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CROSSROADS: MODERN CONTRACT DISSATISFACTION AS APPLIED TO SONGWRITER AND RECORDING AGREEMENTS

TODD M. MURPHY*

INTRODUCTION

If you want to learn how . . . to make songs yourself, you take your guitar and you go to where the road crosses that way, where a crossroad is. Get there, be sure to get there just a little 'fore 12:00 that night so you'll know you'll be there. You have your guitar and be playing a piece there by yourself. . . . A big black man will walk up there and take your guitar, and he'll tune it. And then he'll play a piece and hand it back to you. That's the way I learned to play anything I want.¹

A young man, barely visible through the dust swept up from the road, walks wearily through the Mississippi countryside.² Hanging at his side, his left hand clutches a beaten and weathered guitar case. There, among sparse patches of grass and crackling road beneath his feet, he approaches a crossroads.³ He stops, turns, peers off as the four roadways wind away from him into the

* J.D. Candidate, June 2003. B.A. in English and Pre-Professional Studies from The University of Notre Dame, 1996. The author would like to thank the Editorial Board of The John Marshall Law Review for their patience, hard work, and commitment. Extreme gratefulness is owed to those who always challenge and refuse to stop believing in me, and to Leanne Metzcus for always having a little faith. This article is dedicated to those who show me, by example, the person I want to be, and who provide me with guidance through all my crossroads: Ryan, Amanda, Kyle, and, my heroes, Mom and Dad. I am truly awestruck by your constant inspiration, commitment, and love.

1. PETER GURALNICK, *SEARCHING FOR ROBERT JOHNSON* 18 (Plume 1998). This story was told by LeDell Johnson, brother of the late blues musician, Tommy Johnson, upon whom the legend is based. *Id.*

2. Catherine Yronwode, *The Crossroads*, at <http://www.luckymojo.com/crossroads.html> (last modified July 29, 2001). This legend is usually attributed to blues musician Robert Johnson (1911-1938). GURALNICK, *supra* note 1. However, most sources equate the legend's beginnings with Tommy Johnson's meeting at a "crossroads" in Mississippi. Yronwode, *supra*. The musician Robert Johnson later used this legend to explain his own guitar talents, and the legend subsequently remained with him. *Id.*

3. *Id.*

distance, and slowly removes his guitar from its case. His name is Robert Johnson.⁴ He has come to these crossroads in rural Mississippi to become a blues musician. Robert puts his hands to the instrument and lets his fingertips fall softly across the strings, producing a hollow ring.

As the last note reverberates into the afternoon air, a car appears in the distance, the only life Robert has seen in hours. Pulling into the intersection and slowly stopping beside the musician, a figure appears from the back seat. He stands next to Robert, his skin as black as onyx, his towering frame shading Robert's face from the sun.⁵ The stranger takes the guitar, quickly tunes it, glides his thumb down the strings, and returns it to Robert, instilling a gift and sealing the pact.⁶

Those who saw Johnson's progress as a guitar player were convinced that he sold his everlasting soul to the devil in order to become so talented.⁷ Johnson became one of the most prolific and hallowed blues artists in the history of music.⁸ However, the consequences were grave.⁹ It was here at the crossroads, with the devil's pen, that Robert Johnson's first recording contract was signed.¹⁰

4. Courtney Danforth & Adriana Risetto, *The Robert Johnson Notebooks*, at <http://xroads.virginia.edu/~MUSIC/blues/rjbio.html> (last visited Aug. 4, 2002). Robert Johnson, originally named Robert Spencer after his stepfather, was born May 8, 1911, in Hazelhurst, Mississippi. *Id.*

5. See Yronwode, *supra* note 2 (stating that the "black" color of the individual in this case refers not to his race, but to his actual color as referenced by many actual African crossroads spirits).

