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The Talent Agencies Act: Time for a Change

by
EDWIN F. MCPHERSON*

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Introduction

Several years ago, the Talent Agencies Act[1] was an effective tool for regulating unscrupulous agents and would-be agents, and the Labor Commissioner was a rigorous enforcer of the law. In fact, as recently as two to three years ago, the Act was interpreted and enforced uniformly and strictly, and wreaked havoc on the personal management profession.[2]

However, citing budget cuts and other unspecified staffing problems, the Labor Commissioner, apparently hoping that the problem will simply go away, has left much of the enforcement and interpretation of the Act up to the courts.[3] Superior Court judges do not understand (or do not care to understand) the Act, and appellate justices appear to be just as confused.

I
Labor Commission Cases

A. *Hurley v. Rockit Enterprises, Inc.*

Although in theory the Act is still designed to prevent gross abuses, some of the greatest abuses (against the artists who have the greatest need for the protection afforded by the Act) are left unchallenged. One such instance occurred in *Hurley v. Rockit Enterprises, Inc.*,[4] which was filed on behalf of a rock band named "Wild Boyz" on September 3, 1992. In the suit, the band claimed that Rockit Enterprises, Inc. ("Rockit"), the band's manager, and Polaris Records, Inc. ("Polaris"), the band's record label,[5] were guilty of violating the Talent Agencies Act[6] by unlawfully booking the band into several venues across the country without a requisite Agency license.[7]

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

2. *See generally* Edwin F. McPherson, *The Talent Agencies Act - A Personal Manager's Nightmare*, L.A. LAW. (June 1994).

3. Since the original preparation of this article, the Labor Commission, particularly Miles Locker and Thomas Kerrigan, have taken a much more proactive role in connection with the Act.

4. Labor Commissioner Case No. TAC 70-92 (1992).

5. Both companies were owned and operated by the same individuals.

6. CAL. LAB. CODE §§ 1700-1700.47.

7. More specifically, the unlawful activities alleged were: (1) procuring, offering, promising and/or attempting to procure employment for the band without a talent agency license; (2) demanding unconscionable fees and compensation from the band for illegal

Obviously, the allegations were very serious. The band members felt that if they were not allowed to get out of their contracts, their careers would be over. Although the Labor Commissioner might not have been interested in the other allegations, because there was such compelling evidence of improper booking, including compelling testimony by the very employee at Rockit/Polaris who was hired to do the booking, it was fairly clear that the contracts should and would be declared void.

The case was tried before the Labor Commissioner in April and May of 1993. Although there was no court reporter transcribing the proceedings, the trial was audiotaped for the convenience (and subsequent referral) of the Commissioner's representative. During the trial and thereafter, emphasis was placed on the fact that, although Polaris did not have any money to go forward with another record, no other label would touch the band until it was free from all legal ties with Polaris. It was also made clear that, unless the Commissioner acted swiftly, the band would have no future in music.

Notwithstanding the obvious importance of the ultimate disposition of the case to the band and the unequivocal existence of improper booking, the Wild Boyz are still awaiting a decision more than four years later. Meanwhile, despite their talent and the success of their first record, they have been repeatedly turned down by other record labels because of their deal with Polaris.

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services; (3) exerting dominating and manipulative control over the band for the managers' own self interests and financial gain without regard to the best interests of the band; (4) acting in conflict of interest with the best interests of the band; (5) making false representations to the band and/or concealing material information from the band; (6) failing to maintain proper records; (7) misrepresenting to the band amounts of monies that it would receive for certain projects; (8) telling certain members of the band that they could further their careers if they were not associated with certain other members of the band; (9) purporting to "fire" certain members of the band while knowing that they had no legal authority to do so; (10) attempting to exclude certain members from band meetings; (11) failing to communicate with the designated members of the band; (12) misrepresenting record sales' numbers and refusing to provide proper accountings; (13) threatening the band with "holding them up in court" if they complained about their treatment; (14) demanding that the band members refrain from joining any unions; (15) continuing to hold themselves out as the managers of the band after being terminated; (16) refusing to disclose to the band the amount of commissions received; (17) refusing to provide proper accountings of the expenses that were taken out of the band's earnings; (18) hiring attorneys to represent the band who had ownership interests in both companies, and were currently representing both companies; (19) forging the band members' signatures on legal and other documents; and (20) stealing the band's equipment and instruments, thereby precluding the band from earning any livelihood whatsoever.

B. *Arsenio Hall v. X Management, Inc.*

In *Hall v. X Management, Inc.*,[8] the Commissioner became quite active in evaluating, criticizing, and ultimately punishing very similar activities of Arsenio Hall's personal manager, notwithstanding that most of the acts complained of did not technically constitute violations of the Talent Agencies Act.

In that case, X, which was a management company made up of Eddie Murphy (who left the company prior to the suit), Robert Wachs (Hall's attorney), and Mark Lipsky, allegedly negotiated for Hall to serve as a guest host of a nightly talk show and to act in "Coming to America" and other films. They also negotiated Hall's contract to host the "Arsenio Hall Show," for which Wachs and Lipsky each received $5,000 per week and credit as production executives, until Hall discovered this, and they stopped receiving the payments. The company also negotiated another film contract with Paramount, a $1.5 million contract with Coca-Cola, and a contract for Hall to host the MTV Video Music Awards, most of which were apparently at Hall's direction and with his full knowledge and consent, which the Commissioner found to be irrelevant.

The Commissioner also found that the production executive salary and the company's later insistence that it was to receive 50% of all of the profits from the "Arsenio Hall Show" was deplorable, and thus determined that this conduct constituted bad faith and overreaching on the part of the management company.

