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The Talent Agencies Act: Reconciling the Controversies Surrounding Lawyers, Managers, and Agents Participating in California's Entertainment Industry

Money it's a crime,
Share it fairly,
But don't take a slice of my pie.¹
– Pink Floyd, "Money"

I. INTRODUCTION

For almost a hundred years, Southern California has been known as a basin of artistic talent and as an avid protector of artists' rights.² As a consequence, California's entertainment industry has emerged as one of the state's greatest sources of revenue.³ Despite California's reputation for earning and producing at a phenomenal rate, greater than that of most countries, all is not well in the land of fiction. As the pot of money at the end of the entertainment rainbow has expanded, so too have the controversies and confusions regarding just how to slice the industry's pecuniary pie. Remarkably, the Talent Agencies Act⁴ (hereinafter "TAA" or "Act") has emerged as a principle battleground for this struggle.

This Comment explicates the fiscal war currently being waged among the entertainment industry's lawyers, managers, and agents. In particular, this Comment will focus on the interplay, roles, and prominent controversies that have served as the backdrop between these powerful players as the fight for financial and legal footing has intensified. Part II of this Comment defines the contemporary roles of the lawyer, manager, and agent participating in California's entertainment industry and introduces the dispute between managers and agents.⁵

1. PINK FLOYD, MONEY, THE DARK SIDE OF THE MOON (Capitol Records 1973).

2. See James M. O'Brien III, *Regulations of Attorneys Under California's Talent Agencies Act: A Tautological Approach To Protecting Artists*, 80 CAL. L. REV. 471, 472 (1992).

3. See generally Jon Garon, *Star Wars: Film Permitting, Prior Restraint & Government's Role in the Entertainment Industry*, 17 LOY. L.A. ENT. L. REV. 1, 5-11 (discussing significant economic impact of the entertainment industry in California, and describing it as one of California's largest industries); see also generally Abilio Tavares, Jr., *The Entertainment Economy*, 23 L.A. LAW 60 (2000) (describing California's entertainment industry).

4. CAL. LAB. CODE §§1700-1700.47 (Deering 1991 & Supp. 2000).

5. See *infra* notes 10-51 and accompanying text.

Part III delineates the history of legislative efforts aimed at protecting artists' rights in California that culminated in the TAA.⁶ Part IV explains in full the disputes and contentions between managers and agents.⁷ Part V explores whether lawyers should be exempt from the provisions of the TAA or any such regulatory scheme.⁸ Finally, Part VI outlines foundational principles and rudimentary considerations underlying a solution to the controversies and confusions presently surrounding lawyers, managers, and agents in California's entertainment industry.⁹

II. DEFINITIONS

A. *Contemporary Roles of the Lawyer, Manager, and Agent*

A full appreciation of the controversies and confusions involving the TAA explored below cannot be attained without a clear understanding of the contemporary roles of lawyers, managers, and agents in the entertainment industry.

1. Lawyers

Most agree that the lawyer's role is indispensable in the entertainment industry.¹⁰ Attorneys known as "entertainment lawyers" are actually full service lawyers with clients involved in the entertainment industry.¹¹ As such, entertainment lawyers are often well versed in several substantive legal areas such as corporate and business law, tax and general accounting, labor law, intellectual property, criminal law, family law, immigration law, and litigation.¹² Perhaps the only qualities that distinguish entertainment lawyers from other lawyers are the entertainment lawyer's two greatest selling points: (1) a thorough understanding of the internal workings of the entertainment industry; and (2) a variety of contacts in the vocation.¹³ Many would also argue that the entertainment lawyer needs to be able to possess the ability to understand and reason with the impassioned, creative, and often unpredictable temperament associated with entertainment clients.¹⁴

6. See *infra* notes 52-116 and accompanying text.

7. See *infra* notes 117-232 and accompanying text.

8. See *infra* notes 233-246 and accompanying text.

9. See *infra* notes 247-303 and accompanying text.

10. See O'Brien, *supra* note 2, at 472.

11. See WILLIAM D. HENSLEE, ENTERTAINMENT LAW CAREERS 1-9 (2d ed. 1998); see also O'Brien, *supra* note 2, at 484-87.

12. See HENSLEE, *supra* note 11, at 4-9; see also O'Brien, *supra* note 2, at 484-87.

13. O'Brien, *supra* note 2, at 484.

14. *Id.* at 486 (citing MICHAEL I. RUDD, BEHIND THE SCENES: PRACTICAL ENTERTAINMENT LAW 171 (1984)). See also generally Donna G. Cole-Wallen, Comment, *Crossing the Line: Issues Facing Entertainment Attorneys Engaged in Secondary Occupations*, 8 HASTINGS COMM. & ENT. L. J. 522 (1986)).

Many attorneys cross over into more untraditional and more lucrative roles in the industry.¹⁵ For example, many attorneys represent artists in their varied personal and professional affairs, while others represent motion picture studios, record companies, and distribution entities in a variety of corporate and commercial ventures.¹⁶ Such lawyers in the industry have been known to package deals, shop talent and creative material, and advise on financial matters.¹⁷ As a consequence, while representing their artist clients in a legal capacity, many lawyers cross over into the definitional realms of agent and manager.¹⁸ Motivations to cross over into these more untraditional areas, in addition to the financial windfall often associated with representing artists in non-legal affairs, include the opportunity to be involved with fascinating subject matter and an unpredictable working environment.¹⁹

Notably, the Act does not expressly mention the applicability of the Act toward lawyers. This omission has created a controversy of its own.²⁰ It has become increasingly difficult to ascertain which rules of conduct govern attorneys in the entertainment industry; the crossover entertainment lawyer may encounter regulation under the ABA model rules of ethics, the TAA, and/or entertainment guild and union directives.²¹

2. Managers

The personal manager has evolved into a powerful force in the entertainment industry. Managers can command up to twenty percent of an artist's gross income²² and can obtain production credit that result in fees from studios.²³

15. O'Brien, *supra* note 2, at 472, 485.

16. *Id.*

17. Kenneth J. Abdo, *Agents, Managers, and Lawyers: A Roadmap For The Entertainment Attorney*, 14 ENT. & SPORTS LAW 3, 3 (1996).

18. *See* O'Brien, *supra* note 2, at 485.

19. *See id.* at 486-87.

20. *See infra* Part V and accompanying text.

21. O'Brien, *supra* note 2, at 485-86.

22. Abdo, *supra* note 17, at 3. There is technically no limit as to the percentage amount a manager can receive, but the industry norm is twenty percent. *Id.*

23. Emmanuel Nunez, Entertainment Law Class Lecture at Pepperdine University, School of Law (Feb. 1999). In the entertainment industry, production credits can be used as leverage when bargaining with other industry entities and financial organizations regarding future projects, funding, and so forth. *Id.* Thus, these credits can be used to generate opportunities for the manager separate and distinct from their representation with the artist. *Id.* Many managers are able to use the clout of their clients to get this benefit from the studios; many managers do nothing but bring in their client and still receive production credit. *Id.* Depending upon the size of the fee and/or the magnitude of the credit from the studio, managers can attract and retain clients by not charging their clients. *Id.* This is an emerging phenomenon with bigger name talent. Amy Wallace, *Agents Losing Star Power, Celebs Flocking to Managers*, CHI. SUN TIMES, Dec. 20, 1998, at NC22.

Generally, personal managers are the talent's principal career advisor, concerned with how money is earned.²⁴ The personal manager's primary duties include advising, counseling, and directing the most lucrative and fulfilling career path for the artist.²⁵ Additionally, the personal manager may handle mundane day-to-day activities, arrange meetings with other personal representatives, or act as the artist's confidant in all matters of the artist's personal and professional life.²⁶ Accordingly, by organizing both the artist's personal and professional life, the personal manager liberates the artist, allowing the artist to spend the bulk of his or her time being creatively productive.²⁷

There are few limitations to the duties by which the personal manager is bound.²⁸ Due to the Act, however, the personal manager cannot actually procure employment for the artist without facing the risk of severe consequences, such as forfeiture of past and future fees and/or the rescission of a lucrative representation agreement.²⁹ No statutory regulation exists for managers. In fact, aside perhaps from common law fiduciary duties, which have unclear application in the specific context of the entertainment industry, no regulation exists for managers whatsoever.³⁰

3. Agents

Agents principally attend to one glaring need that managers cannot fulfill due to the provisions of the Act—procuring employment for artists.³¹ The provisions of the Act closely regulate agents.³² Notably, an agent cannot receive in excess of ten percent of the artists' gross income, a regulation promulgated in conjunction with the various entertainment guilds and unions.³³

An agent's work includes the solicitation of engagements, the solicitation and licensing of rights to creative works, and otherwise exploiting opportunities for talent.³⁴ Naturally, an agent may reject employment opportunities, influence the

24. See Abdo, *supra* note 17, at 3. Business managers, as opposed to personal managers described in the main text, are concerned with managing business and personal finances. *Id.* They are usually accountants. *Id.* This Comment focuses solely upon personal managers as recognized in the context of the entertainment industry.

25. See Heath B. Zarin, Note, *The California Controversy Over Procuring Employment: A Case For The Personal Managers Act*, 7 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 927, 937 (1997).

26. *Id.* at 938-40.

27. See *id.* at 940.

28. O'Brien, *supra* note 2, at 483.

29. *Id.* at 474, 491.

30. *Id.* at 483-84; 492-493.

31. See Abdo, *supra* note 17, at 3.

32. See *infra* Part III.D.

33. See Abdo, *supra* note 17, at 3. This figure was established using a concerted combination of the policies of the California Labor Commission and the various guilds and unions. See O'Brien, *supra* note 2, at 480; see also Wallace, *supra* note 23, at NC22.

34. Abdo, *supra* note 17, at 3.

direction of an artist's career, and negotiate all-or-nothing "package deals"³⁵ by exploiting business and personal contacts.³⁶ In sum, the agent can, in addition to procurement functions, perform all the duties of a manager without any repercussions, as long as the agent stays within the black letter regulation of the Act.³⁷ Yet, unlike a manager, an agent cannot receive production credit or the resulting fees from studios.³⁸ Agents' fees are strictly limited to the aforementioned ten percent figure.³⁹

B. Statement of the Dispute Between Managers and Agents

To fully appreciate the legislative history of the Act, a rudimentary understanding of the principal disputes that have emerged between managers and agents is necessary.