6. *Id.* Greek, African, Indian, and American folklore repeatedly refer to the "crossroads" as a place of ritual and spirituality. *Id.* According to Hoodoo, an African-American Folk-Hagic Tradition, a "big black man" will visit one seeking to learn a skill at the crossroads. *Id.* This man will take the device, show the owner the proper method by playing it himself, and then return it. *Id.* The owner will then have the "gift of greatness" upon the instrument. *Id.*

7. Michael Downs, *Robert Johnson*, at <http://bluesnet.hub.org/artists/robert.johnson.html> (last visited Aug. 4, 2002).

8. *Id.* Robert Johnson influenced many modern blues musicians, such as Muddy Waters and Eric Clapton. *Id.* See also Greil Marcus, *Blues Beyond Time*, INTERVIEW, March 1999, at 89 (maintaining that, although sixty years has passed since Johnson was alive, "he persists as the most famous and influential blues musician who ever lived.").

9. *Robert Johnson Biography*, ROLLING STONE, at <http://www.rollingstone.com/artists/bio.asp?oid=1418986> (last visited Aug. 4, 2002). After his meeting with the devil at midnight at a crossroads near Dockery's plantation in Mississippi, Johnson was able to create the greatest blues anyone had ever heard. *Id.* However, a lifetime of internal torment is said to have been the payment for his success. *Id.* Johnson was known to have recurring nightmares of hellhounds chasing him. *Id.* He was murdered at the age of twenty-seven and was buried in an unmarked grave, finally free of his contract. *Id.*

10. See Downs, *supra* note 7 (stating Johnson supposedly told the story of the southern myth in his recording of "Crossroads Blues"). In the song, Johnson states that his reason for going to the crossroads was to hitch a ride.

The terms of Robert's legendary contract were simple and both parties carried out the duties promised.¹¹ Aside from its mythological drafter, Johnson's contract seems well within the bounds of an enforceable agreement. However, upon closer inspection, it is obviously unequal because, under the contract, Robert cannot negotiate its terms or terminate the deal. This disparity in bargaining power still exists today in recording studios, corporate boardrooms, and managers' offices. Agreements in music are still signed with blindness to consequences and a lack of adequate business savvy.¹²

Fitting amorphous, artistic expression into a strict body of contract law is often a necessary "evil" in order to execute the goals of both parties.¹³ The bargaining power of the parties can be grossly unequal and the basis of the contract, the value of the music, often increases beyond the foresight of either party.¹⁴ To further complicate matters, the adjudication process is insensitive to the contracts of artists and music publishers, and fair standards remain difficult to apply.

This comment focuses on the unique relationship formed when an artist signs a recording or publishing contract, and describes the ways that these agreements expand beyond the boundaries of the common contract model.¹⁵ This comment will

Id. However, according to the legend of the Deep South, "one went to the crossroads to make a deal with the devil." *Id.*

11. Yronwode, *supra* note 2; see also *supra* notes 6 & 7 and accompanying text.

12. Wallace Collins, *Bankruptcy: An Extreme Remedy for Unfair Contracts*, at <http://www.outersound.com/osu/contracts/bankrupt.html> (last visited Aug. 4, 2002).

13. DONALD E. BIEDERMAN, ET AL., *LAW AND BUSINESS OF THE ENTERTAINMENT INDUSTRIES* 554-55 (4th ed. 2001). Established songwriters will be less apt to sign an Exclusive Songwriter Agreement because of the complete rights that such a deal grants. *Id.* at 555. Artists will likely be required to relinquish copyrights to their compositions. *Id.* Inexperienced artists have less bargaining power, and most recording and publishing contracts are offered on a "take-it-or-leave-it basis" that allows the publisher increased access to the work. *Id.* at 554-56. Furthermore, without the marketing power of a record label, most artists will not have the longevity to continue to make and sell their compositions. Telephone Interview with Michael P. McCready, Music Law Offices (Feb. 1, 2002).

