DEFINING THE RELATIONSHIP: CALIFORNIA'S NONCOMPETE LAWS AND EXCLUSIVITY IN THE ACTING INDUSTRY LEADING UP TO THE 2023 SAG-AFTRA STRIKE

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ABSTRACT

California is firm in its stance against post-term noncompete clauses. This Note examines early Hollywood and the historical and economic context in which talent contracts arose. It analyzes the shift in talent contracts from the harsher terms of the 1930s studio system to the modern terms which give more control to actors.

Exclusivity exists in both the film and television industry. However, the in-term and post-term treatment of exclusivity provisions and noncompetes has received conflicting treatment by California and Ninth Circuit Courts, suggesting that perhaps the California Supreme Court should weigh in on the matter as they did in 2008 with Edwards v. Arthur Andersen *and articulate whether Section 16600 can apply to in-term noncompete and exclusivity provisions. While it is widely held that Section 16600 does not apply to in-term noncompetes, the holding in* ITN Flix, LLC v. Hinojosa *suggests that certain situations in the acting industry may trigger its application and deem an in-term noncompete invalid if unduly harsh.*

Regardless, the ability of actors and unions to negotiate with studios for mutually beneficial terms has allowed common practices in entertainment contracts to shift over time without much recent legislation. This suggests that, while the applicable law will provide one side with bargaining power, negotiations and collective-bargaining agreements will

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largely continue to set the standards for common entertainment contract practices.

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INTRODUCTION

From 2005 to 2010, American actress Katherine Heigl appeared in the hit ABC television medical drama, *Grey's Anatomy*, as the supporting role of Dr. Izzie Stevens.[1] Simultaneous to her work on the television series, Heigl starred in films that would soon become classics of the 2000s, such as *Knocked Up* (2007), *27 Dresses* (2008), and *The Ugly Truth* (2009).[2] By 2008, Heigl had been deemed the new "It Girl" of Hollywood by *Vanity Fair* as a result of her acting endeavors.[3] *Knocked Up* had been a box office hit, and Heigl had taken home the 2007 Primetime Emmy Award for Outstanding Supporting Actress in a Drama Series for her television work

1. *Katherine Heigl*, IMDB, https://www.imdb.com/name/nm0001337 [https://perma.cc/K8VD-9CVP].
2. *Id.*
3. Leslie Bennetts, *Heigl's Anatomy*, VANITY FAIR (Jan. 1, 2008), https://www.vanityfair.com/news/2008/01/heigl200801 [https://perma.cc/YG3J-MH7L].

on *Grey's Anatomy*.[4] Heigl had pursued a career in film while still appearing as a series regular on *Grey's Anatomy*, rendering her a household name across the United States. Meanwhile, the lead of *Grey's Anatomy*—Ellen Pompeo—had not appeared in a role outside of Dr. Meredith Grey since the series inception in 2005.[5] While this could be attributed to personal choices, it may instead be the result of contractual differences between a series's lead actress and a supporting actress, stemming from varying exclusivity terms. It is possible that Ellen Pompeo, as the lead role of Meredith Grey, was "contractually forbidden from acting elsewhere."[6] In 2018, Pompeo told *The Hollywood Reporter*, "I don't get to do anything else, and that's frustrating for me creatively. I make 24 episodes of TV a year, and as part of this deal, I cannot appear anywhere else."[7] While exclusivity terms can be frustrating to an actor,[8] as demonstrated by Pompeo's statement to *The Hollywood Reporter*, many studios view exclusivity as vital to production. Studios use exclusivity to coordinate production schedules and ensure talent's availability as they invest time and money in the creation of a particular character.

In 2022, exclusivity terms could be freely negotiated in the entertainment industry when union actors were paid above an "exclusivity money break."[9] The exclusivity money break is a minimum salary bargained for by SAG-AFTRA,[10] above which producers and talent can negotiate exclusivity freely. This would often result in producers paying substantial salaries for the exclusivity of top talent.[11] Meanwhile, union actors paid below the exclusivity money break (non-star talent) were restricted in their ability to grant exclusivity.[12] While these restrictions are discussed later in detail, actors in this latter non-star category who worked on a streaming show

4. *Katherine Heigl*, TELEVISION ACADEMY, https://www.emmys.com/bios/katherine-heigl [https://perma.cc/3LKF-AKBV].

5. Pompeo has not appeared in other roles since *Grey's Anatomy* was first released, apart from a cameo in a Taylor Swift music video and a "meow" in a children's animated series voiceover. Dan Clarendon, *A Recap of Ellen Pompeo's Roles Outside of 'Grey's Anatomy'*, TV INSIDER (Aug. 13, 2022, 12:00 PM), https://www.tvinsider.com/1055398/ellen-pompeo-tv-movie-roles-greys-anatomy [https://perma.cc/V9S6-5VXZ].

6. *Id.*

7. *Id.*

8. "Actor" is used throughout this Note to capture both actors and actresses.

9. *SAG-AFTRA Netflix Agreement*, SAG-AFTRA (Aug. 10, 2022), https://www.sagaftra.org/files/sa_documents/SAG-AFTRA_Netflix_2022.pdf [https://perma.cc/2MSC-6T7V].

10. SAG-AFTRA is a prominent actors union, discussed in detail in later sections. Because the vast majority of Hollywood actors are union members of SAG-AFTRA, nonunion actors are not the focus of this Note.

11. Charles Rivkin, *A New Threat to California Film, Television and Streaming Jobs (Opinion)*, VARIETY (Aug. 1, 2022, 9:38 AM), https://variety.com/2022/film/news/charles-rivkin-mpa-california-bill-ab-437-television-streaming-jobs-1235330603 [https://perma.cc/VS9A-KQE5].

12. SAG-AFTRA, *supra* note 9; Rivkin, *supra* note 11.

were often able to appear in feature films, as guests on other shows, and in commercials, yet they sometimes had to receive permission from studios in order to do so.[13] Practical difficulties sometimes arose in the process of coordinating outside roles, as the actor's main show would take scheduling precedence and restrict the actor's ability to alter their appearance.[14] This tension between actors, who often want the freedom to appear in additional roles, and studios, who face the challenges of coordinating production schedules and may have invested in an actor's image, has led to debate in Hollywood surrounding the use of exclusivity provisions in talent contracts. Exclusivity, along with other issues concerning residuals and the use of Artificial Intelligence, contributed to SAG-AFTRA's 2023 strike against Hollywood's major studios, lasting 118 days from July to November of 2024 while new contract boundaries were negotiated.[15] This Note will examine the contractual exclusivity terms leading up to the 2023 strike. The rise of online streaming has increased the demands placed on actors, as shorter series seasons contribute to more idle time for actors. The landscape is changing rapidly, resulting in the frequent renegotiation of terms and resulting standstills, exemplified by the 2023 SAG-AFTRA strike.

Exclusivity provisions are contractual terms that prevent an employee from working elsewhere during the term of their employment, resulting in the employee giving their undivided effort to the employer. Noncompete clauses are another set of contractual terms that also appear in talent contracts and typically restrict an employee from working for certain third-parties. Noncompetes may last for only the term of the employment, and thus be *in-term* restrictions, or they may last after the employee no longer works for the current employer, which is a *post-term* restriction.[16]

Arguments exist on both sides of the general debate around exclusivity provisions and noncompetes in the talent industry. Opponents argue that they hinder competition by restricting the free movement of talent and ideas.[17] In the talent industry specifically, SAG-AFTRA has argued that exclusivity terms in actors' personal service agreements are often used to "hold series

13. Rivkin, *supra* note 11.

14. SAG-AFTRA, *supra* note 9.

15. *SAG-AFTRA Slams 'Bullying Tactics' as Strike Talks Break Down With Studios,* TIME (Oct. 12, 2023, 12:31 PM), https://time.com/6323071/actors-strike-talks-suspended [https://perma.cc/RQ46-RH8M]; Gene Maddaus, *SAG-AFTRA Approves Deal to End Historic Strike*, VARIETY (Nov. 8, 2023, 4:40 PM), https://variety.com/2023/biz/news/sag-aftra-tentative-deal-historic-strike-1235771894 [https://perma.cc/6QNZ-5M3T].

16. Ananya Nair, *What Is the Difference Between a Non-Compete Clause and an Exclusivity Clause?*, LINKEDIN (Oct. 17, 2021), https://www.linkedin.com/pulse/what-difference-between-non-compete-clause-exclusivity-ananya-nair [https://perma.cc/865C-UTQL].

17. *See* Lindsey Schmidt, *A More Reasonable Approach to Noncompete Employment Agreements in California*, 48 J. LEGIS. 145, 155 (2021).

regulars off the market and unable to work for unreasonably long periods of time"[18] while a show is in an off period.[19] SAG-AFTRA has noted that these exclusivity provisions were less burdensome when talent worked three quarters of the year on twenty episode seasons, but that the rise of online streaming platforms, year-round production cycles, and short seasons of thirteen episodes (or sometimes fewer) have left lower and mid-level actors short of work.[20] Some actors are "not being paid while on hold between seasons, but they're also not allowed to accept other paying jobs. These contracts mean that actors often find themselves collecting unemployment, struggling to pay their bills and unable to build a career."[21] The arguments against exclusivity and noncompetes have received national attention.[22] In 2021, President Biden issued an executive order attempting to limit the effect of noncompetes, authorizing the Federal Trade Commission ("FTC") to "interpret noncompetition agreements as an unfair method of competition, and thereby declare them unlawful."[23] SAG-AFTRA was " 'thrilled to see President Biden take steps to curtail the use of unfair non-compete clauses, which are a major problem for . . . actors . . . .' "[24]

Conversely, proponents of exclusivity provisions and noncompetes argue that without them, employers have little incentive to invest in the development of their employees.[25] In the acting industry specifically, production studios have concerns regarding the coordination of "complex

18. *See* David Robb, *SAG-AFTRA Board Overwhelmingly Approves Deal with AMPTP That Sharply Limits Exclusivity in TV Actors' Personal Service Agreements*, DEADLINE (Aug. 20, 2022, 5:36 PM), https://deadline.com/2022/08/sag-aftra-board-approves-deal-amptp-limits-exclusivity-tv-actors-personal-service-agreements [https://perma.cc/S63E-FATW].

