ROCK AND ROLL ROYALTIES, COPYRIGHTS AND CONTRACTS OF ADHESION: WHY MUSICIANS MAY BE CHASING WATERFALLS

STARR NELSON

Abstract

Copyrights form the basis of every recording contract. When a recording artist signs his or her first recording contract, the artist retains the copyright in the musical work but transfers ownership of the sound recording to the record company. With respect to any subsequent recording contract, the artist is not on equal bargaining footing with the record company because the record company already owns certain copyrights in the previous recording. This Comment proposes that courts recognize this unequal bargaining power when construing what is, in effect, a contract of adhesion.

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ROCK AND ROLL ROYALTIES, COPYRIGHTS AND CONTRACTS OF ADHESION: WHY MUSICIANS MAY BE CHASING WATERFALLS

STARR NELSON*

"I work all night, I work all day, to pay the bills I have to pay ... [a]nd still there never seems to be a single penny left for me."[1]

INTRODUCTION

Lisa Lopes, Rozanda Thomas and Tionne Watkins grew up in Atlanta, Georgia with dreams of "making it big" in the music industry.[2] The girls supported themselves with jobs such as fast food workers and hair stylists while working toward their big break.[3] Tionne and Lisa met their first manager in a beauty shop in Atlanta.[4] They had been singing under the name "Second Nature," and it was their manager's idea to add Rozanda to the group. Thus, the group "TLC" was born.[5]

Lisa "Left Eye" Lopes, Rozanda "Chilli" Thomas and Tionne "T-Boz" Watkins hit the ground walking when they scored their first hit record "Oooooooohh-on the TLC tip."[6] The year was 1992 and the group had just released their debut album.[7] In 1994, the girls found even more success with their second album, "Crazysexycool."[8]

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[1] Abba, *Money, Money, Money, on* ARRIVAL (Polar Records Int'l AB 1976) (written by Benny Anderson and Bjorn Ulvaeus).

[2] In this Comment, "music industry" refers to the collection of musicians, recording labels, radio stations, cable music outlets such as MTV, and anyone else whose livelihood revolves around making, producing or selling popular music. For a detailed discussion of the music industry, see JAY S. KENOFF, ENTERTAINMENT INDUSTRY CONTRACTS § 140.01 (1999). The entertainment industry covers everything from artist recording contracts to merchandising. *Id.* The subject matter can at times be so pervasive and so different than other disciplines within the entertainment industry that an attorney who considers him or herself an "entertainment attorney" may have little knowledge about the entertainment business in general or particular areas in the entertainment business. *Id.*

[3] *The Music Stories: TLC, at* http://www.themusicstories.com/Stories/tlc (last visited Oct. 23, 2001).

[4] *See History of TLC, at* http://www.tlclive.com/history.shtml (last visited Oct. 23, 2001) (providing that the manager, Perri "Pebbles" Reid, received her own acclaim in 1988 when she released her first album entitled "Pebbles" including a string of hit singles including "Girlfriend" and "Mercedes Boy.").

[5] The term "TLC" is an acronym representing the first letters of the names of all three female members, Tionne "T-Boz" Watkins, Lisa "Left Eye" Lopes, and Rozanda "Chili" Thomas. Prior to forming TLC, the three original members (Tionne Watkins, Lisa Lopes, and Crystal) were known as Second Nature. For a detailed discussion of TLC's history, see History of TLC, *at* http://www.tlclive.com/history.shtml (last visited Oct. 23, 2001).

[6] Donna Freydkin, *TLC's Glam Goddesses Resurface With 'Fan Mail', at* http://www7.cnn.com/SHOWBIZ/Music/9902/25/tlc (last visited Oct. 23, 2001).

[7] *Id.*

[8] *TLC Biography, at* http://www.mtv.com/bands/az/tlc/bio.jhtml (last visited Oct. 23, 2001).

Several of their singles did very well on the Billboard charts including "Ain't 2 Proud 2 Beg," which rose to number five on the Billboard charts, "Baby-Baby-Baby," which rose to number two, and "What About Your Friends," which climbed to number seven.[9] TLC sold 10 million copies of "Crazysexycool" worldwide.[10]

Despite this apparent success, the girls from Atlanta who dreamed of making it big in the music industry were forced to file for bankruptcy in 1995 with liabilities of $3.5 million.[11] Further complications arose over the group's management, record label, and production company.

Since filing for bankruptcy, TLC has rebounded with many successful records and is apparently free of their early financial problems. The story of the difficulties that they had in their early years in the music industry illustrates the problems that many musicians face. The reality of the music industry is that the road to money, fame, and fortune begins in the complex world of the recording contract.[12]

In large part, an artist's personal economic success is dependent upon the early stages of his or her contract negotiations.[13] The problem is that there are more artists looking for a record company to sign them to a recording contract than there are record companies looking for artists to sign. That dramatic difference in the balance of power has been an extraordinary impediment to lawyers who negotiate on behalf of artists in record contracts for some time now.[14] To put it plainly, most record companies do not need Joe Blow artist in order to keep thriving as a successful record company. If musician Joe Blow does not want to accept the terms of their recording contract, musician Joe Schmow will gladly accept the terms. Record companies never run out of a talent pool to choose from, but the artist will eventually run out of interested record companies. At first glance, it would seem that the parties to a recording contract are no different than any other contract in the law. However, when one considers the particular circumstances of the artists and record companies in the music industry, it becomes clear that there is a definite inequality among the players in the equation.

This Comment discusses the problems that the artists face when negotiating a recording contract. Part I.A discusses the impact of copyright law on a recording contract. Part I.B then explores the intricacies of a typical recording contract. Part

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[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *See TLC Biography*, *supra* note 8. Record contracts are offered by major and independent record labels alike. The main difference between the two is that independent record companies release albums without the same financial support that many major record labels enjoy. Some independent releases refer to an artist's ability to put out a record on his or her own.

