
TALENT AGENTS, PERSONAL MANAGERS, AND THEIR CONFLICTS IN THE NEW HOLLYWOOD

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I. INTRODUCTION

Hollywood is an impersonal, uncaring, and unforgiving place, and artists need the sophisticated assistance of third parties to help them locate employment opportunities and to assist them in making career decisions.¹ This is where talent agents and personal managers step in. Agents and managers represent artists, and their collective role in the entertainment industry² is straightforward. According to agent Joel Dean, they “try to put [artists and producers] together to make a match It couldn’t be simpler.”³

To be more specific, agents procure employment for talent.⁴ Their job is to get the artists they represent as much work as possible.⁵ Managers, on the other hand, shape artists’ careers.⁶ Their job is to serve their clients in an advisory capacity and to counsel them on the career options that have been made available to them through their agents.⁷ When looked at this

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1. See PAUL C. WEILER, ENTERTAINMENT, MEDIA, AND THE LAW: TEXT, CASES, PROBLEMS 758 (2d ed. 2002).

2. It should be mentioned at the outset that this Note looks only at the business of representing film and television talent, so “entertainment industry” refers only to feature films and television programming. The music industry, although a significant part of the entertainment industry, is subject to different rules and so is beyond the scope of this Note.

3. FREDERICK LEVY, HOLLYWOOD 101: THE FILM INDUSTRY 223 (2000).

4. RODGER W. CLAIRE, ENTERTAINMENT 101: AN INDUSTRY PRIMER 28 (1999); LEVY, *supra* note 3, at 224.

5. See CLAIRE, *supra* note 4, at 28; LEVY, *supra* note 3, at 224.

6. CLAIRE, *supra* note 4, at 29.

7. LEVY, *supra* note 3, at 236.

way, things seem very black-and-white: Agents present artists with employment opportunities, and managers suggest which of those opportunities artists should accept.

Taking this black-and-white distinction as a given, the California Legislature and the various entertainment-industry unions (guilds) have promulgated role-specific rules with respect to what third-party artist representatives can and cannot do. For instance, California law allows only agents to procure employment.⁸ Put differently, the Legislature has made it illegal for managers to do what agents do. This seems to be a good idea: By allowing only agents to procure employment and by regulating those agents through the Labor Code, the Legislature ensures that agents (and managers, who are effectively regulated by the Legislature through the prohibition on their procuring employment) do not take advantage of their clients.

A similar motivation is presumably behind the guild regulations, the most important of which states that agents cannot own financial interests in production or distribution entities.⁹ This rule prevents agents from producing the work that they procure for their clients. Managers, on the other hand, are not prohibited from producing their clients' work. This, too, seems to be a good idea: By prohibiting agents from acting as producers, the guilds eliminate the possibility of agents' acting simultaneously as their clients' representatives and as their clients' employers. The guilds do not need to worry about managers because managers are prohibited from procuring employment in the first place.

However, things are not always as they seem, particularly in Hollywood. The entertainment industry has changed in recent years, and that change has blurred the traditional distinction between agents and managers. Today, it is typical for managers to procure employment and for agents to act as producers. In other words, it is typical for managers to behave like agents and for agents to behave like managers. This creates a problem.

The problem, however, is not necessarily that agents and managers are doing more than they are supposed to. The problem is that, given the present state of the entertainment industry, the current regulatory scheme is ineffective. This Note addresses that problem.

8. See CAL. LAB. CODE § 1700.4 (West 1989).

9. See, e.g., SCREEN ACTORS GUILD, CODIFIED AGENCY REGULATIONS RULE 16(g) § XVI (Jan. 1, 1991) [hereinafter SAG RULE 16(g)].

Part II of this Note details the traditional distinction between agents and managers. Part III then describes the law, both public and private, that has been established pursuant to the traditional distinction. Part IV next demonstrates that today's agents and managers do more than their traditional counterparts, and it argues that the current regulatory system is ill-equipped to deal with this phenomenon. Part V concludes.

II. THE TRADITIONAL DISTINCTION BETWEEN TALENT AGENTS AND PERSONAL MANAGERS

A. TRADITIONAL TALENT AGENTS

Talent agents market their clients and procure employment offers for them.¹⁰ Their job is to negotiate deals between talent-sellers and talent-buyers on behalf of the talent-sellers.¹¹

Most of these negotiated deals are short-term and project-related.¹² Instead of establishing enduring career relationships with regular employers, artists typically move from employer to employer and from production to production.¹³ It is the job of their agents to move them from production to production and to secure for them the best deals in the process.¹⁴

Typically, agents are paid for this service only if they get their clients work.¹⁵ Generally, the payment takes the form of a contractual commission of their clients' gross earnings.¹⁶ Accordingly, agents have a financial incentive to represent large numbers of clients and to procure for them as much work as possible.¹⁷ This suggests the possibility of a conflict of interest. For example, fly-by-night agents who act out of pure self-interest might not consider adequately what their clients actually want and instead might procure whatever employment first comes along simply in order to guarantee themselves quick commissions. For that reason, talent agents are regulated by state statutes¹⁸ and entertainment guilds.¹⁹

10. WEILER, *supra* note 1, at 758.

11. CLAIRE, *supra* note 4, at 28.

12. WEILER, *supra* note 1, at 757.

13. *Id.*

14. CLAIRE, *supra* note 4, at 28.

15. *See* WEILER, *supra* note 1, at 758.

16. CLAIRE, *supra* note 4, at 28; WEILER, *supra* note 1, at 758.

17. *See* LEVY, *supra* note 3, at 238.

18. *See infra* Part III.A.

19. *See infra* Part III.B.

Although the state laws and guild regulations arguably correct the conflict of interest, they do not remedy another problem that has been created by the commission-payment scheme. In particular, because agents receive commissions only if they successfully procure employment, they have a profit motive to represent only established clients who have bankable reputations.²⁰ As a result, many agents are reluctant to engage fledgling performers or industry newcomers who have unproven track records.²¹ Although these up-and-comers can attempt to procure their own employment, their likelihood of success is slim.²² Presumably, most lack the industry contacts necessary to get their feet in producers' doors. Moreover, even if they were to get that far, they likely lack the industry wherewithal to negotiate sophisticated employment contracts successfully.²³

B. TRADITIONAL PERSONAL MANAGERS

Unlike agents, managers perform a strictly advisory function for their clients.²⁴ Their job is to develop, guide, and enhance actors' career paths.²⁵ They do not procure employment and they do not negotiate their clients' deals.²⁶ As a matter of fact, they are legally prohibited from doing so.²⁷

