

Legal Protection of recording artists against unfair contracting

Carl Philipp Schöpe, Chicago-Kent College of Law, Exchange Student Fall 2009

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I. Introduction and Problem

“It's all about fairness. It's about companies treating artists fairly. It's an age-old debate and, unfortunately, it will probably continue into the distant future”

Jared Leto, 30 Seconds To Mars¹

Being only the most recent example, Jared Leto and his band, 30 Seconds To Mars, and their business relation to EMI are symptomatic of a controversy, which every now and then is addressed, scandalized and then again forgotten about, without having found any solution. It is a question about the shades between freedom of contract and abuse of power. It is a question about public policies and about how much sacrifices society can allow some to demand as the price of fame. It even is a question about the philosophy of a whole industry and, of course, it a question about incredible sums of money. The question is: do recording artists need legal protection against unfair contracting with the recording industry and, if yes, how should they be protected?

The recording industry is, in many respects, unique. The prospect of becoming rich and famous by recording and performing music represents the dream of millions of bands and musicians. For many, it is reason enough to make any sacrifice necessary to enter the world of professional music. The line “I’m gonna trade this life for fortune and fame. I’d even cut my hair and change my name.” of the Canadian band “Nickelback”’s popular song “Rockstar”², is describing the willingness of artists not only to give away natural contractual rights but also aspects of their lives, even including their identities. In addition to this unparalleled desire to enter into a recording contract, an oligopolistic structure with world-wide operating major labels which together control more than three quarters of the world market³, secures the companies an enormous superiority in bargaining power.

¹ Chris Harris, *30 Seconds To Mars In 'Good Spirits' Despite \$30 Million Lawsuit* (Dec. 1, 2008), http://www.mtv.com/news/articles/1600420/20081201/30_seconds_to_mars.jhtml.

² Nickelback, “Rockstar”, *All the Right Reasons*, Roadrunner, 2005.

³ Paul Cashmere, *Universal the Biggest Label in 2006*, (2007), <http://www.undercover.com.au/News-Story.aspx?id=1215>.

As part of the whole business model, this has resulted in contracts that have been accompanied by criticism and complaints. It has caused lawsuits and has been the matter of legislative hearings. This issue has, for example, been addressed by George Harrison, when he wrote a protest song against the Beatles' music publishing business⁴ or by the then "Artist formerly known as Prince", when he performed for years with the word "slave" written on his cheeks⁵. The artists Don Henley, LeAnn Rimes and Courtney Love have complained about contract terms in a California State Senate hearing, comparing a recording contract to "indentured servitude"⁶. In all cases, this issue has been addressed, discussed, but it eventually lost importance again without being resolved. The case of "30 Seconds to Mars", which is mentioned in the beginning, is a great example of this phenomenon. In 2008, the band wanted unilaterally to terminate their contract with Virgin, a label belonging to EMI, after being signed for over nine years. EMI eventually sued the band for \$30 million compensation for albums owed to the label but not produced by the band. While the label insisted on full performance of the contract, the band, being signed to the label for over nine years by that time, asserted that under Californian Law, creative artists cannot be bound to a contract by more than seven years. This rule and its application in the music business will be explained later in this paper. In this case, courts never came to a decision, as the suit was resolved by the parties in April 2009⁷.

Cases like this raise the question about industry standard recording contracts and their legal standing in principle. Settlements like in the aforementioned case avoid a judicial review of industry standard contracts on aspects like illegality, unconscionability or even a lack of consideration. This leaves a questionable mark on recording contracts, and in this way the industry itself. Most importantly, however, without any precedents or other standards, artists

⁴ BRIAN SOUTHWALL, *NORTHERN SONGS, THE TRUE STORY OF THE BEATLES' PUBLISHING EMPIRE*, 216 (2007) .

⁵ Philipp W. Hall Jr., Note, *Smells like Slavery: Unconscionability in Recording Industry Contracts* 25 *Hastings Comm. & Ent. L.J.*, 189, 190 (2002).

⁶ *Music stars argue contract freedom*, BBC.CO.UK, Sept. 6, 2001, <http://news.bbc.co.uk/2/hi/entertainment/1528112.stm> (last visited Dec. 21, 2009)

⁷ August Brown, *30 Seconds to Mars soars*, LOS ANGELES TIMES (Nov. 29, 2009), available at <http://www.latimes.com/entertainment/news/la-ca-30-seconds-to-mars29-2009nov29,0,7437853.story>.

will continue to be subject to contracts whose provisions are not unambiguously clarified as lawful.

This paper discusses whether standard recording contracts really deserve to be criticized the way they are. Furthermore, methods and regimes shall be displayed to protect artists from conduct which potentially opposes public policy and to avoid contract provisions, which possibly are unconscionable. For this purpose, first a brief overview is given about the content of a standard recording contract, second the standards are explained upon which contract terms have to be legally reviewed, third these standards are applied on the most questionable provisions of an industry standard contract and finally ways are presented to protect artists effectively, considering foreign cases as well as other regimes of protection.

II. Elements of an industry standard recording contract

Before reviewing critical components of an industry standard recording contract on their legality or conscionability, it shall first be briefly displayed, how recording contracts are set up in general and what objects of regulations are typically included in a standard agreement.

A. Term

The term of a contract, as it rules about the duration of the contractual relationship, is one of the important pillars of the contract. It is usually placed at the beginning of each contract. Contracts can be either arranged in flat terms or in optional periods. In a flat term contract both parties commit each other to the same, fixed period of time after which either the contract is renegotiated, or the contractual relationship ends. The much more common practice in the recording industry is, however, to form option contracts, which are arranged more flexibly for the record companies by granting them a number of options to renew the contract in periods⁸. The term of an option contract consists of an initial period, guaranteed to

⁸ DOMINIK INGENDAAY, KÜNSTLERVERTRÄGE : VERTRAGSPRAXIS UND INHALTSKONTROLLE VON TONTRÄGERPRODUKTIONSVERTRÄGEN NACH DEUTSCHEM UND US-AMERIKANISCHEM RECHT [Recording contracts: Contractual practice and legal review of sound recording contracts in German and U.S. american law] 304 (2008).

both, artist and the record company. After the initial period, the company is granted options to extend the contract by an additional number of periods, which are fixed in the contract. These option contracts can again be separated into option contracts with fixed time periods and open-ended contracts. In cases of a fixed period, which in most cases is a “one year plus four years clause”⁹, the maximal duration of the contract is clearly predictable. For example, if a label is granted a clause like the one mentioned, the contract will end 12 months after being signed, The company can, however, extend the term for another 12 months, simply by using its contractually granted option. With a “one year plus four years clause”, the company can use the option four times, which consequently means that the maximum duration of the contract is five years. Record companies can, however, suspend the expiry, if the artist does not fulfill his recording commitment until he has done so¹⁰. Displayed on the example above, this means that if the contract above contained a clause, guaranteeing the label the delivery of three albums by the artist, the contract term could be extended until the delivery of the third album, even though this would make the contractual relation between the parties last longer than five years.

While this form of option contracts with fixed periods becomes decreasingly popular, nowadays open-ended option contracts are more common, with the duration of each period depending solely on the artist’s production frequency, by linking the end of a period to the delivery of an album. Open ended in this context means, that a contract with one fixed and four option periods, in which every period ends six months after delivery of an album, could last six years, eight years, ten years or even longer, solely depending on how fast the artist is delivering his albums. Like in the example just given, a period in an industry standard contract today ends six to nine months after the delivery of the last owing album¹¹. This is mostly due to the fact, that the recording process of an album has become longer and less predictable in its duration. The term generally starts with the signing of the contract.

⁹ *Id.* at 305.

¹⁰ SIDNEY SHEL & M. WILLIAM KRASILOVSKY, THIS BUSINESS OF MUSIC 7 (4th ed. 1979).

¹¹ *Id.* at 101.

B. Commitment, recording procedure and delivery requirement

The commitment implies the main contractual duties of the artist. It defines the number of albums to be delivered per period, which is in general one or two. It further governs the minimum and maximum playing time, as well as the amount of compositions to be included in the album¹².

The contract also regulates the recording and producing procedure. This includes agreements as to the recording elements, which are e.g. producers, musicians, engineers, but also the venue and dates of the recording, as well as the recording budget. In general, contracts require both, the artists and the company to approve mutually every element of the recording procedure. If for example the artist wants to work with a certain producer or in certain studios, he has to inform the company about that. The company then is required to inform the artist periodically on their approval. In cases of dissent, companies mostly have the final say.

The contract further regulates the standards the company may set to approve the delivery itself¹³. Concerning these standards, it can be distinguished between two approaches: There are contracts requiring commercially satisfactory recordings, and contracts requiring technically satisfactory recordings¹⁴. The former grant a bigger leeway in acceptance to the company, since the commercial value of the record will be most likely estimated by them. The latter are very rare, as the requirement of a record that solely has to be “well-made” in order to obligate the company to approval, can easily lead to misemployment¹⁵. Approving standards also decrease, the more famous and profitable the artist becomes. Finally the delivery regulations also govern the range of material to be delivered. Artists can, for example, have the duty to deliver all session tapes, derivatives and mixes. Most importantly, they have to deliver any production-ready master recordings including safety copies, as well as licenses, permissions and all material required for packaging and marketing.

¹² Peter J. Strand, Recording Agreement, 1, (Chicago Kent College of Law Music Law, 2009) (unpublished working paper, on file).

¹³ *Id.* at § 3.

¹⁴ DONALD S. PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS 104 (6th ed. 2006).

¹⁵ *Id.* at 105.

C. Payments to the Artist

The main income a recording artist receives from the record company is the share he receives for every sold copy of his music. These payments are called royalties. In most contracts, the payment of royalties is split into advanced payments, which are paid to the artist before production and eventually can be recouped by the record sales and the regular royalty payments, which the artist receives, when his records are sold. In recording contracts, only the payments paid after and according to record sales are referred to as “royalties”, while the recoupable payments are referred to as “advances”.

