COMMENTS OF SAG-AFTRA, MUSIC ARTISTS COALITION & BLACK MUSIC ACTION COALITION

TO FTC
REQUEST FOR PUBLIC COMMENT
REGARDING CONTRACT TERMS THAT MAY HARM FAIR COMPETITION

Screen Actors Guild-American Federation of Television and Radio Artists ("SAG-AFTRA"), Music Artists Coalition ("MAC") and Black Music Action Coalition ("BMAC") submit the following comments in response to the FTC's Request for Public Comment regarding contract terms that may harm fair competition.

SAG-AFTRA represents approximately 160,000 actors, announcers, broadcast journalists, dancers, DJs, news writers, news editors, program hosts, puppeteers, recording artists, singers, stunt performers, voiceover artists and other entertainment and media professionals. SAG-AFTRA members are the faces and voices that entertain and inform America and the world. A proud affiliate of the AFL-CIO, SAG-AFTRA has national offices in Los Angeles and New York and local offices nationwide representing members working together to secure the strongest protections for entertainment and media artists into the 21st century and beyond.

Music Artists Coalition (MAC) was formed because the music business is at a critical point in its history. Decisions are being made today in the United States and abroad which will impact music creators for decades. MAC believes music creators should be driving the strategy and conversation about the issues that shape their lives and that artists should have the opportunity to decide how to best protect the fate of their music and their other rights. Founding board members include Anderson .Paak, Dave Matthews, Don Henley, Maren Morris, Meghan Trainor, Shane McAnally, and Verdine White, among others. MAC has been engaging on key issues since its founding in 2019, and is behind the current fight for the FAIR Act in California, an attempt to help balance Major Label record deals.

Black Music Action Coalition (BMAC) is an advocacy organization formed to address systemic racism within the music business. Our Coalition advocates on behalf of Black artists, songwriters, producers, managers, agents, executives, lawyers and other passionate industry professionals.

Harming Worker Mobility / Streaming Services & Actor Contracts

Since the earliest days of the entertainment and news industries, entertainment employers have sought to control talent by binding them to onerous contracts that hold them off the market unpaid and restrict their ability to pursue their profession. Much like today, during Hollywood's "Golden Age" (from the 1920s through the early 1960s), a few vertically-integrated studios controlled the means of production and distribution while binding media professionals to long-term employment contracts that limited their mobility.[1] Even the biggest stars were bound to these oppressive contracts. In the film industry, this system started to unravel in the mid-1940s, when a brave union actor challenged the era's exclusive contracts.[2]

The litigation of the 1940s helped create a freelance film industry where actors could finally work with multiple production companies. Unfortunately, as the television industry becomes vertically-integrated once again, employers are utilizing new forms of restrictive covenants.[3] Overly broad exclusivity clauses and unilateral options, exercisable in the employer's sole discretion, allow employers to unreasonably restrain actors' ability to work.

These restrictive covenants are increasingly oppressive and keep actors off the market and unable to work for excessively long periods of time. They restrict actors' abilities to work, compete, and build their careers. For all practical purposes these pernicious provisions are non-negotiable and unmodified for everyone but a handful of the biggest stars.

Underrepresented groups will be disproportionately disadvantaged by this practice. Being held off the market -- and therefore off-screen -- for years, during the period when they would statistically have the most opportunities, will destroy earning potential and career building. It prevents opportunities and limits exposure at the most critical juncture in their careers.

These restrictive covenants lack a pro-competitive justification in today's market. There is no market harm if an actor works on another series, commercial, or movie during hiatus periods. There is market harm by unilaterally and unreasonably restricting work for actors, to the sole benefit of increasingly powerful, vertically integrated, global entertainment conglomerates.

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[1] Stephen M. Gallagher, *NOTE: Who's Really "Winning"?: The Tension of Morals Clauses in Film and Television*, 16 VA. SPORTS & ENT. L.J. 88, 92 (2016); Margaret Heidenry, *How Hollywood Salaries Really Work*, VANITY FAIR, Feb 12, 2018, https://www.vanityfair.com/hollywood/2018/02/hollywood-movie-salaries-wage-gap-equality.

[2] Gallagher 16 VA. SPORTS & ENT. L.J. at 92; *De Haviland v. Warner Bros. Pictures*, 153 P.2d 983, 988 (1944).

[3] Sabri Ben-Achour and Daniel Shin, *How the "vertical integration" of streaming studios today evokes old Hollywood's power*, MARKETPLACE MORNING REPORT, Aug 13, 2021, https://www.marketplace.org/2021/08/13/how-the-vertical-integration-of-streaming-studios-today-evokes-old-hollywoods-power/.