The company argued that it did not "procure" employment for Hall within the meaning of the Act because it did not *initiate* those contacts with the studios. The Commissioner found that the company did, in fact, initiate those contacts, but ruled nevertheless that "to procure employment" means "either to secure employment or to bring about employment or to cause employment to occur. . . . It means to arrange employment. It means to negotiate for employment."[9] This, of course, was consistent with years of Labor Commission precedent.[10]

8. Cal. Lab. Comm. Case No. TAC 19-90 (1992).

9. *Id.*

10. *See* Kearney v. Singer, Cal. Lab. Comm. Case No. MP-429 AM-211-MC (1977) ("We do not believe that an engagement is procured by opening or preliminary discussion alone. Procurement implies an arrangement including the determination of the specifics pertaining to the particular request for an artist's service. The intention of the respondent to *actively negotiate terms of specific proposed engagements* . . . colors the intentions with regard to the

X Management had received a total of approximately $2.6 million in commissions since the inception of the management agreement, but only $2.15 million during the year prior to Hall's filing a Petition to Determine Controversy. Because of the strict one year statute of limitations in such proceedings, the Commissioner ruled that the management agreement was void, ordered the disgorgement of $2.15 million from X, to be paid to Hall, and held that, because the management agreement was void *ab initio*, the arbitration clause in the agreement could similarly not be enforced.[11]

One might ask what the difference is between Hall's case and the Wild Boyz case, and why the Labor Commissioner would devote so much of its time to the former, and literally no time (post hearing) to the latter. Other than the amount of publicity surrounding the cases and the amount of money at stake, there appears to be no significant differences. One might also ask who was in greater need of assistance from the Labor Commissioner: Arsenio Hall, who made over $10 million during the offending year, or the Wild Boyz, who could not even afford to sue their manager/record company in Superior Court.

II
Appellate Decisions

The appellate courts' handling of the Act has been confusing, at best. Two cases have been decided in the last three years, which, on their face, are entirely inconsistent. The first was *Wachs v. Curry,*[12] in which the California Court of Appeal indicated that the Act's prohibition against the procurement of employment by an unlicensed agent may only apply if such procurement was a "significant" part of that individual's activities on behalf of the artist.[13]

The second case, decided just two and a half years later by the same Second District Court of Appeal, was *Waisbren v. Peppercorn Productions, Inc.,*[14] which essentially wrote off the *Wachs* decision as "dictum," holding that the Act means what it says, i.e., *any*

entire agreement.")(emphasis added); Pryor v. Franklin, Cal. Lab. Comm. Case No. TAC 17 MP-114 (1982) ("The furthering of an offer constitutes a significant aspect of procurement prohibited by law since *procurement includes the entire process of reaching an agreement on negotiated terms* where the intended purpose is to market an artist's talents.")(emphasis added).

11. *Hall*, Cal. Lab. Com. Case No. TAC 19-90.
12. 13 Cal. App. 4th 616 (1993).
13. *Id.* at 628.
14. 41 Cal. App. 4th 246 (1995).

procurement activity whatsoever is prohibited.[15]

A. *Wachs v. Curry*

In *Wachs*, the plaintiffs, Robert Wachs and X Management, Inc. acted as personal managers for Arsenio Hall. While Hall's petition was pending before the Labor Commissioner, Wachs and X Management commenced a declaratory relief action in Superior Court against the Labor Commissioner and other state officials, seeking a declaration that the licensing provisions of the Act are unconstitutional on their face and as applied, in that (1) no rational basis exists for providing an exemption for recording contracts and not other contracts; and (2) the provisions are unconstitutionally vague as to precisely what activities are prohibited. The trial court granted the Labor Commissioner's motion for summary judgment, holding that the provisions were constitutional.[16]

The court, after addressing certain procedural issues, discussed the issue of whether the statute is constitutional on its face, i.e., whether "there is a rational basis for exempting from the licensing requirement those who engage in procuring recording contracts but not other kinds of contracts."[17]

The court noted that the provision exempting the procurement of recording contracts was added to the Act in 1982, with a "sunset provision" of January 1, 1986.[18] At that time, the California Legislature created a committee called the California Entertainment Commission, which was to study the Act and make any necessary revisions thereto.[19] The Commission engaged in its study for two years, after which it submitted its recommendations to the Legislature, which adopted them almost verbatim.[20]

A majority of the Entertainment Commission recommended that the recording agreement exemption be retained in the Act, for the following reasons:

> A recording contract is an employment contract of a different nature from those in common usage in the industry involving personal

15. *Id.* at 255.
16. 13 Cal. App. 4th at 621.
17. *Id.* at 624.
18. 1982 Cal. Stat. 682, § 1, 2814; 1984 Cal. Stat. 553, § 1, 2185.
19. 1982 Cal. Stat. 682, § 4, 2816.
20. 1986 Cal. Stat. 488, 1804; *see* James M. O'Brien III, Comment, *Regulation of Attorneys Under California's Talent Agencies Act: A Tautological Approach to Protecting Artists*, 80 CAL. L. REV. 471, 493-95 (1992).

> services. The purpose of the contract is to produce a permanent and repayable showcase of the talents of the artist. In the recording industry, many successful artists retain personal managers to act as their intermediaries, and negotiations for a recording contract are commonly conducted by a personal manager, not a talent agent. Personal managers frequently contribute financial support for the living and business expenses of entertainers. They may act as a conduit between the artist and the recording company, offering suggestions about the use of the artist or the level of effort which the recording company is expending on behalf of the artist. . . .[21]

However, the problems of attempting to license or otherwise regulate this activity arise from the ambiguities, intangibles and imprecisions of the activity.

