Talent Managers Acting as Agents Revisited: An Argument for California's Imperfect Talent Agencies Act

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by MYLES L. GUTENKUNST*

I. Introduction

The entertainment and copyright production industries have a substantial impact on our daily lives and enjoyment. According to the International Intellectual Property Alliance, the core copyright and entertainment industries accounted for nearly 6.5% of the United States gross domestic product and exceeded $1 trillion in 2012.1 As the two largest entertainment media producing states, California and New York

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are key players and producers in the entertainment industry. Entertainment and copyrightable mediums, such as film, television programs, and music, are all developed by talented artists, who are supported by their agents and managers. California and New York statutes that govern the artist-manager and artist-agent relationships have a direct impact on the artist’s creative works and the entertainment industry as a whole.

Since California’s Talent Agencies Act (“TAA”) was enacted in 1978, many managers, artists, and legal critics have been quick to point out its flaws either through litigation or lobbying. The California Legislature intended to protect artists from unscrupulous agents who attempt to take advantage of them financially. The TAA requires that individuals who procure employment for artists must acquire a state authorized license to do so and abide by the regulations set forth in the TAA. Disputes, however, arise between a talent manager and artist when the manager procures employment for the artist, and the artist withholds the commission to the manager on the basis that the manager is not a licensed agent under the statute. These clashes give way to a plethora of disputes, which private arbitrators and the California Labor Commissioner adjudicate annually.

New York Employment Agency Law shares similar common law roots and statutory provisions but with one major exception: incidental booking. A New York talent manager may procure employment for the artist where the procurement is incidental to the normal management duties

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4. CAL. LAB. CODE § 1700 (West 2009).

5. Marathon, 42 Cal. 4th at 984.

6. CAL. LAB. CODE § 1700.5.


8. N.Y. GEN. BUS. LAW §§ 171, 185 (McKinney 2004); see also N.Y. ARTS & CULT. AFF. § 37 (McKinney 2004).

9. N.Y. GEN. BUS. LAW § 171(8) (“‘Theatrical employment agency’ means any person . . . who procures or attempts to procure employment . . . , but such term does not include the business of managing such entertainments, exhibitions or performances, or the artists or attractions constituting the same where such business only incidentally involves the seeking of employment therefor.”).
for the artist. As a result, the talent manager would be entitled to a commission under the artist-manager contract even if the manager is not a licensed talent agent.

The difference between the two statutes has created different environments for talent managers in California and New York. Despite the manager’s (or artist’s) inability to dictate the geographic location of certain types of employment in the entertainment industry, New York agency law inherently appears on its face to be more favorable to talent managers than the TAA. This note will, however, argue that the TAA is a preferable arrangement as it provides better protection of the artist, allows little room for abuse by the manager and agent as fiduciaries of the artist, provides a clear legal structure and predictable outcomes, and upholds the public policy underlying talent agent regulation.

This note primarily compares two key statutory provisions that supervise the relationship between talent manager and artist, and advocates for California’s scheme over New York’s. Further, while commentators, justices, and personal manager collectives have advocated for the addition of an incidental booking exception to the TAA, or for the creation of a personal talent manager’s statute, this note will argue why neither remedy is necessary today. Part II covers the general roles and duties of talent managers and agents, the legislative history of the TAA and California’s case law, and New York’s Employment Agency Law history and subsequent case law. Part III analyzes the main distinctions between California and New York, specifically, the incidental booking exception and the TAA’s agent-manager collaboration safe harbor. Part IV discusses how the TAA’s structure is preferable over New York’s scheme while considering the underlying duties of the manager and agent, past proposals to alter the TAA and California’s entertainment industry, the TAA’s safe harbor for manager and agent collaboration, and the public policy each statute seeks to support. Part V concludes by suggesting that the TAA’s current iteration is effective in protecting artists from unscrupulous third parties.

10. Id.; see also Pawlowski v. Woodruff, 203 N.Y.S 819, 820 (App. Term. 1924) (holding that the manager-artist contract was indeed a contract for management, and that the employment procured was only incidental to the duties of the plaintiff-manager).

11. See infra Part II.C.

II. Background

To understand a scenario in which disputes arise under the TAA and the New York Employment Agency Law, and to effectively compare the statutes, consider a basic hypothetical: while working on a movie set for a fledgling actor, who is not currently represented by an agent, the actor’s manager begins a conversation with the film’s producer-director. Although the actor has a minimal role in the current production, the manager and producer-director begin discussing other projects during down time on the set. The conversation ends with the producer-director giving the actor an audition for a substantial role in the next film. When the actor is contracted for the substantial role in the film, the manager requests to be compensated for this particular engagement as he procured it. The actor refuses, however, claiming that the manager is not entitled to a commission payment pursuant to their contract because the manager acted as an unlicensed talent agent, and files a complaint against the manager to invalidate the contract. This scenario is generally litigated between managers and artists, and this note will demonstrate that different results can be effectuated in California and New York.

A. Talent Managers and Agents

Theatrical employment agency law was created to protect artists from unprofessional and devious talent agents seeking to take advantage of new artists attempting to break into the entertainment industry. As a threshold matter, it is important to distinguish the different roles managers and agents play in the career of an artist.

According to the TAA, talent agents and agencies are individuals or institutions that engage in the occupation of “procuring, offering, promising, or attempting to procure employment or engagements for an artist . . . .” These responsibilities include the negotiation of employment contracts and general career development advice. One commentator has defined an agent as a commodity trader of talent, who mediates between buyers and sellers of talent. Talent agents are generally compensated on a percentage of the artist’s earnings through the employment opportunities they procure, and these fees are customarily ten percent.

