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THE CURRENT ANTITRUST DISPUTE BETWEEN THE WRITERS GUILD OF AMERICA AND HOLLYWOOD TALENT AGENCIES: A MODERN RETELLING OF A FAVORITE HOLLYWOOD CLASSIC

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INTRODUCTION

If entertainment executives decided to make a motion picture about the history of American antitrust law, Hollywood itself would play a leading role.

Currently, a large conflict grounded in contract negotiations and entertainment-industry minutiae rages throughout Hollywood. This conflict affects every person who writes and creates television shows and movies that the world watches and consumes.

Since April 2019, the labor union representing writers, the Writers Guild of America (the "Writers Guild"), and the institutions charged with procuring writers their jobs and negotiating their compensation, the agencies that comprise the Association of Talent Agencies ("ATA"), have been in a standoff surrounding the renewal of a decades-old contract between the Writers Guild and the ATA.[1] The Artists' Manager Basic Agreement of 1976 ("AMBA") was a franchise agreement between the ATA and the Writers Guild that governed the working relationship between writers and their agents. The AMBA recently expired in April 2019.[2]

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[1] *See* Jordan Crucchiola, *The Hollywood Fight That's Tearing Apart Writers and Agents, Explained*, VULTURE, https://www.vulture.com/article/wga-hollywood-agents-packaging-explained.html (last updated April 21, 2019).

[2] The Artists' Manager Basic Agreement gives agencies the authority to negotiate over Writers Guild of America's scale (the minimum a writer can be compensated for the writer's work) on a

The AMBA contained a "Code of Conduct" ("Code") that talent agencies were required to follow. The Code regulated the way agencies represented film and television writers, and it became ubiquitous as the Writers Guild and the ATA contractually authorized franchised agencies to include writers in packages through agreements entered into between the Writers Guild and the ATA.

The ATA refused to sign the Writers Guild's new Code of Conduct. The new Code requires agencies to absolutely, categorically, and without exception cease and withdraw from (i) the decades-long practice of "packaging" arrangements, and (ii) any affiliation with or investment in any entity that produces or distributes content (agency-affiliated production).[3]

Since the expiration of the AMBA, of the roughly one hundred talent agencies that comprise the ATA, approximately forty smaller talent agencies have agreed to the Writers Guild's Code of Conduct.[4] However, the Writers Guild is specifically targeting the major talent agencies: Creative Artists Agency ("CAA"), William Morris Endeavor ("WME"), and the United Talent Agency ("UTA").

In April 2019, the dispute between the Writers Guild and the major talent agencies took the spotlight in the Superior Court of California in Los Angeles. There, the Writers Guild filed a lawsuit against the major talent agencies, alleging violations of state and federal law with respect to anticompetitive practices associated with packaging content. The Writers Guild moved into

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writers' behalf. Under federal labor law, the Writers Guild of America is the only organization that is allowed to negotiate compensation for its members, however the union can franchise that right to other entities, such as talent agencies. *See generally* 29 U.S.C. §§ 151–169. *Cf.* Jonathan Handel, *Can the Writers Guild Turn a Manager Into an Agent? Probably Not*, HOLLYWOOD REP. (Mar. 27, 2019).

[3] David Robb, *CAA Files Antitrust Lawsuit Against WGA, Becoming Latest Agency To Sue*, DEADLINE (July 1, 2019), https://deadline.com/2019/07/caa-sues-writers-guild-group-boycott-hollywood-wga-agencies-1202640486/; *see also* Todd S. Purdum, *Why Hollywood Writers are Firing the Agents They Love*, THE ATLANTIC (April 21, 2019), https://www.theatlantic.com/entertainment/archive/2019/04/story-behind-hollywood-writers-vs-their-agents/587650/.

[4] *See* Hoai-Tran Bui, *The WGA vs. ATA Standoff Explained: What is Happening in Hollywood Between Writers and Their Agents?*, /FILM (APRIL 22, 2019), https://www.slashfilm.com/wga-ata-explainer/.

"uncharted waters" when it demanded thousands of Hollywood writers to fire their agents who refused to sign the Code of Conduct.[5] The conflict quickly shifted, graduating to a larger, brighter federal stage in June 2019 when the following sequence of events occurred:

> **June 2019**: UTA and WME filed individual complaints against the Writers Guild for violation of Section 1 of the Sherman Antitrust Act in the United States District Court in the Central District of California, Western Division.[6]
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> **July 2019**: CAA filed a complaint against the Writers Guild for violation of Section 1 of the Sherman Antitrust Act in the United States District Court in the Central District of California, Western Division.[7]
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> **August 2019**: The Writers Guild dismissed its suit in state court and consolidated its claims against CAA, WME, and UTA in the United States District Court for the Central District of California, Western Division ("District Court") adding antitrust violations and allegations of racketeering.[8]

The trailer for this story may facially appear to be a new, exciting summer blockbuster. However, it is best likened to a

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[5] Sasha Ingber, *'Uncharted Waters': Union Tells Hollywood Writers to Fire Their Agents*, NPR (April 13, 2019), https://www.npr.org/2019/04/13/713030206/uncharted-waters-union-tells-hollywood-writers-to-fire-their-agents.

[6] David NG, *CAA becomes third agency to take Writers Guild to court*, LA TIMES (July 1, 2019), https://www.latimes.com/business/hollywood/la-fi-ct-caa-antitrust-suit-wga-20190701-story.html.

[7] *Id.*

[8] Jonathan Handel, *Writers Guild Moves Agency Lawsuit to Federal Court, Adds Racketeering and Antitrust Claims*, HOLLYWOOD REP. (Aug. 19, 2019), https://www.hollywoodreporter.com/thr-esq/writers-guild-moves-agency-lawsuit-federal-court-adds-racketeering-antitrust-claims-1233123.

digital remake of an original motion picture filmed in the 1940s or, better yet, the 1960s.

This Note will examine the Writers Guild's conflict with CAA, WME, and UTA. It will address the merits of the claims through an analysis of Hollywood's monopolistic practices that have emerged, subsided, and reemerged throughout the last century.

This Note begins with a historical overview of the monopolistic practices that existed in early twentieth century Hollywood that resulted in the separation of major motion picture producers and exhibitors from distribution and production companies. This occurred as a result of the 1948 Supreme Court decision *United States v. Paramount Pictures, Inc.*[9] Next, the focus will shift to the anticompetitive practices that forced, via legal action, a major Hollywood talent agency and production company in the 1960s to dissolve its agency business on the grounds that being both a buyer and seller of talent posed an inherent conflict of interest.[10]

At risk of playing "spoiler" to this blockbuster Hollywood sequel, several items should be noted:

(i) The District Court should enjoin the Writers Guild from restricting film and television writers from being represented by the agency of their choosing because doing so does have an anticompetitive effect on a particular market—the agents, producers, directors, and viewers;

(ii) The District Court should hold that the industry-standard practice of "packaging" does not violate the Sherman Antitrust Act because it, in fact, promotes pro-competitive practices between agencies, writers, studios, and production companies; and

(iii) The District Court should determine that agency-affiliated production companies are pro-competitive and outweigh any anticompetitive conflicts of interests. However, the District Court

[9] 334 U.S. 131 (1948).
[10] Purdam, *supra* note 3.

> should reserve the right to require CAA, UTA, and WME to provide evidence that agency-affiliated production companies seek to employ competitor-agency's clients.

Now, let the show begin!

I. HISTORY OF ANTITRUST ISSUES IN HOLLYWOOD

An analysis of government antitrust action in the entertainment industry must begin with a description of the industry's product and the demand for it.[11] The product is never identical, rather each product is uniquely different than the last. The market is constantly evolving, and uncertainty is higher in this industry than most others.[12]

To combat this uncertainty, and have some semblance of security, production companies, studios, theaters and talent agencies have used various tactics to control their respective product from "top to the bottom" to ensure that the sale of their product would remain stable.[13] This approach is known as "vertical integration."[14]

A. THE BEGINNING OF THE MOTION PICTURE INDUSTRY

The history of Hollywood and the entertainment industry is one of continuous innovation and a succession of strategies to

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[11] *See* MICHAEL CONANT, ANTITRUST IN THE MOTION PICTURE INDUSTRY 1 (1960).

[12] *Id.*

[13] In the 1930s and 1940s, major producers in the twentieth century purchased leading theaters. *Id.* Through this strategy, the production company could ensure that its product would be exhibited to paying customers. *Id.* This was an attempt to bring some calm in the midst of a knowingly tempestuous market. *Id.* At the same time, large theater chains acquired production companies to ensure that there would be a steady supply of films. *Id.* Through vertically integrated combinations, it was a small step to nationwide horizontal combinations that could exclude the pictures of independent producers from large theaters, and, by withholding their own pictures from independent exhibitors, force them to sell out to major theater circuits. *Id.*

[14] Erwin A. Blackstone & Gary W. Bowman, *Vertical Integration in Motion Pictures*, 49 J. OF COMM. 123, 124 (1999).

control markets.[15] The first innovations occurred in cameras and projectors, film and screens, distribution organization, theater structure, and in techniques throughout the industry.[16] These approaches were based on control of patents, actors, distribution facilities, and theaters.[17]

In the early twentieth century, there were attempts at setting up monopolies by acquiring patents on equipment and technology needed to produce and exhibit motion pictures.[18] As technology became more sophisticated, the power that patents provided decreased.[19] In an attempt to maintain control, however, industry leaders of the time, led by Thomas Edison, merged their companies and formed a coalition: the Motion Picture Patents Company (the "MPPC").[20] With the combination of the licenses and patents held by individual members of the MPPC, the group gained substantial power in the entertainment industry. The MPPC required distributors and exhibitors to use its members' film technology exclusively.[21] While this standardized the manner by which films were distributed and exhibited, it also allowed the MPPC to monopolize this segment of filmmaking.[22]

As technology advanced, so did the rise in independent producers and production companies that refused to join the MPPC. Between 1909 and 1914, Edison's group engaged in continuous litigation against independent producers and

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[15] CONANT, *supra* note 11, at 16–17.

[16] *Id.*

[17] *Id.*

[18] *See id.* Patents were held for the raw film and cameras needed to make motion pictures and for the projectors that were needed to exhibit them. As technology in the motion picture business was still in a pre-industrialized stage, ownership of these patents gave Edison and his contemporaries an opportunity to control the entire business. These individuals vigorously defended their power by bringing a myriad of lawsuits against anyone who infringed on any of their patent rights. *See, e.g.*, Edison v. Am. Mutoscope & Biograph Co., 151 Fed. 767 (2d Cir. 1907).

[19] CONANT, *supra* note 11, at 16–17.

[20] *Id.* at 18 ("The [MPPC] was organized in 1908 and the next year began to control production and marketing in the entire industry").

[21] *Id.* at 19.

[22] *Id.*

production companies that refused to join the MPPC's pool.[23] However, in 1912, the United States filed an antitrust action against MPPC.[24] The United States District Court for the Eastern District of Pennsylvania found that the contracts between the MPPC, its members, and licensees were a "conspiracy in restraint of trade or commerce . . . and were and are illegal, and that [MPPC] had attempted to monopolize, and have monopolized . . . a part of the trade or commerce . . . in the motion picture business . . . ."[25] By 1915, the MPPC had rapidly lost control of the industry, and the rise in production companies that became national distributors, namely Fox, Mutual, Universal, and Famous Players-Laskey, arrived on the scene.[26]

B. THE CREATION OF PARAMOUNT AND THE HOLLYWOOD STUDIO

A majority of the attempts to monopolize in the motion picture industry before 1917 were by the creators of equipment or producer-distributors.[27] Between 1917 and 1927, the industry shifted to stronger theater circuits[28] and their affiliation with the leading producer-distributors.[29] While the court's decision ended the MPPC in 1915, it was not successful in rolling back the control Hollywood producers and distributors had now acquired. The

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[23] The MPPC filed more than 40 patent infringement suits. *See, e.g.*, Motion Picture Patent Co. v. Yankee Film Co., 183 F. 989 (S.D.N.Y. 1911); Motion Picture Patents Co. v. Champion Film Co., 183 F. 986 (S.D.N.Y. 1910); Motion Pictures Patents Co. v. Ullman, 186 F. 174 (S.D.N.Y. 1910); Motion Pictures Patents Co. v. Laemmle, 178 F. 104 (S.D.N.Y. 1910); Motion Picture Patents Co. v. Ceniaur Film Co., 217 F. 247 (D.N.J. 1914); Motion Pictures Patent Co. v. Éclair Film Co., 208 F. 416 (D.N.J. 1913).