The majority of the Entertainment Commission concluded that the industry would be best served by resolving these ambiguities on the side of preserving the exemption of this activity from the requirements of licensing.[22] The Entertainment Commission recommended that the recording contract exemption become permanent, and the recommendation was accepted by the Legislature.[23]

The *Wachs* court went on to hold that the Entertainment Commission Report "provides a sufficiently rational basis for the exemption from the licensing requirement" to withstand Wachs' constitutional challenge.[24]

The court then discussed the second part of Wachs' challenge that the phrase "occupation of procuring [employment]," as used in Labor Code section 1700.4(a), does not sufficiently define the conduct that is prohibited by the Act.[25] The court noted that the standard Webster's Dictionary definition of the term "occupation" is "the principal business of one's life; a craft, trade, profession or other means of earning a living."[26]

The court also looked to the definition of a "talent agency" contained in the Act itself: "A talent agency is hereby defined to be a

21. REPORT OF THE CALIFORNIA ENTERTAINMENT COMMISSION 13-14 (1985)[hereinafter REPORT]; *Wachs*, 13 Cal. App. 4th at 625-26.

22. REPORT, *supra*, note 21. It is difficult to reconcile this analysis with that undertaken with respect to personal managers in the film and television industries.

23. 1986 Cal. Stat. 488, § 2, 1804.

24. 13 Cal. App. 4th at 626.

25. *Id.*

26. *Id.* at 627 (citing WEBSTER'S NEW INTERNATIONAL DICTIONARY 1560 (3d ed. 1981)).

person or corporation who engages in the occupation of procuring, offering, promising, or attempting to procure employment or engagements for an artist or artists. Talent agencies may, in addition, counsel or direct artists in the development of their professional careers."[27]

The court noted the emphasis in the Act on "the occupation of procuring," employment (with a sideline of counseling and directing careers).[28] This is contrary to the Act's predecessor, the Artists' Managers Act of 1943, which focused on the "occupation of advising, counseling," etc., with procuring employment as the sideline.

The court held that the key word, "occupation," does not encompass managers and other individuals whose "employment procurement function" compared to his or her "counseling function," is not a significant portion of the individual's business as a whole. The court noted that, "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 requirements of the Act. . . ."[29]

However, the court was careful to note that the key was the nature of the business *as a whole*, as opposed to the specifics of the individual's activity for that one client. In other words, as long as a significant portion of one's business was devoted to counseling, as opposed to procuring, it would not matter that one did not engage in any counseling with respect to the one particular client. Similarly, as long as a significant portion of one's overall business is procuring, just one procurement would violate the Act, even if all other activity (for that one client) was limited to counseling.[30] The court refused, however, to set guidelines as to the meaning of the term "significant" in this context.

Although Wachs challenged as unconstitutionally vague the term "procure," the court summarily dismissed this attack, holding that, in order to be unconstitutionally vague, a term must be "so patently vague and so wholly devoid of objective meaning that it provides no standard *at all*."[31] The court noted that the term "procure" is used in numerous California statutes,[32] and that the fact that none of these

27. *Wachs*, 13 Cal. App. 4th at 627 (quoting CAL. LAB. CODE. § 1700.4 (WEST 1989)).
28. *Id.* at 628.
29. *Id.* at 627.
30. *Id.* at 628.
31. *Id.* at 629 (citing Cranston v. City of Richmond, 40 Cal. 3d 755, 765 (1985) (emphasis in original)).
32. *See, e.g.*, CAL. BUS. & PROF. CODE §§ 9997, 9998.1 (West 1989); CAL. CIV. CODE §§

statutes had ever been challenged "is some evidence the term is well understood."[33]

Of course, the court's determination that the term "procure" is not "unconstitutionally vague" is not a determination that the term is not vague, at least as it is applied in this context. Notwithstanding ample Labor Commission case authority, it is highly doubtful that many (if any) personal managers understand that "procuring" means anything other than actual solicitation of the employment, and that they can be held liable under the Act for negotiating employment that an agent or someone else actually sought out and secured. However, based upon the *Wachs* court's holding that *incidental* procurement was acceptable, the expansive definition of "procurement" is not a significant problem.

B. *Waisbren v. Peppercorn Productions, Inc.*

Wachs remained the law for approximately two and one half years; as long as "procuring" was not a "significant" part of an individual's business, there was no violation of the Act. For two and one half years, managers could rest easy, knowing that they could carry on their day-to-day business without the risk of losing all of the benefits of their agreements with their artists as a result of one "procurement" indiscretion. In fact, the Labor Commissioner took the position during that period that the relationship between the artist and the manager must be "permeated and pervaded by employment procurement activities. . . ."[34]

However, in December of 1995, the Second District Court of Appeal essentially overruled itself and purported to reinstate pre-*Wachs* law. In *Waisbren v. Peppercorn Productions, Inc.*,[35] the plaintiff had agreed to "promote" Peppercorn, which specialized in the design and creation of puppets and produced various television projects. As part of that promotion, Waisbren:

> assisted in project development, managed certain business affairs,

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1812.501, 1812.509 (West 1989); CAL. ELECT. CODE § 296.20 (West 1989); CAL. LAB. CODE § 1540 (West 1989).

33. *Wachs*, 13 Cal. App. 4th at 629.