14. CAL. LAB. CODE § 1700.4(a).
16. Birdthistle, supra note 7, at 503.
17. Id.
Talent managers tend to focus more on the personal lives of the artist, advising on the aspects of daily life as an artist and developing the artist’s long-term career goals. Essentially, a manager advises the artist on which employment opportunities to accept that are procured by an agent. Frequently, managers are the first professional contact that a fledgling artist has. Managers advertise their industry contacts and track record with other successful artists to secure a manager-artist services contract. Talent management fees tend to be higher than that of an agent, customarily between ten percent to fifty percent of the artist’s gross earnings.

The agent and manager make up the team which (theoretically) works synergistically to further the artist’s career on a system of checks and balances. Operating within the law, the agent will procure employment opportunities for the artist and the manager will counsel the artist on employment opportunities. The structure of theatrical agency law limits both the manager and agent from taking advantage of the artist, and limits any fiduciary conflict of interest that the manager or agent may have in evaluating a particular employment opportunity.

Nonetheless, the lifecycle and practical reality of the entertainment industry creates a conundrum for managers. Managers typically are the first contact of a young artist, and successful agents will not likely represent a new artist where there is no visible return on investment. As such, the manager is put in a position where, to procure a successful career for the artist, the manager must generate employment opportunities for the artist to gain visibility until an agent will represent him or her. When


22. Id. at 481–82.

23. Id. at 483.

24. Zelenski, supra note 20, at 980.

25. However, this structure does not include situations where an agent serves as a manager as well.


27. Id.
managers step into the ecosystem reserved for the agent, complications ensue under both the TAA and New York Employment Agency Law.\(^{28}\)

**B. California’s Talent Agencies Act**

The TAA’s history extends back to 1913 with the passing of the Private Employment Agencies Law, which imposed licensing requirements for employment agents.\(^{29}\) The legislature was primarily concerned with agents taking advantage of artists.\(^{30}\) Some of the concerns involved conflicts of interest, including fee splitting between agents or sending artists to “houses of ill fame.”\(^{31}\) The multiple iterations of the TAA, whose present form came about in 1978,\(^{32}\) is the codification of the legislature’s continual concern of preventing exploitation of the artist.\(^{33}\) The only relative expansion of the TAA came about in 1982 when the legislature passed an amendment that allowed unlicensed individuals to avoid a violation of the TAA if they worked in concert with a licensed agent.\(^{34}\)

The California Legislature has made attempts to provide a regulatory scheme to govern and regulate talent managers. The most recent attempt was the 1999 Kuehl Amendment, which sought to create licensing and testing requirements for talent managers to ensure that fledgling artists know they are being represented by a reputable state-licensed manager.\(^{35}\) The proposal paralleled the TAA in most structural regards, but did not provide any real solution to the present concern as agents remained the only party allowed the procure employment.\(^{36}\) Nevertheless, the California Supreme Court held that the TAA does “apply to [talent] managers as well as agents.”\(^{37}\)

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30. Id.

31. Id. (citation omitted).

32. The TAA was codified to its present scheme at CAL. LAB. CODE § 1700; see also Birdthistle, supra note 7, at 512.


34. CAL. LAB. CODE § 1700.44 (see discussion infra Part II.B.2); see Birdthistle, supra note 7, at 511–12; see also Devlin, supra note 28, at 389.


The TAA essentially prohibits unlicensed individuals from acting as a talent agent.\textsuperscript{38} Licensed talent agencies must comply with the procedural requirements of the TAA, which include submitting form contracts and fees to the state, posting bond, and prohibitions against discrimination and certain types of conflicts of interest.\textsuperscript{39} For controversies arising under the TAA, the parties in dispute must first petition the California Labor Commissioner with an appeal reviewable de novo in the California superior court.\textsuperscript{40} In the aim of protecting the artist and the general policy of the TAA, California case law provides a remedy where any "unlicensed person's contract with an artist to provide the services of a talent agent is illegal and void."\textsuperscript{41}

C. The Traditional TAA Application, Preston, and Marathon.

Two major decisions in recent years have affected how the TAA operates procedurally and the outcomes in artist-manager disputes. The first wrinkle in the procedure of these disputes was developed in the 2008 United States Supreme Court decision of Preston v. Ferrer.\textsuperscript{42} The Court held that where the parties agree to arbitrate disputes pursuant to a provision in their contract, the Federal Arbitration Act supersedes the TAA.\textsuperscript{43} This principle enables arbitration clauses to be valid in artist-manager and artist-agent relationships, as opposed to only allowing adjudication before the California Labor Commissioner as the TAA permits. The second significant case, Marathon Entertainment, Inc. v. Blasi (also decided in 2008), was a landmark decision for the case law dynamic of the TAA. Marathon formally introduced severability into the TAA ecosystem, which provided some recourse for managers.\textsuperscript{44} Nevertheless, before this decision, there were numerous examples of the traditional TAA application where a manager was unable to recover for lost commissions while acting as an unlicensed talent agent.