1. Advances

In today's record deals, the term advances describes all payments made to the artist in advance of the production. While in the past, royalty advances and production costs were strictly separated, today most payments are structured in “recording funds”, including recording costs as well as any other foregoing payments to the artist¹⁶. This means, that an artist, who for example receives a recording fund of 60,000 \$ has to use this money to get a location as well as equipment to record his songs and to pay the producer and any other personnel needed during the recording process. Any money which he does not have to spend on the production, belongs to him. Yet, as aforementioned, in most contracts, the companies are given a right to approve the recording budget and all the elements of the procedure. With the artist being responsible and competent for the way the recording budget is used, he is on the one hand more independent in his working process. On the other hand, since the advances are, as explained below, recoupable, he is also bearing a higher risk than with a regulation granting the company the right or duty to pay directly the recording sessions. Pure advances, in contrast to funds, can solely be found today in some pop and hip-hop contracts, as those productions are often made in cooperation with external producers, who, due to the

¹⁶ *Id.* at 89.

higher importance of their work in contrast to other music styles, are paid much better than other producers, making the whole production much more expensive¹⁷.

In many record deals, the amount of money paid to the artist within the recording fund, is calculated by a so called “formula”. Under this concept, the amount of advances for every album produced under the contract, depends on the amount of royalties paid for the preceding albums delivered by the artist. The “formula amount” generally constitutes around two thirds of either the royalties earned during the last term period or the average amount of royalties paid to the artist per album under the contract¹⁸. To prevent both, the artist and the record company from undesirable formula amounts due to either extremely good or extremely bad sales of the previous album(s), contracts working with formulas contain a floor and a ceiling amount for each term period¹⁹. Both, the floor and the ceiling amount become higher along with the duration of the contract. For example if for his second album, the formula floor is \$ 55,000 and the ceiling is \$ 110,000, the limits for the third album could be between \$ 60,000 and \$ 120,000.

2. Recoupment

In almost every record deal, advances are nonreturnable, avoiding the artist to owe the company huge debts in case of a flopping album.²⁰ This does, however, not mean, that the company is not returned its advances at all. Companies meet their expenses by not paying any royalty to the artist until all advances are recouped by the money earned by the artist. This means that only the sales rate granted to the artist, is taken for compensation. Only from the moment that all advances are recouped, the company will pay the artist the agreed royalties.

3. Royalties

¹⁷ *Id.* at 90.

¹⁸ Strand, *supra* note 12, at 6.

¹⁹ PASSMAN, *supra* note 14, at 91.

²⁰ INGENDAAY, *supra* note 8, at 342.

Royalty provisions in a recording contract generally comprehend the agreement on the sales royalty rate itself, as well as clauses, which under certain factors modify the royalty rate by raising or reducing it.

a) Royalty rates

Royalties are the artist's participation in the recording sales. In contrast to non-exclusive studio musicians, who generally receive flat payments, artist under a record deal receive a fixed percentage of the money made with every record, called the "rate"²¹. The final rate and thereby the amount of money, the artist eventually receives is composed of a base rate which is then modified by royalty accelerations or royalty reductions, which will be explained below. Also, most record deals stipulate so called "all-in-royalties". All-in means, that the artist also has to pay the record producer and the mixer from his royalties²². Basis for the royalty calculation is either the published price to dealers (PPD), which is the wholesale price or the suggested retail list price (SRLP)²³.

The base rate for new artists' all-in-royalties is regularly between 13% to 16%, for midlevel artists between 15% and 17% and for superstars between 18% and 20% of the PPD²⁴. In general, there are different base rates for singles and albums. Finally, the base rate is also affected by the term. The longer the contract is lasting, i.e. the higher the option period number, the higher is the base rate²⁵.

As mentioned, base rates are usually modified. The higher the amount of sold copies, the higher is in most cases also the royalty rate. Given that a contract for example specifies a base rate of 13%, the rate might increase to 13.5 % if the artist sells more than 250,000 copies. If the album achieves record sales of 500,000 copies, his royalties increase up to 14%. On the other hand, there are also many factors reducing the base rate. Whenever the

²¹ *Id.* at 295.

²² PASSMAN, *supra* note 14, at 88.

²³ INGENDAAY, *supra* note 8, at 299.

²⁴ PASSMAN, *supra* note 14, at 86.

²⁵ Strand, *supra* note 12, at 7.

record company does not receive the full price for a sold copy, the reduction is automatically transferred on the artist's royalties. The most common lower levels are mid-price and budget records, which are released with a PPD between 65% and 80%, respectively less than 65% of the original price²⁶. A lower status does, however, not only affect the sales revenues, but also the royalty rate itself. The royalty for mid-price records is generally 75%, and for budget records 50% of the basic royalty rate²⁷. Records become mid-price or budget records either by being downgraded after a certain period of time after their release or by being sold mid-price for promotional reasons, pushing in particular new-comer artists²⁸. Other forms of promotional methods, which are affecting the artist's royalty rate or income, are sales via record-clubs and the giveaway of free records. For records sold to members of record clubs, the artists generally receive 50% of the receipts, the record company gets for granting the record club the license to manufacture and distribute the records to their members. This sum, however, is usually less than half of the artist's royalty rate²⁹. As to records given away for free, the artist does not receive anything for those records³⁰. Another reason for reductions are sales in foreign countries. Due to licensing fees, in some countries a record sale can make the artist earn down to only two thirds of the base rate or less³¹. A further form of royalty reduction can still be found in some record deals, containing packaging charges. The intention behind that is to pay the artist only for the component of the product he contributed to. The standard packaging deduction for CDs is 25%³² of the SRLP. Finally, there are also some agreements reducing the royalty rate on digital records³³. With the growing importance and use of new media music distribution systems like i-tunes, those provisions, however, will be less likely to be found in newer contracts. This means that the rate will stay the same³⁴,

²⁶ PASSMAN, *supra* note 14, at 169-170.

²⁷ *Id.*

²⁸ *Id.* at 171.

²⁹ *Id.*

³⁰ Ian Brereton, Comment, *The Beginning of a new age? The Unconscionability of the "360-Degree" Deal*, 27 CARDOZO ARTS & ENT. L.J., 167,181,183 (2009).

³¹ PASSMAN, *supra* note 14, at 154.

³² INGENDAAY, *supra* note 8, at 298.

³³ Strand, *supra* note 12, at 8.

³⁴ PASSMAN, *supra* note 14, at 158.

even though in absolute numbers the artist might receive fewer royalties from an i-tunes download, since the record companies get less in comparison to a CD sale, too.

An example for the concept of acceleration and reduction can be provided by the following scenario made up by the author. An artist is selling his third contractual album. The base rate for his first album was 13% of the SRLP. The contract raises the base rate by 1% per term period. Further, the contract provides an acceleration of 0.5% for every 250,000 copies sold. The packaging deduction for CDs is 25%. In his third period, the artist releases an album which is selling 400,000 copies. Initially sold for \$ 15.00, he would, with an accelerated royalty rate of 15 % and a packaging reduction of 25 %, receive \$ 1.6875 per record. If, after three years, the company decided to sell the record mid-price with a price of \$ 10.00, and the contract provided a reduction of 25% for mid-price records, he would, after three years only receive \$ 0.84375 per sold copy.

b) Accounting and Payment

The owed sales royalties are accounted by the company on the base of sales figures. With the payment, which is generally received on a semi-annular basis, the artist is informed by the company in form of a royalty statement about the amount of royalties payable under the contract³⁵. For the purpose of legal certainty, contracts also provide a time limit after the statement for the artists to object, until the accounting becomes final³⁶. In order to be informed sufficiently to decide whether or not to object, artists are granted a right to audit the company's books. Most record deals allow artists to audit once a year and per royalty statement³⁷. They are required to pay for the auditing themselves which can cost \$25,000 to \$50,000³⁸.

³⁵ Brereton, *supra* note 30, at 191.

³⁶ PASSMAN, *supra* note 14, at 149.

³⁷ Brereton, *supra* note 30, at 192.

³⁸ PASSMAN, *supra* note 14, at 150.

The artists are paid their royalties twice a year after accounting and rate-modification. However, even with all advances being recouped, the artists do not receive all of their royalties at once. This is due to records generally being sold with 100% return privilege for the retailers. In order to make the retailers buy a larger stock of records, the retailers are granted the right to return the copies they did not sell and receive their money in return. As a result of penalty points, which the companies can impose, they do not have to repay the full price. Still, the companies want the artists to take part in the risk of unsold records being sent back to them³⁹. For that purpose, recording contracts may allow companies to retain portions of payable royalties as a reserve, which in general is limited to up to 35% of the royalties for albums and 50% for singles⁴⁰.

c) Mechanical royalties / Controlled composition clauses

Besides the contractual royalties the company has to pay the artist for each performance on the record, the artist also may receive so called mechanical royalties, which are statutory-based and granted to the author of each song. While the contractual royalties concern the recorded work, mechanical royalties concern the composition of the song itself. Mechanical royalties are directly granted by the Copyright Act (17 U.S.C. §115) and the rate is fixed⁴¹.

At the moment, the mechanical rate is 9.1 cents per song or 1.75 cents per minute of playing time or fraction thereof, whichever is greater. Songs that are written, owned or controlled by the performing artist are called “controlled compositions”⁴². To avoid paying the full amount of mechanical royalties, record companies often include controlled composition clauses into the agreements. These clauses limit the amount of mechanical royalties payable to the artist. New artists, for example, are generally not paid more than two thirds of the statutory rate⁴³. The clauses further set a maximum number, called mechanical ceiling, limiting the amount of mechanical royalties that are paid for the whole album. For new artists, this cap usually is ten

³⁹ *Id.* at 70-71.

⁴⁰ Strand, *supra* note 12, at 10.

