

Expanding the Rights of Recording Artists

AN ARGUMENT TO REPEAL SECTION 2855(b) OF THE CALIFORNIA LABOR CODE

I. INTRODUCTION

You're a nineteen-year-old dropout without a nickel to your name. No car, no job, no credit. Your gigs at CBGB don't even cover the rent for your studio in Alphabet City. Who in their right mind would hand you \$750,000? Welcome to the record business, where giant corporations risk more than \$1 billion each year on young, untested musicians whose careers typically crash and burn.¹

Any recording artist who hopes to have his music played on radios across the world has little choice but to sign with a major label.² Four companies, Universal, Sony BMG, EMI, and Warner Music, have acquired vertical and horizontal control over almost every aspect of the industry.³ These record

¹ Adaptation based on Chuck Philips, *Record Label Chorus: High Risk, Low Margin; Music: With Stars Questioning their Deals, the Big Companies Make their Case with Numbers*, L.A. TIMES, May 31, 2001, at A1, available at 2001 WLNR 10516413 [hereinafter Philips, *Record Label Chorus*].

² The fact that "most recording [artists] who have the opportunity to exit the major label system typically re-sign with [another] major label" indicates the necessity of signing with one of the Big Four. *Id.* (quoting Hilary Rosen, President of the Recording Industry Association of America).

³ These record companies control over seventy-five percent of the worldwide music sales. Jack Bishop, *Building International Empires of Sound: Concentrations of Power and Property in the "Global" Music Market*, 28 POPULAR MUSIC & SOC'Y 443, 443 (2005) (discussing "how the world's media giants use their power and property to influence national and international laws in order to lock down culture and control creativity").

Throughout the late 1970s and until the late 1990s, six major record companies, Warner, EMI, RCA/BMG, Polygram, MCA/Universal, and Sony, reaped virtually all the profits of the music industry, owned the major labels, and held the most profitable artists. Theresa M. Bevilacqua, Note, *Time to Say Good-Bye to Madonna's American Pie: Why Mechanical Compulsory Licensing Should be Put to Rest*, 19 CARDOZO ARTS & ENT. L.J. 285, 301 n.114 (2001) (suggesting the possibility that "monopolistic practices [will] plague the music industry in the near future due to large corporate mergers"). After the purchase of Polygram by Universal and the merger of Sony and BMG, the major six became four. See David Lieberman, *Lack is Determined to be More than a Music Man*, USA TODAY, June 13, 2005, at 1B, available at 2005 WLNR 9342352.

companies, the “Big Four,” control manufacturing, distribution, retailing, shelf space, record clubs, and digital delivery, not only in the United States, but also in all markets worldwide.⁴ The Big Four specialize in marketing and promoting records to mass audiences, and they have the capital to take huge financial risks to advance an artist.⁵ Furthermore, only a few media companies control most of the nation’s radio stations,⁶ making it that much more difficult for an artist to get her music on the air without the backing of one of the major labels.⁷

Recording artists describe the standard Big Four agreements as “unconscionable,” “indentured servitudes,” and “impossible”⁸ because of the control these contracts give the record company over the artists’ careers.⁹ Recording

Even though the discussions of an EMI/Warner Music merger have been put to a halt since the the European Court of First Instance in Luxembourg overturned regulatory approval of the 2004 merger of the music units of Sony and Bertelsmann, the possibility remains that the four could soon become three. See Andrew Ross Sorkin and Jennny Anderson, *Descision on Bids for BMG Music Unit Could Be Imminent*, NY TIMES, Sept. 5, 2006, at C1, available at LEXIS News Library, USPAPR file; Dan Milmo, *Analysts Play Matchmaker to EMI and Warner: The Week Ahead*, GUARDIAN (UK), Nov. 14, 2005, at 29, available at LEXIS News Library, UKPAPR file.

⁴ See Bishop, *supra* note 3 (“Today’s music business is in the hands of mega-corporations, which also control TV, radio, publishing, electronics manufacturing, and global communications networks.”).

⁵ See Philips, *Record Label Chorus*, *supra* note 1.

⁶ Kathleen Sharp, *Recording Artists Sue, Aiming to Rock Industry Action Expected to Put Big Labels Under Scrutiny*, BOSTON GLOBE, Oct. 7, 2001, at A6, available at 2001 WLNR 5521579. After the passage of the Telecommunications Act of 1996, the limitations controlling national ownership of radio stations were eliminated. Consequently, radio companies could control much larger segments of the airwaves. See Zeb G. Schorr, Note, *The Future of Online Music: Balancing the Interests of Labels, Artists, and the Public*, 3 VA. SPORTS & ENT. L.J. 67, 85 (2003).

⁷ Sharp, *supra* note 6.

⁸ See Omar Anorga, Note, *Music Contracts Have Musicians Playing in the Key of Unconscionability*, 24 WHITTIER L. REV. 739, 739, 754-73 (2003); Connie Chang, Note, *Can’t Record Labels and Recording Artists All Just Get Along?: The Debate Over California Labor Code § 2855 and it’s Impact on the Music Industry*, 12 DEPAUL-LCA J. ART & ENT. L. & POL’Y 13, 13 (2002); Sharp, *supra* note 6.

⁹ Chuck Philips, *Courtney Love Seeks to Rock Record Labels’ Contract Policy; Music: Suit Challenges Universal’s Royalty Practices; Firm Says it is Fair*, L.A. TIMES, Feb. 28, 2001, at A1, available at 2001 WLNR 10498258 [hereinafter Philips, *Courtney Love*]. One prominent artist, Courtney Love, asserts that

the primary reason the [Big Four] record conglomerates have been able to call the shots for so long is that they control nearly 90% of the music sold throughout the world. They operate the label system under which most music is recorded, manufactured, marketed, promoted and distributed to radio, MTV and retail outlets.

Id.

Various other recording artists, such as Don Henley, Patti Austin, and LeAnn Rimes, argue that record contracts are unfair. See Bill Holland, *Performers Give Testimony Before Judges and Lawmakers—Record Labels, Artists at Loggerheads*

agreements contain various clauses and provisions that are usually non-negotiable.¹⁰ One of the foremost reasons for dissension between recording artists and record companies is the duration of a standard recording contract.¹¹ In most instances, a musician signing a contract for the first time is expected to deliver five to seven albums.¹² Under the standard recording agreement, artists must deliver an album every nine to eighteen months.¹³ While in theory an artist could deliver seven albums in seven years (if an album is actually delivered every nine to twelve months), standard recording industry practices preclude this possibility.¹⁴ “[R]ecord companies have preferred and often insisted on a minimum two-year gap between releases for . . . artists.”¹⁵ This typical two-year time span between album releases substantially increases the length of the term of the agreement.

Over Contracts, BILLBOARD, Sept. 22, 2001, available at 2001 WLNR 8736669 [hereinafter Holland, *Performers Give Testimony*]; Melinda Newman, *Battle Lines Drawn Over Seven-Year Statute*, BILLBOARD, Sept. 15, 2001, available at 2001 WLNR 8717304; Chuck Philips, *Recording Stars Challenge Music Labels' Business Practices*, L.A. TIMES, March 29, 2001, at A1, available at 2001 WLNR 10504302 [hereinafter Philips, *Recording Stars Challenge*] (“Singer-songwriter Don Henley, co-founder of the Recording Artists coalition, which represents dozens of stars, including Eric Clapton, Joni Mitchell, Q-Tip and Peggy Lee, said: ‘Record companies have been screwing artists for ages. It’s time we organize and fight back.’”).

¹⁰ Such provisions include: the recoupment clause, the work-for-hire clause, the controlled composition clause, discounted royalties for foreign and record-club sales, “phony” free goods clauses, cross-collateralization clauses, packaging royalty deductions, “breakage” royalty deductions, and new technology royalty deductions. See Holland, *Performers Give Testimony*, *supra* note 9. For further discussion on these provisions, see *infra* Part III.A.

¹¹ See Note, *California Labor Code Section 2855 and Recording Artists' Contracts*, 116 HARV. L. REV. 2632, 2633-34 (2003) (“Section 2855 has been an important aspect of almost every significant dispute between a recording artist and a major record company during the last decade.”).

¹² DONALD PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS 100 (5th ed. 2003) [hereinafter PASSMAN, 5th ed.] (Labels “insist on the right to get a total of five to seven albums over the course of the deal.”).

¹³ See Cross Complaint at 6, *Love v. Geffen Records, Inc.*, No. BC 223364 (Cal. Super. Ct. filed Feb. 7, 2001) [hereinafter *Love Cross Complaint*] (“For example, the [Hole contract] provided for a standard delivery schedule, i.e., for a master recording no later than every approximately 18 months.”).

¹⁴ Chang, *supra* note 8, at 16-17.

¹⁵ *Love Cross Complaint*, *supra* note 13, at 6.

California Labor Code section 2855¹⁶ is the most significant law impacting the duration of a recording agreement,¹⁷ and it has often been the focus of tension between artists and record labels.¹⁸ Under section 2855, “professional service providers, including actors and sports figures, are not required to remain under contract for their services for more

¹⁶ The statute states, in relevant part:

(a) Except as otherwise provided in subdivision (b), a contract to render personal service . . . may not be enforced against the employee beyond seven years from the commencement of service under it. Any contract, otherwise valid, to perform or render service of a special, unique, unusual, extraordinary, or intellectual character, which gives it peculiar value and the loss of which can not be reasonably or adequately compensated in damages in an action at law, may nevertheless be enforced against the person contracting to render the service, for a term not to exceed seven years from the commencement of service under it. If the employee voluntarily continues to serve under it beyond that time, the contract may be referred to as affording a presumptive measure of the compensation.

(b) Notwithstanding subdivision (a):

(1) Any employee who is a party to a contract to render personal service in the production of phonorecords . . . may not invoke the provisions of subdivision (a) without first giving written notice to the employer . . . specifying that the employee from and after a future date certain specified in the notice will no longer render service under the contract by reason of subdivision(a).

(2) Any party to such a contract shall have the right to recover damages for a breach of the contract occurring during its term in an action commenced during or after its term, but within the applicable period prescribed by law.

(3) In the event a party to such a contract is, or could contractually be, required to render personal service in the production of a specified quantity of the phonorecords and fails to render all of the required service prior to the date specified in the notice provided in paragraph (1), the party damaged by the failure shall have the right to recover damages for each phonorecord as to which that party has failed to render service in an action which, notwithstanding paragraph (2), shall be commenced within 45 days after the date specified in the notice.

CAL. LAB. CODE § 2855 (West 2005).

¹⁷ “Section 2855(b) of the California Labor code provides an exception for recording contracts which serves to virtually remove any limits on their length.” Sen. Kevin Murray, *Recording Industry Practices*, available at <http://democrats.sen.ca.gov/articlefiles/985-Recording%20Industry%20Practices.pdf> [hereinafter *Recording Industry Practices*] (last visited Sept. 22, 2006).

¹⁸ Nicholas Baumgartner, *The Balance Between Recording Artists and Record Companies: A Tip in Favor of the Artists?*, 5 VAND. J. ENT. L. & PRAC. 73, 77 (2003) (“The decades-old controversy surrounding [the Seven Year Statute], is at the heart of the current tension between recording artists and recording companies.”). See also MELVIN SIMENSKY ET AL., ENTERTAINMENT LAW 257-58 (3rd ed. 2003) (“Several major recording acts, including Metallica, Don Henley, Luther Vandross and the Smashing Pumpkins, have claimed violation of the seven-year rule in complaints filed against their record companies in an effort to get out of their recording agreements.”).

than seven years.”¹⁹ This limitation, however, is not applicable to musicians. Under subsection (b), an artist can notify his label that he wants to be released from his contract after seven years, but the label can then sue to recover damages for any undelivered albums remaining in the contract, a right that is not available to any other professional services employer.²⁰

Even though section 2855 currently exists only under California law, its effects are present in other jurisdictions.²¹ Since most recording contracts are signed in or otherwise made subject to the laws of New York or California,²² the Big Four, with offices operating on both sides of the country, have continued to use a standard form agreement, which includes a duration provision that is the same in both New York and California.²³ The labels take advantage of the fact that section 2855(b) permits them to sue for damages for undelivered albums, therefore extending the duration of the agreement for as long as possible by requiring an unrealistic number of albums.²⁴

In reality, a recording artist is rarely able to deliver all the required number of albums under a recording contract in seven years.²⁵ He is therefore never able to fulfill the terms of the agreement to leave the record label.²⁶ If the artist tries to leave the label after seven years, like any other personal

¹⁹ See A. Barry Cappello, *Old Financial Ways are Over for Record Biz*, 21-SPG ENT. & SPORTS LAW. 23 (2003).

