for such a remedy where the only injury alleged is to its members. Instead, section 16 of the Clayton Act, 15 U.S.C. \S\ 26, allows injunctive relief for such an injury.
    \item \textsuperscript{99} \textit{Barr}, 573 F.Supp. at 562 (citing \textit{Warth v. Seldin}, 422 U.S. 490, 511 (1975))
    \item \textsuperscript{100} \textit{Id.}
    \item \textsuperscript{101} \textit{Id.} (citing to \textit{Hunt v. Washington State Apple Advertising Commission}, 432 U.S. 333, 343 (1977)).
    \item \textsuperscript{102} \textit{Id.} at 563.
    \item \textsuperscript{103} \textit{Id.}
    \item \textsuperscript{104} \textit{Id.}
\end{itemize}
Congress has repeatedly proposed the Quality Health-Care Coalition Act (hereinafter "Health-Care Act") in response to the doctors' pleas, the bill has yet to pass both the House and the Senate.\(^{105}\) A few states, however, have recently passed legislation amending the antitrust laws in favor of these doctors.\(^{106}\) In particular, Texas passed Senate Bill 1468 in 1999.\(^{107}\) The law allows groups comprising no more than ten percent of the physicians within a health-benefit plan's service area to negotiate contract terms and conditions with the health-benefit plan.\(^{108}\) They may only do so, however, where the benefits of joint negotiation would outweigh the disadvantages from reduced competition.\(^{109}\) The policies behind this Texas law are very similar to those behind the PLAI. Both protect collective bargaining by associations when the threat of monopolistic behavior is outweighed and restrained by an unequal amount of bargaining power.

Supporters of the Texas law asserted that the growth of managed care gave health-benefit plans a great advantage over individual physicians in their negotiations, creating contracts that were severely unfavorable to the physicians.\(^{110}\) They claimed that these unfavorable provisions threatened patient care because doctors were forced to either turn down health plans that dominated the market or join an individual physicians association\(^{111}\) when they would rather work on their own.\(^{112}\) The supporters rebutted opponents' claims that the legislation would raise the cost of premiums at the expense of patients, stating that there was no hard


\(^{106}\) H.R. 4277; H.R. 1304; H.R. 1247; H.R. 3074.


\(^{108}\) Id.

\(^{109}\) Id.


\(^{111}\) Individual physician's associations are exempted under antitrust laws and allowed to bargain collectively. Id.

\(^{112}\) Id.
evidence that joint negotiations would increase costs. Instead, the supporters pointed to an aging population, new medications, and advances in medical technology as the major factors contributing to higher medical costs. The supporters’ main contention was that the new legislation would level the playing field and was no more anticompetitive than the tactics previously used by the plans.

Opponents of the bill argued that it would have anticompetitive effects that would harm consumers. They also rebuked the bill for its lack of research on physician joint negotiation, calling it “foreboding in view of the huge impact that the bill would have on health care in Texas.” The Texas legislature eventually passed the bill, despite these objections.

III. PROPOSED LEGISLATION: THE PLAYWRIGHT LICENSING ANTITRUST INITIATIVE ACT OF 2005

Since 2001, Representative Henry Hyde and Senator Orrin Hatch have introduced several versions of the Playwright Antitrust Initiative Act of 2005. The bill would modify the application of antitrust laws to permit collective development and implementation of a standard contract form for playwrights for the licensing of their plays. This would allow an association of playwrights, namely the Dramatists Guild, to develop and utilize their Minimum Basic Agreement or Minimum Basic Production Contract, and thereby participate in the negotiations between playwrights and producers concerning licensing agreements. The Act has not yet been voted on, but as of 2005 it was still pending in the House. It did, however, gather much support along the

113. Id.
114. Id.
116. Id.
117. Id.
118. Id.
119. See supra note 3.
120. H.R. 532.
121. Id. At the time of the submission of this article for publication (end of 2006 term), the PLAI had not been reintroduced to either the House or the
way, and various other Representatives and Senators have added their names as Cosponsors of the bill.\textsuperscript{122}

In April 2004, the Senate heard testimony on the proposed legislation (then titled the Playwright Antitrust Initiative Act of 2004).\textsuperscript{123} Senator and Chairman Orrin Hatch opened the hearing on the PLAI.\textsuperscript{124} Afterward, the Senate Judiciary heard testimony from such playwright heavyweights as Arthur Miller and Steven Sondheim, as well as from the Guild and a prominent Broadway producer.\textsuperscript{125} The first three, along with Chairman Hatch, spoke in support of the bill, while the producer spoke out against it.\textsuperscript{126}

\textit{A. Opening Statements of Chairman Orin Hatch}

Chairman Hatch opened by asserting that the future of live theater depended on maintaining the artistic independence of dramatists and giving them a greater voice in licensing terms.\textsuperscript{127} He went on to describe the nature of the proposed legislation:

\begin{quote}
Due to the interaction of federal labor, antitrust and copyright law, the dramatists and their voluntary peer organization, the Dramatists Guild of America, have been hampered in acting collectively in their dealings 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.\textsuperscript{128}
\end{quote}

