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TALENT AGENTS AS PRODUCERS: A HISTORICAL PERSPECTIVE OF SCREEN ACTORS GUILD REGULATION AND THE RISING CONFLICT WITH MANAGERS

Koh Siok Tian Wilson*

I. INTRODUCTION

In the entertainment industry, talent has always required agency representation.\(^1\) The necessity for such representation is clear. Producers have vested interests in securing the services of creative talent for the lowest possible price and under the least onerous terms to the producer.\(^2\) In order to limit production costs, producers' eyes are trained to the bottom line. Their business acumen and negotiating abilities may easily intimidate a creative person whose training and natural abilities are of a different world.

Enter the agent. Representation of creative talent, in particular actors, includes a multiplicity of tasks. First and foremost, the agent has always negotiated and continues to negotiate the basic terms of the deal.\(^3\) Traditionally, the agent assumed the role of nurturer, and provided actors with advice and assistance in career development.\(^4\) For example, the agent

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2. See Milton Barnes, A Dog’s Life For A Composer, THE TORONTO STAR, Nov. 25, 1989, at J6. But see Victor P. Goldberg, Essay, The Net Profits Puzzle, 97 COLUM. L. REV. 524, 538–40 (1997). It may financially benefit a producer to hire expensive talent if the talent will increase the success of the motion picture, therefore increasing the likelihood that the producer will be offered other projects at increased fixed compensation. Id. Although such a plan decreases the producer’s share of net profits of the film by employing an actor who takes a greater share of these profits, it may benefit the producer in the long run. Id.


4. See id. See generally, Stephen P. Clark, Note, Main Line v. Basinger and the Mixed
helped the actor to prepare materials for submission to casting directors and production companies, helped make choices when multiple offers were on the table, introduced the client to the studios and producers, handled the media and coordinated public appearances. However, over time, agents have increasingly confined themselves to the central task of sending the actor out for roles and negotiating the terms of the resulting deals. For assistance with other aspects of their careers, actors have employed personal managers and a variety of other professionals, such as lawyers, business managers and publicists.

These additional representatives come at quite a considerable cost to the actor. A personal manager generally charges between ten to fifteen percent of the actor's income. Lawyers charge either their hourly rate or five percent of the actor's income. Business managers charge an additional five percent. Publicists charge a fee on a monthly basis in the range of $1500–$3000. Only the highest paid actors can afford all of these services but even less-established actors often find it necessary, at the very least, to employ a personal manager.

Personal managers perform a wide range of activities. They offer the beginning actor counsel on breaking into the business and are often the means by which an agent is procured. For the experienced actor, they serve as a sounding board and offer expertise and help on aspects of sustaining and/or reviving a career. For the star, blessed with an array of personal assistants and professional help, the personal manager has become by and large a personal producer. Certain personal managers have built...

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5. See generally, Clark, *supra* note 4.


9. See id. at 486 (listing six types of fee arrangements typically used by attorneys in the entertainment industry: 1) hourly billing; 2) annual or monthly retainer; 3) flat fees; 4) percentage of artist's contract; 5) percentage of artist's income or 6) percentage of the lawyer/artist partnership).


13. *Id.*

14. *Id.*
substantial movie and television production businesses by using the enormous clout of the star talent to which they have unique access. As a result, conflicts with agents have arisen. This Article explores the origins of this conflict and provides a historical perspective for presently existing tensions.

II. BACKGROUND

Fewer restrictions govern personal managers than agents.\textsuperscript{15} In addition to statutory law,\textsuperscript{16} the agency business is regulated by the Screen Actors Guild ("SAG") pursuant to the Codified Agency Regulations or Rule 16(g).\textsuperscript{17} To represent any member of SAG, an agent must be franchised by SAG and meet the requirements of the Agency Regulations.\textsuperscript{18} An important aspect of the Agency Regulations are the rules prohibiting an agency from possessing various kinds of financial interests that would, among other things, transform them into producers and employers of actors.\textsuperscript{19} There is no similar prohibition for personal managers whose ascendancy has been a comparatively recent phenomenon.