[13] JEFFREY BRABEC & TODD BRABEC, MUSIC, MONEY, AND SUCCESS: THE INSIDER'S GUIDE TO THE MUSIC INDUSTRY, 69, 412 (1994). Record contracts are like complex puzzles. *Id.* One word or phrase in a 50,000-word contract can have a great economical effect on the artist. *Id.* That is why artists and their attorneys need a basic understanding of the terms and concepts found in most recording contracts. *Id.* The amount of money that an artist will eventually take home is almost completely dependent on the words in the recording contract. *Id.*

[14] KENOFF, *supra* note 2, at § 140.01(1). The complex nature of contracts in the entertainment business is due to sophisticated industry practices. *Id.* These industry practices have evolved from the growth of new technologies and forms of exploitation in the entertainment business as a whole. *Id.* The result of such practices has brought forth changes in business trends, the use of complicated royalty formulas, and the continuing attempts of the contracting parties to the contract to avoid the problems of past contractual arrangements. *Id.*

II.A describes the common law notion of a contract of adhesion where the parties' have a large disparity in bargaining power. Part II.B analyzes several cases where a disagreement arose with respect to a recording contract. Part III.A posits that the typical recording contract is a contract of adhesion. Part III.B proposes that courts recognize the relative positions of the parties to a recording contract and take that into consideration when arbiting such disagreements.

I. COPYRIGHT LAW AND THE RECORDING CONTRACT

A. Copyright Law

One of the most basic yet important elements of the entire creative process begins in the world of copyrights.[15] The reality is that the rights associated with copyrights are what are at stake in a recording contract. What is at stake often depends on the artist's role in the creative aspects of the recording.[16] If the artist is simply a performer at heart, then the role of copyrights as a form of income has very little importance.[17] However, if the artist is in line with many of the versatile performers of this generation, their interests in the final recording goes much further than lending vocal performances to a couple of tracks merely for the enjoyment of performing.[18] From the perspective of the artist who is also a musician, the statutory

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[15] *See, e.g.*, Jack Gee, Jr. v. CBS Inc., 471 F. Supp. 600 (E.D. Penn. 1979) (providing that, to establish a claim for copyright infringement, the plaintiff must specify the works in question, that the plaintiff owned the copyright, that the work was registered, and how the defendant infringed). The U.S. Constitution gives Congress the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. Const. art. I, § 8, cl. 8. The U.S. Copyright Act of 1976 was enacted after the Copyright Act of 1908, bringing with it a number of changes.

[16] DAVID BASKERVILLE, MUSIC BUSINESS HANDBOOK AND CAREER GUIDE 301-02, (6th ed. 1995). There are a number of different roles in the entertainment business. *Id.* One of the most important positions in relation to the artist is the producer. *Id.* The producer is like the "director" who brings together the two elements of song and performance to make a successful recording. *Id.* The producer has the difficult task of matching the artist to the specific repertoire of music. *Id.* An excellent producer manages to make a successful combination more often than not. *Id.* In addition to being able to meld artist and song, the producer must also have a working and sometimes sophisticated knowledge of the technological elements that are important to making music. *Id.* That is why many music producers today are also very skilled and talented engineers. *Id.*

[17] Henry Hansmann & Marina Santilli, *Authors' and Artists' Moral Rights: A Comparative Legal and Economic Analysis*, 26 J. LEGAL STUD. 95, 96 (1997). Other nations recognize that the author and artist have an interest in their work that is separate from copyright. *Id.* This interest can even be obtained by the author and artist after they have transferred their copyrights to other persons. *Id.* These legally recognized interests are collectively referred to as authors' and artists' "moral rights": the right of integrity, under which the artist can prevent alterations in his work; the right of attribution or paternity, under which the artist can insist that his work be distributed or displayed only if his name is connected with it; the right of disclosure, under which the artist can refuse to expose his work to the public before he feels it is satisfactory; and the right of retraction or withdrawal, under which the artist can withdraw his work even after it has left his hands. *Id.*

[18] *See* BASKERVILLE, *supra* note 16, at 588 (providing that tracks are one recorded portion of combined tracks, as in "24-track" recording; the sound on one track, as in "the bass track").

law of copyrights eventually translates to money.[19] The royalty points that are negotiated in the early stages of a recording contract are important because they determine the eventual income for the artist.[20]

The rights found in copyright law are embodied in the United States Copyright Act of 1976.[21] Section 102(a)(2) of the Copyright Act provides for copyright protection for "musical works, including any accompanying words."[22] The Act was created to give copyright owners an exclusive right in certain works that are "fixed in any tangible medium of expression."[23] The works must be "original works of authorship."[24] In this Comment, an "original work of authorship" is a song or sound recording that is fixed in a tangible medium of expression, typically a record or compact disc.[25]

Copyrights give artists enormous power.[26] With respect to musical recordings, copyrights allow artists to control the ways in which their works are exploited.[27] Artists have the power to sell, trade or license their rights in their copyrighted

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[19] RICHARD SCHULENBERG, LEGAL ASPECTS OF THE MUSIC INDUSTRY: AN INSIDER'S VIEW OF THE LEGAL ASPECTS OF THE MUSIC BUSINESS 437 (1999). Copyrights are often viewed as a bundle of rights, each of which can be copyrighted separately and sold, assigned, leased, and/or licensed separately. *Id.* at 494. A copyright is like a telephone cable which is made up of many individual strands of wire, each of which can carry a different message. *Id.* Similarly, a copyright is made up of many individual rights, and each right within that copyright is like an individual strand of cable. *Id.*

[20] MARK HALLORAN, THE MUSICIAN'S BUSINESS AND LEGAL GUIDE: A PRESENTATION OF THE BEVERLY HILLS BAR ASSOCIATION COMMITTEE FOR THE ARTS, 114, 441 (1996). Music publishing has been the major source of revenue for songwriters since the turn of the century. *Id.* There are four general categories of revenue in the music publishing industry: public performance income; mechanical rights income; sheet music income; and synchronization income. *Id.*

[21] Copyright Act of 1976, 17 U.S.C. §§ 101-810 (1994 & Supp. 1999).

