CALIFORNIA'S TALENT AGENCY ACT:
TIME TO GET REAL: ANTIQUATED REGULATION AND THE 21st CENTURY

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"We cannot solve our problems with the same thinking that created them."[1]

TABLE OF CONTENTS

IV. Introduction

Glitz. Glamor. Fame. Fortune. Red carpets. That is what Hollywood is all about, right? Wrong. The reality is that Hollywood is an impersonal, uncaring, and unforgiving place. Today's average American consumer arguably knows more about the lives of the Kardashians and Justin Bieber than Obama's health care reform. What the public doesn't concern themselves with are the industry players who help catapult entertainers to great levels of fame.

To navigate the harsh reality of the entertainment industry, artists seek the sophisticated assistance of third party representatives, specifically agents and managers, to aid in locating employment opportunities and developing a career.[2] Historically, these industry players have

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[1] TODD MACLEAN, GLOBAL CHORUS: 365 VOICES ON THE FUTURE OF THE PLANET 125 (Todd Maclean Ed., 2014) ("To paraphrase the great Albert Einstein, we cannot solve our problems with the same thinking that created them in the first place.")

[2] David Zelenski, Note, *Talent Agents, Personal Managers, and Their conflicts in the new Hollywood*, 76 S. CAL. L. REV. 979, 979 (2003).

engaged in unscrupulous business practices in an effort to thrust their artists into the limelight.[3] In an effort to quell such behavior, California legislature enacted the Talent Agencies Act ("TAA" or "the Act").[4]

The Act establishes and relies on a bifurcated system, where an artist's employment procurement efforts are relegated exclusively to licensed agents, leaving managers to handle all other aspects of an artist's career.[5] Unfortunately, in today's entertainment industry, such a black-and-white occupational distinction simply does not exist.[6] In fact, the Act turns a blind eye to one key industry reality: talent agents have no interest in signing unseasoned artists, but without the talent agent there is no legal way for the artist to procure employment to establish a reputation.[7]

This leaves personal managers to face the difficult dilemma of violating the Act by procuring employment, and thus jeopardizing their contract with the artist due to the illegal procurement, or acquiring agency licensing and subjecting themselves to regulation and fees.[8] As managers typically advance a significant amount of time, money, and effort for their new artists with the ultimate desire of obtaining a return on their investment, they often opt to procure

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[3] Erick Flores, Note, "*That's a Wrap! (Or is it?)": The Unanswered Question of Severability Under California's Talent Agencies Act After Marathon Entertainment, Inc. v. Blasi*, 97 GEO. L.J. 1333, 1334 (2009).
[4] Marathon Entm't, Inc. v. Blasi, 174 P.3d 741, 746 (Cal. 2008)
[5] 1 THOMAS D. SELZ, MELVIN SIMENSKY, PATRICIA ACTON & ROBERT LIND, ENTERTAINMENT LAW 3D: LEGAL CONCEPTS AND BUSINESS PRACTICE § 8:7 (Westlaw 2014).
[6] Heath B. Zarin, Note, *The California Controversy Over Procuring Employment: A Case For The Personal Managers Act*, 7 Fordham Intell. Prop. Media & Ent. 927, 929 (1997).
[7] Gregory Albert, Note, *Taking Away An Artist's "Get Out of Jail Free" Card: Making Changes and Applying Basic Conract Principles to California's Talent Agencies Act*, 8 PIERCE L. REV. 383, 384 (2010).
[8] James M. O'Brian III, Comment, *Regulation of Attorneys Under California's Talent Agencies Act: A Tautological Approach To Protecting Artists*, 80 CAL. L. REV. 471, 484 (1992).

employment.[9] Sadly, artists use this situation to their advantage – first retaining management in their early years to procure employment and obtain an agent, and then utilizing the Act to disavow their management contracts.[10]

The distinction between agents and managers is further blurred when these representatives opt to forgo their commission in lieu of producer credits or engage in packaging deals.[11] These manager-producer and agent-producer roles create significant conflict-of-interest concerns.[12] Though guild regulation on production and distribution currently exists, failed negotiations between agencies, managers, guilds and unions can render such regulation obsolete and ultimately leave artists without protection.[13] In addition to these problems, the 1986 revision of the TAA did not foresee the impact of technological advancement on the entertainment industry. With the advent of the internet, the rise of illegal file sharing, and resulting decline in physical music sale, the music industry has scrambled for new ways to generate revenue.[14] As a means to recoup their losses, the industry has begun to engage in multiple rights agreements, better known as 360 deals.[15] Under such agreements, the record label becomes, in essence, a personal manager by investing in an artist's brand and developing their act by providing business