Talent agents advocate a strict reading of the Act; agents believe that managers should not be entitled to perform any procurement duties whatsoever until they too become regulated by the same statutory regulations and are subject to the same fees promulgated by the Labor Commissioner.⁴⁰ Talent agents' principal complaint regarding managers lies in the assertion that managers are continually engaging in illegal procurement functions, thus infringing upon talent agents' slice of the market.⁴¹

The argument from the side of the personal managers is more complex, but compelling nonetheless. Primarily, managers contend that the nature and realities of the entertainment industry require that, in the normal conduct of their profession, managers simply *must* engage in limited or incidental activities which may be construed as procurement.⁴² Additionally, many deals in the entertainment industry are made casually, such as at social functions, where a manager cutting off a conversation for fear of offending the Act would be both awkward and unproductive for everyone involved, except a talent agent.⁴³ Meanwhile, managers contend that their business does not constitute the kind of endeavor that can

35. See Wallace, *supra* note 23, at NC22. A talent agency can reap a huge windfall by negotiating with television networks and movie studios a fee for the delivery of a "package" of talent that includes the actors, directors, and writers to work on a particular project. *Id.* The package may, but does not always, contain talent that the network or studio may not have otherwise chosen. *Id.* An example of a package deal occurred with the NBC sitcom "Friends," a package that produced a fee of fifty million dollars for the talent agency. *Id.*

36. Abdo, *supra* note 17, at 3.

37. See O'Brien, *supra* note 2, at 478-79.

38. See Nunez, *supra* note 23.

39. See *supra* note 33 and accompanying text.

40. See *Waisbren v. Peppercorn Prods., Inc.*, 48 Cal. Rptr. 2d 437, 443 (1995).

41. See *id.*

42. See *id.* at 444.

43. See Nunez, *supra* note 23.

feasibly be subject to licensure.⁴⁴

Managers maintain that the realities of the industry dictate that the manager become more deeply involved in the artist's life than agents and that the Act's premise that the agent is the more prominent figure is erroneous.⁴⁵ The personal manager is often the artist's first representative because agents typically will not accommodate unknown talent or talent that is less in demand;⁴⁶ managers are the only individuals in the business that are *actually* willing to procure employment for such artists.⁴⁷ Yet, because managers are unable to procure employment for fear of violating the TAA, the artist is virtually left without access to the industry.⁴⁸ Moreover, even when an artist *can* obtain an agent, managers contend that the operational nature of talent agencies' are such that the agency often weighs one client's interests against another's, while the manager is singularly looking after the individual artist's best interests.⁴⁹

Given the reality that only managers tend to shoulder the financial and emotional risk inherent with unknown talent,⁵⁰ managers argue that they should be able to engage in at least limited procurement activities in order to increase the likelihood that they will realize their investment in the artist.⁵¹

III. HISTORY

A. Initial Legislation

California has long been concerned with drafting legislation aimed at protecting artists' rights in the entertainment industry.⁵² The first such legislation was drafted as a direct response to widespread artist abuses at the hands of unscrupulous talent agents. Talent agents became notorious for abuses "such as sending female artists to houses of prostitution, sending artists to dangerous

44. See *Waisbren*, 48 Cal. Rptr. 2d at 444.

45. See Chip Robertson, Comment, *Don't Bite the Hand That Feeds: A Call For A Return To An Equitable Talent Agencies Act Standard*, 20 HASTINGS COMM. & ENT. L. J. 237, 238 (1997).

46. See O'Brien, *supra* note 2, at 481. From the artists' perspective, filmmaker Edward Burns revealed the artist's reality as such:

You should know that the really tough part about screenplay writing is not the writing but finding anyone in the business who will read your script- unless it is submitted to them by an agent. . . . Apparently, however, there is some legal reason why industry pros can't accept unsolicited scripts. So the Catch-22 is you can't sell a script unless you have an agent, and you can't get an agent unless you've sold a script. Welcome to Hollywood.

EDWARD BURNS, THREE SCREENPLAYS 4-5, (Hyperion 1997).

47. See O'Brien, *supra* note 2, at 481.

48. See *id.* at 481, 483-84.

49. See Wallace, *supra* note 23, at NC22.

50. See O'Brien, *supra* note 2 at 482. Managers often provide the struggling artist with financial support such as costs of rent, tuition for lessons, and other living and professional costs until the artist's career takes off, not to mention the free costs of the manager's counseling, expertise, and contacts. See Zarin, *supra* note 25, at 928-31.

51. See Robertson, *supra* note 29, at 267.

52. See *id.* at 228.

locations, arranging for minors to work in bars [and other unsuitable locales,] and splitting fees with owners [and] managers of the venues that booked artists.”⁵³ In 1913, California established licensing requirements for all types of employment agencies when the Legislature passed the Private Employment Agencies Law.⁵⁴ Similarly, in 1937 the Artist Manager Law (“AML”) was adopted into the state’s labor code.⁵⁵ The AML’s creation highlighted the importance of protecting artists’ rights in the state’s burgeoning entertainment industry.⁵⁶

Expanding on the principles first enunciated in the AML, California’s Legislature sought to create greater protections for the artist when it passed the Artist Managers Act (“AMA”) in 1943.⁵⁷ The AMA created four regulatory categories that, in the aggregate, recognized the varying needs of artists within different niche areas of the entertainment industry.⁵⁸ While the AMA did manage to codify the duties now associated with contemporary managers and agents, the AMA failed to recognize a then-emerging reality in the industry—that the duties recognized within this single occupation were quickly becoming bifurcated into two different, albeit overlapping, jobs.⁵⁹ Not surprisingly, coupled with the rapid growth of the industry, this overlap of employment relationships made implementation of the Legislature’s regulatory categories impossible.⁶⁰

In order to clarify the AMA and narrow its focus upon the procurement functions of talent agents, the Legislature repealed certain regulatory categories in 1967.⁶¹ This amendment, however, did little to address and rectify the growing range of practical problems with the AMA that those in the industry already dealt with on a daily basis.⁶² As talent agencies increased in size, focused more of their attention toward the procurement of employment, and began to shy away from more personalized artist services such as publicity and other day-to-day problems, “personal managers” emerged with greater prominence, filling this emanating void in assistance for artists and further confusing the hazy line between themselves and agents.⁶³ Despite this trend, the Legislature neglected to

53. See Zarin, *supra* note 25, at 943-44.

54. See Robertson, *supra* note 45, at 228. A 1923 amendment to the PEAL empowered the Labor Commission to preside over disputes. See *id.*

55. See *id.*

56. See *id.*

57. See *id.*

58. See *id.* at 228-229.

59. See *id.* at 229-31.

60. See *id.* at 229; see also Raden v. Laurie, 262 P.2d 61 (Cal. App.2d 1953) (explicating the confusion created by the AMA); see also Buchwald v. Superior Court, 62 Cal. Rptr. 364 (1967).

61. Robertson, *supra* note 45, at 230. “[The] Legislature repealed the classifications for motion picture and theatrical employment agents.” *Id.*

62. See *id.*

63. See *id.* at 231 (citing Neville L. Johnson & Daniel Webb Lang, *The Personal Manager in the California Entertainment Industry*, 52 CAL. L. REV. 375, 395 (1979)).

accurately measure prevailing quandaries experienced by those in the industry.⁶⁴ As a result, those in the field could not determine the classes of individuals and specific activities that were subject to regulation under the AMA.⁶⁵ Notable cases attributable to this controversy and triggered by the AMA, such as *Raden v. Laurie*⁶⁶ and *Buchwald v. Superior Court*,⁶⁷ failed to clarify or settle these clouds of confusion.⁶⁸

B. Emergence of the Talent Agencies Act

In 1978, the Legislature attempted to iron out the problems associated with the AMA.⁶⁹ The eventual product was actually an amended version of the Talent Agencies Act of 1978.⁷⁰ Significantly, at the time of this amendment, a proposal for an "incidental exemption" for managers to the licensing requirement was denied.⁷¹ The proposed incidental exemption would have shielded managers from the harsh remedies associated with unlawful procurement of employment such as the forfeiture of fees earned and the rescission of lucrative contracts.⁷² The incidental exemption would only have applied to persons engaged with managing artists whereby such representation only incidentally involved the seeking of employment.⁷³

As adopted by the Legislature, the expressed intent of the 1978 TAA was "to regulate only those whose *primary purpose* and function is the securing of employment for artists."⁷⁴ However, once again, the Legislature fostered confusion by failing to stipulate precisely which individuals and specific activities fall beneath the umbrella of the new licensing requirements.⁷⁵ In the absence of a clear test for the industry to follow, the previous problems continued to surface and the need for clarity was sustained.⁷⁶

Notwithstanding the ongoing controversy, the Labor Commission in *Derek v. Callan*⁷⁷ and *Pryor v. Franklin*⁷⁸ strictly applied the TAA of 1978.⁷⁹ In both

64. *Id.* at 230.

65. *See id.*

66. *See infra* Part IV.A.1.

67. *See infra* Part IV.A.2. The *Buchwald* case "established the authority of the Labor Commissioner to determine controversies and guaranteed the right of trial de novo." Robertson, *supra* note 45, at 232.

68. *See* Robertson, *supra* note 45, at 230-32.

69. *See id.* at 232.

70. *Id.* at 233 (stating that "[t]he legislature amended the 'Artists' Managers Act to the 'Talent Agencies Act of 1978'"). *Id.*

71. *See id.* at 232-33.

72. *See* Zarin, *supra* note 25, at 953-53 (discussing remedies for TAA violations).

73. *See id.* at 932.

74. Neville L. Johnson & Daniel Webb Lang, *The Personal Manager in the California Entertainment Industry*, 52 S. CAL. L. REV. 375, 388 (1979).

75. Robertson, *supra* note 45, at 233.

76. *See id.*

77. Cal. Labor Comm'n No. TAC 18-80 (1982); *see infra* note 140.

78. Cal. Labor Comm'n No. TAC 17 MP 114 (1982); *see infra* note 140.

79. Robertson, *supra* note 45, at 235.

disputes, personal managers were forced to forfeit their lucrative contractual relationships with artists due to incidental procurement activities in violation of the TAA.⁸⁰ Not surprisingly, industry professionals—particularly managers—were unsatisfied with these decisions due, once again, to the absence of clear rules for determining which activities trigger the Act.⁸¹

In 1982, the TAA endured additional experimental amendments.⁸² An amendment was added to the TAA that allowed an unlicensed person to avoid violation of the Act by working together with a licensed agent when negotiating contracts.⁸³ A recording exception was also added, which allowed an individual to procure a recording contract without a license.⁸⁴ Furthermore, the Legislature created the California Entertainment Commission for the purpose of reviewing and recommending changes to the TAA in light of the technical concerns repeatedly voiced by those operating in the industry.

