February 24, 2020

The Honorable Lorena Gonzalez
California State Assemblymember, District 80
P.O. Box 942849
Sacramento, CA 94249-0080

RE: Variety Performance Artists Exemption to AB 5 (Gonzalez)

Dear Assemblymember Gonzalez:

We urge you to consider providing an exemption in Assembly Bill 5 for Variety Performance Artists who typically work in different venues, generally never more than a few nights a year, and are not permanently employed at any particular establishment.

We believe you never intended to change the traditional designation of such performers, who have always been considered independent contractors, or constrain the clubs that feature them for very short periods of time (i.e., a 20 minutes per night, a single night or a week).

There does not seem to be a single California case in which courts have held that such occasional performers, whose acts are not controlled by the clubs where they appear, are employees. It would be as if the Hollywood Bowl "employed" the artists who appeared there for a night. For the many small venues who book different artists every night or even every week to perform, the burden of having to process and treat them as employees will be insurmountable. In addition to the costs of processing the hiring and terminating of individuals who work a day or a week, and the difficulty of them having taxes withheld by 50-300 different employers each year, there is the issue of requiring the employer to provide the "employee's equipment" – the musician's instruments, the magician's elaborate tricks, the comedian's props, etc.

Likewise, many of the comedy clubs often have nights where 20 or more comedians will perform mere 10 minute sets in exchange for $20 a set. And often when these very same comedian are in town, they will perform one set at the Improv on Melrose Avenue in West Hollywood, then drive to The Laugh Factory on Sunset Boulevard to perform another 10 minute set and then drive a mile down on Sunset to end the night at The Comedy Store. The performers alone decide if and when they desire to play one or more of these clubs on the same night. The clubs have no input in how the performers perform their act nor have any type of advance approval over what the act that night will consist of—it is First Amendment expression at its fullest. Unlike stage and screen actors, Variety Artists write their own material, and serve as performer, director, choreographer, lighting technician and producer and advertiser all wrapped up in one.

If these performers which have met every single element under the traditional tests for independent contractors, are now needed to be added to each club's employee lists, those lists may go from approximately 30 bartenders, servers, ticket-takers and other support staff to perhaps 200 or 300 employees, and it is not just payroll taxes and the different types of equipment brought by each performer that will need to be addressed, but workers compensation insurance will now need to account for 300 employees instead of 30 employees. If an artist performs even for just one night in the course of the year, AB-5 could potentially force him or her to be counted for all of these unintended consequence, which

would have a devastating effect on clubs and variety artists and most likely put many of them out of business, depriving both the owners and the performers of the ability to earn a living and audiences the benefit of their art.

The field of Variety Arts includes stand-up comedy, musical performances, puppetry, mime, sketch and improvisational comedy, magic, acrobatics, juggling and ventriloquism, just to name a few. Individuals spend an enormous amount of time honing their talents over many, many years. It is well known amongst this tight-knit community of performers that the only way to get good is to perform consistently. In order to do this, they need to be able to "gig" whenever and wherever they can. For a Variety Performance Artist, performance Venues are akin to institutions of higher education. They not only provide income to artists, they are places where artists can share knowledge and expertise.

These venues also provide a place to fail. This is particularly true for stand-up comedians who since the early 70s have relied on L.A. comedy clubs, such as The Comedy Store, Improv and Laugh Factory to serve as an artist community where young comedian learn timing and how to play to audiences while the veteran comedians hone rough routines that they would never want their wide fan base to see until perfected. The L.A. clubs provide an intimate setting where they can appear unannounced on an off-night and perfect their act in front of a small gathering absolutely startled to see such a star. Jay Leno famously prepared and tried out many of his upcoming jokes for Tonight Show monologues every Sunday night at The Comedy & Magic Club in Hermosa Beach, and to this day he still tries out new material in that hidden away club. Similarly, most recently, Steve Martin and Chris Rock appeared unannounced to try out the jokes they were to perform the next night on the Oscar telecast. The jokes that fell flat, were scraped from the routine, the ones with the big laughs were kept, and the ones with the modest laughs, were re-written and tightened before showtime. That would not have occurred, if The Comedy Store was required to insist Steve Martin produce his driver's license and social security card to complete an I-9 Form to ensure employment eligibility along with a form w-2 so he can collect his $20 payment at the end of the evening. Furthermore, virtually every comedian with a Netflix or Comedy Central special appears at these clubs to hone their act before the actual day in which their specials are shot. Surely, the drafters of AB-5 could not have intended such performances to constitute employment for the clubs in which they occurred.