Harming Worker Mobility / Recording Artists & the 7 Year Rule

Among the anti-competitive behaviors existing in the music business, one particular practice is given the cover of law to exploit the talents of musicians. Unconscionably long contract terms are rampant in the industry, aided by an exemption to California's Seven Year Rule, which keeps musicians and actors from accessing the Rule's protections. The Rule, which prevents any personal service contract from being enforced beyond seven years, is one reason California is a haven of worker mobility that helps it become one of the great economic powers in the world. Musicians are singled out -- to the economy and the publics' detriment -- as this anti-competitive law and Major Label practices deflate the movement of labor and stifle creativity in the workforce.

Musicians sign record contracts for a chance at success in music. But for most musicians, record contracts are not a means to success but rather a mechanism Major Labels use to exploit their labor. While Major Labels contend that only 1 out of 10 artists recoup on their advances[4] (sums given to artists before a record is released that are entirely recouped by the label before an artist is paid any royalties), this claim is immaterial: Major Labels do not provide many artists with access to the market.

Musicians are routinely denied the chance to complete their contractual obligations and are thus severely or entirely restricted in the movement of their services and economic opportunities. One way artists are rebuffed is when labels "shelve" an album, refusing to release a record entirely. Another is by releasing songs as "singles" instead of on albums. In both instances, the label prolongs the term of the contract because record contracts for a specific number of albums, as opposed to a term of years or a total number of songs, and in California, because the Seven Year Rule excludes musicians.

Three multinational, foreign-owned, multibillion dollar companies (collectively, the "Major Labels") control over 65% of the market across the world.[5] While artists today make pennies on the dollar compared to past generations, Major Labels have launched massive IPOs, riding skyrocketing margins, huge stakes in the top streaming companies, and ownership of their own publishing companies to huge profits and executive compensation.[6] These and other historic

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[4] Richard Osborne, “I am a One in Ten”: Success Ratios in the Recording Industry, in Music by Numbers: The Use and Abuse of Statistics in the Music Industry 56–71 (Richard Osborne & Dave Laing eds., 2021).

[5] Figures assembled by Goldman Sachs Equity Research, relying on data from the International Federation of the Phonographic Industry (an industry trade group that counts the three major labels as members), the major labels accounted for over 70% of total market share in 2019. The Goldman Report is available at https://www.goldmansachs.com/insights/pages/infographics/music-in-the-air-2020/report.pdf.

[6] Geoff Mayfield, *What Can We Expect From Universal Music Group’s $40-Billion-Plus IPO on Tuesday?*, Variety, Sept 17, 2021, https://variety.com/2021/music/news/universal-music-group-40-billion-ipo-1235067564; *see also*, Tim Ingham, *Let’s Break Down the Mind-Blowing Money in Universal Music’s IPO*, Rolling Stone, Sep 20, 2021, https://www.rollingstone.com/pro/features/universal-music-ipo-billions-lucian-grainge-1228834; Lucian Grainge, CEO of UMG, is paid over 40 million dollars a year, and is expected to earn several hundred million dollars in 2021 in connection with the IPO.

predatory practices are still rampant today, where Major Label record deals ensnare young artists, many of whom are from underserved communities and are people of color.[7]

The restrictive and anti-competitive practices of the recording industry belong in a bygone era. An exemption like that in California's Seven Year Rule gives the labels safe harbor to mistreat musicians. Our international allies have taken notice: the U.K., the third-largest music market by revenue in the world[8], has engaged in an anti-competitive investigation into the practices of the recording industry.[9] Restricting the free movement of labor and services, and clamping down on creativity generally, is antithetical to American ideals and norms. The record labels already have a leg up–they do not need or deserve to have the law and leaders look the other way in the face of unfair contracting.

Harming Worker Mobility / Non-Compete Agreements for Broadcast Professionals

SAG-AFTRA has been addressing the issue of non-compete agreements in employment agreements for television and radio broadcasters for well-over twenty-five years. These contract provisions have long been a staple of employment agreements in the news and broadcast industry. These agreements, once limited to very highly compensated, high-profile employees who resigned their employment, have over the past two decades become "standard boilerplate" / "non-negotiable" for employees, regardless of pay, who appear in front of a camera, behind a microphone, work behind the scenes and are enforced even in cases of termination or lay-off.

Employees in the news and broadcast industry are under a more traditional staff employment structure. Non-compete agreements have the effect of limiting or restraining employee mobility and individual worker entrepreneurship. They artificially restrict an individual's ability to market his/her talents, services and skills in a free market resulting in wage and salary stagnation.

We have seen the unfortunate impact of non-competes and restrictive covenants for decades. We regularly speak to young professionals starting their career in TV or radio making as little as $11.00 / hour who have had to pass up opportunities to earn more money because of these restrictive covenants. Others have been forced to leave the industry rather than leave a city where they have started their family. And, others who have been asked to pay their employer thousands of dollars in liquidated damages to leave a job to get out from under a restrictive covenant.