Traditionally, courts and the California Labor Commissioner have applied a strict interpretation of the TAA, which provides no relief for

\textsuperscript{38} \textsc{Cal. Lab. Code} § 1700.5.
\textsuperscript{39} See \textit{id.} at §§ 1700.23–1700.47.
\textsuperscript{40} \textit{Id.} at § 1700.44; \textit{see also} Buchwald v. Katz, 8 Cal. 3d 493, 498 (1972) (holding that the standard review for appeals should be de novo rather than review of the prior proceeding).
\textsuperscript{41} Styne v. Stevens, 26 Cal. 4th 42, 51 (2001); \textit{see also} Waibren v. Peppercorn Prod., Inc., 41 Cal. App. 4th 246 (1995); \textit{see also} Buchwald v. Super. Ct., 254 Cal. App. 2d 347, 351 (1967) ("[S]ince the clear object of the Act is to prevent improper persons from becoming artists' managers and to regulate such activity for the protection of the public, a contract between an unlicensed artist's manager and an artist is void.").
\textsuperscript{43} \textit{Id.} at 359; \textit{see also} 9 U.S.C. § 1.
\textsuperscript{44} Marathon Entm't., Inc. v. Blasi, 42 Cal. 4th 974, 997 (2008).
managers who procure employment for their client.\footnote{Zarin, supra note 12, at 962.} The \textit{Waisbren v. Peppercorn Productions} decision embodies the bright-line judicial approach that any unlicensed activity is covered by the TAA.\footnote{\textit{Waisbren}, 41 Cal. App. 4th 246; \textit{see also DONALD E. BIEDERMAN ET AL., LAW AND BUSINESS OF THE ENTERTAINMENT INDUSTRY 56–60} (Greenwood Publ'g Grp., 5th ed. 2007).} In \textit{Waisbren}, the manager's occasional procurement of employment was incidental to his other responsibilities.\footnote{\textit{Id.} at 250.} The court recognized that the remedial purpose of the TAA, and that its "licensing scheme contemplates that the 'occasional talent agent,' like the full-time agent, is subject to regulatory control."\footnote{\textit{Id.} at 255.} Citing the California Entertainment Commission,\footnote{\textit{Id.} at 256.} the court highlighted the black and white approach to the regulation of agents and managers: "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."\footnote{\textit{Id.} at 258.}

In a more notorious example,\footnote{See Jonathan E. Stern, \textit{Talent Agency Act – Don't Procure Employment Without a License}, ASS'N OF TALENT AGENCIES (Jan. 1, 2008), http://www.agentassociation.com/frontdoor/news_detail.cfm?id=306; \textit{see also Busch, supra note 28.}} the former manager for the Deftones, Dave Park, sued for breach of contract against the band for unpaid commissions.\footnote{Park v. Deftones, 71 Cal. App. 4th 1465, 1466–68 (1999).} The California Labor Commissioner found that Park had obtained eighty-four engagements for the Deftones without a license.\footnote{\textit{Id.} at 1468.} The court followed the reasoning of \textit{Waisbren}\footnote{\textit{See BIEDERMAN ET AL., supra note 46, at 58–60} (explaining that the bright line rule in \textit{Waisbren} was underscored in \textit{Park}).} and stressed the report filed by the California Entertainment Commission and its conclusion that "personal managers or anyone not licensed as a talent agent should not, under any condition or circumstances, be allowed to procure employment . . . without being licensed as a talent agent."\footnote{\textit{Park}, 71 Cal. App. 4th at 1472 (stressing the California Labor Commissioner's reluctance to endorse incidental procurement).}
In 2008, the California Supreme Court decided Marathon, which altered the legal environment for managers. Marathon Entertainment sued Rosa Blasi for breach of contract and sought recovery of unpaid commissions. In 1998, Blasi hired Marathon to be her personal manager in exchange for fifteen percent of her earnings "from entertainment employment obtained during the course of the contract." Marathon claimed that Blasi failed to pay commission due from her Strong Medicine employment contract after she began to reduce her commission payments to ten percent in 2001, and eventually ceased payments altogether. Blasi argued that Marathon procured employment as an unregistered talent agent, thus violating the TAA. The Labor Commissioner concluded that Marathon in fact violated the TAA by soliciting and procuring engagements for Blasi, and thus voided the contract ab initio which barred Marathon from recovery pursuant to the TAA.

In an opinion from Justice Werdegar, the court agreed with the Labor Commissioner that Marathon had procured engagements for Blasi without a license, and thus violated the TAA. Justice Werdegar then addressed whether or not Marathon could obtain partial recovery of fees and commissions duly owed under the contract by using severability under section 1599 of the California Civil Code. Justice Werdegar concluded that the TAA and severability were not in conflict and that the Labor Commissioner had severed contracts unilaterally without citing section 1599. Moreover, since the legislature had not "seen fit to specify the remedy for violations" of the TAA, the rules of interpretation suggested that section 1599 applies to TAA disputes.

57. Marathon, 42 Cal. 4th at 981.
58. Id.
59. Id.
60. Id. at 981–82.
61. Id.
62. See id. at 990 (explaining that the parties stipulated that Marathon did not hold a license, and that there was no dispute over whether Marathon had procured engagements for Blasi).
63. Marathon, 42 Cal. 4th at 990–98; see also CAL. CIV. CODE § 1599 (West 1872) ("Where a contract has several distinct objects, of which one at least is lawful, and one at least is unlawful, in whole or in part, the contract is void as to the latter and valid as to the rest.").
65. Marathon, 42 Cal. 4th at 996.
Two previous California cases had reflected on the idea of severability in TAA artist-manager disputes. The appellate court in *Yoo v. Robi* found that the plaintiff-manager procured employment in violation the TAA, and the contract was thus voided under the traditional approach. The court reasoned that the decision of severability is weighed by "equitable considerations." First, the trade-off here was the "unbargained" benefit to the artist in not having to pay for management services against "a dilution of the deterrent effect of invalidating the entire contract" if severability was to be applied. Second, decided with the *Marathon* court nearing a decision, the court in *Chiba v. Greenwald* did not permit severability because the trial court determined that the legal and illegal terms of the contract were inextricably intertwined, thereby making the contract invalid as a whole.