14. Robin Morley, *Contract Killers: Making Sense of Music Contracts*, at <http://www.sospubs.co.uk/sos/sep00/articles/music.htm> (last visited Feb. 1, 2002). Negotiation is available for an artist in theory, but it can be tedious and expensive. *Id.* Many artists create successful works that make substantial profits for their record label, but the artist remains relatively uncompensated. *Id.*

15. The common legal understanding of a contract is, "a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty." RESTATEMENT (SECOND) OF CONTRACTS § 1 (1979). The term "contract" also refers to the legal obligations that are placed upon both parties through the agreement, and

show that these special contracts are long overdue for special treatment. The pre-contract bargaining power and the amount of knowledge about the agreement must be more evenly balanced between the parties and these agreements must be interpreted with increased uniformity. These goals can be realistically accomplished with an application of modern contract law that is better suited to the particularities of music.

Part I of this comment will outline the means of formation and termination of publishing and recording agreements in modern music. It will also discuss the relationship between the artist and the publisher and the unique aspects of a songwriter agreement. Part II will illustrate the strategies and processes for ending these contractual relationships, and will provide an overview of disagreements that have arisen between musicians, publishers, and managers that could have been avoided with the utilization of different methods of contract formation and interpretation. Finally, Part III will propose industry-wide changes in music contract formation and alternative methods for dispute resolution. These proposed changes include standard form contracts, mediation provisions, and mandatory arbitration provisions.

I. MUSIC CONTRACTS AND THE EXCLUSIVE SONGWRITER AGREEMENT

The goal of many musicians is monetary gain.¹⁶ Others desire nothing more than the public's connection with their creative message.¹⁷ Most seek a combination of both of these goals.¹⁸ To fully understand the need to treat these contracts differently under the law than other contracts, one must be familiar with their additional terms and their unique methods of formation and termination. An understanding of the ways that music contracts diverge from the norm will foster an equal understanding of the need for a deviation in the methods of formation and adjudication.

A. Formation of the Songwriter/Publisher Relationship

Although most musical endeavors begin as products of an artist's pure love and creativity, the assistance of a music publisher and recording label allow songwriters to communicate their work with others while marketing their product on a global

often the "contract" between two parties is, "the entire resulting complex of legal relations. *Id.* at cmt. b.

16. Cornelius Cowles, *Music, Money, and the Middleman: The Relationship Between the Songwriter and the Publisher*, 1 VAND. J. ENT. L. & PRAC. 101, 102 (1999). Money is one of the driving forces in the music industry. *Id.*

17. *Id.* The creative drive and excitement of the music industry are two reasons for many attempts at obtaining a publishing agreement. *Id.*

18. *Id.*

scale.¹⁹ The contract between a songwriter and a publisher is exclusive.²⁰ The transfer of the songwriter's copyright ownership to the publisher can encompass existing compositions or future, unwritten work.²¹ In exchange for restricting the writer's ability to make collateral or additional agreements during the life of the contract, the publisher must assist the writer in a number of ways.²² The music publisher must promote, license, and record the music; implement legal protection of compositions; collect the income generated by the artist's work; and pay the artist a share of the income.²³

The publisher, as the handler of the songwriting agreement,

19. Cowles, *supra* note 16, at 102-03. The music publisher is the vehicle through which songwriters get their music radio airplay and dissemination into record stores. *Id.* at 103. Similar to a publisher requiring a songwriter to sign over exclusive rights to their work as consideration for the contract, a record label will also attempt to sign an artist to an exclusive contract. BIEDERMAN, *supra* note 13, at 586. Usually, this agreement is short-term with options for the recording company to extend the length of the agreement upon the artist's delivery of additional master recordings. *Id.* at 586-87. If the artist succeeds during the initial short term, he will likely be granted an extension due to the decrease in risk that the recording company can undertake with an established artist. *Id.* at 587.

20. BIEDERMAN, *supra* note 13, at 586. An "Exclusive Songwriter Agreement" is the exclusive contractual relationship between a songwriter and a music publisher. *Id.* at 553. In this agreement, the artist will typically receive up to fifty percent of the revenue that the publisher receives. *Id.* However, the "Artist Recording Agreement" also plays a very large role in the artist's career. *Id.* at 586-90. This agreement is between the artist who records the work and the record company that manufactures and distributes the recordings. *Id.* at 586. These agreements will give the artist typically between nine and twelve percent of the retail cost of a recording, or between twenty and twenty-four percent of the wholesale cost of a recording. *Id.* at 587.

