Testimony of Art Eisenson

Assembly Committee on Arts, Entertainment,

Sports, Tourism & Internet Media

October 19, 2011

Whether we work as "talent," work in the primary and ancillary businesses of making copyrighted intellectual property, or work in the creation, interpretation, enforcement, or avoidances of laws, we are all at this hearing because we are citizens.

My name is Arthur M. Eisenson. Until the settlement of Alch vs. Warner Bros, etc, I earned 99.9% of my W-2 income as a writer, all of that as a member of the Writers Guild of America, West. All my produced work was originally aired on ABC, CBS, and NBC.

Both federal law and California's Fair Employment and Housing Act and the Unruh Act categorize me as a member of a protected class, a worker at least forty years old. As such, I was a lead named plaintiff and member of the Plaintiffs' Liaison Committee of the TV Writers Class Action Age Discrimination Suits. I retain those roles in the one unsettled case against Creative Artists Agency, which is I believe a member of the Association of Talent Agencies.

As a member of the Plaintiffs' Liaison Committee, I am bound by the terms of the settlement not to make disparaging comments about the settling defendants, about their legal counsel, and I may not state that the settlement was a "victory" nor use any synonym

characteriziing it as such. I gave my word on that, so my testimony may be more circumspect than Committee might wish.

I am not any of the following:

1. I am neither a claimant nor a witness in any civil rights action filed by any department of the United States government in Federal Civil Courts.

2. I am neither a claimant nor a witness in any civil rights action filed by any department of the State of California in California Superior Courts.

3. I am neither a victim nor a witness in any criminal procedures for civil rights violations prosecuted by the federal government nor the state of California.

4. I am neither a victim, witness, nor claimant in any action, civil or criminal, filed on behalf of TV writers over forty years of age by my union, the Writers Guild of America, west.

There's a reason to state what I'm not at a hearing about changing behavior by law. It's this - ask two questions about any human event. First - What happened that should or shouldn't have happened? Then ask what didn't happen that should have happened?

California's Fair Employment and Housing Act and Unruh Act became laws in 1959. They're far from obscure laws. To paraphrase and invert a line from Ghostbusters, "These aren't really guidelines. They're laws."

The entertainment industry is about as lawyered up as they come, and its economic viability relies on government legislation and enforcement of copyright laws – we see in the credit crawls or warning notices in every show we watch.

Which brings us to Alch vs. Warner Brothers, the TV Writers' Class Action Age Discrimination Suits. We brought these suits because we alleged non-compliance first in 2000 with Federal Civil Rights law, and then non-compliance with FEHA.

Ms. Dana Mitchell of this Committee's staff anticipates that Professor Walton will cover the broad policy issues of civil rights law and I'll be more specific as to how those laws relate to the entertainment industry from the experience as a member of the Plaintiff's Liaison Committee in a class action suit. Ours had the largest settlement in the history of such suits, and it's the only settlement with the entire industry since the "consent decree" of 1940, in a suit brought by the U.S. government.

More people want careers in the entertainment industry than there are jobs for them. For example, for the Writers Guild alone, a higher percentage of applicants to Harvard's Medical School are accepted than the percentage of new members who try to get into the Writers Guild by registering scripts and/or gaining agency representation. A greater number

of people become new major league baseball players than become new members of the Writers Guild. The representative from DGA and SAG can give their unions' figures, and note that talent agencies represent composers, editors, cinematographers, and workers in other arts and crafts as well.

The overabundance of talent and the scarcity of jobs is one reason the term "gate keeping" will come up in this hearing. It is almost impossible for an artist as defined by the California Labor Code to send a job application "over the transom." The jobs aren't listed with the HR departments. There are no "now hiring" ads. Buyers of labor defer to the perceptual sets of brokers who believe they can predict the buyers' needs. Those who actually put together theatrical films and TV shows essentially outsource part of their decision-making processes to talent agents on the assumption the agents' perceptual sets will be appropriate to their needs.