In *Marathon*, Justice Werdegar continued his severability analysis expounding that:

If the central purpose of the contract is tainted with illegality, then the contract as a whole cannot be enforced. If the illegality is collateral to the main purpose of the contract, and the illegal provision can be extirpated...by means of severance or restriction, then such severance and restriction are appropriate.

In a fashion not necessarily in accord with the TAA, Justice Werdegar specified that managers who truly act as managers and procure employment in an isolated incident should be allowed to recover for services rendered that do not require a license. The court held that severability could be applied in the present case, but since it is an equitable doctrine and a fact specific analysis, it is more appropriate for the Labor Commissioner and trial courts to decide, and the case was remanded for further proceedings.

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67. *Id.*
68. *Id.*
69. *Chiba v. Greenwald*, 156 Cal. App. 4th 71, 81–82 (2007). The dissent by Justice Johnson, who penned the decision in *Yoo v. Robi*, expressed at great length the considerations for allowing severability in this case. *Id.* at 82. He noted that no matter what the *Marathon* court would eventually decide, the parties here should be allowed severability. *Id.* at 86–90.
70. *Id.* at 97–98 (citing Little v. Auto Stiegler, Inc. 29 Cal. 4th 1064, 1074 (2003)).
71. *Marathon Entm't., Inc. v. Blasi*, 42 Cal. 4th 974, 998 (2008) (citing Lindenstadt v. Staff Builders, 55 Cal. App. 4th 883, 894 (1997) (where a real estate broker acted in some instances as a broker without a license, and the finder could recover for services that did not require a license)).
72. *Marathon*, 42 Cal. 4th at 998–99 (discussing the letters and briefs submitted by managers showing their "uniform dissatisfaction with the Act's application"). Justice Werdegar
The court in Marathon solidified the fact that managers that act as talent agents without a license can still recover the commissions owed via severability principles on non-agent services performed under the artist-manager contract.\(^{73}\) In Dwight Yoakam v. The Fitzgerald Hartley Co., the California Labor Commissioner decided that the management contract where the manager procured engagements for the recording artist was not void ab initio.\(^{74}\) The Labor Commissioner held that the procured engagements were "collateral to the main objective of the [management] contract," and the manager's violations of the TAA were severed from the contract.\(^{75}\) Conversely, the Labor Commissioner in Kyle Bluff v. Paris Djon found the artist-manager agreement void ab initio on the grounds that the manager provided very little management services and spent most of his time procuring employment for the band.\(^{76}\) The Labor Commissioner balked at an application of severance under Marathon because "the central purpose of the contract between the parties was to unlawfully procure musical engagements."\(^{77}\)

After Preston and Marathon, some commentators discussed the viability of the TAA and whether these decisions materially altered the legal landscape for managers and artists under the TAA.\(^{78}\) In the years following these decisions, however, the Labor Commissioner still adjudicates a healthy amount of TAA disputes. Since 2008, the Labor Commissioner has heard 50 different disputes, while it rendered 204 published decisions between 1971 and 2007.\(^{79}\) Comparatively, between 2008 and 2013, the Labor Commissioner adjudicated an average of ten disputes per year, whereas between 1971 and 2007, an average of just nearly six disputes per year.\(^{80}\) This comparison encapsulates that the Labor

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\(^{73}\) See generally id. at 996-99; see also McPherson, supra note 56, at 462 ("Under Marathon, unless the violations by the manager so permeate the entire relationship between that manager and the artist that the unlawful acts cannot be severed from the lawful acts, the agreement will not be voided. . . ").


\(^{75}\) Id. at 21.


\(^{77}\) Id. at 4.

\(^{78}\) McPherson, supra note 56.


\(^{80}\) Id.
Commissioner still adjudicates a significant number of TAA disputes post Preston and Marathon, unlike some commentators’ predictions.

I. The TAA Agent-Manager Collaboration Safe Harbor

Uniquely, the TAA provides a safe harbor for managers who act in conjunction with a registered talent agent in the negotiation of an employment contract. The California Labor Commissioner breaks down the provision into a two-part analysis: (1) whether the manager acted in conjunction with, and at the request of, the registered talent agent, and (2) whether the manager’s activities are considered “the negotiation of an employment contract.” In Plana v. Quinn, the manager and agent agreed that the manager would contact the casting manager for the television program Ugly Betty. The Labor Commissioner held in favor of the manager, stating that “the Labor Commissioner has historically considered acts completed in furtherance of securing employment for artist’s aspects of the negotiation of an employment contract.” In Transeau v. 3 Artist Management, the Labor Commissioner held that the safe harbor did not apply to the manager, as “‘procurement’ includes any active participation in a communication with a potential purchaser of the artist’s services aimed at obtaining employment for the artist, regardless of who initiated the communication or who finalized the deal.” The TAA’s safe harbor allows for collaboration between managers and agents to spread the workload and risk of managing all portions of the artist’s career. This safe harbor is an underutilized, and underpublicized, provision of the TAA that talent managers should employ more often.

D. New York’s Employment Agency Law

New York’s talent agency law is regulated in a single statute, which additionally covers employment agencies for nurses, emigrant job seekers, and general employment agencies that procure, or claim to procure, the services of artists.

81. This increased number may also indicate that more TAA disputes are being litigated as well given the healthier environment for managers to seek recourse. It should be noted that this comparison does not take into account any private arbitration disputes allowed under Preston.

82. CAL. LAB. CODE § 1700.44 (“It is not unlawful for a person or corporation which is not licensed pursuant to this chapter to act in conjunction with, and at the request of, a licensed talent agency in the negotiation of an employment contract.”).