More importantly, if employment status attaches to the clubs that these performers use to hone their acts, both the comedians and the actual companies that ultimately produce the comedy specials would be dumbfounded to learn that the material contained in those ultimate filmed comedy special are actually the copyrighted work product that belongs not to the comedian but to the comedy club where the comedian's material are developed in those club which AB-5 (and Dynamex) may transform into employers. Under Copyright law work created by an employee in the course and scope of his employment deems the employer not the employee as the "author for copyright purposes." This is the exact opposite of how copyright ownership works under a structure where the comedian is an independent contractor.

These same clubs have for the past fifty years also served as the place where casting directors and producers gather to discover the newest stars— and the list of ultimate television and radio talent that have been discovered in these live clubs is incredibly numerous and quite legendary. The Comedy Store, The Whisky-A-Go-Go, The Magic Castle, Second City all have served as the discovery zone of tomorrows next mega stars. The ability to showcase at these venues regularly is vital to the evolution of any Variety Performer and it is in these dark clubs where producers and casting directors gather to find the next big thing. Unfortunately, this law as currently written threatens the existence of these arts in California, as it is simply not economically viable to hire performers for very short periods of time unless they are independent contractors.

The Mission of the California Arts Council is: "Advancing California through the arts and creativity." There is not a comedian, magician or juggler in the world who did not make their way through the nightclub circuit, working one-nighters and/or weekly and monthly "gigs". The very word "gig" has been used for decades by entertainers. It is a standard in the field and always has been. Please help "advance California through arts and creativity" by granting these artists the ability to get paid as independent contractors for short term gigs.

Likewise, the California Society of Entertainment Lawyers (CSEL) is a non-profit organization whose motto, "Fighting to Protect Artist's Rights" expresses CSEL's primary purpose. CSEL advocates on behalf of authors, screenwriters, songwriters, and other creative professionals in the entertainment industry in a pro bono capacity and has filed multiple amicus curie briefs before the 9th Circuit Court of Appeals and the U.S. Supreme Court on important matters confronting creative professionals, and always in support of the individual copyright creators. CSEL is particularly concerned about the unintended effects of AB-5 on the copyright of material which a stand-up comedian, improv performer or musical act may create in an improvisational setting or where brand new material is performed and captured by recording equipment (i.e. "fixed in a tangible medium") in the live venues where they perform. Most comedians seek to have such recording as a way of remembering what worked and what was new in the performance that occurred for the first time on a club's stage. The expression of an idea fixed in a tangible medium is what gives birth to copyright protection. If the club is deemed the "employer" of the artist, then Section 201 of the US Copyright Act states that the wholly original work is deemed work-made-for hire belonging to the employer, and not the artist! In the employment context, the employer is deemed the "author" for copyright purposes. Further, this result occurs regardless of whether the recording equipment was professional equipment owned by the club (which most clubs have) or a mere tape recorder or recording captured on the Smart Phone owned by the performer/employee (or for that matter even a recording of the performer/employee captured by a member of the audience). There is a distinction between physical ownership of the recording versus the intellectual property ownership of the ideas that are expressed within the recording. As an employee of the club, if the original performance was fixed in tangible medium, then the employer is the author of the work. AB-5 completely alters the historical presumption of who is the copyright owner and the comedians would only be able to regain the copyright if the clubs agreed to transfer it by written instrument. Conversely, if an employment relationship is not at issue, then the copyright to an original work belongs to the Variety Performer himself and the copyright can only transfer from the original author to a third party (such as comedy club venue) via written instrument. Section 201 defines Ownership of Copyright as follows:

> (a) Initial Ownership.- Copyright in a work protected under this title vests initially in the author or authors of the work. The authors of a joint work are co-owners of copyright in the work.
>
> (b) Works Made For Hire.- *In the case of a work made for hire*, ***the employer*** or other person for whom the work was prepared ***is considered the author for purposes of this title***, and ***unless the parties have expressly agreed in a written instrument*** signed by them, owns all the rights comprised in the copyright.