²⁰ See CAL. LAB. CODE § 2855(b)(3).

²¹ In *Radioactive, J.V. v. Manson*, 153 F. Supp. 2d 462 (S.D.N.Y. 2001), the agreement between recording artist Shirley Manson and her record label, Radioactive, was subject to New York jurisdiction, and the contract still obligated Manson to deliver at least one album, and at the sole option of Radioactive, up to six additional albums.

²² M. WILLIAM KRASILOVSKY & SIDNEY SHEMEL, *THIS BUSINESS OF MUSIC: THE DEFINITIVE GUIDE TO THE MUSIC INDUSTRY* 14 (8th ed. 2000) (“Most recording contracts are signed in or otherwise made subject to the laws of New York State or California.”).

²³ *Id.* The only difference that exists between a recording agreement entered into in New York and one in California is a clause under section 3423 of the California Labor Code, which requires record companies to pay a guaranteed minimum amount per year before they can obtain an injunction against an artist attempting to leave the label while still under exclusive contract. This statute relates to obtaining a court order barring the artist from recording for another company, but does not affect the continuing right to sue for monetary damages. This recognizes the fact that it would be unfair for a label to require an artist to remain under contract if the artist is not receiving any income. See *id.* at 15.

²⁴ A. Barry Cappello & Troy A. Thielemann, *Challenging the Practices of the Recording Industry: Recent Lawsuits by Recording Artists Question the Legality of their Contracts*, L.A. LAW., MAY 25, 2002, at 14, 16 (2002).

²⁵ *Id.* at 16.

²⁶ *Id.*

services employee, the label will sue for damages. Recording artists allege this is a form of “involuntary servitude” because they are left with no choice but to work or be subject to legal sanction.²⁷

Whereas section 2855(b) has continued to place artists in a disadvantaged position for the past nineteen years, the music industry has changed considerably.²⁸ Music companies first fought with, but are now slowly accepting, a revolution in the way music is delivered via digital distribution.²⁹ Today, record companies are reinventing themselves as full-service music companies, claiming exclusivity over new media such as ringtones and voicetones as well as over traditional media such as film and TV.³⁰ It used to be that the label only acquired the exclusive right to *record* an artist during the term of the agreement.³¹ New clauses added to today’s recording contracts provide the label with a portion of the artist’s revenues in all ancillary activities.³² These provisions, however, deprive the artists of a substantial amount of income that they never before shared with the label.³³

The changed music industry makes the application of section 2855(b) more unjust than ever before. Even though the statute lacks a definition of “damages,”³⁴ record companies believe they should be able to recover lost profits based on the “expected profits on the additional albums that artists have neither delivered nor created.”³⁵ Under the new form of recording agreements, the record company will likely argue that it should be able to collect not only expected profits on album sales, but also expected profits derived from all the new areas over which they have exclusive rights. This creates the prospect of enormous damages, and essentially leaves the artist with no choice but to work even if doing so will require the artist to perform beyond seven years.

²⁷ *Id.* (quoting *United States v. Kozminski*, 487 U.S. 931, 942-43 (1988)).

²⁸ *See infra* Part IV.

²⁹ *See id.*

³⁰ Owen J. Sloane, *Commentary: The Changing Deal*, BILLBOARD, Aug. 20, 2005, available at LEXIS News Library, USPAPR file.

³¹ KRASILOVSKY & SHEMEL, *supra* note 22, at 16.

³² Record labels are “exploit[ing] and expand[ing] their traditional areas of exclusivity to include such media as ringtones, voicetones, mobile wallpaper, videogames, film and TV, and other formats that carry music.” Sloane, *supra* note 30.

³³ Charles Duhigg, *EMI Is Expected to Unveil New Profit-Sharing Deal With Korn*, L.A. TIMES, Sept. 12, 2005, available at 2005 WLNR 14317222.

³⁴ Cappello & Thielemann, *supra* note 24, at 17.

³⁵ *Id.*

This Note argues that section 2855(b) should be repealed because it permits unconscionable contracts that impose involuntary servitude. Part II provides some background to section 2855, including the history and purpose of the statute, and the addition of subsection (b). Part III describes the structure of recording agreements and the application of section 2855(b) to the music industry in 1987, when the amendment was adopted. Part IV examines the relationship between the evolving music industry and changes in recording agreements. Specifically, it will compare the state of the music industry and the structure of agreements that developed from the time the amendment was passed in 1987, to 2000 when digital distribution was introduced. This section will end with a look at 2005 as record labels expand their areas of exclusivity. Part V will argue for the repeal of the amendment. In doing so, this section will demonstrate the effects of section 2855(b) on the music industry today and analyze the legal doctrines of unconscionability and involuntary servitude in connection with today's recording agreements. Throughout the discussion, these sections will examine the record labels' justifications for keeping the amendment, and demonstrate how they are now even less valid than when it was passed.

II. BACKGROUND OF SECTION 2855

A. *History and Purpose*

The United States' constitutional prohibition against involuntary servitude³⁶ laid the foundation for the California legislature to enact section 2855. In 1872, California lawmakers passed legislation to protect against involuntary servitude in the form of unconscionable employment agreements.³⁷ The United States Supreme Court has held involuntary servitude to mean a "condition of servitude in which the victim is forced to work for the defendant by use or threat . . . of coercion through law or legal process."³⁸ Accordingly, an employer cannot force an employee to work for

³⁶ U.S. CONST. amend. XIII, § 1.

³⁷ Revella Cook, *The Impact of Digital Distribution on the Duration of Recording Contracts*, 6 VAND. J. ENT. L. & PRAC. 40, 42 (2003) (discussing Senator Kevin Murray's testimony before the California State Senate in which he explains the legislative purpose behind the Seven Year Statute).

³⁸ *United States v. Kozminski*, 487 U.S. 931, 952 (1988).

him when the work involves services of a personal nature, so courts refuse to order specific performance of contracts for personal services.³⁹

The California legislature was concerned with the rights of large classes of workers whose personal services constituted their means of livelihood.⁴⁰ These employees were contractually prohibited from changing employers or occupations,⁴¹ which was a violation of the principles of unconscionability. The doctrine of unconscionability protects a contracting party from harsh and oppressive terms.⁴² Unconscionability presents itself in two forms: procedural unconscionability, which relates to procedural deficiencies in the contract formation process,⁴³ and substantive unconscionability, which relates to the contract terms themselves and whether those terms are unreasonably favorable to the more powerful party.⁴⁴

Unconscionable working relationships were common before the first Civil Code was established in California in 1872.⁴⁵ Inhabitants of California who did not share the same freedoms as others, legally or socially, lacked true freedom of contract and were often forced to work pursuant to harsh and oppressive terms since there was “little or no enforcement

³⁹ Theresa E. Van Beveren, *The Demise of the Long-Term Personal Services Contract in the Music Industry: Artistic Freedom Against Company Profit*, 3 UCLA ENT. L. REV. 377, 385-86 n.26 (1996) (“Many contracts between musicians (or athletes) and recording or management companies contain a negative covenant ensuring the entertainer’s exclusivity. At least one court has held that if such a contract is for a specific period of time, then it should be classified as a contract for personal services. If, however, the contract has no time limitation, then it should be considered in light of case law dealing with employment contracts.” (referring to the majority opinion in *Ichiban Records, Inc. v. Rap-A-Lot Records, Inc.*, No. 01-95-00085-CV, 1995 Tex. App. LEXIS 1739, at 15 (1st Dist., Aug. 1, 1995))).

⁴⁰ *De Haviland v. Warner Bros. Pictures, Inc.*, 153 P.2d 983, 988 (Cal. 1944) (discussing the legislative intent in passing section 2855).

⁴¹ *Id.*

⁴² See Anorga, *supra* note 8, at 772 (“The doctrine of unconscionability is an extraordinary remedy that should only be used to protect a contracting party from harsh and oppressive terms.”). See also 8 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW ON CONTRACTS § 18:8 (4th ed. 1993 & Supp. 2005) (“The principle [of the doctrine of unconscionability] is one of the prevention of oppression and unfair surprise and not of disturbance of allocation of risks because of superior bargaining power.” (quoting U.C.C. § 2-302, comment 1 (2003))).

⁴³ 8 WILLISTON & LORD, *supra* note 42, § 18:10.

⁴⁴ *Id.*

⁴⁵ Donna R. Mooney, *The Search for a Legal Presumption of Employment Duration or Custom of Arbitrary Dismissal in California 1848-1872*, 21 BERKELEY J. EMP. & LAB. L. 633, 634. 648-51 (2000) (discussing the social and economic environment in California prior to the introduction of the Civil Code in 1872).

against slavery.”⁴⁶ This oppressive environment left personal services employees in a situation where they were waiving their rights to limit the life of personal services agreements.⁴⁷ The lawmakers recognized a right of private contract and they believed that a restriction of such right in this situation better preserved “public comfort, health, safety, morals and welfare.” They therefore created section 1980 of the Civil Code, which later became section 2855 of the California Labor Code.⁴⁸

B. Section 2855(a)

California Labor Code section 2855, which is commonly referred to as the Seven Year Statute,⁴⁹ prohibits the enforcement of personal services contracts beyond seven years, and allows employees in California to terminate contracts after that period.⁵⁰ In 1947, *De Haviland v. Warner Brothers Pictures, Inc.*⁵¹ established the prevailing interpretation of the

⁴⁶ *Id.* at 652.

⁴⁷ *De Haviland v. Warner Bros. Pictures, Inc.*, 153 P.2d 983, 989 (Cal. 1944).

⁴⁸ *See id.* at 985-88. As enacted in 1872, section 1980 of the Civil Code read as follows:

A contract to render personal service, other than a contract of apprenticeship, as provided in the chapter on master and servant, cannot be enforced against the employee beyond the term of two years from the commencement of service under it; but if the employee voluntarily continues his service under it beyond that time, the contract may be referred to as affording a presumptive measure of the compensation.

In 1931, section 1980 was amended to read as follows:

A contract to render personal service, other than a contract of apprenticeship, as provided in the chapter on master and servant, and other than a contract entered into pursuant to the proviso hereinafter in this section contained cannot be enforced against the employee beyond the term of seven years from the commencement of service under it;

Exceptional services. Provided, however, that any contract, otherwise valid, to perform or render service of a special, unique, unusual, extraordinary or intellectual character, which gives it peculiar value, the loss of which cannot be reasonably or adequately compensated in damages in an action at law, may nevertheless be enforced against the person contracting to render such service, for a term not beyond a period of seven years from the commencement of service under it.

In 1937, the section was repealed and section 2855 of the Labor Code was enacted.

⁴⁹ *See, e.g.*, Chris Marlowe, *Artists, RIAA Plead Cases at “7 Year Statute” Hearing*, HOLLYWOOD REP., Sept. 6, 2001, available at LEXIS News Library, USPAPR file; Philips, *Courtney Love*, *supra* note 9.

⁵⁰ *See* CAL. LAB. CODE § 2855(a) (West 2005); *California Labor Code Section 2855 and Recording Artists’ Contracts*, *supra* note 11, at 2642.

⁵¹ 153 P.2d 983 (Cal. 1944).

Seven Year Statute for all personal services contracts.⁵² Warner Brothers (“Warner Bros.”) signed a contract with Hollywood actress Olivia de Haviland for a one-year term that gave Warner Bros., through various option clauses, the right to extend the contract for up to six successive one-year terms.⁵³ The contract also gave Warner Bros. the right to suspend de Haviland for “any period or periods when she should fail, refuse or neglect to perform her services to the full limit of her ability and as instructed by [Warner Bros.]”⁵⁴ In connection with this, Warner Bros. had the right to extend the term for a time equal to the suspension period(s).⁵⁵

Warner Bros. suspended de Haviland for a total of twenty-five weeks over the course of seven years.⁵⁶ Consequently, Warner Bros. sought to exercise its option and extend the term of the contract for a time equal to the twenty-five week suspension period, which would have caused the term of the agreement to last more than seven calendar years.⁵⁷ Warner Bros. contended that the personal services contract could be enforced for seven years of actual service.⁵⁸ The court rejected this argument and held that section 2855 should be interpreted as limiting personal services contracts to seven calendar years.⁵⁹

In keeping with the purpose of the Seven Year Statute, the court reasoned that public policy encouraged limiting the term to seven calendar years to promote economic mobility.⁶⁰

⁵² *California Labor Code Section 2855 and Recording Artists’ Contracts*, *supra* note 11, at 2634-35.