[24] United States v. Motion Picture Patents Co., 225 F. 800 (E.D. Pa. 1915).

[25] *Id.* at 811.

[26] CONANT, *supra* note 11, at 21.

[27] *Id.* at 23–27.

[28] A "circuit" is a number of theatres, cinemas, et cetera, under one management or in which the same film is shown. *Circuit*, COLLINS ENGLISH DICTIONARY–COMPLETE AND UNABRIDGED (12th ed. 2014).

[29] CONANT, *supra* note 11, at 27–29.

demise of the MPPC paved the way for a studio system that soon became synonymous with Hollywood.[30]

National distribution became the focus of producer-distributors, which eventually led to the first fully integrated studio, Paramount Pictures Corporation ("Paramount").[31] In the 1930s, Paramount had contracts with popular motion picture stars with substantial box office appeal.[32] Paramount combined this appeal with its national distribution capabilities, and in doing so, created a new tactic of control: block booking.[33] Although Paramount was the principal leader in the industry, other production-distribution companies followed in Paramount's footsteps.[34]

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[30] *See id.*; *see also* DOUGLAS GOMERY, THE HOLLYWOOD STUDIO SYSTEM 23 (1986).

[31] Alan Paul & Archie Kleingartner, *Flexible Production and the Transformation of Industrial Relationship in the Motion Picture and Television Industry*, 47 INDUS. AND LABOR RELATIONS REV. 666, 680 (July 1994). At the time Paramount was established, film distribution was accomplished by either (i) individual producers selling a motion picture to different theaters throughout the United States, or (ii) by exchanges that distributed motion pictures in separate markets throughout the United States. Kraig G. Fox, Note, *Paramount Revisited: The Resurgence of Vertical Integration in the Motion Picture Industry*, 21 HOFSTRA L. REV. 505, 508 n.22 (1992). W.W. Hodskin initially formed Paramount with the intent for Paramount to become a national distributor. *Id.*; JOHN IZOD, HOLLYWOOD AND THE BOX OFFICE, 1895-1986 45 (1988). Later, in 1916, Paramount merged with Adolph Zukor's Famous Players forming the first Hollywood studio involved in producing and distributing. *See* CONANT, *supra* note 11, at 83.

[32] For example, Mary Pickford, Fatty Arbuckle, Gloria Swanson, Clara Bow, and Rudolph Valentino. Later, in the 1920s and 1930s, Paramount added Claudette Colbert, Carole Lombard, Marlene Dietrich, Mae West, Gary Cooper, W.C Fields, and Bing Crosby. Paramount also added directors Ernst Lubitsch, Josef von Sternberg, and Rouben Mamoulian. *See* DOUGLAS GOMERY, THE HOLLYWOOD STUDIO SYSTEM: A HISTORY 23 (2005).

[33] Block booking "is the practice of licensing, or offering for license, one feature or group of features on condition that the exhibitor will also license another feature or group of features released by distributor during a given period." *See* United States v. Paramount Pictures, 334 U.S. 131, 156 (1948).

[34] This included Fox Film Corporation, Warner Bros. Pictures, Inc., Loew's Incorporated, Radio-Keith-Orpheum Corporation, and

Producer-distributors began a block-booking system of distribution based on runs,[35] zones,[36] and clearances.[37] The effects rippled throughout the United States as exhibitors started to suffer the financial consequences of the run-zone-clearance system. To counter this practice, and to gain bargaining power in the industry, exhibitors banded together to form chains and circuits.[38] In 1917, exhibitors throughout the United States formed the National Exhibitors Circuit,[39] the first national merger of high quality, first run theaters.[40] The practice of "circuit booking" became the exhibitors' defense against powerful producer-distributors and studios.[41]

By the 1920s, circuit booking resulted in substantial market domination.[42] Studios took notice. If a particular studio had the means to control the theaters within various circuits, then that studio could conceivably control the entire industry from production to exhibition.[43] Moreover, if that same studio could

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Universal Theaters Corporation. HOWARD T. LEWIS, MOTION PICTURE INDUSTRY 345 (1933).

[35] "Runs" are successive exhibitions of a feature in a given area, first-run being the first exhibition in that area, second-run being the next subsequent, and so on, and include successive exhibitions in different theatres, even though such theatres may be under a common ownership or management. United States v. Paramount Pictures, Inc., 334 U.S. 131, 145 n.6 (1948).

[36] "Zones" are geographic boundaries. IZOD, *supra* note 31. A distributor would only release a particular motion picture to one theater for exhibition. *Id.* Releasing motion pictures in zones would maximize the number of audience members while preventing other theaters in close proximity from competing for the same customers. *Id.*

[37] A "clearance" is the period of time, usually stipulated in license contracts, which must elapse between runs of the same feature within a particular area or in specified theatres. *Id.*

[38] *See id.* at 64; *see also* CONANT, *supra* note 11, at 56.

[39] Later, in 1924, the First National Exhibitors Circuit expanded into a production company under the name First National Pictures, Inc. *See* CLIVE HIRSCHHORN, THE WARNER BROS. STORY 54 (1987). Eventually, First National Pictures was purchased by Warner Bros. *Id.*

[40] *Id.*

[41] MAE D. HUETTIG, ECONOMIC CONTROL OF THE MOTION PICTURE INDUSTRY 27 (1944).

[42] In the 1950s, several circuits were charged with violating the Sherman Antitrust Act. *See* CONANT, *supra* note 11, at 117.

[43] *See* IZOD, *supra* note 31, at 40–42.

control prices and ensure access to theaters for the exhibition of their own motion pictures, the studio could inevitably prevent competition from other producer-distributors; specifically, the smaller, independent producers.[44] As such, the studios with the ability to do so would have control over the entire industry.[45]

Studios began purchasing exhibitors to make domination of the market a reality. As they did so, studios started to engage in practices that gave exhibition preferences to their own pictures. Additionally, studios would give preference to other major studio's pictures by using extended clearances, creating overbroad zones for affiliated exhibitors, and refusing to exhibit pictures produced by independent producers.[46] As preferential practices and policies started to become the status quo in the industry and the studio-owned circuits dominated the exhibition market, the government took notice.[47]

The government reacted by filing numerous lawsuits against both the circuits and the distributors.[48] These suits charged the circuits and distributors with illegally restraining trade in the motion picture industry by adopting various anticompetitive practices including the use of clearances, zoning methods, and block booking.[49] The government succeeded in these suits by

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[44] *Id.*

[45] *Id.* at 43; *see also* HUETTIG, *supra* note 41, at 53.

[46] J. Pen, *A General Theory of Bargaining*, 42 AM. ECON. REV. 24, 24–34 (1952).

[47] CONANT, *supra* note 11, at 42-59.

[48] *See* SIMON N. WHITNEY, ANTITRUST POLICIES, AMERICAN EXPERIENCE IN TWENTY INDUSTRIES 163-65 (1958); *see, e.g.*, United States v. Griffith Amusement Co., 68 F.Supp. 180 (W.D. Okla. 1946), *rev'd*, 334 U.S. 100 (1948); United States v. Schine Chain Theaters, Inc., 63 F.Supp. 229 (W.D.N.Y. 1945), *aff'd in part and rev'd in part*, 334 U.S. 110 (1948); United States v. Crescent Amusement Co., 31 F.Supp. 730 (M.D. Tenn. 1940), *aff'd in part and rev'd in part*, 323 U.S. 173 (1944); United States v. Interstate Circuit, Inc., 20 F.Supp. 868 (N.D. Tex. 1937), *remanded*, 304 U.S. 55 (1938), *aff'd*, 306 U.S. 208 (1939); United States v. First Nat'l Pictures, Inc., 34 F.2d 815 (S.D.N.Y. 1929), *rev'd*, 282 U.S. 44 (1930); *see also* CONANT, *supra* note 11, at 84–101.

[49] Two notable suits were the government's antitrust charges brought against distributors and exhibitors in Chicago, Illinois and Los Angeles, California. The suits were United States v. Fox West Coast Theaters, 1932-1939 Trade Cas. (CCH) ¶ 55,018 (S.D. Cal. 1932) and United States v. Balaban & Katz Corp., 1932-1939 Trade Cas. (CCH) ¶

forcing the circuits and distributors to sign consent decrees restricting their conduct.[50] However, these consent decrees had a minimal effect on limiting the increasingly expansive anti-competitive mindset that had permeated and dominated the motion picture industry.[51] By the end of the 1930s, major studios had purchased the most powerful circuits.[52]

The government responded to the studios' undeniably anticompetitive activity by filing more lawsuits to eliminate the monopolistic activities of the circuits.[53] Finally, the Department of Justice took a monumental step in attempting to end these activities. In 1938, the government brought a case against Paramount Pictures Co.[54] However, the studios settled the case with the government before it went to trial and agreed to sign a consent decree.[55]

55,001 (N.D. Ill. 1932) respectively. *See also* Barak Y. Orbach, *Antitrust and Pricing in the Motion Picture Industry*, 21 YALE J. ON REG. 341, 350 (2004).

[50] *See* Orbach, *supra* note 49, at 342 ("The decree (i) limited the Majors' expansion of their exhibition businesses, (ii) permitted reasonable run-clearance-zone systems, (iii) prohibited discrimination among theaters, and (iv) prohibited block-booking of more than five features").

[51] *See* CONANT, *supra* note 11, at 87.

[52] *Id.* at 82.

[53] *See, e.g.*, Schine Chain Theaters v. United States, 334 U.S. 110 (1948); United States v. Griffith, 334 U.S. 100 (1948); United States v. Crescent Amusement Co., 323 U.S. 173 (1944); *Interstate Circuit Inc.*, 20 F.Supp. at 868.

[54] The antitrust suit was brought under 29 Stat. 209 (1890), which is now codified in 15 U.S.C. §§ 1–7 (1982). Paramount was one of seven defendants in the suit. However, Paramount was the most dominant defendant. The defendants were divided into groups. The "major" defendants were Paramount, Loew's Inc., Radio-Keith-Orpheum Corp. ("RKO"), Twentieth Century-Fox Film Corp., and Warner Bros. Pictures, Inc. All studios in the "major" grouping produced, distributed, and exhibited motion pictures. The "minor" defendants were Columbia Pictures Corp. and Universal Corp., both distributed and produced pictures, and United Artists Corp., who only distributed motion pictures.

[55] United States v. Paramount Pictures, Inc., 1940-1943 Trade Cas. (CCH) ¶ 56,072 (S.D.N.Y. 1940).