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[9] Albert, *supra* note 7, at 384.
[10] Id.
[11] *See infra* Part V.
[12] Amy Wallace, *Hollywood Agents Lose the Throne*, LATIMES.COM (Dec. 11, 1998) *available at* http://articles.latimes.com/1998/dec/11/news/mn-52950
[13] *See e.g. Former SAG Agency Relations Unpates*, SAGAFTRA.ORG, http://www.sagaftra.org/sag-agency-relations-updates (last visited April 26, 2015).
[14] Mark Kesten, Article, *Collateral Damage: Will The 360 Deal Be the Next Victim of California's Talent Agencies Act*, 43 SW. L. REV. 397, 398. (2014).
[15] *See* Jeff Leeds, *The New Deal: Band as Brand*, N.Y. TIMES, Nov. 11, 2007, Section 2 (Arts & Leisure), at 1, available at http://www.nytimes.com/2007/11/11/arts/music/11leed.html ("Like many innovations, these deals were born of desperation; after experiencing the financial havoc unleased by years of slipping CD sales, music companies started viewing the ancillary income from artists as a potential new source of cash.").

and administrative support and guidance.[16] Unfortunately, by essentially becoming personal managers, the record label also then faces the unfortunate dilemma of having to violate the Act.

This note exposes the inapplicability of the TAA given the twenty-first century entertainment industry landscape. Part II defines the industry roles of talent agents and personal managers and introduces the dispute between the two representatives. Part III discusses the history of the TAA and introduces the Act's fundamental provisions. Part IV describes the diverse roles of industry players as they exist today, and exposes how the TAA is no longer adequate in light of the evolved industry.

II. INDUSTRY REPRESENTATIVES

In order to thoroughly understand the legal concerns surrounding California's Talent Agencies Act, it is imperative to first understand the roles of the entertainment industry participants – agents and managers.[17] As the entertainment industry has evolved, so have the roles of the participants, resulting in overlapping duties, and thus misunderstood classifications.[18] Understanding the bifurcated system of representatives will facilitate the discussion regarding the key issues with the TAA, and aid in the understanding of the need for reformation.

A. Talent Agents

A talent agent's primary role is to procure employment for their artists.[19] The agent works as a middleman, negotiating deals between the artist and prospective employers.[20] These

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[16] *Id.*
[17] Flores, *supra* note 3, at 1337.
[18] *Id. See also* O'Brian, *supra* note 8, at 478.
[19] Selz, *supra* note 5, at § 8:3.
[20] *Id.*

negotiated deals often pertain to short-term, project specific employment opportunities such as film or television engagements, theatrical or other live appearances, and licensing creative works.[21]

As pursuant to the TAA, a California talent agent must be licensed.[22] The license is granted only after an application is filed, the filing fee is paid, and the labor commissioner conducts a thorough investigation as to the applicant's character and location of business.[23] The licensing requirement evolved from a need to protect artists from unscrupulous agents and historical practices of sending artists to "house[s] of ill fame" and dangerous and unhealthy locations, placing minors in illegal settings such as a bar, and splitting fees with venues that offered employment.[24]

In exchange for acquiring employment for the artist, the agent may collect a customary fee of ten percent of the artist's gross earnings, or a slightly larger commission (15-20%) contingent on the type of employment.[25] Though there is no statutory limit as to the maximum allowable commission, the California Labor Commission policy indicates that the agent's fee should not exceed 25%.[26] In an idealized world, obtaining agency representation would be easy. However, the harsh reality is that agents only receive payment if the artist receives work, and employers are less inclined to work with a little known, fresh-faced artist.[27] As such, agents have

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[21] Flores, *supra* note 3, at 1337.
[22] CAL. LABOR CODE § 1700.5 (West 2014).
[23] *Id*.
[24] Gary E. Devlin, Comment, *The Talent Agencies Act: Reconciling the Controversies Surrounding Lawyers, Managers, and Agents Participating in California's Entertainment Industry*, 28, PEPP. L. REV. 381, 386 (2001).
[25] O'Brian, *supra* note 8, at 480.
[26] STAFF OF THE CAL. SENATE COMM. ON BUSINESS AND PROFESSIONS, 1982 REGULAR SESS., STAFF ANALYSIS OF ASSEMBLY BILL 997, at 1 (1982).
[27] Zelenski, *supra* note 2, at 981.

little to no interest in signing unseasoned artists.[28] Contrariwise, there is a financial incentive to acquire a large number of artists and procure, for them, a significant amount of employment opportunities. As such, entertainment unions and guilds[29], which have great interest in protecting artists, have also placed limits on fees available to agents.[30]

As talent agents are disinclined to work with industry newcomers, many artists are left to attempt procuring employment on their own – a task fraught with the need for industry contacts, skill with complex negotiations, and knowledge of sophisticated contracts.[31] Often lacking in these abilities, artists turn to the aid of personal manager to garner enough success to turn the head of an agent. Unfortunately, such success requires employment, which, as set forth by the TAA, only an agent can provide. This unfortunate "catch-22" is the first indication that the TAA is no longer sufficient in regulating today's industry representatives.