⁴¹ U.S. COPYRIGHT OFFICE: MECHANICAL LICENSE ROYALTY RATES (2006), <http://www.copyright.gov/carp/m200a.html>.

⁴² PASSMAN, *supra* note 14, at 214.

⁴³ Brereton, *supra* note 30, at 190.

times 75% of the statutory rate⁴⁴. This affects the artist even more, when he the album also contains non-controlled compositions, meaning songs, others have composed and hold the rights of, as their composers are notwithstanding paid the full mechanical royalties⁴⁵. If for example, an artist sells an album with 10 songs, all of them around 3 minutes long, and his contract provides only two thirds of the statutory rate per song and only ten times 75% overall, he would receive 6.06 Cent per song instead of the statutory 9.1 Cent. If there were for example 12 instead of 10 songs on the album, he would only receive 5.25 Cent per song. If one of the songs was a cover version of a song by another artist, he would receive 4.93 Cent per song, since the full royalty, the other artist receives is taken from the overall payment, the artist receives under the contract.

D. Assignment of rights / Exclusivity

The purpose of clauses as to the assignments of rights in a recording contract is, in general, to provide the record company with exclusive, all-embracing exploitation rights on the artist's work, which are locally and temporally unlimited⁴⁶.

1. Copyright Ownership

A fundamental part of each recording contract is the global transfer of copyright ownership. The artist has to transfer all the exclusive rights which are held by the owner of copyright under the 1976 Copyright Act (17 U.S.C. §106) to the record company. This is required by the company in order to be entitled to reproduce the records to be sold. Many recording contracts govern the ownership of copyright in a "work for hire clause", in which the artist agrees on delivering each master as work made for hire⁴⁷. Under § 201 (b) of the Copyright Act, "in the case of a work made for hire, the employer or the person for whom the work was prepared is considered the author (and)[...] owns all of the rights comprised in the

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ INGENDAAY, *supra* note 8, at 342.

⁴⁷ *Id.*

copyright.”⁴⁸ This also implicates that artists lose the right to recapture their copyright thirty-five years after contractual assignment, which they are otherwise granted by the 1979 Copyright Act⁴⁹. To fall under the work for hire provision, the record either has to be prepared by an employee within the scope of his or her employment or has to be specially ordered or commissioned for use in a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, the latter requiring a written agreement signed by both parties, which defines the work as a work made for hire. A work for hire clause would constitute such an agreement. It further includes the acknowledgement of all circumstances required for the master to be classified as a work made for hire, for example the preparation of the work within the scope of the company’s engagement of the artist’s personal services or the use of the master as a contribution to a collective work⁵⁰. The standards provided by primary authority and whether or not they are fulfilled by the relationship between recording artists and labels, will be analyzed later in this paper.

As these “work for hire” clauses are highly disputed, each contract with such a clause also includes a so called “backup assignment”. This agreement states that in case that the masters are not deemed to be work for hires and thereby the artist still is the author of the work, the artist is compelled irrevocably to transfer the ownership of all copyrights in the works governed by the contract as well as any renewal and extension rights⁵¹.

With regards to the company’s use of masters apart from record sales, some contracts grant the artist a right to control and approve the use of the transferred copyrights. The artists consent can then be required among others for the use as a contribution to a compilation, or the use in film, television or commercials⁵²

⁴⁸ 17 U.S.C. §201 (b)

⁴⁹ PASSMAN, *supra* note 14, at 292.

⁵⁰ Strand, *supra* note 12, at 3.

⁵¹ INGENDAAY, *supra* note 8, at 342.

⁵² PASSMAN, *supra* note 14, at 147.

2. Personal rights

Apart from copyright ownership, most record deals include agreements permitting the company to use material subject to artist's personal rights, such as name, likeness or biographic material as well as the rights on pictures, which are required for promotion purposes⁵³. The artist, however, is often granted a right to approve material, e.g. photographs and biographical material, used by the company before its release. In case of disapproval, the artist must notify the company within a short period of time, e.g. five days after being informed. This period of time is also fixed in the contract⁵⁴.

3. Exclusivity

Recording contracts generally provide the companies full exclusivity on the artist's work within the term of the contract. Exclusivity implies personal exclusivity and exclusivity of titles⁵⁵. Agreements as to personal exclusivity restrain the artist from any commitment to a third party that would interfere with his contractual duties. Most importantly, he is not allowed to perform for any other person than for the company⁵⁶. For some exceptions, however, the artist may perform for a third person with the company's permission. The two most common exceptions are works related to motion picture or television soundtracks and so called "sideperson performances"⁵⁷. The willingness to such exceptions differs from company to company and often requires special conditions as restrictions on the amount of appearances and contribution to the work, the grant of "courtesy credits" to the company and a guarantee, that the other work will not negatively influence the artist's performance of the contract⁵⁸.

Exclusivity of titles is granted by the artists by accepting re-recording restrictions. These restrictions forbid the artist to perform or record any songs, he delivered as part of his

⁵³ *Id.* at 242; *see also* Strand, *supra* note 12, at 4.

⁵⁴ Strand, *supra* note 12, at 4.

⁵⁵ INGENDAAY, *supra* note 8, at 276.

⁵⁶ Strand, *supra* note 12, at 15.

⁵⁷ INGENDAAY, *supra* note 8, at 276.

⁵⁸ *see* PASSMAN, *supra* note 14, at 135-36.

contractual duties without permission of the company⁵⁹. In contrast to provisions on personal exclusivity, re-recording restrictions last even beyond the term of the contract, mostly until five years after the recording or at least three to five years from the end of the term⁶⁰.

4. Multiple rights / 360° Deals

Most recently, a new type of record deals has evolved, going beyond the sole sale of records. Ongoing changes in the music industry, mainly due to technological progress, have weakened the role of album sales, while other income sources, such as live performances, seem increasingly to gain economical importance⁶¹. As it is not in the record companies' interest to contract with artists solely on products with decreasing perspectives, many companies are seeking to take share in further activities and income sources of the artists. The most famous example for such new contracts is the so called "360° deal". These agreements allow the company not only to take part in the publishing rights, including mechanical royalty payments for the artists' compositions, but also in income derived from merchandising, touring and endorsements⁶². Atlantic, for example, recently offered an artist a contract, including an option granted to the company with the release of the artist's first album, to pay the artist \$ 200,000 in exchange for 30 percent of the net income from all touring, merchandise, endorsements and fan-club fees⁶³. The first and so far best known case of a 360° deal is the contract Madonna signed with the concert promoter Live Nation in 2007. This deal, which is reported to be worth \$120,000,000 over a period of 10 years gives Live Nation rights not only to three new albums, but also to tour promoting, merchandise, sponsorship, websites, DVDs, TV shows and films⁶⁴.

⁵⁹ *Id.* at 132.

⁶⁰ *Id.*

⁶¹ see Henry H. Perritt, Business models for music 23-26 (Aug. 6, 2009) (unpublished manuscript, on file).

⁶² Brereton, *supra* note 30, at 194.

⁶³ Jeff Leeds, *The new Deal: Band as Brand*, N.Y. TIMES, Nov. 11, 2007,

http://www.nytimes.com/2007/11/11/arts/music/11leed.html?_r=2&oref=slogin.&pagewanted=all.

⁶⁴ *Madonna signs radical record deal*, BBC.CO.UK, Oct. 16, 2007, <http://news.bbc.co.uk/2/hi/7047969.stm> (last visited Dec. 21, 2009)

E. Other contract provisions

1. Videos

Terms on promotional videos mainly govern issues as budget and recoupment as well as creative control. The production of an adequate quality video requires an investment of at least \$25,000⁶⁵. In the industry it is, however usual to spend \$125,000 to \$150,000 for new artists and up to more than \$1,000,000 for top acts. For that, companies both leave the artist only a limited room to negotiate about video production aspects and expect the costs to be recouped⁶⁶. If the company grants any approval rights to the artist, those are generally limited to the selection of story, director or producer and must be exercised before the shooting⁶⁷. With regards to the recoupment of video production costs, companies usually take up to 100% of the artist's video royalties, which are the money the artist may receive for the exploitation of the audiovisual work, and up to 50% from the artist's record royalties⁶⁸.

2. Annual payments

Many labels, in particular those who enter into contracts which might fall under the provision of California law, place language in the contract guaranteeing the artist an annual payment of \$9,000 in the first year, \$12,000 in the second year and \$15,000 each from the 3rd to the 7th year of contract.⁶⁹ This payment includes record royalties, so that additional payments resulting from this clause are only made to the artist in years, in which he does not receive the named amounts from the company otherwise. The reason of this clause is the California legislature on injunctive relief, stating that final injunction and provisional injunction to prevent a breach of contract may only be granted under certain if the contract complies with certain requirements⁷⁰. These requirements, listed in § 3423 (c) Cal. Civil Code, are a written

⁶⁵ PASSMANN, *supra* note 7, at 138-39.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *See Id.* ; Strand, *supra* note 12, at 14.

⁶⁹ INGENDAAY, *supra* note 8, at 287.

⁷⁰ § 3423 Cal. Civil Code; § 526 Cal. Code of Civil Procedure

agreement, the qualification of the owed services to be of a special, unique, unusual, extraordinary, or intellectual character, rendering non-performance not compensable, and finally, a guaranteed minimum compensation for the services⁷¹. The criteria for this compensation are listed in subsection (e) of § 3423 and distinguish between contracts entered into before and on or after January 1, 1994. The amount of money mentioned above and used in the corresponding clauses equals the minimum compensation for contracts entered into on or after January 1, 1994 under § 3423 (e) (2) (A). These clauses further obligate the artist to notify the company betimes, if the company has not paid the required sum before the end of each contract year⁷². They further make the artist acknowledge the intention of the payment guarantee and contain a sub-clause granting the company the right to amend the guarantee in case that it is not required anymore to preserve the company's right to seek injunctive relief⁷³.