This consent decree lasted three years.[56] while the government relied on the strength of the consent decree and the good faith of the studios to eliminate their anticompetitive behavior.[57] Among other remedies, the decree (i) limited the major studios' expansion of their exhibition businesses,[58] (ii) permitted reasonable run-clearance-zone systems,[59] (iii) prohibited discrimination among theaters,[60] (iv) prohibited blind bidding,[61] and (v) prohibited block-booking of more than five features.[62] In addition, the decree set up an arbitration system to resolve disputes directly between independent theater owners and any of the *Paramount* defendants.[63] Ultimately, the decree was unsuccessful because the government did not compel the separation of production and exhibition. At the three-year term, affiliated circuits continued to control exhibition.[64] As such, independent production companies failed to gain any progress or traction.[65]

By late summer 1944, the *Paramount* defendants gained control over 17.35% of the theaters in the United States[66] which equated to the control of 90% of the most significant theaters in major markets throughout the country.[67] This control combined with the reality that the *Paramount* defendants distributed 75% of all motion pictures in the United States[68] provided substantial evidence that that the *Paramount* defendants had achieved their long-term goal to control the distribution market for first-run

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[56] *Id.*

[57] *Id.*

[58] *Id.* at 294.

[59] *Id.* at 291–92.

[60] *Id.* at 292–94.

[61] *Id.* at 292–93. "Blind bidding" is a practice where the exhibitors did not have the opportunity to view the motion picture before they licensed it. *See* CONANT, *supra* note 11, at 78.

[62] *Paramount*, 1940-1943 Trade Cas. Trade Cas. (CCH) ¶ 56,072 at 289–90.

[63] *See supra* text accompanying note 54.

[64] *See* CONANT, *supra* note 11, at 97–99.

[65] *Id.*

[66] United States v. Paramount Pictures, Inc. 70 F.Supp. 53 (S.D.N.Y. 1946).

[67] *See* CONANT, *supra* note 11, at 80–83.

[68] *Id.*

motion pictures.[69] As a result, the United States Justice Department reactivated the *Paramount* case and asked the District Court for the Southern District of New York to enforce all of the remedies of the amended complaint.[70] Moreover, the Justice Department placed specific emphasis on compelling the divestiture of the theaters by the *Paramount* defendants in an attempt to free up trade and create competition by ending the monopoly that the *Paramount* defendants still maintained.[71]

While the district court did not find that the major *Paramount* defendants had fully monopolized production in the entertainment industry, the court did find that the distribution system was restraining trade in violation of the Sherman Act.[72] As part of its decision, the district court issued another decree in December 1946.[73] The decree prohibited activities such as the use of excessive zones and clearances, forced block booking, fixing admission process, expansion in theater ownership, and joint theater ownership by the *Paramount* defendants or between any defendant and an independent theater owner.[74] Additionally, while the government's proposed remedy of separating motion picture exhibition from production and distribution was deemed to be "unnecessary," the court mandated an alternative remedy to correct the then current illegal distribution system.[75] The court's remedy mandated the installment of a competitive bidding system between exhibitors and production and distribution entities that would open doors to all theaters for any movie.[76]

On appeal to the United States Supreme Court, a majority of the district court's holdings relating to the illegality of trade practices carried on by the *Paramount* defendants were upheld.[77]

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[69] *See Paramount*, 70 F.Supp. at 70–71 (findings 145-151). The studios had blocked access to independent producers and distributors and had effectively eliminated competition for audience dollars from non-affiliated theaters by filling 90% of the best theaters with 75% of the movies that they exhibited. *Id.*

[70] ROBERT H. STANLEY, THE CELLULOID EMPIRE 1–49 (1978).

[71] *Id.*

[72] *Paramount*, 70 F.Supp. at 53; United States v. Paramount Pictures, Inc., 66 F.Supp. 323, 323 (S.D.N.Y. 1946).

[73] *Paramount*, 66 F.Supp. at 353.

[74] *Id.*

[75] *Id.*

[76] *Id.*

[77] *Paramount*, 334 U.S. at 160–75.

However, the Supreme Court reversed the district court's mandate instituting a competitive bidding procedure.[78] The Court was concerned that a competitive bidding system would "involve the judiciary so deeply in the daily operation of [a] nation-wide business and promises such dubious benefits that it should not be undertaken."[79] The Court's holding suggests that it was more concerned with vertical integration and ordered the district court on remand to consider whether or not the remedy of theater divestiture was a more appropriate remedy.[80]

On remand from the Supreme Court, and prior to any hearings in the case, two major *Paramount* defendants—RKO and Paramount—voluntarily signed consent decrees that divorced their theater circuits and divested certain theaters from the circuits.[81] By signing the decrees prior to a final decision in the case, RKO and Paramount were able to obtain more favorable terms in their decrees than were the remaining major defendants.[82] The final decision for the remaining six defendants was filed in July 1949.[83]

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[78] *Id.*

[79] *Id.* at 162.

[80] *Id.* at 166–75. The Supreme Court established a two-part test to determine whether vertical integration was illegal under the Sherman Act. The test turns on whether: (1) the purpose or intent with which [the practice] was conceived, or (2) the power it creates and the attendant purpose of intent." *Id.*

[81] United States v. Paramount Pictures, 1948-1949 Trade Cas. (CCH) ¶ 62,377 (S.D.N.Y. 1949) [hereinafter Paramount Consent Decree]; United States v. Paramount Pictures, 1948-1949 Trade Cas. (CCH) ¶ 62,335 (S.D.N.Y. 1948) [hereinafter RKO Consent Decree]. Note: The District Court for the Southern District of New York used the term "divorcement" when referring to the required separation by the defendants or exhibition from production and distribution. The court used the term "divestment" to refer to the selling off of theaters by the circuits.

[82] The remaining defendants were Columbia Pictures Corporation, United Artists Company, Inc., Universal Pictures Company, Loew's Inc., Twentieth Century-Fox Film Corp., and Warner Bros. Pictures, Inc. *See also* Paramount Consent Decree, *supra* note 81; *see also* RKO Consent Decree, *supra* note 81.

[83] United States v. Paramount Pictures, Inc., 85 F.Supp. 881 (S.D.N.Y. 1949), *aff'd*, 339 U.S. 974 (1950).

The district court found the defendants had conspired to and had restrained trade in the distribution and exhibition of motion pictures.[84] The court determined that vertical integrations were "a definite means of carrying out the restraints and conspiracies" that were found to be illegal and in restraint of trade.[85] The court further found that divorcing exhibition from production-distribution was necessary in order to free up trade.[86] As such, the district court issued a final decree against the three major defendants and the three minor defendants.[87] The decree was later supplemented with new decrees that described the details of the defendants' divorcement and theater divestiture.[88]

In the end, the result of the government's long-pursued case against all *Paramount* defendants forced the defendants to end the illegal conduct.[89] Moreover, the defendants were required to begin licensing motion pictures on a picture-by-picture basis, entirely upon the merits and without discrimination in favor of affiliated theaters or circuit theaters.[90] The decrees also appeased the government by requiring the divestiture of specific theaters as well as the divorcement of theater circuits by the major defendants.[91]

This case not only set the stage for the modern studio and motion picture theater system. It forced the *Paramount* defendants to divorce theater ownership from their control by creating independent "theater" and "picture" companies that would be separately owned.[92] More significantly, the decree prohibited the theater companies and picture companies from attempting to influence one another's conduct.[93] Newly created theater companies that were created could only enter the distribution

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[84] *Id.* at 892–93.

[85] *Id.*

[86] *Id.* at 896.

[87] United States v. Loew's Inc., 783 F. Supp. 211, 215 (S.D.N.Y. 1992).

[88] *Id.* at 315.

[89] *See, e.g.*, United States v. Loew's Inc., 1950 Trade Cas. (CCH) ¶ 62,573 (S.D.N.Y. 1950).

[90] *Loew's Inc*., 783 F. Supp. at 215.

[91] *See* STANLEY, *supra* note 70 at 134–36.

[92] *Id.*

[93] Charles H. Grant, *Anti-Competitive Practices in the Motion Picture Industry and Judicial Support of Anti-Blind Bidding Statutes*, 13 COLUM. J. OF L. & THE ARTS 349, 361 (1989).

business, and newly established motion picture companies that were created could only enter the exhibition business after petitioning the court, "upon showing that any such engagement shall not unreasonably restrain competition in the distribution or exhibition of motion pictures."[94]

After more than a decade, the government had finally succeeded in lessening the control that Hollywood studios had long held over the entire industry. Through eliminating the domination of vertically integrated studios, the control over motion picture distribution was significantly weakened. This weakening gave independent producers access to screens and a chance to succeed in the motion picture business.[95] Between 1946 and 1957, the number of independent producers expanded from 70 to roughly 170.[96]

By the early 1950s, the United States Justice Department found that the decrees provided the opportunity for arms-length dealing in the motion picture industry.[97] "After the *Paramount* case, competitive bidding and competitive negotiations became the predominant method of film licensing."[98] Finally, independent theaters had the opportunity to compete equally for the right to exhibit first run motion pictures.[99]

C. THE EVOLUTION OF HOLLYWOOD IN THE AFTERMATH OF PARAMOUNT

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[94] *Loew's Inc.*, 1950-1951 Trade Cas. (CCH) ¶ 62,765, at 64,273 (Warner Consent Judgment) (stating new theater companies could only acquire additional theaters in the limited situations outlined in the decrees, or with the court's consent after showing that such acquisition would not restrain competition); *see also* Grant, *supra* note 93, at 363.

[95] *See* STANLEY, *supra* note 70 at 146–47.

[96] *See* CONANT, *supra* note 11, at 112–13.

[97] *Id.*

[98] William J. Borner, *Motion Picture Split Agreements: An Antitrust Analysis*, 52 Fordham L. Rev. 159, 164 (1983).

[99] SUZANNE MARY DONAHUE, AMERICAN FILM DISTRIBUTION: THE CHANGING MARKETPLACE 57 (1987); *see also* WHITNEY, *supra* note 48, at 156.

After the Supreme Court ruled that major studios must sell off their theatre chains,[100] the studio system began to unravel. No longer could studios afford the substantial payrolls that were required to maintain movie stars and major motion picture directors, all whom were employed by the studio in multiyear contracts.[101] Many employees left studios to form independent production companies. Movie attendance had fallen sharply with the advent of television,[102] drastically impacting a once substantially lucrative business.[103] In 1946, there were only around eleven thousand television sets in the United States. By 1952, there were fourteen million.[104] As Connie Bruck noted in *When Hollywood Had a King*, "Thousands of hours of entertainment must be available to the television public and any guess as to where it will come from is as good as another."[105]

In response, the Music Corporation of America (MCA), a then Chicago-based band-booking agency, began representing talent in the motion picture business, and in 1936 moved its offices to Beverly Hills, California.[106] In the late 1930s and early 1940s, MCA began buying out movie stars' contracts from other agencies, and buying agencies themselves.[107] In doing so, MCA exponentially expanded its talent roster with several hundred performers, including star actors like Greta Garbo, Fred Astaire, Joseph Cotton, and Henry Fonda.[108] MCA also absorbed leading

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[100] United States v. Paramount Pictures, Inc., 334 U.S. 131, 175 (1948).

[101] CONNIE BRUCK, WHEN HOLLYWOOD HAD A KING: THE REIGN OF LEW WASSERMAN, WHO LEVERAGED TALENT INTO POWER AND INFLUENCE 118 (2003); BERNARD F. DICK, CITY OF DREAMS: THE MAKING AND REMAKING OF UNIVERSAL PICTURES 160–62 (1997).

[102] *Id.* at 157. (stating the television industry began to thrive by hiring Broadway and burlesque artists at a fraction of the costs of major movie stars, ultimately jeopardizing the livelihood of Hollywood actors. As such, members of the Screen Actors Guild ("SAG") were anxious about the future of Hollywood and the motion picture industry).

[103] *Id.* at 209.

[104] SETH SHAPIRO, TELEVISION: INNOVATION, DISRUPTION, AND THE WORLD'S MOST POWERFUL MEDIUM VOLUME 1: THE BROADCAST AGE AND THE RISE OF THE NETWORK 85 (2016).