83. Plana v. Quinn, No. TAC-15652, at 6 (Cal. Lab. Comm’r Feb. 24, 2012) (finding that the manager was acting in conjunction with the agent pursuant to the statute, and applying the severability doctrine under Marathon).

84. Id.

85. Id.

employment engagements for job seekers. The statute requires employment agents to obtain a license from the state and post a bond in case conflicts arise. Section 171(8) of the New York General Business Law defines a “[t]heatrical employment agency” as “any person . . . who procures or attempts to procure employment or engagements for circus, vaudeville, the variety field, the legitimate theater, motion pictures, radio, television, phonograph recordings, transcriptions, opera, concert, ballet, modeling or other entertainments or exhibitions or performances . . . .” The statute provides an exception for nonlicensed managers who procure employment engagements where the procurement was incidental to their management duties. Much like the TAA, any individual who operates an employment agency or acts as an employment agent without a license, violates the statute and cannot lawfully receive commissions. The statute also contemplates a fee ceiling of ten percent per individual engagement.

With a similar public policy underpinning the TAA, New York’s talent agency origins date back to 1910, prior to the TAA’s ancestral birth. To enforce this public policy, the New York law can (1) regulate the conduct of the agency, for example by prohibiting an agent from sending an artist to a place “maintained for immoral or illicit purposes,” and (2) allow criminal proceedings for violations under the statute.

Traditional case law in which managers procure engagements parallels that of California’s TAA. In the 1912 case of Meyers v. Walton, the court held that a contract that contemplated management duties to be rendered between a manager and a vaudeville performer was unenforceable because the manager acted solely as a booking agent and procured employment for the artist. Citing precedent, the court noted that “[o]ne who is required by

87. N.Y. GEN. BUS. LAW § 171; see also N.Y. ARTS & CULT. AFF. § 37 (contemplating the same sections of the New York General Business Law, but providing restrictions for engagements with employers who have a record of not paying salaries and such).
88. N.Y. GEN. BUS. LAW §§ 172-177.
89. Id. at §§ 177–178.
90. Id. at § 171(8).
91. Id. For coverage of the incidental booking exception, see discussion infra Part III.A.
92. Id. at § 172.
93. Id. at § 185(8). The fee ceiling applies to all types of theatrical employment except for “engagements for orchestras and for employment or engagements in the opera and concert fields,” where the limit is twenty percent per engagement. N.Y. GEN. BUS. LAW § 185(8).
94. See discussion supra Part II.B.1.
96. See N.Y. GEN. BUS. LAW § 187(6).
97. See id. at § 190.
law to procure a license to conduct any trade, calling, or profession may not recover for services rendered..."

99 In Pine v. Laine, the court found that an unlicensed manager who sought music recording contracts for an artist violated the statute. 100 Since the artist already had a manager, and the defendant only pursued employment opportunities for the artist, the court found that the defendant was clearly acting as an unlicensed agent and denied recovery for services rendered. 101 Had the defendant already been the artist's primary manager, however, there could have been a possibility for utilizing section 171(8)'s incidental booking exemption.

III. The Key California-New York Distinctions

This section addresses the two major distinctions between the TAA and New York Employment Agency Law: (1) New York's incidental booking exception, and (2) California's manager-agent collaboration safe harbor.

A. New York's Incidental Booking Exception

The TAA and New York Employment Agency Law read nearly the same, aside from the incidental booking exception present in New York's statute. 102 Section 171(8) of the New York General Business Law provides that:

Theatrical employment agency means any person... who procures or attempts to procure employment... but such term does not include the business of managing such entertainments, exhibitions or performances, or the artists or attractions constituting the same where such business only incidentally involves the seeking of employment therefor. 103

This exemption allows a manager who is operating under a management contract with an artist to procure employment if it is incidental to the manager's regular duties under the contract. 104

New York case law gives insight into how the courts have viewed the structure of this exception. One of the earliest examples came in Pawlowski v. Woodruff, where a manager was able to recover commission owed under the management agreement with the artist, even though the manager was not a registered agent under the New York statute. 105 The

99. Id. (citing Sirkin v. Fourteenth Street Store, 124 A.D. 384, 388-89 (1908)).
101. Id.
102. Birdthistle, supra note 7, at 519.
103. N.Y. GEN. BUS. LAW § 171(8) (emphasis added).
104. Birdthistle, supra note 7, at 519-20.
court found that the manager was entitled to relief because the contract was indeed a contract for artist management services, and the employment procurement was only incidental to the services provided for under the contract.\textsuperscript{106} The Pawlowski court concluded that an "employment agency could not circumvent the statute by putting its contract to procure employment for an artist in the form of an agreement for management."\textsuperscript{107} Following Pawlowski, courts have continued to recognize that when a dispute arises and a valid artist-manager contract exists, the incidental booking exception will be recognized, so long as the provisions are management focused.\textsuperscript{108}

In Washington v. Escobar, a New York court affirmed the position in Pawlowski, stating that the agreement between the manager and agent was a contract for management services, not an agency contract.\textsuperscript{109} The contract contained clauses explicitly indicating that the manager was "not an employment agency," and there was no promise to procure employment under the contract.\textsuperscript{110} Additionally, when New York courts have found that the primary purpose of a manager-artist agreement did not pertain to management duties, they have not enforced the exception.\textsuperscript{111} In Friedkin v. Harry Walker, the court held: "the instant contract cannot be characterized as one of management . . . [Friedkin] is clearly an unlicensed employment agency . . . and the exclusionary provision of [section 171(8) of the New York General Business Law] is clearly inapplicable."\textsuperscript{112} These cases stand for the idea that management centric contracts allow more breathing room within the incidental booking exception than contracts that are not clearly focused on management duties.