34. Church v. Brown, Cal. Lab. Comm. Case No. TAC 52-92 (decided May 12, 1994). Procurement activities may include anything from calling a producer and asking her to put your artist in her film, to answering the phone and having a producer ask *you* if he can put your artist in his film, to negotiating the agreement between the producer and your artist, to telling the producer that your artist likes a particular color jelly bean in his dressing room. *See* McPherson, *supra* note 2.

35. 41 Cal. App. 4th 246 (1995).

> supervised client relations and publicity, performed casting duties, advised Peppercorn regarding the selection of artistic talent, coordinated production, and handled office functions, such as the hiring and firing of personnel. Occasionally, Waisbren procured employment for Peppercorn, but his efforts in that regard were incidental to his other responsibilities.[36]

In return for such services, Waisbren was to receive 15% of Peppercorn's profits.[37]

After Peppercorn terminated its relationship with Waisbren, Waisbren commenced litigation against Peppercorn, alleging breach of contract, among other causes of action.[38] Four years into the lawsuit, Peppercorn filed a motion for summary judgment, claiming that Waisbren, in procuring "employment" for Peppercorn, violated the Talent Agencies Act. Waisbren admitted procurement activities but maintained that those activities were "minimal and merely incidental to his other responsibilities."[39] Nevertheless, and notwithstanding that *Wachs* had been decided 15 months earlier, the trial court granted the motion and declared the agreement between the parties void.[40]

The Court of Appeal, in affirming the decision, noted first that an "artist," as that term is defined in the Labor Code, "includes a broad spectrum of persons and entities working in the entertainment field."[41] The court then held that "there is no dispute that defendants qualify as 'artists' under the Act."[42]

The court went on to describe the primary functions of personal managers as advising and counseling the artist.[43] The court noted that,

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36. *Id.* at 250.

37. *Id.*

38. The author consulted in connection with that case.

39. *Waisbren*, 41 Cal. App. 4th at 251.

40. *Id.*

41. *Id.* at 252.

42. *Id.* at 252 n.5. The court recites the Labor Code definition of "artists" as:

> actors and actresses rendering services on the legitimate stage and in the production of motion pictures, radio artists, musical artists, musical organizations, directors of legitimate stage, motion picture and radio productions, musical directors, writers, cinematographers, composers, lyricists, arrangers, models, and other artists and *persons* rendering professional services in motion picture, theatrical, radio, television and other entertainment enterprises. CAL. LAB. CODE § 1700.4(b) (emphasis in original).

The Labor Code further defines "person" as "any individual, company, society, firm, partnership, association, corporation . . . manager, or their agents or employees. *Id.* § 1700.

43. The court, citing O'Brien, *supra* note 20, stated an elaborate recitation of the general functions of a personal manager, as opposed to a talent agent:

although, "as a practical matter," personal managers "find themselves in situations in which they would like to procure employment for their clients,"[44] this was not the issue before the court. The issue before the court was whether the "occasional" procurer needs to be licensed, which the court handily resolved in the affirmative.

The court first looked to the definition of the term "occupation." The plaintiff argued, consistent with *Wachs*, that the dictionary definition of "occupation" is "the *principal* business of one's life,"[45] and that, in order to violate the Act, procuring employment for an artist must be a person's principal responsibility. The *Waisbren* court disagreed with this analysis, noting that one may have more than one "occupation," and that the term is synonymous with "employment," which includes "temporary or occasional work or service for pay."[46]

The court then went on to quote *Buchwald v. Superior Court,*[47] which indicated that the Act is a "remedial statute," to "correct abuses that have long been recognized," and "enacted for the protection of those seeking employment."[48] The Act, then, according to the court, "should be liberally construed to promote the general object sought to be accomplished." In order to "ensure the personal, professional, and financial welfare of artists, the Act strictly regulates a talent agent's conduct."[49]

> In essence, 'the primary function of the personal manager is that of advising, counseling, directing and coordinating the artist in the development of the artist's career.' The manager's task encompasses matters of both business and personal significance. As business advisors, they might attend to the artist's finances, and they routinely organize the economic elements of the artist's personal and creative life necessary to bring the client's product to fruition. The personal manager frequently lends money to the neophyte artist, thereby speculating on a return from the artist's anticipated future earnings. The manager also serves as a liaison between the artist and other personal representatives, arranging their interactions with, and transactions on behalf of, the artist. On a more personal level, the manager often serves as the artist's confidant and alter ego. . . . By orchestrating and monitoring the many aspects of the artist's personal and business life, the personal manager gives the artist time to be an artist. That is, managers liberate artists from burdensome yet essential business and logistical concerns so that artists have the requisite freedom to discharge their artistic function and to concentrate on their immediate creative task. . . . In this regard, the personal manager is an indispensable element of an artist's career.

Waisbren, 41 Cal. App. 4th at 252-53.

44. *Id.* at 253.

45. *Id.* (emphasis in original).

46. *Id.* at 254.

47. 254 Cal. App. 2d 347 (1967).

48. *Id.* at 350-51.

49. *Waisbren*, 41 Cal. App. 4th at 254.