It is in the operations of decisions based on these perceptual sets where I believe 20th and 21st century civil rights legislation relates to the entertainment industry. "Perceptual sets" can be parsed as "judgments" or as "prejudices." Sometimes anyone can think she or he is exercising "judgment" but to someone else – including those who make the laws – it's the "prejudice."

So we have to recognize another kind of "gate-keeping," one on perception. We the talent rely on others to describe and define the parameters of realities in this business. We're all told early this is "show business, not show art." We know that whom we know can matter as much as how good we are at our arts. We learn about creative accounting and that

compliance with contracts, both individual and union basic agreements is anything but guaranteed. We rely on our agents to describe realities to us, and lately attorneys and managers, and far less than we used to, our unions.

We older writers learned, unfortunately, that there is a phenomenon I call "Hollywood exceptionalism." It was best stated by an agent -- quoted anonymously in an NPR interview about the TV Writers suits -- "Federal and state laws shouldn't apply to the Industry – we don't use them. We have our own way of doing things."

For many years, most of us didn't even realize that this just was not all right, that success in the Industry did not require us to give up our passports in exchange for our union cards. Those in whom we entrusted the business aspects of our lives – neither our agents, not our transactional attorneys and their studios and network negotiating partners, nor even our own union said "They can't do that to you! You're citizens!"

For older writers, unlike a change in the color or presence of our hair, the "gray list" did not happen all that gradually. Those curious about the history can read the filings in our cases, and it helps to recall the meme of "branding" in marketing which came into vogue in the early 1980's, along with the attacks on workers' rights which came with the Reagan administration, right after the Writers Guild's 1981 strike.

Our suits happened because about fourteen years ago a few TV writers decided that we'd gone to one too many meetings at our Guild on how to showcase the works of people

who already had distinguished credits. It was time instead for someone to pick up the clue by four of a class action suit and get the networks', studios', and agencies' attention.

While we looked for lawyers, two lawyers found us, because the Writers Guild commissioned reports by sociologists Denise and William Bielby on employment of Television Writers. Civil rights attorneys Maia Caplan from Washington D.C. and Dan Wolf from New York City were in L.A. working on a law suit for unpaid revenues on the "Home Improvement" series when "Variety" and "The Hollywood Reporter" covered the Bielby Reports. Ms. Caplan and Mr. Wolf read the "Bielby Reports," and brought them to the attention of Paul Sprenger, the employment class action attorney who won the "North Country" suits.

Outside lawyers – no firms with entertainment practices, effected clients, and experiential knowledge of what was happening were involved. So this is the "lesson learned" about Hollywood exceptionalism: There is an absolute disconnect between an industry conducting itself as a principality not bound by U.S. and California laws and the federal and California civil rights laws which embodying broad civil rights policies. Because of the perceptual gate-keeping by those who do business on behalf of artists, we older writers weren't even aware that we had federal law, FEHA and the Unruh act available to us, if we could just find someone to front the expenses.

Moreover, we weren't made aware by any of our perceptual gate-keepers that employment discrimination suits such as ours don't rely on "smoking guns," direct

admissions by defendants, or the kinds of granular evidence in other sorts of litigations. Those who researched and wrote Federal and California Civil Rights employment law understood that evidence of that sort would always be hard to get. So the laws rely on statistics – how many standard deviations away from the percentage of the population at large of any protected class group are there in the hirings by employers, and by extension in our suits, to their representation by outsourced gate-keepers – talent agents. Get the statistics, you have your case. All the anecdotes are support.

We learned that the way the law works and the way the Industry works are as different as a spiffy TV courtroom on a lawyer show is from Judge Elias' actual courtroom over on Commonwealth Avenue. The courts' calendars are crowded; the courts' budgets have been cut. Second, there is money involved. In a case with more than forty law firms every lawyer reads every filing and every communication and responds at a billable hourly fee. There's an awful lot of billable reading and responding. Between the date the suits were filed and the distributions were made, more than 10% of the original plaintiffs died. The reality of the legal process for a complex case is it's slow.