[22] 17 U.S.C. § 102(a)(2) (1994).

[23] 17 U.S.C. § 102(a) ("A work is 'fixed' in a tangible medium of expression when its embodiment in a copy or phonorecord ... is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration."). It is no longer required that the song be reduced to written form in conventional musical notes. H.R. REP. NO. 94-1476, at 53 (1976). In 1908, the Supreme Court, in *White-Smith Music v. Apollo Co.*, held that the music must be in "a written or printed record in intelligible notation" to receive copyright protection. 209 U.S. 1, 17 (1908). This was expressly overruled as part of the 1976 Copyright Act. H.R. REP. NO. 94-1476, at 53.

[24] 17 U.S.C. § 102. There are two facets to the original work of authorship requirement. Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991). First, the author must have engaged in some intellectual endeavor and not merely have copied the work. *Id.* Second, the work must exhibit some minimal amount of creativity. *Id.* In *Feist*, the Court found that white page listings in a telephone book did not meet the originality requirement. *Id.* at 363-64.

[25] 17 U.S.C. § 101 (1994 & Supp. 1999). The Copyright Act provides that a work is "created" when it is fixed in a copy or phonorecord for the first time. *Id.* Where a work is prepared over a period of time, the portion of it that has been fixed at any particular time constitutes the work as of that time, and where the work has been prepared in different versions, each version constitutes a separate work. *Id.*

[26] *See generally* Edward T. Saadi, *Sound Recordings Need Sound Protection*, 5 TEX. INTELL. PROP. L.J. 333 (1997). Saadi contends that the United States Copyright Act favors composers over recording artists and business over artistic integrity. *Id.* at 334. Saadi proposes that section 114(b) of the Copyright Act should be replaced with a new standard for determining infringement of sound recordings and for providing greater protection of moral rights for recording artists. *Id.*

[27] *See* BRIAN MCPHERSON, GET IT IN WRITING: THE MUSICIAN'S GUIDE TO THE MUSIC BUSINESS 36 (1991).

work.[28] In addition, artists have the exclusive right to reproduce the work, the right to prepare derivative works, the right to distribute copies or phonorecords, the right to perform the copyrighted works publicly, and the right to display the copyrighted work publicly.[29] In order to secure a copyright, the artist need only create the work and then fix it in a tangible means of expression.[30] Though there are benefits to copyright registration, registration is not required in order for songs to be protected.[31]

Sound recordings represent the total embodiment of the song.[32] Because § 102(a)(2) protects "musical works, including any accompanying words," there are potentially two separate copyrights for a musical work.[33] One copyright is in the

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[28] *Id.*

[29] 17 U.S.C. § 106 (1994 & Supp. 1999). The Copyright Act defines a derivative work as:

> [A] work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations or other modifications that as a whole represent an original work of authorship, is a "derivative work."

17 U.S.C. § 101. The Copyright Act defines copies as:

> [M]aterial objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term "copies" includes the material object, other than a phonorecord, in which the work is first fixed.

Id.

[30] 17 U.S.C. § 102 (1994). Works can be fixed in a "tangible medium of expression" by a number of means. For music, the artist need only write down the words of the music on a piece of paper or record it on an audio or video tape. *See* MCPHERSON, *supra* note 27, at 36.

[31] *See* Greenwich Film Prods. S.A. v. DRG Records, 833 F. Supp. 248 (S.D.N.Y. 1993). Although a person does not have to register the work to be entitled to a copyright, before a copyright holder can bring a suit against someone for copyright infringement, registration is required. 17 U.S.C. § 411 (1994 & Supp. 1999). However, in response to the Berne Convention Implementation Act, any work whose country of origin is a Berne Convention nation does not have to go through the formality of being registered before a suit for its infringement may be maintained in the United States. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, S. TREATY DOC. NO. 99-27, 828 U.N.T.S. 221 (last revised at Paris, July 24, 1971).

[32] 17 U.S.C. § 101. Sound recordings are "works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied." *Id.* The copyright protects the actual sounds on the record, disc, or tape and not the physical object of the record itself. Dowling v. United States, 473 U.S. 207, 227 (1985). The ownership of a record's copyright is normally in the record company name as part of the negotiated artist contract. *Id.*

[33] 17 U.S.C. § 102(a)(2). The exclusive right of the owner of copyright in a sound recording under § 106(1) is limited to "the right to duplicate the sound recording in the form of phonorecords or copies that directly or indirectly recapture the actual sounds fixed in the recording". 17 U.S.C. § 114(b) (1994 & Supp. 1999). The exclusive right of the owner of copyright in a sound recording is limited to the right to prepare a derivative work "in which the actual sounds fixed in the sound recording are rearranged, remixed, or otherwise altered in sequence or quality." *Id.* The exclusive rights of the copyright owner in a sound recording do not extend to the duplication of another sound recording that consists entirely of "an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording." *Id.*

musical composition performed and captured in the recording.[34] The other copyright is in the lyrics and musical notes reduced to writing.[35] To make this distinction, the Copyright Act refers to the written composition and lyrics of the song as the "musical work."[36] The recorded performance of a musical work is referred to as the "sound recording."[37]

As the composer of the musical work and sound recording, the artist enjoys all of the rights expressed under § 106 of the Copyright Act.[38] However, when the artist signs a recording contract, he or she, while retaining the rights to the musical work, transfers the ownership of the sound recording to the record company.[39]

B. The Recording Contract

In a recording contract, the artist receives compensation for the sound recording or recordings in a number of ways.[40] First, there is the advance money.[41] Musical artists that are signing their first recording contract usually see the advance as their first tangible sign of success.[42] What many artists fail to realize, particularly when they are excited at signing their first recording contract, is that record companies typically recoup all advances given in a recording agreement.[43] Record companies will set up an accounting, known as a recording fund, for each project.[44] The company will keep track of all the costs associated with that project including the cost associated with producing, recording, and manufacturing the record.[45] Once the record is released and begins bringing in sales, the record company will apply any record royalties that the artist earns from sales against any advances paid on behalf

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[34] *See* F.A. Mills v. Standard Music Roll Co., 223 F. 849, 851 (D.N.J. 1915) (noting that the unauthorized use of the words or music would be considered an infringement even though they were not copyrighted separately).