3. Indemnity

Many contracts also contain clauses denying the artist to seek for punitive damages, costs or for relief from the contract⁷⁴. The clauses are further granting the company reimbursement for any payment resulting out of claims by the artist⁷⁵.

III. Legal review on contract terms

[you need to be clear about the remedy when a contract term is found to be unenforceable—whole contract is void, in what case the artist has no right to payment? Only those terms favoring the label are void?]

When contract terms are reviewed by law, there are three major conditions on which a contract or certain terms can be rendered unenforceable: illegality, unconscionability and a lack of consideration⁷⁶.

⁷¹ *Id.*

⁷² Strand, *supra* note 12, at 23.

⁷³ *Id.*

⁷⁴ Hall, *supra* note 5, at 208.

⁷⁵ Strand, *supra* note 12, at 20.

A. Standards

1. Illegality

As a matter of principle, illegality can render a contract as a whole or in parts void and unenforceable⁷⁷. Illegality can arise out of breaches of constitutional law, statutory law, administrative regulations and common law⁷⁸. In cases of palpably illegal agreements, courts will not hesitate to deny enforcement, since it would oppose public policy dramatically, if legal instruments were abused for illegal conduct to prevail⁷⁹. There is, however a large grey area of cases, where even though certain laws or regulations might be violated, courts do not recognize incoherency with public policy, if the respective contract remained enforceable. Consequently, cases with reference to illegality are highly influenced by precedents and require a strong case⁸⁰.

2. Consideration

As a general rule in common law, promises are only enforceable as part of a bargain, which by definition excludes gratuitous promises and thereby requires consideration⁸¹. Consideration is on hand when the parties suffer legal detriments due to their promises and when promises and detriments have induced each other⁸². Apart from that, there are no requirements courts look upon when reviewing the contract on the existence of consideration. As a characteristic of freedom of contract, there is, in particular, no judicial review on the adequacy of the consideration, implicating high requirements for individuals claiming on the grounds of a lack of consideration⁸³.

⁷⁶ INGENDAAY, *supra* note 8, at 253.

⁷⁷ JOSEPH M. PERILLO, CALAMARY AND PERILLO ON CONTRACTS, 844 (5th ed. 2003).

⁷⁸ INGENDAAY, *supra* note 8, at 253.

⁷⁹ PERILLO, *supra* note 77, at 844.

⁸⁰ *see Id.* at 845.

⁸¹ INGENDAAY, *supra* note 8, at 253.

⁸² PERILLO, *supra* note 77, at 174-5.

⁸³ *Id.*

3. Unconscionability

Originally implemented by courts of equity, the doctrine of unconscionability today is recognized as a fundamental part of contract law, denying enforceability of contracts, which are one sided to such an extent, that “they affront the sense of decency”⁸⁴. In the 1950s, the doctrine of unconscionability found its way into statutory regulation, being implemented in § 2-302 of the Uniform Commercial Code, stating that courts may refuse to enforce contracts or clauses, which have been unconscionable at the time of their formation in order to prevent unconscionable results⁸⁵. Courts did not, however, constrain the appliance of the doctrine to contracts subject to the U.C.C.⁸⁶. This practice was fortified by the implementation of a section nearly identical to U.C.C. § 2.302 into the Restatement (Second) of Contracts⁸⁷. Still, neither the U.C.C., nor the Restatement can provide a guideline on how unconscionability has to be determined. Such a guideline can, nevertheless, be found in the official commentary of the U.C.C., which reads as follows:

“The basic test is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the market.”⁸⁸

Furthermore, contracting shall be kept free from “oppression and unfair surprise” and contracts shall not contain disturbed allocations of risk as a result to unequal bargaining power.⁸⁹ Pursuant to these provisions, unconscionability generally requires both, an unconscionable contracting procedure and an unconscionable result. Thereby, some courts only enforced contracts due to unconscionability if procedural unconscionability and

⁸⁴ PERILLO, *supra* note 77, at 388.

⁸⁵ *see* U.C.C. § 2-203 (1) (2003).

⁸⁶ *see* Brereton, *supra* note 30, at 171.

⁸⁷ *see* Rest 2d Contr §208 (1979).

⁸⁸ U.C.C. § 2-302 cmt. 1.

⁸⁹ *Id.*

substantive unconscionability were at hand⁹⁰. In practice, however, procedural unconscionability can also be assumed, if there is intense and unambiguous case of substantial unconscionability⁹¹

a) Procedural Unconscionability

Procedural unconscionability applies to the bargaining process, focusing on the conduct of the parties⁹². It is at hand when, at the time the contract was formed, there was an absence of meaningful choice for the weaker party resulting from either a lack of knowledge of the terms or a clear disparity in bargaining power⁹³. Referring to the official comment to U.C.C. § 2-302, it thereby requires either unfair surprise or oppression⁹⁴.

Unfair surprise, in general, arises out of terms that due to incomprehensive or ambiguous language, misleading bargaining or a lack of counsel lead to a result, the party claiming unconscionability could not reasonably expect⁹⁵. With regards to recording contracts, however, due to a high amount of standardization and common practice within the industry on the one hand⁹⁶ and the fact that artists are generally represented by counsel⁹⁷, it is not to be expected that record deals contain elements of unfair surprise.

As to the procedural unconscionability of recording contracts, legal review needs to approach the oppressive elements of contracting in the music industry instead. As aforementioned, in an oppressive contract, the absence of meaningful choice is resulting from a high disparity in bargaining powers⁹⁸. Superior bargaining is, however only a ground for striking down a contract, if it prevents any real choice by the other party as in industry-wide form contracts drafted by a party with predominant bargaining power and which only leave the other party

⁹⁰ PERILLO, *supra* note 77, at 388.

⁹¹ INGENDAAY, *supra* note 8, at 256.

⁹² Breerton, *supra* note 30, at 173.

⁹³ MARTIN A. FREY, PHYLLIS HURLEY FREY: ESSENTIALS OF CONTRACT LAW, 164 (2001).

⁹⁴ Hall Smells like Slavery at 195.

⁹⁵ INGENDAAY, *supra* note 8, at 257.

⁹⁶ *Id.*

⁹⁷ Breerton, *supra* note 30, at 177.

⁹⁸ *see* INGENDAAY, *supra* note 8, at 257.

the choice to “take it or leave it”⁹⁹. Those contracts are referred to as contracts of adhesion¹⁰⁰.

Absence of meaningful choice as in contracts of adhesion is usually given in markets, which are characterized by a monopolistic or oligopolistic structure¹⁰¹. This structure can be assumed for the music industry as on the one hand more than 80 percent of the market shares are in the hands of the four major labels Universal Music, Sony BMG, Warner Music Group (formerly Warner Electra Atlantic) and EMI¹⁰², who not only own the four major distributors, but also most of the big independent distributors¹⁰³, and on the other hand nowadays major-label record deals have become that similar, that there are lawyers even assuming a cartel in the industry¹⁰⁴. With pay-for-play policies in radio stations or music television and promotion budgets that exceed those of indie labels by far, major record deals have been the only chance for artists to get enough airplay and advertisement to launch commercially successful albums¹⁰⁵

But, even assuming a declining role of the “Big Four”, there are no fundamental changes in sight as even independent labels, when they become bigger, draft their contracts more and more similar to those of the major labels¹⁰⁶.

A further question to be raised in the context of procedural unconscionability in recording contracts is the qualification of the contract as a commercial contract. As most courts for the purpose of freedom of contract require a special need of protection, there is reluctance in finding commercial contracts unconscionable under the same requirements as consumer contracts¹⁰⁷. This more deferential standard applied on commercial contracts, does, however, not apply to all recording contracts, since, for example contracts between artists and

⁹⁹ PERILLO, *supra* note 77, at 390.

¹⁰⁰ *Graham v. Scissor-Tail, Inc.*, 28 Cal. 3d 807, 818 (1981).

¹⁰¹ *Id.*

¹⁰² Cashmere, *supra* note 3.

¹⁰³ PASSMAN, *supra* note 14, at 64-65.

¹⁰⁴ Bill Holland, *Artists' Lawyers Debate Contracts*, BILLBOARD, Sept. 29, 2001 available at: http://books.google.de/books?id=wRMEAAAAMBAAJ&printsec=frontcover&source=gbs_navlinks_s#v=onepage&q=&f=false.

¹⁰⁵ Hall, *supra* note 5, at 201.

¹⁰⁶ PASSMAN, *supra* note 14, at 110.

¹⁰⁷ Hall, *supra* note 5, at 196-197.

independent labels are often formed without legal counsel and contain standardized adhesive language similar to consumer contracts¹⁰⁸. Additionally, even with most major contracts being viewed as commercial contracts, they are not prevented from being declared unconscionable, but are rather merely underlying higher requirements for procedural unconscionability. This seems logical, as the main difference here is basically affecting the prevention of unfair surprise, but not the prevention of oppressive conduct as businesses can be victims of unequal bargaining power the same way customers can be. In fact, as pointed out, major record companies have a bigger bargaining power than independent labels and can thereby more easily implement terms into the contract, which the artist then can take or leave. In conclusion, a factual lack of alternative choice on the side of the artists strongly indicates that the formation of a recording contract comes off procedurally unconscionable¹⁰⁹. Courts will, however, in their decisions on procedural unconscionability, with regards to the discretionary character of the provisions, judge on a highly individual basis, considering all aspects of the bargaining process.¹¹⁰

b) Substantive Unconscionability

In contrast to procedural unconscionability, substantive unconscionability applies to the result of the bargaining process and thereby to the content of the contract itself¹¹¹. It is to be held when, at the time the contract was made, there is either an extensive disproportion of benefits or an unreasonable reallocation of risks between the two parties¹¹². For being found substantially unconscionable, contract terms thereby have to be harsh, unfair or oppressive¹¹³ and as a whole “unreasonably favorable” to one of the parties¹¹⁴.