19. An "off period" in a television series is a period during which the show is not actively filming, but the actor is still under contract as the next season of filming is approaching.

20. Joe Otterson, *How Exclusive Contracts Leave Writers and Actors Scrambling to Navigate Supercharged Job Market*, VARIETY (Dec. 23, 2021, 10:15 AM), https://variety.com/2021/tv/entertainment-industry/exclusive-deals-streamers-prestige-television-1235142536 [https://perma.cc/Y892-CNW7].

21. Duncan Crabtree-Ireland, *Forced Exclusivity Terms in Actor Contracts Add a Dark Side to Hollywood's Golden Age (Opinion)*, VARIETY (Aug. 5, 2022, 10:00 AM), https://variety.com/2022/tv/news/sag-aftra-duncan-crabtree-ireland-exclusivity-law-act-1235333015 [https://perma.cc/FPL7-MXWS].

22. Mitch Danzig & Paul Huston, *How FTC Could Regulate Noncompetes After Biden's Order*, LAW360 (July 15, 2021, 3:14 PM), https://www.law360.com/articles/1403236/how-ftc-could-regulate-noncompetes-after-biden-s-order [https://perma.cc/FPL7-MXWS].

23. *Id.*

24. *See SAG-AFTRA Applauds President Biden's Effort to Address Anti-Competitive Employment Practices*, SAG-AFTRA (July 9, 2021), https://www.sagaftra.org/sag-aftra-applauds-president-bidens-effort-address-anti-competitive-employment-practices [https://perma.cc/FP4V-3H7S]; *see also SAG-AFTRA Celebrates 10th Anniversary of Merger of Screen Actors Guild and American Federation of Television and Radio Artists*, SAG-AFTRA (Mar. 30, 2022), https://www.sagaftra.org/sag-aftra-celebrates-10th-anniversary-merger-screen-actors-guild-and-american-federation-television [https://perma.cc/E27A-K8RC].

25. *See* Schmidt, *supra* note 17.

production schedules involving hundreds—or at times even thousands—of people [with the] talent's availability."[26] The California Chamber of Commerce argues that without exclusivity, talent contracts are far "less valuable, which will lead to a reduction in wages paid to actors."[27] Charles Rivkin, Chairman and CEO of the Motion Picture Association, views exclusive employment agreements as the backbone of scheduling for film, television, and streaming productions: they "provide the certainty necessary for producers to finance, insure, plan for and complete major feature film, television and streaming projects, particularly those involving long-term story arcs. They assure writers and showrunners that characters developed in one season can be brought back for subsequent storylines."[28] Further, studios note an interest in preserving the investment of "millions [of dollars] in developing and promoting a show [and its actors, and] don't want to see the lead actor show up in another series on a rival network."[29] A studio may seek to control the image of a particular actor to protect its franchise from actions which could negatively impact the performance of the franchise, and thus, the studio itself.

Section 16600 of the California Business & Professions Code ("Code") acts as a per se ban on noncompete agreements in California, as it "does not permit non-compete clauses, even if they are reasonable in scope and purpose."[30] While many states operate under reasonableness standards, enforcing noncompetes when they are reasonable in scope and duration,[31] the California Supreme Court case *Edwards v. Arthur Andersen* is strong in both its language and policy rationale against the enforcement of post-term employment restrictions. Following the 2008 decision in *Edwards*, discussed later in this Note, any post-term employment restriction is likely to fail. Discussion around the Code has focused on Silicon Valley, where the ban on noncompetes has often allowed technology companies and start-ups to

26. *See* Rivkin, *supra* note 11.

27. Tom Tapp, *California's AB 437, Which Would Limit Exclusivity in TV Stars' Deals, Faces Crucial Vote*, DEADLINE (Aug. 1, 2022, 1:42 PM), https://deadline.com/2022/08/californias-ab-437-exclusivity-tv-stars-deals-sag [https://perma.cc/DA2F-K5MK].

28. Rivkin, *supra* note 11.

29. Gene Maddaus, *California Considers Bill That Would Free Actors from Exclusivity Deals*, VARIETY (Aug. 1, 2022, 8:40 AM), https://variety.com/2022/tv/news/california-exclusivity-legislation-1235329639 [https://perma.cc/HV73-QZ2A].

30. *The Validity of California Non-Compete Clauses*, THE NOURMAND LAW FIRM, APC (Mar. 11, 2021), https://www.nourmandlawfirm.com/blog/the-validity-of-california-non-compete-clauses [https://perma.cc/2UX6-N6TD].

31. For example, Massachusetts will enforce noncompete agreements "if they: [1] are reasonable in duration, geographic area, and scope, [2] are necessary to protect a legitimate business interest, [3] are consonant with public policy, and [4] contain a 'garden leave' clause." *Non-Compete Agreements—When Are They Enforceable?*, KATZ LAW GROUP, P.C., https://www.katzlawgroup.com/non-compete-agreements [https://perma.cc/DH64-P5SH].

innovate rapidly as employees move from company to company. However, little attention has been paid to the application of Section 16600 in Hollywood, particularly to its recent extension by the Ninth Circuit to reach in-term agreements in the acting industry in *ITN Flix, LLC v. Hinojosa*.[32]

This Note investigates noncompete agreements and exclusivity in the entertainment industry through the lens of Section 16600 and critically analyzes recent decisions involving the extension of *Edwards* to in-term noncompetes and exclusivity agreements in talent contracts. Historically, case law involving Section 16600's ban on noncompetes has been limited to *post-term* employment restrictions. In the acting context, *post-term* noncompetes are those which restrict an actor's employment options after they no longer work with a particular studio. However, a recent Ninth Circuit case (*ITN*) broadens the scope of Section 16600 to potentially invalidate *in-term* noncompete contracts that restrict an actor's work, even if only for the duration of the employment contract. This Note discusses the Ninth Circuit's decision, weighing the tension between exclusivity proponents and opponents to explore the extension of Section 16600 to in-term noncompetes and exclusivity clauses in the talent context.

Part I examines early Hollywood and the historical and economic context in which talent contracts arose. It analyzes the shift in talent contracts from the harsher terms of the 1930s studio system to the modern terms which give more control to actors. It provides a summary of common industry practices prior to the 2023 SAG-AFTRA strike. The agreements between SAG-AFTRA and major studios that led up to the strike are also explored, highlighting the prevalence of exclusivity while weighing the tension between its proponents and opponents.

Part II discusses Section 16600 and the significant 2008 California Supreme Court decision, *Edwards v. Arthur Andersen*, after which any post-term restriction on employment in California will likely fail.

Part III analyzes the possible extension of *Edwards* to in-term noncompete agreements and the changes that this extension may bring to exclusivity in the acting industry. To do so, it touches again on common exclusivity practices as well as in-term and post-term noncompete practices in the acting industry, while critically analyzing case law to explore how Section 16600's extension to in-term noncompete and exclusivity provisions may bring unintended results. It concludes with a suggested theoretical legal standard that would consider an actor's fame when analyzing exclusivity and noncompetes.

32. ITN Flix, LLC v. Hinojosa, 686 F. App'x 441, 444 (9th Cir. 2017).

Part IV summarizes the case law findings and asks the California Supreme Court to weigh in on the conflicting lower court precedent, and the conclusion summarizes the findings from this Note.

I. HISTORY OF THE ENTERTAINMENT INDUSTRY

[T]he legal framework . . . in which all entertainment and media businesses operate is constantly challenged and in need of regular review and adjustment.

—Harold L. Vogel[33]

A. THE ECONOMICS OF THE 1930S STUDIO SYSTEM

Shortly after film was introduced to the United States in the early 1900s, the major film studios realized there was immense potential for vertical integration and cost minimization in the film industry.[34] They quickly began to operate almost every stage of film production, from "production [and] distribution [to] exhibition."[35] The West Coast (and Southern California in particular) emerged as the heart of this new and emerging studio system, as Hollywood was "far for the Trust enforcers to reach [and] . . . provide[d] low-cost nonunion labor and an advantageous climate and geography for filming."[36] After the Great Depression, it was only "the companies with the most vertical integration . . . that survived," further concentrating the control over the movie industry.[37] An incredibly "productive [and] efficient" synergy emerged as the major companies cooperated in "a 'mature oligopoly' " with a significant share of the Hollywood market.[38]

Vertical integration characterized this era of film production, with the major companies exerting control over large parts of the industry.[39] By the 1930s, this studio system led to stars signing "long-term contracts."[40] While accompanied by cost minimization and efficiency, these contracts were often

33. HAROLD L. VOGEL, ENTERTAINMENT INDUSTRY ECONOMICS: A GUIDE FOR FINANCIAL ANALYSIS 55 (Cambridge Univ. Press, 10th ed. 2020).

34. *Id.*

35. Studios with control of all three stages of production were dubbed "the Big Five": Warner Brothers, RKO, Twentieth Century Fox, Paramount, and GM. Smaller companies had trouble competing, although Universal and Columbia shadowed the Big Five with control over production and distribution, but not exhibition. *Id.* at 91–92. *See generally* THOMAS SCHATZ, THE GENIUS OF THE SYSTEM (Metropolitan Books, 1988).