21. 2 ALEXANDER LINDEY AND MICHAEL LANDAU, LINDEY ON ENTERTAINMENT, PUBLISHING AND THE ARTS 7-6, FORM 7.01-1 (1980). In a common songwriter agreement, the songwriter agrees that he or she will not write or compose music that will be commercially used for any entity other than the named publisher. *Id.* By signing an exclusive songwriter agreement, the artist is obliged to give all works written during the term of the contract to the publisher. AL KOHN & BOB KOHN, KOHN ON MUSIC LICENSING 104 (2nd ed. 1996).

22. Cowles, *supra* note 16, at 102. The publisher agrees to undertake certain tasks in return for the songwriter's transfer of rights. *Id.* These include "introduc[ing] the songwriter to artists and producers, . . . provid[ing] a disciplined working environment, oversee[ing] the business aspects of song promotion, and advanc[ing] money to the writer." *Id.* See also BIEDERMAN, *supra* note 13, at 560 (stating that although the publisher of a musical composition cannot guarantee any particular amount of success, the publisher is obligated to "exploit" the work by using its resources to generate income and publicity for the artist).

23. KOHN & KOHN, *supra* note 21, at 88. Although publishing contracts of the early twentieth century focused on creativity, modern contracts focus more on the administrative aspects of the agreement. *Id.*

and the label, as the facilitator of recording the composition, share the obligation of finding the perfect combination of creativity and business administration to nurture the success of both parties.²⁴ Although the final product of the songwriter-publisher contract is artistic expression in music, its primary goal is financial gain for both parties.²⁵ It is this unusual combination of art and business that necessitates a special treatment of these contracts.

B. *The Components of the Exclusive Songwriter Agreement*

Each music contract has the basic aspects of any other modern business contract as well as additional features that make it unique.²⁶ These unique elements are often referred to as "deal points."²⁷ These include the rights transferred between the parties, the length of the agreement, the number of recordings to be made, and the financial arrangement between the artist and the publisher.²⁸ These elements are some of the distinctive features of songwriter agreements that pull them outside of traditional contract lines.²⁹

24. *Id.* The creative department of most music publishers undertakes the task of: "signing up songwriting talent, developing the talent, and getting songs recorded by popular performing artists." *Id.* Often a creative department, or professional manager, will polish the talents of a songwriter and become the facilitator of relationships that can potentially lead the artist to success. *Id.* at 89. On the other hand, the administrative departments within the publishing company include "Copyright Administration, Licensing, Legal Affairs, Royalty Accounting, International, and Print." *Id.*

25. Michael P. McCready, *Record Contract Basics*, at <http://www.music-law.com/contractbasics.html> (last visited Aug. 4, 2002). Although it is the initial goal of almost all musicians to make music, their entry into a recording contract with a record company is a financial relationship. *Id.* See also BIEDERMAN, *supra* note 13, at 549 (summarizing the National Music Publishers Association *International Survey of Music Publishing Revenues*, Ninth Edition, and noting that the worldwide music publishing revenues during 1998 were more than \$6.54 billion).

26. See BIEDERMAN, *supra* note 13, at 549 (opining that the customary methods and uses for publishing music, which have served the music industry in the past, will likely evolve into new methods or will disappear altogether).

27. McCready, *supra* note 25. Deal points represent the basic provisions of a music contract. *Id.* Unsigned, new artists may not be able to negotiate their deal points effectively. *Id.*

28. *Id.* Many artists will have already negotiated many of the deal points of a contract prior to the signing. *Id.* Further, many artists will refuse to retain independent counsel and will continue without realizing the importance of such representation. *Id.* Thus, without assistance, pre-requisite legal knowledge, and foresight, the recording and publishing deals signed by artists can vary in monetary amount and size. Christina Saraceno, *Whitney a \$100 Million Woman*, ROLLING STONE, available at <http://www.rollingstone.com/news/newsarticle.asp?nid=14358> (Aug. 3, 2001). The current largest recording contract ever signed is that of artist Whitney Houston, when she signed a deal valued at over \$100 million. *Id.*