Chairman Hatch explained that as a result of this interaction,
playwrights, who are frequently at a substantial bargaining disadvantage, are forced to accept contracts on a take-it-or-leave-it basis.\textsuperscript{129} He stated that for the next generation of American playwrights to truly flourish, they needed a more organized voice.\textsuperscript{130} He described the PLAI as "a narrow measure that would allow playwrights . . . to act collectively in dealing with other industry groups. . . ."\textsuperscript{131} The Chairman further explained that, "it would permit these artists to sit down with their creative colleagues for the purpose of negotiating, adopting, and implementing updated standard form terms."\textsuperscript{132} Chairman Hatch also emphasized that the bill only covered collective adoption and implementation, not collective enforcement.\textsuperscript{133} He also stressed that this measure would encourage young, struggling playwrights to continue working in the industry.\textsuperscript{134}

\textbf{B. Testimony of Arthur Miller}

Arthur Miller, a critically acclaimed playwright, having written such plays as \textit{Death of a Salesman} and \textit{The Crucible}, spoke on the merits of the proposed legislation.\textsuperscript{135} Miller noted that he was speaking not on behalf of himself, but on behalf of up and coming playwrights.\textsuperscript{136} He stressed that the American theater risks losing the next generation of playwrights to other media as the pressures on them increase and their power to protect their economic interests diminishes.\textsuperscript{137}

In his testimony, Miller explained the benefit of the Act for playwrights and the American theater itself:\textsuperscript{138}

\begin{itemize}
  \item \textsuperscript{129} \textit{Id.}
  \item \textsuperscript{130} \textit{Id.}
  \item \textsuperscript{131} \textit{Id.}
  \item \textsuperscript{132} \textit{See supra} note \textsuperscript{127}.
  \item \textsuperscript{133} \textit{Id.}
  \item \textsuperscript{134} \textit{Id.}
  \item \textsuperscript{136} \textit{Id.}
  \item \textsuperscript{137} \textit{Id.}
  \item \textsuperscript{138} \textit{Id.}
\end{itemize}
The American theater has undergone enormous changes over the years. From its entrepreneurial start it has become increasingly dominated by corporate interests. Sure, business is changing in virtually every sector of our economy, and there is no reason that the theater should be immune from business pressures. But, unfortunately, in the midst of these increasing pressures, only one entity does not have a seat at the bargaining table: the playwrights. . . . [A]ll other entities have the collective power and ability to fight for their rights. As a result, it is the playwright who gets squeezed. . . . [The PLAI] would provide a very limited legislative fix that would allow for the standard form contract . . . to be updated to take account of today’s market realities and intellectual property climate. It does not force producers to hire any playwrights, but it does allow playwrights with a willing producer to protect their economic and artistic interests.139

Miller readily conceded that antitrust exemptions are difficult to create, and asserted his belief that laws should not be too easily amended; however, he urged that the national interest demanded such a change.140

C. Testimony of Steven Sondheim

Steven Sondheim is a successful playwright and winner of a Pulitzer Prize and several Tony awards.141 He is also a former President of the Guild and has worked for some time with Congress to promote the PLAI.142 In his testimony, Sondheim

139. Id.
140. See supra note 135.
142. Id.
stated that the Guild is the only professional association for playwrights, composers, and lyricists, and consists of more than 6,000 members. He also acknowledged that the Guild is not a union, and therefore did not come under the protections of the NLRA, as the members do not meet the definition of “employee” that would allow them to bargain collectively. He went on to note that case precedent has granted both choreographers and scenic designers the exemptions necessary to allow them to bargain collectively, and stressed his belief that playwrights should be afforded that same opportunity.

Sondheim also injected personal experience into his testimony to illustrate his position:

[O]ne show I wrote, “Merrily We Role Along,” is a piece that goes backwards in time. It starts at the end of the story and . . . proceeds back to the beginning. One producer tried to reverse the order of the play because he believed it would be easier for the audience to understand. Needless to say, it did not improve matters, but even if it had, it was not the show we had written or intended to be presented. Because I was a recognized name in 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. And it is partly due to the collective ability of the Dramatists Guild that those rights can be enforced. But under the outdated contract we now have with theater producers, our ability to negotiate realistically, based on current market factors and realities, is limited.

Sondheim also stressed that the amount of support for this piece

143. Id.
144. Id.
145. Id.
146. Id.
of legislation shows that it is not a partisan issue, and that the PLAI would help create a competitive marketplace where all interests can be appropriately balanced.147

D. Testimony of The Dramatists Guild of America

The Guild also submitted a statement at the hearing, explaining that the Act was “surgically designed to correct a single anomaly in the case law relating to playwrights. . .”148 The Guild declared that as a result of related case law, it has operated under the constant threat of the Sherman Act’s application.149 The Guild declared that “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.”150 The Guild highlighted the distinctions between the stage directors, lyricists, and choreographers in the Julien and Bernstein decisions and the playwrights in Ring, with regard to employment status.151 The Guild further discussed the legal implications of the new legislation, noting that:

The legal framework for judging the propriety of dramatists acting through their Guild in a collaborative effort to reform 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 antitrust.152

The Guild further stated that this accommodation/reconciliation is a challenge in the abstract:

147. See supra note 141.
149. Id.
150. Id.
151. Id.
152. Id.
[I]t 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. The Broadway theater is not the . . . electric supply company. “Death of a Salesman” is not a widget.153

The Guild asserted that the legislation is not intended to resolve the greater issues of labor and antitrust laws, but merely to resolve a long history of problems in the American theater.154