Within the legal review of recording contracts, the fact whether or not and to what extent the contract or a clause is substantively unconscionable is of great importance, because of the

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 221.

¹¹⁰ *Id.* at 202.

¹¹¹ INGENDAAY, *supra* note 8, at 260.

¹¹² *Id.* ; *see also*: Brereton at 174.

¹¹³ Hall, *supra* note 5, at 195.

¹¹⁴ *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965).

courts' reluctance to hold commercial contracts procedurally unconscionable¹¹⁵. Therefore, contract terms have to be reviewed and evaluated carefully from both perspectives, isolated and as a whole. In practice, however, contract terms are rather reviewed hesitantly, as on the one hand, doubtful provisions enjoy high justification through the principle of contractual freedom and on the other hand due to the indefinite precedents which result of the high amount of discretion on that topic, there is still not enough legal certainty to provide a stable and reliable legal review in the U.S.¹¹⁶.

c) Remedies resulting from unconscionability

Under both the U.C.C. and the Restatement (Second) on Contracts, a court can, if it finds a clause to be unconscionable choose between three remedies to grant the claimant. The court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result¹¹⁷. As a general rule, writings have to be interpreted as a whole¹¹⁸ and might thereby also be held void and unenforceable as a whole for being unconscionable. In the case of the German singer Xavier Naidoo¹¹⁹, which will be explained later in the paper, the court has held the whole contract unenforceable for being unconscionable under the provisions of the German Civil Code. In consequence, both the artist and the company lost all their remedies granted in the contract. Further, the transfer of ownership of any of the artist's rights to the company was held invalid from the time the artist challenged the enforceability of the contract. Hence, the company had to pay the artist all profit, which it had received from exploiting the artist's work. In the U.S., however, courts in general refuse to enforce the entire contract only when the aggrieved party has not yet performed anything¹²⁰. Yet, most disputes concerning the unconscionability of recording contracts arise after the contract is in force for several years. Thereby, courts are more likely

¹¹⁵ Hall, *supra* note 5, at 205.

¹¹⁶ INGENDAAY, *supra* note 8, at 261.

¹¹⁷ U.C.C § 2-302 (1).; Rest 2d Contr § 208 (1979).

¹¹⁸ Rest 2d Contr § 202 (2) (1979).

¹¹⁹ BVerfG, July 25, 2005, docket number 1 BvR 2501/04, at juris online / Rechtsprechung.

¹²⁰ JANE M. FRIEDMAN, CONTRACT REMEDIES IN A NUTSHELL 306 (1981)

to strike down or limit the application of those clauses attacked by the artist, if they are to be found unconscionable.

B. Application on relevant contract terms

In the following, the major clauses of an industry standard recording contract are reviewed upon the criteria described above.

1. Term

In today's recording contracts, the term is not only one of the most important regulations, but also one of the most debatable ones.

The growing popularity of option contracts, which refer not to fixed time periods, but to the time of artistic delivery, has increased the number of critics within scholarship and legislature. Option contracts make it possible for record companies to both bind artists for a long time in case of success, and drop the artist after each period if they are not satisfied with the artist's success. This provides lots of power and planning reliability for the companies, while the artists are restrained in their career planning and in addition are constantly bearing the risk to lose their employment. These provisions are certainly heavily one-sided and there are opinions in the literature finding them oppressive enough to underlie the standards for substantive unconscionability¹²¹. It can be noted that the more options a contract provides for the company, the more likely it is to be found unconscionable. Furthermore, those option contracts, not referring to fixed time periods, can oppose public policy laid down in state regulations. Referring to personal service contracts, § 2855 of the California Labor Code limits the enforceability of an employment contract to a period of seven years¹²². This rule also became known as "De Haviland Law", when in a landmark case in 1944, female filmstar Olivia De Haviland successfully sought relief from her contract with Warner Brothers,

¹²¹ see Brereton at 180, *see also*: Holland, *supra* not 104, at 70 (Jay Rosenthal finding the eight-option contract unconscionable)

¹²² CAL. LAB. CODE § 2855.

referring to the seven years rule.¹²³ Concerning the music industry, Californian courts both hold recording contracts to be contracts of personal service and include artists as independent contractors under its scope, so that the seven years rule also applies on them.¹²⁴ This provision, however, does not render contracts containing provisions that extend the contract term to more than seven years, void. The legal consequence is, that after seven years of service, the contract is no longer enforceable, which does not exclude the artist from his contractual duties within the seven year period¹²⁵. Furthermore, with the implementation of a subsection to § 2855 Cal. Labor Code, special legislature for artists was laid down after being requested by the recording industry in 1987¹²⁶. This subsection requires the artist to give written notice to the company, if he does not want to be bound by the contract after the seven years, specifying the date from which he intends to terminate the contract. The company is then granted 45 days to claim damages against the artists, if he has not delivered the amounts of albums he owes the company according to the recording contract¹²⁷. The subsection was added to prevent artists from abusing the rule not to fulfill their contractual duties by simply sitting out the seven years¹²⁸. It does thereby not exclude recording contracts from the general public policy intention behind the seven years rule, as other Californian statutory rules like for example the aforementioned requirements for injunctive relief are set on the assumption that employment contracts for any personal services not last longer than seven years¹²⁹. The subsection, however, allows record companies to evade the seven years rule by simply agreeing with the artists on high production commitments¹³⁰. Furthermore, most record labels refuse to accept more than one album per year, claiming they need the time for sufficient promotion¹³¹. As regular marketing cycles last about 18 to 24 months, artists can deliver 3 to five albums per seven years.

¹²³ De Haviland v. Warner Bros. Pictures, Inc., 67 Cal. App. 2d 225 (1944)

¹²⁴ Foxx v. Williams, 244 Cal. App 2d 223, 239 (1966).

¹²⁵ INGENDAAY, *supra* note 8, at 308.

¹²⁶ Hall, *supra* note 5, at 217.

¹²⁷ see § 2855 (b) Cal. Labor Code, Ingendaay at 308-09.

¹²⁸ INGENDAAY, *supra* note 8, at 309.

¹²⁹ see § 3423 (e) (2) (A) Cal. Civil Code.

¹³⁰ INGENDAAY, *supra* note 8, at 309.

¹³¹ Hall, *supra* note 5, at 218.

Recording deals in which the artist commits to deliver a number of albums he could never possibly produce within seven years, are thereby likely to be assumed as intentionally evading the seven years rule. Consequently they can be assumed to be against public policy in an oppressive manner, rendering them substantively unconscionable¹³². Artists like LeAnn Rimes, Don Haley or Hole singer Courtney Love, who have been involved in lawsuits with their record companies about contracts obligating them to deliver a higher number, have, however, settled with their former labels, so that there are still no precedents on these provisions¹³³. In 2002, Californian State Senator Kevin Murray introduced a bill repealing the criticized subsection, which has been passed by the State Senate, but eventually was not further preceded by the assembly and thereby failed to pass¹³⁴.

Apart from California, there is no regulation comparable to the seven years rule, although in New York, Georgia, Texas, Florida and Tennessee the implementation of a statutory limitation to the endurance of personal service contracts is intended¹³⁵. As long as these intentions are not put into legislation, recording contracts may contain more extensive production commitments and are not inevitably required to state a time presently definite for their termination¹³⁶. Accordingly, terms in recording contracts signed by artists, who are not residing in California, can merely be reviewed upon the aforementioned general standards for substantive unconscionability, providing at least protection against clauses which are unreasonably oppressing the artist with abnormally high duration or production commitments¹³⁷.

2. Advances and recoupment provisions

The general practice of recoupment of artists' advances and production costs is mainly criticized for the aspect, that those advances are only recouped out of the artists' percentage

¹³² see Brereton at 182.

¹³³ Hall, *supra* note 5, at 218-19.

¹³⁴ OFFICIAL CALIFORNIA LEGISLATIVE INFORMATION, SB 1246 SENATE BILL (2002) – BILL HISTORY, *available* at http://info.sen.ca.gov/cgi-bin/postquery?bill_number=sb_1246&sess=0102&house=B&site=sen.

¹³⁵ INGENDAAY, *supra* note 8, at 313.

¹³⁶ Ketcham v. Hall Syndicate Inc. 236 N.Y.S.2d 206, 214, (1962).

¹³⁷ INGENDAAY, *supra* note 8, at 313.

of the sales income. This basically means that with a 12% royalty rate, the company not only receives 78 % of the income, but also gets practically paid back the production costs by the artists, while the company is still keeping ownership of the record¹³⁸. Republican US Senator Orrin Hatch (Utah) compared this procedure to a mortgage, which is to be paid off even though the bank still owns the house afterwards¹³⁹. As aforementioned, artists nowadays are granted a production fund, which contains both, royalty advances and funds to pay the production costs and which are eventually recouped. Especially the recoupment of production costs constitutes an abnormal allocation of risks¹⁴⁰ and can furthermore constitute oppression, because it prevents the artist from receiving royalties although his personal advances are already recouped, while the company receives both, the percentage of royalties they are entitled to in any case and the royalties retained from the artist. Additionally, in case that the artist's first album sold that badly, that the production costs could not have been recouped by the artists' share of royalties, record companies can recoup those costs from royalties earned by the artist with his second, third and any following album¹⁴¹. As a result of the company's already guaranteed gains, there will be in almost all cases a period of time, in which the company will take profit from the record sales, while the artist, although having recouped their royalty advances, does not receive any payments. In collusion, these provisions thereby seem very one-sided and oppressive, indicating possible grounds for substantive unconscionability.

3. Royalty reductions

While the royalty rates themselves have not been criticized by scholars and, in fact have improved for the artists within the last years¹⁴², rate reductions have faced criticism and have to be reviewed upon their conscionability¹⁴³. As aforementioned, royalty rate reductions affect

¹³⁸ Holland, *supra* note 104, at 70.