A. History of the New York Agency Regulations

The earliest attempt to regulate the agency business occurred in New York in 1910 as a result of hard lobbying by members of the American Federation of Labor, a group of vaudeville performers calling themselves the White Rats of America.\textsuperscript{20} At the time, the New York Employment Agency Act required that all agencies submit copies of their contract forms for prior approval to the Corporation Council of New York.\textsuperscript{21} This law also regulated the amount agents could charge in commissions.

In 1928, the United States Supreme Court struck down a New Jersey law that was similar to the New York Employment Agency Act.\textsuperscript{22} The decision left agents unregulated as to the amount they could charge in commissions.

\footnotesize{15. Id. at 941–42.}
\footnotesize{16. California Labor Code provisions govern both managers and agents. Some federal statutes impacting the business as well. However, a discussion of these provisions is beyond the scope of this Article.}
\footnotesize{17. Johnson & Lang, supra note 7, at 412–13.}
\footnotesize{18. Id. at 413–14.}
\footnotesize{19. See id. at 417.}
\footnotesize{20. Valerie Yaros, AGENCY TIMELINE (2000) (on file with Loyola of Los Angeles Entertainment Law Review) [hereinafter AGENCY TIMELINE]. Yaros is the historian for the Screen Actors Guild.}
\footnotesize{21. Id.}
\footnotesize{22. Ribnik v. McBride, 277 U.S. 350 (1928).}
This was the catalyst for New York Actors Equity Association ("Equity") Council to approve a licensing system. Agents were required to obtain a permit from Equity in order to conduct business with Equity and its members. The permit regulated the amounts agents charged in commissions. The court in Edelstein v. Gillmore finally silenced challenges to the Agency Regulations by affirming the right of Equity to regulate agencies.

B. The Inception of the Screen Actors Guild

In 1925, an attempt by producers in California to pass legislation to regulate agencies was forestalled by the timely action of West Coast Equity representative, actor Wedgwood Nowell. The text of a telegram sent by Nowell to Frank Gillmore of Equity is illustrative:

Unexpected private information received late today reveals attempt being quietly made to railroad through Sacramento legislature bill known as Senate Bill six hundred thirty one introduced by Senator Pedrotti January twenty third and referred to Committee on Labor and Capital pending final action February twenty third. This amendment relates strictly to agents representing persons seeking theatrical or other artistic employment including motion picture acting. It first stipulates no agent association club or corporation etcetera shall represent actor unless agency possesses signed written agreement with actor. Then it provides that agent must likewise possess signed written agreement with producer also or else agents vocation becomes illegal. Have copy of Bill complete. Portion compelling agent to possess written agreement with manager or producer highly pernicious in its future aspect and forms real reason for Bill. Plainly apparent intent of those fostering Bill is to legally provide for existence of but one agency in future presumably to be operated either openly or secretly by picture producers who will naturally withhold necessary written agreement from all agencies excepting their own. Undoubtedly Producers Association promulgating this legislation in order to centralize into one agency and curtail salaries. Players

23. See id.
25. Id.
26. Id. at 709–10; see also Edelstein v. Gillmore, 35 F.2d 723, 726 (S.D.N.Y. 1929).
27. Edelstein, 35 F.2d at 726; see also AGENCY TIMELINE, supra note 20.
28. See id.
absolutely at their mercy if Bill carries. Furthermore ambiguous wording of Bill may later be so interpreted as to inhibit Equity’s economic representation of members unless we possess written consent from each manager. Although I believe Equity should never operate agency we nevertheless should utilize every endeavor to halt this legislation or producers will own players body and soul and forbid forever their joining Equity. Represents rankest form of class legislation and we now perhaps may understand the reasons behind long silence of Hays*29 who is still dodging and probably awaiting outcome at Sacramento before seeing me and turning down future relationship. May I fight this issue immediately with every possible means I can hurriedly summon.30

On a May evening in 1933, the idea for SAG was born.31

The new SAG was soon strengthened by a further attempt by producers to exert control over actors. SAG was founded to “gain fair economic conditions for actors . . . [and develop a] better understanding and cooperation among the producing, talent and craft groups of the motion picture industry.”32 In 1933, the Academy of Motion Picture Arts and Sciences developed the first code to govern relations between producers and talent.33 By a grand subterfuge, the producers secured a code provision that placed a $100,000 cap on the salaries of actors, directors and writers, and another that mandated the licensing of agents by producers.34 This caused a mass exodus of well-known talent from the Academy35 who then