⁵³ *De Haviland*, 153 P.2d at 984.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at 985 (“[A] contract for ‘exceptional services’ could be enforced against an employee for seven years of *actual* service, even though the employee would thereby be required to render services over a period of more than seven calendar years.”).

⁵⁹ *De Haviland*, 153 P.2d at 986 (“We cannot believe that the phrase ‘for a term not beyond a period of seven years’ carries a hidden meaning. It cannot be questioned that the limitation of time . . . was one to be measured in calendar years. It is conceded that contracts for general services are limited to seven calendar years. The substitution of years of service for calendar years would work a drastic change of state policy with relation to contracts for personal services.”).

⁶⁰ Chang, *supra* note 8, at 18 (“The court further reasoned that public policy limited the term . . . because the ability to change employment after that allotted time, whether to afford a reasonable opportunity to move upward along with increased skillfulness, or exploit new economic conditions, was highly advantageous to the employee.”). *See also De Haviland*, 153 P.2d at 988 (“As one grows more experienced

As the employee becomes more skillful, he should be able to seek new employment after the allotted time in order to obtain the highest compensation.⁶¹ The court's interpretation of section 2855 created a new "free agency" era for actors.⁶² The powerful studios had previously stifled the careers of many actors by holding them to long-term contracts.⁶³ As a result of the *De Haviland* decision, actors gained the power to negotiate new contracts with different studios and on better terms based on their true market value.⁶⁴

Section 2855's application in the music industry was markedly different.⁶⁵ Record labels attempted to avoid the law altogether by rewriting contracts of disgruntled stars; the labels offered large cash advances and higher royalty rates in exchange for more albums.⁶⁶ Some labels were actually able to contravene the statute by telling artists that each renegotiation of a contract constituted a new contract with the "seven-year clock ticking anew."⁶⁷ It was only a matter of time before the record companies would petition for legislative action, ensuring their ability to hold a recording artist to an exclusive contract long after the allotted seven years. In 1987, the Recording Industry Association of America ("RIAA")—the influential trade association representing the music industry⁶⁸—successfully lobbied for a proposal that became section 2855(b).⁶⁹

and skillful there should be a reasonable opportunity to move upward and to employ his abilities to the best advantage and for the highest obtainable compensation.”).

⁶¹ *De Haviland*, 153 P.2d at 988 (“There are innumerable reasons why a change of employment may be to [the employees’] advantage.”).

⁶² See Holland, *Performers Give Testimony*, *supra* note 9 (“Many entertainment attorneys say the hearing [to repeal section 2855(b)] was reminiscent of challenges that eventually brought down the old Hollywood studio system, which hampered or ruined many actors’ careers by holding them to long-term contracts.”).

⁶³ *Id.*

⁶⁴ See *California Labor Code Section 2855 and Recording Artists’ Contracts*, *supra* note 11, at 2635.

⁶⁵ Chang, *supra* note 8, at 18-19. (“The application of § 2855 in the music industry . . . has seen different results. . . . Around 1985, the Recording Industry Association of America (RIAA), the industry’s lobbying arm, launched an attack on § 2855 on behalf of record labels and tried to get the statute extended to ten years.”).

⁶⁶ *Id.* at 18.

⁶⁷ *Id.* at 18-19.

⁶⁸ *California Labor Code Section 2855 and Recording Artists’ Contracts*, *supra* note 11, at 2632.

⁶⁹ *Id.* at 2636 (“In 1987, after several revisions, the RIAA’s proposal became section 2855(b).”).

C. *Exception to the Seven Year Statute: Section 2855(b)*

Subsection (b) of the Seven Year Statute requires recording artists, unlike any other contractual employee rendering creative, intellectual, or professional services, to serve written notice of their intent to terminate a contract after seven years.⁷⁰ Most importantly, subsection (b) subjects a recording artist, unlike any other artist under contract, to lawsuits for damages alleged to flow from the artist's failure to deliver the required number of albums during the term of the contract.⁷¹ Essentially, the RIAA was able to exclude recording artists from the protections offered by the Code.⁷²

In its proposal to the California legislature, the RIAA argued that the application of section 2855 to the music industry was unfair for various reasons. First, the law allowed an artist to breach a recording contract after seven years, regardless of the artist's remaining obligations.⁷³ Second, record companies made large investments in an artist based primarily on the guarantee that the artist would deliver the specified number of albums required under the contract.⁷⁴ Third, the RIAA argued that the primary reason most artists were not able to record and deliver the required number of albums in seven years was because the artists themselves were negligent.⁷⁵

While artists and attorneys later challenged the validity of these arguments,⁷⁶ subsection (b) created an exemption for

⁷⁰ See *Hearings Before the Senate Select Comm. on the Entm't Indus.*, 2001 Leg., Reg. Sess. (Cal. 2001) [hereinafter *Hearings: 2001*] (testimony of Ann Chaitovitz, Director of Sound Recordings, AFTRA).

⁷¹ See *id.*

⁷² See *id.* ("The result of this exemption was to effectively lock out recording artists from the protections offered by the code, rendering the code moot on any practical level for only one group of individuals—the music makers." (testimony of Michael Greene, President & CEO, Grammys)).

⁷³ See Chuck Philips, *Company Town; Lawmakers Take Aim at Music Industry Contracts; Recording: Officials Prepare to Examine What Artists Call the "Unconscionable" Agreements of the Big Five Conglomerates*, L.A. TIMES, Aug. 8, 2001, at 1, available at LEXIS News Library, USPAPR file [hereinafter Philips, *Lawmakers Take Aim*].

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ In 2001, Senator Kevin Murray (D-Cal.) proposed California Senate Bill 1246 ("S.B. 1246") to repeal section 2855(b). See Cook, *supra* note 37, at 42. S.B. 1246 proposed the elimination of the exception for recording artists. This amended version would have left subdivision (a) of the Seven Year Statute in effect, deleted the provisions relating to personal services in the production of sound recordings, and modified the subdivision addressing damages for breaches of recording contracts to

the record companies that violated the public policy rationale behind section 2855—to optimize the welfare of employees by allowing them freedom to seek better employment opportunities after the allotted amount of time.⁷⁷ By providing labels with the ability to sue recording artists for damages without regard to the Seven Year Statute, the legislature created a regime under which recording artists found little protection.⁷⁸ The unconscionable provisions of recording agreements only further exposed the artist.

III. APPLICATION OF SECTION 2855(b) TO A RECORDING CONTRACT

A. *Structure of the Recording Contract*

Congratulations, you got yourself a deal. Beware, making a living from a business you don't fully understand can be risky. A large number of artists, like yourself, including major ones, have never learned such basics as how record royalties are computed, what a copyright is, how music publishing works, and a number of other concepts that directly affect your life. But without understanding these basics as a foundation, it's impossible for you to understand

limit the amount that could be recovered. Legislative Counsel's Digest, S.B. 1246, available at http://www.leginfo.ca.gov/pub/01-02/bill/sen/sb_1201-1250/sb_1246_bill_20020801_amended_asm.pdf (last visited Sept. 26, 2006). As originally introduced in January 2002, S.B. 1246 simply eliminated the damages provision for breaches of recording contracts, but after the process of negotiating with lobbyists from both sides took place, the subsequent two parts were added. See Baumgartner, *supra* note 18, at 83. ("While it seem[ed] . . . that the ideal result for recording artists would be the mere elimination of the recording artist exception, it seem[ed] equally likely that the recording companies would so irrepressibly lobby against passage of SB 1246 as to defeat the Bill entirely.")

During a series of hearings held by the California Select Committee on the Entertainment Industry, chaired by Senator Murray, top U.S. recording artists and labor leaders converged on the state capitol to call on legislators to support S.B. 1246. Newman, *supra* note 9. The artists refuted the RIAA's fourteen year-old arguments, and were eager to throw a spotlight on the practices of the music industry. Sharp, *supra* note 6. Despite a series of high-profile lawsuits and support from top U.S. recording artists and labor leaders, negotiations between the Recording Artists Coalition (RAC) and the RIAA failed to produce an agreement. See Melinda Newman & Bill Holland, *Artists Seek Govt. Redress of Contract, Radio Issues: Acts Want Repeal of 7-Year Statute*, BILLBOARD, Feb. 2, 2002 at 1, available at 2002 WLNR 10375838; Philips, *Lawmakers Take Aim*, *supra* note 73; *Recording Industry Practices*, *supra* note 17. S.B. 1246 was put on hold and may be revisited in an upcoming legislative session. *Recording Industry Practices*, *supra* note 17. While the bill has not been revisited in another legislative session as of the writing of this Note, the possibility is still very strong because this is an issue that must be solved by the legislature.

⁷⁷ Chang, *supra* note 8, at 21.

⁷⁸ See *California Labor Code Section 2855 and Recording Artists' Contracts*, *supra* note 11, at 2642.

the intricacies of your professional life. And as your success grows, and your life gets more complex, you'll become even more lost.⁷⁹

Because of the high failure rate of released albums,⁸⁰ record companies absorb great losses on most albums, and thus insist that they must earn profits from the few successful acts on their rosters.⁸¹ The standard industry contract, then, is typically structured around a business model that allows labels to extract much of their earnings from the handful of blockbuster albums each year.⁸² Some of the devices used by the labels include minimum recording requirements with additional options, recoupable artist advances, and exclusive rights over the artist's creative output.⁸³ All of the major contract clauses described in this section continue to exist in agreements today even though the numbers have changed slightly.⁸⁴ More importantly, however, is taking into account how the structure of agreements evolve, and how those changes affect the application of section 2855(b).⁸⁵

Recording agreements set forth a minimum number of albums that the artist must deliver to the record company during the contract term.⁸⁶ At the time the amendment was passed, companies typically insisted on one firm album

⁷⁹ Adaptation based on DONALD PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS 3 (1st ed. 1991) [hereinafter PASSMAN, 1st ed.]. Throughout this section the footnotes sometimes cite the first edition of Donald Passman's book. The first edition is referred to because it provides a more accurate look at the way recording agreements were structured around the time subsection (b) was passed, specifically the numerical figures of deal terms (i.e. advance monies, royalty percentages). The general concepts of advances, royalties, and the like remain the same in recording agreements today, however, and therefore, the discussion of these provisions are supported by citations from both versions of the book as a method of comparison.

⁸⁰ See *Hearings: 2001*, *supra* note 70 (testimony of Ann Chaitovitz, Director of Sound Recordings, AFTRA). In Ann Chaitovitz' testimony, she recounted singer Sheryl Crow's experiences. Crow did not receive any money until after her record had sold three or four million copies, demonstrating that it can take two or three years for an artist to become successful and actually receive a royalty payment. Ann stated that "in 1999, nearly 39,000 recordings were released, but only 3 singles and 135 albums—0.35%—were certified as selling three million units [reaching a level of recognizable success]." *Id.*

⁸¹ *California Labor Code Section 2855 and Recording Artists' Contracts*, *supra* note 11 at 2638.

⁸² Philips, *Recording Stars Challenge*, *supra* note 9.

⁸³ See *infra* notes 86-99 and accompanying text.

⁸⁴ See *infra* Part IV.A & B for a description of the changes that occurred from the time the amendment was passed to today.

⁸⁵ Part V of this Note asserts that the application of section 2855(b) in today's record industry leads to even more harsh results.