[35] *See* Saadi, *supra* note 26, at 335.

[36] 17 U.S.C. § 101.

[37] *Id.*

[38] Besides the artist who is a composer in the songwriter sense of the word, the soundtrack composer is usually an employee for hire. BASKERVILLE, *supra* note 16, at 494. The composer is hired to create the score and, sometimes, songs for the soundtrack of a film, television show, etc. *Id.*

[39] *Id.* at 337. Once the sound recording has been created in a recording session, the record company will then present a series of sound recordings on a compact disc, cassette, or album to present them to the public. *Id.*

[40] HALLORAN, *supra* note 20, at 338.

[41] *Id.*

[42] MCPHERSON, *supra* note 27, at 61.

[43] David C. Norrell, *The Strong Getting Stronger: Record Labels Benefit From Proposed Changes to the Bankruptcy Code*, 19 LOY. L.A. ENT. L. REV. 445, 454 (1999). After an increase in the number of artists filing for bankruptcy, record labels began to realize that artists had an effective way of escaping their recording contracts. *Id.* Norrell discusses how the proposed changes to the bankruptcy laws threaten to elevate the record companies rights and interests above the artist. *Id.* The new laws would restrict the artist's ability to get out of their current recording contract by filing for bankruptcy. *Id.*

[44] MCPHERSON, *supra* note 27, at 62.

[45] *Id.*

of the artist.[46] Thus, the advance will be deducted from any money the artist realizes from the sale of his or her musical work.[47]

In reality, the advance is just as much of a gamble for the record company as it is for the artist.[48] The record company stands to lose its investment in advances and recording costs because there is no guarantee that the record it puts out will sell.[49] If the album does not sell, the record company is not able to recoup.[50] The record company takes a risk any time it signs a recording contract with a new and unproven artist.[51] The music and entertainment business is a very lucrative industry.[52] Many of the major record companies have been in the record making business for years and have made their fortunes from selling sound recordings. This realization underscores the realities of the recording contract—they are drafted to ensure that the record company comes out ahead no matter what.[53] This is why almost all advances are recoupable against royalties.[54] That is also why royalty provisions in recording contracts encompass as much as they do.[55]

Once the album has been distributed to the public, the record company and artist stand to profit from the sales that ensue.[56] The artist's profits are determined based on the royalty provisions in the recording contract.[57] Though there is no standard rate, the royalty rate that an artist can receive can range from 7% for records to 25% for configurations like compact discs ("CD's") and cassette tapes.[58] On average, new artists can expect a 10% to 12% royalty rate, whereas an artist with a history of sales will receive a royalty rate anywhere from 17% to 25%.[59]

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[46] Note this simplified example: An artist receives a $350,000 recording fund upon signing. If the entire recording fund is recoupable, the artist will need to have earned at least $350,000 in royalties just to break even. That means that the artist will not be paid from royalties until the record company has recouped all of the money it advanced on the artist's behalf.

[47] Norrell, *supra* note 43, at 455.

[48] SCHULENBERG, *supra* note 19, at 82.

[49] *Id.*

[50] *Id.*

[51] *See* Michael Laskow, *Getting a Record Deal: What You Need To Know To Get A Record Deal*, *at* http://www.taxi.com/insiders/wy.html (last visited Oct. 23, 2001).

[52] BASKERVILLE, *supra* note 16, at 257.

[53] *Id.* at 263.

[54] HALLORAN, *supra* note 20, at 340.

[55] *Id.*

[56] BRABEC & BRABEC, *supra* note 13, at 71.

[57] *Id.* The royalty provision has been described as the most important part of the recording agreement for the artist. *Id.* This is because it lets artists know how much they stand to make from each record sold. *Id.* Generally speaking, there are two types of royalties. MCPHERSON, *supra* note 27, at 65. Record royalties are what the record company will pay the artist for records sold. *Id.* In other words, record royalties are what is paid to the artist who plays and sings on a recording. *Id.* Mechanical royalties are what the record company pays to the songwriters and publishers of each song on the album. *Id.* Royalties are usually expressed in terms of percentages instead of dollar amounts. *Id.* Whereas some terms in a recording contract are considered standard, royalties are almost always a point of close negotiations because of their potential for profit. *Id.*

[58] MCPHERSON, *supra* note 27, at 66.

[59] *Id.* Royalty rates can either be based on the suggested retail price or the wholesale price of each recording sold. *Id.* If the artist's royalty percentage is based on the suggested retail list price of each recording that is sold, theoretically, the artist is in a better position initially. *Id.* For example, if the artist has a 10% royalty rate and the retail list price of the record is $12, the artist would theoretically receive $1.20 from each record sold. *Id.* However, a royalty percentage based on wholesale will dramatically reduce that amount. *Id.* The wholesale price is usually one half the

If an artist is unable to generate a satisfactory royalty rate in the recording contract, he or she will often negotiate an escalating royalty clause into his or her contract.[60] If the artist starts out with a low royalty rate, an escalating royalty clause serves to increase the artist's royalties proportionate with his or her success in selling albums.[61]

Although the record company will pay each artist a royalty on each copy of the sound recording sold, there is another way for the record company to make money as part of the recording agreement.[62] One of the single largest items deducted from the artist's royalty base is the cost of the covers, sleeves, and containers in which the recording is packaged.[63] These deductions are also called "container deductions" or "container charges." As with royalties, "container deductions" are always expressed in percentages and range anywhere between 15% to 25%.[64] For example, if the suggested retail list price ("SRLP") of the record is $16.00, at a 25% container deduction rate, a $4.00 deduction will be implemented against every record sold.[65] Instead of the artist being able to calculate royalties at the SRLP of $16.00, the added container deduction results in the artist's royalty being calculated at the reduced rate of $12.00 per record.[66]

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amount of the suggested retail list price. *Id.* Therefore, if the artist receives a 10% royalty at the wholesale price of $6.00, the artist would only receive $0.60 from each record sold. *Id.* Usually, the artist's royalty rate is based on the suggested retail price, but some major record companies use the wholesale price as the base. *Id.* In those instances, the artist's attorney should look for a royalty rate that is almost double what it would have been had the amount been based on retail. *Id.*

[60] SCHULENBERG, *supra* note 19, at 47.