C. *The California Entertainment Commission*⁸⁵

The California Entertainment Commission (“CEC”) was formed with an eye toward putting to rest the controversies and uncertainties connected with the TAA.⁸⁶ The CEC was ordered to:

[s]tudy the laws and practices of this state, the State of New York,⁸⁷ and other entertainment capitals of the United States relating to the licensing of agents and representatives of artists in the entertainment industry in general . . . so as to enable the commission to recommend to the Legislature a model bill regarding this licensing.⁸⁸

80. *See id.* at 233-35.

81. *See id.* at 235.

82. *Id.* at 235.

83. *Id.*

84. *See id.* at 235-36.

85. The CEC consisted of ten members. *See Waisbren v Peppercorn Productions, Inc.*, 48 Cal. Rptr. 2d 437, 443 n.12 (1995). Three were appointed by the Governor, three by the Speaker of the Assembly, and three by the Senate Rules Committee, in addition to the Labor Commissioner. *Id.* “Each appointing power had to appoint a licensed talent agent, a personal manager, and an artist.” *Id.* As such, the appointed portion of the CEC consisted of three licensed talent agents, three personal managers, and three artists. *Id.* The Labor Commissioner chaired the Commission. *Id.*

86. *See id.* at 442-43.

87. Significantly, the State of New York’s version of the Act employs an incidental exemption. Zarin, *supra* note 25, at 965-69.

88. *Waisbren*, 48 Cal. Rptr. 2d at 443 (quoting former Lab. Code § 1702, added by stats. 1982, ch.682 §6, p.2816 and repealed by stats. 1984, ch.553 § 6, p.2187).

The CEC was asked to settle several specific issues.⁸⁹ First, the CEC was asked to determine, under certain circumstances, whether a manager should be able to procure employment.⁹⁰ Second, the CEC was asked to explore whether “the entire Act [should] be repealed and/or [if] there [should] be a separate licensing law for personal managers.”⁹¹ Third, the CEC was asked to suggest what changes, if any, should be made to the TAA of 1978.⁹²

The CEC met fifteen times over two years and delivered its report to the Legislature and the Governor on December 2, 1985.⁹³ The majority of the members found that “the Talent Agencies Act of California is a sound and workable statute and the recommendations contained in this report will, if enacted by the California Legislature, make that Act a model statute of its kind in the United States.”⁹⁴ As such, the CEC recommended only minor statutory changes,⁹⁵ and that the Act remain the same with respect to requiring a license for procurement activities of any kind, whether they be deemed incidental or otherwise.⁹⁶ Also, the CEC recommended permanent adoption of the 1982 experimental amendments.

Significantly, the CEC report stated that “[n]o person, including personal managers, should be allowed to procure employment for an artist in any manner or under any circumstances without being licensed by a talent agent.”⁹⁷ The CEC reasoned “[t]here can be no ‘sometimes’ talent agent, just as there can be no ‘sometimes’ professional in any other licensed field of endeavor.”⁹⁸ Thus, at least in regard to the Act’s licensing requirement, the CEC opted for a strict application, or black letter approach, toward administering this mandate of the TAA.⁹⁹

The Legislature adopted all of the CEC’s recommendations, and the Governor signed them into law, thus creating the TAA of 1986.¹⁰⁰ As such, the implementation of the CEC became significant because of the realization that the Legislature and the Courts deferred to the CEC’s findings as the default, or tie-breaking vote, in the controversy over the issues surrounding the incidental exemption and other

89. Robertson, *supra* note 45, at 236. In addition to those issues stated above, the CEC was also asked to determine if the recording exemption should be altered or repealed. *Id.* Also, the CEC was asked to decide whether criminal sanctions should be reinstated. *Id.* Finally, the CEC was asked to make a decision as to whether the added sunset provisions should be deleted. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. See *Waisbren*, 48 Cal. Rptr. 2d at 443.

94. *Id.* (quoting the CEC’s report at 4).

95. The CEC adopted provisions allowing the unlicensed individual to work in conjunction with a talent agent. Robertson, *supra* note 45, at 237. The CEC also repealed criminal sanctions. *Id.* Further, the CEC affirmed “the exemption for [the] unlicensed individual to [be able to] solicit, promise, or procure a recording contract.” *Id.*

96. *Waisbren*, 48 Cal. Rptr. 2d at 444.

97. *Id.* at 443 (quoting the CEC’s report Executive Summary at 1).

98. *Id.* at 444 (quoting the CEC’s report at 8-12).

99. See *id.*

100. See *id.* at 443.

manager/agent disputes.¹⁰¹ No major changes have been made to the TAA since 1986.¹⁰²

D. Significant Provisions of the TAA¹⁰³

The Legislature sees the TAA as a device that both defines the role of the talent agent and provides for the regulation of the talent agent in the entertainment industry.¹⁰⁴ Notable provisions of the TAA of 1986 follow.

Article One delineates the scope and definitions of terms found in the TAA. In this article, a talent agent is defined as a person engaged in the occupation of procuring employment for artists.¹⁰⁵

Article Two of the TAA describes the licensing procedures and makes explicit the requirement that representatives who procure employment, of any kind, must obtain a license.¹⁰⁶ Article Two describes the application procedures and technicalities, including costs and fees.¹⁰⁷ Furthermore, Article Two gives the Labor Commissioner complete discretion to deny any application for licensure; a denial generally occurs after an evaluation and hearing of the individual's character and/or the nature of the talent agency.¹⁰⁸

Article Three regulates talent agents' business activities; this section of the Act governs the day-to-day operational nature of talent agencies, prohibiting certain forms of conduct and mandating that the Labor Commissioner pre-approve any form agreements used to bind artists to the agency.¹⁰⁹ Further, the TAA gives the Labor Commissioner the authority and exclusive jurisdiction to hear and

101. *See id.* at 442. In light of the CEC's slight changes to the existing TAA of 1978, it should also be noted that the Court was already inclined toward accepting the Labor Commissioner's interpretation of the Act. *See id.* "If the administrative agency's construction is reasonable, a court should defer to it. Because the Labor Commissioner's interpretation of the Act is reasonable, we agree with the analysis of the licensing requirement." *Id.*

102. *See Zarin, supra* note 25, at 946-47 (discussing generally the CEC).

103. CAL. LAB. CODE §§ 1700-1700.47 (West 1989).

104. *Zarin, supra* note 25, at 947; *see also O'Brien, supra* note 2, at 487-492 (thoroughly explicating the provisions of the California Labor Code, otherwise known as the TAA of 1986).

105. CAL. LAB. CODE § 1700.4(a) (West 1989).

106. *Id.* § 1700.5.

107. *Id.* §§ 1700.6-1700.22. *See also Robertson, supra* note 45, at 237. The application fee is \$25.00, the license fee is \$225.00, and the branch office fee is \$50.00. *Id.* The talent agent must also post a \$10,000.00 surety bond, perhaps the most detested provision of the Act- especially for smaller agencies. *Id.* (citing CAL. LAB. CODE §§ 1700.4-1700.5, 1700.15).

108. *See* CAL. LAB. CODE § 1700.8 (West 1989).

109. *Id.* §§ 1700.23-1700.47. In addition, talent agents must maintain a separate trust account for their clients, retain records for their clients, refrain from making misleading statements, and avoid certain payment practices. *Id.* Talent agents must also maintain records of the names of their clients, the amount of fees received from their client, the engagements secured on behalf of each client, and the amount of compensation received by each client. *Id.*

resolve disputes regarding potential violations of the TAA.¹¹⁰ As such, managers cannot escape the Labor Commissioner's authority when they procure employment but fail to obtain a license.¹¹¹ Additionally, the Labor Commissioner has the authority to fashion remedies for violations; these remedies can include the disgorgement of past and future fees¹¹² and the rescission of lucrative representation contracts.¹¹³

Although the Commissioner has the authority to award the manager or agent some amount of compensation based on quantum meruit, most often the Labor Commissioner exercises the power to divest unlicensed individuals of both past and future compensation.¹¹⁴ As such, most artists do not employ the TAA as a shield to ensure the range of protections originally envisioned by the Legislature when the various artist protection Acts were first drafted.¹¹⁵ Rather, artists use the TAA as a sword—to regain fees paid to their personal managers and/or to cancel representation agreements.¹¹⁶

IV. ISSUE ONE: MANAGER VS. AGENT CONTROVERSIES

The basic tenets of the conflict that has historically existed between managers and agents were set forth in Part II.B. of this Comment.¹¹⁷ In short, the tension that exists most prominently between managers and agents centers around whether the TAA should contain an "incidental booking exception" provision, a concept that has been applied with apparent success in New York's analogous statutory scheme.¹¹⁸

The incidental exception would shield many managers from the harsh remedies associated with unlawful procurement of employment, such as the forfeiture of past and future fees earned and the rescission of lucrative representation contracts.¹¹⁹ The incidental exception would apply only toward those individuals engaged in managing artists whose representation incidentally or occasionally involved the seeking of employment.¹²⁰

110. *Id.* § 1700.44(a) ("In cases of controversy arising under this chapter, the parties involved shall refer the matters in dispute to the Labor Commissioner, who shall hear and determine the same.")

111. *See* REO Broad. Consult. v. Martin, 81 Cal. Rptr. 2d 639, 645-46 (Ct. App. 1999).

112. *See infra* Part IV.A.2. (referring to Buchwald v. Superior Court, 62 Cal. Rptr. 364 (Ct. App. 1967)); *infra* note 140; *see also* CAL. LAB. CODE § 1700.44(a) (West 1986).

113. *See infra* note 140; CAL. LAB. CODE § 1700.44(a) (West 1986) (citing Humes v. Margil Venture, Inc., 220 Cal. Rptr. 186 (Ct. App. 1985); Zarin, *supra* note 25, at 952-53).

114. Zarin, *supra* note 25, at 952-53.

115. *See id.* at 953; *see also supra* Part III.A-B.

116. Zarin, *supra* note 25, at 953.

117. *See supra* Part II.B.

118. *See generally* Zarin, *supra* note 25, at 965-70.

119. *See* Zarin, *supra* note 25, at 933.

120. *See id.*

A. Case Law

Throughout the evolution of artist protection legislation, culminating in the TAA of 1986, there have been several battles fought over the incidental exception in the common law. Significantly, a common pretext exists throughout the litigation—artists have been more concerned with the attempt at avoiding the payment of fees and rescinding representation contracts than any other endeavor. As such, the cases that follow present virtually identical fact patterns.