29. Will Hays was the former head of the Motion Picture Producers and Distributors of America, now known as the Motion Picture Association of America (“MPAA”). Encyclopedia Britannica, Motion Picture Association of America, at http://www.britannica.com/eb/article?eu=55320 (last visited Apr. 1, 2000).
30. Telegram from Wedgwood Nowell, Representative, West Coast Equity, To Frank Gillmore, Actors Equity Association (Feb. 18, 1925) (on file with Loyola of Los Angeles Entertainment Law Review).
31. Ralph Morgan & John C. Lee, The Guild: In the Beginning—An Idea Goes to Work, SCREEN ACTOR, Sept. 1941, at 18 (on file with Loyola of Los Angeles Entertainment Law Review). SAG was formed as the result of a meeting between six actors including Ralph Morgan, who became SAG’s first president. Id. at 18–19; Keith Collins, Reeling in the Years, DAILY VARIETY, Mar. 8, 2001, at 6. Articles of Incorporation were filed on June 30, 1933. Roger Armbrust, Performers United, BACK STAGE, Dec. 17, 1999, at 25.
33. AGENCY TIMELINE, supra note 20.
34. Id.
35. Id.
joined the newly formed SAG, setting it on its way to becoming a major industry force.\textsuperscript{36}

In 1939, after one year of negotiations, SAG adopted the Agency Regulations.\textsuperscript{37} The Regulations required agents apply to SAG for a franchise, and forbade them from producing films.\textsuperscript{38} This marked the first appearance of the financial interest rules currently in dispute.\textsuperscript{39}

The financial interest rules prohibit agents from becoming motion picture producers and narrowly limits their participation in television production.\textsuperscript{40} They also essentially prevent agencies from owning an interest in, or being owned by, production companies or distribution companies.\textsuperscript{41} However, a provision within the rules allows for agents to "package" productions.\textsuperscript{42} Packaging a production calls for an agent to entice a particular combination of key talent to work on a production.\textsuperscript{43} In such a case, the talent, if represented by the packaging agent, will not pay a commission to the agent.\textsuperscript{44} The agent instead receives a commission as a percentage of the production budget and its profits, which may afford the agent a far greater return than if the agent were simply to receive the standard commission.\textsuperscript{45} However, in practice, only the major agencies are able to package.\textsuperscript{46}
C. The Prohibition on Agencies Acting as Producers

In 1952, SAG granted the first of several waivers to Music Corporation of America, Inc. ("MCA"), which allowed MCA, then an agency representing talent, to produce television programs through its subsidiary, Revue Productions. With its unique access to talent, MCA’s television production business flourished. By 1960, MCA became the principal producer and seller of network television productions and packages, earning an additional $9.5 million more in revenue than its nearest competitor, the William Morris Agency. In June 1962, MCA acquired a controlling interest in Decca Records, Inc., whose subsidiary was Universal Pictures Company, Inc. ("Universal").

On July 13, 1962, the Justice Department filed a complaint against MCA alleging violations of the Sherman Antitrust Act ("Sherman Act") and the Clayton Act. SAG and the Writers Guild of America ("WGA"), each of which had granted similar waivers, were named as co-conspirators. The suit was settled later that same month by an agreement that MCA would divest itself of its agency business. In its place, MCA-Universal would sign talent to exclusive term contracts, commonly referred to as "slave" contracts, under which the studio would pay a guaranteed sum for the duration of the contract.