[105] *Id.*

[106] *Id.*

[107] *Id.* at 90–115.

[108] *Id.*

directors and writers, including Billy Wilder, Joshua Logan, Dorothy Parker, and Dashiell Hammett.[109]

MCA started producing television shows in 1950 through a newly formed subsidiary, Revue Productions. However, Revue's output paled in comparison to what MCA's President, Lew Wasserman had in mind.[110] At the time, the Screen Actors Guild ("SAG"), an actors union,[111] prohibited talent agencies from producing motion pictures because of the inherent conflict of interest in simultaneously being the agent and employer. It seemed clear that SAG would adopt comparable restrictions for television production.[112]

Under the existing regulations, an agent could apply on a case-by-case basis for a waiver to produce a movie, and that, presumably could be applied to television as well.[113] However, MCA wanted unrestricted freedom: a blanket waiver allowing MCA to engage in television production for many years to come.[114] The company realized that control of the talent—writers, directors, and actors—would give MCA an unbeatable advantage of television production, and experience in television production would strengthen MCA's relationship with talent.[115] This

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[109] *Id.*

[110] *Id.*

[111] Actors' unions in the 1950s were the Screen Actors Guild ("SAG") and Actors Equity Association. *Screen Actors Guild History*, FUNDING UNIVERSE, http://www.fundinguniverse.com/company-histories/screen-actors-guild-history/ (last visited April 23, 2020). The American Federation of Television and Radio Artists (AFTRA) was founded on September 17, 1952. Nikki Finke, *GAG-AFTRA MERGER APPROVED! 81.9% Of SAG Ballots Returned Voted Yes; 86.1% Of AFTRA; Single Union Effective Immediately*, DEADLINE (Mar. 30, 2012), https://deadline.com/2012/03/sag-aftra-merger-approved-screen-actors-guild-american-federation-television-radio-arts-251114/. On March 30, 2012, SAG and AFTRA merged to form SAG-AFTRA, representing artists in all mediums except live performance. *Id.*

[112] Koh Siok Tian Wilson, *Talent Agents as Producers: A Historical Perspective of Screen Actors Guild Regulation and the Rising Conflict with Managers*, 21 Loy. L.A. Ent. L. Rev. 401, 413 (2001).

[113] *Id.*

[114] *See* BRUCK, *supra* note 101.

[115] *See* DICK, *supra* note 101.

combination would create a system so powerful that other producers would be unable to compete.[116]

To gain SAG approval, MCA needed an influential ally. It turned to the then president of SAG, Ronald Reagan—one of MCA's oldest clients.[117] In early 1952, MCA pursued the SAG waiver in ways so undetectable that even subsequent Federal Bureau of Investigations and grand-jury investigations were unable to fully reconstruct what MCA had done.[118] Regardless of how many times MCA, Reagan, or SAG executives were questioned, each insisted that a waiver was necessary because if MCA were permitted to go into television production in an unrestricted and unlimited way, it would create badly needed jobs for actors. The increase in those jobs in television would also mean that SAG would stop losing members to the rival television union, the American Federation of Television and Radio Artists.[119]

In late 1952, SAG granted MCA the waiver.[120] With the waiver secured, MCA was propelled into the television production business.[121] MCA already had a sophisticated knowledge of the broadcasting business and well-established relationships with major advertisers and advertising agencies.[122] However, perhaps most importantly, MCA controlled the talent.[123] The final step in its domination of the industry was to form a relationship with one of the three major TV networks.[124] It targeted the Columbia Phonograph Broadcasting Company (CBS).[125] Within months,

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[116] *Id.*

[117] DAN E. MOLDEA, DARK VICTORY: RONALD REAGAN, MCA, AND THE MOB 32 (1986).

[118] *See* BRUCK, *supra* note 101.

[119] AFTRA held jurisdiction over live television. *See* Wilson, *supra* note 112.

[120] *Id.*

[121] *Id.*

[122] *See* BRUCK, *supra* note 101, at 123.

[123] *Id.* at 71.

[124] *Id.* at 124. The three networks were: Columbia Phonograph Broadcasting Company (CBS), the National Broadcasting Company (NBC), and the American Broadcasting Company (ABC). It is interesting to note that MCA already had a relationship with CBS which was second to NBC in entertainment programming for roughly twenty years. *Id.*

[125] *See* DICK, *supra* note 101, at 198.

most of the top talent from the National Broadcasting Company (NBC) moved to CBS.[126]

By early 1957, MCA had established a contractual relationship with NBC, and fourteen series that were either produced or sold by MCA were placed in NBC's prime time slots.[127] With its prominent position of power at NBC, there was no true competition for MCA. It generally treated NBC more favorably than other buyers, and gave all of MCA's best programming to NBC. This arrangement worked to MCA's advantage and provided a major, reliable outlet for MCA's production. MCA garnered even more clients as the common perception became that the best way a producer could get a show on NBC or an actor could get roles in the continuous flow of productions was to be represented by MCA. Once those clients signed on with MCA, they were tied to the agency long term. MCA required its clients to have MCA represent them in all areas of the entertainment business for several years.[128]

As a result of MCA's relationships with the three major television networks, MCA could place a director, star talent, story, and supporting talent in a single deal, and demand ten percent commission on the cost of an entire show even when the network itself was supplying much of the talent and producing the show.[129] By the end of the 1959-1960 season, MCA was producing or co-producing more television series than any other company, and was earning revenue from roughly forty-five percent of all network evening shows.[130] MCA had established a system that produced a

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[126] *See* BRUCK, *supra* note 101, at 133. Top talent such as Burns and Allen, Red Skelton, and Groucho Marx. *Id.*

[127] *Id.*

[128] *Id.* at 105–07.

[129] *Id.* This included all above-the-line (talent) costs and below-the-line (facilities, production) costs. For example, in the 1950s, if a production cost $500,000, MCA would earn $50,000. *Id.*

[130] Among those shows MCA produced were "Wagon Train," "General Electric Theatre," and "Bachelor Father." MCA was also the agent for many shows made by independent producers, including "Alfred Hitchcock Presents," "Tales of Wells Fargo," and "Ford Startime." *Id.* at 134.

perpetual stream of revenue, deriving from multiple sources directly tied to MCA.[131]

The SAG waiver that permitted MCA to be an agent and television producer had enabled MCA, to dominate television production in the span of a few years.[132] However, MCA's success made the company vulnerable as the Justice Department started to pay closer attention to MCA's operations.[133] In 1958, the Justice Department's Antitrust Division had initiated an investigation of MCA which caught the attention of the new Attorney General, Robert F. Kennedy.[134]

In the late 1960s, the Justice Department learned about MCA's use of "packaging," which was a version of an old practice known in antitrust language as a "tie-in"—that is, using MCA's control over one product to sell another. The practice is *per se* illegal because it prevents companies that do not have significant power in a market from breaking into that market.[135] At the time, for example, NBC had production facilities with the capacity to commence production with top scripts, writers, and directors, and only needed star talent from MCA.[136] If MCA agreed to provide star talent, it would do so only if NBC promised to pay MCA commission for all of the producers, directors, writers, etc., employed on the production.[137]

This practice was not only anticompetitive, but also caused MCA to serve its own interests above the interests of its clients.[138] An independent producer may be prepared to pay star

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[131] While MCA prided itself on secrecy, it would not divulge which television series it was representing, or even how many series it handled. In 1960, *Fortune* calculated that MCA was likely to earn seven million dollars from a thirty-nine-week, half-hour television series that MCA produced at it Revenue studios. *Id.*

[132] STEVE NEALE, THE CLASSICAL HOLLYWOOD READER 383 (2012).

[133] *See* DICK, *supra* note 101, at 211.

[134] *Id.* It is interesting to note that when Robert F. Kennedy started to take an interest in the MCA case, no less than eight investigations by the Antitrust Department into MCA's practices had been terminated since 1941. *Id.* at 213.

[135] *See* BRUCK, *supra* note 101, at 305.

[136] *Id.* at 136.

[137] *See* MOLDEA, *supra* note 117.

[138] *See* BRUCK, *supra* note 101, at 83.

talent ten thousand dollars for a production.[139] If MCA demanded ten percent of all above-the-line costs[140] (e.g., twenty-five thousand dollars) regardless of the fact that the independent producer had already hired a director and other talent, the producer would have to pay thirty-five thousand dollars for a star worth only ten thousand dollars.[141] As a result, the independent producer may not be able to hire the star talent.[142]

The Justice Department's investigation continued for nearly a year and a half. During this time, Robert Kennedy collected internal memorandums to encourage "faster action."[143] Early on, Leonard Posner, a young attorney in the Justice Department, advocated for the use of a grand jury in the matter because the witnesses were frightened of MCA.[144] Posner also noted that there was no likelihood of obtaining any direct evidence from MCA. At this point, the Justice Department concluded the evidence was not strong enough to bring a criminal case against MCA for bribery or coercion.[145]

The scales finally tipped in favor of the Justice Department when MCA acquired Decca Records and its

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[139] *Id.*

[140] Generally, "above-the-line" refers to producers, directors, writers, cast (including name actors/movie stars, etc.), and stunt cast/personnel. *Id.*

[141] *Id.*

[142] *Id.* In early 1961, Leonard Posner, an attorney in the Justice Department, wrote a detailed description of MCA's antitrust practices. *Id.* Among several details outline in the memorandum there were tie-ins, exclusive contracts, packaging, demanding packaging commissions even when MCA had not done the packaging, conflicts of interest, omnibus contracts, coercive dealings, blacklists, bribes, procuring women, luring talent from other agencies with houses, cars, and huge sums of money, and withholding top talent from competitors. *Id.*

[143] *See* BRUCK, *supra* note 101, at 182.

[144] *Id.*

[145] The primary questions the Justice Department considered were: (1) Did MCA bribe SAG to receive the waiver?; and (2) Did MCA actually do the tie-ins? Ultimately, the Justice Department concluded that the evidence was not strong enough to bring a criminal case against MCA. *Id.* at 188. "There was a lot of smoke, but no fire." *Id.*

subsidiary, Universal Pictures, in 1962.[146] At the same time, MCA was proceeding with a plan to "spin off" its talent agency to two senior MCA agents and go primarily into production.[147] However, on June 13, 1962, the Justice Department intervened and brought a civil antitrust suit against MCA.[148] The Justice Department also named SAG as a co-conspirator, charged MCA with a series of violations, and asked for court orders to halt any named violations.[149] Moreover, the Justice Department's suit asked that MCA be required to completely divest itself of Decca Records and Universal, and that MCA be ordered to dissolve—rather than "spin off" the talent agency.[150] MCA would be prohibited from controlling both the production side and the talent representation side of film business.[151]

Ten days after the Justice Department filed its suit, MCA agreed to dissolve its talent agency and operate solely as a production company. [152] Two months later the terms of the consent decree were finalized.[153] While MCA ultimately accepted the specific restrictions on its business, its only major loss was the dissolution of the talent agency.[154]

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[146] *Id.* at 189. The acquisition of Decca Records fulfilled MCA's goal of becoming a diversified entertainment company, dedicated to television, movie, and music production. *Id.*

[147] *Id.*

[148] *Id.* at 182.

[149] *See* Wilson, *supra* note 112.

[150] *Id.*

[151] *See* BRUCK, *supra* note 101, at 189.

[152] U.S. DEP'T. OF JUSTICE, ANNUAL REPORT OF THE ATTORNEY GENERAL OF THE UNITED STATES 114 (1962).