B. Personal Managers

Unlike talent agents, the key role of a manager is to counsel, advise, and supervise the development of the artist's career.[32] Managers do not procure employment for their artists, nor

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[28] *Id.*

[29] The entertainment industry is one of the most highly unionized industries in America. A variety of unions exist for producers, directors, special effects operators, cinematographers, talent agents, stunt men, and even animal trainers and wranglers. A large body of private law, developed by these organizations, further regulates talent representatives. *See* Zarin, *supra* note 6, at 957. *See also Entertainment Industry Associations, Guilds, and* Unions, CALIFORNIA FILM COMMISSION (April 26, 2015), http://www.film.ca.gov/ProductionTools_GuildsUnions.htm.

[30] Donna G. Cole-Wallen, Comment, *Crossing the Line: Issues Facing Entertainment Attorneys Engaged in Related Secondary Occupations*, 8 HASTINGS COMM. & ENT. L.J. 481, 519 (1986).

[31] Zelenski, *supra* note 2, at 981.

[32] Selz, *supra* note 5, at § 8:7.

do they negotiate their contracts.[33] In fact, as previously mentioned, they are statutorily restricted from doing so.

After artists arrive in Hollywood, they are often quick to realize that juggling creative responsibilities such as writing songs, rehearsing vocals, and building a fan base, with business responsibilities such as obtaining a music attorney, soliciting demo packages, and making follow-up calls, becomes a task fraught with difficulties and closed doors.[34] In the hopes of opening some doors, and relieving some of the burdens of managing business affairs, artist then seek the assistance of personal managers.[35] In turn, managers often acquire the unseasoned artists by enticing them with exposure to their extensive list of contacts, and occasionally implying that, through their guidance, they will achieve success and reach the coveted "celebrity" status.[36] After acquiring the artist, the manager will essentially become the "liaison between the artist and the business world."[37]

In addition to the consultative role, managers routinely attend to the artist's finances[38], serve as a confidant[39], and even lend the artist money.[40] As one scholar notes, a manager may even "nurture the artist's personal relationships, mollify the artist's bruised ego, endure telephone calls at all hours, and even pick up the client's laundry."[41] As managers frequently

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[33] *Id.*
[34] *What you Really Need to Know About Managers and Talent Agents*, FINDLAW, http://corporate.findlaw.com/law-library/what-you-really-need-to-know-about-managers-and-talent-agents.html (last visited April 26, 2015).
[35] Selz, *supra* note 5, at § 8:7.
[36] O'Brian, *supra* note 8, at 482.
[37] Selz, *supra* note 5, at § 8:7.
[38] Flores, *supra* note 3, at 1338.
[39] Luaine L. Quast, *Musicians, Their Representatives, and the Agreements Between Them*, in 1990 ENTERTAINMENT, PUBLISHING AND THE ARTS HANDBOOK 191, 198. (John D. Viera & Robert Thorne eds.).
[40] Zarin, *supra* note 6, at 937.
[41] O'Brian, *supra* note 8, at 483.

take care of all the personal and business needs of an artist, the artist is then able to spend time perfecting their craft.[42] Where an artist is established and working, such time could be utilized to fulfill the terms of employment contracts, including acting in a commercial, performing in a play, or even writing a book.[43]

As managers serve many functions for their artists, they routinely have fewer clients and charge higher fees than agents to compensate for the loss of clientele.[44] The fee may range anywhere between 10-50% of the artist's gross income.[45] Large fees are often felt by managers as justifiable because of the risk endured; they take an unseasoned artist who is unattractive to employers, assist in building a career for the artist, and bare the risk that the artist will never garner enough employment as to justify the time consuming duties of the manager.[46] They may also opt for payment in the form of equity interest in the production employing their artist.[47] Such form of payment is attractive for managers as they stand to gain far greater profits if the production were to be lucrative.[48] However, as one commentator notes, this form of payment may create a conflict of interest as where a "manager[] own[s] part of their clients' productions…they have an interest in limiting production costs…[meaning] they have an incentive to limit the amount of money that their clients get paid."[49]

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[42] *Id.*
[43] *Id.*
[44] Flores, *supra* note 3, at 1338.
[45] STAFF OF THE CAL. SENATE COMM. ON BUSINESS AND PROFESSIONS, 1982 REGULAR SESS., STAFF ANALYSIS OF ASSEMBLY BILL 997, at 1 (1982) (Personal management agreements may establish a fee as high as 40 or 50% of the artist's income); *See also* Selz, *supra* note 5, at § 8:7.
[46] PAUL C. WEILER, ENTERTAINMENT, MEDIA, AND THE LAW: TEXT, CASES, PROBLEMS 758 (2d ed. 2002).
[47] Zelenski, *supra* note 2, at 983.
[48] FEDRICK LEVY, HOLLYWOOD 101: THE FILM INDUSTRY 238-39 (2000).
[49] Zelenski, *supra* note 2, at 984.