By putting on this suit and mingling in the courthouse corridor with defense attorneys I learned that all American corporations wish to disincline dropped employees from filing class action discrimination suits. This sort of corporate behavior is coming into national consciousness in the Occupy Wall Street events. I particularly like the street placard which says ""I refuse to believe that corporations are people until Texas executes one."

We plaintiffs asked our attorneys about the defendants' possible claim that the advertising agencies didn't want older voices, so the defendants were just responding to their market. Our outside attorneys told us we'd move for summary judgment before an attorney who made that argument could even sit down. None of our industry perceptual gate-keepers, as lawyered up as they all are, ever told us that violating the law at the behest of another is not a defense, but a confession.

To my mind, when we plaintiffs originally signed representation contracts with agents governed by the California Labor Code, that failure to tell us what the laws required is one more instance of "What didn't happen that should have happened."

We filed in 2000. During a California Appeals Court hearing on "Privacy notices" in 2007, it was stunning to hear defendants' chief counsel Seth Pierce acknowledge that the exigencies of Civil Rights laws trump privacy concerns. Mediated settlement discussions began later in 2007. Settlement agreements were made in spring of 2010. Awards to plaintiffs and claimants were paid on January 28, 2011. All the details available are in court documents, and I will not breach attorney-client privilege nor the proscriptions in the non-disparagement clauses.

The experience was that the law is fine; the processes in the real world of doing what the people who made those laws to get done isn't. What we in the Industry came to expect about our lack of rights was determined not by law, but by "gate-keepers." It is those gate-keepers whose businesses should operate within the law who should educate talent coming

into the Industry about both our rights as citizens and what the laws require of talent agencies. It could be a one page document with every representation contract.

There is nothing. Worse, there is no immediate negative sanction for violating our civil rights. No enforcement arm of the federal or state government is empowered to protect our rights. For example, soon after the suits were filed Jay Kenoff, my transactional entertainment attorney, told me he had been called by someone on the defendants' side to "inform me" that unless I dropped out of the suit, I would never work in TV again. Mr. Kenoff and I thought that threatening someone with what had already been done to him was less than effective, and we enjoyed the inanity. Just about every plaintiff I know got a similar call from her or his attorney. But I know one writer who did drop out. Probably there were more – no one likes to admit being scared off. My guess is those threatening calls violated law as well as common sense. I'd have been quite happy to see all those threateners perp walked and picking litter out of freeway iceplant. But who was there to call about that? Ask our union to put some business on its strike or unfair list? Fat chance.

The named plaintiffs were not precisely shunned, but a lot of old acquaintances seemed to forget they knew us. We were trouble-makers, and hanging out with us would not do anyone's career any good. By contrast, when the Red Scare blacklisting happened, some producers gave "under the table" or pseudonymous work to black listees. The "gray list" lasted longer than the black list, but to my knowledge, none of us got gigs, and to my knowledge, even with the settlements, none of us has even gotten representation. That sort of

thing comes with the territory – for all the Hollywood Exceptionalism, all this is human behavior, not something "other."

Consciousness of the rights of anyone who works in our industry has to be made part of the culture of the industry.

In summary as to how the law relates to the Industry – the law's not near strong enough nor fast enough. The law's too expensive for those who need it most and makes us rely on law firms investing their own capital for at least a decade with no certainty of return. I'm all for lawyers doing well by doing good. They just shouldn't have to do for citizens what we need our governments to do.

Down the line I hope everyone who lives in the U.S. with our civil rights recognized in the founding documents of the U.S, should have those rights protected and enforced not by individuals or classes, but by our federal and state governments. An offense to anyone's civil rights is an offense to all of us. So making California's labor code refer directly to FEHA is necessary in our time, but not sufficient. What we want from our polity is a future in which the laws are artifacts of some bad old days when the laws were necessary. Compliance should not be a matter of fear of sanctions, but of doing right by each other.

Thank you.