Managers, then, work in conjunction with other third-party handlers and advise their clients on career decisions.²⁸ Put differently, they are supposed to oversee the deals that have been brokered by their clients' agents.²⁹ As manager Michael Valeo explains, "Our job is to look at the client's whole career. If there's a piece of it that's not working, part of our job is to fix the problem."³⁰ Fixing the problem may mean giving clients advice about the kinds of training to get or projects to accept,³¹ it may mean helping them switch agents,³² and it may mean counseling them on how to deal with personal problems.³³

20. See WEILER, *supra* note 1, at 758.

21. See *id.*

22. See *id.*

23. See *id.*

24. CLAIRE, *supra* note 4, at 31; LEVY, *supra* note 3, at 236.

25. CLAIRE, *supra* note 4, at 31; LEVY, *supra* note 3, at 236; WEILER, *supra* note 1, at 758.

26. CLAIRE, *supra* note 4, at 29; LEVY, *supra* note 3, at 236.

27. See *infra* Part III.A.

28. LEVY, *supra* note 3, at 236.

29. See *id.*

30. *Id.*

31. See CLAIRE, *supra* note 4, at 29; LEVY, *supra* note 3, at 236; WEILER, *supra* note 1, at 758.

32. LEVY, *supra* note 3, at 236.

33. WEILER, *supra* note 1, at 758.

Given the involved nature of these services, managers tend to represent fewer clients than agents do.³⁴ However, like agents, they are paid for their services only if their clients get work.³⁵ Sometimes, the payment takes the form of a contractual commission of their clients' gross earnings,³⁶ and in order to compensate for their having fewer sources of income, the commission tends to be larger than what agents demand.³⁷ Other times, the payment takes the form of an equity interest in the production employing their clients.³⁸ In other words, managers sometimes opt for ownership interests or producers' fees that they negotiate from their clients' employers (the studios) in lieu of charging fees to their clients.³⁹ These ownership interests can be very lucrative because they allow managers to share in the profits of possibly successful television programs and motion pictures.⁴⁰

Although some managers make a living by charging commissions, they do not face agent-like conflicts of interest. In the least, they do not face conflicts of interest that are as severe as agents'. The possibility and extent of conflicts are mitigated because managers' interests tend to coincide with those of their clients. Managers, again, represent problematic clients—in other words, clients who are unattractive to employers and who do not get work. Accordingly, it is in both the clients' interest and managers' interest to eliminate the problems and to make the clients attractive. Of course, like agents, managers have a profit motive to see that their clients get as much work as possible. But unlike agents, they cannot procure employment and so cannot seek out job opportunities. To be sure, they can recommend out of pure self-interest that their clients accept certain employment engagements, but they still have to wait for employers to present their clients with the opportunities in the first place. And employers are going to do that only if the clients are financially attractive. At least initially, then, managers have an incentive to promote their clients' best interests.

34. LEVY, *supra* note 3, at 238; Marc Hirschfeld, Letter to the Editor, *Actors Put Talent Managers in Bind*, L.A. TIMES, Dec. 2, 2001, at C3.

35. See WEILER, *supra* note 1, at 758.

36. See *id.*

37. See Fred Jelin, *The Personal Manager Controversy: Carving the Turf*, in COUNSELING CLIENTS IN THE ENTERTAINMENT INDUSTRY 1993, at 471, 480 (PLI Patents, Copyrights, Trademarks, and Literary Prop. Course, Handbook Series No. G4-3896, 1993).

38. CLAIRE, *supra* note 4, at 31; LEVY, *supra* note 3, at 238–39.

39. CLAIRE, *supra* note 4, at 31; LEVY, *supra* note 3, at 238.

40. LEVY, *supra* note 3, at 238–39.

On the other hand, managers who opt for producers' fees may face a conflict.⁴¹ Because these managers own part of their clients' productions and so are paid only if those productions turn a profit, they have an interest in limiting production costs.⁴² This means that they have an incentive to limit the amount of money that their clients get paid.⁴³ Although these managers face no *initial* conflict of interest—they still need to develop their problematic clients in order to make them attractive to employers—they face an eventual one if and when they opt for producer-like compensation.

III. REGULATING TRADITIONAL TALENT AGENTS AND PERSONAL MANAGERS

As the preceding Part has explained, talent agents and personal managers traditionally have performed distinct, albeit similar-sounding, roles in the entertainment industry. Agents, again, arrange and negotiate their clients' employment opportunities; managers suggest which of those opportunities are worthwhile. Taking this distinction between the two representatives as a given, the California Legislature and the industry guilds have established role-specific rules that restrict what agents and managers can do.

A. STATE LAW

The California Legislature regulates agents and managers through the Talent Agencies Act ("TAA").⁴⁴ A quick reading of the TAA demonstrates that its purpose is to protect artists from their representatives' business practices. For example, it prohibits agents from giving their clients false or misleading information concerning employment engagements;⁴⁵ from sending them to unsafe places;⁴⁶ from allowing "prostitutes, gamblers, [or]

41. William A. Birdthistle, *A Contested Ascendancy: Problems with Personal Managers Acting as Producers*, 20 LOY. L.A. ENT. L. REV. 493, 525–27 (2000).

42. *See id.*

43. *See id.*

44. The TAA is an outgrowth of the more general Private Employment Agencies Law that the California Legislature had passed in 1913 to regulate all types of employment agencies. 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). That general law gave way to the more entertainment-industry-specific Artist Manager Law ("AML") and Artist Managers Act ("AMA") in 1937 and 1943, respectively. *Id.* Those laws, however, failed to consider adequately the different roles of agents and managers. *See id.* at 229–30. Basically, neither the AML nor the AMA distinguished between the two types of representatives. *See id.* In an attempt to clarify those representatives' roles, the Legislature amended the AMA in 1978 to create the TAA. *See id.* at 232–33.

45. *See* CAL. LAB. CODE § 1700.32 (West 1989).

46. *See id.* § 1700.33.

intoxicated persons . . . [to] be employed in . . . the place of business of the talent agency”;⁴⁷ from arranging unlawful employment for minors;⁴⁸ and from splitting fees with the employers who hire their clients.⁴⁹

But more so than through all of these restrictions, the TAA attempts to protect artists’ interests by preserving and enforcing the agent-manager distinction. According to the TAA, 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 or artists.”⁵⁰ It goes on to state that “[n]o person shall engage in or carry on the occupation of a talent agen[t] without first procuring a license therefor from the Labor Commissioner.”⁵¹ Taken together, these provisions make it clear that a representative must be licensed as an agent in order to procure employment. In other words, the TAA makes it illegal for a manager to do the agent’s traditional job.

By allowing only agents to procure employment—that is, by preserving the traditional distinction between agents and managers—and by regulating agents’ activities, the TAA ensures that agents do not take advantage of their clients. Also, it ensures that managers do not take advantage of their clients—for example, by procuring unsafe employment for them—because it completely prohibits them from procuring employment in the first place.