The court then reviewed certain Labor Commission decisions that addressed the issue.[50] In particular, both *Derek v. Callan*[51] and *Damon v. Emler*[52] specifically held that the Act is violated no matter how "incidental" or negligible the procurement activities are.[53] The court noted that "the construction of a statute by an agency charged with its administration is entitled to great weight," and that, because the Commissioner's interpretation in this instance was reasonable (presumably, because it was consistent with the court's interpretation), the court agreed with the Commissioner's analysis.[54]

The court then looked to the California Entertainment Commission's Report of 1985 for guidance.[55] The Entertainment Commission was created by the California Legislature in 1982 in order to "study the laws and practices of this state, the State of New York, and other entertainment capitals of the United States relating to the licensing of agents and representatives of artists in the entertainment industry in general . . . so as to enable the Commission to recommend to the Legislature a model bill regarding this licensing."[56]

One of the most important functions of the Entertainment Commission was to determine whether personal managers or anyone other than a licensed talent agent should be allowed to procure employment for an artist. The Entertainment Commission resolved this issue with a resounding "no," maintaining that

> [e]xceptions in the nature of incidental, occasional or infrequent activities relating in any way to procuring employment for an artist cannot be permitted; one 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. There can be no 'sometimes' talent agent, just as there can be no 'sometimes' professional in any other licensed field of endeavor.[57]

The Legislature then adopted all of the Commission's recommendations.

The court then went on to discuss the Act's limited exception for

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50. Although Labor Commission cases are not publicly reported, some cases are accessible.

51. Cal. Lab. Comm. Case No. TAC 18-80 (1982).

52. Cal. Lab. Comm. Case No. TAC 36-79 (1982).

53. *Waisbren*, 41 Cal. App. 4th at 255.

54. *Id.*

55. *Id.* at 256-59. *See also* McPherson, *supra*, note 2.

56. *Waisbren*, 41 Cal. App. 4th at 256.

57. REPORT, *supra* note 21, at 8-12; *Waisbren*, 41 Cal. App. 4th at 258.

unlicensed persons, i.e., when an unlicensed individual acts "in conjunction with, and at the request of, a licensed talent agency."[58] The court noted that such a provision would make no sense and would be unnecessary if incidental or occasional procurement did not require a license in the first place.[59]

Finally, the court looked to prior judicial construction of the Act. The first case that the court discussed was *Buchwald v. Superior Court*,[60] which did not address the "incidental procurement" issue.[61] The *Waisbren* court nevertheless indicated that the case was persuasive because "it did hold generally that procurement efforts require a license and that the substance of the parties' relationship, not its form, is controlling."[62]

The *Waisbren* court then addressed the *Wachs* case. The court explained the two-pronged constitutional challenge that the plaintiffs made to the Act, i.e., that the recording exception violated the equal protection clause for non-music industry managers, and that the term "procure" was sufficiently unconstitutionally vague as to violate due process.[63]

The court cited language in the *Wachs* case that "the *only* question before us is whether the word 'procure' in the context of the Act is so lacking in objective content that it provides no standard *at all* by which to measure an agent's conduct."[64] According to *Waisbren*, because this constitutional test on the vagueness of the term "procure" was clearly satisfied, everything else—including all of the discussion in *Wachs* concerning the meaning of the term "occupation," and the *Wachs* requirement that the procurement activity be "significant"—was dictum.[65] The *Waisbren* court declined to follow

58. CAL. LAB. CODE § 1700.44(d) (West 1989). This provision, first enacted in 1982 as a temporary measure, was made permanent as a result of the Commission's Report. *See* REPORT, *supra* note 21, at 19; *see also Waisbren*, 41 Cal. App. 4th at 259 n.14.

59. Of course, it is the *court's* analysis that makes no sense. If a personal manager's procurement activities were more than "incidental," this provision would then be used to allow the manager to work "in conjunction with" a licensed talent agent.

60. 254 Cal. App. 2d 347 (1967).

61. *Id.* at 351.

62. *Waisbren*, 41 Cal. App. 4th at 259.

63. In fact, the plaintiff in the *Wachs* case suggested that the entire phrase "occupation of procuring [employment]" was vague; however, the focus was on the term "procuring." *See Wachs*, 13 Cal. App. 4th at 626-29.

64. *Waisbren*, 41 Cal. App. 4th at 260 (citing *Wachs*, 13 Cal. App. 4th at 628-29) (emphasis added).

65. *Id.*

this "dictum" because it is contrary to the Act's language and purpose.[66]

This, of course, is completely contrary to the *Wachs* court's statement justifying its own decision:

> We conclude from the Act's obvious purpose to protect artists seeking employment and from its legislative history, the "occupation" of procuring employment was intended to be determined according to a standard that measures the significance of the agent's employment procurement function compared to the agent's counseling function taken as a whole. If the agent's employment procurement function constitutes a significant part of the agent's business as a whole then he or she is subject to the licensing requirement of the Act. . . .[67]

Finally, the court addressed the consequences or "sanctions" for violations of the Act.[68] For the answer to this issue, the court did not have to look past *Buchwald* ("a contract between an unlicensed [agent] and an artist is void")[69] and the Report ("the most effective weapon for assuring compliance with the Act is the power . . . to . . . declare any contract entered into between the parties void from the inception.")[70] However, conspicuously absent from the *Waisbren* court's analysis and discussion is any indication from the statute itself that such a remedy is proper. Moreover, as the judicial and Labor Commission decisions aptly demonstrate, the significance and meaning of the voiding of a personal management agreement is anything but clear.

The penalties suggested and imposed in these cases vary significantly. In some cases, the manager merely does not get paid a commission for the offending procurement.[71] In others, the artist does not have to pay any further commissions to the manager.[72] In still others, the manager is actually disgorged of commissions previously earned and collected, and not permitted to recover either the

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66. *Waisbren*, 41 Cal. App. 4th at 261.

67. *Wachs,* 13 Cal. App. 4th at 628.

68. 41 Cal. App. 4th at 262.

69. *Buchwald*, 254 Cal. App. 2d at 351; *Waisbren*, 41 Cal. App. 4th at 361; *see also* McPherson, *supra* note 2 and accompanying text; Wood v. Krepps, 168 Cal. 382, 386 (1914).