E. Testimony of Roger Berlind

Roger Berlind, the renowned producer of over forty plays on Broadway (some written by Steven Sondheim) and many off-Broadway and regional productions, opposes the PLAI.155 Before entering the industry, Berlind was an investment banker, and therefore has a great deal of knowledge about investment risk.156 He testified that, as he understood the proposed legislation, “the playwrights seek to be free from the restraints of antitrust law, to which the rest of us must adhere.”157 He stressed that this would not be good for competition or the theater, and would specifically be harmful to young playwrights:

The essence of theatrical production is risk. . . . The risk/reward ratio is not enticing. The process begins with the initial agreement to license the rights to produce. . . . While [the purpose of the

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153. Id.
154. Id.
156. Id.
157. Id.
PLAI] sounds reasonable, in practice it just won’t work. The proposal assumes that there are two positions – a producer position and a playwright position – that can be stated for all time. [But] there are way too many variables, and at least from the perspective of the producers – we don’t all agree on structure, price or terms. Every show is different, and we want the flexibility to negotiate those things in each and every different context we face.\textsuperscript{158}

Berlind asserted that “it’s just a fact that one might not structure the same agreement for a brand-new, never-before-produced play by an unknown author as for one of the distinguished playwrights sitting here.”\textsuperscript{159} Berlind insisted, “[t]hat’s not unfair; it’s what allows the unknown author to become known.”\textsuperscript{160}

Berlind stressed that if this proposed legislation were enacted there would no longer be a free market in the industry, but rather a closed one with the Guild acting as gatekeeper.\textsuperscript{161} That gatekeeper role, he concluded, was the reason there were currently many more productions of plays by non-Guild members than by members.\textsuperscript{162}

IV. ANALYSIS

This Analysis will argue that the PLAI meets the underlying policies behind copyright, labor, and antitrust laws, even when it is in contradiction with the literal language of the applicable statutes. Further, it will address and analyze the case precedent. Finally, it will illustrate the similarities between the Health-Care Act and the PLAI.

\textsuperscript{158} Id.
\textsuperscript{159} Id.
\textsuperscript{160} Id.
\textsuperscript{161} See supra note 155.
\textsuperscript{162} Id.
A. The Dual Goals of Copyright Law: How the Incidental Facilitates the Most Important

There are two competing interests in Copyright law: protection of the author’s rights in her work and the public’s rights to free access of new materials. The inherent public policy behind copyright law, however, is public access. But are there really any new ideas, or are there only new expressions of old ideas? The Framers understood that expressive creations are beneficial to society in that they promote the economic and social progress and the development of nations. That is why Copyright law adheres to the notion that new artistic concepts and designs are created from the previous artistic concepts and designs of those before us.

While artists often possess passion for the subject of their work and their primary goals may not be financial ones, the act of creating, is still work nonetheless. Without financial incentives for their creations, they may abandon their pursuit of the arts and turn to other, more lucrative careers. Again, the Framers understood this reality and therefore created the Copyright Clause as an incentive for those scientists and artists. But ultimately, that incentive was created as a means to the important end of assuring that new creative works will eventually end up in the public domain. This ensures eventual access to those specific creations, giving new artists the opportunity to build off of existing ideas.

1. The PLAI Creates Incentives that Further the Promotion of Public Access

It could be argued that the PLAI will decrease public access by deterring producers from investing in new plays or by the possibility of increased ticket prices. The PLAI, however, will provide an incentive to authors to create these works in the first place. While public access is the most important objective of copyright law, without these incentives there would be no works for the public to access.

The PLAI specifically protects playwrights. Over the last fifty years, American theater has taken a back seat to other mediums of

163. See supra note 8.
expression, namely television and movie productions.\textsuperscript{164} Without
the rights afforded by the PLAI, playwrights will (and have been)
turning to those other mediums; and not because they no longer
possess a passion for writing plays, but merely because the stage
lacks the financial incentives necessary to attract and keep them.\textsuperscript{165}
New playwrights face a particular hardship in that producers will
often take advantage of their willingness to accept almost any
terms just to have their work produced. The League’s argument
that new playwrights will actually be harmed by the PLAI because
they will not have their plays produced at all is simply without
merit. Surely, no one presumes that it is the responsibility of
producers to protect the rights of young playwrights. In fact, it is
through the PLAI that playwrights choose to protect their own
rights. Whether there may be any truth to the League’s argument
is speculative for now and will be answered by the market if the
PLAI should pass. Certainly it makes more sense to give
playwrights the ability to protect themselves than to have
producers acting in a paternalistic fashion, especially when the
interests of the two parties, at least in regards to financial concerns,
are at odds.