¹³⁹ Brereton, *supra* note 30, at 167, Hall at 190.

¹⁴⁰ INGENDAAY, *supra* note 8, at 342.

¹⁴¹ PASSMAN, *supra* note 14, at 122.

¹⁴² Holland, *supra* note 104, at 71.

¹⁴³ *see* Brereton, *supra* note 30, at 183-186.

packaging costs, sales to foreign countries, and records being sold to record clubs, given away for free or sold as mid-price, respectively budget records, for promotional purposes.

Especially the latter provisions exhibit oppressive character and are not entirely convincingly justified by the record labels¹⁴⁴. Rate reductions on records sold at discount prices are justified with a reduced margin due to a reduced wholesale price¹⁴⁵. This, however, means that companies want the artists to be double-charged¹⁴⁶ in order to sell records they would not have sold without subsidizing them, while their margins stay the same¹⁴⁷.

With regards to packaging deductions, it has to be criticized that those charges are merely artificial ways to reduce the artists' royalties, since they, in general, charge more than any package would actually cost¹⁴⁸.

All in all, royalty rate reductions by themselves can, however, not cause substantive unconscionability, as many courts are not likely not find them sufficiently enough for not to prioritize freedom of contract¹⁴⁹. In addition to one-sided and oppressive recoupment provisions, they can, however, enhance legal reservation against the standard industry contract as a whole.

4. Controlled Composition Clauses

Controlled composition clauses refer to statutory based, so called mechanical royalties, which are paid to the artist for all of the songs he composed himself. As explained above in the description of these kinds of clauses, they both limit the amount of money paid per recorded song, and set a cap on the number of mechanical royalties paid to the artist for the whole album. The most simple and probably also persuasive argument is thereby, that controlled composition clauses oppose public policy. They artificially limit a statutory granted payment. This payment was, however, intended by Congress in particular to prevent the

¹⁴⁴ *Id.*

¹⁴⁵ PASSMAN, *supra* note 14, at 169.

¹⁴⁶ *Id.*

¹⁴⁷ *see* Brereton, *supra* note 30, at 183.

¹⁴⁸ *see* PASSMAN, *supra* note 14, at 73.

¹⁴⁹ INGENDAAY, *supra* note 8, at 299.

music industry from being dominated by a monopoly¹⁵⁰. Furthermore, controlled composition clauses can be considered oppressive, as the artist is taken from the only income he receives from his record sales during the period of recoupment¹⁵¹. The controlled compositions clause in a standard industry contract is thereby very likely to be found substantively unconscionable, if not illegal.

5. Accounting / auditing provisions

Standard accounting provisions in recording contracts have been persistently criticized during the last year, named inter alia “one of the most glaringly and oppressive clauses in the standard recording industry contract”¹⁵². Criticized points are mainly the high financial hurdles for artists to audit the accountings, a short period of time in which the artist has to audit and object to royalty statements and restrictions as to the auditing companies, artists may choose¹⁵³

As a result of that, Californian legislature has provided improvements to the artists’ situation in 2004, namely by giving artists’ auditors access to manufacturing records and in making auditing more affordable by allowing auditors to work for several clients employed by the same record label and moreover by allowing them to be paid on a contingency-fee basis¹⁵⁴.

Financial hurdles are, however, still keeping many artists from auditing their royalty statements, as at the time they receive their statement, many have not even recouped their advances yet¹⁵⁵. A persistently high number of auditors discovering their artists to be underpaid, indicates that there is still a need for measures to make companies provide accurate royalty statements. Clauses, which contain high barriers for artists to audit and little

¹⁵⁰ PASSMANN, *supra* note 7, at 201.

¹⁵¹ Brereton, *supra* note 30, at 190.

¹⁵² Hall, *supra* note 5, at 208.

¹⁵³ *Id.*

¹⁵⁴ OFFICIAL CALIFORNIA LEGISLATIVE INFORMATION:, SB 1036 SENATE BILL (2004) – BILL HISTORY, *available* at http://info.sen.ca.gov/pub/03-04/bill/sen/sb_1001-1050/sb_1034_bill_20040716_history.html.

¹⁵⁵ Brereton, *supra* note 30, at 192.

incentives for companies to work accurate, seem highly one-sided and may thereby, be found substantially unconscionable¹⁵⁶.

6. Work for hire clauses

With regards to copyright ownership, many recording contracts contain clauses, defining the owing records as work made for hire. Those clauses are highly disputed¹⁵⁷. Their effect is nothing less than a transfer of authorship, instead of a regular transfer of ownership¹⁵⁸. The most drastic consequence of that is that artists lose their right to recapture copyright ownership after 35 years. As this provision was, however, implemented by congress in order to protect new artists with limited bargaining power¹⁵⁹, its evasion by labels using their bargaining superiority, would constitute conduct against public policy. Furthermore, it is doubted whether sound recordings can be work for hires at all. To fall under the work for hire provision, the record either has to be prepared by an employee within the scope of his or her employment or has to be specially ordered or commissioned for use in a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, the latter requiring a written agreement signed by both parties, which defines the work as a work made for hire¹⁶⁰. Concerning the question whether a recording artist is an employee, the relevant standard is the definition of employment laid down in agency law, mainly focusing on the author's discretion, the source of the tools used for the production, but also benefits, sick relief and tax treatment by the employer¹⁶¹. In today's contracts, providing recording funds for the artist, which he uses for a more independent production under his responsibility, recording artist rather have to be seen as independent contractors¹⁶². Thereby, for a qualification as a work made for hire, sound

¹⁵⁶ *Id.* at 193

¹⁵⁷ Hall, *supra* note 5, at 210, INGENDAAY, *supra* note 8, at 342.

¹⁵⁸ *see* PASSMAN, *supra* note 14, at 87.

¹⁵⁹ Hall, *supra* note 5, at 211.

¹⁶⁰ *see* 17 U.S.C. § 101.

¹⁶¹ *Community for Creative Non-Violence et al. v. Reid*, 490 U.S. 730, 743 (1989)

¹⁶² *see* INGENDAAY, *supra* note 8, at 308.

recordings would have to fall under the nine categories of specially ordered or commissioned work, which are mentioned above. Apart from songs written for any purpose within a movie, record companies mostly argue that recorded songs constitute a contribution to a compilation or a collective work, as most of them are produced to be sold on an album¹⁶³. With a view to legislative history, it has to be considered, however, that sound recordings have been included within the categories in 1999, but have eventually be excluded due to enormous protest by recording artists¹⁶⁴. Acknowledging the companies' argument, would consequently oppose this legislative intent. Recent court decisions have affirmed that sound recordings do not fall under the nine categories¹⁶⁵. In consequence, work-for-hire clauses in standard recording contracts have to be held ineffective.

7. Exclusivity / recording restrictions

Agreements granting exclusivity in the artist's personal services to the company and thereby prohibiting the artist to perform for other persons than the label are general custom in the recording industry and, as an example for contractual freedom not per se unconscionable¹⁶⁶. Grounds for substantive unconscionability may, however, be at hand, if there is an extreme disparity in contractual duties. This involves contracts, in which the company does not provide the artist a sufficient infrastructure to sell his records, mainly concerning promotional expenses. It would be highly one-sided and oppressive if an artist was bound to a contract, while he is not able to sell his albums adequately, because the label is, for example, not promoting him at all¹⁶⁷. In these extreme cases, courts can, however, also imply obligations to the stronger party as duties of good and fair dealing¹⁶⁸. Another exception from the general practice of allowing restrictions is granted as to restrictions which last longer than the term of the contract, so called covenants not to compete. In California, §16600 of the Business and Profession Code forbids covenants of compete, reading as follows: "Except as provided in

¹⁶³ PASSMAN, *supra* note 14, at 289-290.

¹⁶⁴ *Id.*

¹⁶⁵ *see* Staggars v. Real Authentic Sound, 77 F. Supp. 2d 57, 64 (1999).

¹⁶⁶ INGENDAAY, *supra* note 8, at 278.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

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.”¹⁶⁹. Exceptions thereafter are granted for former company owners, who are sold or have sold themselves out of their business¹⁷⁰, as well as to former members of a partnership¹⁷¹. Neither the business ownership exception, nor the partnership exception applies, however, to recording contracts. As this provision is representing Californian public policy, it constitutes an absolute bar for any postemployment restraints¹⁷². In the state of New York, next to California the other main location for record labels and artists¹⁷³, non-compete clauses are, as well, very unlikely to be enforced, as, in general, they are “not favored by the law”¹⁷⁴. Exceptions are only granted in cases of employee’s use or disclosure of trade secrets or confidential customer or if the employee’s services are unique¹⁷⁵. Nevertheless, since unique services alone do not constitute a sufficiently strong basis for an enforcement of a non-compete clause¹⁷⁶, such covenants within recording contracts are not very likely to stand before courts in New York as well.

8. 360° Deals

Also with respect to the most recent development in recording contracting, the 360° deal, the newly developed provisions have to stand legal review upon substantive unconscionability. Since these kind of deals are not yet fully developed and in existence for only a short period of time, there is only very few scholarship opinion published about 360° deals. A recent article in the Cardozo Arts & Entertainment Law Journal criticizes the 360° and argues that

¹⁶⁹ Cal. Bus. and Prof. Code § 16600.

¹⁷⁰ Cal. Bus. and Prof. Code § 16001.

¹⁷¹ Cal. Bus. and Prof. Code § 16602.

¹⁷² *KGB, Inc. v. Giannoulas*, 104 Cal. App. 3d 844, 848 (1980) at 848, see also: *Edwards v. Arthur Andersen LLP*, 142 Cal. App. 4th 603 (2006).

¹⁷³ *SHEMEL & KRASILOVSKY*, *supra* note 10, at 7.

¹⁷⁴ *Nigra v. Young Broad. of Albany, Inc.*, 177 Misc. 2d 664, 666 (1998).