70. *See* REPORT, *supra* note 21, at 17; *Waisbren*, 41 Cal. App. 4th at 262.

71. *See* O'Bannon v. Nelson, Cal. Lab. Comm. Case No. TAC 1-81, SF MP 98; Bank of America (Groucho Marx) v. Fleming, Cal. Lab. Comm. Case No. 1098 ASC, MP-432 (decided January 6, 1982).

72. *See* Kearney v. Singer, Cal. Lab. Comm. Case No. MP-429, AM-211-MC (decided December 1, 1977); Damon v. Emler, Cal. Lab. Comm. Case No. TAC 36-79, SF MP 63 (decided January 12, 1982).

reasonable value of his services or any expenses that he advanced.[73] In others, the manager is only disgorged of amounts that he made after he became aware that a Talent Agency license was necessary.[74]

Notwithstanding the analysis by the court and, on occasion, the Labor Commissioner, the voiding of the personal management agreement and disgorgement of all monies really does not make much sense. The agreements themselves, as discussed by the courts, generally contain provisions indicating, in no uncertain terms, that the personal manager is not a talent or booking agent, and therefore will not solicit employment for the artist. Whether or not that provision is breached, the *agreement* itself does not contain any illegal terms, such that the enforcement of the agreement would be a crime or other legal violation.

Numerous agreements are breached every day without the *agreement* being rendered unlawful and void. Moreover, there is no particular mandate that, once the agreement is ruled void, there is automatically no recovery on that agreement. In fact, the Labor Commission, itself, has often held that an *innocent* violator (i.e., not unsavory and otherwise qualified to obtain a Talent Agency license), particularly when there is a sophisticated artist, can recover or keep at least some monies under such an illegal agreement.[75]

Even other violations of the Act are not punished by rendering the agreement void. For example, if a licensed talent agent violated the Act by failing to post his or her fee structure, he or she would, at best, draw a fine or warning. Licensed agents violate the Act every day by entering into *oral* agreements with their clients. Yet, even if those agreements are held to be unenforceable (as they should be), and no *further* monies are to be paid to the agent, monies are never *disgorged* from the agent.

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73. *See generally Buchwald*, 254 Cal. App. 2d at 360; Rogers v. Portnoy, Cal. Lab. Comm. Case No. SF MP 40 (decided March 8, 1978); *Pryor*, Cal. Lab. Comm. Case No. TAC 17 MP-114; Sinnamon v. McKay, 142 Cal. App. 3d 847 (1983); Humes v. Margil Ventures, Inc, Cal. Lab. Comm. Case No. TAC 19-81, SF/MP 116 (decided April 15, 1982); Cummings v. The Film Consortium, Cal. Lab. Comm. Case No. TAC 5-83.

74. *See* Nussbaum v. The Chicken's Company, Inc., Cal. Lab. Comm. Case No. TAC 17-80, SFMP 81 (consolidated with Case No. TAC 20-80, SFMP 84).

75. *See, e.g.,* Wilson v. Bergman, Cal. Lab. Comm. Case No. MP 456, AMC 13-78 (decided January 9, 1980); *Bank of America*, Cal. Lab. Comm. Case No. 1095 ASC, MP-432; *Damon*, Cal. Lab. Comm. Case No. TAC 36-79, SF MP 63.

C. *Shapiro-Lichtman v. DiSalle*

In a Superior Court case, Shapiro-Lichtman, a talent agency, and Mark Lichtman claimed that Mark DiSalle, a writer/producer/director, owed the agency commissions for packaging a film entitled "Kickboxer," starring Jean-Claude Van Damme.[76] DiSalle claimed that he (DiSalle) put the film together, including all of the principal cast and the foreign distribution/financing. He further claimed that the only thing that Lichtman did with respect to the film was to obtain domestic distribution/financing when the original financing fell out, for which Lichtman was to be paid 10% of the $250,000 Producer's fee for the film. The $25,000 commission had already been paid and, according to DiSalle, nothing more was owed.[77]

Lichtman claimed that he was entitled to be paid 10% of all monies received by DiSalle with respect to the film (and any and all sequels), even before DiSalle made third party payouts, which totaled approximately 67%. Under Lichtman's theory, he would have made more on the film than DiSalle, who wrote, produced and directed the film. The agreement between Lichtman and DiSalle was, of course, oral.[78]

DiSalle claimed that once he had paid Lichtman the $25,000, Lichtman threatened that, if DiSalle did not pay more commission, he would tell the studio with which DiSalle was making another film entitled "The Perfect Weapon," that DiSalle was a drug addict. DiSalle therefore filed a cross-complaint against Lichtman for intentional infliction of emotional distress and other related claims.[79]

III
Prohibition Against Oral Agreements

Shapiro-Lichtman was particularly troublesome for several reasons. First, DiSalle argued without success that an oral agency agreement is unenforceable under California law.[80] Implied within Section 1700.23 of the Labor Code is a requirement that agreements between agents and clients be in writing. The section provides, in

76. Shapiro-Lichtman v. DiSalle, L.A.S.C. Case No. BC 082 266 (1982).
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.*

pertinent part, as follows:

> Every talent agency shall submit to the Labor Commissioner a form or forms of contract to be utilized by such talent agency.... Each such form of contract... shall contain an agreement by the talent agency to refer any controversy between the artist and the talent agency relating to the terms of the contract to the Labor Commissioner for adjustment....[81]

In *Beverly v. Raymundo,*[82] the labor Commissioner enforced this provision:

> Moreover, the agreement entered into was never approved by the Labor Commissioner as required by Labor Code Section 1700.23. Further, contracts which violate the act are void.... Accordingly, the Labor Commissioner finds that because the Respondents attempted to operate under an agreement which was not first approved by the Labor Commissioner, any recitations or covenants therein contained which would otherwise entitle Respondents to fees or commissions or any money whatsoever are null and void.[83]

Although there is no express term in the labor code section requiring a writing, the section would not make sense if such a writing were not contemplated.[84] Clearly, if the Legislature requires that "all agreements" be submitted to the Labor Commissioner for its approval as to form and contents, it goes without saying that an agent cannot completely circumvent this requirement by entering into oral agreements that do not contain the approved terms.