Another possible argument against the PLAI is that the Guild is
actually the one acting in a paternalistic fashion, creating
incentives over and above those recognized by copyright policy.
This seems to be the function, however, of all associations.
Certainly it is the primary goal of an association to further the
interests of its members, as evidenced by the Supreme Court
decision allowing an association to bring suit on behalf of its
members.\textsuperscript{166} In addition, the Guild is only acting to protect those
incentives already advanced by copyright law, and not to extend
them further. If one accepts the argument that without the PLAI
playwrights will leave the field of live theater in search of other
opportunities, then the incentive created by the PLAI, and
therefore the Guild, is fundamental and quite basic.

\begin{footnotes}
\item[164. See, e.g. supra note 134; supra note 137.]
\item[165. Id.]
\item[166. See supra note 98.]
\end{footnotes}
B. Labor Law: Addressing the Inequalities that Burden Commerce

The NLRA was enacted in response to a specific social and economic problem. Congress recognized that the inequality in bargaining power between employees and employers had the effect of burdening the free flow of commerce. The statute's language illustrates that the congressional intent was to ensure a smooth flow of goods through the market. The full text of the NLRA, however, lists some of the obstructions to commerce that the PLAI was designed to prevent, one of which is "causing diminution of employment and wages in such volume as to substantially impair the flow or disrupt the market for goods flowing from or into the channels of commerce." When producers take advantage of young playwrights, causing those playwrights to leave the field, those producers are, in essence, impairing the flow (when they take advantage) or disrupting the market for goods flowing (when their conduct causes playwrights to leave the theater) into the channels of commerce. Even so, that does not end the inquiry here; the question of whether playwrights are employees, as defined and protected by the NLRA, still remains.

1. Playwrights are Not Covered Under the Literal Language of the NLRA

When Congress uses the term "employee" without defining it, the Supreme Court has indicated that it is referring to the common-law agency doctrine. Generally, a court will apply a thirteen-factor test to determine whether or not a party is an employee. The factors considered are: (1) the hiring party’s right to control the manner and means by which the product is accomplished; (2) the skill required; (3) the source of the instrumentalities and tools; (4) the location of the work; (5) the duration of the relationship between the parties; (6) whether the hiring parties have a right to

168. Supra note 59.
169. See id.
assign additional projects to the hired party; (7) the extent of the hired parties’ discretion over when and how long to work; (8) the method of payment; (9) the hired party’s role in hiring and paying assistants; (10) whether the work is part of the regular business of the hiring party; (11) whether the hiring party is in business; (12) the provision of employee benefits; and (13) the tax treatment of the hired party.\textsuperscript{170}

Here, the product at issue is the script. Applying the thirteen-factor test, an overwhelming majority of the factors demonstrate that a playwright is not an employee of the producer. Namely: the hiring party, the producer, has no control over the manner and means by which the script is written or developed and does not become involved until the script is complete; as the writing of a script involves a great deal of imagination, specialized writing abilities and talent, it is not the type of skill an employer usually seeks out for daily work, but rather the type contracted for independently; a playwright will use his own pen (or computer), as well as his own workspace, to write his play; the duration of the relationship between the producer and the playwright is very limited and involves only the time it takes to produce the one play; if the producer should wish to commission another play, a new contract would have to be devised and therefore the producer does not have the right to assign additional projects to the playwright; because the relationship does not, in most instances, come into existence until after the play is written, the playwright has unfettered discretion over when and how long to work on writing the play; the method of payment is governed by the licensing agreement and not a traditional employer-employee salary agreement; the playwright also has full discretion in the hiring of assistants; the playwright receives no employee benefits from the producer as traditional employees would; and, producers do not take taxes out of the playwright’s payment as a hiring party would normally do for an employee.

These factors all demonstrate that a playwright is not an employee of the producer, but rather an independent contractor.

\textsuperscript{170} See, e.g., Community for Creative Non-Violence, 490 U.S. 730, 751-752. \textit{Supra} note 60.
2. However, The PLAI Acts to Address the Inequalities that Burden Commerce

If a party is not an employee, is he still protected by the NLRA and allowed to bargain collectively? Certainly not if the NLRA is read literally. But the relationship here may still meet the inherent purpose of the NLRA to ensure the smooth and uninterrupted flow of commerce. Labor law is often seen as being at odds with antitrust law. It seeks to promote equality of bargaining power by allowing groups of employees to join together and bargain collectively. In contrast, antitrust law discourages collective bargaining in order to avoid monopolistic growth of power. Nonetheless, these two areas of law can arguably be aligned. The term “employee” can effectively work as a safeguard, keeping the NLRA indirectly connected with antitrust policies which prohibit collective bargaining. Hence, the two laws combine to provide that only employees can lawfully engage in collective bargaining. But if antitrust policies are not themselves violated by the PLAI, then there is no need for that particular safeguard.

C. Antitrust Law: Interpretation and Analysis

1. The Literal Language

The PLAI would arguably be a violation the Sherman Act’s literal language. The Guild boasts that its membership consists of virtually every playwright in America. When all the playwrights in America gather together to negotiate the terms of the Agreement, which is the only way a play may be licensed, they are actually controlling the entire market of live theater scripts. That is the very definition of a contract or conspiracy in restraint of trade. Literal interpretation, however, is not the only avenue for statutory interpretation.

171. Ring, 148 F.2d 649.
2. **Policy Analysis**

When a statute is unclear or ambiguous, a court may look to the intent of Congress at the time the statute was created. The antitrust laws are among the least precise statutes enacted by Congress and its original goals are impossible to establish with certainty. There are many theories of antitrust law and dozens of ways to explain why Congress adopted the Sherman Act and how it intended it to be applied. This discussion of antitrust law and policy will be confined only to those theories implicated by the PLAI.