1. *Raden v. Laurie*¹²¹

In a case arising under the AMA, Raden, a personal manager, sued his client, Piper Laurie, for fees due under a written contract.¹²² The contract expressly stipulated that Raden could not procure employment for Laurie.¹²³ Laurie sought to have the contract rescinded because Raden had agreed to seek employment for Laurie as an unlicensed agent, a violation of the contract.¹²⁴ The trial court found for Laurie.¹²⁵ Meanwhile, the Labor Commissioner determined that the contract stipulation was a contrivance designed to cloak Raden's procurement activities.¹²⁶

Yet, the Appellate court rejected Laurie's argument that the act of seeking employment, rather than the contract provision, triggered the licensing requirement of the AMA.¹²⁷ The court reasoned that an unlicensed individual's procurement activities in seeking employment will trigger the licensing provisions only if the contract is found to be a sham, designed to conceal the true nature of the agreement between the parties and to "evade the law."¹²⁸ Thus, while the court failed to affirmatively express whether a personal manager could procure employment, the court implied that a manager could seek employment for an artist so long "as the [procurement] did not result from contractual fraud or pretext."¹²⁹

The *Raden* holding left those in the entertainment industry displeased because the decision failed to clarify which specific activities and which individuals were subject to the licensing provisions of the AMA.¹³⁰ Furthermore, *Raden* did little

121. 262 P.2d 61 (Cal. Ct. App. 1953).

122. *Id.* at 63. The AMA has been repealed. See *supra* notes 57-68 and accompanying text.

123. See *Raden*, 262 P.2d at 63-64.

124. *Id.*

125. *Id.* at 63, 65.

126. *Id.* Notably, an earlier contract between the two parties expressly stated that Raden "promised" to secure employment for Laurie. See Robertson, *supra* note 45, at 229 (citing *Raden*, 262 P.2d at 63).

127. Robertson, *supra* note 45, at 230 (citing *Raden*, 262 P.2d at 65).

128. *Id.*

129. *Id.*

130. See *id.*

to help tailor the AMA to the dynamics and realities of the industry.¹³¹

2. *Buchwald v. Superior Court*¹³²

The manager's position within the AMA's regulatory scheme climaxed in the dispute involving the group Jefferson Airplane and their manager, Matthew Katz.¹³³ In *Buchwald*, Katz and each member of the band had a written agreement in which a provision stated that Katz had not agreed to procure employment for the band and that Katz was not authorized to procure employment.¹³⁴ The band alleged that Katz had in fact obtained employment for the band and, as a result, the band sought restitution for past fees paid to Katz.¹³⁵ Katz argued that the contract provision established, as a matter of law, that Katz was not subject to the AMA's licensing provisions.¹³⁶

The court rejected Katz's argument and found for the band, reasoning that the Labor Commissioner and the court had the power to question the various contracts' illegalities.¹³⁷ Therefore, although the court did not explicitly answer the direct question of whether a manager *must* obtain a license for incidental procurement activities, the court recognized that procurement efforts generally require a license and that the "substance of the parties' relationship, not its form, is controlling."¹³⁸ The case firmly established the authority of the Labor Commissioner to hear and determine controversies and guaranteed the right of trial de novo upon appeal to the California Superior Court.¹³⁹

Unfortunately, the *Buchwald* and *Raden* cases collectively failed to delineate just what kinds of activities triggered enforcement of the AMA, and many in the entertainment industry anticipated further tinkering.¹⁴⁰

131. *See id.* at 230-31.

132. 62 Cal. Rptr. 364 (Ct. App. 1967).

133. Robertson, *supra* note 45, at 231.

134. *See* Waisbren v. Peppercorn Productions, Inc., 48 Cal. Rptr. 2d 437, 445 (1995) (citing *Buchwald*, 62 Cal. Rptr. at 364).

135. *See id.*

136. *See id.*

137. *See id.*

138. *See id.*

139. *See* Robertson, *supra* note 45, at 232.

140. *See id.* In 1978, the AMA became the Talent Agencies Act of 1978. *Id.* As described in Part III.C., *supra*, a proposal for a New York-style incidental exception was shot down and a strict application, or black letter approach, toward dealing with procurement activities was adopted. Yet, as with the AMA, the new TAA did not expressly delineate which individuals and which specific activities fell under the Act. *See id.* Therefore, the controversy and confusion remained.

The first exercise in strict application came by way of a dispute between Bo Derek and her personal manager, Karen Callan. *Id.* After an acquaintance informed Callan of a role for which Derek would be suited, Callan casually mentioned Derek's name to the director as a possible candidate. *Id.* Later, after this activity was deemed "procurement" and the court rejected Callan's defense of "incidental" procurement, Derek was awarded rescission of a subsequent contract entered into between the parties whereby Callan was to receive compensation for her negotiating services in regard to posters and t-shirts bearing Derek's likeness. *Id.*

Likewise, the strict application approach was applied in a dispute involving Richard Pryor and his

3. *Wachs v. Curry*¹⁴¹

In 1993, California's long-standing inclination in favor of strict application of the TAA and its predecessors, and against the incidental exception, was suddenly eliminated.¹⁴² In *Wachs*, a conflict arose between entertainer Arsenio Hall and his managers Robert Wachs and Mark Lipsky.¹⁴³ The personal management contract between the parties expressly stated that the managers had not promised to obtain employment for Hall and that they were not authorized to procure employment.¹⁴⁴ However, Hall was able to prove that the managers had promised the procurement of employment during contract negotiations.¹⁴⁵ Additionally, Hall was able to prove that the managers had indeed performed procurement functions for Hall regarding Hall's successful talk show and on seven other occasions.¹⁴⁶ Hall sought to have the agreement rescinded when the managers attempted to gain a share of the talk show's proceeds, an agreement to which Hall contested.¹⁴⁷

The managers argued that the Act's licensing provisions were unconstitutional on their face because no rational basis exists for providing an exemption for the procurement of recording contracts but not for other kinds of contracts in the industry.¹⁴⁸ The managers also alleged that the Act's provisions were unconstitutionally vague.¹⁴⁹

Both of the managers' aforementioned arguments failed.¹⁵⁰ The court reasoned that California benefits from a wide use of discretion in economic and social legislation, and that a rational basis relationship attaches in cases of occupational licensing.¹⁵¹ Noting the enactment and findings of the CEC,¹⁵² the court ultimately determined that the reasoning provided by the Legislature's panel

manager David Franklin. *Id.* at 234. Pryor alleged that the personal management contract between himself and Franklin was void because Franklin procured employment for Pryor. *Id.* Franklin asserted that he merely responded to solicitations and that he was not "actively" seeking employment for Pryor. *Id.* The Labor Commissioner rejected this defense, reasoning that the "furthering" of an offer constitutes procurement because the intended purpose is to market the artist's talents. *Id.* Pryor was awarded past commissions paid Franklin for a five-year period. *Id.* at 234-35.

141. 16 Cal. Rptr. 2d 496 (1993).

142. *See id.*

143. *See id.* at 498. The managers operated through their management company, X-Management.

144. *See id.*

145. *See id.*

146. *See Robertson, supra note 45, at 240.*

147. *See id.*

148. *See Wachs v. Curry*, 16 Cal. Rptr. 2d 496, 498 (1993).

149. *See id.*

150. *See id.* at 504.

151. *See id.* at 501.

152. *See supra* Part III.C.

of experts for the licensing exemption satisfied the rational basis test.¹⁵³ The court also noted that there are numerous decisions that support the ideal that persons in the same general type of business may be classified differently when their methods of operations differ.¹⁵⁴

The managers' second contention was that the language in the TAA was unconstitutionally vague.¹⁵⁵ Specifically, the managers' contended that the terms "procure" and "occupation" failed to delineate which individuals and activities trigger enforcement of the Act.¹⁵⁶ However, the court rationalized that the meaning of the terms were reasonably ascertained by reference to the common law and the legislative history and purpose underlying the TAA.¹⁵⁷ In so doing, the court found that "reasonable certainty" satisfied due process and constitutional concerns.¹⁵⁸ The court stated: "[T]he statute has an objective content from which ascertainable standards of conduct can be fashioned."¹⁵⁹

Therefore, due to the managers' significant procurement activities, the court ruled against the managers and awarded Hall the remedies of rescission and damages in the sum of \$ 2.1 million.¹⁶⁰ However, without question, the most significant development to come about as a result of the *Wachs* decision was the allowance for the infamous incidental exception, repeatedly denied by previous efforts in the Legislature.¹⁶¹ The court reasoned:

We conclude from the Act's obvious purpose to protect artists seeking employment and from its legislative history, the "occupation" of procuring employment was intended to be determined according to a standard that measures the significance of the agent's employment procurement function compared to the agent's counseling function taken as a whole. If the agent's employment procurement function constitutes a significant part of the agent's business as a whole then he or she is subject to the licensing requirement of the Act even if, with respect to a particular client, procurement of employment was only an incidental part of the agent's overall duties. On the other hand, if counseling and directing the clients' careers constitutes the significant part of the agent's business then he or she is not subject to the licensing requirement of the Act, even if, with respect to a particular client, counseling and directing

153. See *Wachs*, 16 Cal. Rptr. 2d at 502.

154. See *id.* (citing *Marsh & McLennan of Cal., Inc. v. City of Los Angeles*, 132 Cal. Rptr. 796 (1976) (providing additional case support for proposition)).

155. See *id.*

156. See *id.*

157. See *id.*

158. See *id.* This is the test which satisfies due process as announced in *Hall v. Bureau of Employment Agencies*, 138 Cal. Rptr. 725 (1992). A statute will not be held void for uncertainty so long as a reasonable and practical construction can be given to the language. *Wachs*, 16 Cal. Rptr. 2d at 502 (citing *Hall*).

159. See *id.*

160. Robertson, *supra* note 45, at 240.

161. See *supra* Part III.B and accompanying text.

the client's career was only an incidental part of the agent's overall duties. What constitutes a "significant part" of the agent's business is an element of degree we need not decide in this case.¹⁶²

162. *Wachs*, 16 Cal. Rptr. 2d at 503 (citing *Hall v. Bureau of Employment Agencies*, 138 Cal. Rptr. 725 (Ct. App. 1976)). Applying this rationale, three subsequent cases sought to implement the *Wachs* "significance" test. In *Church v. Brown*, Cal. Lab. Comm. No. TAC 52-92 (1994), the Commissioner used a balancing test to help define the fine line between what is, and what is not, an agreeable amount of procurement in the manager's business. Robertson, *supra* note 45, at 243-46. The Labor Commissioner declared that activities involving the representation of talent should be separated from activities that fall outside of the artist-manager relationship. *Id.* at 244. Further, the Commissioner determined that a manager cannot present a "second career as an affirmative defense to a violation of the Act." *Id.*

The Commissioner decided that procurement of employment constitutes a 'significant' portion of activities of a [personal manager] if the procurement is not due to inadvertence or mistake or is simply a de minimus aspect of the overall relationship between the parties when compared with the [personal manager's] counseling functions on behalf of the artist.