The hurdle that managers must overcome is their inability to procure the artist employment. It is difficult for a manager to establish a career for an unseasoned artist when they are barred from doing the one thing that would aid in making the artist reputable. In today's Hollywood, the reality is that in order to launch a career, a manager will partake in some manner of procuring or attempted procurement for the artist.[50] Thus, managers face the difficult dilemma of having to either illegally procure the artist work in the hopes (and often for the purpose) of garnering the attention of a talent agent, or obtain an agency license and subject themselves to the regulations and fees set forth for talent agencies.[51]

III. History of California's Talent Agencies Act

Since 1913, California has been concerned with drafting legislation aimed at protecting artists' welfare in the entertainment industry.[52] In direct response to widespread abuses by corrupt third party representatives, California enacted the Private Employment Agencies Law.[53] The legislation regulated "theatrical employment agencies and theatrical contracts" and established licensing requirements for all types of employment agencies. [54] Shortly after, in 1937, the state enacted the Artist Manager Law (AML).[55] In an attempt to further protect artists, the new regulations established criminal penalties for unscrupulous exploitation of an artist's

[50] O'Brian, *supra* note 8, at 484.
[51] *Id.*
[52] Chip Robertson, Note, *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 223, 228 (1997).
[53] Zarin, *supra* note 6, at 934.
[54] Robertson, *supra* note 53, at 228.
[55] Devlin, *supra* note 26, at 387.

talents.[56] The state expanded on the AML in 1959, when it enacted the Artist Managers Act (AMA).[57]

The AMA established four regulatory categories including the Artists' Manager, the Theatrical Employment Agent; the Motion Picture Employment Agent; and the general Employment Agent.[58] For the first time, the duties of a manager were codified as a person who engages in "the occupation of advising, counseling, or directing artists…and who procures…or attempts to procure employment."[59] Though the act generally preserved the substance of the 1913 regulations, it failed to recognize the then emerging distinctions between agents and managers.[60]

As the entertainment industry expanded, and agents began to increase their attention on procuring employment, and managers on the day-to-day activities, unethical practices of all representatives once again led to statutory changes.[61] To further quell exploitation of artists, the 1967 Act was amended to focus on those representatives who served to procure employment for artists.[62] Unfortunately, the amendments once again did not distinguish between the roles of an agent and a manager.[63]

In 1978, due to the rapid growth of the industry and further bifurcation of representative roles, the legislature once again revised the AMA.[64] Taking into account the industry changes,

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[56] *A Brief History of The California Talent Agencies Act (TAA),* STOPTAA.ORG, http://www.stoptaa.org/HistoryStopTAA.pdf (last visited March 14, 2015).
[57] Devlin, *supra* note 26, at 387.
[58] Bruce C. Fishelman Esq., *Agents and Managers: California's Split Personality*, 11 Loy. L.A. Ent. L. Rev. 401 (1991), *available at* http://digitalcommons.lmu.edu/elr/vol11/iss2/4.
[59] 1943 CAL. STAT. 329
[60] Devlin, *supra* note 26, at 387.
[61] *Id.*
[62] *Id.*
[63] Robertson, *supra* note 53, at 238.
[64] *Id.* at 228.

the legislature drafted and introduced the Talent Agencies Act.[65] To clarify whose actions fell within the purview of the act, the TAA enumerates that a talent agent is "a person or corporation who engages in the occupation of procuring, offering, promising or attempting to procure employment or engagements for an artist."[66] As such, legislature, for the first time, establishes a key distinction between talent agents and personal managers – the ability to procure employment.

Unfortunately, the act failed to define which procurement activities fell within the purview of the Act, leading many managers to grapple with lost commission due to incidental procurement activities.[67] On the heels of many complaints from personal managers, lawmakers considered the enactment of an "incidental booking" exemption for managers, which would have alleviated the concerns regarding fee forfeiture and contract rescission, but the idea was ultimately rejected[68].

In 1986, the legislature made yet another revision to the TAA, allowing unlicensed individuals, such as managers, to act in concert with, and at the request of licensed talent agents in procuring employment[69], exempting procurement of recording contracts from regulation[70] and establishing a one-year statute of limitations.[71] The recognition that managers routinely procured recording contracts for artists, and the exemption inclusion in the revised act, indicates that even in 1986, the legislature had noticed the beginning of a blurring of representative roles.

