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Sports & Entertainment Beat

25 Is the New 40: California's AB-1687

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"It is time to stop the ageism that permeates Hollywood's casting process," wrote SAG-AFTRA President Gabrielle Carteris.[1] On September 24, 2016, California Governor Jerry Brown took a controversial step toward achieving such a goal when he signed the Customer Records bill, AB-1687 (effective January 1, 2017), into law. This new state law requires that Internet Movie Database "IMDb" remove an actor's listed age upon request by that actor.[2] IMDb is a well-known website in the entertainment industry that offers information about movies, television shows, and actors. Its subscription service, IMDbPro, allows actors to create their own profile page and access job listings posted by industry professionals. Industry professionals directly use the website for casting calls and auditions and have been known to frequently filter out potential actors though information posted on the website. Thus, the broader goal of this law is to alleviate age discrimination in an industry that has been alleged to phase out ageing actors in a discriminatory fashion.

The current state and federal age discrimination laws may be said to fail to adequately protect employees in the entertainment industry. In 1967, Congress implemented The Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634.[3] The purpose of the ADEA is "to promote employment of older persons based on their ability rather than age" and "to prohibit arbitrary age discrimination in employment."[4] Under the ADEA, it is unlawful for an employer "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age."[5]

However, the ADEA may not go far enough in covering individuals employed in the entertainment industry. Age discrimination in the entertainment industry is alleged to start before the age of 40, which is the requisite age an employee must be to allege an age discrimination claim under the ADEA. In fact, many female actresses claim to lose out on roles, because of their age, as early as age 30.[6] In such cases, the actor would be unable to make out a prima facie case of age discrimination under the ADEA, because they do not meet the age 40 threshold. These individuals also tend to have further difficulty proving an age discrimination claim under state law because most states have similar age discrimination requirements as the ADEA.

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There are numerous examples of actresses claiming to have been turned down for parts because of their age. Anne Hathaway has, at age 32, explained
in interviews that she lost parts to 24 year-olds.[7] Similarly, Elizabeth Banks claimed that she was turned down for the role of Mary Jane Watson in *Spider-Man* in 2002 when she was 28 years old.[8] The 18 year-old Kirsten Dunst was instead offered the female lead, and played 27 year-old Toby Maguire's on-screen girlfriend.[9] Olivia Wilde was turned down for the role of Leonardo DiCaprio's wife in *The Wolf of Wall Street* when she was 28 years-old, ten years DiCaprio's junior.[10] Instead, Margot Robbie, at age 23, was chosen as the female lead. Most notably, Maggie Gyllenhaal made headlines last year when she went public about how she was told she was too old, at age 37, to play the love interest of a 55 year-old male lead.[11] Each of these actresses is under 40 years old and would be barred from bringing an age discrimination claim under the ADEA.

In 2013, a less well-known actress, Huong "Junie" Hoang, litigated this issue of age discrimination in *Huong Hoang v. Amazon.com, Inc.* As an aspiring actress, Hoang had signed up for IMDbPro services in 2001 "[b]ecause it's the bible of the industry."[12] She utilized the services that came with an IMDbPro profile but wanted to conceal her true age of 30 years-old so she falsified her birthday on the profile to represent that she was seven years younger.[13] In 2007, Hoang decided to correct her age and contacted IMDb to remove her age from her profile.[14] An IMDb customer service representative conducted an investigation into Hoang's birthday and published her actual birthday on the website, while Hoang continued requesting that her birthday be removed.[15]

Hoang filed suit in the United States District Court for the Western District of Washington alleging wrongful use of her IMDbPro account that caused her to suffer age discrimination after her age information was published on the Internet.[16] She sought to recover for her lost acting income, which she termed "career damages."[17] The jury rejected her breach of contract claim, which asserted that IMDb breached its Subscriber Agreement and incorporated Privacy Policy for failing to act "'carefully and sensibly' in the way it handles subscribers' personal information," and found in favor of IMDb.[18] Hoang appealed the verdict that permitted IMDb to list her age information on the website.[19]

In a 2015 appeal, Hoang objected to the jury instruction citing her agreement to provide IMDb with accurate information upon signing up for its service.[20] Two motions were made to file amicus briefs in support of Hoang: the first, by four screenwriters; and the second, by SAG-AFTRA and WGAW.[21] Both motions were denied for failing to address the grounds upon which Hoang appealed.[22] The Ninth Circuit unanimously affirmed in favor of IMDb. In response, SAG-AFTRA commented that the site was "facilitating age discrimination."[23]