36. VOGEL, *supra* note 35, at 91–92.

37. *Id.*

38. SCHATZ, *supra* note 35, at 18–20.

39. *Id.*

40. Brent Lang, *How Olivia de Havilland Took on the Studio System and Won*, VARIETY (July 27, 2020, 12:59 PM), https://variety.com/2020/film/news/olivia-de-havilland-lawsuit-gone-with-the-wind-warner-bros-1234717146 [https://perma.cc/8KB2-T4KF].

harsh and demanding, leaving little autonomy to actors.[41] This early coordination of "studio operations [with] marketing strategies" brought "substantial [cost] savings [to] the studio [system.]"[42] Exclusive contracts between stars and studios could last up to seven years, and in practice, even longer. [43] Actors such as "Bette Davis and James Cagney were constantly suspended without pay by Warner Bros. for refusing roles."[44] Actors who were suspended, such as Davis and Cagney, due to their "refus[al] to be loaned out to another studio or declin[ing of] a role . . . could be suspended without pay[, with the] length of the suspension . . . added to that of the contract," extending contracts beyond seven years.[45]

Early challenges to these contractual practices were unsuccessful, as demonstrated by Bette Davis's 1937 lawsuit against Warner Brothers.[46] The same year as Davis's unsuccessful lawsuit, California (home of Hollywood and longtime proponent of employee rights) enacted Section 2855 of the Code to limit the indefinite employment contracts often abused by studios.[47] Commonly referred to as the "Seven Year Rule," Section 2855 "limits the term of personal service employment to seven years," rendering any personal-service contract unenforceable past the seven-year mark.[48] This Section was tested in 1943, when Olivia de Havilland sued Warner Brothers.[49] The studio had refused to release De Havilland from her seven-year contract (despite the seven years lapsing) and claimed that her refusal to accept certain roles over the years had resulted in the addition of six

41. *Id.*

42. SCHATZ, *supra* note 35, at 49.

43. Aljean Harmetz, *Hollywood, the Marriage of Studios and Stars Is Back*, N.Y. TIMES (Jan. 8, 1984), https://www.nytimes.com/1984/01/08/arts/hollywood-the-marriage-of-studios-and-stars-is-back.html [https://perma.cc/2JAN-PGF9]; *see also Star System*, FILM REFERENCE, http://www.filmreference.com/encyclopedia/romantic-comedy-yugoslavia/star-system-the-studio-system-and-stars.html [https://perma.cc/E88Z-YMP3].

44. *Id.*

45. Lang, *supra* note 40; *see also* Harmetz, *supra* note 43.

46. Davis sought to be released from her contract with Warner Brothers after being cast in a series of unfavorable roles; she wanted to pursue films in England that she believed would be a better fit. Her lawsuit, alleging that the contract was unenforceable due to its inequitable suspension and extension clauses that added time to the contract for "suspension periods incurred during the contract term," was unsuccessful, and Davis was required to return to Warner Brothers and fulfill her term contract. John M. Broderick, Warner Bros. v. Nelson*: A Prelude to the De Havilland Law*, 41 LOY. L.A. ENT. L. REV. 111, 111 (2021); *see also* Richard Brody, *The Clippings File: Bette Davis and the System*, THE NEW YORKER (Sept. 6, 2012), https://www.newyorker.com/culture/richard-brody/the-clippings-file-bette-davis-and-the-system [https://perma.cc/2H4G-8RTL].

47. Krishna Parekh & Brandon Anand, *The "Seven Year Rule": CA Labor Code § 2855 & The Entertainment Industry / 7 Year Rule*, ANAND LAW, https://www.anandlaw.com/the-seven-year-rule-california-labor-code [https://perma.cc/CC8B-EFHE].

48. *Id.*

49. Lang, *supra* note 40.

months to her contract.[50] This practice of adding time to contracts was common in Hollywood, and these "suspension/extension" provisions (previously upheld in Bette Davis's case) "could double the term of an actor's contract."[51] De Havilland successfully argued that Warner Brothers was breaching its contract—as the contract was for seven years regardless of her refusal of certain roles—and violating labor law in doing so, as California had a statutory limit of seven calendar years on the enforcement of employment contracts.[52] This marked the beginning of a new era of bargaining power for employees. This monumental decision applied "to more than just Hollywood[, as it] applied to every employee in California."[53] While the extension provisions of De Havilland's contract were deemed illegal in 1943, her concern around being held off the market is still shared by many series regulars today in the debate around exclusivity. An actor's desire to pursue additional roles may conflict with a studio's desire to coordinate production schedules.

Until the late 1940s, the major studios had maintained almost complete vertical integration of the film production process, evading various antitrust charges through government deals.[54] But in 1948, Paramount was found guilty of price-fixing by the Supreme Court in an antitrust lawsuit.[55] This case, widely known as the beginning of the end of Hollywood's Golden Age, forced film studios to break up their vertically integrated practices.[56] A decree was signed by the major studios which "separated production and distribution from exhibition."[57]

This separation of exhibition from other links in the production chain played a transformative role in fundamentally shifting entertainment industry practices, replacing the long-term contracts of the 1930s with the disintegrated model of the 1950s.[58] With the collapse of the vertically integrated studio system, long-term contracts and standard seven-year exclusivity provisions were phased out and replaced by the freelance model that is still in place today.[59]

50. *Id.*
51. Broderick, *supra* note 46, at 111.
52. *Id.*
53. Lang, *supra* note 40.
54. Among the antitrust charges was block booking, which is "illegally conspiring to restrain trade by . . . causing an exhibitor who wanted any of a distributor's pictures to take all of them." VOGEL, *supra* note 33, at 92.
55. Erin Blakemore, *How TV Killed Hollywood's Golden Age*, HISTORY (June 1, 2023), https://www.history.com/news/how-tv-killed-hollywoods-golden-age [https://perma.cc/ULW7-JD2K].
56. *Star System*, *supra* note 43.
57. VOGEL, *supra* note 33, at 92.
58. *Star System*, *supra* note 43.
59. *Id.*

Later, the emergence of television caused movie theater attendance to decline, leading studios to limit film production.[60] "[C]ontracted stars . . . became a hugely expensive overhead," moving the industry into a freelance model as studios looked to cut costs.[61] The relationship between studios and talent shifted as stars were given more freedom to choose their roles. Still, studios often incorporated exclusivity terms into deals as "series regular actors were busy working almost the entire year, with long production periods and short hiatuses that made their employment similar to other full-time jobs."[62] As film and series productions have grown in size and scale, studios argue that the exclusivity of actors involved in a production is essential to the coordination of various schedules and logistics. The ability to contract for the exclusivity of certain well-known actors may offer large incentives for a studio to invest in a production.[63]

B. MODERN TALENT CONTRACTS

Currently, Hollywood does not operate by the onerous long-term contracts that once existed, as modern talent contracts are no longer set at seven-year terms of exclusive work as they were in the 1930s. Instead, talent is cast specifically from project to project, often incorporating exclusivity clauses in both the film and television industry. Special contract terms, such as option contracts and pay or play contracts, raise similar issues to in-term exclusivity surrounding an actor's ability to pursue other roles. The following paragraphs state the entertainment industry terms as they existed prior to the 2023 SAG-AFTRA strike.

60. *Id.*; *see also* Blakemore, *supra* note 55.

61. *Star System*, *supra* note 43.

62. Crabtree-Ireland, *supra* note 21.

63. The early 2000s marked another shift as cable television transitioned into online streaming, creating new opponents to exclusivity provisions as series actors were cast for shorter seasons with more off time. Netflix emerged in 2007, followed by the introduction of Disney Plus (Disney's online streaming service) in 2019, Warner Media's HBO Max in 2020, and NBCUniversal's Peacock streaming service in 2020. "[T]he Big Three entertainment companies launch[ing] their video platforms" solidified the substitution of traditional media with online entertainment. "[S]treaming services [are ordering] fewer episodes and cancel[ing] series after shorter runs, [thus employees] are having to switch jobs more frequently" to stay working. *See* Brooks Barnes, *The Streaming Era Has Finally Arrived. Everything Is About to Change.*, N.Y. TIMES (Nov. 19, 2019), https://www.nytimes.com/2019/11/18/business/media/streaming-hollywood-revolution.html [https://perma.cc/DPR6-839M]. New arguments against exclusivity criticize the forced idle time it leads to as series regulars have shorter production schedules and are left unable to work during breaks. *See also* Crabtree-Ireland, *supra* note 21.

1. Film

Film production begins and ends on (more or less) defined dates.[64] As a result, exclusivity terms in movie deals are common and are rarely a source of extreme debate. An actor's film contract will often explicitly include the dates for "consecutive *exclusive* preproduction services, a specified number of weeks for shooting, and a maximum number of days for postproduction services."[65] In-term exclusivity provisions tend to accompany the preproduction and production period,[66] as exclusivity is often used to coordinate scheduling among large casts and crews, and actors are left with little idle time during film rehearsals and shooting. Conversely, postproduction requests[67] are generally subject to an actor's availability, as an actor's work will typically be completed and any post-term restriction preventing the actor from accepting other jobs would likely be invalidated by Section 16600.[68]

It may be possible, however, for talent contracts to include postproduction restrictions preventing actors from working on certain projects for a certain amount of time *even after* a movie has completed filming. One can imagine this being the case for actors in the Marvel Universe.[69] For example, Chris Hemsworth—popular for his role as superhero Thor in the Marvel Comics ("Marvel") film *Thor* as well as *The Avengers*—could theoretically be unable to appear in films by Marvel's direct competitor, DC Comics ("DC").[70] Marvel and DC are both immensely popular comic-book publishers that have transformed their comic-book characters into big-screen franchises. If these contractual provisions exist, they may be legally vulnerable, as Section 16600 invalidates post-term restrictions on an employee's work.