[61] In addition to escalating royalties, record companies will often agree to increase the artist's royalty percentage if the artist's contract is renewed for additional option years. MCPHERSON, *supra* note 27, at 67.

[62] SCHULENBERG, *supra* note 19, at 50.

[63] Rebecca J. Gemmel, Note and Comment, *New Use and the Music Licensing Agreement*, 22 T. JEFFERSON L. REV. 239, 245 (2000). Gemmel discusses the progression of the Internet and digital technology as a means of distribution. *Id.* at 240-42.

[64] BRABEC & BRABEC, *supra* note 13, at 76. Interestingly, it costs record companies very little to package a CD, cassette or album, in actuality. *Id.* However, almost all record companies manage to build expensive packaging deductions into their recording contracts. *Id.* What is even more interesting and perhaps even unfair is that artists almost never can negotiate packaging deductions out of their recording contracts. *Id.* Packaging deductions have taken on a life of their own in the world of recording contracts, and it is almost universally accepted by attorneys and artists alike as just another means by which record companies manage to make their money. *Id.*

[65] MCPHERSON, *supra* note 27, at 68.

[66] BRABEC & BRABEC, *supra* note 13, at 75. In addition to packaging deductions, recording contracts also contain a number of reductions and deductions that are sometimes difficult to spot. *Id.* For example, there is no such thing as a standard royalty base price. *Id.* As discussed earlier, the royalty base price is the suggested retail list price ("SRLP") or wholesale price of a particular record (minus packaging costs). *Id.* Though most record companies use the SRLP for the purposes of exploring royalties, the SRLP of a particular record varies. *Id.* The different variations are called "price lines." The "price line" often depends on the status of the artist, the nature of the product recorded, and the length of time a particular album has been in commercial release. *Id.* This is important to note because an artist's royalty will usually be different depending on the price line under which an album is sold. *Id.*

Almost all record companies break their price line ranges into three groups. *Id.* The "top line" generally refers to the record company's bigger artists. *Id.* Artists in this category enjoy having albums with a suggested retail list price at the top of the price guidelines. *Id.* Those albums can sell for around $15. *Id.* Companies also have a mid-priced line which carries a suggested retail list price

The point of illustrating the intricacies of the recording contract is to show how an unwary and often unsophisticated artist who has dreamt of "making it big" in the music industry can be taken advantage of by a record company.

II. OWNERSHIP OF COPYRIGHTS AFFECTS THE ARTIST'S BARGAINING POWER IN RECORDING CONTRACT NEGOTIATIONS

A. Contracts of Adhesion

A contract of adhesion[67] is one where one party is able to dictate the terms of the agreement to the other party.[68] This typically occurs where one party has significantly more bargaining power than the other party.[69] The party in the superior position can then dictate the terms of the agreement to the other party "on a 'take it or leave it' basis."[70] Courts have been reluctant to intervene in such contracts and generally rely on the objective theory of contracts to refrain from relieving the complaining party of its obligation under the so called contract of adhesion.[71] The objective theory of contracts does not require "that a person intend or even understand the legal consequences of one's actions."[72] In fact, the law presumes that a person has read and completely understands each term of the agreement.[73]

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ranging between 20% to 40% lower than the price of the "top line" product. *Id.* Record companies will sometimes move an album from "top line" to mid line when they feel that they have a better chance of selling more copies at the lower SRLP. *Id.* Most record companies will also reserve the mid-line price range for albums released by their new artists. *Id.* In addition to the "top line" and mid-line albums, record companies also have a budget line. *Id.* Budget line albums typically carry an SRLP that is 30% to 50% less than the "top line" SRLP. *Id.* This price line is usually reserved for old albums once they stop selling at the mid-line price. *Id.* Once artists know which SRLP has been reserved for them, they will have an easier time calculating their royalties. *Id.*

[67] The term "contract of adhesion" originates in Edwin Patterson, *The Delivery of a Life-Insurance Policy*, 33 HARV. L. REV. 198, 222 (1919); *see* 1 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 4.26, at 480 n.4 (1990). The term was coined as "contrat d'adhesion" in R. Saleilles, *De la Declaration de Volonte* 229 (1901). *Id.*

[68] 1 FARNSWORTH, *supra* note 67, at 480.

[69] *Id.* Generally the adhesion argument is not applied to recording agreements, though it is commonly seen in tenant/landlord claims. For example, in *Standard Oil Co. of California v. Clyde A. Perkins*, the court defined an adhesion contract as a shorthand descriptive of standard-form printed contracts prepared by one party and submitted to the other on a "take it or leave it" basis. 347 F.2d 379, 383 n.5 (9th Cir. 1965). *Standard* involved a consignment agreement between two parties for the sale of petroleum oil on a non-exclusive basis. *Id.* at 383. When the consignee instituted a breach of contract suit against the consignor, without giving much detail into the reason for its finding, the court quickly determined that it was dealing with an adhesion contract. *Id.* at 381. With that fact under consideration, the court upheld the lower court's decision, finding in favor of the consignee. *Id.* at 383. The law has recognized that there is often no true equality of bargaining power in adhesion contracts. *Id.* Some courts will even recognize that inequality when construing some contracts. *Id.*

[70] *Standard Oil*, 347 F.2d at 383 n.5.

[71] *See* 1 FARNSWORTH, *supra* note 68, § 4.26, at 481.