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[65] *Id.*
[66] CAL. LABOR CODE § 1700.4(a) (West 2013).
[67] Flores, *supra* note 3, at 1340.
[68] Devlin, *supra* note 26, at 388.
[69] CAL. LABOR CODE § 1700.44(d) (West 2014).
[70] CAL. LABOR CODE § 1700.4(a) (West 2014).
[71] CAL. LABOR CODE § 1700.44(c) (West 2014).

Unfortunately, since the 1986 revision, no further modifications have been made and the distinctly bifurcated system of representatives is no longer an industry reality.

A. Important Provisions of the Act

Most notably, the TAA defines the role of a Talent Agent. Anyone engaged in the occupation of procuring employment for artists is subject to the regulations codified in California Labor Code Sections 1700-1700.47.[72] Article one delineates the scope and definitions of terms within the Act.[73] Conspicuously absent from the defined terms is "procurement." This unfortunate exclusion has led both the Labor Commissioner and the courts to have varying interpretations.[74] The term has been construed to include introduction of artists to producers, directors, and employers,[75] presenting an offer to an artist[76], and in the broadest sense, any attempt to solicit employment for an artist.[77]

Article Two describes licensing procedures and explicitly states that "[n]o person shall engage in or carry on the occupation of a talent agency without first procuring a license."[78] There are two notable exceptions to the licensing requirement.[79] The first excludes individuals who procure recording contracts for artists from licensing requirements.[80] The second allows for the negotiation of employment contracts when acting in concert with, and at the request of, a

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[72] CAL. LABOR CODE §§ 1700-1700.47 (West 2014).
[73] CAL. LABOR CODE § 1700-1700.4 (West 2014).
[74] Zarin, *supra* note 6, at 959.
[75] Derek v. Callan, No. TAC 18-80 (Cal. Labor Comm'r 1982); Pryor v. Franklin, No. TAC 17 MP 114 (Cal. Labor Comm'r 1982).
[76] Kearney v. Singer, No. MP 429, AM 211 MC (Cal. Labor Comm'r 1978).
[77] O'Brian, *supra* note 8, at 498.
[78] CAL. LABOR CODE §1700.5 (West 2014).
[79] CAL. LABOR CODE §1700.5 (West 2014).
[80] CAL. LABOR CODE §1700.4 (West 2014).

licensed talent agency[81]. The Article also defines the necessary application, affidavits, fees and bond requirements to obtain a license.[82] Furthermore, upon notice and hearing of an application, the Article establishes the Labor Commissioners' complete discretion to deny any application for licensure.[83]

Article Three provides regulations for the operation and management of talent agencies.[84] The section sets forth guidelines on form contracts, fees, financial and record requirements, and other day-to-day operational obligations.[85] Furthermore, the article provides the Labor Commissioner with the authority and exclusive jurisdiction to hear and resolve disputes arising under the TAA.[86] As such, the Commissioner has the authority to fashion remedies, including complete disgorgement of past fees[87] and rescission of contracts[88]. Though the TAA was originally enacted as a shield to protect artists' from unscrupulous exploitation, the availability of such remedies have, unfortunately, led artists to employ the TAA as a proverbial sword to sever representation contracts and divest managers of past and future compensation.[89]

B. Union/Guild Regulation

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[81] CAL. LABOR CODE §1700.44 (West 2014).
[82] CAL. LABOR CODE §1700.5 (West 2014).
[83] Devlin, *supra* note 26, at 392.
[84] CAL. LABOR CODE §§ 1700.23-1700.47 (West 2014).
[85] CAL. LABOR CODE §§ 1700.23-1700.47 (West 2014).
[86] CAL. LABOR CODE § 1700.44 (West 2014).
[87] Buchwald v. Superior Court, 62 Cal. Rptr. 364 (Ct. Appl. 1967) (Jefferson Airplane band brought suit against their manager for unlawful procurement and sought restitution for past fees. Court held that Labor Commissioner and the court had the power to question contract illegalities, and found in favor of Jefferson Airplane.)
[88] Humes v. Margil Venture, Inc., 220 Cal. Rptr. 186 (Ct. App. 1985).
[89] Zarin, *supra* note 6, at 953.