29. BIEDERMAN, *supra* note 13, at 549. The music industry will likely have to adopt standards that will evolve with time. *Id.*

The crux of the union between an artist and a publisher is the transfer of rights.³⁰ This provision transfers the full copyright of the composition to the publisher,³¹ subject only to any prior agreements between the artist and performing rights societies.³² The agreement allows all the income that is generated by the songwriter's work to be collected by the publisher and then paid accordingly to the artist.³³ Societies such as Broadcast Music, Inc. ("BMI"),³⁴ the American Society of Composers, Authors and Publishers ("ASCAP"),³⁵ or the Society of European State Authors

30. KOHN & KOHN, *supra* note 21, at 105-106. The consideration in the contract is mainly in the transfer of rights. *Id.* The publisher furnishes all that is needed by the artist to produce the recording of the composition and the artist allocates the exclusive rights to the publisher. *Id.* See also Band Radio.com at <http://www.bandradio.com/law/recording-1.html> (last visited Aug. 4, 2002) (illustrating an exclusive grant of rights clause in a modern recording agreement). The publisher is then allowed to distribute and exploit the work commercially in the United States and Canada. *Id.* The publisher will have exclusive rights to the artist's songs for the term of the contract, profits made from the performance of the songs under contract, and the title of the songs. *Id.*

31. 4 THOMAS D. SELZ, ENTERTAINMENT LAW: LEGAL CONCEPTS AND BUSINESS PRACTICES Music-2 (1999). This example of an Exclusive Songwriter's Term Agreement transfers the copyright to the work that exists at the time of the writing as well as during the future term of the agreement. *Id.* Works available for transfer at the time of the contract are referred to as "existing compositions," while those developed during the contractual period are referred to as "subject compositions." *Id.*

32. KOHN & KOHN, *supra* note 21, at 106. Only agreements made with performance societies prior to the grant of rights will be valid. *Id.* See also 4 THOMAS D. SELZ, ENTERTAINMENT LAW: LEGAL CONCEPTS AND BUSINESS PRACTICES, § 6.02, 6-9 (1999) (stating that the American Society of Composers, Authors and Publishers ("ASCAP") and Broadcast Music, Inc. ("BMI") are the "intermediaries between the author of a composition and those seeking to license small performing rights.").

33. KOHN & KOHN, *supra* note 21, at 133.

34. *Broad. Music, Inc. v. O'Connell's Clover Club, Inc.*, No. 4-82-1076, 1983 U.S. Dist. LEXIS 15186 *2 (D. Minn. 4th Div, 1983). "[Broadcast Music, Inc. ("BMI")] is a performing rights organization." *Id.* "[BMI] acquires public performance rights from publishers and composers of musical compositions." *Id.* BMI then grants licenses to those who wish to use this music. *Id.* BMI monitors the compositions played in bars, nightclubs, and restaurants. *Id.*

35. See STANLEY ROTHENBERG, COPYRIGHTS AND PUBLIC PERFORMANCE OF MUSIC 27 (1954) (noting that ASCAP was developed to "police" possible public performances throughout the country). See also *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 55 F.R.D. 292, 293 (S.D.N.Y. 1972) (noting ASCAP was organized in 1914 as an entity which licenses the performance rights of songs in its repertory); See also The American Society of Composers, Authors and Publishers Web Site Home, at www.ascap.com/lp_about_ascap.html (last visited Aug. 4, 2002) (finding the membership of ASCAP consists of over "135,000 composers, songwriters, and publishers."). Artists who wish to perform copyrighted music publicly, must seek permission to use the license that ASCAP holds for that song. *Id.* ASCAP calculates the performance royalties using a variety of factors. *Id.* at www.ascap.com/about/payment/royalties.html. These factors include the type of use, the fee paid to

and Composers ("SESAC")³⁶ account for both public and recorded live performances by the artist and others.³⁷