It is also possible that these terms, which (on face value) appear to be post-term, are *actually* in-term restrictions, and thus valid under Section 16600. The acting industry has a unique gray area between in-term and post-

64. Jill L. Smith, *Perk Points*, L.A. LAW., May 2015, at 18, https://www.kleinberglange.com/wp-content/uploads/2015/05/Jill_Smith_Los_Angeles_Lawyer.pdf [https://perma.cc/WBH9-5FXD].

65. *Id.* at 18–20 (emphasis added).

66. Preproduction often includes rehearsals and costume fittings, while the production period largely revolves around actual filming. *Id.*

67. Postproduction requests may include press tour appearances or reshoots of particular scenes. *Id.*

68. *Id.*

69. Dean Ravenola & Brian Boone, *Rules Actors Have to Follow When Joining the MCU*, LOOPER (Jan. 31, 2023, 7:59 AM EST), https://www.looper.com/139571/rules-actors-have-to-follow-when-joining-the-mcu [https://perma.cc/U2SY-6Z87].

70. *Id.*; *see also* Edward Nigma, *Chris Hemsworth Confirms That Marvel Actors Aren't Allowed to Be in DC Movies*, FORTRESS OF SOLITUDE (June 19, 2017), https://www.fortressofsolitude.co.za/marvel-actors-arent-allowed-dc-movies.

term restrictions when an actor is no longer actively filming but may be called back for a reshoot, or–for example–when an actor is no longer filming the first *Thor* movie but is still under an exclusive contract for the second movie. While this may be in-term contractually, it has post-term implications as an actor's work is restricted while they wait for the next production cycle to begin. This area of talent contracts seems to be the most legally vulnerable, especially under the Ninth Circuit's extension of Section 16600 in *ITN* to invalidate in-term noncompete provisions.

2. Series and Short Form (Television)

While not heavily debated in film contracts, exclusivity terms are a highly contentious subject of debate in television and series contracts. Television seasons may be short, and actors may find themselves wanting to solicit intermittent work, leading them to seek additional roles while still under contract with another show. Unlike films, there is not a set beginning and end date in television series production, as shows are in "a relatively constant state of production and postproduction during which there will be stretches of time when an actor's services are not needed."[71] Exclusivity terms can vary greatly depending on the contractual terms negotiated: a series actor who wants to render outside services may either be free to do so, may need special permission from the studio, or may be prohibited from doing so.[72]

When a television talent contract *does* allow an actor to pursue additional roles, there are practical limits to an actor's ability to do so, as studios prefer their talent to be somewhat exclusive to their shows.[73] For example, scheduling work on a feature film is difficult, as television series production is demanding and leaves only a few days off at a time (apart from true offseasons).[74] Further, many deals preclude an actor from appearing on another television series, apart from "a limited number of guest spots, appearance in foreign commercials and services in nonidentified voice-over commercials."[75] Standard series agreement deals (as of December 2021) allowed networks and streaming services to enter into exclusivity deals with talent for "anywhere from nine months to more than a year in some cases," making the process of rendering outside services difficult during this period.[76]

71. Smith, *supra* note 64, at 21.
72. *Id.* at 21–22.
73. *Id.* at 22.
74. *Id.* at 21–22.
75. *Id.* at 22.
76. Otterson, *supra* note 20.

Noncompete and exclusivity terms for a series contract generally fall in the category of in-term restrictions, as they apply to the actor while they are still in a contract for their current series. They are therefore not legally vulnerable under the historical interpretation of Section 16600, which has traditionally applied only to post-term restrictions. If, however, the Ninth Circuit's extension of Section 16600 in *ITN* to invalidate in-term employment restrictions is valid, then these common industry practices may be legally vulnerable.[77]

3. Option Contracts

When a film or television series is part of a larger, ongoing story and multiple production periods are likely (such as classic blockbuster films like *Wonder Woman* and *Spider-Man* for which sequels can be anticipated), option contracts are often used. An option clause in a talent contract "gives the producer or studio the sole right, or 'option,' to extend a contract for an additional period of time [and] commits the actor to working on the subsequent television or new media season."[78] The option period can last anywhere from months to years.[79] While option clauses ensure that characters an audience has come to know and love will be returning in the same role, they have the potential to prevent an actor from accepting additional work when paired with exclusivity terms, as options can be exercised even if no start date has been set for the next project.[80] This raises similar issues to exclusivity and noncompetes, as actors may be kept off the market for unreasonably long periods of time, yet studios have an interest in ensuring well-known characters such as Wonder Woman and Spider-Man are able to return for a sequel.

4. Pay or Play

A pay or play term in a contract guarantees that an actor will be paid for their role in a production, regardless of whether they are used or whether the production gets made.[81] These terms can typically only be negotiated by top talent, as they require the studio to pay the actors their full salaries "even if

77. ITN Flix, LLC v. Hinojosa, 686 F. App'x 441, 441 (9th Cir. 2017).

78. *What Are Options and Exclusivity Clauses?*, SERVICE SAG-AFTRA, https://servicesagaftra.custhelp.com/app/answers/detail/a_id/2188 [https://perma.cc/CBS8-QTKB].

79. Jan Breslauer, *What You Need to Know About Entertainment Contracts: Part Deux*, BRESLAUER L. (Nov. 8, 2014), https://www.breslauerlaw.com/what-you-need-to-know-about-entertainment-contracts-part-deux [https://perma.cc/6UGV-4AHM].

80. *What Are Options and Exclusivity Clauses?*, *supra* note 78.

81. Dominique Saint Malo, *Pay or Play Contract—How Does It Affect Your Production?*, STUDIOBINDER (Feb. 20, 2022), https://www.studiobinder.com/blog/pay-or-play-contract [https://perma.cc/5U5M-L6UD].

they are terminated before rendering all of their services."[82] This compensates the talent for rejecting other "lucrative" roles with similar time lines due to the expectation of exclusivity surrounding their involvement in the pay or play production.[83] Pay or play terms therefore symbolize the acknowledgement by studios that exclusivity is highly valuable, and as such, studios are willing to compensate top talent highly for the opportunity cost of rejecting other roles. Since these terms are often accompanied by exclusivity terms, they may be subject to challenges if Section 16600 is extended to invalidate in-term exclusivity.

C. INDUSTRY PRACTICES

The Screen Actors Guild ("SAG") was founded in 1933 as a union representing actors in "film, television, and digital media."[84] In 2012, the Screen Actors Guild merged with the American Federation of Television and Radio Artists ("AFTRA") to form SAG-AFTRA, a powerful union representing "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 media professionals."[85] The union is frequently in talks with major production studios to exercise its collective-bargaining power and achieve favorable deals for its members, going on strike in 2023 to do so.

In-term exclusivity is highly contested in the acting industry as a constant battle between studios, who view the terms as essential to production, and actors and unions, who generally oppose them. In August of 2022, SAG-AFTRA[86] reached an agreement with Netflix ("Agreement") limiting the use of exclusivity provisions for series regulars.[87] A similar agreement was reached between SAG-AFTRA and the Alliance of Motion Picture and Television Producers ("AMPTP")[88] limiting exclusivity in series

82. *'Pay or Play' Contracts: Behind the Scenes of Johnny Depp's Fantastic Beasts Exit*, HARBOTTLE & LEWIS (Nov. 24, 2020), https://viewpoints.harbottle.com/post/102hbg6/pay-or-play-contracts-behind-the-scenes-of-johnny-depps-fantastic-beasts-exit [https://perma.cc/XJ9D-PAFR].

83. *Id.*

84. Matt Crawford, *What Is SAG-AFTRA? History, Origins & How To Get Membership*, FILMMAKING LIFESTYLE, https://filmlifestyle.com/what-is-sag-aftra [https://perma.cc/4WSP-25UU]; *see also The History of the Unions During the 1930s*, SAG-AFTRA, https://www.sagaftra.org/about/our-history/1930s [https://perma.cc/2TFY-DL52].

85. *About*, SAG-AFTRA, https://www.sagaftra.org/about [https://perma.cc/R2MK-B8JX].

86. *See SAG-AFTRA Celebrates 10th Anniversary of Merger of Screen Actors Guild and American Federation of Television and Radio Artists*, SAG-AFTRA, https://www.sagaftra.org/sag-aftra-celebrates-10th-anniversary-merger-screen-actors-guild-and-american-federation-television [https://perma.cc/W2TH-WHAQ].

87. SAG-AFTRA, *supra* note 9, at 1–2.

88. The Alliance of Motion Picture and Television Producers ("AMPTP") acts as the collective-

actors' employment agreements.[89] SAG-AFTRA's 2023 strike ended in November of 2023 (the Writers Guild of America also went on strike on May 2, 2023 and ultimately reached a deal with AMPTP on September 27, 2023).[90] This Note will focus on the terms impacting SAG-AFTRA as they existed prior to the 2023 strike.

An important distinction exists between stars and other talent in the entertainment industry when considering the practical relevance of the prior Agreement's minimum terms. For those paid above a minimum salary, known as the "exclusivity money break," the minimum terms of the collective-bargaining agreement do not apply.[91] This means that stars and top-tier talent paid above this amount are not bound by the terms, limiting the effect of the Agreement to non-star talent. The 2022 SAG-AFTRA and Netflix Agreement increased this exclusivity money break (above which exclusivity can be freely negotiated) from $40,000 per episode or per week in 2019 to "$65,000 for a half-hour program and $70,000 for an hour program."[92]

For non-star talent paid less than the exclusivity money break, "the minimum terms of the collective bargaining agreement . . . require that a series regular retain the right to do certain other work in addition to working on the series on which they are a regular."[93] The Agreement grants them the ability to take on a second position as a series regular or miniseries lead and removes the condition that a guest appearance[94] may not be on a competing platform.[95] Netflix still "must approve the [guest] [a]ppearance and the series regular must confirm availability and scheduling with Netflix before accepting it."[96] Netflix retains the ability to deny a guest appearance if the guest role is too similar to the actor's Netflix role, and actors cannot make

bargaining representative for "over 350 motion picture and television producers" such as "Paramount Pictures, . . . Twentieth Century Fox, Universal Pictures, Walt Disney Pictures and Warner Bros. Pictures [and] ABC, CBS, FOX, and NBC." As Netflix has joined the AMPTP in 2021, all future negotiations on behalf of Netflix will take place with those of the AMPTP. Bruce Bisbey, *What Is the Alliance of Motion Picture and Television Producers? (In the Entertainment Industry.)*, LINKEDIN (Apr. 20, 2019), https://www.linkedin.com/pulse/what-alliance-motion-picture-television-producers-industry-bisbey [https://perma.cc/P2F9-BUTA]; *see Welcome*, AMPTP, https://www.amptp.org [https://perma.cc/5B8M-57GJ]; *see also* SAG-AFTRA NETFLIX AGREEMENT, *supra* note 9, at 1.