[72] *Id.*

[73] *Id.*

This Comment does not assert that recording artists should be excused from recording agreements that they did not read. However, examples will show that recording contracts are designed to be so complex and involve many hidden costs that allow record companies to obscure the process by which artists get paid. This facet of the modern recording agreement effectively puts the record company in a far superior bargaining position than that of the artist.

Recording companies have been conducting business in this manner for some time now. In fact, though many in the industry balk at the terms that most artists are forced to accept, very little has been done to make things better. On some occasions, the artist will fight back by instigating a lawsuit against the record company. On other occasions, the disputes are settled long before the issue ever reaches the stage of litigation. However, when it does become an issue for litigation, the artist's displeasure with the contract is often clouded under many different disguises. However, the objective is always the artists' attempt at getting him or herself out of a particular "one-sided" recording contract.

B. Recording Agreements That Have Gone Bad

In *Ohio Players, Inc. v. Polygram Records, Inc.*, the Ohio Players, a popular 1970s funk music group, filed suit against their record company in an attempt to rescind their recording contract.[74] In 1975, the Ohio Players had signed a recording contract with Phonogram Records.[75] The 1975 agreement had not been favorable to the Ohio Players and, in 1995 they still were indebted to Phonogram for advances made against royalty payments.[76] In 1995, Polygram, successor-in-interest to Phonogram, convinced the Ohio Players to enter into a second recording agreement to release a "greatest hits" album to capitalize on a renewed interest in funk music.[77] The terms of the 1975 recording contract authorized the record company to make "recordings."[78] However, this agreement did not authorize Phonogram to distribute the recordings on compact disc, or license them as samples with other artists' recordings.[79] The 1995 agreement was drafted to allow Polygram to release prior recordings in compact disc format.[80] The Ohio Players were concerned with the allocation of royalty payments under the new agreement, having been unsatisfied with their financial realization from the old agreement.[81] Thus, the group was reluctant to enter into a new agreement unless the royalty issue could be resolved.[82] The Ohio Players believed that through the course of negotiations, the royalty issue

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[74] No. 99 Civ. 0033, 2000 U.S. Dist. LEXIS 15710 (S.D.N.Y. Oct. 25, 2000). The Ohio Players are probably best-known for their hit singles "Love Rollercoaster" and "Fire."

[75] *Id.* at *3.

[76] *See id.* (stating that the Ohio Players had "dug themselves into a large financial hole").

[77] *See id.* (noting that in the mid-1990s, "the music industry saw a renewed interest in funk music from the seventies").

[78] *Id.*

[79] *Id.*

[80] *Id.* In addition, the 1995 agreement was designed to allow Polygram to license the Ohio Players recordings as "samples" to be used with other artists' recordings. *Id.*

[81] *Id.*

[82] *See id.* (noting that, despite the apparent contentions of Polygram during contract negotiations, the terms of the royalty provisions were clear).

had been resolved.[83] However, they soon learned that the 1995 recording agreement was no more favorable than the 1975 agreement.[84] Specifically, they learned that Polygram was selling twelve different Ohio Players albums in compact disc format, but only the royalties from the "greatest hits" album were generating royalties payable to the Ohio Players' account.[85] The Ohio Players also learned that Polygram had licensed some of their songs to Burger King and Amoco for television and advertising purposes, and the group was not receiving revenue from such licensing.[86]

The group brought suit against the record company seeking rescission based on misrepresentation and fraud.[87] In addition, the group claimed unjust enrichment.[88] The court noted that rescission is a "drastic and extraordinary" measure, and a remedy only appropriate in situations where one party fraudulently induces another to contract, or where there has been such a material breach of contract "by the one party that the other party is justified in canceling the contract." [89] Although the group argued that Polygram fraudulently induced them to sign the contract by representing that they would establish a separate royalty account for sales of Ohio Players' recordings in the compact disc format as well as for commercial licensing, the court held that the language of the royalty provisions was clear.[90] Therefore, the court granted Polygram's motion for judgment on the pleadings and dismissed the rescission and unjust enrichment claims.[91]

In *Cafferty v. Scotti Brothers Records, Inc.*, the songwriter who penned many of the songs in the 1983 movie *Eddie and the Cruisers* sued his record company in a dispute about royalty payments.[92] John Cafferty and his band, the Beaver Brown Band, performed the songs in the movie and Cafferty signed a recording contract covering the movie soundtrack.[93] In addition, Cafferty and his band signed a recording contract for the creation of records in their own name.[94] Two albums and a sequel to the movie including another soundtrack were eventually released.[95]

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[83] *See id.* ("Given the extent to which Plaintiff was indebted to Defendant, [the] concession by Defendant [that compact disc sales would generate royalties] was a major factor in Plaintiff's decision to enter into the 1995 Agreement.").

[84] *Id.*

[85] *Id.* at *4.

[86] *See id.* (relating that "Fire" and "Love Rollercoaster" were the specific songs that had been licensed for television advertising purposes).

[87] *Id.* The Ohio Players also sued for unlawful appropriation of the two songs that had been licensed for television advertising purposes. *Id.* at *11. The court held that the claim was preempted by federal copyright law, as the right complained of fell within the exclusive right of reproduction. *Id.* at *14; *see also* 17 U.S.C. § 106(1) (1994 & Supp. 1999).

[88] *Ohio Players*, 2000 U.S. Dist. LEXIS 15710, at *5.

[89] *Id.* at *6.

[90] *See id.* ("Defendant may have stated its intention to act in a manner consistent with Plaintiff's interest, but the language of the contract, not the statements made prior to the contract's execution, is controlling.").

[91] *Id.* at *17.

[92] 969 F. Supp. 193, 196 (S.D.N.Y. 1997).

[93] *Id.* The movie told the story of a rock and roll band that struggled to make ends meet and struggled to make a name for themselves in the music industry. *Id.* at 195.

[94] *See id.* (noting that sales of the movie soundtrack "soared" while sales of the John Cafferty and the Beaver Brown Band recordings "met with limited success").

[95] *Id.* at 196.