In May 1981, further support for the agency franchising system came from the Supreme Court. A group of agents brought suit against Equity alleging the agency franchising system violated the Sherman Act. The court found that labor unions, acting in their self-interest and not in combination with non-labor groups, enjoy statutory exemption from Sherman Act liability, and thus rendered judgment for the Union. The peculiar nature of the industry, whereby union members rely on agents to secure employment and those agents' fees are calculated as a percentage of

49. See DAN E. MOLDEA, DARK VICTORY 206 (Penguin Books) (1986); see also MCDougAL, supra note 48, at 296.
50. MCDougAL, supra note 48, at 300; MOLDEA, supra note 49, at 207.
51. MOLDEA, supra note 49, at 207.
52. MCDougAL, supra note 48, at 300–01.
53. See id. at 313.
54. H.A. Artists & Assoc., Inc. v. Actors' Equity Ass'n, 451 U.S. at 704 (1981); see also AGENCY TIMELINE supra note 20.
56. See id. at 721–23.
the member's wage, makes it impossible for the union to defend the integrity of the minimum wages it negotiates with the producers without regulation of agency fees. The agents are considered part of the union's labor group, and agency regulations are clearly designed to promote the union's legitimate self-interest.

IV. THE EMERGING CONFLICT OF INTEREST: MANAGERS AS PRODUCERS

Since 1981, the agency business has continued to change in the manner described in Part I. Agents have become dealmakers, and thus actors have increasingly turned to personal managers to fill the gap. State legislation prohibits managers from soliciting employment or negotiating deals, but the unique nature of the business has resulted in many instances where the lines are not clearly drawn. Additionally, managers are not subject to the same financial interest restrictions that govern franchised agents. Consequently, managers use the clout of the celebrity talent they represent in their self-interest to produce motion picture and television productions. Some of these management businesses are enormously profitable, and in one case, has led to the buyout of a firm for a substantial figure.

Agents see vast financial opportunities just out of reach and now wish freedom from the financial interest restrictions. Two of the main agency groups, the Association of Talent Agents ("ATA") and the National Association of Talent Representatives ("NATR"), have mounted a vigorous and acrimonious campaign to pressure SAG to grant a broad-ranging waiver of the restrictions. However, this is opposed by a majority of SAG membership, who anticipate that serious conflict of interest issues

57. Id. at 721.
58. Id. at 722.
59. See CAL. LAB. CODE §§ 1700.4, 1700.5 (West 1989 & Supp. 2001); see also O'Brien, supra note 8, at 495 (quoting Report of the California Entertainment Commission to the Governor and Legislature 6 (1985)) (submitted pursuant to Act of Aug. 31, 1982, ch. 682, 1982 Cal. Stat. 2814, 2816, repealed by Act of July 17, 1984, ch. 553, 1984 Cal. Stat. 2185 (effective Jan. 1, 1986)) (stating "[o]ne either is, or is not, licensed as a talent agent, and, if not so licensed, one cannot expect to engage, with impunity, in any activity relating to the services which a talent agent is licensed to render").
60. See SAG RULE 16(g), § XVI(B); see also Johnson & Lang, supra note 7, at 418 (citing Rock Tycoon, NEWSWEEK, July 31, 1978, at 40).
61. See Johnson & Lang, supra note 7, at 418.
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will arise if such a waiver is granted. SAG supports its members’ concerns and understands the problems such a waiver would confront under state and federal legislation.\(^{64}\)

The ATA and the NATR assert that the industry has changed and that the financial interest rules are antiquated and no longer applicable.\(^ {65}\) It is true that enormous changes have occurred in structure since the financial interest rules were first enacted in 1939.\(^ {66}\) However, the agency regulations have served agents and union members through many changes and fluctuations in the industry. At this time, with non-"A-list" actors’ salaries suffering a precipitous plunge, there is an even greater need for strong and independent representation. The financial interest rules assure that agents work for their clients.\(^ {67}\) Such an assurance cannot be as effective if agents also become their clients’ employers.

A paper circulated in February 2000, when SAG members were first alerted to the waiver issue, makes evident some of the conflict of interest concerns:

CONFLICT OF INTEREST

Screen Actors Guild has come within a hair’s breadth of instituting changes in your relationship with your agent which effectively leave you totally unprotected in your contractual negotiations with producers.