As previously noted, this exception is not currently present in the TAA, but the California legislature has made multiple efforts to adopt a similar incidental booking provision.\textsuperscript{113} In 1972, the Conference of Personal Managers proposed an incidental booking exception as part of an

\begin{itemize}
\item \textsuperscript{106} Id. at 697.
\item \textsuperscript{107} Id.
\item \textsuperscript{108} See, e.g., Russell-Stewart, Inc. v. Birkett, 24 Misc. 2d 528, 530 (N.Y. Sup. Ct. 1960) (holding that the language of the contract was that of an employment agency agreement, not a management agreement, was contrary to public policy and was not enforceable); see also Gervis v. Knapp, 182 Misc. 311, 313 (N.Y. Sup. Ct. 1943) (citing Pawlowski, 122 Misc. at 695) (finding no weight in the argument against enforcing the contract where a "contract establishes that the plaintiff was primarily a manager").
\item \textsuperscript{110} Id. at *14.
\item \textsuperscript{111} E.g., Friedkin v. Harry Walker, 90 Misc. 2d 680 (N.Y. Civ. Ct. 1977).
\item \textsuperscript{112} Id. at 613–14.
\item \textsuperscript{113} Neville A. Johnson & Daniel Webb Lang, The Personal Manager in the California Entertainment Industry, 52 S. CAL. L. REV. 375, 404 n.168 (1979).
\end{itemize}
amendment to the Labor Code applicable to employment agents.\textsuperscript{114} This organization sought to obtain consistent statutes between jurisdictions as managers’ activities are based primarily between California and New York.\textsuperscript{115} California talent agents who criticized the exception strongly opposed the amendment, arguing that allowing managers to incidentally procure employment in California without a license would violate collective bargaining agreements.\textsuperscript{116} In particular, the provisions “affecting duration of contracts with artists and fees chargeable under such contracts” were of concern to the guilds and agents.\textsuperscript{117} Individual members of the California Labor Commissioner and representatives of the Screen Actors Guild criticized the incidental booking exception on the basis that it would be “unadministrable.”\textsuperscript{118} During the hearings, the effectiveness of the New York approach was analyzed and was determined to be difficult to assess.\textsuperscript{119} Jurisdiction was an additional concern raised during the hearings.\textsuperscript{120} The determination of whether or not the procurement was incidental is left to the courts in New York, whereas the California Labor Commissioner has jurisdiction to hear the dispute before it reaches the superior court.\textsuperscript{121}

Nevertheless, commentators and judges alike have advocated that California should adopt a similar provision.\textsuperscript{122} In Waisbren, Justice Masterson recognized that allowing a manager to spend a majority of his time to procure employment for the artist would violate the legislative intent behind the TAA.\textsuperscript{123} But the “fact that an unlicensed manager may devote an ‘incidental’ portion of his time to procurement activities would be of little consolation to the client who falls victim to a violation of the Act.”\textsuperscript{124} Other commentators have argued for the various actors guilds who

\textsuperscript{114} Id.
\textsuperscript{115} Id.
\textsuperscript{116} Id.
\textsuperscript{117} Id. (citing The Licensing and Regulation of Artists, Managers, Personal Managers, and Musicians Booking Agencies Before the Cal. Senate Comm. on Industrial Relations 49–52, 216 (Nov. 20, 1975)).
\textsuperscript{118} Johnson & Lang, supra note 113, at 404.
\textsuperscript{119} Id.
\textsuperscript{120} Id.
\textsuperscript{121} Id.; see also CAL. LAB. CODE § 1700.44. This amendment and subsequent debate took place in 1982, twenty-six years before the decision of Preston v. Ferrer, see discussion supra Part II.B.1.
\textsuperscript{122} See Zarin, supra note 12, at 932; see, e.g., Waisbren v. Peppercorn Prod., Inc., 41 Cal. App. 4th 246, 255 (1995); see generally Birdthistle, supra note 7.
\textsuperscript{123} Waisbren, 41 Cal. App. 4th at 255 (holding that the TAA applies to part-time and full-time talent agents, and if an individual acts as an agent without a license, then the representation agreement is void); see also Wachs v. Curry, 13 Cal. App. 4th 616, 628 (1993).
\textsuperscript{124} Waisbren, 41 Cal. App. 4th at 255.
collectively bargain with entertainment agencies to oversee and regulate personal managers.\footnote{125} Nonetheless, \textit{Marathon} upholds the principle\footnote{126} in California that the TAA does not recognize incidental procurement of employment to be an exemption, and as such, incidental acts cannot be recovered for.\footnote{127}

**B. The Agent-Manager Collaboration Safe Harbor Absence in New York Law**

New York law does not contain a similar safe harbor\footnote{128} for managers who procure employment in collaboration with a licensed agent. New York law actually discourages managers and agents from working together, as it rebuts the incidental booking exception.\footnote{129} By collaborating with an agent in procuring employment for the artist, it is presumed that the manager is engaged in too much of the employment procurement activity and employment procurement is not incidental to the manager's regular duties.\footnote{130} This additional distinction creates a conflict of law between the TAA's safe harbor and the incidental booking exception, which commentators and justices have advocated to adopt.\footnote{131} In adding the incidental booking exception to the TAA, the legislature would have to remove the safe harbor provision. A manager procuring employment under that provision would not be eligible to use the incidental booking exception since the procurement is not incidental to their management duties and would violate the TAA. Consequently, the incidental booking exception and safe harbor provision cannot exist together.