⁸⁶ KRASILOVSKY & SHEMEL, *supra* note 22, at 17.

obligation with options for seven to nine more.⁸⁷ For each album, the artist receives an advance of monies, from which he pays all costs to produce the records and gets to keep any remaining portion as pre-royalty compensation.⁸⁸ When the RIAA successfully lobbied for the amendment, a new artist typically received an advance of \$175,000 to \$250,000, whereas a mid-level recording artist may have received an advance of up to \$400,000.⁸⁹ The advance for a top-selling artist could rise to more than \$500,000.⁹⁰ Although these advances may seem substantial, they are quickly consumed by the costs necessary to release an album, including recording, video production, marketing and promotion costs.⁹¹

⁸⁷ See PASSMAN, 1st ed., *supra* note 79, at 91. A label, however, is not required to release every album that an artist is committed to deliver. The agreements contain a record company's commitment to record and distribute only *one* album (a "firm album") from the artist and option clauses that, if exercised by the company, require the artist to record and deliver additional albums ("options" or "option albums"). See KRASILOVSKY & SHEMEL, *supra* note 22, at 14; PASSMAN, 1st ed., *supra* note 79, at 91; PASSMAN, 5th ed., *supra* note 12, at 100. The company therefore commits itself to the smallest obligation it can negotiate, while keeping the option to demand as much product as possible. PASSMAN, 1st ed., *supra* note 79, at 91; PASSMAN, 5th ed., *supra* note 12, at 100. Further adding to the one-sidedness of the agreement, after the initial album is released, the record company has the option of "dropping" the musician if he has not generated profits, or is no longer marketable. Philips: *Lawmakers Take Aim*, *supra* note 73.

⁸⁸ See PASSMAN, 1st ed., *supra* note 79, at 85-89; PASSMAN, 5th ed., *supra* note 12, at 80; GARY STIFFLEMAN & BONNIE GREENBERG, *Exclusive Recording Agreements Between An Artist and A Record Company*, in 8 ENTERTAINMENT INDUSTRY CONTRACTS ¶ 159.03, at 159-17 to 159-18 (Donald C. Farber ed., 1986); Cook, *supra* note 37, at 41.

⁸⁹ PASSMAN, 1st ed., *supra* note 79, at 85. In the first edition of his book, Donald Passman distinguishes artists as follows: *New Artist*: an artist that has never signed a record deal, or an artist that has been signed but never sold over 150,000 albums per release; *Midlevel Artist*: an artist whose last album sold in the 200,000 to 500,000 range; *Superstar*: sales from 750,000 and up. He acknowledges that these categories are rough approximations, as there are many variables. *Id.* at 82.

⁹⁰ *Id.* at 85.

⁹¹ See Downs et. al, *Sound Recordings and Music Videos*, in COUNSELING CLIENTS IN THE ENTERTAINMENT INDUSTRY, 311 PLI/PAT 11, 13-14 (1991) [hereinafter *Sound Recordings and Music Videos*] (Recording costs of up to \$250,000, promotion, advertising and initial production of up to \$300,000, and additional costs of distribution). In addition, the record company charges the artist 50% of video costs, to create music videos, and 100% of independent radio promotion costs, to get the songs played on the radio. Cook, *supra* note 37, at 41. In addition to a specific list of recoupable items (like cash to the artist, recording costs, and video costs), almost every contract has a general provision that says all amounts "paid to you or on your behalf, or otherwise paid in connection with this agreement" are recoupable unless the contract specifically provides otherwise. PASSMAN, 1st ed., *supra* note 79, at 76; PASSMAN, 5th ed., *supra* note 12, at 82.

In late 2005, payola payments made by record labels to get songs played on the radio made headlines again after some label executives were discovered bribing programmers to play songs by certain artists. "An investigation led by New York Attorney General Eliot Spitzer into pay-for-play schemes resulted in Sony-BMG

These expenses are all charged against the artist's royalties.⁹² Royalties are the percentage the artist receives on records sold.⁹³ A newly signed artist in the late eighties typically received a royalty of eleven to thirteen percent.⁹⁴ Established artists could usually negotiate a higher royalty rate.⁹⁵ An artist will not see a penny of these royalties, however, until the label recoups the entire advance and all other chargeable expenditures associated with the release of the album.⁹⁶ Because advances are non-returnable, if an artist does not sell enough records to recoup the full amount of the advance, the record company loses that amount.⁹⁷ It is this major loss that labels use in defense of their business practices that artists so often label as "unfair."⁹⁸ A label can, however, cross-collateralize the loss against future royalty streams.⁹⁹ Therefore, if an artist delivers his first album, but does not recover the full advance, the deficit from the first album would

making a \$10 million settlement and the Warner Group paying another \$5 million." Steve Morse, *Amid Industry Troubles Some Sterling Moment, Live 8, Stones and U2 Shows Stood Out*, BOSTON GLOBE, Dec. 25, 2005, at N7, available at 2005 WLNR 21064330. The focus then turns to the question of whether or not the labels will continue to charge these independent promotion costs to recording artists even though the practice has been labeled as "illegal" and "deceptive." Amanda Bronstad, *Facing the Music: Debatable Point: Tough Stance may not Halt Tradition of Payola*, L.A. BUS. J., Dec. 5, 2005, at 14, available at 2005 WLNR 22007369.

⁹² In Courtney Love's cross complaint, it was argued that "[i]n addition to the unworkable theoretical delivery schedule, the Agreement effectively required the artist to incur production and other costs, recoupable against advances, which virtually guaranteed little financial return for most artists and monumental profits for the record company." Love Cross Complaint, *supra* note 13, at 7.

⁹³ See KRASILOVSKY & SHELME, *supra* note 22, at 19; PASSMAN, 1st ed., *supra* note 79, at 62-73 (discussing royalty calculations); PASSMAN, 5th ed., *supra* note 12, at 68-79 (same).

⁹⁴ PASSMAN, 1st ed., *supra* note 79, at 83.

⁹⁵ See KRASILOVSKY & SHELME, *supra* note 22, at 19. A midlevel artist typically received a royalty of 14-16%. A superstar artist could receive anywhere between 16-20%. PASSMAN, 1st ed., *supra* note 79, at 83.

⁹⁶ PASSMAN, 1st ed., *supra* note 79, at 74-79; PASSMAN, 5th ed., *supra* note 12, at 80-84.

⁹⁷ PASSMAN, 1st ed., *supra* note 79, at 77; PASSMAN, 5th ed., *supra* note 12, at 82.

⁹⁸ *California Labor Code Section 2855 and Recording Artists' Contracts*, *supra* note 11, at 2638 ("Because of the high failure rate of released albums, however, record companies absorb great losses and thus insist that they must earn profits from the few successful acts on their rosters."). See *supra* note 9 and accompanying text for a listing of artists who argue that their contracts are unfair.

⁹⁹ PASSMAN, 1st ed., *supra* note 79, at 78-79; PASSMAN, 5th ed., *supra* note 12, at 83-84.

be recouped from the earnings of the second album in addition to the advance for the second album.¹⁰⁰

As an additional incentive to underwrite the enormous costs of developing an unknown artist's career, record companies acquire the exclusive right to record an artist during the term of the recording agreement.¹⁰¹ Traditionally, this simply meant that the artist could not make records for anybody else—it did not prohibit the artist from appearing on television, in a motion picture, or on the radio as long as the artist did not grant the use of his recordings for phonograph record purposes.¹⁰²

Various other contractual provisions—the work-for-hire clause, the controlled composition clause, and numerous discounted royalty provisions—continue to be the source of rigid disagreement amongst those in the legal and music communities.¹⁰³ While no American court has ever held a

¹⁰⁰ PASSMAN, 1st ed., *supra* note 79, at 78-79; PASSMAN, 5th ed., *supra* note 12, at 83-84.

¹⁰¹ See KRASILOVSKY & SHEMEL, *supra* note 27, at 16.

¹⁰² See PASSMAN, 1st ed., *supra* note 79, at 119-23; PASSMAN, 5th ed., *supra* note 12, at 132-37; *Sound Recordings and Music Videos*, *supra* note 91, at 37-39.

¹⁰³ Anorga, *supra* note 8, at 754. These provisions include:

(1) The work-for-hire clause, which allows the labels to become the owners, or authors, of the sound recordings that the artist produces under that contract—this means the artist loses all rights and control in how the song will or will not be exploited by the record label. See Holland, *Performers Give Testimony*, *supra* note 9; Future of Music Coalition, *Major Label Contract Clause Critique* 2-3, Oct. 3, 2001, <http://www.futureofmusic.org/contractcrit.cfm> [hereinafter *Contract Clause Critique*] (last visited Sept. 22, 2006); see also PASSMAN, 1st ed., *supra* note 79, at 240-42; PASSMAN, 5th ed., *supra* note 12, at 276-79.

(2) The controlled composition clause, which puts a cap on how much money an artist can earn for musical contributions in the form of *mechanical royalties* (monies paid by a record company for the right to use a song in records). See PASSMAN, 1st ed., *supra* note 79, at 185-91; PASSMAN, 5th ed., *supra* note 12, at 209-19; Anorga, *supra* note 8, at 765-66 (discussing the controlled composition provision); Holland, *Performers Give Testimony*, *supra* note 9; *Contract Clause Critique*, *supra*, at 6-7.

The Copyright Office sets the statutory rate for mechanical royalties, increasing every two years according to changes in cost of living as determined by the Consumer Price Index. . . . The first rate increase was in 1981. It was at about this time that the Controlled Composition clause became commonplace in record contracts.

See *Contract Clause Critique*, *supra*, at 6.

(3) Discounted foreign and record-club sales provisions, which provide that an artist will receive a discounted royalty for the sale of his music in these formats. See PASSMAN, 1st ed., *supra* note 79, at 132-51 (discussing advanced

standardized music contract unconscionable,¹⁰⁴ it is hard to deny the one-sidedness of these agreements. The record companies stand firm in their position, however, that they take huge risks investing extensively in unproven artists, and therefore need to capitalize on those artists who achieve success.¹⁰⁵ Undeniably, labels do spend enormous amounts of money with no guarantee that they will see any return on that investment.¹⁰⁶ Leaving the successful artists bankrupt and in debt to their record labels, however, is not a just way to make

royalty computations); PASSMAN, 5th ed., *supra* note 12, at 151-73 (same); Holland, *Performers Give Testimony*, *supra* note 9. Record club sales are a substantial source of income for record labels, more than \$1 billion in 2001. The record clubs actually pay hundreds of millions of dollars in up-front fees to record companies in order to have the rights to sell their artists' CDs, but the labels neither disclose nor include these fees when calculating artist royalties. *Courtney Love Sues UMG Recordings Charging Violation of California Labor Code*, PR NEWSWIRE, Feb. 28, 2001, available at LEXIS News Library, USPAPR file [hereinafter *Courtney Love Sues*].

(4) "Phony" free goods clauses, which provide that the record company does not have to pay the artist a royalty on records that are not "sold." As a result, if a company gave a retailer fifteen free records for every eighty-five purchased, the artist did not receive a royalty. However, today, few companies actually give away fifteen percent of the records they ship, yet still don't pay artist royalties on these records. See PASSMAN, 1st ed., *supra* note 79, at 67-69; PASSMAN, 5th ed., *supra* note 12, at 72-74; Holland, *Performers Give Testimony*, *supra* note 9.

(5) Breakage royalty deductions, which dates back to the days when shellac records (which haven't been manufactured since 1975) arrived broken at the retailer, and therefore labels passed on the cost of damage to the artist. See PASSMAN, 1st ed., *supra* note 79, at 71; PASSMAN, 5th ed., *supra* note 12, at 77; Holland, *Performers Give Testimony*, *supra* note 9.

(6) New technology deductions allowed labels to deduct up to twenty-five percent from the artist's royalty for the development of CDs. See PASSMAN, 1st ed., *supra* note 79, at 138-40; PASSMAN, 5th ed., *supra* note 12, at 88-91; Holland, *Performers Give Testimony*, *supra* note 9.

¹⁰⁴ Anorga, *supra* note 8, at 740.

¹⁰⁵ See *Hearings Before the Senate Select Comm. On the Entm't Indus.*, 2002 Leg., Reg. Sess. (Cal. 2002) (statement of Hilary Rosen, President and CEO, Recording Industry Association of America) ("The only reason record companies can risk investment in the new artists and absorb losses from failures is because, when successful artists make it, money goes back into the system.").