Moreover, the California Code of Regulations[85] discusses the propriety of the use of oral agreements by talent agents, by a prohibition against oral agreements that are not confirmed within 72 hours. The Code provides that:

> No [talent agent] shall be entitled to recover a fee, commission or compensation under an oral contract between an [agent] and an artist, unless, the particular employment for which such fee, commission or compensation is sought to be charged, shall have procured directly through the [talent agent] and shall have been confirmed in writing within 72 hours thereafter. Said confirmation may be denied within a reasonable time by the other party....[86]

Moreover, the Labor Commissioner has interpreted the old Section to mean exactly what it said. In *International Creative*

81. CAL. LAB. CODE § 1700.23 (West 1989).
82. Cal. Lab. Comm. Case No. SF MP 41 (decided August 22, 1978).
83. *Id.* at 6:5-19; *see also Sinnamon*, 142 Cal. App. 3d at 847.
84. *See* CAL. LAB. CODE § 1700.23 (West 1989).
85. Formerly the California Administrative Code.
86. CAL. CODE REGS. tit. 8, § 12002 (1989).

Management v. Reynolds,[87] the labor Commissioner specifically held that, because the 72 hour follow-up writing was not sent to the artist, the agreement was void. As discussed by the Commissioner:

> It is clear from the Administrative regulation that before an [agent] can recover a fee for his services in procuring employment for an artist under an oral contract, he must confirm in writing within 72 hours, the employment found for the artist.... The letters that alleged to be confirmations, did not contain the full terms of the oral agreements, thus failing to fulfill the requirements set forth in the California Administrative Code.[88]

DiSalle, during the pendency of the case, commenced a proceeding before the Labor Commissioner, claiming that these sections precluded the enforcement of the alleged oral agreement and that the Labor Commissioner had exclusive jurisdiction over the matter. He then filed a motion to stay the action pending the determination of the case by the Labor Commissioner. Such motions had been routinely granted for years in both State and Federal courts.[89]

Judge Edward Ross denied the motion, ruling that, because DiSalle was a producer, and the Code does not specifically mention "producers" as falling under the definition of "artists," he had no standing to assert a violation of the Code.[90] The court completely ignored the fact that DiSalle also acted as the *director* of the film, because Lichtman's counsel claimed that his client was not seeking commissions for DiSalle's directorial work, despite allegations in a verified complaint to the contrary.[91] The court also ignored the portion of the definition of "artist" in the Act that says: "and other artists and persons rendering professional services in motion pictures,"[92] of which a producer is certainly one.[93]

The Labor Commissioner never even bothered to advise the parties that, contrary to the provisions of the Act itself which provides

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87. Cal. Lab. Comm. Case No. LA220-CVW.

88. *Id.*; *see also* Professional Artists Management v. Peltz., Cal. Lab. Comm. Case No. TAC 12-79, MP 475 (decided October 27, 1980) (holding that the artist's manager was owed nothing because the oral agreement was not confirmed in writing within 72 hours); Cloutman-Miller Agency, Inc. v. Botham, Cal. Lab. Comm. Case No. TAC 3-83.

89. *Shapiro-Lichtman*, L.A.S.C. Case No. BC 082266.

90. *Id.*

91. *Id.* This statement was completely contrary to Lichtman's own *verified* complaint, in which he alleged that he was seeking commissions for all of DiSalle's work, including as a producer and as a director.

92. CAL. LAB. CODE § 1700.4(b) (West 1989).

93. *Shapiro-Lichtman*, L.A.S.C. Case No. BC 082-266.

for original jurisdiction with the Labor Commissioner, he would defer to the Superior Court's wisdom. In fact, the Labor Commissioner never bothered to do anything about the case other than simply to ignore it and hope that the matter took care of itself.

In *Shapiro-Lichtman*, Judge Ross ultimately dismissed DiSalle's cross-complaint on statute of limitations grounds, after denying an *ex parte* application to continue the summary judgment hearing as DiSalle was changing counsel. DiSalle was eventually forced to settle the case with a stipulated judgment for $140,000, which was more than 10% of the monies received by DiSalle for writing, directing and producing the film, and more than 500% of the commission owed on the producer's fee.[94]

This case was an absolute travesty on several levels, from the court denying the motion to stay, to the Labor Commissioner's complete abandonment of the case, to the court's refusal to enforce the Act, to the dismissal of the cross-complaint, and, finally, to the ultimate settlement. If the Act exists to protect the artist, then it hopelessly failed in this case, as did the system that was designed to enforce it.

IV
Conclusion: Whom Does the Act Really Protect?

Why are *licensed* agents allowed to violate the Act with relative impunity, while personal managers cannot negotiate one term of one agreement for a baby band to perform at a bar for $20? It seems that there is something inherently unfair about such a system, particularly when a band that could only generate $20 for a night in a bar (or $200 or $2,000 for that matter) is almost invariably not going to be able to attract the attention of a licensed booking agent, let alone get signed by one.