89. Robb, *supra* note 18.

90. Mandalit del Barco, *Hollywood Writers Return to Work, After a Nearly Five Month Strike*, NPR (Sept. 27, 2023, 11:27 AM EST), https://www.npr.org/2023/09/26/1201936449/writers-strike-end-vote-wga-leadership [https://perma.cc/763M-374S].

91. SAG-AFTRA, *supra* note 9, at 1.

92. *Id.* at 2.

93. *Id.* at 1.

94. A "guest appearance" is a brief role on another show.

95. SAG-AFTRA, *supra* note 9, at 2.

96. *Id.*

irreversible changes to their appearance (such as haircuts).[97] A minimum three-month "conflict free window" after each season, "during which the series regular may accept a [guest] [a]ppearance without first having to confirm availability or schedule with Netflix" has been established.[98] This conflict free window means that a series regular will not be held off the market during offseasons, even in an in-term exclusive talent contract. The guest appearance, however, must be completed during the conflict free window or all remaining work will be second to Netflix's scheduling, reflecting the concern of studios regarding the coordination of many crew and cast member schedules.[99] Failure on Netflix's end to provide this window would result in Netflix paying the series regular their episodic fee for the prior season during the window the actor is not able to compete.[100]

Concessions on behalf of Netflix in the above Agreement were made in exchange for SAG-AGTRA's withdrawal of a California bill that it had supported, AB-437, known as the Let Actors Work (LAW) Act.[101] AB-437 would have sharply limited exclusivity in television deals in favor of allowing actors to work on competing networks "as long as 'there is no material conflict of interest with their original employer,' [and] . . . it [did] not conflict with the original show's schedule."[102] At the time AB-437 was drafted, exclusivity terms in contracts often prohibited stars from appearing on competing networks, even during production breaks.[103] While "AB-437 passed the [California] Senate Judiciary Committee in a 9-1 vote,"[104] it was withdrawn prior to the close of the August 2022 Legislative session as a result of the SAG-AFTRA agreements with Netflix and AMPTP.[105]

The 2022 Agreement between Netflix and SAG-AFTRA exemplifies the arguments both for and against exclusivity and the resulting tension, as concessions were made on each side of the bargaining table. As a result of the Agreement, the demands of an actor's "exclusivity" during an offseason were reduced. If exclusivity terms for actors paid below the exclusivity money break *must* now allow a conflict free window during which an actor can accept other roles, these terms may—in practice—act more like

97. *Id.* .
98. *Id.* at 3.
99. *Id.*
100. *Id.*
101. *Id.* at 4.
102. Tapp, *supra* note 27, at 27.
103. *Id.*
104. *Id.*
105. Kristina M. Launey & Scott P. Mallery, *Final Round: Employment Bills Making the Cut to the Governor*, SEYFARTH: CAL. PECULIARTIES EMP. L. BLOG (Sept. 1, 2022), https://www.calpeculiarities.com/2022/09/01/final-round-employment-bills-making-the-cut-to-the-governor [https://perma.cc/CZP3-5JMX].

noncompete agreements than exclusivity agreements, since even "exclusive" actors are able to work on other shows. This blurs the lines between exclusivity and in-term noncompete agreements. Simultaneously, the importance of ensuring talent's availability has been acknowledged and protected with provisions granting Netflix first position rights for scheduling.

II. SECTION 16600 AND *EDWARDS*

A. SECTION 16600

Some states allow contractual noncompete agreements, provided they satisfy a certain reasonableness standard. California, however, takes a strong stance against the enforcement of noncompetes in favor of employee mobility. Section 16600 of the Code states, "Except as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void."[106] Section 16600 carves out an exception for noncompetes in the sale or dissolution of corporations, partnerships, and LLCs, allowing covenants not to compete "where a person sells the goodwill of a business and where a partner agrees not to compete in anticipation of the dissolution of a partnership."[107] This exception ensures that those who purchase a business do not immediately face competition from the seller.

B. *EDWARDS V. ARTHUR ANDERSEN*

Prior to 2008, a small number of cases (mainly federal) allowed narrow restraints on competition in California if they passed a "reasonableness" standard.[108] In 2008, the California Supreme Court rejected the Ninth Circuit's narrow restraint approach to Section 16600 and articulated a single standard for noncompetes in *Edwards v. Arthur Andersen LLP*.[109]

In 1997, Raymond Edwards II was hired as an accountant by the Los Angeles office of Arthur Andersen LLP, contingent on his signing a noncompete agreement that all managers were required to sign.[110] The noncompete prohibited Edwards from performing similar services to any clients he had worked with in the eighteen months prior to his departure for

106. CAL BUS. & PROF. CODE § 16600(a).

107. Kelton v. Stravinski, 41 Cal. Rptr. 3d 877, 881 (Ct. App. 2006); *see also* Edwards v. Arthur Andersen LLP, 189 P.3d 285, 290–92 (Cal. 2008).

108. *See* Schmidt, *supra* note 17, at 147–48.

109. *See Edwards*, 189 P.3d at 288, 293.

110. *Id.* at 288; *see also Edwards v. Arthur Andersen*, STAN. L. SCH., https://scocal.stanford.edu/opinion/edwards-v-arthur-andersen-33130 [https://perma.cc/EW7W-BS2A].

another eighteen months after his release or resignation.[111] While Edwards was subject to a non-solicitation provision, he was not prohibited from accepting employment with clients.[112]

In 2003, shortly after Edwards's employment at the firm was terminated, Edwards filed a complaint alleging that Andersen's noncompete agreement violated Section 16600 and was thus unlawful.[113] The trial court held that, since the noncompete was "narrowly tailored" and "did not deprive Edwards of his right to pursue his profession," it did not violate Section 16600.[114]

The California Court of Appeals reversed, finding that the noncompete was invalid under Section 16600.[115] The California Supreme Court agreed and explicitly rejected the "narrow-restraint" exception to Section 16600 used by the Ninth Circuit, stating that "California courts have not embraced the Ninth Circuit's narrow-restraint exception."[116] The court discussed its policy rationale in favor of protecting Californians and ensuring that "every citizen shall retain the right to pursue any lawful employment and enterprise of their choice."[117] This means that even a narrow restriction on employment in a specific industry will be invalid under California law.[118] As noted in *Edwards*, the California Legislature did not include language to narrow the application of Section 16600 to only overbroad or unreasonable restraints on competition, thus the court will not add those limitations unless expressly indicated by the legislature.[119]

While the text and notes of the Code do not specify whether Section 16600 should apply to current as well as former employees, there are nearly a hundred years of case law interpreting the Code in the context of *post-term* employment restrictions—during which no California state cases have applied the Code to in-term restraints on employment such as exclusivity

111. *Edwards*, 189 P.3d at 288.
112. *Id.*
113. *Id.* at 289.
114. *Id.*
115. *Id.* at 290.
116. *Id.* at 293.
117. *Id.* at 291 (citing Metro Traffic Control Inc v. Shadow Traffic Network, 27 Cal. Rptr. 2d 573, 577 (Ct. App. 1994)).
118. *Edwards*, 189 P.3d at 297; *see also* Daniel Joshua Salinas, Amy Abeloff & Robert B. Milligan, *California Court Gives Two Thumbs Down and Voids Non-Compete in Actor's Agreement*, SEYFARTH: TRADING SECRETS (Apr. 20, 2016), https://www.tradesecretslaw.com/2016/04/articles/trade-secrets/california-court-gives-two-thumbs-down-and-voids-non-compete-in-actors-agreement [https://perma.cc/5BFH-35RX].
119. *Edwards*, 189 P.3d at 293.

provisions.[120] Accordingly, exclusivity provisions are used often in the talent industry to coordinate schedules among individuals involved in production.[121] However, a recent Ninth Circuit case, *ITN*, may extend application of Section 16600 (California's ban on noncompetes) to exclusivity in the acting industry.