¹⁰⁶ See Philips, *Record Label Chorus*, *supra* note 1 (discussing one failed act that received a \$750,000 advance, which was allocated to cover the cost of recording its first album and to provide the group with about \$250,000 to live on after deducting legal and management fees. The company invested an additional \$2.8 million to roll out a marketing campaign to reach retail stores, radio, music TV networks, and another \$1.2 million for retail product placement, tour support, photo shoots, advertising and radio and TV show appearances to boost the CD. The album sold only 100,000 copies and the label dropped the act after losing more than \$2.7 million on the project.).

up for these losses. The application of section 2855(b) allows just that.¹⁰⁷

B. Application of Section 2855(b)

Problems arise from the dissonance between the quantity-based requirements of the standard recording contract and the temporal requirements of the Seven Year Statute.¹⁰⁸ Labels assert that an artist can easily deliver one album a year, and therefore can deliver seven albums within the statutory time period.¹⁰⁹ When an artist is forced to promote records via tours, music videos, and television appearances, however, this makes the labels' proposed delivery schedule almost impossible to meet.¹¹⁰ All these additional activities can extend the time period between albums to two years.¹¹¹ In effect, section 2855(b) permits record labels to extend the duration of a recording agreement to fourteen years or more; because of this, the labels have no reason not to demand seven or more albums.¹¹²

¹⁰⁷ Marlowe, *supra* note 49 (“The nonprofit Future of Music Coalition . . . submitted a detailed written analysis of standard recording industry contracts. We are submitting this critique here as a means to shed light on the major-label working environment, which leaves an estimated 99.6% of artists in debt to their record labels.”).

¹⁰⁸ *California Labor Code Section 2855 and Recording Artists' Contracts*, *supra* note 11, at 2641 (“The combination of contract terms based on the number of albums delivered and the amendment of section 2855 to include 2855(b) in effect shifted the problems associated with the unanswered questions to the artists. The problems arose from the dissonance between the temporal requirements of section 2855 and the quantity-based requirements of the standard recording contract, the duration of which is defined by an album delivery requirement . . .”).

¹⁰⁹ See Holland, *Performers Give Testimony*, *supra* note 9 (“Answering questions from lawmakers about whether the number of albums contractually requested by labels can be delivered in seven years, MCA's [senior VP of business and legal affairs, Mark] Goldstein [sic] gave a list of artists, such as Reba McEntire, who can consistently deliver an album every year.”).

¹¹⁰ See Chang, *supra* note 8, at 16-17:

Since no artist is able to turn out seven albums within seven years, considering the restrictions put on them by the labels to take two years between record releases to promote the record via tours, music videos, and television appearances . . . such quotas allegedly threaten to lock recording artists into personal service contracts for at least fourteen years, twice as long as the statutorily allotted time period [for other artists under contract].

Id.

¹¹¹ See, e.g., Love Cross Complaint, *supra* note 13, at 6 (“[R]ecord companies have preferred and often insisted on a minimum two-year gap between releases for artists.”); Cappello & Thielemann, *supra* note 24, at 17.

¹¹² Cappello & Thielemann, *supra* note 24, at 16 (“When artists sign the industry standard contracts, no one expects them to deliver seven albums in seven

In addition to effectively allowing record labels to demand long-term recording agreements, section 2855(b)(3) purports to allow damages if an artist gives notice of termination under section 2855(a).¹¹³ The damages provision of section 2855(b)(3), however, is unclear.¹¹⁴ Although neither the statute itself nor any case law defines “damages,” record companies argue that the courts should equate damages with lost profits.¹¹⁵ Back when labels were granted exclusive control over recordings only, the record company could base damages solely on sales from these recordings.¹¹⁶ Under the theory of lost profits, a record company would have been entitled to recover the expected profits on the additional albums that an artist had yet to deliver when he breached the contract.¹¹⁷

In awarding damages on the lost profits theory, the court would be required to make a calculation of the future worth of a contract.¹¹⁸ Recovery of damages for lost profits depends on three questions: whether the defendant’s conduct was the proximate cause of the damages; whether the damages were foreseeable as a probable result of the breach at the time the contract was made; and whether the damages can be proven with reasonable certainty.¹¹⁹ Assuming a record company will easily be able to meet the proximate cause and foreseeability prongs, the label will still need to prove that it would incur damages with “reasonable certainty.”¹²⁰ The courts

years, yet the industry uses the threat of speculative lost profits under Section 2855(b) to force an artist to produce seven albums even if doing so will require the artist to perform beyond seven years.”)

¹¹³ Section 2855(b)(3) states:

In the event a party to [a recording contract] is, or could contractually be, required to render personal service in the production of a specified quantity of the phonorecords and fails to render all of the required service . . . the party damaged by the failure shall have the right to recover damages for each phonorecord as to which that party has failed to render service in an action.

CAL. LAB. CODE § 2855 (West 2005).

¹¹⁴ See *California Labor Code Section 2855 and Recording Artists’ Contracts*, *supra* note 11, at 2642; Baumgartner, *supra* note 18, at 84; Cappello & Thielemann, *supra* note 24, at 17.

¹¹⁵ See Cappello & Thielemann, *supra* note 24, at 17.

¹¹⁶ KRASILOVSKY & SHEMEL, *supra* note 22, at 16. See *infra* Part V.B for a discussion on the application of subsection (b) in today’s music world where the label earns revenue from more than just sales of recordings.

¹¹⁷ KRASILOVSKY & SHEMEL, *supra* note 22, at 16.

¹¹⁸ Van Beveren, *supra* note 39, at 412.

¹¹⁹ See 1 ROBERT L. DUNN, RECOVERY OF DAMAGES FOR LOST PROFITS §§ 1.1, 1.4, 1.8 (4th ed. 1992).

¹²⁰ *California Labor Code Section 2855 and Recording Artists’ Contracts*, *supra* note 11, at 2644.

have held that “if plaintiff’s proof leaves uncertain whether plaintiff would have made any profits at all, there can be no recovery.”¹²¹

The record company would attempt to prove with certainty the future profitability of the artist with evidence of number of records sold, profits on past record sales, the popularity of the artist, and other indicators of success.¹²² While all this data would help the court assess the future profits a company expects to earn from record sales, nothing in the music business can be predicted with certainty.¹²³ A hit record in the past does not guarantee similar sales in the future; often, artists are simply one-hit wonders.¹²⁴ A popular group with many successful albums may not be able to create another album whose numbers match past sales figures.¹²⁵ For example, unforeseen personality or substance abuse problems could surface.¹²⁶

¹²¹ *Id.* (quoting 1 ROBERT L. DUNN, RECOVERY OF DAMAGES FOR LOST PROFITS §§ 1.1, 1.4, 1.8 (5th ed. 1998)). See also *Kids’ Universe v. In2labs*, 116 Cal. Rptr. 2d 158, 169 (Ct. App. 2002) (“Lost anticipated profits cannot be recovered if it is uncertain whether any profit would have been derived at all from the proposed undertaking (quoting *S.C. Anderson, Inc. v. Bank of America*, 30 Cal. Rptr. 2d 286, 289 (1994) (internal quotation marks omitted)).

¹²² *Id.* at 2647 n.109 (“The record company would put on evidence such as past record sales, increasing rates of sales, critics’ record reviews and predictions of popularity, plans for future touring and the revenue gained or lost by touring, testimony about the quality of marketability of partially completed songs and albums, stability and longevity . . .”).

¹²³ Van Beveren, *supra* note 39, at 412. As an example of the difficulty inherent in calculating lost profits, what if Alanis Morissette decided to leave her record label after seven years but still owed the company four more albums? It is unclear whether the company would be allowed to base the value of damages on her 30-million selling hit, “Jagged Little Pill,” or her follow-up, “Supposed Former Infatuation Junkie,” which sold just 2 million copies. Philips, *Lawmakers Take Aim*, *supra* note 73.

¹²⁴ For an in-depth look of all the one-hit wonders from the ‘50s to the ‘90s, visit <http://www.onehitwondercentral.com>. Some of the most played songs of all time were originally performed by artists that were never heard from again: The Penguins, “Earth Angel”; The Bobbettes, “Mr. Lee”; The Monotones, “The Book of Love”; Bobby Day, “Rockin’ Robin”; Devo, “Whip It”; Sugar Hill Gang, “Rapper’s Delight”; Bow Wow Wow, “I Want Candy”; Toni Basil, “Mickey”; Dexy’s Midnight Runners, “Come On Eileen”; House of Pain, “Jump Around”; the list goes on and on. *Id.*

¹²⁵ Van Beveren, *supra* note 39, at 412.

¹²⁶ *Id.* One-time pop diva, Whitney Houston, whose albums were certified seventeen, thirteen and nine times platinum, entered a drug treatment rehabilitation center in early 2004 to deal with her years of rumored drug abuse. See Recording Industry Association of America, *Gold & Platinum Searchable Database: Whitney Houston*, <http://www.riaa.com/gp/database/> (search “Whitney Houston”) (last visited Sept. 22, 2006); César G. Soriano, *Whitney Houston Enters Drug Rehabilitation Center*, USA TODAY, Mar. 16, 2004, at 01D, available at 2004 WLNR 6255933. The RIAA defines a “platinum album” as one million units sold. Recording Industry Association of America, *Gold & Platinum*, available at <http://www.riaa.com/gp/default.asp> (last visited Sept. 22, 2006).

Even “successful, established artists are subject to the same uncertainties that face the average artist.”¹²⁷ Some of the most successful artists of all time have been unable to maintain past record sales. For example, Michael Jackson, the biggest-selling solo artist of all time, literally shattered sales records. Two of his albums, *Off the Wall* and *Dangerous*, reached a status of seven times platinum, *Bad* had sales of eight times platinum, and *Thriller*, which holds the title of best-selling album in history, was certified twenty-six times platinum.¹²⁸ However, in 2002, Jackson’s album *Invincible* was certified only two times platinum,¹²⁹ a number that fell far short of his past sales records. In addition to the inherent market uncertainties, it is completely speculative for record companies to assume that over the next twenty years they would actually exercise each and every one of the remaining options.¹³⁰ Given the emotiveness of the various factors that can affect future lost profits, courts should not get involved with determining such an incalculable number.¹³¹

Even if a court was able to devise a fair and workable method for the calculation of lost profits, the outcome would become even more onerous for the artist. Because a record company’s profit on a single album typically exceeds the royalties that the artist earns, the lost profits a record company purportedly suffers would exceed whatever royalty the artist would earn under a new record deal.¹³² Artists who breach their contracts would be free to sign with a new record label, but would never see a dime since they would owe their previous record company more money in alleged lost profits than they would earn in royalties from their new record contract.¹³³ The

¹²⁷ *California Labor Code Section 2855 and Recording Artists’ Contracts*, *supra* note 11, at 2647.

¹²⁸ Recording Industry Association of America, *Gold & Platinum Searchable Database: Michael Jackson*, <http://www.riaa.com/gp/database/> (search “Michael Jackson”) (last visited Sept. 22, 2006).

¹²⁹ *Id.* As another example of the unpredictability that affects all artists, Mariah Carey’s self-titled album *Mariah Carey* was certified nine times platinum, *Music Box* and *Daydream* were both certified ten times platinum, while *Glitter* sold only one million albums. Recording Industry Association of America, *Gold & Platinum Searchable Database: Mariah Carey*, <http://www.riaa.com/gp/database/> (search “Mariah Carey”) (last visited Sept. 22, 2006).

¹³⁰ See Cappello & Thielemann, *supra* note 24, at 17.

¹³¹ Van Beveren, *supra* note 39, at 413-14 (“It is important to recognize that determining the value of an artist’s contract is not synonymous with judging artistic merit. Courts have been extremely unwilling to judge a performer’s quality.”).

¹³² Cappello & Thielemann, *supra* note 24, at 17.

¹³³ *Id.*

artist would also owe financial commitments to her new record company, thus the artist's royalties would be paid to both her old record label and her new one.

Faced with these dismal prospects, few artists choose to terminate their contracts under section 2855(a). Many recording artists that attempted to litigate the issue in court¹³⁴ alleged that the issue of "damages" imposes involuntary servitude, which exists because they have "no available choice but to work or be subject to legal sanction."¹³⁵ While these artists most definitely had a strong argument, at least they could still rely on ancillary revenue streams for additional income. At this time, recording agreements only granted the labels control over recordings and merchandising; therefore, an artist being sued for damages could still bring in revenue from commercial endorsements, merchandising, music publishing, and acting deals.¹³⁶ This would quickly change, however, as the industry evolved and record companies began to demand more control over an artist's creative works.