Id. (quoting *Church*, No. TAC 52-92 at 12).

Thus, a two-prong test was developed for the *Wachs* significance test in *Church*. *Id.* To show a violation of the Act, the artist must first show that the contractual relationship was breached by procurement activities. *Id.* at 244-45. Next, "the burden shifts to the personal manager [to show] that the procurement activities did not constitute a significant part of [his] business as a whole." *Id.* at 245. The procurement functions must have been a result of inadvertence or honest mistake. *Id.* If the test is fulfilled, the artist can recover fees paid within the past year, which is the statute of limitations. *Id.*

A second application of the *Wachs/Church* standard involved a dispute between Pamela Anderson and her manager Robert D'Avola. *Anderson v. D'Avola*, Cal. Lab. Comm. No. TAC 63-93 (1993). The merits surrounding the dispute were virtually identical to those of the aforementioned cases. The factual situation differed, however, in one respect—D'Avola attempted to get around the licensing requirements of the Act by using a licensed agent as a "hip pocket agent." Robertson, *supra* note 45, at 246. Basically, D'Avola was engaging in procurement functions while his hip pocket agent served as a front; the hip pocket agent would initiate contacts with producers for parts discovered by D'Avola. *See id.* This practice was not accepted by the Labor Commissioner. *Id.* at 247. In addition to stating that the use of a hip pocket agent will not circumvent the licensing requirements of the Act, the *Anderson* case is also significant because it represented a relaxing of the penalties awarded against a personal manager when "significant" procurement is found. *Id.* at 248. Instead of awarding Anderson a disgorgement of all fees already paid to D'Avola, "[t]he Commissioner bifurcated the business relationship into two distinct periods." *Id.* at 247. Anderson was only awarded fees paid to D'Avola during the period in which D'Avola's procurement activities exceeded a finding of "incidental." *Id.* at 248. Thus, D'Avola was able to retain fees earned while he was not in violation of the Act, a seemingly more equitable standard in light of the factual nature of the disputes previously filed under the TAA. *Id.* at 249.

Finally, in *Ivy v. Howard*, Cal. Lab. Comm. No. TAC 18-94 (1994), the *Wachs* significance test was substantially narrowed to encompass "only those situations where the personal management contract is silent regarding procurement activities." Robertson, *supra* note 45, at 249. Therefore, the incidental exception was virtually eliminated, signaling that a return to the strict interpretation of the Act was imminent. *Id.* at 251. Indeed, in *Ivy*, the manager did not even procure employment for the artist; the manager was stripped of his representation agreement merely because he had a provision in the management contract stipulating that he would attempt to procure employment. *Id.* at 250.

4. *Waisbren v. Peppercorn Productions, Inc.*¹⁶³

Managers' hopes for a reliable and predictable interpretation and application of an incidental exception came to a sudden and abrupt end in *Waisbren*.¹⁶⁴ After two and a half years worth of substantial tinkering with and modification of the incidental exception inspired by *Wachs* in Division Seven,¹⁶⁵ California's First Division opted to return to strict application of the TAA.¹⁶⁶

Once again, the factual background underlying the dispute involved an artist's attempt to avoid the payment of fees owed to their manager as agreed in the parties' representation contract.¹⁶⁷ In *Waisbren*, Brad Waisbren promoted Peppercorn under an oral agreement.¹⁶⁸ Part of Waisbren's activities included incidental procurement.¹⁶⁹ After the agreement was terminated and Peppercorn failed to pay fees owed under the agreement, Waisbren filed suit.¹⁷⁰ Peppercorn defended his position, alleging that Waisbren procured employment without being licensed.¹⁷¹ Waisbren admitted, and the court acknowledged, that Waisbren's procurement was merely incidental.¹⁷² The court held that Waisbren was required to be licensed as a talent agent in order to perform even incidental procurement functions and that the remedies of rescission and disgorgement of fees owed were proper to ensure faithful adherence to the Act.¹⁷³

The court reasoned that the provisions, or plain meaning, of the TAA sufficiently enabled the court to ascertain legislative intent.¹⁷⁴ Notably, the court rejected Waisbren's interpretation of "occupation" as "the principal business of one's life."¹⁷⁵ Citing directly to provisions of the Act, the *Waisbren* Court stated that an individual could engage in an occupation even when most of his time is spent on other pursuits.¹⁷⁶ Thus, a single person can function as both a manager and a talent agent, subject to the licensing provisions of the TAA.¹⁷⁷

Justifying a return to the strict approach and an abolishment of the incidental exception, the court acknowledged the remedial purpose and nature of the Act.¹⁷⁸

163. 48 Cal. Rptr. 2d 437 (Ct. App. 1996).

164. Robertson, *supra* note 45, at 251.

165. See discussion *supra* note 162.

166. See *Waisbren v. Peppercorn Productions, Inc.*, 48 Cal. Rptr. 2d 437, 437 (1995).

167. *Id.* at 439.

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.* at 439-40.

173. *Id.* at 447. The determination of the trial court, in which Peppercorn was granted summary judgment, was affirmed. *Id.* Waisbren sought delinquent fees owed under the contract. *Id.* at 439. The ruling of the court eliminated this claim. See *id.* at 447.

174. *Id.* at 441.

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

The court reasoned that the Act should be liberally administered to ensure that artists are not abused, and that an incidental exception would cut against this rudimentary purpose underlying the initial formation of the Act.¹⁷⁹ The fact that a manager's business is devoted only "incidentally" to procurement would be of "little consolation" to the artist who falls prey to a violation of the Act.¹⁸⁰ Furthermore, the court expressed dissatisfaction with the fine line between what constitutes "incidental" procurement and "principal" procurement activities of the manager's business.¹⁸¹ The court stated that "it would be virtually impossible to determine accurately whether a personal manager had exceeded" the fine line.¹⁸²

The *Waisbren* Court also supported its decision by explicating the practices of the Labor Commissioner, noting that the Commissioner, before *Wachs*, had long accepted the position that a license is needed even for incidental procurement.¹⁸³ Further, the court cited the findings of the CEC,¹⁸⁴ the history of the Act,¹⁸⁵ and prior case law that ruled against the implementation of an incidental exception¹⁸⁶ to support the assertion that the *Wachs* ruling was wrongly decided.¹⁸⁷

It is important to note that *Waisbren* was not adjudicated in a court that has the power to actually overturn *Wachs*.¹⁸⁸ Therefore, both decisions are technically good law.¹⁸⁹ Since *Waisbren*, however, the Labor Commissioner, who possesses exclusive jurisdiction over disputes before a case can reach the court via appeal, has opted to err on the side of historical precedent, embracing the *Waisbren* ruling, dismissing the *Wachs* significance test, and strictly applying the TAA.¹⁹⁰

B. Recent Rumbling: The Michael Ovitz/CAA Controversy

1. The Story

Michael Ovitz was seen by many as the most dominant force in Hollywood over the course of two decades while running Creative Artists Agency ("CAA"),

179. *Id.* at 441-42.

180. *See id.* at 442.

181. *Id.*

182. *Id.* at 442 n.10.

183. *Id.* at 442.

184. *See supra* notes 79-96 and accompanying text.

185. *See supra* notes 47-96 and accompanying text.

186. *See supra* notes 115-156 and accompanying text.

187. *Waisbren*, 48 Cal. Rptr. 2d at 442-45.

188. Robertson, *supra* note 45, at 254.

189. *See id.*

190. *See id.* Naturally, the cases that constituted the progeny of *Wachs* were similarly discarded. *See id.*

a prominent talent agency.¹⁹¹ Indeed, Ovitz is largely credited with lavishing upon the talent agency field its current structure, tactics, and lucrative status in the industry.¹⁹² Ovitz created the powerful Creative Artists Agency, helped train their most prominent agents, and was paid tens of millions of dollars by the company in severance when he left the company to become President at Walt Disney Company.¹⁹³

However, after a short and unsuccessful tenure at Disney—ending when his contract was bought out for over \$100 million—and a couple of suspect investments, Ovitz decided to return to artist representation by starting Artists Management Group (“AMG”).¹⁹⁴ Ovitz recognized that managers had increasingly become dominant players in the entertainment industry and that the possibility for huge dividends loomed large for that profession.¹⁹⁵

By partnering with hot young managers Rick Yorn and Julie Yorn, Ovitz was able to get his business off the ground with immediacy.¹⁹⁶ The Yorns represented several young profitable stars such as Leonardo DiCaprio, Cameron Diaz, Claire Danes, and Edward Burns.¹⁹⁷ Ovitz brought to the partnership his reputation as a staunch protector of his clients and an unparalleled list of friends and contacts in the industry.¹⁹⁸ Additionally, Ovitz brought to his new business a large list of enemies, a reputation for demanding complete control, and an aura of paranoia that Ovitz was once famous for creating and exploiting to his economic advantage.¹⁹⁹ Ovitz reportedly told friends in the industry that he planned to reinvent the structure of the entertainment industry with his new venture.²⁰⁰

News of Ovitz’s new venture perturbed many agents throughout the entertainment industry who assumed that Ovitz, although classified as a manager, would procure employment in violation of the TAA and persuade artists to discard their talent agents altogether.²⁰¹ In fact, this was precisely the position taken by Ovitz’s own former CAA, the talent agency from which Ovitz initially began to pull talent to institute his new business.²⁰² Within a matter of weeks, Ovitz was able to lure directors Barry Levinson, Martin Scorsese, and Sydney Pollack, along with actor Robin Williams, all of whom were CAA clients.²⁰³ Ovitz also

191. Corie Brown, *Managing Hollywood: Michael Ovitz Eyes A Return To The Agency-Er, Management-Business*, NEWSWEEK, November 30, 1998, at 40, available at 1998 WL 17010856.

192. See Wallace, *supra* note 23, at NC22.

193. Bernard Weinraub, *With Robin Williams, Ovitz Has A Very Big Bird In The Hand: First Marquee Actor: Hollywood Mogul Isn't Afraid To Raid Agency He Founded*, N.Y. TIMES, Jan. 26, 1999, at C12.

194. *Id.*; see also Brown, *supra* note 191, at 40.