**IV. Outcomes and Acceptance of the Talent Agencies Act**

As mentioned previously in Part II, common disputes between talent managers and artists generate different results depending on the jurisdiction in which the dispute is heard. Considering the discussion above, and the hypothetical described in Part II, the differing jurisdictional results are quite clear.

\footnote{125}{Birdthistle, \textit{supra} note 7, at 499 ("[T]he most appropriate response to this situation is for the entertainment guilds to use their strategic position in the industry to oversee personal managers and to regulate the degree to which those managers can act as producers.").} \footnote{126}{Styne v. Stevens, 26 Cal. 4th 42, 51 (2001) ("The weight of authority is that even the incidental or occasional provision of such services requires licensure.").} \footnote{127}{Marathon Entm't., Inc. v. Blasi, 42 Cal. 4th 974, 987–88 (2008).} \footnote{128}{See discussion \textit{supra} part II.B.2.} \footnote{129}{Zarin, \textit{supra} note 12, at 966 (citing Fred Jelin, \textit{The Personal Manager Controversy: Carving the Turf, in Counseling Clients in the Entertainment Industry} 1993, at 471, 473 (PLI Pats., Copyrights, Trademarks & Literary Prop. Course Handbook Series No. 359, 1993)).} \footnote{130}{Id.} \footnote{131}{See discussion, \textit{supra} part III.A.}
A. California’s TAA Outcomes

Prior to the *Preston* and *Marathon* decisions, a common dispute between a manager and an artist would be resolved in the traditional manner before the California Labor Commissioner. Thus, the actor in the hypothetical posed in Part II of this note would prevail on his claim since the manager acted as an unlicensed talent agent in violation of the TAA. Accordingly, the Labor Commissioner would likely strike down the agreement in its entirety due to the manager’s TAA violation.132

After *Preston* and *Marathon*, however, the outcome would be less damaging to a manager. Although the outcome on the merits would remain the same, the Labor Commissioner would have the option133 to sever the invalid portions of artist-manager contract, and the manager would be allowed to recover the fees related to management activities. Thus, the manager is made whole, but only as to the fees for management services rendered. Under *Preston*, managers also have the option to resolve a claim before a private arbitrator, thus reducing costs and increasing convenience for managers. This change is a marked improvement for managers who, prior to *Marathon*, had much more to lose if they procured employment for an artist.

Additionally, the TAA’s collaboration safe harbor flexibly allows for another stream of work and fees for the manager. Applying the same facts from the Part II hypothetical, assume the actor had an agent, and the manager and agent agreed that the manager would contact the producer-director on the set that day to negotiate upcoming opportunities for the actor. The manager could be legally entitled to compensation for this procurement under the TAA, if the manager helped conduct negotiations over the contract. This safe harbor allows the manager and agent to collaborate, and obtain more employment opportunities for their client in a more efficient manner than a true separation of duties would allow.

B. New York’s Employment Agency Law Outcomes

The Part II hypothetical generates a different result for the manager if the scenario took place in New York. Claiming New York’s incidental booking exception, the manager could recover the fees for employment procurement in accordance with the statute. Since the manager was present on set while conducting management services for the artist, and subsequently began discussing and procuring employment opportunities with the producer-director incidentally, the manager would likely fall under the exception. Nevertheless, to raise the incidental booking exception as a

132. See discussion, *supra* Part II.
133. See discussion, *supra* Part II.B.1.
valid defense for the manager, the artist-manager contract must be clearly structured as a contract for managerial services. As opposed to the TAA, managers will be able to receive commissions for certain engagements depending on (1) the manner in which the manager procured the engagement, and (2) the structure of the artist-manager contract.

C. Keeping the TAA Intact

California’s TAA in its present form is an imperfect regulatory scheme. The preceding hypotheticals illustrate that the statutes produce different results in California and New York. However, if structured in the proper way, employment procurement under the TAA creates more equitable results for managers, while promoting the best treatment of the artist in the process. Adding an incidental booking exception to the TAA or a private manager statute could resolve issues managers face currently, but the changes could put the underlying public policy of the TAA in jeopardy.

Initially, the adoption of an incidental booking provision would cloud the waters. As the New York courts have recognized, contracts between artists and managers that mainly concern management duties are normally valid if the manager procures employment incidentally to those duties. Managers in this type of arrangement still have the ability to take advantage of artists and violate the policy underlying the TAA. Managers tend to charge more for services than agents do. An incidental booking exception can create an environment where particularly devious managers can charge high fees to fledgling artists, procure employment incidentally, and thus reap the benefits of a higher commission rate than agents are allowed to receive. Situations similar to Washington v. Escobar can arise where an artist-manager contract is structured to effectuate the allowance of the incidental booking exception, and in the case of a dispute, the manager would be insulated from losing those high commissions. Gamesmanship in contract-drafting would ensue to the detriment of artists not well versed or experienced in hiring and contracting with personal managers, which is exactly the type of abuse the TAA seeks to prevent. Ultimately, these disputes would be resolved as a matter of contract interpretation, as opposed to the fact that a manager violated the TAA. Adding

134. See supra Section III.A.
135. See generally supra Section II.
136. See supra Section III.
138. O'Brien III, supra note 18, at 481–82; see also Zelenski, supra note 20, at 983.
the incidental booking exception can create room for abuse by managers, and eliminate the predictable outcomes TAA disputes currently enjoy.