Although most agreements will obligate the songwriter to transfer all work composed during the period to the publisher exclusively, they are often limited to the life of the copyright, or any fixed number of years agreed upon in the contract.³⁸ The exclusivity of the rights transferred is also subject to other termination conditions, such as those created by statute.³⁹ The statutory provisions that provide for termination of a copyright may include a right of the author or the author's heirs to unilaterally terminate the grant in certain rare instances, prior to the time set forth in the agreement. These instances include a statutory limit on the number of years of an agreement,⁴⁰ and a right of reversion.⁴¹

Once the artist transfers his or her rights to the publisher, both parties may enjoy any profits that the work may produce.⁴² These profits, or royalties,⁴³ are the method by which the publisher

obtain the license by the station or establishment, and the time or specific day of the performance. *Id.*

36. See KOHN & KOHN, *supra* note 21, at 867 (stating the Society of European State Authors and Composers (SESAC) is an American organization engaged in licensing and performing rights of artists in the United States.).

37. *Supra* notes 34-36 and accompanying text.

38. LINDEY & LANDAU, *supra* note 21, at 7-5. FORM 7.01-1 illustrates an example of a "Grant of Rights" clause of a songwriter agreement:

Writer hereby assigns . . . each and every right and interest of every kind . . . together with all copyrights and renewals and extensions thereof, which musical compositions have been written, composed, created, conceived or acquired, in whole or in part, by Writer alone or in collaboration with another or others at any time prior to or during the term hereof

Id.

39. KOHN & KOHN, *supra* note 21, at 107. A copyright that is transferred "is subject . . . to any statutory rights of termination under the copyright law . . ." *Id.*

40. Tamera H. Bennett, Comment, *Risky Business: Rejecting Adherence to Industry Standards in Exclusive Songwriter Agreements*, 4 TEX. WESLEYAN L. REV. 71, 78 (1997).

41. KOHN & KOHN, *supra* note 21, at 108.

42. BIEDERMAN, *supra* note 13, at 560. The publisher makes an accounting of the revenue that a recording makes and appropriately pays the writer. *Id.*

43. LINDEY & LANDAU, *supra* note 21, at 7-7-7-8. FORM 7.01-1 illustrates an example of a Royalties clause of a songwriter agreement:

Compensation: Provided that the Writer shall perform all of the terms and covenants of this Agreement, Publisher hereby agrees to pay for all of Writer's services and grant of rights hereunder, and Writer accepts, the following compensation based on the Compositions: (a) Ten (10) Cents per copy for each piano copy and dance orchestration sold by Publisher and paid for in the United States, . . . (c) Fifty percent (50%) of any and all net sums actually received . . . by Publisher from mechanical rights, electronical transcription and reproduction rights . . . sold by

and the artist divide the income that a given work creates.⁴⁴ Income arising from the different forms and uses of each composition are divided differently.⁴⁵ The percentage of each sale that an artist will receive depends on the individual contract.⁴⁶ Mechanical licenses and performance licenses are the two major methods of accounting for the profits generated by musical compositions.⁴⁷

Most songwriter agreements begin with an advance payment made to the songwriter⁴⁸ used as a salary⁴⁹ and for demonstrational recordings in the early stages of the song's promotion and recording.⁵⁰ The advance is the consideration that the artists receive for the transfer of the exclusive rights to their written work.⁵¹

licenses of Publisher in the United States . . . (g) Royalties as hereinabove specified shall be payable solely to Writer in instances where Writer is the sole author of the entire Composition . . .

Id.

44. KOHN & KOHN, *supra* note 21, at 86-87. Division of the profits from promotion, publication, and performance of a songwriter's music are divided into what is commonly known as the "writer's share" and the "publisher's share." *Id.* These portions are usually equal, but may be shared with others who undertake these duties. *Id.*

45. *Id.* at 111-22. Sources of income for a songwriter can include sheet music, printed folios (songbooks), mechanical licenses, performance royalties, promotional copies, and demo recordings. *Id.*

46. Cowles, *supra* note 16, at 109. Composers usually will receive less than fifty percent of all the publishing fees that the recording produces. *Id.* Usually, an artist can expect to receive only eleven to sixteen percent of the cost of each record sold through retail avenues. David C. Norrell, Comment, *The Strong Getting Stronger: Record Labels Benefit from Proposed Changes to the Bankruptcy Code*, 19 LOY. L.A. ENT. L.J. 445, 454 (1999).