¹³⁴ Several artists have sued their labels over contract disputes. See Holland, *Performers Give Testimony*, *supra* note 9, at 1, 4, 5. The list of artists that have sued their labels include: Prince, the Beatles, the Beach Boys, Sammy Hagar, L.A. Reid, Teena Marie, Kenny Rogers, Donna Summers, Barry White, Meat Loaf, the Eagles, Metallica, Oscar de la Hoya, Luther Vandross, Toni Braxton, Beck, Bone Thugs-N-Harmony, the Bellamy Brothers, 'N Sync, Bush, New Edition, the Goo Goo Dolls, TLC, Dr. Dre, Blondie, the heirs of Buddy Holly, Blink-182, and various others. *Id.* at 5.

Two of the most publicized cases, involving Dixie Chicks and Courtney Love, focused national attention on the Seven Year Statute—the artists battled their labels over undelivered albums and payments of royalties. Baumgartner, *supra* note 18, at 81. Both cases challenged the "legality of many provisions of record contracts in that most artists have little or no negotiation power, and that the contracts are onerous, unconscionable, a restraint of trade, and are even criminal." See Holland, *Performers Give Testimony*, *supra* note 9, at 4. In both cases, the parties agreed to settle before going to trial. Baumgartner, *supra* note 18, at 81. A settlement is typical for lawsuits between an artist and her record company for several reasons. One reason is that artist attorneys have no desire to change the climate created by unfair contracts and unhappy clients. Another is that companies would rather settle a complaint than be involved in lengthy litigation. See, e.g., Holland, *Performers Give Testimony*, *supra* note 9; Philips & Morain, *Company Town; Measure on Music Contracts Planned; Entertainment: State Senator Says He'll Challenge Statute that Ties Recording Artists to Years-Long Contracts*, L.A. TIMES, Oct. 19, 2001, available at LEXIS News Library, USPAPR file.

¹³⁵ See Cappello & Thielemann, *supra* note 24, at 16 (citing *United States v. Kozminski*, 487 U.S. 931, 942-43 (1988)).

¹³⁶ Philips, *Record Label Chorus*, *supra* note 1.

IV. EVOLUTION OF THE MUSIC INDUSTRY AND RECORDING AGREEMENTS

A. 2000: Digital Distribution

Well, there's a lot of smart people at the music companies. The problem is, they're not technology people. . . . And so when the Internet came along, and Napster came along, they didn't know what to make of it. A lot of these folks didn't use computers—weren't on e-mail; didn't really know what Napster was for a few years. They were pretty doggone slow to react. Matter of fact, they still haven't really reacted, in many ways.¹³⁷

In 1999, an eighteen year-old college dropout, Shawn Fanning, developed an idea that drove the music industry mad.¹³⁸ Fanning and “an Internet chat-room friend, founded Napster, a peer-to-peer file sharing service that enabled its users to trade and share music files for free over the Internet.”¹³⁹ At the same time, major record labels experienced an economic downturn.¹⁴⁰ The number of units shipped in the United States decreased by about ten percent from 2000 to 2001, which led to a decrease in sales of about \$600 million.¹⁴¹ This was also the first time the recording industry experienced a decline in CD sales since 1994—units shipped decreased by

¹³⁷ Adaptation based on Jeff Goodell, *Steve Jobs: The Rolling Stone Interview*, ROLLING STONE, Dec. 3, 2003, http://www.rollingstone.com/news/story/_/id/5939600.

¹³⁸ Joseph A. Sifferd, *The Peer-to-Peer Revolution: A Post-Napster Analysis of the Rapidly Developing File-Sharing Technology*, 4 VAND. J. ENT. L. & PRAC. 93 (2002).

¹³⁹ *Id.* at 93. Even though the Ninth Circuit determined that Napster violated existing copyright law and Napster consequently shut down, various other file-sharing websites emerged, such as Morpheus, Grokster and Kazaa. See Schorr, *supra* note 6, at 77-78. On June 27, 2005, the Supreme Court unanimously ruled that file-sharing companies, such as Grokster and Morpheus, can be held liable when promoting theft of copyrighted materials. While this decision was a “win” for the record labels, analysts predict the ruling will have little impact on the availability of illegally downloaded music and movies. See *Metro-Goldwyn-Mayer Studios Inc. v. Grokster Ltd.*, 545 U.S. 913 (2005); Sarah Rodman, *And the Beat Goes On . . . Analysts See Little Impact of Court's Downloading Ruling*, BOSTON HERALD, June 28, 2005, available at 2005 WLNR 10175860.

¹⁴⁰ Schorr, *supra* note 6, at 68. (“Major record labels [were] floundering for their economic survival.”). See also *id.* at 72-73 (“The major labels are experiencing an economic downturn. The number of recordings shipped in the United States from record companies to retail outlets . . . fell 10.3% in 2001, and more than 15% over the last two years. . . . Globally, the value of the international music market plunged 5%, and unit sales dropped by 6.5% in 2001. Industry insiders estimate that between 5,000 and 10,000 music industry employees have been laid off, and many established recording artists have been discharged by their labels.” (footnotes omitted)).

¹⁴¹ Recording Industry Association of America, Recording Industry Association of America's 2004 Yearend Statistics, <http://www.riaa.com/news/newsletter/pdf/2004yearEndStats.pdf> (last visited Sept. 22, 2006).

seven percent and dollar sales decreased by two percent.¹⁴² Record label executives blamed the poor record sales on increased online piracy through file-sharing websites.¹⁴³ They fought vigorously to conquer the Internet by suing the online competition for appropriation of their copyrighted music and by creating their own subscription services.¹⁴⁴

As the industry began to change drastically, standard provisions in recording agreements changed as well, but not as one might suspect. Ten years prior, after the CD was introduced, “any record company with a library suddenly became a ‘cash cow.’”¹⁴⁵ Labels were in the mode of “spend big to sell big,” and recording agreements began to reflect this growing wealth.¹⁴⁶ A new artist typically received an *advance* of \$175,000 to \$300,000, whereas a mid-level recording artist may have received an *advance* of up to \$600,000, twice of what an artist in the late eighties would receive.¹⁴⁷ The *advance* for a top-selling artist could rise to more than \$1,500,000, over \$1 million more than thirteen years prior.¹⁴⁸ Labels insisted on a total of five to seven albums over the course of a deal, instead of the eight to ten options they used to require twenty years before.¹⁴⁹ A new artist that entered into a recording agreement in 2000 typically received a royalty of anywhere between

¹⁴² *Id.*

¹⁴³ Schorr, *supra* note 6, at 73. “The music industry had never experienced a decline of this magnitude.” *Steal This Song; Go Ahead and Burn That MP3. The Music Biz Will Thank You Later*, SCENE ENT. WKLY., Nov. 19, 2003, available at 2003 WLNR 13301184 [hereinafter *Steal This Song*].

¹⁴⁴ Schorr, *supra* note 6, at 75-76.

¹⁴⁵ Phil Gallo & Meredith Amdur, *Time to Face the Music: Mergers, New Owners, Piracy Reshaping Tune Biz*, DAILY VARIETY, Dec. 9, 2003, available at 2003 WLNR 10942868.

¹⁴⁶ *Id.* (“With an eye cast more toward marketshare to impress shareholders than toward artist development to attract musicians, the industry moved to a model in which only bigger was better. That paved the way for free-spending on hype and marketing that focused on only the most commercial of recordings.”). Record labels say they are still suffering from a spate of expensive deals negotiated during the middle and late 1990s. Philips, *Record Label Chorus*, *supra* note 1.

¹⁴⁷ PASSMAN, 5th ed., *supra* note 12, at 93. See also *supra* note 89 and accompanying text. In the fifth edition of his book, Donald Passman distinguishes artists as follows: *New Artist*: an artist that has never signed a record deal, or an artist that has been signed but never sold over 250,000 albums per release; *Midlevel Artist*: an artist whose last album sold in the 750,000 to 1,500,000 range; *Superstar*: sales from 2,500,000 and up. PASSMAN, 5th ed., *supra* note 12, at 87. These sales criteria are much larger than those in the eighties, and reflect the success that the industry experienced during the nineties with the advent of the CD. See *supra* note 89.

¹⁴⁸ PASSMAN, 5th ed., *supra* note 12, at 93. See also *supra* note 90 and accompanying text.

¹⁴⁹ PASSMAN, 5th ed., *supra* note 12, at 93. See also *supra* notes 86-87 and accompanying text.

thirteen to sixteen percent of the suggested retail list price, a definite improvement from the eleven to thirteen percent he used to receive years ago.¹⁵⁰

While the terms of the newer agreements may have appeared more favorable to the artist, labels actually added to the oppression of artists by introducing new provisions to make up for the losses they were experiencing after the introduction of digital downloads. One such provision was the packaging royalty deduction, which provided for deductions of up to twenty-five percent off the artist's royalty to pay for label development of digital electronic transmissions, future digital downloads, upkeep of Websites, and expanding label Internet presence.¹⁵¹ In addition, the labels were able to maintain new technology royalty deductions of up to twenty-five percent. In the eighties, labels justified these deductions for the development of CDs.¹⁵² After the introduction of online distribution, labels defended the deductions to make up for the costs involved in such new configurations as digital compact cassette, DVD-Audio, and audiophile records.¹⁵³ In effect, these provisions procured the artist's money for the label.¹⁵⁴

¹⁵⁰ PASSMAN, 5th ed., *supra* note 12, at 93. See also *supra* note 94 and accompanying text.

¹⁵¹ Holland, *Performers Give Testimony*, *supra* note 9.

¹⁵² *Id.*

¹⁵³ *Id.* Essentially, "the modernization of product formats and manufacturing processes [was] at least partly charged against artists' recoupment accounts." *Id.*

¹⁵⁴ For example, if a new artist received a royalty of fourteen percent, an eighty-five percent rate on CDs (new technology deduction), a three percent producer, recording costs of \$300,000, and tour support of \$50,000, his or her royalty for sales of 500,000 albums looked something like this:

Suggested Retail Price	\$18.98
Less: Packaging (25%)	<u>-4.74</u>
Royalty Base	\$14.24
Royalty Rate (14%, less 3% for the producer [11%] x 85% for CD [9.35%])	<u>x 9.35%</u>
Royalty	\$1.33
Royalty x 500,000 units	<u>x 500,000</u>
	\$665,000
Less 15% "free goods factor"	<u>-99,750</u>
	\$565,250
Less: Recording Costs	-300,000

With the label receiving a greater share of revenues by reducing the artist's royalty, the record companies' arguments in defense of section 2855(b) became even less valid.¹⁵⁵ In 1987, recording industry lobbyists told lawmakers that labels did not earn a profit on their successful artists until the fourth album, and therefore they would be severely injured if the artist did not deliver the remaining three albums.¹⁵⁶ This argument may have had some validity twenty years ago, when the recording industry was based on development.¹⁵⁷ Back then, labels nurtured their artists and focused on developing long-term successes.¹⁵⁸ According to then-deputy president of EMI Recorded Music, Roy Lott, it was not until artists Kenny G. and Sarah McLachlan were on their fourth albums and into the fifth year of their contracts that they started to experience success.¹⁵⁹

By the beginning of the century, however, labels had shifted their focus to creating immediate superstars. If an artist's record did not immediately succeed, the record company did not exercise its option and it dropped the artist.¹⁶⁰ Labels could no longer claim that the reason they needed to be exempted from the Seven Year Statute was because they needed to "develop" the artist. Nonetheless, the record companies continued to operate under the protection of subsection (b). As a result, an artist being sued for breach of contract would be liable to the label for an even larger amount of damages since lost profits would include these monies that rightfully belonged to the artist but that the label now claimed.

Less: 50% of independent promotion	-100,000
Less: 50% of video costs	-75,000
Less: tour support	<u>-50,000</u>
TOTAL	\$40,250

Calculations adapted from PASSMAN, 5th ed., *supra* note 12, at 98.

¹⁵⁵ See *supra* notes 73-75 and accompanying text.

¹⁵⁶ See Philips, *Lawmakers Take Aim*, *supra* note 73.

¹⁵⁷ *Hearings: 2001*, *supra* note 70 (statement of Michael Greene, President & CEO, Grammy's, discussing the differences in relationships between artists and labels in the 1980's and today, and drawing attention to the fact that artists used to be developed and nurtured by the labels whereas today using the word "relationship" may be completely inappropriate, given the lack of its existence).

¹⁵⁸ *Id.*

¹⁵⁹ See Newman, *supra* note 9.

¹⁶⁰ *Hearings: 2001*, *supra* note 70 (testimony of Ann Chaitovitz, Director of Sound Recordings, AFTRA).