If these changes are finalized what it will mean is that agents will be allowed to cross over the line between being actors representatives and being producers. Agents will be able to do the following;

- own a financial interest in motion pictures and television programs
- own interests in production companies
- engage in distribution and financing of motion pictures
- sell their agencies to companies engaged in the production distribution and financing of motion pictures

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64. See CAL. LAB. CODE §§ 1700.4, 1700.5.
65. Letter from Karen Stuart, Executive Director, ATA & NATR, to SAG Franchised Talent Agents (May 24, 2000), at http://www.agentassociation.com/negotiations.html (last visited Apr. 1, 2001) (stating "the negative economic impact on any business working under antiquated work rules and outdated financial constraints can be disastrous"). Id.
66. See infra Part II.B.
67. See SAG RULE 16(g), §§ 1(c), XVI(B), XVI(F).
Your agent will have a financial interest in direct opposition to yours.

A smoke screen of apparent “safeguards” has been agreed to by the agents but these have no bite

- they cannot be “active motion picture producers” but they can still have a business and financial interest in opposition to yours
- they cannot own a controlling interest in production companies but they can still own a substantial interest which will be directly in opposition to yours
- they cannot be directly owned by the traditional studios or networks but they can be owned by a company affiliated with the studios and networks like MCA, AOL/Time-Warner Inc. or Viacom. This will make your agency a sister company of the studio or network with whom your agent is negotiating your deal
- they must disclose their interest to each client who is to be employed by an interested company. And then what do you do with that information? Demand that the agent divest his interest? Leave the agency? And go where? To another agent who is owned by another company with whom you might need to do business?
- their fiduciary obligation to their client is not to be impaired i.e. they must still negotiate the best deal possible for you. In the real world this will be virtually impossible to enforce given that so much about a deal is negotiated verbally or by unwritten and even unspoken understandings.
- the actor may seek independent counsel or representation at the cost of the agent. You must go against your own agent and risk the consequences. You must additionally find someone who is competent and does not have his own conflict of interest issues, as many law firms do. That person must be brought up to speed on all of your needs and requirements and the history of prior negotiations. That person additionally is to negotiate with your agent who has a history with you and knows all of your weaknesses and vulnerabilities and who now is effectively your potential employer. That person’s fee is
to be paid for by your agent, which divides his loyalties. To top it all you still pay your agent his 10% commission.

ADDITIONAL ISSUES

1) What happens if you have to sue or if you are sued by, say, Paramount and your agent is owned by Viacom which owns Paramount? Your agent will have vital information that will assist your case but who is to tell what pressures will be brought to bear on him by virtue of his association in that family of companies. Can you be sure that he has disclosed to you all information which will be of use to you? Can you be sure that his memory of the deal will be in accord with yours? How do you establish that concessions made were fairly negotiated? This is the person in whom you placed your confidence. Now it is a question of your word against his. Who will prevail? Who will you get to reinforce your contentions?

2) If these changes go through agents will be able to enter into partnerships with internet and new technology companies who will produce and distribute motion pictures over their networks. The attraction for these companies will be the product which they can get. That product comes from you, the talent, BUT the agents are not going to be negotiating the same ownership interests for you as they will for themselves. Their plan is to tie up certain chosen talent to a long-term commitment in return for some licensing and merchandising royalties and then, on the strength of those commitments, negotiate an ownership interest for themselves in the company involved. You will end up working for your agent for a small piece of a pie which was all yours to begin with.

3) One stated objective of these changes was to ensure a greater number of agents would remain agents. In fact it will ensure entirely the opposite result. Once established as owners of internet and new technology companies agents will have no more need to be agents. Furthermore, those premium agencies which are bought out by the major holding companies in our industry will have a lock on their product and the smaller agencies will be shut out.
4) If your agency is owned by one of the major companies it will be in its interest to see that you never see a script from another company. You will effectively be shut out of all productions for other companies unless they make a deal with your agent's company. Shades of the old studio system and "slave" contracts except that you will be paying a commission for the privilege.

5) The changes are being made in the form of a two-year waiver of the existing conflict of interest rules in the Agency Regulations. Any agreement entered into between the agent and any other company during that period of two years will remain in force after the two years is up. Of course there will be a stampede to complete their deals before the two years is up and then at the end of that period we will have a totally transformed landscape to deal with and one in which actors will have no one protecting their interests.