Since *Hoang*, SAG-AFTRA has publicly condemned IMDb for publishing the birth dates of actors without their consent.[24] Many of the actors include those less famous and unknown to the general public. The issue is that when an actor's actual age becomes known to the casting personnel, the age range that casting personnel perceive the actor to be able to portray shrinks, and, thus, limits the actor's opportunity to be selected for roles.[25] SAG-AFTRA stated that IMDb could "remove the temptation for employers to

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engage in age discrimination" and "step up and take responsibility for the harm it has caused" by removing age information from its website.[26]

The holding in *Hoang* and the perceived lack of age discrimination protection afforded to actors by federal and state laws may be some of the reasons for SAG-AFTRA's ardent support of a new California law. The law, AB-1687, is intended to fill the void in both federal and state age discrimination laws. It specifies that paid subscribers who enter into a contractual agreement with a "commercial online entertainment employment service provider" to provide "specified employment services" may prohibit that provider "from publishing information about the subscriber's age in an online profile."[27] The law requires that the provider "remove from public view . . . certain information regarding the subscriber's age on any companion Internet Web site under the provider's control" within 5 days of a subscriber requesting such action.[28]

The law's stated purpose is to ensure that the age information of a subscriber will not be used "in furtherance of employment or age discrimination."[29] The law notably includes individuals employed in entertainment industries such as television, film, and video games. It is limited to a subscriber, who is defined in Subsection 4 "as a natural person who enters into a contractual agreement . . . to receive employment services in return for a subscription payment."[30] Thus, this law leaves the door open for age information to be displayed on websites where viewers do not pay a subscription fee.

Proponents of the new law advocate that it will help alleviate some of the age discrimination female actresses allegedly face when passed over for roles, by limiting age information from a widely used website in the industry. This limitation would also help lesser known actors who have allegedly suffered from exclusionary hiring practices during auditions when competing for smaller roles because casting directors directly use IMDb profile information to fill smaller roles.[31] One of the most compelling arguments is that the law will halt the dangling of an actor's age in front of casting directors, who dictate who is hired for a role and who may already have biases against older performers.[32]

Proponents also argue that the law will not be challenged as a restriction on First Amendment free speech, because the limitation placed on the law, which is its restricted application to only those who pay for a subscription, effectively insulates it from constitutional challenges.[33] The law only limits free speech in an effort to advance the important government interest of preventing age discrimination and does so in a manner substantially related to that interest. Thus, the law does not purport to limit other expressions of age-related free speech. Yes, age information will still be available on other prominent websites, but those who support the law argue that it provides actors with a new legal sword.

Contrastingly, critics speculate that the law will end up challenged before the Supreme Court for restricting free speech despite the limitation. Arguments suggest that the new law is not insulated from constitutional challenges simply because it advances a government interest and is limited to those people who pay for a subscription.[34] Further, critics oppose the removal of factually accurate age information from the Internet. Michael Beckerman, of The Internet Association, a political lobbying organization representing Internet companies, argues that the new law will not stop the "bad actors" who can search for age

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information on other websites.[35] "This is not a question of preventing salacious rumors," argues Beckerman, "rather it is about the right to present facts that live in the public domain."[36] The law effectively punishes Internet companies for the way in which people use the public data companies present.[37] Requiring only paid subscription websites to remove age information may create an unfair competitive advantage for websites that are not required to abide by the new law.[38]
The lawsuit that critics speculated about recently began on November 10, 2016, when IMDb filed a Complaint in federal court in California against California Attorney General Kamala Harris to overturn AB-1687 in an effort to protect its right to post actors' ages on their website.[39] IMDb argues that not only is the goal of combating age discrimination not achieved with AB-1687, but also that the law is unconstitutional and chills free speech while limiting public access to factual information.[40] IMDb is asking the court to enter a permanent injunction to ban California and its agencies from enforcing the law and also to declare the law unconstitutional and unenforceable.[41] Harris has yet to answer the Complaint.

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[2] Andrew Pulver, *Law Passed Enabling Actors to Remove Age from IMDb*, The Guardian, (Oct. 12, 2016, 1:01PM), https://www.theguardian.com/film/2016/sep/26/law-passed-enabling-actors-to-remove-age-from-imdb.