As labels soon realized that digital distribution was here to stay, they quickly found novel ways to secure for themselves a larger share of the artist's profits.

B. 2005: Expanding the Rights of Labels in the Music Industry

Shawn Fanning turned twenty-five in late November of this year, and it's been a very long seven years since he wrote a little computer program that let him trade electronic music files with his dorm mates. He called it Napster, and it quickly grew into an Internet phenomenon, not to mention the music industry's *bête noire* until the courts shut it down four years ago.

Now the spotlight is turning back to Mr. Fanning, this time as a symbol of how big business and the disruptive force of the Internet just might find a way to get along. By year-end, Grokster, a new file sharing service will appear—this one sanctioned by the record industry because it will use technology that requires file-swappers to pay for copyrighted material.¹⁶¹

In the few years since the introduction of digital distribution, the music companies have finally caught on. They are starting to embrace the idea that peer-to-peer file-sharing services can be reconstituted as legal sales outlets.¹⁶² Album sales, however, are still not what they used to be. Sales are thirty percent below their level the year Napster was let loose, and ten times as many songs are illegally downloaded from file sharing services as are bought from paid services like Apple's iTunes.¹⁶³

Nonetheless, labels have started to accept the new business models presented by innovative media such as downloads, subscriptions, and ringtones.¹⁶⁴ As the Web quickly replaces traditional forms of music distribution, label executives and artist managers are frequently at odds over how to slice up these new "money pies."¹⁶⁵ Labels are fighting to

¹⁶¹ Adaptation based on Saul Hansell, *Putting the Napster Genie Back in the Bottle*, N.Y. TIMES, Nov. 20, 2005, available at 2005 WLNR 18734374.

¹⁶² *Id.* ("Apple Computer and other companies have built thriving, unquestionably legal music-downloading businesses.")

¹⁶³ *Id.*

¹⁶⁴ Antony Bruno, *Video Booms Online—But for Whom? Explosive Demand for Clips Sparks Renewed Debate on how Artists Should Share the Wealth*, BILLBOARD, Oct. 29, 2005, available at LEXIS News Library, USPAPR file [hereinafter Bruno, *Video Booms Online*].

¹⁶⁵ *Id.* Ringtones are a good example. Bernie Lawrence-Watkins, Esq. describes a ringtone as:

obtain the largest possible portion of the revenues attributed to digital downloads, video downloads, ringtones, and ringbacks.¹⁶⁶

In addition to these novel revenue streams, labels are exploiting and expanding their traditional areas of exclusivity to include areas that used to belong to the artists: videogames, film, and TV.¹⁶⁷ Labels are trying to muscle their way into all these additional revenue streams by adding non-negotiable provisions to the standard recording agreements that require artists to share these ancillary revenues with the label.¹⁶⁸ Record companies are even requiring currently signed artists to accept amendments to their existing agreements that grant the label the exclusive rights to these new media.¹⁶⁹ Fred Davis, a prominent music entertainment attorney, points out that:

a portion of a song embodied in a digital file and rendered into audio. Ringtones allow you to customize the sound your mobile phone makes when you receive a call. Ringtone providers license the sound recordings/compositions from music labels and publishers, reformat the song—usually in 30 second formats—for mobile phone use and stores the format on their database.

Dennis M., *7 Questions with Bernie Lawrence-Watkins, Esq.: A Backstage Pass to the Music Industry*, ATLANTA TRIB., July 1, 2005, available at 2005 WLNR 14596030.

When ringtones first arrived on the cell phone market, artists and their managers ignored them, doubting any real revenue could come from cell phone rings. Bruno, *Video Booms Online*, *supra* note 164. Now that the industry is worth \$3 billion globally, some artists feel that ringtones should yield a licensing rate of 50%, instead of what most get: a royalty rate, generally 10-20%. See Bruno, *Video Booms Online*, *supra* note 164; Lawrence-Watkins, *supra* note 165. Analysts predict that this is a market that will continue to grow. As full-track ringtone downloads stabilize around a \$1.50 price point, the lucrative realtone (ringtones that sound more like online digital music downloads because of the vocals and the improved voice quality) market currently charges around \$3 to \$3.50. *The Specialist Role of the Aggregators*, MUSIC WK., Sept. 4, 2005, available at 2005 WLNR 14921366. See also Bruno, *Video Booms Online*, *supra* note 164.

¹⁶⁶ Artists typically receive a thirteen percent royalty on record sales before any royalty deductions, which then leaves the artist with a royalty of around nine percent. See *supra* Part III.A. With digital downloads, artists receive an even smaller eleven percent royalty, based on the standard 99 cent price before any deductions. Bruno, *Video Booms Online*, *supra* note 164.

In addition to digital downloads, labels are claiming a stake in online video download receipts. In mid-October of this year, Apple announced that it would expand its à la carte model to sell music videos. *Id.* Some labels have started charging for access to their video libraries on America Online and Yahoo. *Id.* These sites have shown explosive growth in video demand online—Yahoo streamed 3 billion music videos in 2004, and now averages about 350 million music videos per month. *Id.* Labels now charge about \$1.40 per video, and pay the artists a royalty percentage. *Id.* Artists and their lawyers contend that the video sales should be counted as a license instead of a royalty, which would increase the artist share to fifty percent of the fee. *Id.*

¹⁶⁷ Sloane, *supra* note 30.

¹⁶⁸ *Id.*

¹⁶⁹ Personal experience/interviews subject to confidentiality.

Right now the issue of distribution of digital income isn't on the radar of most artists. However, when you combine the projected income in 2006 from ringtones, digital downloads, subscriptions and video income, it's going to become an ever-increasing portion of artist revenue. The battle lines need to be formed right now.¹⁷⁰

Record companies defend these new exclusive rights by arguing that they are not trying to control an artist's ability to exploit her music in other formats, they only want to share in the income derived from an artist's activities in other media.¹⁷¹ Agreements used to require only that artists promise not to make records for anyone else.¹⁷² Activities in other media—TV, webcasting, or film—were untouched, and the artist was able to profit from those activities, owing nothing to the record company as long as the recordings were not part of a motion picture soundtrack.¹⁷³ Under the new deal terms, however, a recording artist may not, without record company approval, and presumably, financial involvement, appear in a TV show, webcast, or motion picture unless the role is completely unrelated to the artist's endeavors as a musician.¹⁷⁴ These new agreements only add to the unconscionability of the artists' situation because artists have lost control over the ability to convert their musical fame into other financial opportunities.¹⁷⁵

As one example of today's revised agreements, EMI recently signed an agreement with the rap-metal band Korn, which gives EMI a stake in almost every dollar the band will earn worldwide over at least the next five years.¹⁷⁶ EMI will pay the four-member band an estimated \$15 million upfront—more than twice what the band might expect from a traditional recording contract. In return, EMI will get more than twenty-five percent of the band's publishing, merchandising, and touring revenue, as well as profits from the group's albums.¹⁷⁷ Artist managers and attorneys are concerned about these deals that appear to favor the artists, because in reality, they deprive the artists of a substantial part of their income.¹⁷⁸ They

¹⁷⁰ Bruno, *Video Booms Online*, *supra* note 164.

¹⁷¹ Sloane, *supra* note 30.

¹⁷² *Id.* See also notes 101-02 and accompanying text.

¹⁷³ Sloane, *supra* note 30.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* (“[R]ecord companies are trying to secure a bigger piece of the artist's pie without paying or adding anything extra.”).

¹⁷⁶ Duhigg, *supra* note 33.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

maintain that musicians rely on concerts and licensing contracts for as much as seventy percent of their income.¹⁷⁹ It used to be that recording artists could “earn millions of dollars from concerts, commercial endorsements, merchandising, music publishing and acting deals, none of which they share[d] with their labels.”¹⁸⁰ These new agreements render the application of section 2855(b) even more disastrous for the artist than ever before.

V. ARGUMENT TO REPEAL SECTION 2855(b)

A. *Application of Section 2855(b) to the Music Industry Today*

As labels transform themselves from vendors of physical goods to licensors of digital media, label executives, artist managers, and attorneys will continue to fight over how to slice up ancillary revenues.¹⁸¹ Given their command of the entire recorded music industry, it is hardly surprising that the record labels are quickly gaining control over new revenue streams as well as traditional revenue channels that once belonged solely to the artist.¹⁸² Even if the record companies were to compensate the artists fairly, the issue remains that in the past artists typically relied on these activities as financial opportunities that were untouched by the label.¹⁸³

Under this new contract model, the artists have even more reason for dissension as the legal effects of applying section 2855(b) are revealed.¹⁸⁴ Under the lost profits theory, it used to be that a record company would be entitled to recover the expected profits on the additional albums that the artist had not yet delivered.¹⁸⁵ Although subsection (b) provides for damages for *phonorecords*,¹⁸⁶ which at the passing of the amendment only existed in the form of vinyl, cassettes, and

¹⁷⁹ *Id.*

¹⁸⁰ Philips, *Record Label Chorus*, *supra* note 1.

¹⁸¹ Antony Bruno, *The Future of Music: Industry Transformation is Just Getting Started*, BILLBOARD, at 33, Dec. 3, 2005, available at 2005 WLNR 19575250 [hereinafter Bruno, *The Future of Music*].

¹⁸² See *supra* Part IV.B.

¹⁸³ See *supra* notes 136, 178-80 and accompanying text.

¹⁸⁴ See *supra* note 11 and accompanying text.

¹⁸⁵ *Id.*

¹⁸⁶ See CAL. LAB. CODE § 2855 (West 2005).

CDs,¹⁸⁷ U.S. copyright law defines *phonorecords* as sounds fixed in any method that existed in 1976 or that were later developed.¹⁸⁸ Therefore, under today's recording agreements, a label recovering for breach of contract will also claim the new, additional, and rapidly growing revenue streams that fit within the definition of *phonorecords* as damages.

This problem is aggravated by the nature of today's industry. With the push for one-hit wonders and instant successes, labels may be bringing in more revenue on a new artist within the first few months of an album release due to ringtones, ringbacks, and video download sales than they used to make on a successful artist after two or three albums.¹⁸⁹ Because the labels contend that an artist's future worth is based on past profits,¹⁹⁰ after just one semi-successful album and additional sales through supplemental revenue streams, a label may be able to claim millions of dollars in damages.

While the application of section 2855(b) was plainly unfair when it was passed, at least an artist being sued for breach of contract back then could rely on other financial opportunities such as film, TV, and licensing.¹⁹¹ Today, however, an artist is not only liable for a practically unlimited amount of potential lost profits, but she has also lost the opportunity to exploit and expand on her creative works. Therefore the artist is left penniless. Faced with such bleak prospects, an artist is left in a situation whereby she is subject

¹⁸⁷ See Recording Industry Association of America, Recording Industry Association of America's 1999 Yearend Statistics, <http://www.riaa.com/news/newsletter/pdf/2004yearEndStats.pdf> (last visited Sept. 22, 2006). The yearend statistics from 1990 only include sales figures for CDs, cassettes, and vinyl records. It was not until 2004 that the RIAA included sales figures for digital formats. See Recording Industry Association of America, Recording Industry Association of America's 2004 Yearend Statistics, <http://www.riaa.com/news/newsletter/pdf/2004yearEndStats.pdf> (last visited Sept. 22, 2006).

¹⁸⁸ 17 U.S.C. § 101 (2000). U.S. Copyright law defines "phonorecords" as "material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." *Id.*

¹⁸⁹ *Record Biz Taking Hits on All Sides*, VARIETY, June 27, 2005, available at 2005 WLNR 11655954. PricewaterhouseCoopers predicts that consumer music spending will rise 8.3% between 2004 and 2009, and "at least 6% of that increase will be created by purchases of digital downloads and mobile music." *Id.* See also *supra* note 170 and accompanying text (quotation of Fred Davis, projecting the ever-increasing amount of income that ringtones, digital downloads, subscriptions and videos will bring in).

¹⁹⁰ See *supra* Part II.C.

¹⁹¹ See *supra* notes 136 and 175 and accompanying text.

to unconscionable agreements that impose involuntary servitude.