[153] United States v. MCA, Inc. 1962 Trade Cases ¶ 70,459 (MCA Consent Decree) (S.D. Cal. 1962). As part of the consent decree, MCA agreed not to engage in the talent agency filed and, for a period of seven years, to be restrained from merging with other picture companies or television production or distribution firms. *Id.*

[154] *See id.* In the end, giving up the agency business was not a tough choice for MCA owners, Lew Wasserman and Jules Stein. By 1961, MCA's gross revenues were about $82 million, according to Wasserman's biographer, Connie Bruck, with the agency's share only accounting for about ten percent of that. *See* BRUCK, *supra* note 101, at 189. As head of Universal, Lew Wasserman would go on to create the studio's lucrative back-lot tour, and would pioneer the summer blockbuster with films like *Jaws*. *See id.*

The Justice Department's antitrust case against MCA and the subsequent consent decree set a precedent in Hollywood that dictated the relationships and boundaries between talent agencies, studios, and production companies.[155] For roughly sixty years after, Hollywood talent agencies shied away from producing both of its clients' motion picture and television content. Now, major talent agencies find themselves towing the same line that MCA did only sixty years ago.

II. THE CURRENT ANTITRUST CONFLICT IN HOLLYWOOD

A. THE PLAYERS

The Writers Guild is the labor union that is the exclusive collective bargaining representative for writers in the entertainment industry. The Creative Artists Agency ("CAA"), United Talent Agency ("UTA"), and William Morris Endeavor ("WME") are talent agencies licensed under California law to procure and negotiate terms of employment for artists working in the entertainment industry including Writers Guild members. Under California law, only a licensed talent agent may procure and negotiate terms of employment for artists working in the entertainment industry.[156]

B. THE CONFLICT

As aforementioned in the Introduction, the Writers Guild dismissed its suit in state court and consolidated its claims against CAA, UTA, and WME in the United States District Court in the Central District of California, Western Division adding alleged antitrust violations.[157] The conflict between the Writers Guild and CAA, UTA, and WME comes down to two alleged anticompetitive issues: the fees associated with packaging, and the

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[155] *See* BRUCK, *supra* note 101, at 189.

[156] *See* CAL. LAB. CODE § 1700.5. Talent agencies are defined in the California Labor Code as "a person or corporation who engages in the occupation of procuring, offering, promising, or attempting to procure employment or engagements for an artist or artists . . . . Talent agencies may, in addition, counsel or direct artists in the development of their professional careers." *Id.* § 1700.4(a).

[157] *See* Handel, *supra* note 8.

rising trend of agencies working with "affiliated producers" owned by their parent companies. If the Writers Guild prevails, its proposed changes would dramatically affect how Hollywood agencies do business and the entertainment industry at large.

C. SETTING THE SCENE

In April 2019, with the expiration of the AMBA and failed negotiations between the ATA, of which CAA, UTA, and WME are members, the Writers Guild organized a group boycott targeting CAA, UTA, WME, and other talent agencies.

The Writers Guild instructed its members to refuse to deal with CAA, UTA, WME, and other talent agencies unless the agencies accepted and signed a revised Code of Conduct. This agreement would require the agencies, among other things, to absolutely, categorically, and without exception cease to engage in and withdraw from the decades-long practice of "packaging" arrangements, and any affiliation with or investment in any entity that produces or distributes content.[158]

If the Writers Guild members do not follow the union's instructions to refuse to deal with agencies that reject the terms of the Code of Conduct, members face sanctions including expulsion from the union. Such a sanction is effectively a death sentence for a writer's (or writer-producer's) career. As a result, most Writers Guild members—even those opposed to the Writers Guild actions—have fired their agents, including those at CAA, UTA, and WME.[159]

Given that "agency packaging" has been an industry wide practice since the 1950s, why is it now at the center of the Writers Guild's conflict with the major agencies? With the express contractual permission of the Writers Guild, talent agencies have brought together some or all of the key creative talent and intellectual property for certain television shows, motion pictures, and radio.[160] Historically, each "package" deal is different and the deals are highly idiosyncratic, depending on the particular deal and particular agency. In broad terms, "packaging" occurs when an agency presents to a studio one or more of the key creative

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[158] *See* Robb, *supra* note 3.

[159] *Id.*

[160] Generally, "packaging" is a type of product bundling where a top-level talent agency creates a project using writers, directors and/or actors it represents. *Packaging*, COLLINS ENGLISH DICTIONARY–COMPLETE AND UNABRIDGED (12th ed. 2014).

elements for a television production, such as writers, actors, directors, or the intellectual property on which the project is based.

Functionally, the presentation of a package might convince the studio that the project is sufficiently compelling to justify the studio's risk of financing and producing the project. Moreover, in television, as production continues over multiple episodes or seasons, the agency ordinarily will help to provide a pipeline of additional talent (e.g., staff writers, actors, directors mid- and lower-level employees of different kinds) necessary to support a television program's continued production and provide other ongoing services to ensure the production's success.

Packaged deals generally do not end with the development of a project. The ongoing services that an agency may provide to a packaged project are substantial. These services include (a) working with a showrunner on a television program's budget after it is organized for production including facilitating discussions with a production company or studio and negotiating for an overall higher initial writer budget; (b) providing lists of available writers to help "staff" the program; (c) helping identify opportunities for actors to work on productions and for decision-makers on shows to become aware of available talent that would contribute to the success of the show; (d) helping to find series and episodic directors; (e) research and social media support; (f) publicity and marketing assistance; (g) programming and scheduling assistance; and (h) offering to help with off-network sales.[161] Beyond this, if a television program is cancelled, the agency may assist in helping to set up the project at a new network or platform.[162]

"[T]alent agencies spend substantial time and resources searching for and fostering new talent—and then leverage that

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[161] First Consolidated Complaint at 10–12, William Morris Endeavor, LLC v. Writers Guild of Am., Inc., 2:19-cv-05465-AB (C.D. Cal. Sept. 27, 2019).

[162] *See* Wendy Lee, *Hollywood writers fired their agents. Now agencies are sidelining writers in new deals*, L.A. TIMES (Nov. 14, 2019), https://www.latimes.com/entertainment-arts/business/story/2019-11-14/despite-the-wgas-objections-talent-agencies-continue-to-package-tv-shows; *see also* Jonathan Handel, *Television Packaging Deals: All the Confusing Questions Answered*, HOLLYWOOD REP. (April 3, 2019), https://www.hollywoodreporter.com/news/what-exactly-are-packaging-fees-a-writers-agents-explainer-1198974.

new talent to help its clients penetrate the television and motion picture ecosystem that might otherwise be closed to them."[163] Packaging is important for writers "in the current media economy, because it helps agencies and their [writer] clients secure better deals . . . [with] studios that relentlessly seek to reduce the costs of [producing]," including artists' salaries.[164]

When a talent agency's project is packaged, none of its clients—including writers—pays the standard ten percent commission that agents otherwise charge their clients.[165] In exchange for waiving its clients' fees and providing the studio with a package, the agency receives a packaging fee, which is typically paid by the entity that produces the television program or motion picture.[166] Packaging fees are discussed in detail in the following section.

When television programs or motion pictures are successful enough to generate meaningful back-end profits, a talent agency can earn more from package fees than it would under a traditional commission system.[167] This is because agencies will often receive a percentage of the back-end profits as part of the package fee.[168]

Additionally, as an outgrowth of an agency's longstanding work with financiers and independent producers, the major agencies have invested in independent productions companies in which they hold an ownership interest.[169] The agencies' goal with these production companies is to offer an innovative, talent-friendly alternative to traditional television and motion picture studios and production companies.[170] Agency-affiliated production companies offer opportunities that might not otherwise exist to both the specific agency's clients as well as artists not represented by the agency.[171] Moreover, these

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[163] First Consolidated Complaint at 10, ¶ 32, William Morris Endeavor, LLC v. Writers Guild of Am., Inc., 2:19-cv-05465-AB (C.D. Cal. Sept. 27, 2019).

[164] *Id.* at 10, ¶ 34.

[165] *Id.* at 10, ¶ 35.

[166] *See id.* at 10, ¶37.

[167] *See* at 17, ¶ 52.

[168] *See id.*

[169] *See id.* at 22, ¶¶ 65–67. CAA has invested in "wiip," WME has invested in "Endeavor," and UTA has invested in "Civic Center Media." *See id.* at 21–23.

[170] *Id.* at 23–24.

[171] *Id.* at 24–25.

production companies provide an opportunity to get entertainment projects made that might otherwise die for lack of independent financing and producers willing to take on riskier projects.[172]

III. WHO IS THE NEWEST ANTAGONIST IN THE NEWEST ANTITRUST BATTLE?

A. THE WRITERS GUILD OF AMERICA HAS AN OBLIGATION TO PROTECT THE PROFESSIONAL AND ARTISTIC INTERESTS OF ITS MEMBERS

The Writers Guild has a duty to protect the professional and artistic interests of its members. This duty includes promoting fair dealing between the Writers Guild members and "organizations, groups or individuals with whom [the writers] have mutual aims or interests or with whom [the writers] work or have business or professional dealings."[173] The conflict between the Writers Guild and CAA, UTA, and WME arises out of the Writers Guild's efforts to protect its members from an allegedly unlawful compensation system and an allegedly inherent conflict of interest associated with agency-affiliated production companies.

According to the Writers Guild, packaging creates two substantial issues that infringes on its members' interests. First, the Writers Guild alleges that packaging creates a conflict of interest between a talent agency and the writer it represents as well as perpetuates agencies' collusive efforts to maintain a system through agreed upon price structures.[174] Over time, this practice has "depressed writers' compensation, employment opportunities," choice of talent for productions, and quality of productions "while greatly enriching the talent agencies."[175]

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[172] *Id.*

[173] Writers Guild of America, *Constitution and By-Laws* art. II, § 3.

[174] First Consolidated Complaint at 15, ¶ 45, William Morris Endeavor, LLC v. Writers Guild of Am., Inc., 2:19-cv-05465-AB (C.D. Cal. Sept. 27, 2019).

[175] Answer and Counterclaims at 2, ¶ 1, William Morris Endeavor, LLC v. Writers Guild of Am., Inc., 2:19-cv-05465-AB-AFM (C.D. Cal. Aug. 19, 2019)

"[T]he entertainment industry is a freelance industry, and because writers may negotiate compensation above the minimum [fees] established" between the Writers Guild and Hollywood studios, "the vast majority of working writers have procured employment through talent agents . . . ." [176] The writer's expectation is that the agency will find work and negotiate for the best possible compensation. However, while the Writers Guild concedes that packaging began as a service to writers in their negotiations with production companies and studios, it has become an "unlawful, price-fixing cartel dominated by a few talent agencies"[177] that use their position to advocate for its own respective interests, rather than the interests of the writers the agencies represent.

Second, the Writers Guild further contends that agency-affiliated production companies, through vertically integrated parent corporations, are equally as detrimental to its members' interests.[178] A member of the Writers Guild's negotiating committee claims that "seventy-five percent of writers creating projects at [agency-affiliated] studios . . . are clients of that agency."[179] To the Writers Guild, agency-affiliated production companies are a step-beyond packaging projects. Rather than earning ten percent of a production's back-end profits, an agency could earn fifty to sixty percent of the profits through owning a writer's property.[180]

Agency-affiliated production companies pose further risks to writers' interests. When a writer delivers a script to an agent, the agent's responsibility is to shop the script to production companies and studios where the project has the best opportunity for success.[181] The Writers Guild is concerned that an agent will take the script to the agency's production company first rather

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[176] *Id.* at 2, ¶ 3.

[177] Mike LaSusa, *WGA Takes Antitrust War With Talent Agencies Federal*, LAW360 (Aug. 19, 2019 10:38 PM EDT), https://www.law360.com/articles/1190298/wga-takes-antitrust-war-with-talent-agencies-federal.