The entertainment industry is one of the most highly unionized occupations in American industry.[90] As such, in addition to the TAA, there exists a large body of private law to regulate industry representatives. Guilds such as the Screen Actors Guild ("SAG"), the Writer's guild, and the Directors Guild have set standards for agents who represent the guild members.[91]

Such privatized regulation is enforced through a mutual understanding amongst union members not to utilize un-franchised[92] agents. Franchised agents subject themselves to union regulations including maximum commission percentages[93], use of specific form contracts[94], and limits on the length of agent-client agreements.[95] Additionally, the vast majority of guilds have a strict prohibition on agencies engaging in the production or distribution of their client's work.[96] Unfortunately, the continual existence of such regulation relies on successful negotiations between the Association of Talent Agents and the union seeking to regulate. As a means to remain adaptable to industry evolution, privatized regulation routinely expires and requires new negotiations.[97]

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[90] Zelenski, *supra* note 2, at 989.
[91] *Id*.
[92] *Id*. Franchised agents are union approved agents. Unions only approve of agents after an agency application, affidavits, and business licenses are reviewed by the organization. An example of mutual understanding amongst members is seen in SAG Rule 16(g), which explicitly states "No member of SAG may engage, use or deal through any agent for representation in motion picture…unless such agent holds a franchise issued hereunder." *Former SAG Agency Relations Unpates,* SAGAFTRA.ORG, http://www.sagaftra.org/sag-agency-relations-updates (last visited April 26, 2015).
[93] Zelenski, *supra* note 2, at 990.
[94] Zarin, *supra* note 6, at 958.
[95] FRED JELIN, THE PERSONAL MANAGER CONTROVERSY: CARVING THE TURF, IN COUNSELING CLIENTS IN THE ENTERTAINMENT INDUSTRY 1993, at 479 (PLI Patents, Copyrights, Trademarks, and Literary Prop. Course, Handbook Series No. G403896, 1993).
[96] *Former SAG Agency Relations Updates,* SAG-AFTRA, http://www.sagaftra.org/sag-agency-relations-updates (last visited March 14, 2014).
[97] See e.g. *Former SAG Agency Relations Updates,* SAG-AFTRA, http://www.sagaftra.org/sag-agency-relations-updates (last visited March 14, 2014).

IV. The TAA and Industry Representatives in the 21st Century

It has been thirty years since the California Legislature last reviewed the Act.[98] Unfortunately, today's entertainment industry is very different from the clearly bifurcated system of agents and managers upon which the traditional regulatory scheme is based. As evidenced by the sheer volume of academic discourse on the controversies surrounding the area of agent and manager regulation, the TAA fails to satisfy the purpose of its inception, and accordingly, it is time for reform.

Today's entertainment industry makes it an absolute necessity for managers to procure employment for their unseasoned, neophyte artists. As previously mentioned, agent's have an incentive to represent only established, bankable artists.[99] In fact, many talent agencies have strict policies in place barring contractual relations with artists with insufficient track records and reputations.[100] In an effort to develop their reputation and garner further career guidance, these unseasoned artists then seek the assistance of managers.[101] Unfortunately for managers, the only real means of developing the unseasoned artists reputation involves the one task that the legislature has expressly forbidden them from doing – procuring entertainment based employment.

This frustration has led many commentators, and the courts themselves, to suggest and promote the inclusion of an "incidental bookings" exception, a concept that has been applied with apparent success in New York's equivalent statutory scheme.[102] Regrettably, as many

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[98] *See supra* Part III and accompanying text.
[99] *See supra* Part II. A.
[100] Zelenski, *supra* note 2, at 993.
[101] *See supra* Part II.
[102] Devlin, *supra* note 26, at 392. New York has statutory regulation for talent agents and those who engage in employment procurement activities in the entertainment industry. However, their regulation has in place an "incidental bookings" exception that allows for unlicensed managers

detractors argue, any such exception would likely be unconstitutionally vague.[103] In fact, in Waisbren v. Peppercorn Productions, Inc.[104], the court felt that there was no rational basis by which to interpret the TAA as exempting personal managers from regulation unless "procurement efforts cross some nebulous threshold from 'incidental' to 'principal.'"[105] Though the court may not be inclined to read an exemption into the act, there remains a clear and absolute need for some form of statutory exemption.

In a perceived attempt to maintain the bifurcated system upon which the current regulatory scheme relies, some commentators have suggested the inclusion of statutory penalties for willful acts of procurement.[106] These scholars suggest that, though there is a clear necessity for managers of unseasoned artists, and, in some instances, even established artists, to procure and solicit employment, the TAA deterrence policy would be furthered by punishing only those managers who willfully, not incidentally, violate the Act.[107] These authors have established a factor based framework on which to determine even constructive willful violations, whereby issues such as "whether the procurement involved an affirmative solicitation by the manager,…

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to engage in procurement activities so long as it is incidental to their primary duties. N.Y. Gen. Bus. Law § 171(8) (West 2014).

[103] Tracie Parry-Bowers, Note, *Note: The Talent Agencies Act: A Call For Reform*, 27 LOY. L.A. ENT. L. REV. 431, 458. *See also*, Waisbren v. Peppercorn Productions, Inc., 41 Cal. App. 4th 246 (Ct. App. 1995).