*a. The PLAI Promotes Economic Efficiency*

One of the theories embodied in the analysis of antitrust policy is based on economic efficiency. This theory is based on the notion that monopolies cause increased prices and reduced output. When there are multiple sources of a particular good or service, as opposed to just one, the quality and quantity of the goods and fairness in price to consumers increases substantially and the transactions become much more economically efficient. While this theory factors in consumer welfare, it is essentially based on the resulting economics and does not reflect a preference of consumer wealth over monopolist wealth.

The PLAI would not be barred by the “economic efficiency” theory. While it can be argued that the quality of the plays written may be lowered by the PLAI because young playwrights would lose some of the incentive to write a relatively “better” play in an attempt to get a “better” licensing agreement, that argument is speculative and flawed. As mentioned above, artists possess a special passion for their work. The work itself is unlike most goods. As the Guild stated during Senate testimony, “*Death of a Salesman* is not a widget.” The likelihood that the Agreement

172. *Lande, supra* note 21, at 81.
173. *See id.; Shulman, supra* note 19.
175. *Id. at 84.
176. *See supra* note 141.
would compromise the integrity of a playwright’s work is minimal at best. The playwright’s name will be on his work, and if he wishes to be produced again, he will want to put forth his best effort regardless of the Agreement. In addition, the PLAI would not force producers to invest in a particular play; it only permits the Agreement to stipulate the minimum terms for the licensing of that play.

It could be argued that the quantity of plays being produced would decrease and that ticket prices would increase, thereby reducing consumer welfare. Again, those arguments would be speculative and flawed. It is the Guild who is the main proponent of this piece of legislation. Its members consist of America’s playwrights. Playwrights would be harmed if the quantity of plays being produced decreased and ticket prices increased because consumer attendance would surely decrease in response, slowing the market on which their future income depends. The Guild has been fighting for the PLAI in the economic interest of their members for decades. It would be paternalistic to deny them the benefits of this legislation simply because it could possibly harm them, especially when the potential for gain is much greater. In addition, the argument that ticket prices would be increased here as well, because it is focused on a preference of consumer wealth over monopolist wealth — a preference not embraced by economic efficiency theorists, as mentioned above. Therefore, the PLAI complies with the economic efficiency theory.

b. The PLAI Promotes Allocative Efficiency

Robert H. Lande, in an article in the Hastings Law Journal, explains allocative efficiency well:

Monopoly pricing reduces the total amount of wealth in society. Because monopolists produce less than would be produced under competitive conditions, some resources that would have been used to make that monopoly product, will be diverted for other purposes, ones that consumers value demonstrably less. That misallocation of resources diminishes the fulfillment of a society’s
needs, which in terms of what society values, results in a reduction of society’s total wealth. This process is considered to be an “allocative inefficiency.” Elimination of monopoly pricing would . . . increase society’s wealth and, therefore, increase consumer satisfaction.177

Many argue that the concept of allocative inefficiency did not exist at the time that the Sherman Act was created, and as such, Congress did not intend the antitrust laws to correct it.178 Economists, nevertheless, often consider allocative efficiency to be quite important and condemn monopolies for disrupting it.179

The PLAI would not implicate allocative inefficiency. To create such an inefficiency the PLAI would have to encourage playwrights to write less plays, creating greater demand for the few plays available, which would in turn allow them to forcibly increase prices for the licensing rights of those plays. Clearly, that is not the purpose of the PLAI or the Guild. In fact, the Guild seeks to protect all American playwrights by creating incentives to keep them in the field of live theater and the production of less plays surely would not be beneficial in that sense. This leads to the second reason that the PLAI does not implicate allocative inefficiency – it does not cause resources to be diverted to other purposes which are less desirable to consumers. This is actually what the PLAI seeks to remedy. Without the PLAI, the resources (playwrights’ creativity and work product) would be diverted to other media. Whether television and movies are less desirable to general consumers than live theater is debatable but largely irrelevant as the consumer being affected by the PLAI is not the general public, but producers as a group. Thus, in effect, the PLAI creates an allocative efficiency in the market, as opposed to the typical monopolistic disruption of that efficiency.

177. Lande, supra note 21, at 72.
179. Lande, supra note 21, at 73.
c. The PLAI Does Not Result in Unfair Transfers of Wealth

Yet another theory is that monopolies should be condemned because they have enough market power to raise prices and "unfairly" extract wealth from consumers and turn it into monopoly profits. The word "fair" and "unfair" are treated as moral comparisons: Monopolies extort wealth from consumers, a consequence that is morally unfair. From a morality perspective, the PLAI is surely fair.

Because the PLAI concerns only the licensing Agreement, the League is the targeted consumer base. This means the League is the vantage point from which moral fairness is measured. The analysis does not require that the League derive an extensive benefit from the PLAI, but merely requires that they are treated fairly with respect to wealth transfers. The League is currently a monopoly power extracting wealth from the members of the Guild. The PLAI puts the two organizations on equal footing with respect to collective bargaining and contract negotiations, making it morally fair.

Even setting aside the monopolistic tendencies of the League, the PLAI is still fair and reasonable. It is a common presumption that the average producer has a great deal more power than the average playwright, as power, itself, is often presumed from financial strength. A producer, by the very nature of his profession, is in a much stronger financial position than a playwright; otherwise the playwright would forgo the producer altogether and utilize his own finances to produce the play. If the Guild is allowed to bargain collectively and develop a standard form contract to protect the interests of the individual playwright, a producer would thereby be prevented from taking advantage of his own financial strengths. This would place the two parties on equal footing with respect to bargaining power. Therefore, even on an individual level, the Guild's Agreement acts to ensure that the licensing process is morally fair.