6) The ATA have a problem with managers who operate without the restrictions which are placed on agents. First of all, this is a problem which was created when agents became deal-makers and ceased to concern themselves with the development of their clients' careers. Clients were referred to personal managers who took an additional percentage. Then the demands of careers required the addition of lawyers, business managers, publicists and so on, all for additional chunks out of the actor's income. It is no answer to this problem to create a situation where actors income stands to be further diminished by the conflicting financial interests of their agents. If agents wish to disenfranchise they must do so and run the risk of having to return commissions whenever a disgruntled client sues them under the California Labor Code for wrongfully soliciting employment. We can work together to find an answer to this problem or go to war but the waiver is the wrong way to go.

7) The people most affected will be those actors who earn the most. Young actors who get hot will never know how it is that they are not getting the salaries that equivalent situations have yielded up to now and established talent can be made to believe
that their marketability has diminished or conditions have changed and hence their remuneration. It is the highest salaries that there is the most interest in reducing and your own agent will be the means of doing so. As those salaries are reduced so also will the lower scales of remuneration be squeezed even further.

**THESE CHANGES DECLARE OPEN SEASON ON ACTORS**

With a conflict of interest of such magnitude there can be no assurance that arms-length transactions will be negotiated.

In return for these considerable concessions the ATA has made a number of vague undertakings to assist SAG in various problem areas such as organizing the new technology companies, runaway production, performer salary compression and diversity of employment. None of these undertakings bear any assurance that these problems will be resolved. In fact, in the case of the new technology companies the agents have made a completely separate and contradictory statement that they do not consider themselves bound at all by the Agency Regulations in those areas.

An alignment between the agents and the entertainment conglomerates has very clear anti-trust implications particularly with regard to the effect it could very well have on major actors salaries. The Justice Department takes a very keen interest in any appearance of collusion and price-fixing within an industry and on the face of it implications might very well exist here to initiate an investigation.

Should an investigation be commenced by the Justice Department, SAG itself could well come under scrutiny and this may have some onerous results. The ATA have refused to indemnify the Guild against any legal consequences arising from the acceptance of their proposals. They may have had more reason for their refusal than was contemplated by our advisors.
Hopefully the Board will reconsider the proposals and vote against the waiver. By all accounts the Board has not previously been fully apprised of the nature, consequences and dangers of these proposals.

The Board also has the option to call a referendum and Article XI, Section 7 of the Constitution and Bylaws requires membership ratification for changes that affect commissions or the nature of the income commissionable. Waiver will cause a profound shift in agent/client relations with far-reaching effects on members income. It alters fundamentally the basis on which commissions are paid. Actors will be impacted for years to come and with consequences also for the whole creative community. There is exposure here to law suits which could impact on SAG and conceivably also individual members of the Board. This alone suggests that the prudent course would be to seek membership ratification rather than to unilaterally approve waiver.

The SAG Board did, in fact, reconsider the proposals and found that "relaxing financial restrictions would create a conflict of interest, since the actor’s agent could in effect become the actor’s employer." The ATA and the NATR responded some months later with an additional set of modifications, but these modifications did not solve the basic problem. Currently, the parties are at an impasse and the outcome remains unclear.

A fifteen month grace period, which began in November 2000, is in progress. At the end of this period the ATA and the NATR agencies stand to lose their franchises with SAG. Other agencies that are not members of those groups continue to operate under their SAG franchises.

69. See A Report on the ATA/NATR Regulations, supra note 63.
70. Id.
72. See A Report on the ATA/NATR Regulations, supra note 63, at 7 (stating “SAG expects to enter into independent discussions with non-ATA, non-NATR talent agents shortly”).
73. See id.
V. CONCLUSION

The Agency Regulations have served both the agencies and SAG and their respective members well during their long history. They have provided a measure of security to actors who today can confidently contract with their agents knowing certain protections exist. The agents have prospered with their guarantee of exclusive representation. The financial interest restrictions have enhanced, rather than detracted from, their position as brokers between talent and management. Agents have become major power brokers in the industry and command handsome salaries. Some have gone on to top executive positions at major motion picture and television companies. It is tragic that the success of personal managers has created such a severe strain on the actor-agency relationship. Pressure is rising for a new approach to regulating the personal manager. A breakdown in the important alliance between actor and agent has far-reaching implications for the industry.