[104] Waisbren v. Peppercorn Productions, Inc. 48 Cal. Reptr. 2d 437 (Ct. App. 1995). (Holding that if any entertainment representative engages in any form of employment procurement activity, they are subject to the Talent Agencies Act and all licensing requirements).

[105] *Id. See supra* Part IV. B.

[106] Keith Warren & Ryan Wechler, *"An Offer California Can't Refuse": How an Efficient And Adaptable Framework Can Improve Remedies Under The Talent Agencies Act and Correct The Issues With Its Interpretation*, 21 UCLA ENT. L. REV. 79, 111 (2014).

[107] *Id.* at 113. Suggesting that, in regard to severance, the Labor Commissioner shift the burden of production on artists who are moving to have contracts voided, and imposing statutory penalties for willful offenders of the TAA. Commentators pull from California's penalty statutes, Business and Professional Code, and Civil Code's section on exemplary damages in designing a Willfulness Framework.

the number of times the manager procured,… [and] the commission to be received by the manager from his procurement activities" are utilized to assess willful violation penalties to be paid to the state.[108] Under this proposed scheme, the authors surmise that "incidental acts of procurement will no longer cause the manager to lose his rights under a managerial contract unless the artist can prove that severability is not applicable…and statutory penalties…will maintain the deterrent force behind the formulation of the TAA without enriching artists."[109]

This proposed scheme is in line with the true purpose of the Act – protecting the artist from unscrupulous business practices of industry representatives.[110] However, it does not recognize the industry reality that, given how talent agencies avoid unseasoned artists, most managers *knowingly*, and therefore willfully, violate the TAA, as it is simply the only means by which to make a neophyte client bankable. Furthermore, by utilizing factors such as the number of times the manager procured employment, it remains tethered to the ill-defined line between incidental and principal conduct.[111] Such a scheme would once again pose the question of "how much procurement is too much?".

With the industry reality of blurring occupational lines between agents and managers, additional issues have arisen in pubic discourse. Most notably is the controversy surrounding managers and agents acting as producers.[112] As mentioned above, once managers accept producers' fees in lieu of commissions, a conflict of interest arises as they now have an interest in limiting production costs, which implies an interest in limiting the expenses paid to the

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[108] *Id.* at 116.
[109] *Id.* at 119.
[110] *Id.*
[111] I*d.* at 118.
[112] Zelenski, *supra* note 2, at 994; *See also* Tracie Parry-Bowers, *supra* note 104, at 457-459.

artist.[113] The manager-producer may not have been an issue worthy of note when the TAA was last revised in 1986, however, today's manager-producers aren't simply taking producer credit, but rather, they own production companies, and are often times the dominant producers of their clients' work.[114] Therefore, not only are today's mangers acting as agents for their neophyte artists, they are acting as their employers. This conflict of interest does not only impact unseasoned artists, who likely appreciate the employment opportunity, but also reputable, bankable artists.[115]

Though this manager-producer form of employment procurement sounds as though it violates the TAA, the Labor Commission has determined that it is legal.[116] In Chinn v. Tobin, the Labor Commissioner stated that, "a person or entity who employs an artist does not 'procure employment' for that artist…to suggest that any person who engages the services of an artist for himself is engaged in the occupation of procuring employment…is to radically expand the reach of the [TAA]."[117] Therefore, managers have an easy means of bypassing the restrictions of the TAA by simply producing the work for their artists. Unfortunately, by doing so, managers effectively act as agents, and thus face agent-like conflicts of interest.[118]

Guilds and Unions such as the Screen Actors Guild, [119] placed prohibitions on Talent Agencies from engaging in the production or distribution of their client's work.[120] Originally, for

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[113] *See supra* Part II. B.
[114] *See* Amy Wallace, Hollywood Agents Lose the Throne, L.A. TIMES (Dec. 11, 1998) *available at* http://articles.latimes.com/1998/dec/11/news/mn-52950; *See also* Zelenski, *supra* note 2, at 995.
[115] Zelenski, *supra* note 2, at 995.
[116] Chinn v. Tobin No. TAC 17-96, slip op. at 7 (Mar. 26, 1997).
[117] *Id.*
[118] Zelenski, *supra* note 2, at 997.
[119] *See supra* Part III. B.
[120] *Former SAG Agency Relations Updates,* SAG-AFTRA, http://www.sagaftra.org/sag-agency-relations-updates (last visited March 14, 2014).