180. Lande, supra note 21.
181. This is because producers (the members of the League) are the targeted consumer base.
The underlying goal of the PLAI is to preserve American theater by ensuring that playwrights do not leave the field for more lucrative opportunities. Therefore, it could also be argued that the theater goers are actually the ultimate consumers here. Even when analyzing transfers of wealth from the point of view that theater goers are the consumer, an arguably incorrect vantage point, the PLAI is morally fair. The emphasis here is on transfers of wealth and therefore the focus in regard to moral fairness should depend on the process - the transfer - and not simply the end result. As just explained, the process that determined the price of licensing the play to the producers was fair. Thus, in terms of this analysis, the playwright is out of the picture now; the producer has licensed the play and the fairness analysis now depends on the price increase above and beyond the licensing costs. If the price of tickets is only increased relative to the increase in cost to the producer, then that increase is inherently fair as the process it was derived from was fair. For example, if a producer normally purchases a licensing right to produce a play for $100 and sells tickets for $120, there is a twenty percent increase. If, because of the PLAI, that producer must now pay $200 to acquire that a license, then a fair ticket price would be $240, also a twenty percent increase. The $240 ticket price is a fair one because the producer should still be able to keep the same profit margins. However, if that producer now sells those tickets for $300, the price is not a reflection of the increased licensing costs, but merely a reflection of increased profits to the producer. In such a situation, the price increase to consumers is not a result of the PLAI. This demonstrates that, as long as the licensing process is fair, any increase in price to the consumer would also be fair as far as the PLAI is concerned.

3. The PLAI Also Furthers the Non-Economic Policies of Antitrust

Another major theory in antitrust analysis is based on non-economic policies and is mostly focused on disparate bargaining
positions. The issues addressed by this theory that are relevant to this analysis include concerns that competitors be treated fairly, concerns with the dispersion of economic and social power, and the promotion of equal opportunity.\(^{184}\) The PLAI furthers the goals of this theory completely.

The main goal of the PLAI is addressing and correcting the disparate bargaining power between producers and playwrights. Producers are often very strong financially, and the League could arguably be considered a monopoly in some respects.\(^{185}\) On the other hand, playwrights are often much weaker financially, in fact, young playwrights may often be considered “starving artists.”\(^{186}\) Also, as mentioned above, playwrights may often be so desperate to get their play produced and seen by audiences, that they will accept terms that are detrimental to their own interests.

It can be argued that the PLAI will result in unfair treatment of playwrights as competitors. Young, unknown and inexperienced playwrights may reap the benefit of getting their play licensed on the same terms as a well-established and experienced playwright would. Meanwhile, the well-established and experienced producer would be harmed in that he receives no additional benefit for his years of work and reputation. The PLAI, in practice, would not actually have this effect. The experienced playwright could (and most likely would) still demand even more advantageous terms than what is included in the Agreement. The PLAI merely ensures that the unknown playwrights are not taken advantage of and are treated “fairly” and with respect for the work they have done. In that same way, the PLAI promotes equal opportunity. Without it, a young playwright, disenchanted and disenfranchised, will likely turn to other, more lucrative, opportunities in different media. With the PLAI, that young playwright has the same opportunity to enter the market as the experienced playwright has to stay in it. Thus, overall, the PLAI furthers the non-economic policies of antitrust.

The antitrust laws are quite convoluted and ambiguous, and

\(^{184}\) Shulman, supra note 19 (noting a few of the non-economic concerns addressed by antitrust law).

\(^{185}\) See supra note 93.

\(^{186}\) Common cliché.
therefore congressional intent should be utilized to interpret them. The PLAI is in accord with the policies underlying antitrust law. It is economically and allocatively efficient, in compliance with non-economic concerns, and does not unfairly transfer wealth from the consumer to the Guild.

D. Case Precedents: The PLAI Will Have Positive Effects

1. The Ring Case Demonstrates that the PLAI Would Promote Equal Opportunity While Avoiding Paternalistic Decisions by the Judiciary

The Ring court held that the Guild’s Agreement violated the Sherman Act because the Guild was not a labor organization. In the end, however, the court refused the plaintiff any relief, monetary or equitable. Arguably, this is because the Agreement actually represented what the parties would have bargained for individually had they possessed equal bargaining power. If producers were not more powerful than playwrights, the playwrights here would have insisted upon the same terms as those embodied in the Agreement. If trade was in fact restrained unfairly, as was decided in the beginning of the Ring case, then certainly the plaintiff would have suffered, or would likely suffer in the future (as was held by the district court) and would be entitled to relief.

To allow the plaintiff to modify the contract that he originally bargained for would be overly protective. It would be ridiculous to allow modification of contracts simply because the end result was unfavorable to one of the parties; that risk is inherent in all contracts. The plaintiff should have used better business judgment in his dealings with the defendant. When the plaintiff took over the other producer’s rights in the play, he should have done more preparatory research. The Guild’s members consisted of virtually

187. Ring v. Spina, 148 F.2d 647, 650 (2d Cir. 1945)
188. Ring v. Author’s League of America, Inc. 186 F.2d 637, 643 (2d Cir. 1951).
all of the playwrights in America, and therefore, every producer deals with them in the regular course of business – a fact that surely the plaintiff was aware of, or should have been. If he had read the play first and prepared a plan of action, he would have known from the beginning that he might want to make changes to it. If the changes he wanted to make were essential to his production, he should never have signed the restrictive Agreement. As he did sign, he must abide by it, for it is exactly what he bargained for at the time he entered the Agreement. Courts are reluctant to modify a contract when the terms represent what the parties had in mind at the time the contract was formed.