195. Brown, *supra* note 191, at 40-41.

196. *Id.*

197. *Id.*

198. *Id.*

199. See *id.*

200. *Id.*

201. See Claudia Eller, *Creative Artists Counterpunches in Ovitz Fight*, L.A. TIMES, Jan. 26, 1999, at C1.

202. See Weinraub, *supra* note 193, at C12.

203. *Id.*

purportedly caused the defection of prominent CAA agents, who left CAA for employment as managers at AMG.²⁰⁴ CAA contended that Ovitz's conversions represented aggressive and hostile actions toward CAA and that Ovitz "raided" CAA's clients and employees.²⁰⁵

CAA attempted to slow the wave of clientele that suddenly began to choose Ovitz's management company when they issued a risky ultimatum to their clients, including stars such as Tom Cruise, Steven Spielberg, and Tom Hanks.²⁰⁶ The ultimatum assured CAA clients that if they chose to retain Ovitz as their manager, CAA would no longer represent them as their agent.²⁰⁷ The ultimatum proved risky on the part of CAA because CAA not only risked alienating their clients, but CAA also started a heated controversy within the industry by boldly assuming that Ovitz's new venture planned to violate the TAA.²⁰⁸ Still, CAA felt the move was necessary to protect the future of their livelihood.²⁰⁹ Said CAA president Richard Lovett, "[Ovitz] is a competitor, not a collaborator."²¹⁰ Shortly after the mandate, Scorsese, actress Marisa Tomei, and actress Mimi Rogers, among others, left CAA.²¹¹

2. Preliminary Observations Under the TAA

Without question, the heat of the controversy and debate surrounding the entire Ovitz/CAA controversy is rooted in the vast amount of money involved and a track record of uncertainty as expressed by California's courts. Yet, from a purely theoretical standpoint, as envisioned by the current rendition of the TAA and the interpretation of the TAA by the Labor Commissioner, the fact that a particular artist chooses a new manager should not have any adverse effect on said artist's talent agency. This is due to the fact that a manager risks losing commissions and lucrative representation contracts for violating the TAA's licensing provisions.²¹² Clearly, the manager vs. agent debate is approaching its breaking point, and an Ovitz/CAA type controversy just may prove to be its ultimate battleground.

The following observations operate under the premise that a venture, such as

204. See Lynn Elber, *Hollywood Tussle Leaves Stars Stranded in Middle*, STATE JOURNAL-REGISTER, Jan. 27, 1999, at 15.

205. Eller, *supra* note 201, at C1.

206. *Id.*

207. *See id.*

208. *See id.*

209. *See id.*

210. Andrew Gumbel, *The Dream Factory: The Return of the Talent Man*, THE INDEPENDENT - LONDON, Jan. 31, 1999, at 16.

211. *Artists Take Sides in Agency Tiff*, THE OTTAWA SUN, Jan. 31, 1999, at 6.

212. *See supra* text accompanying note 22-30.

that envisioned by Ovitz, will attempt to either ignore or circumvent the licensing provisions of the TAA.

i. "You'll never work in this town again!"

In recognition of the black letter of the TAA itself and the existing thread of the common law on this issue,²¹³ it becomes clear that the only way someone such as Ovitz would face remedial sanctions under the Act is if an artist chooses to sue.²¹⁴ Indeed, the TAA is not a self-enforcing instrument.²¹⁵ Generally, in order for a case to reach the exclusive jurisdiction of the Labor Commissioner, the Act must be activated by either an artist alleging unlicensed procurement or an agent attempting to recover fees.²¹⁶

Yet, if an artist chose to sue the powerful Michael Ovitz through AMG, he or she would face the legitimate fear of being blacklisted throughout the industry.²¹⁷ Given Ovitz's reputation for exercising and exploiting his clout and contacts, any artist seeking to rescind a representation agreement or recover fees due to abuses suffered at the hands of AMG would first be forced to balance the realization of not being able to locate future employment with the gravity of the abuses they are currently suffering.²¹⁸ Thus, given Ovitz's weight in the industry, circumvention of the existing version of the TAA is not only a reality, but a viable option.

ii. "Hey, the offers were incoming!"

In addition, Ovitz may attempt to hide behind the veil of his clientele's success. Ovitz, in defending claims alleging illegal procurement activities, can state that the offers were incoming, and therefore, not the result of procurement.

Of course, this argument falls prey to the reality that even the most established artists such as Robin Williams typically want someone, typically an agent, to search out the best material.²¹⁹ Moreover, a defense asserting that *all* offers were incoming contradicts, once again, the prevailing and well-documented observation—as espoused by entertainment industry managers—that incidental procurement is an inherent reality connected with the job.²²⁰

213. See *supra* notes 115-182 and accompanying text.

214. See CAL. LAB. CODE § 1700.44(a) (West 1989). "In cases of controversy arising under this chapter, the parties involved shall refer the matters in dispute to the Labor Commissioner, who shall hear and determine the same." *Id.*

215. See O'Brien, *supra* note 2, at 492.

216. See *id.*

217. See Gumbel, *supra* note 210.

218. See *id.*

219. See Nunez, *supra* note 23.

220. See *supra* Part II.B.

iii. "Is that an agent in your pocket?"

In the past, the Labor Commissioner has shut down calculated attempts aimed at circumventing the TAA.²²¹ For instance, one might envision Ovitz setting up a token talent agency next door to the AMG building. This token agency would place AMG's phone calls and, therefore, technically perform AMG's procurement activities while shielding AMG from allegations asserting illegal procurement under the TAA. However, the Labor Commission has dismissed such practices in the past, labeling them "hip pocket agent[ing]."²²²

In a 1991 dispute involving Pamela Anderson and her manager Robert D'Avola, the Labor Commissioner found D'Avola guilty of attempting to use a hip pocket agent in subterfuge of the Act.²²³ In the *Anderson* case, Anderson and D'Avola entered into a personal management contract.²²⁴ Anderson was also signed by a talent agency, a move designed to garner further employment opportunities.²²⁵ Meanwhile, D'Avola hired an additional agent to contact potential employers on D'Avola's behalf; the agent played no significant role in procuring employment other than placing the calls and acted strictly in accordance with D'Avola's instructions.²²⁶ In 1992, Anderson stopped paying D'Avola, alleging that D'Avola procured employment in violation of the Act.²²⁷

The Labor Commissioner ruled that D'Avola's use of the additional agent, the "hip pocket agent," did not meet the exemption for personal managers working in conjunction with licensed talent agents.²²⁸ Furthermore, the Labor Commissioner held that D'Avola's use of the additional agent was an illegal attempt to use the credentials of a licensed individual to procure employment for Anderson without violating the Act.²²⁹ Thus, the court awarded Anderson fees paid and owed to D'Avola during the period in which the hip pocket agent was employed and during which D'Avola's procurement activities constituted a "significant" portion of the relationship between Anderson and D'Avola.²³⁰ The reasoning by the Labor Commissioner, arguing against the use of hip pocket agenting as a mere contrivance to avoid the TAA, likely extends to similar, imaginative "fronts" that

221. See Robertson, *supra* note 45, at 246-49.

222. *Id.*

223. Robertson, *supra* note 45, at 247.

224. Robertson, *supra* note 45, at 246.

225. *Id.*

226. *Id.* at n. 243.

227. *Id.* at 246.

228. *Id.* at 247.

229. *Id.*

230. *Id.* at 248. Note that at the time this dispute was heard, California was operating under the *Wachs* standard.

may be concocted by AMG in efforts to avoid the licensing provisions of the TAA.²³¹

Overall, given the established parameters and benefits already attached to being a manager, such as the ability to achieve production credit and fees from studios, the receipt of fees from clients in excess of ten percent, and the absence of a formal regulatory scheme, it is clearly against the financial interests of someone such as Ovitz to attain a license under the TAA and operate a talent agency.²³² As such, an Ovitz-type operation carries with it the potential of a direct attack upon the TAA, the findings of the CEC, the recent *Waisbren* decision and, ultimately, the profession of agenting as it is currently envisioned.

V. ISSUE TWO: SHOULD LAWYERS BE EXEMPT FROM THE ACT?

Although the greatest amount of exposition in this Comment deals with the controversies and confusions surrounding managers and agents, the TAA's lack of attention and silence in reference to the potential applicability of the Act toward lawyers fosters its own share of bewilderment.²³³ This Comment takes the position that lawyers, for the reasons propounded below, should be exempt from the TAA and any version of any regulatory act that purports to govern the activity of representatives of talent.²³⁴

First, lawyers should be exempt from the provisions of the TAA because the Legislature never intended for the Act to apply to the activities of lawyers.²³⁵ The Act, as historically explicated above,²³⁶ was intended to protect artists seeking employment or career advancement in the entertainment industry.²³⁷ Again, the TAA fails to explicitly discuss attorney behavior.²³⁸

Second, much like the complaints issued by the entertainment industry's managers, the Act is unjust because, due to the ambiguous word "procurement," the Act does not provide a discernable standard by which an individual can determine if a violation of the Act has occurred.²³⁹ The TAA, the TAA's predecessors and amendments, the CEC, California courts, and the Labor Commissioner have each failed to define precisely which activities constitute "procurement."²⁴⁰ Furthermore, much of the activity that has been labeled

231. *See id.* at 248-49.

232. *See Wallace, supra* note 20. Many managers are able to use the clout of their clients to ultimately achieve production credit and fees from studios; many managers do nothing but bring in a client and receive credit as a producer. *Id.* Depending upon the size of the fee and the magnitude of the credit from the studio, managers can in turn attract and retain clients by not charging a fee. *Id.* This is an emerging phenomenon with bigger name, highly sought talent. *Id.*

233. *See generally* O'Brien, *supra* note 2, at 492.

234. *See infra* notes 235-46 and accompanying text.

235. *See* O'Brien, *supra* note 2, at 492.

236. *See supra* notes 52-116 and accompanying text.

237. O'Brien, *supra* note 2, at 493.

238. *Id.* at 496.

239. *Id.* at 492.

240. *Id.* at 497-99.

“procurement” by the Labor Commissioner consists of ordinary attorney conduct such as contract negotiations.²⁴¹

Third, attorneys should be exempt from the provisions of the TAA because every conceivable activity undertaken by lawyers is already governed by the ethics-based Professional Rules and the State Bar Act; even non-legal activities by the lawyer are subject to discipline.²⁴² These rules govern lawyer conduct to a degree equal to, or far exceeding that, of the TAA.²⁴³ Additionally, many of the TAA’s regulations conflict with many of these ethical rules.²⁴⁴ Therefore, artists are given greater protection under the Professional Rules and the State Bar Act than under the TAA, and licensure of lawyers under the Act would be duplicative, confusing, and unjust.²⁴⁵

Although there has not been a case directly on the issue of whether lawyers are subject to the provisions of the TAA, explication of this issue remains important because of uncertainty on the part of lawyers in the field and a level of self-suppressing conduct that has unjustifiably attended such uncertainty.²⁴⁶

VI. PROPOSED SOLUTION: A COMPREHENSIVE ACT FEATURING FIDUCIARY PRINCIPLES

A. Introduction

1. A Single Act

The roles of the lawyer, manager, and agent in the entertainment industry are continually changing. Indeed, the industry as a whole is constantly in a state of transformation. Consequently, the TAA has become outdated and must be replaced by a universal scheme that governs and makes sense of the realities faced by all representatives of talent in the entertainment industry.