It is often argued that many non-competes provisions, based on the applicable state law and individual circumstances, are not even enforceable. However, employers include them in employment contracts knowing that they will not have to enforce them in court. Since the

[7] *See* Ben Sisario, *The Music Industry is Wrestling With Race. Here's What It Has Promised.* NY Times, Jul 1, 2020, https://www.nytimes.com/2020/07/01/arts/music/music-industry-black-lives-matter.html; *see also* Shirley Halperin, Jeremy Helligar, *The Big Payback: How Pharrell Williams Is Breaking the Chains of the Music Industry's Troubled Past,* Variety, Aug 11, 2020, https://variety.com/2020/music/news/pharrell-williams-master-slave-industry-contracts-1234729237.

[8] *Global Music Report*, International Federation of the Phonographic Industry, Mar 23, 2021, https://www.ifpi.org/wp-content/uploads/2020/03/GMR2021_STATE_OF_THE_INDUSTRY.pdf.

[9] *MPs call for a 'complete reset' of music streaming to fairly reward performers and creators*, UK Parliament Digital, Culture, Media and Sport Committee, Jul 15, 2021, https://committees.parliament.uk/committee/378/digital-culture-media-and-sport-committee/news/156593/mps-call-for-a-complete-reset-of-music-streaming-to-fairly-reward-performers-and-creators.

employees must bear the unreasonable burden of knowing the law, hiring an attorney, and prohibiting enforcement of these restrictive provisions, employers can rest assured that they will go unchallenged.

In response to the employers' consistent use of these provisions in the broadcast industry, SAG-AFTRA has proposed limitations on these agreements through collective bargaining, however, employers continue to resist any limitations on these agreements. In fact, employers have only worked to strengthen the language of their non-compete agreements and add other restrictive covenants to employment agreements to avoid existing legislative restrictions on non-compete agreements. In non-union employment, the employee has no recourse against their being included.

SAG-AFTRA has been successful in promoting legislation limiting their enforcement in the broadcast industry in several states, including Arizona, Connecticut, Illinois, Massachusetts, Maine, New York, Washington and the District of Columbia.[10]

Harming Worker Mobility / One-Sided Definite Term Contracts

An issue in employment agreements for radio and television broadcast employees is the use by employers of personal service agreements that purport to be of a definite term inasmuch as they bind the employee for a number of years but also permit the employer to terminate the agreement at any time and with little or no notice to the employee. These contracts thoroughly restrict the mobility of employees for extended periods of time, free the employer from the normal allocations of risk inherent in a definite term contract, and effectively tie an employee to a particular employer for as long as the employer determines that the original bargain remains in its favor without any concomitant obligations on the employer.

Under normal circumstances, when entering into a long term contractual employment relationship, both parties -- the employer and the employee -- incur duties and rights with respect to the other, and in so doing assume some measure of risk that they will not realize the benefit of their bargain over the defined period. The employee agrees to bind herself to the employer and to guarantee the employer a price for her services that she thinks, at the time of the contract's formation, will be favorable to her over the period of the contract. The employer, for its part, bargains to reliably obtain those services over the period of time for a price that it believes to be in its long term advantage. In this dynamic, there is mutuality: both parties assume some measure of risk that they will not realize the benefit of their bargains over the period of time for which they have contracted.

Contracts that bind employees to employers for a definite term, but allow the employer to maintain an essentially at-will relationship with the employee, distort this mutuality. The employee remains bound to her employer irrespective of whether her deal is working out for her.

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[10] Arizona Revised Statutes Title 23. Labor Sect. 23-494; Connecticut General Statutes Title 31 - Labor Chapter 557, Employment Regulation 31-50b; Illinois, 820 ILCS 90/5, 90/10; Massachusetts, Part I, Title XXI, Chapter 149, Section 186; Maine Title 26, Sect. 599-A; New York Lab. Law Sect. 202-k, Washington RCW 49.44.190; D.C. Law 14-258; D.C. Official Code Sect. 32-571 et. seq.)

Meanwhile, her employer is free to move on from her when it determines that the contract no longer benefits it.

This freedom to terminate the contract gives the employer immense power over the employee. The employee is fixed in place by the definite term nature of the contract, and she is restricted from accepting other employment within the industry through a noncompete clause. By contrast, the employer is free from lasting obligation to the employee, and it can survey the field for lower cost alternatives to the employee, whom it can plug in to her position at will.

By exercising this power, the employer is able to put downward pressure on wages. Not only is the employer actually able to replace a higher-paid employee with a lower-paid one with little transaction cost, but the ease of making such a change can have the effect of making incumbent employees more willing to either forego increases or take lower wages themselves just to remain in the position they already occupy.