In the event that a client’s representative violates the TAA, that client can complain to the Labor Commissioner. The Labor Commissioner has the exclusive authority to hear and resolve disputes regarding alleged violations of the TAA.⁵² So, if a manager violates the TAA by procuring employment for a particular client, that client can seek redress from the Labor Commissioner. Typically, the Commissioner’s chosen remedy for a manager’s violation of the TAA is the rescission of all contracts between the manager and client and the forfeiture of all contractual commissions that were paid to the manager in violation of the procurement restriction.⁵³

47. *Id.* § 1700.35.

48. *See id.* § 1700.36.

49. *See id.* § 1700.39.

50. *Id.* § 1700.4(a).

51. *Id.* § 1700.5.

52. *Id.* § 1700.44(a).

53. *See, e.g.,* Anderson v. D’Avola, Cal. Lab. Comm’r Case No. TAC 63-93, slip op. at 11–12 (Feb. 24, 1995) (voiding manager-client contract and explaining that client does not need to pay manager outstanding commissions earned in violation of TAA); Hall v. X Mgmt., Inc., Cal. Lab. Comm’r Case No. TAC 19-90, slip op. at 3–5 (Apr. 24, 1992) (voiding manager-client contract and ordering manager to disgorge commissions earned in violation of TAA); Pryor v. Franklin, Cal. Lab.

However, the TAA establishes a one-year statute of limitations for violations,⁵⁴ which the Commissioner interprets as limiting the forfeited commissions to money earned within the last year.⁵⁵

Even with the statute of limitations, the TAA is a powerful remedial tool that can be used to enforce the traditional agent-manager distinction. Again, this distinction turns on the notion of procurement: Agents can procure employment, and managers cannot. The distinction has teeth because the Labor Commissioner tends to interpret “procurement” very broadly, particularly given a relatively recent California Court of Appeal decision, *Waisbren v. Peppercorn Productions, Inc.*,⁵⁶ which dealt specifically with the scope of that definition.

Waisbren concerned a dispute between a manager, Waisbren, and his client, Peppercorn Productions.⁵⁷ The two parties had entered into an oral contract with one another stating that, in exchange for Waisbren’s assistance in developing Peppercorn’s projects, managing its business affairs, supervising its publicity, and handling its office functions, Peppercorn would pay Waisbren 15% of its profits.⁵⁸ Peppercorn eventually terminated this relationship, but it never paid Waisbren his commission.⁵⁹ Waisbren accordingly brought suit in Superior Court, alleging breach of contract.⁶⁰ Peppercorn, however, moved for summary judgment on the ground that the contract was void—that Waisbren had acted as an agent by procuring employment without first obtaining the TAA’s mandatory license.⁶¹ The court granted Peppercorn’s motion notwithstanding the fact that Waisbren’s “procurement activities were

Comm’r Case No. TAC 17 MP114, slip op. at 2–3 (Aug. 2, 1982) (voiding manager-client contract and ordering manager to disgorge commissions earned in violation of TAA); *Derek v. Callan*, Cal. Lab. Comm’r Case No. TAC 18-80, slip op. at 2 (Jan. 14, 1982) (voiding manager-client contract and explaining that client does not need to pay manager outstanding commissions earned in violation of TAA).

54. See CAL. LAB. CODE § 1700.44(c) (West 1989).

55. See, e.g., *Church v. Brown*, Cal. Lab. Comm’r Case No. TAC 52-92, slip op. at 13–14 (June 2, 1994); *Hall*, slip op. at 50.

56. 48 Cal. Rptr. 2d 437 (Ct. App. 1995).

57. See *id.* at 438.

58. *Id.* at 439.

59. *Id.*

60. *Id.* & 439 n.2. Note that the Labor Commissioner had no part in the *Waisbren* decision. Again, the Labor Commissioner only has exclusive authority to hear cases in which the plaintiff alleges a violation of the TAA. In effect, this means that the Labor Commissioner only hears cases in which the plaintiff is an aggrieved artist. But here, the plaintiff is not an aggrieved artist who is alleging a violation of the TAA; instead, the plaintiff is an aggrieved manager who is alleging breach of contract. Accordingly, the Labor Commissioner does not have jurisdiction over *Waisbren*.

61. *Id.* at 439.

minimal and merely incidental to his other responsibilities.”⁶² In other words, the lower court adopted a broad interpretation of “procurement.”

The appellate court affirmed the lower court’s opinion.⁶³ Correspondingly, it upheld that court’s broad interpretation of “procurement.” In reaching this decision, the appellate court first looked to the plain language of the TAA.⁶⁴ The TAA states that a talent agent is “a person or corporation who engages in the *occupation* of procuring . . . employment.”⁶⁵ Waisbren argued that, because “occupation” can be interpreted to mean an individual’s principal business, an agent’s license is not needed unless the representative’s *principal* responsibilities involve procuring employment.⁶⁶ However, the court rejected this interpretation and explained that “a person can hold a particular ‘occupation’ even if it is not his principal line of work.”⁶⁷

Second, the court noted that the TAA should be construed liberally in order to protect agents’ and managers’ clients.⁶⁸ According to the court, “The fact that . . . unlicensed manager[s] may devote an ‘incidental’ portion of [their] time to procurement activities would be of little consolation to . . . client[s] who fall[] victim to . . . violation[s] of the Act.”⁶⁹ The court went on to state:

We refuse to believe that the Legislature intended to exempt . . . personal manager[s] from the Act—thereby allowing violations to go unremedied—unless [their] procurement efforts cross some nebulous threshold from “incidental” to “principal.” Such a standard is so vague as to be unworkable and would undermine the purpose of the Act.⁷⁰

Third, the court relied on a 1985 report by the California Entertainment Commission (“CEC”)⁷¹ specifically stating 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 as a talent agent.”⁷² The CEC had been created in 1982 by

62. *Id.*

63. *See id.* at 448.

64. *See id.* at 441.

65. CAL. LAB. CODE § 1700.4(a) (West 1989) (emphasis added).

66. *Waisbren*, 48 Cal. Rptr. 2d at 441.

67. *Id.*

68. *See id.* at 441–42.

69. *Id.* at 442.

70. *Id.*

71. *See id.* at 443–45.

72. C. Robert Simpson, Jr., CAL. ENTM’T COMM’N, REPORT: EXECUTIVE SUMMARY 1 (1985) [hereinafter CEC REPORT].

the California Legislature to study the TAA and to recommend a model agency-licensing bill.⁷³ Essentially, it concluded that the TAA was “a model statute of its kind,”⁷⁴ and its findings were accepted by the Legislature.⁷⁵ Relying on this, the *Waisbren* court concluded that “the Act imposes a *total* prohibition on the procurement efforts of unlicensed persons. . . . [It] requires a license to engage in *any* procurement activities.”⁷⁶

By adopting such a broad definition of “procurement,” the appellate court has provided the Labor Commissioner with a powerful remedial tool to enforce the TAA’s black-and-white distinction between agents and managers.⁷⁷ If managers engage in any type of procurement activity,

73. See Talent Agencies Act, ch. 682, 1982 Cal. Stat. 2814, 2816 (repealed 1986).

74. CEC REPORT, *supra* note 72, at 3.

75. See Talent Agencies Act, ch. 488, 1986 Cal. Stat. 1804.

76. *Waisbren*, 48 Cal. Rptr. 2d at 445.