III. CASE ANALYSIS

A. EXCLUSIVITY ANALYZED THROUGH THE LENS OF SECTION 16600

Since *Edwards*, Section 16600 "often operates as a *per se* rule against noncompete clauses in contracts," prohibiting noncompete agreements in California regardless of whether they are narrowly tailored in favor of promoting open competition and employee mobility.[122] As noted earlier, the vast majority of cases applying Section 16600 have been restricted to the *post-term* noncompete context. Therefore, *in-term* exclusivity agreements and noncompetes will typically be allowed if narrowly and fairly drafted, as parties often use in-term exclusivity to ensure loyalty and investment in employee development. In the acting industry, in-term exclusivity may be used to coordinate production schedules, make talent contracts more valuable, and prevent actors from simultaneously appearing in rival network platforms (assuming they are paid above the exclusivity money break). For films, these exclusivity provisions include services such as "preproduction (rehearsal, costume fittings, etc.), production (i.e. principal photography), postproduction (which may include special effects work, dubbing, and reshoots), and publicity for the film."[123]

Nevertheless, at least one recent Ninth Circuit decision (*ITN*) applying California law has extended Section 16600 to invalidate in-term noncompete agreements as well. This extension impacts not only in-term noncompetes, which limit an employee from working in a certain area, but also exclusivity provisions, which restrict an actor's ability to work in other productions entirely. As in-term noncompetes are less restrictive than exclusivity provisions, the policy reasons in support of the Code's extension to capture

120. The notes to Section 16600 state that former employees have the "right to engage in competitive business . . . and to enter into competition with [their] former employer, even for business of those who were formerly customers of [their] former employer, provided such competition is fairly and legally conducted," implying that as long as rules surrounding confidentiality and trade secrets are not violated, the Code applies to former employees to ban noncompetes. CAL BUS. & PROF. CODE § 16600 note (citing Fortna v. Martin, 323 P.2d 146, 148 (Cal. Ct. App. 1958)).

121. *See* Rivkin, *supra* note 11; *see also* Tapp, *supra* note 27.

122. Thomas D. Nevins, *Is an Exclusive Dealing Contract an Unlawful Covenant Not to Compete?*, CASETEXT (Apr. 13, 2009), https://casetext.com/analysis/is-an-exclusive-dealing-contract-an-unlawful-covenant-not-to-compete [https://perma.cc/388Z-VZVE].

123. Smith, *supra* note 64.

in-term noncompetes may capture exclusivity as well.

B. SECTION 16600 APPLICATION TO IN-TERM PROVISIONS

Following years of consistent judicial application by California courts, Section 16600 prohibits most post-term noncompete agreements. The more difficult inquiry is whether Section 16600 does or should apply to in-term exclusivity and noncompete agreements for actors. In 2021, the court for the Southern District of California summarized the precedent set by California courts that Section 16600 applies only to bars on post-employment, not in-term employment, competition in *Youngevity Int'l, Corp. v. Smith*: "Section '16600 does not apply to restrictions on a person's ability to engage in a lawful business *while that person is employed* by the company to which he or she promised loyalty. . . . Rather, § 16600 targets restrictions on post-employment activity.' "[124] In-term prohibitions on competition have allowed employers to rely on an employee's loyalty and commitment while employed.[125] Further, in *Techno Lite, Inc. v Emcod, LLC* (2020), the California Court of Appeals notes that "[a]ppellants do not cite—and we have not found—a single case in which Section 16600 was held to invalidate an agreement not to compete with one's current employer while employed by that employer," rejecting an argument that Section 16600 could apply to restrictions on employees while currently employed.[126]

However, in 2017, the Ninth Circuit Court of Appeals applied California state law in *ITN Flix, LLC v. Hinojosa* to hold that Section 16600 *does* in fact apply to invalidate "in-term" noncompete clauses lasting only for the term of employment set by the contract.[127] If Section 16600 is extended to prohibit in-term noncompete and exclusivity terms (as is suggested by *ITN*), many existing practices in the entertainment industry could be legally vulnerable. In *ITN*, an actor's Master License Agreement ("MLA") and Acting Agreement ("AA") were found to be void as unlawful restraints on trade since they limited the actor's right to pursue lawful employment.[128] The actor had entered into the MLA and AA contracts after starring in a film franchise built around his "vigilante character" role.[129] The contracts limited the actor's ability to play "vigilante characters" in other films, as well as his ability to appear in similar films from 2006 to 2013 (a term of seven years brushing against the outer limit of California's "Seven

124. Youngevity Int'l, Corp. v. Smith, No. 3:16-cv-704-BTM-JLB, 2021 U.S. Dist. LEXIS 53456, at *35 (S.D. Cal. Feb. 3, 2021) (emphasis added) (citation omitted).
125. Techno Lite, Inc. v. Emcod, LLC, 257 Cal. Rptr. 3d 643, 651 (Ct. App. 2020).
126. *Id.*
127. ITN Flix, LLC v. Hinojosa, 686 F. App'x 441, 444 (9th Cir. 2017).
128. *Id.* at 443–44.
129. Salinas et al., *supra* note 118.

Year Rule" for personal-service contracts).[130] The film was a box office flop.[131] The actor then starred in a later film as a "vigilante character," which was a commercial success.[132] The producer of the original film, Medina, sued for the actor's breach of contract and argued that the MLA and AA were valid contracts not to compete, as Section 16600 "does not apply to 'in-term' non-compete clauses that last only for the term of employment set by the contract."[133]

The court disagreed and said that "[u]nder Cal. Bus. & Prof. Code [Section] 16600, both the MLA and AA are void as unlawful restraints on trade because they limit the right of [the actor] to pursue lawful employment."[134] In rejecting Medina's argument that Section 16600 applies only to post-term noncompetes, the court stated—in no soft terms—that "[b]oth California courts and the Ninth Circuit have rejected [that] argument," citing two cases in support of their bold statement that Section 16600 applies to invalidate in-term noncompetes: (1) *Kelton v. Stravinski* (a 2006 California Court of Appeals case) and (2) *Comedy Club Inc. v Improv West Associates* (a 2009 Ninth Circuit case).[135] Both of these cases, however, discuss noncompete agreements in contexts *outside* of the employment context—first the franchise context and later in partnerships—raising the question as to whether the court in *ITN* was stretching to find support for its policy stance.[136] California courts have explicitly stated that the "reasoning [in certain cases] is tied to the franchise context," meaning a case involving a franchisor and franchisee is *not* directly analogous to a case involving an actor and their employer.[137] Thus, the extension of Section 16600 to in-term noncompetes does not seem to be supported by existing laws or cases.

First, *Kelton* involved two partners who developed industrial warehouses and thus had a partnership relationship as opposed to that of an employee and employer.[138] The partners had agreed to a covenant not to compete which prohibited them from building warehouses independently.[139] After one partner allegedly breached the covenant, the California Fifth District Court of Appeals held that the covenant was invalid under Section

130. *Id.*; *see also ITN Flix, LLC v. Hinojosa*, CASETEXT, https://casetext.com/case/itn-flix-llc-v-hinojosa-2 [https://perma.cc/2XEZ-26BM].
131. Salinas et al., *supra* note 118.
132. *Id.*
133. *ITN*, 686 F. App'x at 444.
134. *Id.* at 443–44.
135. *Id.*
136. Kelton v. Stravinski, 41 Cal. Rptr. 3d 877, 882 (Ct. App. 2006); Comedy Club, Inc. v. Improv W. Assocs., 553 F.3d 1277, 1291–92 (9th Cir. 2009).
137. *Kelton*, 41 Cal. Rptr. 3d at 882.
138. *Id.* at 877.
139. *Id.*

16600, as it did not fall under any exceptions to the Code and "[i]n *the partnership context,* an ongoing business relationship [between the parties] does not validate the covenant [not to compete]," or create a Section 16600 exception.[140] Further, the partners in *Kelton* limited the fiduciary duties owed to one another to only those rising out of the Partnership's property, explicitly stating that they had no "obligation to refer to the Partnership or to the other Partner any business opportunity," and that "each partner could 'engage in other real estate activities, . . . competitive with the Partnership or otherwise.' "[141] This is significant, as a large policy reason for enforcing in-term noncompete covenants is the expectation of loyalty that accompanies them. Here, the partners expressly limited both their fiduciary duties and any expectations of loyalty regarding real-estate developments.[142] This makes the facts in *Kelton* distinguishable from those in *ITN*, and, while cited as a supporting case for the application of Section 16600 to in-term noncompetes, support for *ITN* from *Kelton* is not strong due to the factual differences between a business partner and an employee.

The second case cited in *ITN* supporting the ban on in-term noncompetes in the employment context is *Comedy Club Inc. v. Improv West Associates*.[143] *Comedy Club* involved two businesses that agreed to an exclusive Trademark License Agreement, which was later breached.[144] The Ninth Circuit Court of Appeals stated that "an in-term covenant not to compete *in a franchise-like agreement* will be void *if* it 'foreclose[s] competition in a substantial share' of a business, trade, or market."[145] However, the MLA and AA in *ITN* did not resemble a franchise agreement. While *Comedy Club* held the franchise's in-term noncompete was invalid, *Comedy Club* involved two businesses in a franchise agreement—*not* an employee and an employer like in *ITN*.[146] Further, the Ninth Circuit in *Comedy Club* refused to void the entire in-term covenant.[147] Instead, it weighed the interests of the plaintiff in operating its business against those of the defendant seeking to protect its trade name and goodwill, creating a compromise which allowed the plaintiff to operate in certain areas in which the defendant did not already operate.[148]

140. *Id.* at 879 (emphasis added).
141. *Id.*
142. *Id.*
143. Comedy Club, Inc. v. Improv W. Assocs., 553 F.3d 1277, 1292 (9th Cir. 2009).
144. *Id.*
145. *Id.* (citing Dayton Time Lock Serv., Inc. v. Silent Watchman Corp., 124 Cal. Rptr. 678, 682 (Ct. App. 1975)).
146. *Comedy Club*, 553 F.3d at 1292.
147. *Id.* at 1293.
148. *Id*.

The *Comedy Club* court does note that "California courts are *less willing* to approve in-term covenants not to compete outside a franchise context because there is not a need 'to protect and maintain [the franchisor's] trademark, trade name and goodwill.' "[149] This suggests that in-term exclusivity provisions may be subject to some challenges if they are not drafted with appropriate terms.