However, the record company failed to pay certain royalties to Cafferty.[96] In addition to not paying royalties, the record company released previously unreleased Cafferty music and re-released Cafferty's two albums packaged and marketed as the music of the fictitious band Eddie and the Cruisers in an attempt to recoup its investment.[97]

Cafferty filed suit against the record company alleging, inter alia, copyright infringement and breach of contract.[98] The court held that Cafferty's copyright claims were rejected because "they ignore the clear language of the relevant contracts."[99] The court found that these contracts gave the record company the irrevocable "universewide, perpetual right ... to syncronize, record, perform and otherwise exploit" the songs.[100] With respect to the breach of contract claims, Cafferty asserted that the record company had avoided paying royalties on certain quantities of records and goods by giving them away to their customers.[101] In addition, Cafferty contended that the record companies failed to pay royalties on the release of an album comprised of live performances of John Cafferty and the Beaver Brown Band.[102] Cafferty prayed for rescission of the contract on the grounds that these were material breaches and also for "reversion to Cafferty of all the rights in the recordings and compositions at issue."[103] Predictably, the court noted that rescission of a contract is an "extraordinary remedy" and, in the case of a musical composition, cannot be granted for failure to pay royalties unless the failure to pay is total.[104]

In *Porfirio Pina v. Sony Discos, Inc.*, singers in the musical group "Proyecto Uno" sought rescission of their recording contract for failure to pay royalties.[105] By a 1991 agreement, the group had granted the record company the "right to reproduce, sell[,] assign, use in every possible way without restriction as to the works, compositions and performances of the group Proyecto Uno."[106] The recording contract was for five years and provided for an automatic renewal within sixty days from the expiration

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[96] *See id.* at 197 (finding that two types of royalties were due Cafferty under the recording contract—mechanical royalties and artist royalties). Mechanical royalties are paid when an artist's song is used in a sound recording. *Id.* Artist royalties are paid when an artist performs on a sound recording. *Id.*

[97] *Id.*

[98] *Id.* at 196.

[99] *See id.* at 199 (noting that a joint owner of a copyright cannot be sued for copyright infringement).

[100] *Id.* at 198. In actuality, the parties to these contracts were Cafferty and Aurora Film Partners, a predecessor to Scotti Brothers Records, the defendant in this case. *Id.* The agreements granted these rights to Aurora and its licensees and assignees. *Id.*

[101] *See id.* at 201 (providing that the underlying contracts do not obligate the record company to pay royalties on records distributed for promotional purposes, so called "free goods").

[102] *Id.* at 201. The court notes that Cafferty had standing to complain about the royalties from these live albums because Cafferty was effectively "competing against himself." *Id.* The court reasoned that "[a]t the same time that he was continuing to try to establish himself as a songwriter and performing artist in his own right, his songs and recordings that had nothing to do with Eddie and the Cruisers were being sold as the music of Eddie and the Cruisers." *Id.*

[103] *Id.* at 205.

[104] *Id.* The court cited several cases where the Court of Appeals for the Second Circuit had held that partial payment of royalties precluded rescission of a recording contract. *Id.*

[105] No. 97 Civ. 6445, 1999 U.S. Dist. LEXIS 8070 (S.D.N.Y. May 26, 1999).

[106] *Id.* at *2. The group entered into the original recording contract with J&N Records. *Id.* The group filed a copyright infringement claim against Sony on the basis of Sony's agreement with J&N to distribute the group's music. *Id.* at *4.

date.[107] In 1996, the parties began exchanging a series of letters alleging a number of breaches, including failure to pay royalties.[108] However, the record company exercised its option to renew the recording contract without addressing the group's contention that they were owed royalties.[109] Consequently, the group filed a suit against the record company in state court disputing the terms and conditions of the contract.[110] While that suit was pending, the record company entered into an agreement with the defendant in this case to distribute Proyecto Uno's sound recordings.[111]

The court determined that the copyright infringement claim against the defendant was incidental to the group's claim for rescission of the recording agreement with the record company.[112] The group tried to argue that their copyright infringement claim against Sony was not incidental to their claim against J&N because their issue with Sony could be resolved simply under the Copyright Act.[113] However, the court found that the primary purpose of the Sony litigation was to see a resolution of the contract dispute between the group and the record company.[114]

III. PROPOSAL

In construing recording contracts, courts fail to recognize the relative positions of the parties to the contract. Particularly in the case of an artist signing his or her first recording contract, the artist is typically a young musician who has been working for years to try to get a foothold in the music industry. The record company is usually a large corporation that, because of the scarcity of recording contracts, can dictate the terms on a take it or leave it basis. In addition, the record company is typically very sophisticated compared to the artist.

For example, the court in the *Ohio Players* case failed to recognize the relative bargaining strength of the parties to the recording contract at issue. As part of the original recording contract, the 1975 agreement, the Ohio Players transferred ownership in the copyrights to their recordings to the record company.[115] Consequently, when the Ohio Players wanted to capitalize on the success of their funk music from the 1970s, the only recording company with which they could contract was Polygram. The fact that Polygram owned the copyrights in the Ohio Players' sound recordings created a situation where the record company was able to offer the group a recording contract on a take it or leave it basis—a contract of adhesion.[116]

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[107] *Id.* at *2. Pursuant to the agreement, J&N obtained copyright registrations for four Proyecto Uno recordings: "Esta Pegao on April 1, 1994; In Da House on December 12, 1994; Todo El Mundo on April 15, 1996." *Id.* at *4.

[108] *Id.*

[109] *Id.*

[110] *Id.* at *3.

[111] *Id.* at *4.

[112] *Id.* at *8.

[113] *Id.*

[114] *Id.* at *10.

[115] *See* Ohio Players, Inc. v. Polygram Records, Inc., 99 Civ. 0033, 2000 U.S. Dist. LEXIS 15710, at *3 (noting that the 1975 agreement makes this "perfectly clear").

[116] *See id.* (finding that the recording contract was "slanted in favor of the record company").