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

its incorporation in the standard industry contract “only produces a more substantively unconscionable result for recording artists.”¹⁷⁷

This statement is primarily given reason by the contention that with the 360° deal, companies can take a share in profits generated in business areas, which they are barely actively involved in¹⁷⁸. Furthermore, it is criticized, that with the 360° deals, labels are granted final decision making rights on all of the artist’s touring, merchandising and publishing activities on top of the influence they already have today. Since most record labels are not experienced in touring and merchandising management, it is thereby argued that this distribution of power is not only impractical, but also highly oppressive and thereby enhancing the substantive unconscionable character of the 360° deal¹⁷⁹. Finally, similar to the concerns referring to controlled composition clauses, label participation in touring income would take away one of the only sources of income, the artist does not have to recoup and thus hitting him especially hard when he is touring during the recoupment period after an album release.¹⁸⁰

IV. Legal regimes to protect artists

As pointed out, the standard recording contract is fraught with disputable clauses. Some, like work-for-hire clauses or covenants not to compete have already been disapproved by courts. Others, like controlled composition clauses, are very likely to be. Additionally, a factual lack of reasonable alternatives indicates that procedural unconscionability exists as well. With respect to such important provisions as to the term of the contract, advances and recoupment or royalty rate reductions, there are, apart from scholarship, no standards and limitations so far. This leaves an intolerable lack of legal certainty to both, artists and record companies. In the following, it will thereby be discussed how, to what extent and under what

¹⁷⁷ Brereton, *supra* note 30, at 197.

¹⁷⁸ *Id.* at 194.

¹⁷⁹ *Id.* at 196.

¹⁸⁰ *Id.* at 195.

legal regime, guidance and artist protection can be established as to music industry contracting.

A. Judicial review

1. Status quo in the United States

Apart from work-for-hire clauses and covenants not to compete, there are barely any case precedents on recording contracts and in particular the aspects that are listed above in the United States. This is mainly because on the one hand there is a strong reluctance for artists to sue their record company, and on the other hand¹⁸¹, once a company is sued, the relevant cases are settled by the companies before any precedents can be laid down¹⁸².

An article in the *Hastings Communications and Entertainment Law Journal* lists three main reasons, which keep many artists from suing their company: a lack of financial resources to litigate issues, the length of time required for judicial intervention, and judicial inconsistency inherent to the discretionary character of the doctrine of unconscionability¹⁸³. These aspects are more affecting new or minor successful artists. Superstars, who would be economically independent enough to fight a long, risky and expensive lawsuit, are in the same place coveted enough for companies to make them settle not only to avoid any precedents, but also to maintain their contractual relationship. With regards to minor artists, especially the latter of reasons listed above, the lack of uniformity in courts' decisions on unconscionability, is likely to be crucial for the artists' reluctance. A clear example for how the high level of discretion can lead to inconsistent results can be found in the *Yellow Pages* cases¹⁸⁴, in which as to procedural unconscionability, both courts expressed a contrary interpretation of law, whereas the facts were comparable. In both cases, the plaintiffs sued local telephone

¹⁸¹ Hall, *supra* note 5, at 221.

¹⁸² Holland, *supra* note 104, at 70; *see also* Hall, *supra* note 5 at 217-19 mentioning the examples of LeAnn Rimes, Don Henley and Courtney Love.

¹⁸³ Hall, *supra* note 5, at 221-224.

¹⁸⁴ *Allen v. Michigan Bell Telephone Company*, 18 Mich. App. 632, 640 (1969); *Robinson Insurance & Real Estate Inc. v. Southwestern Bell Telephone Co.*, 366 F.Supp. 307, 309, 311

companies for damages, because they had failed to publish advertisements in their Yellow Pages listings. Yet, both companies asserted a clause in their contract as an affirmative defence, which relieved the company from any damages resulting from failure to include any items of advertising. The court in *Allen v. Michigan Bell Telephone Company* held the clause unenforceable as the lack of a reasonable alternative for the plaintiff to advertise in the Yellow Pages amounted to procedural unconscionability. The court in *Robinson Insurance & Real Estate Inc. v. Southwestern Bell Telephone Co* did not share, however, the view that Yellow Pages were an indispensable telephone directory for businesses and thereby without alternative for the plaintiff. Thereby it denied procedural unconscionability and upheld the clause. This inconsistency in decisions about unconscionability put artists at risk, even though they might have a strong case. Artists are even more unsure about their success before courts as on the one hand there are no precedents on the unconscionability of recording contracts and certain terms of them, whereas on the other hand these contracts are mostly considered industry standard and thereby even more unlikely to be set aside by a court. Were there, however, sustainable, unmistakable case precedents on all the terms in a recording contract, which have been described above, decided in New York and California, the two home states of the recording industry, it could be expected that more new and more unknown artists would search legal relief from their contracts, if they had notable prospect to win.

2. View across the Atlantic – the Xavier Naidoo Case

A notable example for a standard setting case, being fought to the very end and highly affecting the local record industry, is the lawsuit between German singer Xavier Naidoo and his former friend and boss Moses Pelham, owner and director of Pelham Power Productions (3P) which began in 2001 and was terminated in 2005 when a decision by the Federal Constitutional Court not to admit a Constitutional Complaint lodged by Pelham and 3P¹⁸⁵. Pelham and Naidoo signed a recording contract in 1998, which had a term provision of one

¹⁸⁵ BVerfG, July 25, 2005, docket number 1 BvR 2501/04, at juris online / Rechtsprechung.

initial and four optional periods, each ending 6 months after delivery of the commitment. Naidoo was committed to deliver one album of at least 10 unpublished songs per period. With respect to venue, date and length of the production, content and arrangement of the songs, the videos and the album cover, as well as all details regarding the release of the album, 3P had the right of last decision. In 2000, while the contract was in its second period, dissent between the parties arose, as Naidoo intended to release a record with a band project, separated from his 3p engagement, while Pelham insisted on his exclusive rights. As a result, Naidoo claimed nullity of the contract and eventually declared cancellation several times, while Pelham nevertheless extended the contract using his option. In 2001, Pelham filed lawsuit against Naidoo for alleged breach of contract. In its judgement on April 19, 2002, the Landgericht (regional court) Mannheim dismissed the claim and declared the contract unconscionable after § 138 (I) of the German Civil Code (BGB) and thereby void¹⁸⁶.

It held that the contract limited Naidoo's artistic freedom by subjecting him to Pelham's decisions in almost all aspects of his work. Additionally, the unilateral right to extend the contract to an unusually long duration, in combination with the right to release the artist within a comparatively short period, was considered to cause a disproportion between commitment and profit-sharing, causing the contract to be characterized exploitative and thereby unconscionable. The court denied Pelham's argument, that the contract was industry standard, as there was no special law for the music industry, allowing oppressive contracts.

Pelham eventually appealed, but the Oberlandesgericht (appellate court) Karlsruhe dismissed the appeal in its judgement on July 9, 2003¹⁸⁷, stating that the regional court did not violate contractual freedom by rendering the contract void for unconscionability. The German Federal Court of Justice did not allow a further appeal and Pelham and 3P consequently lodged their constitutional complaint, claiming their freedom to contract, as well

¹⁸⁶ LG Mannheim, April 19, 2002, docket number 7 O 184/01; outlined in BVerfG, July 25, 2005, *supra* note 180

¹⁸⁷ OLG Karlsruhe, July 9, 2003, docket number 6 U 65/02, at juris online / Rechtsprechung.

as Pelham's artistic freedom as a producer and publisher, granted in Art 2 (III), respectively Art. 5 (III) of the German Basic Law, to be violated by the judgements.

The Federal Constitutional Court denied admission to the complaint. Although producers and publishers enjoy artistic freedom, as they serve as a required medium, connecting the artist with his audience, they cannot claim these rights, when their intention is solely economical and not motivated by an artistic concept. The court further stated that the judgement also did not violate the parties' freedom to contract, since freedom to contract requires factual existence of autonomy for both parties. This cannot be granted, when the contract provisions are unilaterally favourable in such a manner, the court has to assume, that one party had enough power to dictate the content of the contract unilaterally and thereby turn autonomy into heteronomy. The regional court thereby did not err, when it rendered the contract void because of unconscionability.

In a subsequent lawsuit, which was filed by Naidoo, the regional court in Mannheim in its judgement on August 8, 2005, affirmed on October 25, 2006 by the appellate court in Karlsruhe, granted the artist damages for unjust enrichment under § 812 (1) sentence 2 of the German Civil Code (BGB), referring to any profit gained by Pelham and 3P after October 15, 2000, one day after Naidoo claimed nullity of the contract for the first time. 3P and Pelham were further convicted to inform Naidoo about any income received in exploitation of Naidoo's work¹⁸⁸.

Even though the holding is not applicable for U.S. courts, several conclusions can be drawn for discussion about American recording contract provisions. Firstly, the court's statement that contractual freedom requires factual autonomy for both parties, which can be prevailed by parties abusing their dominant bargaining power to dictate the contract terms unilaterally, is an approach neutral to any system. It is, in a similar way, already applied in American scholarship, as the aforementioned discussion about procedural unconscionability shows.

Secondly, the outcome of the Naidoo case shows the importance of legal certainty through clear and understandable standards. The fact, that in the Naidoo case, a contract, customary

¹⁸⁸ OLG Karlsruhe Oct. 25, 2006, docket number 6 U 174/05 at juris online / Rechtsprechung.

within the industry, was rendered void and thereby lead to the artist's right to claim damages for unjust exploitation of his work, provides on the one hand an enormous risk for labels, as they might in cases of successful lawsuits not only lose their artists, but also might be faced with claims, which can have dramatic consequences especially for smaller independent labels like 3P. On the other hand, the fact that a court literally tore apart a contract which was claimed to be industry standard, raises fundamental doubts in a functional and most of all fair form of self-regulation within the industry.