The courts in the *Wachs* and the *Waisbren* cases, along with the Labor Commissioner in countless Commission decisions, and the Legislature itself, cite (as justification for some extremely harsh rules and rulings) the intent of the Act, which is (ostensibly) solely and unequivocally to protect the *artist*, and nothing more. Yet, who is the Act really protecting if the manager of a band that cannot get an agent will not (because he or she cannot) negotiate (or assist the band in negotiating) a performance in a bar, or at a wedding, or at a party.

94. *Id.*

And what about the talent agent at one of the big three agencies in Los Angeles, who (recently), when one of their actress clients told them that she now had an attorney and that she would like them to negotiate her future deals in conjunction with that attorney, responded, "we don't work with lawyers." Is it really the *artist* that is being protected by the Act, or is it the agent?

What about an actor who does not have the clout of Tom Cruise or Sylvester Stallone, or even Gary Cole or Jennifer Rubin? Tom Cruise gets the Creative Artists Agency's full and complete attention every time he sneezes; do other actors that are not of his stature? Most agencies have many more clients than do the majority of personal managers. Based upon shear numbers, agents do not have the time to devote to each actor, to each opportunity, to each aspect of a deal. So when the agent says, "I don't work with lawyers" or "I don't work with managers," what is the actor to do, and how does the Act protect *him* in that situation?

There are many fine actors in Los Angeles that cannot even get an agent. Does the Act really protect them? And what about the actors who lives outside of Los Angeles, where there is not such an abundance of agents—does the Act protect them?

On the music side, although recording agreements are specifically excluded from the Act and anyone can negotiate a recording agreement without violating the Act, there has been much discussion regarding whether or not an unlicensed individual (such as a personal manager or a lawyer) can, without violating the Act, negotiate a publishing agreement. The obvious answer is "no." Although some argue that a publishing agreement is not an *employment* agreement, it clearly is, as such an agreement requires an artist to write songs for the publishing company and for nobody else for a specified term (not to exceed 7 years in California).[95]

Because "booking agents" generally never see the inside of a publishing agreement, because their function is exclusively to book performances, the artist is left literally with nobody who can legally negotiate her publishing agreement. Once again, is the Act then protecting *the artist*?

One might argue that, when you get to court, the Act definitely protects the artist because, generally, the artist, whether or not he needs protection will prevail if the manager was guilty of any

95. *See, e.g.,* Adams v. Irving Music, L.A.S.C. Case No. BC 090 519 (1990).

procurement activities whatsoever.[96] Certainly, there are an abundance of cases that support this argument. However, the Act, and the decisions interpreting the Act, clearly have had and will continue to have a chilling effect on what personal managers are willing to do for their clients.

Clear too, is the fact that there is a myriad of unscrupulous managers out there that take advantage of their artists every day. However, the Act, perhaps because of the incredible and vast power of the talent agent lobby, does very little if anything to protect the artist from the unscrupulous *agent*. What the Act fails to acknowledge is that there are hundreds of professional, talented, and extremely ethical managers out there who may very well be in a position to better protect their artists than an agent, and certainly in a better position than the *artist* to protect him or herself. Many of these managers belong to the Conference of Personal Managers, which is a self-regulated group with a very strict code of conduct that is vigorously enforced.

If an agent "does not work with lawyers" or "does not work with personal managers," and a particular portion of a particular agreement should be negotiated very carefully for an artist, who is going to do that negotiation when the agent has a hundred other clients? The *artist*? Who does the Act protect?

In light of the Commission's Report and Legislative history, *Waisbren* appears to be the current law in California. However, the *Wachs* rationale makes a lot more practical sense than *Waisbren*,[97] in that *Waisbren* completely ignores the practicalities of the entertainment industry and, as a result, does not (as purportedly intended by the Legislature) protect the artist.

If *Waisbren* is a correct statement of the law and an accurate interpretation of the Act, then the Act needs to be amended. It is clear that talent agencies should be regulated and licensed. It is also clear that anyone who, as the predominant part of his or her business "procures" (meaning actually soliciting) work for their clients, should comply with the licensing requirements of the Act.

However, it is also clear that the definition of "procure" should not be construed so broadly as to include negotiating the color of jelly

96. *See* McPherson, *supra* note 2.

97. *Wachs* is also consistent with New York law, which allows "incidental" booking by personal managers. *See* N.Y. GEN. BUS. LAW § 171(8) (McKinney 1996).

beans in a dressing room. It should be construed as the actual solicitation of work, and not the negotiation of the deal. In addition, "incidental" procurement should be allowed (particularly if the definition of procurement continues to include negotiation), as such activities only *help* the artist; they do *not* hurt him. Certainly, if necessary, the State could regulate incidental procurers with some other type of license.

Finally, if none of the foregoing is adopted by the Legislature or the courts, the penalty for "procurement" by an unlicensed individual should be, at most, a forfeiture of only those commissions that would otherwise be received for the particular employment that the individual "procured." Any stronger penalty, in most instances, serves as a windfall to an artist, who, generally, is well aware of the procurement activity, endorses the activity when it suits his purpose (and certainly does not turn down the part when solicited), and uses the Act as a sword when, long after the fact, he realizes that he can avoid paying commissions. It is truly . . . time for a change.

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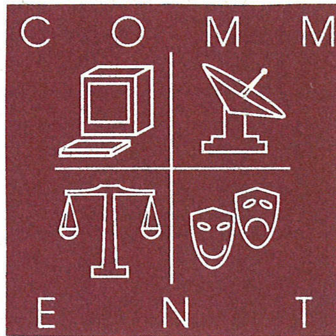
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