Lastly, Medina argued that Section 16600 should not be applied to the entertainment industry, as it "would be unworkable because personal services contracts are so often needed to ensure the availability of celebrities."[150] While the court was not persuaded by this argument, maintaining its stance that this noncompete was illegal regardless of scheduling implications, Medina's argument touches on some of the most important issues that would stem from an extension of Section 16600 to in-term noncompetes.[151] Scheduling work on large productions would be more difficult, potentially raising costs and slowing the pace of production. Further, studios have an interest in ensuring their stars do not accept similar roles in the same time frame during which their films are being released, as it could lower viewership and performance. It is also important to note that exclusive personal-service contracts today are the product of a freelance entertainment industry in which actors are cast for specific roles, as well as extensive collective-bargaining negotiations in which both actors and studios are represented. Actors need protection from exploitation, and unions (such as SAG-AFTRA) will go on strike to ensure actors' interests are adequately represented in collective-bargaining negotiations. The resulting contracts are far less demanding than those that existed in the 1930s, and interference by the courts with the established system and the agreements that have resulted from it may raise more problems than solutions. It may be best to allow unions and studios to reach their desired outcomes without judicially imposed boundaries on in-term noncompete agreements.

One way to reconcile the outcome of *ITN* with the overwhelming enforcement of in-term noncompetes is by treating the MLA and AA as post-term noncompete agreements. While the court *said* the actor's contract was an *in-term* prohibition, it is possible that it actually categorized the MLA and AA as *post-term* noncompete contracts and treated them as such, since both restricted the actor's work *after* the film was released. Thus, the contracts may have been post-term prohibitions on competition and invalid for that reason, despite the courts "in-term" language. This would allow the result in *ITN* to be accurate while maintaining the concept of exclusivity. Further, the

149. *Id.* at 1292 (citing Kelton v. Stravinski, 41 Cal. Rptr. 3d 877, 882 (Ct. App. 2006)).
150. ITN Flix, LLC v. Hinojosa, 686 F. App'x 441, 444 (9th Cir. 2017).
151. *Id.*

importance of this distinction highlights the nuances and gray areas that exist in an actor's contract. A contract may be "in-term" if it applies for a set number of years or seasons of a show, while also operating as "post-term" if it continues to limit the actor after filming has wrapped and an actor's services are no longer actively needed.

Another possibility is that the Ninth Circuit in *ITN* simply incorrectly overapplied Section 16600 in an effort to show its recognition of California case law as distinguished from the more lenient noncompete laws of other states in the Ninth Circuit. In the past, the Ninth Circuit has issued certified questions to the California Supreme Court regarding noncompetes, as it did in *Ixchel Pharma v. Biogen*, asking how broad Section 16600 is in its reach.[152] Further, in 2008, the California Supreme Court had explicitly rejected the "narrow-restraint" exception previously used by the Ninth Circuit.[153] The Ninth Circuit therefore may have improperly applied Section 16600 due to confusion regarding the scope of the Section or in an effort to show its recognition of California law as distinguished from other states in the Ninth Circuit.

ITN may also suggest that certain situations in the acting industry can trigger the application of Section 16600 to hold an in-term noncompete invalid if it is unduly harsh. The actor's contracts, while *technically* within the seven years allowed for a personal-service contract in California, were at the outer limits as they lasted for a full seven years. Perhaps a shorter period, such as three or four years, would have led the court to reach a different conclusion.

Despite the plausible explanations above reconciling *ITN* with existing California case law, *ITN* is likely an outlier on the treatment of in-term noncompetes in California. In *Edwards*, the Supreme Court of California invalidated a noncompete agreement that forbade a former employee from working with certain clients and soliciting other employees for periods of twelve to eighteen months *after his employment terminated*.[154] The Supreme Court "did not address—much less invalidate—agreements by employees not to undermine their employer's business by surreptitiously competing with it while being paid by the employer."[155] This suggests that if an employee is still being paid, in-term noncompetes are entirely valid. As the

152. Robert B. Milligan, Lauren Leibovitch & Miguel Ramirez, *Ninth Circuit Seeks Guidance from California Supreme Court on Business to Business Non-Competes*, CASETEXT (Mar. 23, 2020), https://casetext.com/analysis/ninth-circuit-seeks-guidance-from-california-supreme-court-on-business-to-business-non-competes [https://perma.cc/9ZSP-5CQ8].

153. Edwards v. Arthur Andersen LLP, 189 P.3d 285, 291 (Cal. 2008).

154. *Id.*

155. Techno Lite, Inc. v. Emcod, LLC, 257 Cal. Rptr. 3d 643, 650 (Ct. App. 2020).

California Supreme Court has not weighed in on the treatment of in-term noncompete agreements, its deferential stance in *Edwards* to legislative intent signals that it may be waiting for clarification from the lawmaking branches of the California government before extending Section 16600 to in-term covenants. Further, the transition away from the studio system of the 1930s (in which actors were held off the market for long periods of time) to the freelance model of talent contracts today, accompanied with the introduction of the "Seven Year Rule" in California, has put in place protections for actors that seem to absolve the need for any total ban on exclusivity or in-term noncompete agreements.

C. SECTION 16600 APPLICATION TO POST-TERM NONCOMPETE PROVISIONS

It is generally accepted that Section 16600 prohibits post-term noncompete provisions in California.[156] Post-term noncompetes prevent former employees from working for a competitor or soliciting clients for a certain amount of time.[157] Most cases interpreting Section 16600 under California law fall in this post-employment context, as the statute has consistently invalidated covenants not to compete that interfere with an employee's ability to compete after they cut ties with a former employer.[158]

Post-term noncompete clauses in the entertainment industry are not common but might include provisions forbidding an actor from working in a production associated with a rival television network or film studio, even after all work has been completed for the current role. Terms with similar effects, however, may be included in the contracts of megastars preventing them from accepting roles with competing studios.[159] This represents the unique gray area in talent contracts, in which it appears an actor has completed a term of their contract (as filming for the movie is done), yet the actor may have a three-picture contract bringing these terms within the scope of in-term exclusivity.

Interestingly, the LA County Superior Court seems to take the stance that post-term noncompete agreements *are* valid in the narrow fixed-term employment context where an *employee leaves* in the 2020 case *Viacom v. Netflix*.[160] This is particularly relevant in the acting industry, in which talent

156. Youngevity Int'l, Corp. v. Smith, No. 3:16-cv-704-BTM-JLB, 2021 U.S. Dist. LEXIS 53456, at *34–35 (S.D. Cal. 2021).

157. *Id.*

158. Comedy Club, Inc. v. Improv W. Assocs., 553 F.3d 1277, 1290 (9th Cir. 2009).

159. Nigma, *supra* note 70.

160. Viacom Int'l v. Netflix, Inc., No. 18STCV00496, 2020 Cal. Super. LEXIS 4442, at *7–10 (Cal. Super. Ct. 2020).

contracts are generally for a set term as opposed to at will. The holding of *Viacom*, applied to talent contracts, suggests that noncompete agreements restricting an actor's ability to accept roles after a contract has ended could actually be valid where *the actor* is the party that breaches the contract. In *Viacom*, an executive employed by Viacom (an entertainment company) with a fixed-term employment contract left her job nineteen months prior to the end of her contract to work for Netflix.[161] Viacom sued Netflix, seeking a permanent injunction enjoining Netflix from taking its employees in this manner, as well as damages.[162] The disputed noncompete provisions from the executive's employment agreement read

> Your employment with the Company is on an *exclusive and full-time basis*, and while you are employed by the Company, you shall not engage in any other business activity which is in conflict with your duties and obligations (including your commitment of time) to the Company . . . .
>
> The "*Non-Competition Period*" begins on the Effective Date and ends on the last day of the Contract Period, provided that:
>
> 1. If the Company terminates your employment without Cause before the end of the Contract Period, then the Non-Competition Period shall end on the earlier of (i) the end of the period in which you are receiving payments pursuant to paragraph 11(b)(i) or (ii) the effective date of your waiver in writing of any right to receive or continue to receive compensation and benefits under paragraph 11. You shall be deemed to have irrevocably provided such waiver if you accept competing employment.
>
> 2. If the Company terminates your employment for Cause or you resign, the Non-Competition Period shall *end on the earlier of (i) the last day of the Contract Period or (ii) eighteen (18) months after such termination or resignation.*[163]

While Netflix argued that the covenant was an unlawful prohibition preventing the employee from working in similar positions for eighteen months post-employment, the court disagreed.[164] The court stated that there is no case law supporting the argument that *fixed-term* contracts not to compete are invalid given that the employee *voluntarily* left Viacom under assurance from Netflix that she would be indemnified and would not have to pay legal fees.[165] While Section 16600 would invalidate the noncompete if the employee had been terminated by Viacom, this case suggests that a noncompete provision for a set amount of time will be upheld where the employee voluntarily leaves their position.[166] Applied to talent contracts,

161. *Id.* at *3.
162. *Id.*
163. *Id.* at *13–14 (emphasis added).
164. *Id.*
165. *Id.* at *18.
166. *Id.*

actors who sign fixed-term exclusivity and noncompete contracts for the filming of their television shows or films may have agreed to valid noncompete provisions in the case that an actor quits in order to pursue a different role, regardless of whether the noncompete becomes *post-term*.

In *Viacom*, the noncompete was valid because the employee was not terminated but chose to leave to work for a competitor, thus forsaking her position and its salary *voluntarily*.[167] Had the employee instead been terminated, Section 16600 would undoubtedly be implicated.[168] Additionally, the court notes that *at will* employment contracts (as opposed to *fixed term*) with identical language would prove to be unlawful.[169] This raises an interesting question regarding option contracts.[170] Further, it seems as though the court *wanted* to hold for Netflix from a policy perspective.[171] The court expressly stated that it believes Viacom's fixed-term employment contracts may violate Section 16600, but that it is unable to find binding case law in support of this position.[172] This is an interesting narrowing of Section 16600 in finding post-term noncompete terms legal in the situation in which an employee leaves, with particular application to the acting industry where the actor will typically be the one breaching an exclusivity provision in order to render outside work. While helpful in noting that California case law does not suggest that exclusivity in a fixed-term contract is unlawful, this is a Superior Court case and is thus not binding.[173] The court itself seems to struggle with the outcome and is perhaps expressing its struggle with existing precedent in an effort to open the door for the California Supreme Court to weigh in on the matter.