17 USC 201.

Therefore, if a comedian creates original work in a California comedy club that new Comedy routine may be deemed by automatic operation of the federal Copyright Act as being owned by the comedy club as the employer. Yet under the law prior to AB-5, and in all other states the comedian would be seen as an independent contractor and thus the comedian would retain the copyright ownership. New material is created by comedians on the stages of The Comedy Store, The Laugh Factory, The Improv and other comedy venues on almost a nightly basis. If AB-5 disregards every other factor that so heavily indicates comedians and other Variety Performers are independent contractors, and simply renders them employees simply because they are performing in California venues that exist for the primary purpose of presenting these performers to the public, then AB-5 will have resulted in an unjust taking of highly valued property rights (i.e. the copyright in the comedic material) which have historically always resided with these performers, but by rendering them employees will automatically be bestowed upon the club owner-employer under the Copyright laws.

IF AB-5 applies to Variety Performers other rights otherwise afforded to them under the federal Copyright Act will also be adversely affected by the law's distinction between whether the original creator is deemed an employee or an

independent contractor. Sec. 203 of the Copyright Act deals with the termination of copyrights and operates differently if the artist is an employee who creates work as part of his employment versus an independent contractor who alone holds ownership to his or her creation.

Sec. 203 of the Copyright Act discusses how the original author of a work can by operation of statute voluntarily reclaim ownership in his/her copyrighted work during a specific statutory window of time between the thirty-fifth year and fortieth year from which the date the Copyright was first transferred to another. Sec 203 was an amendment to the federal Copyright Act which was enacted in 1978 and was designed as a special safeguard to protect authors that entered full conveyances of Copyright which they may have later regretted or where 35 - 40 years after the fact, the author or the original author's heirs may desire to renegotiate the copyright transfer from long ago. The importance and utility of this special protection that Congress gave to authors is only now beginning to be fully realized as the first contracts affected by this law have only in the last few years begun to trigger the time in which the original authors or the author's heir have the ability to exercise this reversion right. However, this special protection only applies to work that was not created under a work made for hire situation. Thus, those creations that were made by an employee are not subject to this reversion window by the employee. Section 203 of the Copyright Act reads:

> (a) Conditions for Termination.— In the case of any work ***other than a work made for hire***, the exclusive or nonexclusive grant of transfer or license of copyright or any right under a copyright, executed by the author on or after January 1, 1978, otherwise than by will, is subject to termination under the following conditions: [*the law then set forth the procedure for which the author can regain ownership*].

17 USC 203.

If AB-5 recognizes stand-up comedians as employees of comedy clubs (and other live performers who perform new material and creations at a club) then the special protections that Congress put in place to help authors who knowing or unknowingly gave up their copyrights to others would not be available to help such comedians.

Permit us to provide one actual example of how copyright is affected by AB-5. It is well documented that while the legendary comedian Richard Pryor's 1980 concert film and album "Richard Pryor: Live on the Sunset Strip" was recorded entirely at the Hollywood Palladium, the actual material and comedic routines for that album were developed over many nights on the live stage at the world famous Comedy Store. It was there that Pryor had a "place to fail" and hone his new routine. Pryor, like all comedians at The Comedy Store since its opening in 1972, was treated as an independent contractor so none of his creations could be deemed work made for hire unless a specific written contract was negotiated to give The Comedy Store such rights. Thus, under section 201 of the federal Copyright Act, the material created instantaneously and reshaped and reworded night after night before a live audience at The Comedy Store belongs entirely to the independent contractor and original author Richard Pryor. The Comedy Store had no say over Pryor's comedy material or how it was subsequently used. The only profit The Comedy Store earned was the money from ticket sales and drink sales from those who came to the club on those particular nights to see Pryor work as he developed the ultimate routine that would later be recorded at the Palladium and distributed by Columbia Pictures. The Comedy Store had no claim to any portion of the actual comedy film or the album that derived from the film distributed by Columbia Pictures.