77. It should be noted that *Waisbren* is not the only California appellate authority on the issue of what constitutes “procurement.” In *Wachs v. Curry*, 16 Cal. Rptr. 2d 496 (Ct. App. 1993), decided approximately one year before *Waisbren*, a manager who had been sued by one of his former clients for allegedly violating the TAA filed an action in the Superior Court seeking a judgment declaring the licensing provisions of the TAA unconstitutional. *See id.* at 498. His argument was that those provisions were void for vagueness because it could not be determined from their language which activities required licensing. *See id.* at 499. The lower court rejected this argument, *see id.*, and the appellate court affirmed, *see id.* at 504. In affirming, however, the court explained that 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 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. . . .

Id. at 503. *Wachs*, then, defined “procurement” narrowly and so removed a lot of the TAA’s teeth. On the other hand, *Waisbren* defined “procurement” broadly and so reinserted a lot of those teeth. But both cases were decided by equivalent appellate courts, neither of which had the authority to overrule the other.

Waisbren, then, has created a split in California with respect to the definition of “procurement.” Commentators suggest, however, that the Labor Commissioner has chosen the *Waisbren* standard over the *Wachs* significance test in order to adjudicate TAA disputes. *See, e.g.*, Robertson, *supra* note 44, at 262. As a matter of fact, *Waisbren* always has seemed to be the rule for the Labor Commissioner. Even before the two appellate cases were decided, the Commissioner had concluded that incidental procurement was still procurement. *See, e.g.*, Derek v. Callan, Cal. Lab. Comm’r Case No. TAC 18-80, slip op. at 6 (Jan. 14, 1982) (stating that the argument that incidental procurement does not require a license “is like saying you can sell one house without a real estate license or one bottle of liquor without an off-sale license”). Also, even when the Commissioner relied on the *Wachs* significance test—which it necessarily had to do before *Waisbren* was handed down—it chose to limit that test’s application to exempt only those managers who in good faith had procured employment inadvertently. *See, e.g.*, Church v. Brown, Cal. Lab. Comm’r Case No. TAC 52-92, slip

regardless of how incidental, their clients can complain to the Labor Commissioner, who has the power to rescind the representation contracts and to order the disgorgement of all commissions that were paid in violation of the procurement restriction.

B. PRIVATE LAW

Performing in the entertainment industry is one of the most highly unionized occupations in American industry,⁷⁸ so it is unsurprising that, in addition to the TAA, a large body of private law has developed to regulate artists' representatives. Movie actors and certain television actors are in the Screen Actors Guild ("SAG"), writers are in the Writers Guild, and directors are in the Directors Guild.⁷⁹ All of these guilds have sought to establish appropriate standards for agents who represent guild members in individual negotiations.⁸⁰

The mechanism through which the guilds have enforced these standards is a mutual understanding among all union members not to use agents who have not been certified (franchised) by the unions.⁸¹ But once agents become franchised, they necessarily subject themselves to certain terms, such as maximum commission percentages.⁸² For example, the franchise agreement between agents and SAG states:

No contract of an agent for agency services rendered or to be rendered an actor may specify a higher rate of commission than ten percent (10%) of the compensation or other consideration received by the actor for

op. at 10 (June 2, 1994) ("The *Wachs* court intended to distinguish between the personal manager who, while operating in good faith, inadvertently steps over the line in a particular situation and engages in conduct which might be classified as procurement.").

Insofar as the pre-*Wachs* Labor Commissioner always has adhered to a *Waisbren*-like definition of "procurement," insofar as it has interpreted *Wachs*' significance test to mean inadvertence, and insofar as *Waisbren* was decided after *Wachs* (the *Waisbren* court wrote off *Wachs*' significance test as mere dicta, see *Waisbren v. Peppercorn Prods., Inc.*, 48 Cal. Rptr. 2d 437, 446 (Ct. App. 1995)), it seems safe to say that today's Labor Commissioner is likely to dispense with *Wachs* altogether and to interpret "procurement" very broadly.

78. WEILER, *supra* note 1, at 810.

79. *Id.*

80. *Id.*

81. *Id.* For an example of an explicit understanding among all union members not to use unfranchised agents, see SAG RULE 16(g), *supra* note 9, § II. The agreement states, "No member of SAG may engage, use or deal through any agent for representation in motion pictures . . . unless such agent holds a franchise issued hereunder." *Id.* Note that these performer agreements to boycott noncomplying agents seem to amount to a combination in restraint of trade and so appear to violate the Sherman Antitrust Act. However, in *H. A. Artists & Assocs., Inc. v. Actors' Equity Ass'n*, 451 U.S. 704 (1981), the Supreme Court held that entertainers enjoy the same antitrust immunity vis-à-vis their agents that other labor unions do vis-à-vis their employers. See *id.* at 721-22.

82. WEILER, *supra* note 1, at 810-11.

services rendered in the motion picture industry or under contracts for such services.

....

The agent may not receive for agency services in the motion picture industry from an actor a higher rate of commission than ten percent (10%), directly or indirectly, or by way of gratuity or otherwise.⁸³

Similarly, franchise agreements often specify the maximum length of agent-client contracts.⁸⁴ SAG's agency franchise agreement, for instance, specifies maximum contract lengths of one and three years, depending on whether the contract is a renewal.⁸⁵

Commission-ceiling and contract-length provisions aside, arguably the most important franchise regulation is the requirement of agent independence.⁸⁶ Essentially, the rule prohibits agents from producing or owning pieces of their clients' work.⁸⁷ For example, SAG's franchise agreement states:

An agent or an owner of an interest in an agent shall not be an active motion picture producer. . . . [A]n agent or an owner of an interest in an agent shall not engage in the production or distribution of motion pictures or own or control, directly or indirectly, any interest in a motion picture producing or distributing company.⁸⁸

The agreement also states that

no person, firm or corporation engaged or employed in the production or distribution of motion pictures or owning any interest in any company so producing or distributing, shall own any interest in an agent, directly or indirectly, nor shall any such person, firm or corporation . . . share in the profits of the agent.⁸⁹

Like the other franchise provisions and like the TAA, the restriction on agent production protects artists. In particular, it eliminates the possibility of agents' procuring for their clients only the work that they produce. Put differently, it eliminates a conflict of interest that arises if

83. SAG RULE 16(g), *supra* note 9, § XI.

84. Jelin, *supra* note 37, at 479.

85. SAG RULE 16(g), *supra* note 9, § IV.

86. *See* CLAIRE, *supra* note 4, at 30; Joel Rudnick, Screen Actors Guild—Association of Talent Agents: A Brief History of the Controversy over ATA's Financial Interest Proposals 1 (Feb. 15, 2002) (unpublished manuscript, on file with the Southern California Law Review).