While this new scheme must reflect the ever-changing nature of the business and roles of its players, this new standard must also remain flexible in the face of future developments. Moreover, this new standard must tap into the spirit of

241. See *id.* at 492.

242. *Id.* at 492-93.

243. See *id.* at 493.

244. *Id.* at 493; see also Part II.A.1 (introducing conflicts between the TAA and ethically based rules applicable to lawyers).

245. See *id.* at 493, 501; see generally Abdo, *supra* note 17, at 3-6 (discussing lawyer liability and restrictions in the entertainment industry).

246. See O’Brien, *supra* note 2, 499 (noting certain interpretations of the TAA discouraging zealous representation of clients).

early artist protection legislation in California, which was principally aimed toward protecting artists against unconscionable abuses at the hands of their representatives.²⁴⁷ Indeed, today, while artists relinquish more of their earnings than ever before to an assortment of people who perform many of the same tasks, California's Legislature, Labor Commissioner, and Supreme Court have swayed from this initial intent.

Overall, the driving forces underlying this new Act must include equity, harmony, and predictability in order to facilitate smooth operation, despite the overlap in activities of the various types of representatives. A carefully drafted all-encompassing act, steeped in the principals of fiduciary law and composed in consideration of the peculiarities of the entertainment industry, can achieve such goals. The purpose of Part VI of this Comment is to present foundational principles and rudimentary considerations underlying a solution to the controversies and confusions presently surrounding lawyers, managers, and agents in California's entertainment industry.

2. A Personal Managers' Act Is Not The Answer

In response to the dilemmas and uncertainty clouding the industry's lawyers, managers, and agents, a commonly advocated solution calls for the establishment of a Personal Managers' Act ("PMA").²⁴⁸ The most prevalent version of a PMA would regulate managers, institute an incidental exception, and function alongside the TAA that would continue to regulate agents.²⁴⁹ Advocates reason that the implementation of a PMA would cure the ills currently felt by managers²⁵⁰ and also provide an inexpensive forum for artists and managers to engage in alternative dispute resolution.²⁵¹ Even more importantly, a PMA could define fiduciary duties that managers owe to their clients.²⁵²

While the PMA sounds attractive as a cure toward the ills felt by managers in the entertainment industry, this solution fails to recognize several troubling issues raised by agents and lawyers. Significantly, setting up separate standards for managers and agents would foster additional conflict and tension between the two entities. Inevitably, one entity will argue that the other entity's Act is more favorable, and so forth.²⁵³

The ultimate shortcoming of the PMA suggestion is highlighted by the

247. See *supra* notes 52-56 and accompanying text.

248. Zarin, *supra* note 25, at 986.

249. See *id.* at 1003-04 (arguing for the implementation of a personal manager's act); see also Fred Jelin, *The Personal Manager Controversy: Carving The Turf*, 359 PRACTISING LAW INST. 471 (1993) (discussing the controversy and confusion surrounding personal managers in light of the Talent Act).

250. See *supra* notes 40-51 and accompanying text.

251. See Zarin, *supra* note 25, at 986.

252. See *id.* (discussing proposals in Gary A. Greenberg, *The Plight of the Personal Manager in California: A Legislative Solution*, COUNSELING CLIENTS IN THE ENTERTAINMENT INDUSTRY 514 (1993).

253. See, e.g., *Wachs*, 16 Cal. Rptr. 2d 496, 501-03 (Ct. App. 1993); *Waisbren v. Peppercorn Productions, Inc.*, 48 Cal. Rptr. 2d 437 (Ct. App. 1995).

realization that the TAA is simply outdated. The recording exception, for example, represents a prominent, outdated component.²⁵⁴ Upon a review of the rationale promulgated by the CEC and adopted in *Wachs*,²⁵⁵ the rationale for the recording exception can just as effectively be applied to other endeavors or realities in the entertainment field.

As described in *Wachs*, the recording exception was instituted upon the realization that the activities of procuring recording contracts were a unique specialty in the entertainment field.²⁵⁶ Negotiations for a recording contract are commonly conducted by personal managers or lawyers, not agents.²⁵⁷ Further, personal managers for musicians often contribute financial support to the musician until his or her career takes off.²⁵⁸ The manager for the musician often acts as a conduit between the musician and the recording company, and the manager also acts as the musician's confidant in all matters—business, personal, and otherwise.²⁵⁹ Finally, the activities of the individual who procures recording contracts are ambiguous, intangible, and imprecise, making the conduct difficult to license.²⁶⁰

Extending the same rationale for the recording exception, described above and in *Wachs*, to other specialties in the entertainment field, one could conclude that the activities of procuring contracts for *any* genre in the entertainment field constitute a unique specialty.²⁶¹ Negotiations for any genre or activity in the entertainment field are likely to be conducted by a personal manager, not an agent; the controversy over the incidental exception would not exist otherwise.²⁶² Further, personal managers for other artists in the entertainment industry often contribute financial support to artists until their careers takes off.²⁶³ The managers for other artists in the entertainment industry often act as a conduit between the artist and employer, and the manager also acts as the artist's confidant in all matters—business, personal, and otherwise.²⁶⁴ Likewise, the activities of the individual who procures employment contracts for other artists in the entertainment industry are ambiguous, intangible, and imprecise, making the conduct

254. See generally *Wachs*, 16 Cal. Rptr. 2d at 498. The *Wachs* managers argued that no rational basis existed to justify the TAA's implementation of the recording exception, and therefore, that the Act was unconstitutional. *Id.*

255. See *id.* at 501.

256. See *id.*

257. *Id.* (quoting Report of the California Entertainment Commission 13-14 (1985)).

258. *Id.*

259. *Id.*

260. *Id.* at 501-02.

261. See *Wachs*, 16 Cal. Rptr. 2d at 501.

262. See *id.*

263. *Id.*

264. *Id.*

difficult to license.²⁶⁵ All told, the same rationale that established an exemption relating to the procurement of recording contracts also exists for other genres in the entertainment industry.²⁶⁶ Stated another way, the rationale underlying the recording exemption engulfs the entirety of the TAA.

The illustration above is just one example of an outdated aspect propounded by the TAA. Yet, what makes the TAA particularly outmoded is more a function of what is not able to be confined within the black letter of the current version of the Act. These deficiencies include, but are not limited to, the vague and ambiguous language employed by the Act,²⁶⁷ the failure of the Act to reflect realities in the business, the inability of the Act to remain flexible in light of an ever-changing business climate,²⁶⁸ and the potential applicability of the Act toward lawyers.²⁶⁹ Clearly, adding a PMA to the mix, in place of standardizing the minimum legal obligations of representatives of talent, is not the answer or cure that will address the ills felt by the entertainment industry as a whole.

B. A Fiduciary Influenced Model

1. Foundation

Fiduciaries can be found in many forms and substantive legal areas in the common law.²⁷⁰ The forms in which fiduciaries appear include agents, partners, directors and officers, trustees, and executors.²⁷¹ The substantive areas of law include contracts, labor, criminal, estate planning, and securities.²⁷² Throughout the past century, the United States experienced a considerable degree of expansion and development in the area of fiduciary law.²⁷³

Simply put, “under fiduciary law, a business relationship is viewed in terms of a dominant and a vulnerable party.”²⁷⁴ In conformance with this Comment’s terminology, the representative is the dominant party, and the artist is the vulnerable party.²⁷⁵ Thus, the dominant party or representative, by virtue of his

265. *Id.* at 502.

266. This Comment does not advocate that licensure attach upon managers who procure employment for recording contracts. Rather, like those who procure recording contracts, others in the entertainment industry should be exempt from licensure as well, contingent upon the idea that everyone involved in a representative capacity is legally bound to a fiduciary standard.

267. *See, e.g., Wachs*, 16 Cal. Rptr. 2d at 502. In *Wachs*, the defendant managers contended that the terms “procurement” and “occupation” failed to delineate which individuals and activities triggered enforcement of the Act. *See id.*

268. *See, e.g., supra* notes 121-190 and accompanying text (explicating *Raden*, *Buchwald*, *Wachs*, and *Waisbren*).

269. *See generally* O’Brien, *supra* note 2.

270. Tamar Frankel, *Fiduciary Law*, 71 CAL. L. REV. 795 (1983).

271. *Id.*

272. *Id.*

273. *Id.* at 796.

274. Robertson, *supra* note 45, at 265.

275. *Id.*

expertise and the contractual nature of the parties' relationship, "owes a high level of [care] towards the vulnerable party, the artist."²⁷⁶ Significantly, in the context of the entertainment industry, this high level of care is evidenced by the fact that the representative often has a monopoly over the artist's needs for a particular aspect of the artist's affairs.²⁷⁷ In light of the high percentage of the artists' gross income that managers and agents currently receive in exchange for their services, even successful artists cannot afford to hire more than one talent agent (or talent agency) and one manager.

Potentially, the representative is entrusted with the obligation to perform several tasks.²⁷⁸ Naturally, the core feature of any representative's existence is that the representative acts on behalf of, or as a substitute for, the artist in a variety of matters including, possibly, procurement of employment or negotiation of contracts.²⁷⁹ This feature allows the artist to delegate responsibility to the expert representative and allows the artist more time to be productive in a creative sense.²⁸⁰

Once again, in promulgation of this new Act, California's Legislature must take into account the characteristics and the scope of each particular type of representative currently operating in the entertainment industry so that a new Act encompasses all such distinctions. Prominently, the Legislature must ensure that representatives avoid over-reaching in dealings with the artist.²⁸¹ For instance, the representative must fully disclose all relevant information and attendant consequences regarding the artist's welfare; the representative cannot induce the artist to sign unconscionable contracts, and the representative must inform the artist whenever the representative has a certain conflict of interest that may affect his or her dealings with the artist.²⁸² Moreover, the representative must present conflicts of interest to the artist in writing, in easily understandable terms, delineating the nature of the conflict.²⁸³

276. *Id.*; see Frankel, *supra* note 270, at 800.