[178] *See* David Robb, *WGA Says 75% Of Projects At Agency-Affiliated Production Companies Are Written By Agencies' Own Clients*, DEADLINE (May 15, 2019), https://deadline.com/2019/05/writers-guild-agency-affiliation-argument-hollywood-production-wga-1202615758/

[179] *Id.*

[180] *Id.*

[181] *See id.*

than to the marketplace.[182] There are two substantial risks involved, according to the Writers Guild. First, if the agency-affiliated production company chooses to purchase the writer's script, then the agency will have to negotiate with itself to finalize the deal. The issue here is whether the client is getting the best possible deal for the project.[183] Second, if the agency-affiliated production company chooses to pass on the client's project, then it can create tension between the client and the agency.[184]

Based on these conflicts, the Writers Guild contends that its members' interests are fading into the background and that agency interests are being placed front and center. As such, the Writers Guild has a duty to protect its members' interests. Seeking to fulfill this duty, the Writers Guild issued the mandate requiring all members fire agents who refuse to adhere to the Writers Guild's new Code of Conduct.[185] The Writers Guild believes this mandate is necessary to protect its members from exploiting writers' talent and work-product.[186]

B. OTHER OPPORTUNITIES CREATED FOR WRITERS THROUGH PACKAGING AGREEMENTS AND AGENCY-AFFILIATED PRODUCTION COMPANIES

1. *AGENCY PACKAGING IS PRO-COMPETITIVE*

The Writers Guild's contention that agency compensation from packaging agreements and fees are unlawful is misguided and short-sighted. For an agency's services in bringing together major creative personnel for a production, the agency receives a "packaging fee," paid by the producer or other entity responsible for financing the production. When an agency receives a packaging fee, the agency forgoes its commission that it otherwise would obtain from the compensation earned by its clients in connection with the packaged project. As such, packaging fees do not harm writers nor is there an inherent conflict of interest caused by the packaging fees. In effect, packaging benefits most writers

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[182] *See id.*
[183] *See id.*
[184] *See id.*
[185] Ingber, *supra* note 5.
[186] *Id.*

because the agency facilitates the actual production of a writer's project.

Packaging fees are arranged in industry standard 3-3-10 percentage distribution.[187] There is an upfront fee of three percent of the licensing fee from the production company or studio.[188] For television, this fee can range anywhere from $15,000 to $75,000 per episode.[189] There is also a deferred fee of three percent when the production hits its net profit.[190] However, this fee is often done away with due to few projects hitting the net profit.[191] The final ten percent refers to the modified adjusted gross profits of the packaged production. Often, this number is zero unless the production runs for multiple seasons—generally five to six seasons—and is sold into syndication.[192]

The Writers Guild argues that packaging fees are worse for writers. The Writers Guild claims that agents can become complacent and not negotiate for better pay since the agency receives a back-end profit from the production, thereby aligning its interests with the production company rather than the client. Again, the Writers Guild's argument is misguided. By packaging a project, the agency waives commission from compensation earned by its clients and takes an interest in the prospective profitability of the writer's production. The agency is effectively gambling on its client's project to be successful and run for at least five seasons when the production starts to become profitable. Only then will the agency profit from the packaged project.

The packaging agency is incentivized by ensuring the success of a packaged project. For a project to be successful it must facilitate the staffing of high-quality writers, directors, actors, and producers. This benefits both the writer's and the agency's interest. The writer's project thrives from high-quality talent, and the agency begins to position the project to run for multiple seasons. Further, the writer's interests are served because a production's success will likely create future opportunities for the writer.

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[187] Dan Nagan, *Writers & Agents Split Over Packing Fees*, LEGAL SOLUTIONS BLOG (May 3, 2019), https://blog.legalsolutions.thomsonreuters.com/top-legal-news/writers-agents-split-over-packaging-fees/.

[188] *Id.*

[189] *Id.*

[190] *Id.*

[191] *Id.*

[192] *Id.*

The entertainment industry has dramatically evolved since MCA's venture into both talent representation and producing content. The practice of packaging that the Justice Department determined per se illegal likewise evolved. Perhaps most distinguishable, is that the modern major talent agencies do not receive the standard ten percent commission on their clients' projects if the project has been packaged. Rather, the client retains ten percent and the agency collects revenue from the project's back-end profits. MCA collected both commission from its clients and back-end profits.

In 2020, "packaging" is the practice by which an agency brings together some or all of the major creative elements of a potential television program or motion picture. Studios and the other entities that produce television and motion picture content want a compelling total package of talent (e.g., writers, actors, directors, etc.) to be attached to the project. The agency helps create opportunities for its clients by connecting them with one another.[193] Agencies are able to use its package of talent as a means of facilitating the actual production of television and motion picture projects and help ensure that television and motion picture programs that would otherwise never get produced, in fact, get made and distributed to the public.

CAA, UTA, and WME did not enter in any agreement or conspire to restrain trade through the packaging of their respective clients' projects. This is distinctly different than the industry practices deemed illegal by the Supreme Court and the District Court for the Southern District of New York in the 1948 *Paramount* case. The standard industry practice of agency packaging—existing since the 1950s—does not create the vertical integrations from production distribution to exhibition used by the major studios and motion picture theater circuits. The *Paramount* defendants clearly entered into contracts aimed at controlling

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[193] For example, David Simon, writer and creator of HBO's *The Wire*, was represented by CAA. *'The Wire' Creator David Simon Rips "Greedhead" Agencies Over Packaging, Urges Lawsuit Against ATA*, DEADLINE (Mar. 19, 2019), https://deadline.com/2019/03/david-simon-writers-agents-packaging-fight-wga-ata-commentary-1202578152/. When Simon was still an unknown writer (by industry standards), CAA was able to get *The Wire* produced by packaging the project with A-List producer, Barry Levinson (also a CAA client). *See id.* Without CAA and Levinson's clout, *The Wire* would likely not have been produced at the time. *See id.*

distribution and exhibition of first-run motion pictures enabling theaters to set their desired price of admission. This practice not only detrimentally affected consumers, but also affected other theaters competing in the market to exhibit first-run motion pictures.

In fact, agency packaging enhances competition, rather than stifling it. The practice is a market-making business model that creates economic opportunities for artists and projects. It provides a convenient, efficient, and long-term commitment to studios, production companies, and the packaging agency's client. Should this practice be prohibited, there will likely be longer development periods, friction, and costs between agencies, studios, and production companies involved in greenlighting[194] television programs and motion pictures. This economic friction could inevitably harm the entertainment industry by reducing output of television programs and motion pictures.

For agency packaging to be declared anticompetitive, the Writers Guild must show that that CAA, UTA, and WME conspired to restrain trade. It must also show that there was "a definite means of carrying out the restraints and conspiracies" that are alleged to be illegal.[195] The Writers Guild has a steep, uphill battle. First, the Writers Guild will need to prove there was an agreement or conspiracy to restrain trade in the entertainment. Then, and more significantly, the Writers Guild must prove that the major agencies control the clients whose work is being packaged with a studio or production company. This is where the Writers Guild will inevitably fail.

Talent agencies do not own or control their clients. Unlike the studio system in the first half of the twentieth century where an artist (e.g., actor, director, or writer) exclusively signed with a studio for a designated number of productions, agencies do not require such commitment. Clients will sign with an agency, but the agency does not control the client. Rather, the relationship between an agent and client is fiduciary. The agent guides and advises the client but cannot mandate that the client participate in a certain production or with a specific studio. In fact, should a

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[194] "Greenlight" is an industry term that means "to give permission to go ahead with (a project, i.e., a movie)." *Greenlight*, COLLINS ENGLISH DICTIONARY–COMPLETE AND UNABRIDGED (12th ed. 2014).

[195] United States v. Paramount Pictures, 85 F. Supp. 881, 893 (S.D.N.Y. 1949).

client determine that the agency is failing to progress the client's career, the client is entitled to fire the agency and sign with a competitor.[196]

Agency packaging promotes rather than restrains competition in the entertainment industry. The long-standing agency practice of packaging clients will not be seen as anticompetitive or a restraint on trade in the entertainment industry. CAA, UTA, and WME represent a majority of the entertainment industry's most influential and sought-after artists. However, those agencies do not control their client or their clients' respective projects. As such, agency packaging encourages competition between the major agencies to place their clients with a desired studio or production company. If the agency is unable to do so, the client is free to terminate the relationship and sign with a competitor. Agency packing promotes rather than restrains competition in the entertainment industry.

2. *AGENCY-AFFILIATED PRODUCTION COMPANIES ARE PRO-COMPETITIVE*

CAA, UTA, and WME's ownership of agency-affiliated production companies is testing the boundaries of the law in terms of anticompetitive practices. The ownership of agency-affiliated production companies starts to mirror the very practices that the United States Justice Department deemed illegal in the 1962 MCA

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[196] While termination provisions in writers' contracts may vary depending on the agency, a general termination clause will read "[i]n the event of failure of Writer to obtain employment or a bona fide offer therefor from a responsible employer, in the fields of endeavor specified in this agreement for a period of time in excess of four consecutive months, such failure shall be deemed cause for the termination of the agreement by either party; provided, however, that the Writer shall at all times during the period of four consecutive months be ready, willing, able and available and to render the services required in connection therewith. Notices of intention of either party to terminate must be given in writing to the last known address of said party. In the event Writer accepts employment prior to any written notice of termination, said right of termination is deemed waived as to all past periods of unemployment but not as to future four consecutive months of employment." *See* 8 C.C.R. § 12001 (2002).

consent decree.[197] Like MCA, the major agencies claim that agency-affiliated production companies create "badly needed" jobs for artists, especially writers.[198] However, there are stark differences between MCA's practices and the major talent agencies of the twenty-first century.

The media marketplace is exponentially larger and more diverse than the 1960s. The entertainment industry has rapidly expanded with the advent of cable television and, more recently, digital streaming platforms (e.g., Netflix, Hulu, Amazon, etc.). In the 1960s, there were three major television networks and six major studios. MCA was earning revenue from forty-five percent of network productions. At the moment, the major agencies do not come remotely close to MCA's figures. At the time, MCA had either absorbed talent agencies that represented star talent or purchased star talents' contracts from other talent agencies. Moreover, as a production company, MCA operated much like the studio system of the early 1900s, owning its clients' contracts and controlling the projects in which its clients participated. This is largely a result of the limited number of television networks and studios in existence. When MCA purchased Universal in 1962, it acquired a significant percentage of the production outlets in Hollywood in addition to owning a majority of star talent. As such, competition between talent agencies, studios, and production companies was substantially affected.

CAA, UTA, and WME's ownership of agency-affiliated production companies does not reach the level of control held by MCA over the entertainment industry yet. In fact, wiip, Civic Center Media, and Endeavor Content create, rather than limit, opportunities for artists. They provide an alternative to the traditional studios and in-house production by television networks that have dominated the entertainment industry for the last seventy years. The agency-affiliated production companies compete with existing studios and networks to offer new productions, and more opportunity to talent by providing additional jobs for talent, including writers. Moreover, by creating opportunities with agency-affiliated production companies, employment opportunities will become available at traditional studios and television networks.

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[197] *See* United States v. MCA, Inc. 1962 Trade Cases ¶ 70,459 (MCA Consent Decree) (S.D. Cal. 1962).

[198] *Cf.* Connie Bruck, *The Monopolist*, THE NEW YORKER (April 14, 2003), https://www.newyorker.com/magazine/2003/04/21/the-monopolist

To counter any conflicts of interest, the major agencies with agency-affiliated production companies encourage their clients to obtain independent counsel to analyze a potential deal or employment opportunity between the client and the agency-affiliated production company. Beyond this, the potential for a harmful conflict of interest involving an agency-affiliated production company is strictly limited, given the intensely competitive market in which agencies look for clients and in which writers hire talent agents. The major agencies know that if they act contrary to the interests of the client, the agency can be replaced. As such, agency-affiliated production companies, in the modern marketplace, offer pro-competitive benefits for artists, including writers, in an ever-expanding entertainment marketplace.