[3] 29 U.S.C.S. § 621 (West 2016).

[4] 29 U.S.C.S. § 621 (West 2016).

[5] 29 U.S.C.S. § 623 (West 2016).

[6] Nassiri Law, *Hollywood Age Discrimination Target of Bill*, Orange County Employment Lawyers Blog, (Oct. 12, 2016, 1:03PM), http://www.orangecountyemploymentlawyersblog.com/2016/08/21/hollywood-age-discrimination-target-of-bill/.

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[8] Chris Eggertsen, *Elizabeth Banks: I was told I was 'too old' to Play Mary Jane in 'Spider-Man'*, HitFix, (Oct. 12, 2016, 1:06PM), http://www.hitfix.com/the-dartboard/elizabeth-banks-i-was-told-i-was-too-old-to-play-mary-jane-in-spider-man.

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[9] *Id.*

[10] Chris Eggertsen, *Olivia Wilde: 'Too old' to play Leonardo DiCaprio's wife in 'Wolf of Wall Street'*, HitFix, (Oct. 12, 2016, 1:09PM), http://www.hitfix.com/news/olivia-wilde-i-was-deemed-too-old-to-play-leonardo-dicaprios-wife-in-wolf-of-wall-street.

[11] *Id.*

[12] Huong Hoang v. Amazon.com, Inc., No. C11-1709MJP, 2013 U.S. Dist. LEXIS 190477, at *2-3 (W.D. Wash. Mar. 18, 2013).

[13] *Id.* at *4-5.

[14] *Id.*

[15] *Id.* at *7.

[16] *Id.* at *2-3.

[17] *Id.* at *17.

[18] *Id.* at *4-5.

[19] *Id.* at *2-3.

[20] Huong Hoang v. IMDb.com, Inc., 599 F. App'x 674, 675 (9th Cir. 2015), *aff'g*, Huong Hoang v. Amazon.com, Inc., No. C11-1709MJP, 2013 U.S. Dist. LEXIS 190477 (W.D. Wash. Mar. 18, 2013).

[21] *Acting Unions Criticise IMDb in Age Row*, BBC, (Oct. 12, 2016, 1:20PM), http://www.bbc.com/news/entertainment-arts-15492579.

[22] Huong, 599 F. App'x at 4, n. 1 (9th Cir. 2015).

[23] *Id.*

[24] *Id.*

[25] *AFTRA, SAG Urge IMDb To Stop Facilitating Age Discrimination Against Actors*, Deadline, (Oct. 12, 2016, 1:22PM), http://deadline.com/2011/10/aftra-sag-urge-imdb-to-stop-facilitating-age-discrimination-against-actors-188031/.

[26] *Acting Unions Criticise IMDb in Age Row*, BBC, (Oct. 12, 2016, 1:20PM), http://www.bbc.com/news/entertainment-arts-15492579.

[27] S. AB 1687 Gen. Assemb., Reg. Sess. (Ca. 2016). *Available at*: http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201520160AB1687.

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[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] Gabrielle Carteris, *SAG-AFTRA's Gabrielle Carteris: Actors Need a Law to Keep Ages Off IMDb*, The Hollywood Reporter, (Oct. 12, 2016, 1:28PM), http://www.hollywoodreporter.com/news/sag-aftras-gabrielle-carteris-actors-922253.

[32] *Id.*

[33] *Id.*

[34] Michael Beckerman, *Law to Keep Actor Ages Off IMDb "Suppresses Free Speech"*, The Hollywood Reporter, (Oct. 12, 2016, 1:30PM), http://www.hollywoodreporter.com/news/law-keep-actor-ages-imdb-924441

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] Alex Dobuzinskis, *Revealing an Actor's Age*, Metro, (Nov. 21, 2016, 1:43PM), http://www.metro.us/entertainment/revealing-an-actor-s-age-is-illegal-imdb-website-sues-california/fIqpkk-lhQ_JP80PVSlPiCkKbmzWw/.

[40] *Id.*

[41] Ashley Cullins, *IMDb Sues to Invalidate California's Actor Age Censorship Law*, The Hollywood Reporter, (Nov. 21, 2016, 1:45PM), http://www.hollywoodreporter.com/thr-esq/imdb-sues-invalidate-californias-actor-age-censorship-law-946261.

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