By Edwin F. McPherson

The Talent Agencies Act Is Alive, but Is It Well?

The act is not protecting the very artists it was designed to help

The Talent Agencies Act[1] has, once again, saved a helpless artist from the perils of unscrupulous management. This time the personal manager was so unethical, so utterly despicable, that he failed to *charge* for his procurement services. But alas, the Court of Appeal of the State of California and the California Labor Commissioner have intervened and decided that there will be no more free representation by unlicensed talent agents.

The case: *Park* v. *The Deftones*.[2] The ruling: even a personal manager who does not charge any commission for soliciting employment for an artist is in violation of the Talent Agencies Act, and his agreements with the artist will be rendered void. So, for all the artists out there who thought that *free* representation was *good*, rest assured that it is not only *bad*, it is *illegal*, and no unlicensed managers or any other unlicensed individuals will be allowed to solicit employment for you *for free* ever again, and this is for your own benefit.

Park served for several years as the personal manager of the Deftones, a musical group, and that, according to the Talent Agencies Act, prohibited him from negotiating engagements for his clients in return for a commission. He apparently booked 84 shows for the group during his tenure but did not charge any commission. He also secured and negotiated a recording agreement for them (which is not prohibited by the act), for which he did charge a 20 percent commission. When the group refused to pay that commission, he sued them. A few months after the lawsuit was filed, the Deftones initiated a Labor Commission proceeding to declare the management agreements void based upon the booking activities, which allegedly violated the Talent Agencies Act.

Park argued to the court that his booking activities were not regulated by the act because he never charged a commission for that work. The court did acknowledge that the act only "regulates those who engage in the occupation of procuring engagements for artists." However, the court nevertheless held that the occupation requirement does not include a compensation component (notwithstanding other courts' opinions to the contrary).

The court speaks in lofty terms about the "purpose" of the act and the "remedial" nature of the act, and the "abuses" to be remedied by the act. The purpose of the act has always been, at least ostensibly, to protect the artist, and not the agent, contrary to what one might surmise from recent Labor Commission and court decisions. However, it is difficult to ascertain the "purpose" of the act to which the court is referring or the precise nature of the "abuses" that the court is addressing, when a manager is not charging anything for his procurement activities.

The Talent Agencies Act does not preclude a manager from charging even an 80 percent commission for securing a recording agreement. Park's commission for the recording agreement was only 20 percent, which is well within industry standards. The question then arises: does it really make sense that it is lawful for a manager to charge 80 percent solely for securing a recording agreement, but it is unlawful for a manager to charge 20 percent for both securing a recording agreement and booking 84 performances?

It certainly appears once again—notwithstanding the court's statements that the act is "remedial" and that the purpose of the act is to protect the artist—that it is not the artists but the agents who are being protected. In fact, in this case, the act is protecting the very agents who refused to represent the Deftones when Park was booking their performances because the band was not getting paid enough money to generate enough commissions for those agents.

It seems that, with even minimal common sense, one can understand that an artist who can pay someone 20 percent of gross earnings to secure (and negotiate) a recording agreement and book 84 performances is better off than an artist who has to pay one person 15 percent or 20 percent for the record deal and someone else another 10 percent for the bookings. What is quite clear, however, is that a struggling artist who has a manager who will invest his or her time, effort, and money into that artist, with only a faint hope of recouping that investment, and who may secure performances for that artist (with or without charging a commission), is better off than an artist who cannot obtain agency representation, has nobody willing to invest in his or her career, and therefore does not get to perform at all (and presumably does not secure a recording agreement either).

In light of the vast changes that have occurred in the entertainment industry during the past 15 years, as well as Labor Commission and court decisions that have expanded the act beyond anyone's expectation for it when it was enacted in 1985, the California legislature should create a new commission to examine many aspects of the Talent Agencies Act, the most fundamental of which is whether or not the act really protects the very class of people it was originally designed to protect. ■

Edwin F. McPherson is a partner with the entertainment litigation firm of McPherson & Kalmansohn in Century City.

[1] Talent Agencies Act, LAB. CODE §§1700 *et seq.*

[2] Park v. The Deftones, 1999 DAILY JOURNAL D.A.R. 4407 (May 11, 1999).