Steinberg Moorad & Dunn, Inc. v. Dunn, an unpublished 2005 Ninth Circuit case referenced in *Viacom*, takes the view that a post-term noncompete is invalid regardless of whether the employee left or was fired: "[w]hen an employee leaves, be it before the term of employment has ended or not, [S]ection 16600 prohibits the employer from preventing that employee from pursuing his trade."[174] The *Viacom* court states that, while it would like to rely on *Steinberg* as persuasive, it is unable to do so because, as an unpublished case, it lacks the specific facts needed to analyze Viacom's

167. *Id.*
168. *Id.*
169. *Id.*
170. Are option contracts at will since the producer often has the sole option to extend the contract for an additional movie or season of a show? Or are they fixed term, since the option must be triggered within a set amount of time? *See What Are Options and Exclusivity Clauses?*, *supra* note 78.
171. *Viacom, Inc.,* 2020 Cal. Super. LEXIS 4442*, at *18.
172. *Id.*
173. *Id.*
174. Steinberg Moorad & Dunn, Inc. v. Dunn, 136 F. App'x 6, 10 (9th Cir. 2005).

noncompete clause.[175] This further suggests that some direction is needed from the higher state courts in California or the legislative branch on the application of Section 16600 when an employee is the one to cut ties with the employer in a fixed-term exclusivity contract.

While *Viacom* represents a narrow application of Section 16600 to allow post-term noncompetes, the application is important in certain contexts such as Silicon Valley where technology companies are constantly poaching employees with key information regarding data breakthroughs such as self-driving car technology.[176] However, the nuanced application of the Code to the general prohibition on post-term noncompetes (allowing them where the employee leaves a fixed-term contract) may have unintended consequences by restricting the movement of talent in the acting industry.

D. FACTORS UNIQUE TO THE ENTERTAINMENT INDUSTRY

In determining whether Section 16600 should apply to noncompetes in talent contracts, perhaps talent contracts should be evaluated under a unique standard that considers the nuanced aspects of acting, such as fame. Are actors distinct from other employees whose in-term noncompetes in California are valid? As touched on in the discussion of *ITN* above, a gray area exists within noncompetes in which a contract may be ongoing, but an actor is no longer actively working on a project. A theoretical argument can be made that fame should play a role in the analysis. While most employees merely provide labor, actors are involved in a finished product, the value of which may turn on an actor's reputation. This is particularly relevant when an actor is a widely recognized celebrity, known for their portrayal of certain characters or for a certain genre. For example*, horror films* or *children's films*. Perhaps an actor is different from a typical employee in that the subsequent work of a "famous" actor could impact their image, and in turn, the value of the character created in a series or film owned by the studio. If this is the case, fame could be an important factor in the analysis of exclusivity provisions. While the actions of a little-known actor after a film or series airs will likely be inconsequential, the press surrounding a major celebrity may have a large impact on the success of a program.

This can be exemplified by the controversy surrounding Daniel Radcliffe's involvement in *Equus*, a play in which Radcliffe appeared "full-

175. *Viacom, Inc.,* 2020 Cal. Super. LEXIS 4442, at *17.

176. Timothy B. Lee, *A Little-Known California Law Is Silicon Valley's Secret Weapon*, VOX (Feb. 13, 2017, 2:00 PM), https://www.vox.com/new-money/2017/2/13/14580874/google-self-driving-noncompetes [https://perma.cc/B5Z4-Y8AJ].

frontally nude in a prolonged scene."[177] Following Radcliffe's nude appearance in the play, press speculated whether the star of the *Harry Potter* film franchise would be denied the role in the last two films, as the franchise was widely popular with children. One comment on a *Harry Potter* fan site following news of Radcliffe's role in *Equus* with mature scenes read, "We as parents feel Daniel should not appear nude. Our nine-year-old son looks up to him as a role model. We are very disappointed and will avoid the future movies he makes."[178]

On the other hand, Daniel Radcliffe's role in *Equus* did not seem to hinder the success of the final two *Harry Potter* movies, as "[t]he eighth and final *Harry Potter* movie was . . . the third-biggest movie of all time behind only *Titanic* . . . and *Avatar*," bringing in $1.342 billion in the global box office.[179] If viewers do not place substantial weight on an actor and instead focus on the character portrayed, the argument that fame should be factored into the legality of post-term exclusivity terms is substantially weaker.

IV. SUMMARY OF CASE ANALYSIS

Analyzed through the lens of Section 16600, in-term noncompetes and exclusivity provisions in the acting industry seem to fall outside the scope of the Code's prohibition of post-term noncompetes and are thus, at least in the general sense, legal. This does not mean, however, that the line is clear-cut or that all in-term noncompete and exclusivity clauses are watertight in their legality. Some in-term noncompete provisions may be prohibited if they are too broad in their restrictions or if they are not well-drafted. The Ninth Circuit's application of California law in *ITN* exemplifies a court's refusal to enforce an actor's exclusive MLA and AA agreements even for in-term contracts, as the studio's ban on the actor playing other "vigilante characters" for seven years was an illegal prohibition on the actor's right to work. While this case is an outlier in an otherwise mostly unified interpretation of Section 16600's application to post-term noncompete provisions, it indicates that in some instances, reasonableness and length of a contract may still be used to judge the legality of an in-term noncompete agreement.

Conversely, post-term exclusivity provisions are exactly what the California Code was designed to prevent and are generally illegal, except (as

177. Sarah Lyall, *Onstage, Stripped of That Wizardry*, N.Y. TIMES (Sept. 11, 2008), https://www.nytimes.com/2008/09/14/theater/14lyal.html [https://perma.cc/33N3-DYHJ].

178. *Harry Potter Bares All: Upsets Parents*, LIVE J. (Jan. 30, 2007, 9:09 PM), https://ohnotheydidnt.livejournal.com/10593488.html [https://perma.cc/F3QJ-VPRY].

179. Scott Mendelson, *Every 'Harry Potter' Movie Ranked by Worldwide Box Office*, FORBES (Aug. 13, 2020, 1:00 PM), https://www.forbes.com/sites/scottmendelson/2020/08/13/harry-potter-movies-ranked-box-office-jk-rowling-emma-watson-daniel-radcliffe [https://perma.cc./57NM-LEFC].

Viacom suggests) perhaps in the narrow situation where the *employee* voluntarily leaves the employer. In California, an employer cannot prohibit a former employee from working after they have left. *Viacom* interprets the Code, however, as allowing noncompetes in fixed-term employment contracts where the employee voluntarily leaves but prohibiting them when it comes to at will contracts with no end date. It is notable that the court in *Viacom*, however, believes that these contracts are perhaps illegal but is unable to hold that they are due to the lack of precedential case law on the matter. This may be a signal that it is time for the California Supreme Court to weigh in on the distinction between post-term and in-term exclusivity provisions under Section 16600 and explain that—as currently written and interpreted—it does not extend to invalidate in-term exclusivity and noncompete agreements. The California Supreme Court may also need to articulate whether post-term noncompetes are allowed in the narrow situation where an employee voluntarily leaves.

Another interesting distinction can be made between actors and nonactor employees; while actors are classified as employees, they are distinct due to their fame and their reputational value that has the potential to impact a final work product. This may support the theoretical argument that fame should be considered in analyzing exclusivity and noncompetes. However, if viewers can separate an actor from the roles they play, this may not be an issue.

The table below summarizes the standard from the majority of California cases interpreting Section 16600.

FIGURE 1.

Section 16600	***In-Term Exclusivity***	***Post-Term Exclusivity***
Exclusivity terms are heavily negotiated in television talent contracts, yet not heavily negotiated film talent contracts.	Typically **legal** if narrow in scope and well-drafted.	Often **illegal** if at will.
	Potentially **illegal** if Section 16600 is extended to invalidate restrictive in-term exclusivity. *(ITN)*	Potentially **legal** if fixed-term and the employee *voluntarily* leaves. (*Viacom)*

CONCLUSION

California is firm in its stance against post-term noncompetes, yet an acting industry specific analysis suggests that the unique attributes of talent contracts may require a more nuanced approach. The rise of online streaming has changed the demands placed on actors, with shorter series seasons contributing to an increase in idle time. The landscape is changing rapidly, resulting in the frequent renegotiation of terms and resulting standstills, exemplified by the 2023 SAG-AFTRA strike.

The *in-term* and *post-term* treatment of exclusivity provisions and noncompetes has received conflicting treatment by California and Ninth Circuit Courts, suggesting that perhaps the California Supreme Court should weigh in on the matter as they did in 2008 with *Edwards* and articulate whether Section 16600 can apply to in-term noncompete and exclusivity provisions.[180] While it is widely held that Section 16600 does not apply to in-term noncompetes, the holding in *ITN* suggests that certain situations in the acting industry may trigger its application and deem an in-term noncompete invalid if unduly harsh.[181]

Viacom suggests that in certain instances where an employee breaches a fixed-term exclusivity provision, post-term noncompetes may be upheld. Regardless, the ability of actors and unions to negotiate with studios for mutually beneficial terms has allowed common practices in entertainment contracts to shift over time without much recent legislation. This suggests that, while the applicable law will provide one side with bargaining power, negotiations and collective-bargaining agreements will largely continue to set the standards for common entertainment contract practices.

180. Edwards v. Arthur Andersen LLP, 189 P.3d 285 (Cal. 2008).
181. ITN Flix, LLC v. Hinojosa, 686 F. App'x 441, 444 (9th Cir. 2017).