The PLAI would have kept this issue from ever coming before the court. If the antitrust laws were amended to allow collective bargaining by the Guild, the playwrights’ interests here would have been recognized by the Agreement. In addition, the producer would not have been able to ask the court to change the Agreement simply because he was unhappy with its results.

2. The Bernstein Case Demonstrate that Collective Bargaining by Independent Contractors can Sometimes Satisfy the Basic Objectives of Labor Law

There is a direct correlation between the “employee” analysis of playwrights and that of the composers in Bernstein, which demonstrates that playwrights are independent contractors and not employees. Similarly, the Julien court specifically noted the distinction between stage directors and playwrights in its determination that the directors were in fact employees. The relationship between the Guild and the League, however, still meets the underlying purpose of the NLRA to ensure the smooth and uninterrupted flow of commerce. Also, the term “employee” effectively works as a safeguard by keeping the NLRA indirectly connected with antitrust policies which prohibit collective bargaining. If antitrust policies are not themselves violated by the

189. Ring, 148 F.2d at 649.
190. Bernstein v. Universal Pictures, Inc., 517 F.2d 976 (2d Cir. 1975)
PLAI, then there is no need for this safeguard.

It is also important to note that while the Bernstein court found that composers were likely to be classified as independent contractors, they still allowed the issue to be resolved by the NLRB. When read literally, the NLRA would only allow such an issue to be brought before it by a class of employees, and not by independent contractors. Nevertheless, as the NLRB had already begun hearing the matter, the court agreed to let it make a determination. If such a proceeding, as brought by independent contractors, was completely at odds with the policies behind labor law, the court should not have allowed the NLRB to continue with the case. The fact that it did leads to the conclusion that protection/punishment of independent contractors is not to be absolutely distinguished from the policies underlying the NLRA.

3. The Barr Case Demonstrates that the PLAI Promotes Equality and that Attitudes are Changing

One of the arguments presented by the Guild in Barr was that if playwrights cannot combine as a group to bargain collectively, then producers may not do so either. This is certainly true as supported by the overall objectives of equality embedded in the policies of labor and antitrust law. The Guild’s licensing Agreement also strengthens the objective of copyright law by providing incentives to playwrights.

This case, in effect, foreshadowed the introduction of the PLAI. The court recognized the Guild’s right to bring a lawsuit on behalf of its members. The lawsuit itself was centered around work activities and product. Surely, an association whose sole purpose is to protect the work activities and product of its members is very similar, if not identical, to a labor organization. That purpose does not change merely because its members are classified as independent contractors rather than employees. The Bernstein court refused to treat composers as employees merely because their association “masquerades” as a labor union, however, the Barr court seems to be moving slowly in that direction.

All three cases demonstrate that the PLAI promotes equal opportunity. The PLAI would also reduce requests for paternalistic contract modification by judges. In addition, the PLAI signifies a change in labor law analysis, which is shifting very slowly to include protections for independent contractors as well as employees.

E. Taking Your Doctor’s: A Prescription For Passage

There are great similarities between the struggles of doctors and those of playwrights. Doctors, like playwrights, would be considered independent contractors under the Supreme Court test. When analyzing the factors discussed earlier for determining whether there is an employer-employee relationship, it is apparent that: the HMO has no control over the manner and means by which the doctor performs his work; the skill required for medical treatment is highly specialized; the HMO does not provide the doctors tools or equipment; the HMO cannot assign projects to the doctors at all (let alone “additional projects” as the test requires); the HMO has no discretion over when and how long the doctor may work; the method of payment is not one that is salaried or hourly; the HMO has no discretion over hiring assistants, this is left fully to the discretion of the doctor; the regular business of an HMO is health insurance and not health care, itself; the HMO provides the doctor no employee benefits; and certainly the HMO does not take taxes out of the doctors payments. These factors all support the argument that a doctor is an independent contractor and not an employee of an HMO.

One of the more interesting similarities between the Health-Care Act and the PLAI is its reception in the legislature. When the Health-Care Act was introduced in the US Congress, it received the same treatment as the PLAI. It is reintroduced each year, and no action has been taken. In contrast with the PLAI, Texas has passed state legislation on a similar version of the Health-Care Act.
Act. 197 This is an important point as the Heath-Care Act seems to have more opponents than the generally supported PLAI. Taking that into consideration, proponents of the PLAI should begin lobbying in state legislatures. Federal antitrust laws are incredibly broad and cover all industries. The plight of playwrights may be an esoteric one in relation to the entire country. However, individual states have more specific concerns than the federal government. Many states have niche areas, such as entertainment, which produce a good amount of revenue for that state. 198 As such, the chances of the Guild succeeding in amending a state’s antitrust laws are arguably greater than its chances of amending the federal antitrust laws, as demonstrated by Texas Senate Bill 1468. The goals served by the PLAI may be recognized more clearly in particular states where the constituency is more interested in their promotion.