B. Unconscionability and Involuntary Servitude in Music Contracts Today: An Analysis

The California legislature originally enacted the Seven Year Statute to protect against involuntary servitude in the form of unconscionable agreements.¹⁹² Within the last twenty years, courts have been more willing to apply the doctrine of unconscionability to protect contracting parties in the entertainment industry from harsh and oppressive terms in contracts.¹⁹³ The doctrine has yet to be applied to the duration of a recording agreement.¹⁹⁴ In determining whether a contract is unconscionable, courts will look for the presence of procedural unconscionability, which exists when one party lacks meaningful choice in entering a contract or negotiating its terms, and substantive unconscionability, which exists when the terms are unreasonably favorable to the other party.¹⁹⁵ Some courts require a showing that the contract was both procedurally and substantively unconscionable when made.¹⁹⁶ However, some courts have held that “substantive unconscionability may be sufficient in itself even though procedural unconscionability is not.”¹⁹⁷ Other courts have indicated that a sliding scale applies.¹⁹⁸

In determining whether a contract is unconscionable, and thus unenforceable under law, California courts apply a sliding scale test.¹⁹⁹ The more substantively oppressive a contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is

¹⁹² See *supra* Part II.A.

¹⁹³ Anorga, *supra* note 8, at 747 (“An increasing amount of cases involving the entertainment industry have been litigated within the last twenty years, and courts have appeared more willing to apply the doctrine of unconscionability to protect contracting parties from harsh and oppressive terms in contracts.”).

¹⁹⁴ See *id.* at 759-63 (discussing whether the lengths of standardized music contracts would be considered unconscionable by a court in California).

¹⁹⁵ See Harry G. Prince, *Unconscionability in California: A Need for Restraint and Consistency*, 46 HASTINGS L.J. 459, 472 (1995) (“Most successful [unconscionability] claims involve a combination of procedural and substantive unconscionability, but it is debatable whether both elements must be present.”).

¹⁹⁶ 8 WILLISTON & LORD, *supra* note 42, § 18:10.

¹⁹⁷ *Id.*

¹⁹⁸ Prince, *supra* note 195, at 472.

¹⁹⁹ *Ting v. AT&T*, 319 F.3d 1126, 1128, 1148 (9th Cir. 2003).

unenforceable, and vice versa.²⁰⁰ Even though record companies have traditionally taken advantage of artists' ignorance, inexperience, lack of involvement, and lower social status,²⁰¹ a musician signing a contract with a major record label is probably represented by a competent individual (e.g., manager, agent, or attorney).²⁰² Therefore, a court is unlikely to find much evidence of procedural unconscionability in a recording agreement.

On the other hand, a court may hold that same agreement to be full of provisions that fit the definition of substantive unconscionability.²⁰³ The various contract clauses that deal with duration, ownership of recordings, recoupment of advances, and artist royalties are inherently unfair,²⁰⁴ especially in light of the free agency status that other creative artists enjoy under the Seven Year Statute.²⁰⁵ Instead of protecting recording artists from unconscionable agreements in the same way it does for film actors and athletes, the Seven Year Statute only further exposes musicians by allowing labels to keep an artist under contract for well beyond the statutory limit, a most unfavorable result for the artist.²⁰⁶ Country singer LeAnn Rimes, for example, signed a recording deal when she was twelve years old, agreeing to deliver twenty-one records in seven years.²⁰⁷ Rimes has pointed out that she will probably be working under the contract until she turns thirty-five because the standard schedule of recording, touring, and promotion, makes it practically impossible for an artist to deliver an album a year.²⁰⁸ As a result, she can never leave her label.

As the court in *De Haviland* pointed out, there are "innumerable reasons" why signing with a new label after a reasonable period of time may be to a recording artist's

²⁰⁰ *Id.* at 1148.

²⁰¹ Van Beveren, *supra* note 39, at 381-82 (quoting *Gee v. CBS, Inc.*, 471 F. Supp. 600 (E.D. Pa. 1979)).

²⁰² Anorga, *supra* note 8, at 756.

²⁰³ *Id.*

²⁰⁴ See *supra* Part III.A.; Anorga, *supra* note 8, at 772.

²⁰⁵ See Anorga, *supra* note 8 (discussing why musicians think their contracts are unconscionable); Love Cross Complaint, *supra* note 13, at 2; Marlowe, *supra* note 49 ("This statute is unconstitutional because it singles out the record industry. These contracts are unconscionable, signed by entry-level artists who mostly have no power." (quoting music attorney Don Engel)); *Courtney Love Sues*, *supra* note 103 (referring to Courtney Love's cross complaint).

²⁰⁶ Cappello & Thielemann, *supra* note 24, at 19.

²⁰⁷ Sharp, *supra* note 6.

²⁰⁸ *Id.*

advantage.²⁰⁹ The court stated, “[a]s one grows more experienced and skillful, there should be a reasonable opportunity to move upward and to employ his abilities to the best advantage and for the highest obtainable compensation.”²¹⁰ Every artist engaged in rendering personal services enjoys the equitable compensation and creative freedom provided by the Seven Year Statute, except for contemporary music artists.²¹¹

There is little difference between recording agreements, such as LeAnn Rimes’, and the contracts the California legislature was trying to prohibit when it passed the Seven Year Statute. The threat of damages an artist faces under subsection (b), however, creates exactly the opposite result. It essentially forces recording artists into involuntary servitude.²¹² By seeking excessive damages in a suit against an artist, the recording company is able to use the threat of enormous, lost profit damages to force an artist to produce the remaining albums even if doing so will require the artist to perform beyond seven years.²¹³ Knowing that she will be liable for millions of dollars, the artist will have no choice but to work.

Any artist who attempts to avoid involuntary servitude by breaching her recording agreement is faced with a lack of alternate revenue streams upon which artists before her could rely.²¹⁴ This makes involuntary servitude inescapable because the artist—now liable for profits from ringtones, ringbacks, and video downloads in addition to record sales, and no longer in control of these supplementary revenues—will have even less of a choice but to work or be subject to legal sanction because of the potential for exaggerated damages. As recording artist Don Henley said even before the new agreements, “We aren’t free to compete in the marketplace. We’re talking about . . . indentured servitude.”²¹⁵ Only by repealing the amendment can the legislature preclude a result that forces the artist into involuntary servitude.

²⁰⁹ De Haviland v. Warner Bros. Pictures, 153 P.2d 983, 988 (Cal. Dist. Ct. App. 1944).

²¹⁰ *Id.*

²¹¹ Cappello & Thielemann, *supra* note 24, at 16.

²¹² Baumgartner, *supra* note 18, at 79-80.

²¹³ Cappello & Thielemann, *supra* note 24, at 16.

²¹⁴ *Id.*

²¹⁵ Marlowe, *supra* note 49.

C. *Repealing Section 2855(b)*

Section 2855(b) permits record labels to take part in practices that conflict with the doctrines of unconscionability and involuntary servitude. By allowing the labels to sue for breach of long-term recording agreements, section 2855(b) assists in the creation of unconscionable duration periods and helps force the artist into involuntary servitude with the threat of damages. Record companies with vast resources may continue to press for settlement in important cases they fear they may lose to keep these issues safe from judicial review. For these reasons, the California legislature should repeal subsection 2855(b).

Of course, an artist should not be able to just walk away from a contractual agreement—it would be disastrous for a company to lose the millions it invested in a new artist.²¹⁶ This is not what artists are asking for; they are simply asking that they be treated like every other creative artist that is subject to the Seven Year Statute. Recording artists and their supporters argue that the television and film industries are similar to the recording industry in that they all require large financial investment in projects.²¹⁷ Contrary to the film industry, however, the record industry then holds a recording artist, unlike any other creative artist, liable for future profits that may cover the span of fourteen or more years,²¹⁸ twice the limit imposed by the statute.²¹⁹

²¹⁶ Cook, *supra* note 37, at 43. One spokesperson for the RIAA argued that:

Artists can't just get a pass on this issue. There is not going to be sympathy for them when they take multimillion-dollar advances from the companies and then just walk away before they fulfill the obligations in their contracts. Somebody has got to come up with the money to cover damages that the companies incur.

Philips, *Lawmakers Take Aim*, *supra* note 73. Some label executives go so far as to suggest that a change in the law would “jeopardize the record company’s ability to earn profits from its agreements and run a viable business with successful California-based artists.” Holland, *Performers Give Testimony*, *supra* note 9. History has proven to the contrary. After the holding in *De Haviland v. Warner Bros. Pictures*, 153 P.2d 983 (Cal. Dist. Ct. App. 1944), and the demise of the studio system in the film industry, the industry actually got bigger. The “economic freedom for creative people is just good business.” *Courtney Love Sues*, *supra* note 103 (quoting A. Barry Cappello).

²¹⁷ *Hearings: 2001*, *supra* note 70 (“[T]here is nothing unique about the production costs associated with the phonorecord industry. Artists working in other fields, such as film . . . also often require substantial advances, investment and promotion of the artist over the course of several years and several projects . . .”) (testimony of Anne Chaitovitz, Director of Sound Recordings, AFTRA).

²¹⁸ Holland, *Performers Give Testimony*, *supra* note 9. Anne Chaitovitz, pointed out that the “film industry’s companies have lived with the seven-year law with

If the California legislature repeals subsection (b), recording artists would be able to enjoy the same rights as all other creative artists.²²⁰ There would be a reasonable opportunity for them to receive fair-market compensation for their services,²²¹ which is one of the major policy reasons behind the Seven Year Statute.²²² This same law which has created oppression over recording artists has created immense opportunities for other creative artists, including film actors and athletes.²²³ Free agency has resulted in enormous wealth for these individuals, and the film and sports industries have prospered even as employee salaries have risen in accordance with true market value.²²⁴ More than ever before, recording artists, who have lost control to convert their creative works into other financial opportunities and who are subject to unconscionable recording agreements, need the protections of section 2855(a). Repealing the amendment is the only way to uphold the original purpose behind the Seven Year Statute.

VI. CONCLUSION

The laws here are still evolving (and will be for years), as they try mightily to adapt themselves to new technologies that arrive hourly. And any time you have a concept created in 1909 being applied to things that weren't even conceived at the time, you create a healthy fund to put lawyers' children through college.

So, where's the good news? Well, we're learning there's still a very strong desire for music. We just haven't figured out how to harness it for the forces of good instead of evil.²²⁵

no such amendment for nearly two decades [and], "They haven't gone anywhere, have they?" *Id.* (her response to suggestions that if the law changed, record companies might not only sign fewer artists in California, but might also move to another state).

²¹⁹ Both artists and their attorneys point out the differences in the treatment of recording artists and that of all other creative artists. Don Henley asked, "How can everybody else be protected but us?" Philips, *Lawmakers Take Aim*, *supra* note 73. A. Barry Cappello, Courtney Love's attorney, argued that, "We're really just trying to follow the trend of the law and create the same kind of business opportunities for the musicians and record companies that the end of the studio system created for the film business and that free agency created in baseball." *See Courtney Love Sues*, *supra* note 103.

²²⁰ Cappello & Thielemann, *supra* note 24, at 19.

²²¹ *Id.*

²²² *See supra* Part II.A.

²²³ Cappello & Thielemann, *supra* note 24, at 19.

²²⁴ *Id.*

²²⁵ PASSMAN, 5th ed., *supra* note 12, at 372-79.

The California legislature enacted the Seven Year Statute to protect against unconscionable agreements that impose involuntary servitude. The record industry's efforts to avoid a law under which an artist could walk away from an agreement after seven years led to the creation of subsection (b). By allowing the record label to sue an artist for breach of an agreement, the amendment effectively permits record companies to operate in ways that are contrary to the purpose of the Seven Year Statute.

Faced with the threat of millions of dollars of lost profits damages, back then, an artist essentially had no choice but to work or be subject to legal sanction. At least an artist that breached a recording agreement twenty years ago could rely on other financial opportunities, such as TV, film, and licensing, for a substantial portion of income. This is no longer true in today's music world where record labels demand to share in these ancillary sources of revenue. The new agreements, which grant the label exclusivity over new and traditional methods of distribution, provide an even stronger reason why recording artists should be protected by section 2855(a).

Nonetheless, record labels still enjoy the protections of subsection (b). As a result, artists who wish to leave their record labels to seek better terms will be liable for a greater amount of damages and will not be able to rely on ancillary revenue streams as alternative sources of income. In effect, unconscionability and involuntary servitude are more prevalent than ever before.

For these reasons, the California legislature should repeal section 2855(b). Only then will recording artists be able to enjoy the same rights that all other creative artists enjoy under the protection of the statute. Only then will the Seven Year Statute be able to return to its original purpose of protecting one's natural liberty.

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