87. CLAIRE, *supra* note 4, at 30; LEVY, *supra* note 3, at 235.

88. SAG RULE 16(g), *supra* note 9, § XVI(B).

89. *Id.* § XVI(A).

agents could simultaneously represent clients and act as their clients' employers.⁹⁰

Although private franchise agreements regulate agents' activities, they do not regulate managers'. Unlike agents, managers do not need to be franchised by the entertainment guilds.⁹¹ The apparent reason is straightforward and already has been discussed: Given the traditional distinction between agents and managers—a distinction that is reinforced by the TAA's prohibition on manager procurement—managers do not experience agent-like conflicts of interest.⁹² Accordingly, there is less of a need to regulate managers through private franchise agreements.

Also, the nature of managers' work suggests that they should not be subject to agent-like commission caps and contract-duration limitations.⁹³ As explained above, managers traditionally have represented problematic clients,⁹⁴ and insofar as it takes a long time to make those clients attractive to employers, managers *need* to devote long hours and large sums of money to developing them.⁹⁵ From managers' perspectives, then, clients are an investment, and so long as managers are not compensated for their efforts until that critical point in time when their clients suddenly achieve success, there is a possibility that their clients might take advantage of them.⁹⁶

90. Historically, the ban on agent production came about in the late 1930s in response to extensive vertical integration in the entertainment industry. See WEILER, *supra* note 1, at 759–60; Koh Siok Tian Wilson, *Talent Agents As Producers: A Historical Perspective of Screen Actors Guild Regulation and the Rising Conflict with Managers*, 21 LOY. L.A. ENT. L. REV. 401, 406 (2001). During the 1930s, Lew Wasserman's Music Corporation of America ("MCA") dominated the industry by both representing talent and producing their talent's feature films and television programs. See WEILER, *supra* note 1, at 759–60. In 1938, however, SAG forced all entertainment industry agents to relinquish their film-production rights. *Id.* at 760. Also, in 1952, SAG extended this prohibition to television shows—but with one exception: SAG excluded MCA from the prohibition. *Id.*; Wilson, *supra*, at 407. Apparently, Wasserman cashed-in a favor from then-head of SAG Ronald Regan, who owed his renewed career to Wasserman. See WEILER, *supra* note 1, at 760. So, MCA continued both to represent and to produce until 1962, when the Justice Department, led by Robert Kennedy, launched an antitrust investigation into MCA's activities, which ultimately convinced Wasserman to abandon his agency work. *Id.* See also Wilson, *supra*, at 407.

Since then, MCA has confined its business to producing films, television programs, and music recordings, and all talent agents have operated without the luxury of being able to produce. WEILER, *supra* note 1, at 760–61.

91. See CLAIRE, *supra* note 4, at 30; LEVY, *supra* note 3, at 237; Jelin, *supra* note 37, at 479–80.

92. See *supra* Part II.B.

93. See Gary A. Greenberg, Note, *The Plight of the Personal Manager in California: A Legislative Solution*, 6 HASTINGS COMM. & ENT. L.J. 837, 842–44 (1984).

94. See *supra* Part II.B.

95. See Greenberg, *supra* note 93, at 842–44.

96. See *id.*

For example, suppose that an unbankable artist contracts with a manager for career guidance. Suppose further that the contract is subject to a duration limitation. Eventually, the manager makes the client financially attractive to employers. Ultimately, however, the contract between the two expires and is not renewed—but only then does the client agree to a particular employment engagement. Although this client landed the employment opportunity because of the manager's hard work, the client does not need to pay a commission because the management contract is up. This seems unfair.

Managers, in other words, rightfully have a strong stake in maintaining extended agreements in order to protect their ability to receive returns on the time and money they have invested in their clients during earlier, less profitable years.⁹⁷ Similarly, given their necessarily small client rosters, they rightfully have a strong stake in charging relatively high commissions.⁹⁸ So, the argument goes, managers should not be subject to agent-like guild regulations.

Relative to agents, then, managers are free to operate with little regulatory interference. Most importantly, they can own pieces of their clients' work and so can act as producers. As discussed above, this makes sense because managers are not prone to agent-like conflicts of interest.⁹⁹ It also makes sense for the same reason that their charging higher commissions makes sense: Given the risky nature of their work, they arguably are entitled to the increased earning potential that comes with owning financial interests in their clients' possibly successful television programs and feature films.¹⁰⁰

The fact that managers are free to operate without guild restrictions suggests that the private law, much like the public law, is premised on a black-and-white distinction between agents and managers. Agents face conflicts of interest because they procure employment, so they need to be regulated. Managers, on the other hand, do not procure employment and so do not face agent-like conflicts. Accordingly, there is less of a need to regulate them.

97. *Id.* at 844; Jelin, *supra* note 37, at 479–80; 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, 941–42 (1997). This is not to say that managers can sign their clients to indefinitely long contracts. According to California law, a contract to render personal services may not be enforced beyond seven years. See CAL. LAB. CODE § 2855(a) (West 1989).

98. Greenberg, *supra* note 93, at 843; Jelin, *supra* note 37, at 480; Zarin, *supra* note 97, at 941–42.

99. See *supra* Part II.B.

100. LEVY, *supra* note 3, at 235. See also Birdthistle, *supra* note 41, at 507–08.

This regulatory scheme works so long as agents and managers perform only their traditional roles. However, once they start to do more than that, the scheme's ability to remedy conflicts of interest breaks down.

IV. PERSONAL MANAGERS AND TALENT AGENTS IN THE NEW HOLLYWOOD

A. PERSONAL MANAGERS IN THE NEW HOLLYWOOD

The reality of today's entertainment industry is very different from the model upon which the traditional regulatory scheme is based. Many of today's managers, for instance, need to procure employment for their clients, and many of them have started to represent bankable artists. Many of today's managers simply do not resemble traditional managers. This creates a problem.