B. Statutory regulations

An alternative to provide clear standards and avoid oppressive and highly unfair contracts from being even entered into could be the implementation of statutory minimal standards with respect to debatable aspects and provisions of contemporary standard industry contracts. Since statutory regulations setting a minimum standard for private contracts are by their nature, always directly interfering in the parties' contractual freedom, they can only be considered for contractual aspects, which under current aspects lead to unconscionable results and in which fairness and reliance cannot be provided otherwise than by an artificial regulation. In my opinion, this affects in particular term provisions, royalty rate reductions and the recoupment of production costs. Furthermore, legal loopholes, allowing labels to evade it, have to be closed, especially if there is a strong public policy behind it. This affects, in my opinion, copyright provisions as to controlled compositions and authorship. With regard to the level of legislature, this paper strongly favours uniform regulations, as they provide the highest amount of legal certainty and cannot be evaded by choice-of-law-provisions. The best solution, in fact would be an international regulation as the music industry is one of the most internationalized industries. All major companies are operating all around the globe¹⁸⁹, superstars are in general addressing a worldwide audience and new ways of distribution like

¹⁸⁹ Universal Music Group Overview, <http://new.umusic.com/overview.aspx> (last visited Dec. 2, 2009); Sony Music Entertainment Facts & Figures, <http://www.sonymusic.com/> (follow "Facts & Figures" hyperlink), (last visited Dec. 2, 2009); Warner Music Group Jobs Overview, <http://www.wmg.com/jobsoverview> (last visited Dec. 2, 2009); EMI Group, <http://www.emi.com/page/emi/EMIWebsites/0,,12641,00.html> (last visited Dec. 2, 2009) (providing websites for 25 countries).

the internet practically open the world market for every artist. The best solution would there by be if international standards were negotiated and implemented into national legislation. As this is, however, not very likely to happen, the United States as they are still the biggest market for recording artists to sell their products, should step in and provide legislation, which can eventually serve other countries as kind of a model law.

In the United States, these provisions either had to be passed by congress or by state legislation. Alternatively, as most of all recording contracts are in force in those states, the provisions should at least be implemented by the States of New York and California.

1. Term limitation

As Californian legislature already shows, there is a strong public intent to avoid personal service contracts to last unduly long. However, option contracts referring to commitments instead of fixed time periods, have enabled the companies to bind the artists for longer period and with help of strong lobbying they were granted a subsection, practically keeping artists from utilizing the seven years rule. A bill, addressing the problem by repealing the subsection was not successfully put into legislation in 2002¹⁹⁰. In my opinion, this bill did not, however, address the problem at the right point. Simply repealing the subsection would also benefit artists who do not deliver their commitment even though it would theoretically be possible. An evasion of the seven years rule by unreasonably high commitments can be avoided best by simply limiting the number of options that can be granted in a recording contract. With respect to the Naidoo judgements holding four options unconscionable, the contractors should be limited to three options for renewal, still providing a guaranteed commitment of four albums for the labels. Taking into account that contractual periods generally end six months after delivery, the maximum average production time for an album to stay within seven years would be 19.5 months, which complies with the average time artists take today for their productions.

¹⁹⁰ SB 1246 SENATE BILL, *supra* not 134

2. Royalty rate reductions

Any difference between the base rate and the actual royalty rate, due to rate reductions, as to packaging, discounted sales or sales in foreign countries is, in general, complicating the accounting of the payable royalties. The necessity for these reductions is to be questioned. Packaging, firstly, is about to lose importance dramatically, since the sales for hard record copies are declining as a result of the developments on the online market, and secondly, the justification for a royalty reduction due to packaging costs has already been questioned as the reductions in generally do not equal the actual costs. Discounted sales are as well justifiably criticized for their unduly doubled impact on the artist's income. Finally, foreign country rate reductions should, since they are justified with the costs arising out of profit participation payable to foreign distributors, at least be limited to the cases in which a foreign distributor actually is involved. This would exclude reductions for all major labels in most nearly all importing countries, as they operate nearly worldwide.

3. Recoupment of production costs

With regards to the recoupment of production costs, the main difference between Europe and the United States is that production costs in Europe are, in general, paid by the labels¹⁹¹. The American approach, providing a recoupable production fund, including costs for the production and others in addition to the artist's royalty advances, is primarily criticized for the fact, that it prevents artists from receiving their sales royalties as soon as they have recouped their royalty advances. Furthermore, it is argued that once the artist has paid for the production, it would be then appropriate for him to own the rights on the record. Catchy in this context is Senator Hatch's comparison of the house still being owned by the bank although the mortgage is paid off. As, however, for practical reason, those who produce and distribute the records, should also own the right to reproduce, the problem aforementioned can be solved most fairly by obligating record companies to come up for the production costs

¹⁹¹ *see* INGENDAAY, *supra* note 8, at 341.

or, alternatively, by guaranteeing recording artists their royalty payments as soon as they have recouped nothing but their royalty advances.

4. Closing legal loopholes

The strongest public policy need for clear standards is certainly required in those cases where there already is legislature, which is, however, evaded by contract terms agreeing contrary to statute. This affects controlled composition clauses, in which artists agree to renounce payments, they are explicitly entitled to by statute, intending to avoid any kind of monopolization concerning the copyrights of musical compositions. A further loophole is at hand with regards to “work-for-hire” clauses. Notwithstanding the legislative intent not to include sound recordings in the list works to be made for hire, which was manifested in Congress’ decision to repeal the 1999 amendment to the Copyright Act 1979, adding sound recordings to the list in subsection (2) of the “work made for hire”-Definition in 17 U.S.C. § 101, companies and artists agree regularly, that the works produced under the contract are works made for hire. With regards to both loopholes mentioned, the favourable and indeed primarily competent regime is jurisdiction. Court decisions, providing clear and unambiguous statements whether the clauses mentioned are lawful or not, would certainly be the best solution in these cases. There is, however, little expectation, that courts will have to decide upon the validity of these clauses in near future. Due to a lack of alternatives and an urgent need for public policy reasons, both relevant regulations have to be added an amendment, barring contractual agreements that would undermine the legislative intent. These clauses should be drafted as precisely as needed, but also as general as possible to avoid converse argumentation.

V. Discussion and Conclusion

The call for statutory regulation of contracting is always a drastic one and requires exceptional circumstances. It limits the freedom to contract and at the same time impliedly

acknowledges that neither the parties themselves, nor the judiciary may provide fair and reasonable dealing according to laws and public policy. The current practice within the industry strongly indicates that. As shown, the standard industry recording contract lacks fair and mutually beneficial regulations in many points, while it provides one-sided and oppressive language to an extent hardly endurable.

Courts in the United States have not yet been given the possibility to provide precedents on these terms or on the validity of the industry standard recording contract as a whole. As judgements like the one set in the Naidoo case are unlikely to be established within the next years, there is no other option than statutory regulation, if standards are intended to be set.

This requires, however, a discussion on the necessity for the record industry to make their artists agree on contracts comparable to the current industry standard recording contract. The industry's main argument is that they are economically dependent on the terms listed in the standard contract. The marginal chance of an artist to become a star and resulting from that the high number unprofitable artists signed to the labels require the labels to minimize their risks by binding the artists for a longer time and distributing risks to them by recouping costs from the artists' royalty share. The labels are furthermore complaining about losses in album sales as a result of piracy¹⁹². On the other hand, the high number of artists applying for recording contracts shows, that despite their alleged unfairness, recording contracts are nevertheless highly attractive for newcomer musicians.

Although this paper does not contain an economic analysis about the record labels' financial situation and future perspectives, these arguments are not considered sufficiently cogent to justify the amount of oppression, which is displayed in the standard industry contract. Option contracts, even limited to a commitment of four albums, allow companies to receive a high amount of profit, while unprofitable artists can be dismissed at any time. With regards to the distribution of risks concerning production costs, it seems questionable, that, while companies on the one hand side enjoy creative control at least to the extent of a right of last

¹⁹² Hall, *supra* 3, at 229.

decision, the artists should bear the entrepreneurial risk. All in all, it can be agreed with the Naidoo court, that it does not appear that appropriate contract terms prevent the companies from amortizing their typical investment costs.

Furthermore, critics deny the necessity of statutory regulation, because companies are about to lose their superior bargaining power when contracting with newcomer artists. It is argued, that this power could decline together with the classic business models falling apart as a result of the establishment of new distribution sources like the internet, and many artists promoting their music by themselves using social networks and public channels like myspace and youtube. Even though these means exist and are about to expand in members and importance, record companies will, in spite of all that, not lose much of their enormous attractivity within the foreseeable future, as they still provide experience as well as infrastructure and a broad network. Mitch Bainwol, the Chairman and CEO of the Recording Industry Association of America (RIAA), the recording companies biggest lobbyist group, has summarized the persistently strong position of the labels in the following words: "There are more than 2 million hip hop artists on MySpace and more than 1.8 million rock acts. It's a sure bet that most of these acts are hoping that a label will pluck them from the mass of aspiring, unsigned artists online and take their careers to the next level"¹⁹³.

Cases like the one involving the band 30 Seconds to Mars show us, that companies do not intend to change their policies but rather use provisions and high contractual penalties to sustain their superiority and to exploit the artist as long as possible for them.

In conclusion, to prevent recording companies from using their superior bargaining power to make artists sign contracts on a take it or leave it basis, binding them for periods of time, that are in general opposing public policy, allocating risks in an unduly manner on them and using contractual language to evade clear legislative intent to prevail, the implementation of

¹⁹³ Mitch Brainwol, 5 Reasons for Optimism in the Music Industry, http://www.thewrap.com/blog-entry/5-reasons-optimism-music-industry_7446.

statutory regulations can be an appropriate, efficient and fair solution. With regards to the initial problem, the proposed measures are thereby recommended.