Adding an incidental booking exception to the TAA would also conflict with its collaboration safe harbor for managers. The presumption that negotiations of an engagement is not incidental to the manager’s regular duties, would not allow for the triggering of the incidental booking exception, but it would be a valid exercise under the TAA’s safe harbor. By adding the incidental booking provision, the statute would generate opposite results, and as such, they cannot coexist. By keeping the TAA intact, the agent-manager collaboration safe harbor remains complete and effectuates better results for the artist.

The TAA’s current structure without an incidental booking exception effectuates more desirable relationships between the artist, manager, and agent. The strict disallowance under the TAA of managers procuring employment keeps the roles and duties clear for each party involved with the artist. As such, the TAA encourages a checks-and-balances system between the artist, manager, and agent. Justice Werdegar in Marathon recognized, however, that the division of duties between the manager and agent “largely exists in theory,” but the TAA encourages this type of divided relationship more than New York’s statute.140

Nonetheless, the California legislature recognized that the difference in duties is not always followed, so the safe harbor for managers to procure employment collaboratively with the agent purports to provide some relief.141 The safe harbor allows for the manager and agent to work together and spread some of the responsibilities while keeping the best interest of the artist in mind. Additionally, the safe harbor can help reduce conflicts of interest that may arise. Agents, the only individuals that can procure employment, may only show an artist particular engagements to pursue or engagements that they are personally involved in.142 The safe harbor does not eliminate this problem, but it diversifies engagement procurement sources to a certain degree.143 The safe harbor enables the checks and balances and imposes fiduciary duties upon the agent. A manager, acting legally under the safe harbor, can generate a new stream of engagements for the artist away from the agent, which perhaps the agent could not, or would not, due to conflicts of interest. This safe harbor is a

140. Marathon, 42 Cal. 4th at 980.
141. CAL. LAB. CODE § 1700.44.
142. Admittedly, this issue cannot be mitigated where an agent also acts as an artist’s personal manager.
deviation in the statute that New York does not have, which gives clarity to the scope in which the manager can act.

Additionally, an act solely regulating personal managers may not be necessary in the wake of recent California case law to provide managers with protection. The combination of the decisions in Marathon and Preston, and the TAA’s safe harbor, create an environment for talent managers has been altered dramatically. Managers are no longer at risk for losing management fees over their entire contract, but only the fees generated from violating the TAA.144 Disputes heard before the California Labor Commissioner and private arbitrators now apply the Marathon severability principle to achieve such a result.145 Under the TAA’s safe harbor provision, managers are able to practice some level of valid engagement negotiations that can provide another stream of legitimate fees for them. Thus, managers today have more protection and scope of activities than ever before. Nevertheless, a personal manager statute may be necessary to protect the artist under the same public policy principles that led to the enactment of the TAA; in fact, development of this type of artist protection has begun to percolate outside the California legislature.

On March 4, 2014, Screen Actors Guild-American Federation of Television and Radio Artists (SAG-AFTRA) released its first attempt to regulate the conduct of talent managers.146 In its voluntary ethics code, SAG-AFTRA seeks to regulate talent manager contracts and fee structures, while recognizing the exceptions under the TAA and New York law.147 While the code of conduct is still in its infancy, it represents a step toward regulation of a personal manager’s conduct, and the TAA and Marathon provide commercial protection for managers.

Finally, the TAA’s transparent statutory language and straightforward enforcement by the California Labor Commissioner and appellate courts provide clear and predictable outcomes. Agents and managers, who choose to procure employment, understand that acting in accordance with the statute will decrease the likelihood of conflicts. Despite the strictness

144. See generally McPherson, supra note 56, at 444.


147. See generally SAG-AFTRA, supra note 146.
of the TAA and its enforcement, the Marathon decision has given managers more equity in these disputes by allowing severability and upholding valid contracts where commercial actions have been taken as illustrated by the hypotheticals above.\textsuperscript{148} Additionally, the option to adjudicate TAA claims before the California Labor Commissioner and private arbitrators under Preston now enables quick and cost efficient adjudication of disputes when they arise.

V. Conclusion

California and New York are the undisputed kings of the entertainment industry, leaving a sizeable impact on the United States economy as a whole.\textsuperscript{149} However, it seems odd that the two leading jurisdictions treat talent managers in materially different ways. Courts, commentators, and managers have been criticizing and critiquing the TAA on the basis that it provides no equitable relief for managers when they, albeit unlawfully, procure employment for their artist-client. In the case of an artist who is not represented by an agent, what is the manager to do? How can the manager act in the best interest of the artist without violating the statute?

Commentators and managers have lobbied for multiple ways to resolve this issue: the drafting of a talent manager statute, or the addition of an incidental booking exception to the TAA are the most common remedies to the issue. But a question still remains as to whether a talent manager statute or the incidental booking exception could possibly fit within the strong framework that Hollywood, and the entertainment industry in general, has become accustomed to. Adopting either option could alter the well-accepted public policy underpinning the statute and also lead to massive reshaping of the currently successful bargaining agreements in place with SAG-AFTRA and other artist representative institutions.

Admittedly, the current ecosystem for a talent manager in the entertainment industry is challenging, but Marathon and Preston have begun to provide more relief for managers. The TAA’s current iteration is effective in protecting the artist from unscrupulous third parties and satisfies the public policy grounded in the statute. Managers and agents alike should focus on utilizing the current statutory scheme to work together by using the TAA’s collaboration safe harbor provision as an alternative for spreading risks across more parties. By utilizing the TAA as a mechanism to protect the artist, the manager and agent can best promote the artist’s interests.

\textsuperscript{148} See generally Marathon Entm’t., Inc. v. Blasi, 42 Cal. 4th 974, 974 (2008).

\textsuperscript{149} See INT’L INTELLECTUAL PROP. ALLIANCE, supra note 1, at 1.