277. See Frankel, *supra* note 270, at 801.

278. Robertson, *supra* note 45, at 265.

279. Frankel, *supra* note 270, at 808-09.

280. See *id.* By contrast, while in the absence of codification of fiduciary principles for the context of the entertainment industry, a manager wields a potentially unconscionable degree of power over an artist who is not business savvy. Presently, the artists' best chance at controlling their fiduciaries is by way of threat of termination or carefully drafted contractual provisions. See *id.*

281. See Hal I. Gilenson, Note, *Badlands: Artist-Personal Manager Conflicts Of Interest in the Music Industry*, 9 CARDOZO ARTS & ENT. L.J. 501, 543 (1991).

282. See, e.g., *id.* at 526-28 (explicating the conflict in *Laurel Canyon, Ltd. v. Springsteen*, N.Y.L.J. Aug 25, 1976, at 6 col. 1 (N.Y. Sup. Ct. Aug. 19, 1976), *aff'd* 55 A.D.2d 822 (1st Dept. 1977), in which a managerial contract between Bruce Springsteen and his manager—who owned an interest in the Laurel Canyon publishing company—created a situation in which over a four year period Laurel Canyon made two million dollars to Springsteen's \$100,000).

283. *Id.* at 543. The representative should suggest that the artist have an independent lawyer check any agreement between the parties for unconscionability. If the artist refuses, the representative should have this fact reduced to writing. See *id.* at 544.

Simply put, under fiduciary law and codification of a new Act as suggested by this Comment, the representative is barred from engaging in double-dealing, exploitation of the artist, or other acts constituting bad faith.²⁸⁴ If the representative fails to meet these obligations, the artist may invoke protection pursuant to the new Act and seek termination of the representation contract or restitution of fees paid during the period of such wanton conduct.²⁸⁵

2. Notable Inclusions/Exclusions

As a matter of construction, this new fiduciary-based Act should avoid functional conflict with New York's allowance for the incidental exception.²⁸⁶ Further, for reasons earlier explained,²⁸⁷ this new Act should expressly exclude lawyers because they are already governed by ABA Professional Rules and the State Bar Act.²⁸⁸ Lawyers should be held to the same standard as that applied to non-entertainment related clients while not being afforded an unfair advantage or disadvantage over non-lawyers operating in a representative capacity in the industry. In addition, the new Act should heed the following considerations.

i. Non-Exhaustive List of Abuses

As a supplement to this new Act's codified fiduciary principles, presented in the context of the unique climate of the entertainment industry, this new Act should delineate a non-exhaustive list of traditional abuses that artists endure. This list should include provisions that address a representative's potential mismanagement of income, excessive fees, conflicts of interest, disruption of existing contractual relationships, and misappropriation of funds, among others.²⁸⁹ Although such abuses would already be accounted for by the new Act through application of its fiduciary principles,²⁹⁰ a non-exhaustive list would put representatives on notice and promote clarity in a number of instances. Such a list would alert representatives to the fact that certain named activities have been attempted in the past and will not be tolerated under the new Act. Notably, this section will provide the Legislature with the opportunity to explicitly respond to a plethora of controversies and confusions that have been troubling industry managers, agents, and lawyers for decades.²⁹¹

284. See Gilenson, *supra* note 281, at 526-34 (discussing fiduciary law), 543-44 (discussing proposed legislation).

285. See *infra* notes 292-95 and accompanying text (discussing jurisdiction under the Act as proposed herein).

286. See Robertson, *supra* note 45, at 258-62 (discussing New York's incidental exception).

287. See *supra* notes 233-46 and accompanying text.

288. See *supra* notes 233-46 and accompanying text. See generally O'Brien, *supra* note 2 (discussing regulation and enforcement of California's Talent Agencies Act).

289. See generally Frankel, *supra* note 270 (discussing problems which arise in fiduciary relationships).

290. See generally *id.*

291. See generally *infra* notes 40-246 and accompanying text.

*ii. Jurisdiction*²⁹²

This new Act should continue to allow the Labor Commissioner to review disputes on an individual basis, applying the above-described principles and weighing remedies for violations under an equitable guise.²⁹³ However, in direct contrast to the TAA and its predecessors, which required that cases first be heard before the Labor Commissioner before appeal was allowed to the California Superior Court, the Labor Commissioner must not possess exclusive jurisdiction to hear cases that arise under this new Act.²⁹⁴

There are several conspicuous reasons for this fundamental change in jurisdiction. First, because artists or representatives invoking protection under this new Act shall invariably seek to supplement their complaint with common law causes of action such as breach of fiduciary duty, breach of contract, misrepresentation, misappropriation, and others, petitioners should be afforded the opportunity to present their case for the first time in front of a jury.²⁹⁵ Second, claimants should not be forced to incur the additional cost and expenditure of time associated with an administrative remedy. Clearly, the Act as proposed herein constitutes a radical change in substance and form as opposed to any of the outdated forms of artist protection legislation—the TAA, AMA, AML, and the early Private Employment Agencies Law. The ritualistic adoption of administrative remedies that occurred upon the enactment of each of these pieces of legislation often amounted to red tape that no claimant should be forced to endure in order to attain relief. All told, claimants must possess the option of first presenting their cases before *either* the Labor Commissioner or the Superior Court.

292. The TAA's administrative prerequisite, mandating that the Labor Commissioner first hear disputes arising under the TAA before the case can reach the superior court, was inherited by the TAA from the earlier forms of artist protection legislation, the AMA and the Private Employment Agencies Law (PEAL). *Buchwald v. Superior Court*, 62 Cal. Rptr. 364, 365, 371 (Ct. App. 1967). The PEAL was the earliest form of artist protection legislation in California, passed in 1913. *Id.*

293. *But see id.* at 372 (affirming the principle that the Labor Commissioner must first hear disputes arising under the TAA before the dispute can reach the Superior Court because prior legislation also included such mandate).

294. *See id.*

295. *See Robertson, supra* note 45, at 265.

iii. No Supervision Over Daily Affairs, No Pre-Approval of Forms, No Licenses, Reduced Fees

Due to the fact that managers have never truly been regulated, many artists are already accustomed to choosing their representatives wisely.²⁹⁶ Furthermore, some artists are adept at negotiating for favorable terms in their representation agreements.²⁹⁷ These recognitions, coupled with the enactment of this new Act's clear minimum legal standard for all representatives of talent, obviates the need for many burdensome administrative and regulatory procedures. Specifically, direct and pervasive interference with the daily operations and documentation employed by representatives, as currently mandated by the TAA,²⁹⁸ will be eradicated. Moreover, because the duties of all representatives are comprehensible and standardized, the new Act shall not require such representatives to obtain a license.²⁹⁹ Therefore, a broader range of capable fiduciaries can become empowered with the responsibility of procuring employment without suffering the attendant plethora of administrative obstacles currently required of talent agents.³⁰⁰

Even more, the new Act's clarity and elimination of the debate surrounding the incidental exception will reduce litigation. Joined with the increased economic efficiency connected with administering this proposed model, many of the fees currently required by the TAA could be eliminated or reduced. Notably, the \$10,000 surety bond, required by the TAA by any new talent agency,³⁰¹ would be eviscerated in light of the fact that, as applied to small start-up agencies, the bond is overly burdensome and works a discriminatory effect in favor of larger more established firms.³⁰²

3. Random Effects

The uncompromising distinction between managers and agents will be abolished with the enactment of the new comprehensive Act. Thus, the 50-year debate over the incidental exception will be history. Agents will be able to become producers if studios are apt to allow such a negotiation, and managers will be able to procure employment without the fear of disgorgement and rescission. Current talent agencies will be forced to become more creative and full-service oriented in

296. See Nunez, *supra* note 23. Many artists use their clout in the industry to eliminate their manager's fee altogether. *Id.* This occurs when managers want to obtain production credit and studio fees pursuant thereto. *Id.* A manager can accomplish this by simply bringing their client's name and talent to a project. *Id.* In so doing, a manager can receive his or her compensation from the studio, not the artist. *Id.*; see also Wallace *supra* note 23, at NC22.

297. See Wallace, *supra* note 23, at NC22.

298. See CAL. LAB. CODE §§ 1700.6-1700.22 (West 1986).

299. *But see id.* § 1700.5.

300. See generally *id.* §§ 1700.5-1700.22.

301. See *id.* § 1700.15.

302. See Robertson, *supra* note 45, at 237 (noting that the Act's requirement mandating the posting of a \$10,000 surety bond is perhaps the most detested provision of the TAA).

the effort of retaining business. This effect is necessary and desirable for the standardization of protection for artists. Moreover, equity between big representative agencies and the small start-up representative with only a few clients will be fostered because there will no longer be excessive fees and administrative hurdles tied to the privilege of procuring employment.

Materially, this new Act will allow prospective representatives of talent to delineate a more personalized range of services they want to offer—all with the foresight that they will be held legally accountable to a fiduciary standard. Thus, each business will tailor its “representation contracts” accordingly; as long as each contract is in compliance with the aforementioned standards, implicated by the all-encompassing legislation, the parties’ agreements can be as creative as the parties desire.

Further, each individual representative, based on the full range of services the representative opts to deliver, must negotiate with the artist for a percentage of the artist’s gross income. Given the fact that most talent, especially established talent, already pay up to ten percent for an agent *and* an additional twenty percent for their managers, it is likely that this fee will remain lower than the aggregate of the fees artists are currently paying toward entities who are doing much of the same work. Increased competition between representatives will also help keep percentages down. Plus, under the new Act, the artist can hire a single entity to achieve the full range of their desired services, or a number of specialized representatives, as is the norm in the industry today. The bottom line is that the artist will have a choice.

Furthermore, while this proposed legislation protects artists from all types of representative entities—whether managerial or procurement based and irrespective of operational size—the new model also protects representatives.³⁰³ In addition to providing a legal standard that is clear and functionally predictable, the new model effectively extinguishes the inequitable practice long employed by artists who have used the TAA as a vehicle to avoid paying managers because of incidental procurement activities.

VII. CONCLUSION

Lawyers, managers, and agents, as representatives of artists, all owe a duty to their clients. Given the entities’ common goal aimed toward helping artists become productive and profitable, coupled with the vast and undeniable overlap in the representatives’ job descriptions, a single act must govern representatives’ activities. A fiduciary-based act, adjoined with the distinctions presented herein,

303. See generally Frankel, *supra* note 270.

constitutes the most reasonable path toward getting back to the original goal of protecting artists, fosters consistency, and dissolves the controversies and confusions now plaguing California's entertainment industry.

The state of the present conflicts demand that the California Legislature take action. At stake is one of the most prominent sources of California's revenue and the financial futures of a legion of artists, lawyers, managers, and agents.

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