SAG, such a restriction was in place to protect the artists. By prohibiting agents from producing and distributing, the union sought to prevent the conflict of interest that would arise when an agent is simultaneously representing an artist and acting as their employer.[121] The same restriction prohibiting agents from production also prohibited production and distribution companies from owning any interest in any agency.[122] Unfortunately, this private regulation expired in 2002, and agents are now entitled to act as producers for those artists affiliated with SAG. As one commentator notes, the lack of this restriction now creates a conflict in interest where "advertising firms no longer are expressly prohibited from acquiring stakes in talent agencies…. 'if you do a commercial for Coca-Cola and the ad agency for Coke also owns a piece of your talent agency, whom will your agent be working for?!"[123] However, other guild and union regulation remain intact, thereby regulating and restricting agent-producer roles.[124]

Even with private regulation of agent-producers, many agents historically and today function as "deal packagers" for their clients.[125] Deal packaging involves an agency providing a team of clients including writers, directors, and actors for a project at a fixed percentage fee, typically 10% of the overall production budget, rather than individual commission obtained for each individual artist.[126] Such packaging is akin to producing because agents are now able to exercise control over production by having control over the artists that are incorporated into the

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[121] Zelenski, *supra* note 2, at 991.
[122] *Id*.
[123] *Id.*
[124] *AFTRA Regulations Governing Agents,* AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS, AFL-CIO, BRANCH OF THE ASSOCIATED ACTORS AND ARTISTES OF AMERICA (July 1, 2002), http://www.sagaftra.org/files/sag/documents/AFTRA_Regulations_Governing_Agents_Under_Rule12C.pdf.
[125] Zelenski, *supra* note 2, at 999.
[126] Zarin, *supra* note 6, at 958.

deal.[127] Packaging, and agent-producing in general, creates a significant conflict of interest. By allowing agents the discretion over artist employment at the greater commission rate of 10% of production costs, agencies are able to simply ignore their artist's normal rate, or earning power, and enter into deals that are more profitable for the agency itself.[128] Such practice goes against the very purpose behind the TAA's enactment – to protect the artist. Unfortunately, though discourse has given light to the issue of manager/agent-producers, few have suggested solutions.[129]

In addition to these problems, the 1986 revision of the TAA did not foresee the impact of technological advancement on the entertainment industry. With the creation of the internet, the rise of illegal file sharing, and resulting decline in physical music sale, the music industry has scrambled for new ways to generate revenue.[130] As a means to recoup their losses, the industry has begun to engage in multiple rights agreements, better known as 360 deals.[131] Under such agreements, the record label becomes, in essence, a personal manager by investing in an artist's brand and developing their act by providing business and administrative support and guidance.[132] In exchange, the record label is granted a right to a share of income from *all* of the artist's revenue sources including music publishing, performances, merchandising, and endorsements.[133]

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[127] Zelenski, *supra* note 2, at 1000.
[128] *Id.*
[129] Parry – Bowers, *supra* note 104, at 458.
[130] Mark Kesten, *Collateral Damage: Will The 360 Deal be the next victim of California's Talent Agencies Act*, 43 SW. L. REV. 397, 398. (2014).
[131] *See* Jeff Leeds, *The New Deal: Band as Brand*, N.Y. TIMES, Nov. 11, 2007, Section 2 (Arts & Leisure), at 1, *available at* http://www.nytimes.com/2007/11/11/arts/music/11leed.html ("Like many innovations, these deals were born of desperation; after experiencing the financial havoc unleashed by years of slipping CD sales, music companies started viewing the ancillary income from artists as a potential new source of cash.").
[132] *Id.*
[133] Sara Karubian, Note, *360 Deals: An Industry Reaction to the Devaluation of Recorded Music*, 18 S. CAL. INTERDISC. L.J. 395, 403 (2009).

As with all personal managers, the record label also then faces the unfortunate "catch-22" – in order to make the artist bankable and appealing to agents, the record label must first establish a reputation for the artist by procuring employment.

As evidenced by the issues outlined above, as it stands today, the TAA does little more than provide artists with a statutory loophole that can be used to avoid their contractual obligations. In fact, given how the industry operates today, the TAA requires essentially everyone who works with an artist to obtain a license and thus subject themselves to statutory and union/guild regulation. As simple as that sounds, it would be an unviable business model – forcing representatives to abide by union restrictions on commissions and duration of terms of contracts between artists and licensed talent agents. Such restrictions do not adequately reflect the investments and necessities of the industry.[134] Many unions limit agency-artist contracts to five to seven years – an unreasonable time frame for a manager or record label to see a return on their investment. [135] Ultimately, it is clear that the entertainment industry is not going to mold itself to work seamlessly with the existing regulatory scheme. The only viable solution is for California's legislature to take action and reform the act to coincide with the industry realities of the twenty-first century.

V. CONCLUSION

Today's industry representatives do not fit neatly into the idealized bifurcated system upon which the Talent Agencies Act is based. Personal managers act as agents and agents as producers, and both don many other hats. The statutory regulation needs to change because the

[134] Zarin, *supra* note 6, at 958.
[135] *Id*. at 958.

entertainment industry has evolved. If California truly wants to protect artists, the regulatory scheme must reflect twenty-first century needs.