Today's managers procure employment for their clients because, as explained above, agents have an incentive to represent only established, bankable artists.¹⁰¹ Indeed, many agents have policies against signing artists who have insufficient track records and reputations.¹⁰² In order to develop their reputations, then, many of these agentless artists seek the assistance of managers.¹⁰³

The problem with this is that the only real way for managers to develop these artists' reputations is by procuring employment for them.¹⁰⁴ But the TAA expressly forbids them from doing that.¹⁰⁵ Of course, these managers can obtain TAA licenses, but doing so necessarily subjects them to franchise requirements and so prevents them from receiving compensation that adequately reflects their services.¹⁰⁶ Today's managers, therefore, face a no-win situation: either they violate the TAA and so run the risk of being penalized by the Labor Commissioner, or they acquire agency licenses and so subject themselves to unduly restrictive guild requirements.¹⁰⁷

101. See *supra* Part II.A.

102. WEILER, *supra* note 1, at 758.

103. See *id.*; Greenberg, *supra* note 93, at 840; Jelin, *supra* note 37, at 475.

104. Jelin, *supra* note 37, at 475.

105. See *supra* Part III.A.

106. Greenberg, *supra* note 93, at 840; Jelin, *supra* note 37, at 479–80; Zarin, *supra* note 97, at 942.

107. See Greenberg, *supra* note 93, at 840–41; Jelin, *supra* note 37, at 480; Zarin, *supra* note 97, at 942.

Industry commentators have pointed out that, faced with this catch-twenty-two, most managers choose to forego state licensing and to procure employment anyway.¹⁰⁸ In other words, many of today's managers act as unlicensed agents for their up-and-coming clients. Although the TAA technically forbids them from doing this, it does so irrationally. It ignores the fact that, given how agents behave, managers need to procure employment in order to make their clients bankable.¹⁰⁹ More than that, it ignores the fact that many neophyte clients *want* their managers to procure employment for them.¹¹⁰

The traditional regulatory scheme is inadequate, then, because it fails to consider the reality of today's entertainment industry. As explained above, even when managers incidentally procure employment, they incur substantial risks, namely, the rescission of management contracts and the disorgement of commissions.¹¹¹ This is doubly troubling because many artists use this situation to their advantage: They retain managers in their early years to procure employment, and then they get the Labor Commissioner to rescind their contracts once they establish their reputations.¹¹²

In addition to ignoring this reality, the regulatory scheme also turns a blind eye to the problems created when today's managers act as producers. As explained above, once managers opt for producers' fees in lieu of commissions, they have an interest in limiting production costs, which means that they have an interest in limiting the amount of money that their clients get paid.¹¹³ This is a conflict of interest, but it is a conflict of interest that the regulatory scheme fails to consider.

Until recently, however, this failure was never much of an issue. According to one industry commentator, it was an unimportant oversight because

108. *E.g.*, Jelin, *supra* note 37, at 480.

109. *See* Zarin, *supra* note 97, at 992-93.

110. *See* Erik B. Atzbach, *Drawing the Line Between Personal Managers and Talent Agents: Waisbren v. Peppercorn*, 4 UCLA ENT. L. REV. 81, 84 (1996); Meg James, *Talent Managers' Role Debated*, L.A. TIMES, Nov. 12, 2001, at C1.

111. *See supra* Part III.A.

112. Atzbach, *supra* note 110, at 84. *See also* Greenberg, *supra* note 93, at 857; Hirschfeld, *supra* note 34 ("Actors . . . use the legal constraints placed upon personal managers only when it is convenient for them."); Meg James, *Judge Calls Actor Behr's Pact with Manager Valid*, L.A. TIMES, Nov. 17, 2001, at C2 (explaining that during the last two years, over fifty actors have invoked the TAA to try to sever ties with their managers); James, *supra* note 110.

113. *See supra* Part II.B.

the title [of producer] ha[d] been diluted[,] rendered meaningless by the promiscuousness with which it [had been] used. Films . . . feature[d] credits for producers, executive producers, line producers and associate producers. Furthermore, the number of individuals in each of these categories . . . [had] multiplied enormously.

. . . “[T]he proliferation of producing credits [was] a proliferation of control and that mean[t] no control if you ha[d] an exorbitant number of producers running around on a project.”¹¹⁴

In other words, the regulatory scheme’s failure to consider this theoretical conflict was never much of a problem because the conflict never actually materialized. Although traditional manager-producers had an incentive to limit the amount of money that their clients were paid, they had no real power to place limits on their clients’ compensation because they simply lacked any power over production development.

Today’s manager-producers, however, *do* have the power to control production development.¹¹⁵ This is because many of today’s manager-producers actually own production companies and so wield significantly more bargaining power than traditionally defined manager-producers do.¹¹⁶ These production companies are more than mere titular producers, so they actually have control over production development.¹¹⁷ This means that they have some power to limit the amount of money that their clients get paid.

As a matter of fact, some of these manager-run production companies are so powerful that they sometimes are the dominant producers of their clients’ work.¹¹⁸ In other words, some of them are so strong that they can develop their clients’ work largely by themselves, with little interference from other producers. This development magnifies the conflict of interest problem in two ways.

First, it gives management companies extensive control over production development and so gives them almost absolute power to limit their clients’ compensation. Second, it effectively allows managers to act as agents because it gives them the authority to procure employment for their clients. These managers, after all, are stand-alone employers, and they can funnel their clients into their own productions by hiring them

114. Birdthistle, *supra* note 41, at 526 (quoting producer Lynda Obst).

115. See Amy Wallace, *Hollywood Agents Lose the Throne*, L.A. TIMES, Dec. 11, 1998, at A1.

116. See CLAIRE, *supra* note 4, at 30.

117. See LEVY, *supra* note 3, at 235; Birdthistle, *supra* note 41, at 535–37; Wallace, *supra* note 115.

118. See Wallace, *supra* note 115.

directly. Although this sounds like prohibited procurement, the Labor Commissioner in *Chinn v. Tobin*¹¹⁹ unthinkingly has concluded otherwise.

In *Tobin*, the Commissioner explained that a person or entity who employs an artist does not “procure employment” for that artist, within the meaning of Labor Code section 1700.4(a), by directly engaging the services of that artist. . . . [T]he “activity of procuring employment,” under the Talent Agencies Act, refers to the role an agent plays when acting as an intermediary between the artist whom the agent represents and the third-party employer who seeks to engage the artist’s services.