Despite the pro-competitive benefits agency-affiliated production companies offer, the major agencies should proceed with caution. Agencies and agency-affiliated production companies could potentially violate antitrust laws like the *Paramount* defendants and MCA. For such to occur in 2020, the Writers Guild would need to prove that the major agencies conspired to induce their clients to only work at the respective agency's affiliated production company. Additionally, the agency-affiliated production company would have to set a subscription price in which the consumer paid to view the created content. If this were to occur, the Writers Guild could more effectively show that the agency and agency-affiliated production companies are vertically integrated and, thus, in violation of the Sherman Act.

While this is possible, it is not necessarily plausible. First, clients are not controlled by the agency; rather, they are free to fire an agency and sign with a competitor. If an agency influenced a client to only work with the agency-affiliated production company, then the agency would be limiting the client to a single opportunity in a marketplace of hundreds of production companies and several studios. This practice would likely result in a client terminating a relationship with the talent agency.

Second, the agency-affiliated production companies do not currently control exhibition, like the *Paramount* defendants of the 1940s. In 2020, the agency-affiliated production companies exist to create a platform for writer's projects. This includes writers signed with competing agencies which suggests that the agency-affiliated production companies are more interested in

creating quality content with all writers in the entertainment industry; not limiting opportunities solely for its own clients.

C. THE WRITERS GUILD OF AMERICA'S ACTIONS COULD SUBJECT THE UNION TO ANTITRUST VIOLATIONS

Before the district court hearing the case can consider whether a labor union violated federal antitrust law, it first must determine whether the labor union is exempt from antitrust violations under both statutory and non-statutory labor exemptions.

1. *THE WRITERS GUILD WILL NOT BE ABLE TO RELY ON STATUTORY LABOR UNION EXEMPTIONS*

The Writers Guild cannot rely on the limited statutory labor exemption to the antitrust laws. In brief, the Writers Guild may attempt to claim immunity from any antitrust violations through the statutory labor exemption set forth in the Antitrust Act of 1914.[199] Congress created a statutory labor exemption to protect from antitrust scrutiny certain union activity that is in pursuit of legitimate labor union goals.[200] Without this exemption, most union activity would constitute an unreasonable restraint on trade and, thus, an antitrust violation. However, this exemption is not a catch-all immunity from the antitrust laws for all union conduct.

Labor laws give labor unions, like the Writers Guild, a limited right to exercise monopoly power over the labor market

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[199] Clayton Antitrust Act of 1914, 15 U.S.C.A. § 13(a) (West 1994). Generally, the main antitrust exemption deals with the formation of labor unions. *Id.* § 17. Unions are designed to protect employees from unfair business practices. *All About Unions*, WORKPLACE FAIRNESS, https://www.workplacefairness.org/labor-unions (last visited April 23, 2020). Picketing and boycotting endorsed by labor unions are generally exempt from antitrust enforcement. *See* Brown v. Pro Football, 50 F.3d 1041, 1048 (D.C. Cir. 1995) (citations omitted). Labor unions may also collectively bargain for employees' wages and benefits. *See id.* However, an action or agreement between a union and a nonunion party is not exempt from these laws. Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616, 625 (1975).

[200] *See* Clayton Antitrust Act of 1914, 15 U.S.C.A. § 17 (West 1994).

for their members' services. That monopoly exists to facilitate collective bargaining (i.e., to grant unions the exclusive authority to negotiate with employers over the terms and conditions of the union members' employment), but because that monopoly is so influential, it is subject to only a limited exemption from the antitrust laws.

For the statutory labor exemption to apply, a union (i) must not be acting in concert with non-labor groups and (ii) must be confining its concerted action to the accomplishment of a legitimate union interest.[201] The Writers Guild fails both tests. The Writers Guild's boycott is being conducted in conjunction with one or more non-labor groups (i.e., non-licensed talent managers and attorneys). As such, the statutory labor exemption does not apply on this ground alone.

As to the first point, the Writers Guild has induced non-licensed managers and attorneys to assist it with the group boycott.[202] The Writers Guild has urged managers and attorneys to take the place of talent agents in procuring employment for the Writers Guild's members even though this practice is prohibited by California law.[203] Moreover, to the extent that non-licensed managers and attorneys follow the Writers Guild's urging that they procure employment for talent, these managers and attorneys would be competing in the same market as the major talent agencies to a sufficient degree that they would be capable of committing an antitrust violation against the major agencies regardless of the Writers Guild's involvement.

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[201] *Connell Constr. Co.*, 421 U.S. at 621–22; *see also* Milton Handler & William C. Zifchak, *Collective Bargaining and the Antitrust Laws: The Emasculation of the Labor Exemption*, 81 COLUM. L. REV. 459, 459–515 (1981).

[202] Mike Fleming, Jr., *WGA to Membership: Lawyer Up! David Goodman Explains Why Attorneys & Managers Can Fill The Gap*, DEADLINE (April 16, 2019), https://deadline.com/2019/04/wga-to-membership-lawyer-up-david-goodman-explains-why-attorneys-managers-can-fill-the-gap-1202597247/; *see also* Dave McNary, *WGA Authorizing Managers, Lawyers to Make Deals if Agents Are Fired*, VARIETY (Mar. 20, 2019), https://variety.com/2019/film/news/wga-managers-lawyers-deals-agents-fired-1203168913/.

[203] *See* CAL. LAB. CODE § 1700.44 (West 1986) (stating an unlicensed person is not prohibited from working with a licensed talent agent).

As to the second point, the Writers Guild's boycott oversteps the legitimate scope of any union interest or concern. The Writers Guild's group boycott seeks to entirely ban agency packaging and agency-affiliated production without regard to the existence of any actual harm to writer's interests. It appears that a genuine concern of a "conflict of interest" is not the true motive for the Writers Guild's group boycott. Rather the Writers Guild's true motive, as expressly acknowledged by the Writers Guild's President, is a "power grab" designed to increase institutional power of the Writers Guild by anti-competitively hurting talent agencies and reshaping a significant portion of the entertainment industry whatever the cost to individual writers or to others in the industry.[204]

The Writers Guild's activity does not resemble, in scope, scale, or method, the traditional labor union methods that courts have protected from application of the antitrust laws. The Writers Guild's campaign to eliminate packaging and agency-affiliated production affects commercial markets far beyond writer employment and, thus, beyond traditional union activity. Moreover, encouraging non-licensed managers and attorneys to break California law is not a traditional union activity. As such, the Writers Guild has no legitimate union interest in organizing and conducting a group boycott to restrict competition in commercial markets.

2. *THE WRITERS GUILD WILL NOT BE ABLE TO RELY ON NON-STATUTORY LABOR EXEMPTIONS*.

The Supreme Court has created an additional labor exemption from the antitrust laws, commonly known as the "non-statutory exemption," in areas where courts have deemed the exemption necessary to the proper functioning of the collective bargaining laws.[205] The purpose of the non-statutory labor exemption is to provide unions and employers the ability to bargain over wages, hours, and working conditions.[206]

However, this is not addressed by the Writers Guild's Code of Conduct. Agency packaging and agency-affiliated

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[204] Jonathan Handel, *Writers Guild Sets Vote Targeting Talent Agents: "We Are Making a Power Grab—Divide and Conquer"*, HOLLYWOOD REP. (Feb. 20, 2019), https://www.hollywoodreporter.com/news/writers-guild-sets-vote-targeting-talent-agents-1188615.

[205] *Connell*, 421 U.S. at 622.

[206] *See id.*

production are not mandatory subjects of collective bargaining. They are not part of the collective bargaining process. Thus, the non-statutory labor exemption does not apply.

3. *THE WRITERS GUILD IS VIOLATING THE VERY ANTITRUST LAWS THAT IT CLAIMS ARE BEING VIOLATED*

Ironically, the Writers Guild is at risk of violating the antitrust laws that it claims are being violated by the major talent agencies. Because no exemption from the antitrust laws apply, the Writers Guild's group boycott and concerted refusal to negotiate in good faith could be deemed by the district court as a per se violation of Section 1 of the Sherman Antitrust Act.[207] A Section 1 claim requires a contract, combination, or conspiracy in restraint of trade or commerce.[208] The District Court could find that the Writers Guild has orchestrated a series of such agreements with its members, non-licensed talent managers, and attorneys as part of an overall conspiracy.

First, the Writers Guild instructed and possibly coerced a majority of its members, who themselves compete with one another to hire the services of talent agents, to enter into an unlawful horizontal agreement to boycott and refuse to deal with talent agencies,[209] unless the agencies agree to and adopt the Writers Guild's Code of Conduct. Moreover, the Writers Guild has threatened severe disciplinary action, including expulsion from the union, unless the writers agree to participate in the boycott and group refusal to deal.[210]

Second, the Writers Guild has encouraged certain other talent agencies, who are CAA, UTA, and WME's direct

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[207] *See* 15 U.S.C.A. § 1 (West 2004).

[208] *Id.*

[209] Gregg Mitchell & Isabel Urbano, *Writers Guild of America Announces Lawsuit to End Talent Agencies' Conflicted Business Practices*, WRITERS GUILD OF AM. WEST (April 17, 2019), https://www.wga.org/news-events/news/press/2019/writers-guild-of-america-announces-lawsuit-to-end-talent-agencies-conflicted-business-practices. The WGA has not released an exact number, but according to WGA lawyer Anthony Segall, who is representing the union in its lawsuit, a 'vast majority' of the roughly 8,500 agent-represented Guild writers have signed letters to sever ties with their agents. *Id.*

[210] *See* Ingber, *supra* note 5.

competitors to sign the "Code of Conduct," thus operating as a horizontal agreement to boycott non-complying agencies (i.e., CAA, UTA, and WME) to the direct, anticompetitive benefit of other agencies.[211]

Third, the Writers Guild has encouraged showrunners,[212] when acting in their capacity as non-writing producers, to boycott non-complying agencies, like CAA, UTA, and WME, to the agencies' detriment.[213] And fourth, the Writers Guild has attempted to induce and has induced non-licensed managers and attorneys to procure employment for its members in an effort to achieve the ends of the group boycott and harm non-complying talent agencies.[214]

These contracts, combinations, and conspiracies among horizontal competitors to boycott and refuse to deal could be considered per se violations of Section 1 of the Sherman Act. Even if the District Court were to decline a per se test, the Writers Guild's conduct may constitute an illegal restraint of trade in violation of Section 1 of the Sherman Act.

Under the rule-of-reason analysis, a court will weigh the anticompetitive harm caused by the Writers Guild's restrictions against the potential pro-competitive benefit of those same restrictions.[215] The anticompetitive harm caused by the Writers Guild's conduct is clear, and there are seemingly no pro-competitive benefits. The Writers Guild has restricted its members from using certain agencies that do not adopt the Writers Guild's

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[211] First Consolidated Complaint at 3, ¶ 7, William Morris Endeavor, LLC v. Writers Guild of Am., Inc., 2:19-cv-05465-AB (C.D. Cal. Sept. 27, 2019).

[212] A showrunner is a non-writing executive producer on a production. *See Excellent Advice From Hollywood Producer Laverne McKinnon*, GIRLBOSS (June 10, 2016), https://www.girlboss.com/work/2016-6-10-girlboss-is-coming-to-netflix-an-interview-with-executive-producer-laverne-mckinnon. Generally, showrunners are viewed as the "CEO" of productions. *See id.*

[213] Will Thorne, *Drama Showrunners Talk WGA-ATA Dispute, Evolving Industry at Variety's 'A Night in the Writers' Room*, VARIETY (June 14, 2019), https://variety.com/2019/tv/news/wga-ata-showrunners-a-night-in-the-writers-room-1203243292/.