However, if AB-5 had applied to Richard Pryor, AB-5 would have rendered him an employee of The Comedy Store and unless there was a specific contract stating that the comedian retained all rights to the new material created on its stage and recorded on the comedian employee's personal tape recorder as part of the creative process, the default rules under Section 201 of the Copyright Act would state that The Comedy Store not the employee owned the comedy routines created by that employee in the course scope of his employment for The Comedy Store.

Today, comedians are preparing for their Netflix Specials just as Pryor did 40 years ago. And none of them have any clue that they in preparing their specials in this fashion, the club and not the comedian may be the actual copyright owner.

The Richard Pryor example is also illustrative of how AB-5 could have an adverse effect on termination rights under Sec. 203. Note that the "Live on The Sunset Strip" film was created in 1980. Thus, the heirs of Pryor now have until the end of 2020 to assert a right to reversion of that film and album from Columbia Pictures pursuant to Section 203 of the Copyright Act. This right exists regardless of whether Pryor in 1980 purportedly conveyed all distribution rights in perpetuity to Columbia Pictures. But the protections conveyed by Congress that now exists in favor of Richard Pryor's heirs, would not exist if Pryor worked on The Comedy Store stages in 1980 as an employee rather than under the independent contractor status with which he worked.

Neither the performers nor the venues in which they perform desire Variety Artists in live venues to be deemed employees rather than as independent contractors which they have been traditionally deemed without prior challenge. These artists are very different than traditional actors. The distinction between actors who are told specifically when to report to work, what to wear and what to say in comparison to Variety Performers is a stark and noticeable one. Regardless of what traditional test is applied to Variety Actors, be it the economic reality test, the control test or the IRS 20 point test, Variety Performers fall nowhere even close to the line that would suggest an employment status. A clear exemption to AB-5 (And Dynamex) for such performers is essential and the consequences if such an exemption is not made will be quite real and quite substantial. Artists will lose their copyright protections, and venues will shut their doors given the massive costs associated with exaggerated workers comp premiums and tax bills not to mention the administrative nightmare in keeping track of all these newly classified workers. These costs will result in these very special clubs closing.

We hope you take this information into account, and to heart, and please amend AB 5 as necessary to make these Performance Artists exempt. Their livelihood, as well of the future of the Variety Arts itself, depend on it.

In specific, the exemptions enumerated in Section 2750.3 (b) should be amended to add an additional subsection (8) which reads: ***A variety artist that appear on live stages, including a stand-up comedian, musical performer, or other variety artist engaged in live stage performances consisting of magic, puppetry, mime, sketch and improvisational acts, acrobatics, juggling, ventriloquism, and other similarly situated traditionally recognized art forms wherein the variety artist would otherwise meet the independent contractor test established by Borello.***

We would welcome the opportunity to further discuss this matter and answer any additional questions you may have in regard to this vibrant aspect of California's history, reputation and (hopefully) future.

Thank you very much for your time in considering this.

Sincerely,

The Variety Performance Artists Coalition:
The Hollywood Chamber of Commerce
Good Time Productions
California Society of Entertainment Lawyers ("*Fighting to Protect Artist's Rights*")

CC: Senate President pro Tempore Toni Atkins
Senator Ben Allen
Senator Maria Elena Durazo
Assembly Speaker Anthony Rendon
Assemblymember Laura Friedman
Assemblymember Richard Bloom
Assemblymember Miguel Santiago
Assemblymember Adrin Nazarian