[Concluding otherwise] would mean that every television or film production company that directly hires an actor, . . . without undertaking any communications or negotiations with the actor’s . . . talent agent, would itself need to be licensed 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 Talent Agencies Act beyond recognition.¹²⁰

Tobin, then, carves out a big exception to the rule prohibiting manager procurement. So long as managers take active roles in production development, they can circumvent the TAA’s licensing requirement by hiring their clients directly. But because these managers effectively act as agents, they necessarily face agent-like conflicts of interest. These managers, after all, act simultaneously as their clients’ representatives and as their employers. According to manager Michael Valeo, this is “a very dangerous trend because it’s not the point of personal management.”¹²¹ Basically, explains Valeo, “[i]t becomes much more about what . . . client[s] can do for [their managers’] producing career[s] than what [managers] can do for the client[s’] career[s].”¹²²

Certain commentators, however, have suggested that this development is only problematic if managers represent established, bankable artists.¹²³ Insofar as managers adhere to the traditional model and represent only problematic clients, there is no real conflict. After all, risk-conscious managers presumably are not going to gamble their well-being on the mere possibility that productions featuring their problematic clients might be

119. See Cal. Lab. Comm’r Case No. TAC 17-96, slip op. at 7 (Mar. 26, 1997).

120. *Id.*

121. LEVY, *supra* note 3, at 239.

122. *Id.*

123. See, e.g., Birdthistle, *supra* note 41, at 536 (“The real threat of conflict is triggered only where vast sums of money are at stake.”).

successful. And even if they did, there still is no conflict because their fledgling clients are presumably happy to get the work.¹²⁴

However, unlike yesterday's traditional managers, today's managers represent established, bankable artists.¹²⁵ In other words, they represent agent-caliber clients. Prominent management firm Brillstein-Grey's client roster, for example, includes Brad Pitt, Nicolas Cage, and Adam Sandler; and Michael Ovitz's Artists Management Group represents Leonardo DiCaprio, Robin Williams, and Samuel L. Jackson.¹²⁶ Accordingly, the necessary predicates for an agent-like conflict are present, namely, bankable clients and the ability to procure employment.

Additionally, once managers start to represent bankable clients, their entitlement to increased compensation becomes suspect. As explained above, one of the main reasons managers are not subject to franchise restrictions is that they need to receive returns on the time and money they have invested in their clients during unprofitable years.¹²⁷ But bankable clients by definition do not have unprofitable years. The law's traditional distinction between agents and managers, then, works an unfairness: It subjects licensed agents to restrictive guild requirements but allows similarly situated unlicensed managers to escape them.

In sum, today's managers closely resemble traditional agents. Notwithstanding the TAA, they often procure employment for their up-and-coming clients, and with *Tobin* under their belts, they often legally procure employment for their more established clients by hiring them directly. However, because they do not need to obtain TAA licenses and because they do not need to be franchised, their inevitable agent-like conflicts of interest go unremedied.

This is unfortunate, and it has led to a mass exodus of agents out of the agency business and into the management business.¹²⁸ This, in turn, has further blurred the black-and-white distinction between agents and managers. Essentially, the scenario that has emerged is that managers can do everything that agents can do, plus more.¹²⁹ And as more and more agents become managers, more and more bring to that profession an agent

124. *See id.*

125. CLAIRE, *supra* note 4, at 30–33; LEVY, *supra* note 3, at 235; Wallace, *supra* note 115.

126. CLAIRE, *supra* note 4, at 30–33; LEVY, *supra* note 3, at 235; Wallace, *supra* note 115; Bernard Weinraub, *Ovitz Shakes Hollywood with New Coup*, N.Y. TIMES, Jan. 25, 1999, at C1.

127. *See supra* Part III.B.

128. LEVY, *supra* note 3, at 239; Wallace, *supra* note 115; Weinraub, *supra* note 126.

129. LEVY, *supra* note 3, at 239.

mentality.¹³⁰ It seems safe to say, then, that many of today's managers procure employment for their bankable clients even when they do not fall under the *Tobin* exception. According to agent Marc Bass,

[t]here's not a day that goes by that I don't get a call from a manager who said he's made an appointment for a client or sent a tape or a head shot to a casting director If Marv Dauer [a manager who had been found by the Labor Commissioner to have illegally procured employment for one of his clients] did anything wrong, then he's not doing anything different than anyone else.¹³¹

Indeed, many in the industry go so far as to claim that today's managers compete with, rather than complement, agents.¹³² Some of today's biggest stars, like Leonardo DiCaprio¹³³ and Robin Williams,¹³⁴ forgo agents completely and rely entirely on their managers to close deals. Of course, this is prohibited by the TAA, and unhappy artists can complain to the Labor Commissioner that their managers illegally procured employment. However, many artists simply choose not to complain, presumably worried that if they do speak out, they will make it difficult to obtain future representation.¹³⁵ No one, after all, wants to represent troublemakers who might turn around and sue.

To put it simply, many of today's managers are agents-in-managers'-clothing—and they are agents-in-managers'-clothing who easily escape traditional regulations. So long as these “agents” go unlicensed, their conflicts of interest go unremedied. Furthermore, when the law actually is invoked, it is used selectively to discipline managers who have procured employment for their neophyte clients despite the fact that these managers simply were doing what their clients probably wanted them to do. In other words, the law is used only to punish those who do not have conflicts.

B. TALENT AGENTS IN THE NEW HOLLYWOOD

Similar to today's managers, today's agents also do more than the traditional model assumes. In particular, many agents today function as “deal packagers” for their clients.¹³⁶ Deal packaging closely resembles

130. *Id.*

131. James, *supra* note 110.

132. *See, e.g.,* CLAIRE, *supra* note 4, at 33.

133. Peter Bart, *The Back Lot: Birds Do It, Bees Do It; How About Agents?*, DAILY VARIETY, June 18, 2001, at 31.

134. CLAIRE, *supra* note 4, at 29; Weinraub, *supra* note 126.

135. *See* Dave McNary, *Stating Their Cases*, DAILY VARIETY, Oct. 1, 2001, at 10, 11.

136. CLAIRE, *supra* note 4, at 28.

producing, and although agents are prohibited by guild franchise agreements from acting as producers,¹³⁷ they are not prohibited from putting packages together.¹³⁸ However, because packaging agents effectively act as producers, they necessarily face a conflict of interest.

Agents function as packagers when they put together teams of clients—for example, writers, directors, and actors—and sell those teams to employers for percentage fees instead of commissioning each separate client's deal individually.¹³⁹ Typically, the package fee is 10% of the production's entire budget rather than 10% of each client's individual salary.¹⁴⁰ Agents can charge such high amounts because, as described above, franchise agreements only restrict amounts that *clients* can be charged, not amounts that *employers* can be charged.¹⁴¹

This practice resembles producing in two ways. First, it enables agents to earn producer-sized fees. Ten percent of an entire budget, after all, is much more than 10% of each client's salary. Second, it enables agents to exercise control over production development. So long as they represent bankable artists whom employers want to hire, they can force those employers to hire less-bankable artists as part of the package deal.¹⁴² Packaging agents, in other words, come to the negotiations table with substantial bargaining power, and they can leverage that bargaining power into a final say over which artists get hired. Essentially, agents get to make the decisions that traditionally have been made by employers.

Packaging, then, is a big exception to the general rules that prohibit agents from acting as producers and from charging commissions in excess of 10%. So long as they represent bankable artists, agents can package and so can circumvent franchise restrictions. But because these agents effectively act as their clients' employers, they necessarily face conflicts of interest. In particular, they might procure for their clients only the work that they can package.