V. WHERE DOES THE GUILD GO FROM HERE?

A. Emphasize Policy: The PLAI’s Promotion of a Basic Good

The PLAI has been introduced into both the House and the Senate repeatedly, and yet it has not been put to a vote. Obviously, the Guild must take greater steps to demonstrate the positive effects and necessity of the bill. One suggestion would be to place emphasis on the basic policies served by the laws. Congress does not amend laws easily, and for good reason: there are specific policies promoted by the creation of a law, and assuming that the standards of society have not evolved in such a way to make that law unnecessary, it should remain unchanged and not be tampered with. But the PLAI actually enhances the policies behind the laws it implicates. Copyright law, labor law, and antitrust law all promote a basic good, which is centered on the notion of equal opportunity and advancement for both the public/consumer and the creator/worker. It would be very beneficial for the Guild to focus its arguments on that notion and

197. See supra note 107.
198. For example: California, New York, Virginia.
how it is furthered by the PLAI.

B. The Importance of Entertainment: Lobbying the States May Prove Persuasive

The Guild should take a cue from the medical industry, and try lobbying state legislatures for a similar bill. There are various states which focus more on entertainment issues than others - California, New York, and Virginia, to name a few. The Guild should focus on these states initially to get the PLAI passed in the state levels of government, as opposed to - or at least in addition to - the federal government.

Antitrust law encompasses many facets of commerce and trade. Its scope ranges from state issues to interstate commerce, and even progresses further on the continuum to issues involving international commerce. As mentioned above, the PLAI covers rather specific concerns, and may not be considered an imperative amendment to a federal legislature that has such a wide-range of pressing issues to address. But to a state whose revenues are generated extensively from entertainment-related ventures, it may indeed be such a pressing issue.

VI. CONCLUSION

The PLAI would effectively meet the policies behind copyright law, labor law, and antitrust law. It would enhance the policies of copyright law by providing an incentive for experienced playwrights to remain in, and young playwrights to enter into, live theater. This would act to increase the creative works produced and eventually (after copyright protection expires) disseminated into the public domain. In effect, the PLAI, like all copyright protections, ensures America’s progress and development, both socially and economically.

The PLAI would also satisfy the basic objectives of labor law in that it would ensure the smooth and uninterrupted flow of goods and services through commerce. While playwrights may not meet the traditional definition of “employee,” and therefore do not fall within the literal language of the NLRA, the PLAI would act to further the policies of the NLRA by correcting the disparity in
bargaining power between playwrights and producers. It would help to ensure that playwrights will not be taken advantage of by producers and consequently choose to leave the theater for other media opportunities. The NLRA's literal language aims to correct disparities in bargaining power between employers and employees and the PLAI is in conformity with that language. The term “employee” effectively works as a safeguard, keeping the NLRA indirectly connected with antitrust policies which prohibit collective bargaining. If antitrust policies are not themselves violated by the PLAI, then there is no need for this safeguard.

In addition, antitrust policy does not bar the PLAI, despite the literal language of the Sherman Act. Because the antitrust laws are imprecise, Congressional intent may be used to determine its meaning. In examining various theories of antitrust, the PLAI is in accord with policy concerns of economic and allocative efficiency, non-economic policy concerns, and unfair transfer of wealth. Specifically, the PLAI would not be economically inefficient because it would not decrease either the quality or quantity of plays written. In addition, it would not create an allocative inefficiency in the market because it would not serve to diminish the amount of plays written or divert the resources of playwrights into less desirable arenas. It also satisfies the non-economic concerns because it would act to ensure that competitors are treated fairly and promotes equal opportunity. Lastly, it does not unfairly transfer wealth from the producers into the monopolistic hands of the playwrights. The focus on equal opportunity is essential in all three of these areas of law. It resides deep in the dual goals of copyright law, is greatly advanced by the policies of the NLRA, and is enshrined in the various theories behind antitrust law.

The PLAI would also act to resolve the troubles discussed in the cases here. Amending the antitrust laws to allow playwrights to bargain collectively in negotiating the terms of their licensing agreements would align the literal language of the applicable statutes with their underlying policies, eliminating the unresolved problems in these cases.

199. Bernstein, 517 F.2d 976; Ring, 148 F.2d 647; Julien, 1975 WL 957; Barr, 573 F. Supp. 555.
As comparably demonstrated by the Texas Health-Care Act, the Guild should lobby state legislatures. This issue may be too specific and not relevant to the nation as a whole, especially in light of all the very serious antitrust issues of the day (both international and national). Nevertheless, certain entertainment-focused states are highly affected by this issue, as evidenced by case precedent which demonstrates that this issue is mostly litigated in New York courts. While the Health-Care Act has yet to pass in the United States Congress, it has passed in state legislatures, and the PLAI may, too. Unlike the Health-Care Act, there is not much opposition to the PLAI, and it may have an even greater chance of passing in individual state legislatures than the Health-Care Act.

Based on the above assertions, the PLAI is a positive piece of legislation that is in accord with the laws of the United States. While there is no substantive reason for it not to pass, it may simply fade away because it is so narrowly drawn and applies only to playwrights. The Guild’s best alternative would be to lobby some of the state legislatures for similar enactments, while continuing to stress the important policy objectives in the federal branch of the legislature.

200. See id.