Similarly, the court in *Cafferty v. Scotti Brothers* noted that the movie Eddie and the Cruisers told the story of a fictitious struggling rock and roll band that actually fared much better than the real one, John Cafferty and the Beaver Brown Band.[117] Had the court recognized that the relative bargaining strength between the real band and the record company, the court would have seen that it was dealing with a contract of adhesion.

This Comment proposes that courts view recording contracts as contracts of adhesion to afford artists the same protection that tenants and consumers have been afforded.[118] When one considers the complexity of the typical recording contract coupled with the fact that there are many artists competing for few recording contracts, it becomes clear that they are adhesion agreements.

Artists sign recording contracts, unfair terms and all, because they typically see it as a once in a lifetime opportunity for them. Record companies realize this and use it to their advantage by continually promulgating standardized one-sided agreements to offer to young, naïve artists. It could be argued that the record companies even "bait" the artists by providing them with lavish gifts and luxuries in the form of advances. Of course, artists are usually won over long before they learn the meaning of the word "advance." When artists finally recognize the contractual significance of the advance, they are likely promised that they will be the next big stars, so they have no reason to fear recouping all that the label has advanced.

What artists do not realize are the real hard facts. The facts are that though many artists are signed, very few ever make it to superstardom. That means that it will take the less fortunate ones even longer to repay all that they owe to the record companies. The fact is that even if the artist is armed with all of this knowledge prior to contract negotiation time, it probably would not have a significant effect on the end result. Though artists may be able to negotiate an extra royalty point or two, once the extra deductions and calculations are made, they will end up getting exactly what the record company wants them to get. That is because many recording contracts were carefully created to ensure that the record company comes out on top. And why shouldn't they—they have the most to lose. There is absolutely nothing wrong with the fact that record companies look out for their best interests when pursuing recording contracts. However, courts should at least provide an easier out for the little man.

By construing recording contracts as adhesion contracts, a court does four things. First, the court forces the Goliath major record labels to play fairly by not allowing them to take advantage of the David-sized artist. Second, in construing recording contracts as adhesion agreements, the court protects the artist and deters the record company from drafting complicated agreements designed to obscure payment mechanisms. Third, particularly in the case of parties that have signed multiple recording contracts, it forces the courts to realize that the artist almost certainly assigned copyrights to the record company. This fact likely leaves the artist with no other option than to enter into a subsequent recording contract on the

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[117] Cafferty v. Scotti Bros. Records, Inc., 969 F. Supp. 193, 196 (S.D.N.Y. 1997).

[118] *See, e.g.*, O'Callaghan v. Waller & Beckwith Realty Co., 155 N.E.2d 545 (Ill. 1958) (finding a residential lease with an exculpatory clause a contract of adhesion); *see also* Consumer Credit Protection Act, 15 U.S.C. § 1601 et seq.; Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301-2312 (1994 & Supp. 1999).

record company's terms and points to the need to allow the artist a mechanism to get out of an unfavorable and often outright unfair agreement. Fourth, treating such agreements as contracts of adhesion would allow for rescission of the agreement even if the record company had paid royalties.

Had *Ohio Players*[119] been decided along an adhesion contract analysis, the court would have recognized that the group was compelled to enter into the second agreement with Polygram for two reasons. First, the original recording agreement was so unfavorable to the group that, twenty years later, they were still indebted to Polygram due to unrecouped advances. Second, by the terms of the first agreement, Polygram held the copyrights to all the group's hit songs. Treating the agreement as a contract of adhesion would allow the court to examine the circumstances surrounding the signing of the agreement as well as closely examining the terms of the contract itself. Though not indicated by the facts of the case, the contract was most likely a standardized contract used with many of Polygram's artists. Once the court found that the contract was standardized, they could have also determined that the group was probably forced to accept it on a take-it-or-leave-it basis. On the facts of the case, the record company's disregard for the best interest of the artist is evidenced by the royalty provisions in the 1995 agreement. The court would then allow the Ohio Players to rescind the agreement and allow the group to retain exclusive copyrights in their songs.

Had the court in *Cafferty*[120] recognized that the recording contract there was a contract of adhesion, it may have allowed the artist to rescind the agreement. In that case, the court noted that a music recording agreement could not be rescinded unless the recording company had failed to pay any royalties. The court noted that Scotti Brothers had paid Cafferty some royalties and, therefore, refused to rescind the contract. Treating the agreement as a contract of adhesion would have allowed the court to relieve Cafferty of the unfavorable agreement.

In *Pina*,[121] the artists tried to extricate themselves from an agreement under which they had yet to draw a royalty check by filing a copyright infringement suit. The court recognized that the artists were attempting to get themselves out of a restrictive recording contract and found that the copyright interests were incidental to the contract and dismissed the claim. By applying the doctrine of contracts of adhesion, the court could have focused on the standardization and one-sidedness of the recording agreement and allowed the artists to rescind the agreement.

This Comment does not suggest that all recording contracts are bad merely because they are recording contracts. Nor does this Comment suggest that artists be allowed to get out of every contract they are unhappy with by claiming they are adhesion contracts. Instead, what is suggested here is that courts recognize some recording contracts as contracts of adhesion. The court should consider all of the elements involved in negotiating a recording contract. From royalty points to recoupable advances, courts should recognize that record companies are in great positions of power. With such power, they have enormous control over the way in

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[119] Ohio Players, Inc., v. Polygram Records, Inc., No. 99 Civ. 0033, 2000 U.S. Dist. LEXIS 15710 (S.D.N.Y. Oct. 25, 2000).

[120] Cafferty v. Scotti Bros. Records, Inc., 969 F. Supp. 193 (S.D.N.Y. 1997).

[121] Pina v. Sony Discos, Inc., No. 97 Civ. 6445, 1999 U.S. Dist. LEXIS 8070 (S.D.N.Y. May 26, 1999).

which an artist will make his or her money. If courts have a better understanding of what goes on when negotiating a recording contract, they will have an easier time identifying a contract that is more one-sided than another. It could mean the difference between David standing on a plain to fight Goliath or on a hill of equal footing.