[214] *See* Fleming, Jr., *supra* note 202.

[215] See Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 97 (1984), for detailed analysis of per se violations and the rule-of-reason.

Code of Conduct without providing any pro-competitive justifications or benefits.

The rule-of-reason analysis also requires that a relevant economic market be defined in which the Writers Guild is restraining competition.[216] The Writers Guild's market power in this relevant market is then assessed, and consideration is given as to whether the Writers Guild could achieve any ostensible pro-competitive benefit in a less restrictive manner, and, if necessary, balance the anti- and pro-competitive effects against one another.

The Writers Guild has stifled competition in the relevant market[217] through its group boycott. The major talent agencies compete in a market to sell their representation services to writers negotiating with producers. Additionally, writers compete with each other to acquire the representation services of agents. The geographic scope of this relevant market is the United States. There are no substitutes for the representation services provided in this market because, under California law, only licensed talent agents may procure and negotiate employment in the entertainment industry for writers.[218]

The Writers Guild not only has market power, but also a full monopoly over the relevant market because of its status as the exclusive collective bargaining representative of all writers for television production companies and Hollywood studios. The district court could find that the Writers Guild's ban on agency packaging unreasonably restrains competition in the market for the development and production of scripted television shows. The Writers Guild is leveraging its monopoly power in the labor market for writers to eliminate the agencies as competitors for packaging. As a result, talent agencies will be driven out of packaging entirely, thereby transforming a significant market in the entertainment industry.

The Writers Guild's ban on agency-affiliated production companies likewise unreasonably restrains competition in the market for development and production of scripted television shows and motion pictures. If the Writers Guild leverages its monopoly power in the labor market for writers to eliminate agency-affiliates such as wiip, Endeavor, or Civic Center Media as competitors, with the established studios in the relevant market

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[216] *Id.*

[217] The market being talent agencies, production companies, and studios.

[218] CAL. LAB. CODE § 1700.5.

for television and motion picture production, then it is effectively eliminating new entrants in the market. As such, the anticompetitive effects are substantial because the established studios and production companies directly benefit from the reduction in competition.

The Writers Guild's group boycott also provides an anticompetitive advantage to non-licensed managers and attorneys who are being asked to replace the boycotted talent agents. The Writers Guild has not required non-licensed managers and attorneys to refrain from participation in packaging and content production.[219] In fact, the Writers Guild has knowingly allowed non-licensed managers to produce and own television and motion picture content for multiple decades.[220]

Complete bans on agency packaging and agency-affiliated production cause significant anticompetitive effects in the relevant markets with no offsetting pro-competitive benefits. Moreover, even if there were pro-competitive effects, the Writers Guild could achieve such pro-competitive objectives through far less restrictive alternatives than an absolute bar on agency packaging and agency-affiliated production.

The district court may find that the major talent agencies have suffered antitrust injury to their business and property as a direct and proximate result of the Writers Guild's mandated group boycott, refusal to deal, and instruction to Writers Guild members to fire their agents. Talent agencies have lost a substantial number of clients and work. Moreover, the talent agencies that do not adopt the Writers Guild's Code of Conduct will continue to lose work, lose clients, lose packaging fees, and suffer irreparable harm to their respective business and property.

As such, the district court may find that the Writers Guild's group boycott and refusal to deal violates Section 1 of the Sherman Antitrust Act.

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[219] Talent management companies are permitted to produce content. *See* Matthew Blake, *Private Equity Shines Spotlight on Talent Reps*, L.A. BUS. J. (April 2019), https://labusinessjournal.com/news/2019/apr/05/private-equity-shines-spotlight-talent-reps/.

[220] David Ng, *Talent agencies are reshaping their roles in Hollywood. Not everyone is happy about that*, L.A. TIMES (April 6, 2018), https://www.latimes.com/business/hollywood/la-fi-ct-talent-agencies-20180406-story.html.

D. WRITERS GUILD'S BEST COURSE OF ACTION IS TO CLOSELY MONITOR AND HOLD ACCOUNTABLE AGENCY-AFFILIATED PRODUCTION COMPANIES

The Writers Guild has dug itself into a hole by alleging antitrust violations against the major talent agencies. Now the agencies are firing back, and the Writers Guild may be subject to antitrust violations based on its conduct. The district court will likely find that both the practice of packaging and agency-affiliated production companies do not violate Section 1 of the Sherman Act. Therefore, the Writers Guild will likely lose its battle with the CAA, UTA, and WME.

The Writers Guild could bring a claim against the CAA, UTA, and WME for a potential violation of the California Labor Code, which strictly regulates the business operations of talent agencies. If the Writers Guild prevailed, the agencies could be required to dissolve their respective agency-affiliated production companies.

According to § 1700.40(b) of the California Labor Code, "[n]o talent agency may refer an artist to any person, firm, or corporation in which the talent agency has a direct or indirect financial interest for other services to be rendered to the artist."[221] Arguably, this statute could create problems for agency-affiliated productions. Its language suggests that a talent agency cannot direct its clients to projects in which the agency holds a financial interest, regardless of whether that interest is direct or indirect. For whatever reason, though, the Writers Guild did not turn to the California Labor Code for a remedy.

The rationale for this decision might be based on the Writers Guild's determination to halt the practice of packaging entirely. From the Writers Guild's perspective, the agency-affiliated production companies are ancillary—or in supporting roles—to the larger packaging role. The agency-affiliated production companies, therefore, provide an easier avenue for agencies to package their own clients' projects because the agency has an ownership in the platform that is providing employment to their artists, including writers. This ultimately expands the practice of "packaging" in the entertainment industry, at least in the eyes of the Writers Guild.

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[221] CAL. LAB. CODE § 1700.40(b) (West 1994).

CONCLUSION

The Writers Guild and CAA, UTA, and WME are locked in an antitrust standoff that appears to be headed to trial. It is a battle that could ultimately upend television and movie production and threaten the livelihoods of thousands of people. Consequently, the entertainment industry is closely watching in anticipation of the final outcome. The outcome will inevitably have a ripple effect throughout Hollywood.

Depending on the district court's determination, other unions may follow the Writers Guild's lead. The Writers Guild is one of many unions that have agreements with talent agencies and studios.[222] Each union has unique and idiosyncratic agreements that relate to its members and the services that the members provide in the entertainment industry. Should the court come out in favor of the Writers Guild, it will set a dangerous precedent for future issues and conflicts. The Writers Guild will then be empowered to withhold its members from providing services to a production until an agency or studio agrees to the Writers Guild's terms. Moreover, it will empower other unions to mandate its members to fire or refuse to work with agencies, studios, or production companies that do not agree to the respective union's demands. Were this to occur, it would effectively stall production on all levels, leaving thousands of people unemployed until an agreement is reached, if at all.

In fact, the Writers Guild may soon be leading its members to a strike against major Hollywood studios and production companies if those studios and production companies continue to work with CAA, UTA, and WME. The Writers Guild's conflict with the major talent agencies is currently trickling into the Writers Guild's upcoming franchise negotiations with Hollywood Studios. The Writers Guild is enticing major studios and production companies to take its side in the current conflict. The Writers Guild's demands require studios to negotiate

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[222] Other unions include the Producers Guild of America (PGA), the Screen Actors Guild/American Federation of Television and Radio Artists (SAG-AFTRA), and the Directors Guild of America (DGA). *Guilds and Unions*, DIRECTOR'S GUILD OF AM., https://www.dga.org/Resources/Additional/Guilds-and-Unions.aspx (last visited April 23, 2020).

"only with agents franchised by the [Writers Guild]."[223] Should the studios and production companies collectively fail to acquiesce to the Writers Guild's demands, the result may end up in a group boycott of both talent agencies and studios—building a stronger case for antitrust violations against the Writers Guild.

The Writers Guild conflict with CAA, WME, and UTA comes at a time when economic realities are changing for both writers and agents in the digital Hollywood era. The period of peak television has led to more content creation and a greater need for writers than ever before. It has also led to shorter production seasons, lower salaries for writers, unpredictable production cycles and, in the case of some digital platforms like Netflix, no potential back-end profits for the sale of successful shows to other markets.[224]

At the same time, the business of talent representation has changed dramatically as the three major agencies have expanded and acquired capital from outside investors, requiring a larger revenue stream to be profitable. Within the last decade, the major agencies have taken in hundreds of millions of dollars in private-equity money.[225] Moreover, in 2019, WME planned for an initial public stock offering. However, the agency withdrew its public

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[223] Dave McNary, *Writers Guild Members Strongly Endorse Demand for Studios to Ban Non-Franchised Agents*, VARIETY (Feb. 7, 2020), https://variety.com/2020/biz/news/writers-guild-studios-non-franchised-agents-1203496917/.

[224] *Id.* And the streaming service retains ownership of all its original content. *Id.*

[225] The majority owner of CAA, for example, is TPG Capital, a giant private-equity firm with a prime mandate of growth. *See TPG Deepens Strategic Partnership with Creative Artists Agency*, BUS. WIRE (Oct. 20, 2014), https://www.businesswire.com/news/home/20141020006374/en/TPG-Deepens-Strategic-Partnership-Creative-Artists-Agency. In 2017, WME-IMG received a $1.1 billion investment by a Canadian pension fund and a Singaporean sovereign wealth fund. *See* Gene Maddaus, *WME-IMG to Receive $1.1 Billion Cash Infusion (EXCLUSIVE)*, VARIETY (Aug. 2, 2017), https://variety.com/2017/biz/news/silver-lake-wme-img-1-1-billion-investment-1202513182/. The majority owner of WME-IMG is Silver Lake Partners, a private equity firm. The investment is intended to enable further acquisitions. *Id.*

offering mere hours before it was to begin trading on the New York Stock exchange.[226]

As a result of the infusion of outside capital, the major talent agencies are being forced to reevaluate and reassess their business practices. To remain relevant, no longer can they operate solely as a traditional agency; they must operate as entertainment conglomerates.[227] Interestingly, this is the situation that the Supreme Court decision in *Paramount* and the 1962 federal consent decree with MCA was designed to prevent. However, the modern packaging system and agency-affiliated production companies are distinguishable from the *Paramount* defendant's and MCA's packaging practices.

Perhaps the largest difference between the practice of packaging by MCA and modern agencies is that the agencies now waive standard commissions for their clients, who are combined together on a particular project, while taking fees and back-end ownership stakes for themselves. Moreover, unlike the Hollywood eras in which Paramount Pictures and MCA operated, the modern era of Hollywood holds the most production companies, television networks, studios, and digital platforms ever recorded in Hollywood history.

Should this dispute go to trial, the district court will favorably view the pro-competitive benefits that packaging practices and agency-affiliated production companies offer to writers. Additionally, the Writers Guild's mandate for its members to refuse to work with agencies that do not agree to the Code of Conduct, coupled with its recent strong-arming of Hollywood studios and production companies will not be viewed positively in court. As such, the Writers Guild would be best served by settling its dispute with CAA, UTA, and WME out of court, recognizing that while writers' wages may have stagnated over the past few years, the marketplace has expanded exponentially. In a more diversified marketplace, CAA, UTA, and WME are only adding to the ever-expanding market by introducing more opportunities for writers, and artists in general.

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[226] Gene Maddaus & Cynthia Littleton, *Endeavor IPO Delay Sends Shockwaves Through Agency Business*, VARIETY (Sept. 27, 2019), https://variety.com/2019/biz/news/endeavor-ipo-wme-delay-agents-1203351170/.

[227] Benjamin Mullin, Dana Cimilluca & Erich Schwartzel, *Endeavor Sets Stage for Late-2019 IPO*, WALL ST. J. (Mar. 29, 2019), https://www.wsj.com/articles/endeavor-sets-stage-for-late-2019-ipo-11553875439.