For example, suppose that an agent is considering whether to present a bankable client with two separate job opportunities. The first is a deal to star in a film for \$20 million and the second is a deal to star in a film for \$15 million. Suppose further that both films are budgeted at \$100 million,

137. See *supra* Part III.B.

138. See CLAIRE, *supra* note 4, at 28.

139. *Id.* at 28; WEILER, *supra* note 1, at 758, 760.

140. CLAIRE, *supra* note 4, at 28; WEILER, *supra* note 1, at 760.

141. See *supra* Part III.B.

142. See Birdthistle, *supra* note 41, at 504; Tim Curry, Speech to the CNTV 563 Class of the University of Southern California School of Cinema and Television (Mar. 18, 2002).

that both are identical in terms of prestige, that casting for the first film has been completed except for the starring role, and that casting for the second film has not begun. Given this, the agent can package the second film. In other words, the agent can force the second film's producer to hire other clients in addition to the bankable client and can negotiate with that producer for a package fee totaling 10% of the budget. Because the package fee for the second film exceeds the commission from the first film by \$8 million, the agent has an incentive either to withhold the first opportunity from the client or to convince the client to accept the second opportunity even though it pays \$5 million less.

This conflict of interest effectively goes unremedied under the traditional regulatory scheme. Aggrieved clients can attempt to have their representation contracts rescinded on the ground that their agents violated some type of fiduciary duty, but as discussed above, most would choose not to, presumably out of a concern that if they did speak out, they would brand themselves as troublemakers and so make it difficult to obtain future representation.¹⁴³

In sum, many of today's agents are producers-in-agents'-clothing—and they are producers-in-agents'-clothing who easily escape the traditional regulations. So long as they package rather than outright produce, they can circumvent the law, which leaves their corresponding conflicts of interest unremedied.

C. A RECENT DEVELOPMENT

The preceding discussion illustrates the inadequacy of a regulatory system that turns a blind eye to the complexities of today's talent-representation business, and it suggests that the regulations need to change in light of the blurred distinction between talent agents and personal managers. Significantly, there recently has been such a change. Ironically, however, that change actually has the potential to magnify the current problems.

To be more specific, on January 20, 2002, SAG's franchise agreement—again, one of the main sources of private law regulating agents—expired.¹⁴⁴ One month later, agents and SAG's national board

143. See *supra* Part IV.A.

144. See Peter Kiefer, *SAG, Agents Go Past Deadline*, BACK STAGE WEST, Jan. 24, 2002, at 1, 1.

tentatively agreed on a new deal.¹⁴⁵ The deal eased the financial-interest rules barring agents from acting as producers: It allowed them to take up to 20% stakes in production and distribution companies, and it allowed advertising firms and independent (nonstudio) producers to take up to 10% and 20% stakes, respectively, in talent agencies.¹⁴⁶

The provisional agreement was submitted for approval to SAG's members in April 2002.¹⁴⁷ Unsurprisingly, they rejected it.¹⁴⁸

As of the writing of this Note, negotiations between SAG and agents have come to a standstill.¹⁴⁹ Guild members obviously are worried about the problems that can arise when agents are allowed to produce, and they have made it very clear through their rejection of the provisional agreement that they are opposed to any relaxation of the financial-interest rules. Agents, on the other hand, have made it very clear that they are opposed to any agreement that does not relax those rules.¹⁵⁰ Lifting the ban on agent production is something they have always wanted, and is something they especially want today, given the current agent-like nature of the management business.

The inability to reach an agreement means that there no longer is any express restriction on agent production. This results in an obvious conflict of interest: It creates the potential that agents might procure for their clients only the work that they produce. More subtly, the potential for conflict also arises now that advertising firms no longer are expressly prohibited from acquiring stakes in talent agencies. As a former SAG presidential candidate explains, "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

145. Peter Kiefer & Cynthia Littleton, *SAG Rivals Split on ATA Deal*, BACK STAGE WEST, Feb. 28, 2002, at 2, 2; Dave McNary, *Thesps Give Agents OK to Buy, Sell Stakes*, DAILY VARIETY, Feb. 25, 2002, at 1, 1.

146. Kiefer & Littleton, *supra* note 145, at 2; McNary, *supra* note 145, at 29. Under the expired SAG franchise agreement, advertising firms effectively were prohibited from owning any interest in agents. The agreement prohibited any "person, firm or corporation engaged or employed in the production or distribution of motion pictures . . . [from] own[ing] any interest in an agent," SAG RULE 16(g), *supra* note 9, § XVI(A), and it defined "motion picture" to include commercials, *id.* § I(A).

147. Dave McNary, *Holding Pattern*, DAILY VARIETY, Nov. 18, 2002, at 7, 7.

148. *Id.*

149. *See id.*

150. *See* Laura Weinert, *What's in It for Agents?*, BACK STAGE WEST, Jan. 31, 2002, at 1, 4 ("Said one agent, 'Everybody that I've spoken to just had no interest whatsoever in coming to an agreement with the Screen Actors Guild.' . . . 'Most of the agents are like, Why are we even bothering?'""); *SAG and ATA/NATR Agency Regulations*, Association of Talent Agents, at <http://www.agentassociation.com/5301Message.html> (last visited Feb. 8, 2002).

agent be working for?!"¹⁵¹ Indeed, industry insiders say that the advertising giant Interpublic, whose subsidiary company Fitzgerald actually handles Coca-Cola's advertisements,¹⁵² is interested in partnering with an agency.¹⁵³

Far from protecting artists, then, the new regulatory landscape leaves them vulnerable. Although it rightfully recognizes one significant change in the representation business—it recognizes that today's managers perform agent-like functions—it fails to address the problems created by that change. Specifically, it ignores the problems that inevitably arise when managers procure employment and when they produce. Moreover, it completely fails to recognize both the phenomenon of agent packaging and the conflicts that agent packaging creates. Indeed, the change in the regulatory landscape actually makes things worse: By lifting the express ban on agent production, the regulatory system increases the likelihood that new conflicts will occur.

V. CONCLUSION

Today's personal managers and talent agents no longer perform only their traditional roles, and regulations that assume traditional behavior are ill-equipped to eliminate managers' and agents' emerging conflicts of interest. The regulations need to change because the talent-representation business has changed, and they need to change in such a way that they actually reduce conflicts.

Although the regulations recently have changed, they have not changed in such a way that they actually reduce conflicts. The current regulations rightfully recognize that today's managers and agents perform similar functions, and the regulations level the playing field between agents and managers, but they fail to address any of the conflicts on that new playing field.

151. McNary, *supra* note 145, at 29.

152. See *Clients*, Fitzgerald & Co., at <http://www.fitzco.com/images/rollovers/clients/clientsBW.html> (last visited Mar. 19, 2003).

153. E-mail from Zachary Entertainment, Production Company, to Joan Hyler, Personal Manager (Jan. 14, 2002) (on file with the Southern California Law Review).