47. See generally KOHN & KOHN, *supra* note 21, at 653-73 (describing mechanical licenses) and 863-84 (discussing performance licenses).

48. *Id.* at 109-10. See also LINDEY & LANDAU, *supra* note 21, at 7-18.8, FORM 7.01-1A.1 (illustrating an advance clause in a sample Exclusive Songwriter Agreement). "5. Advances: We shall make the following payments, which shall be recoupable from your royalties hereunder . . ." *Id.*

49. Cowles, *supra* note 16, at 103. "Publishers actually pay writers a salary in the form of advances." *Id.* This advance will be used by the artist as sustenance, as well as for the production costs associated with recording the album. *Id.*

50. The production of a demonstrational recording, often referred to as a "demo," is usually included in a recording agreement. Bennett, *supra* note 40, at 79. These recordings are only a portion of the obligations that the publisher must undertake in order to fulfill a publishing agreement. *Id.*

51. 1 THOMAS D. SELZ, ENTERTAINMENT LAW: LEGAL CONCEPTS AND BUSINESS PRACTICES § 4.06-4.07, 4.22-4.24 (1999). Money advanced to the artist that is nonrefundable is designed to shift risk in the artist's relationship with the publisher. *Id.* at 4.22. While the artist is giving a complete grant of rights to the publisher under the transferred copyright, the publisher's advance acts as a motivation for the publisher to use best efforts to receive royalties on the work. *Id.* The publisher can recoup the advance from the primary royalties of the artist, but they cannot hold the artist individually

The publisher, in turn, is allowed to recoup all of its advance money from the artist by acquiring the artist's royalties.⁵² Once the publisher has recouped its full advance amount, the remaining royalties will be shared with the artist.⁵³ Therefore, the artist does not receive any royalty payments until the publisher has recouped its entire advance.⁵⁴ In reality, it is the artist that funds the production of his or her own record.⁵⁵

The artist and publisher share in the royalties derived from the sale of recordings of the songwriter's work.⁵⁶ These recordings are called mechanical licenses, or mechanical reproductions.⁵⁷ Mechanical licenses are the most common tool used to account for a composition's profits.⁵⁸ These licenses account for the profits generated by the physical copies of the composition.⁵⁹ The media royalties are primarily earned from the sale and use of two recognized forms: copies (e.g., books, manuscripts, sheet music, and film)⁶⁰ and phonorecords (e.g., compact discs, audio tapes, and phonograph records).⁶¹ Royalties from the ability to make and distribute reproductions of the composition are distributed

responsible for the advance. KOHN & KOHN, *supra* note 21, at 109.

52. *Id.* Although the publisher is allowed to recoup the amount of their advance from the artist's share of the initial royalties, they are not entitled to a return of the advance if the recording fails to make a profit. *Id.* In other words, the publisher assumes the risk that they may not get a return on the advanced funds. *Id.*

53. McCready, *supra* note 25. Approximately eighty percent of all recorded albums do not acquire profit beyond that needed for full recoupment by the publisher. *Id.* "A band can expect an average of \$1.00 in royalties for each full-priced (\$16.98) CD sold through normal retail channels . . . [I]f [an artist] owe[s] the record company \$250,000 [from advanced funds] and [the artist] makes \$1.00 per CD, that is a quarter of a million CD's [sic] [the artist] must sell before [he or she] collect[s] royalties." *Id.*

54. Cowles, *supra* note 16, at 109. Most profits that fulfill the recoupment paid to publishers come from mechanical royalties, but any royalties received from a work can be paid to the publisher in recoupment for advances paid to the artist. *Id.*

55. Telephone Interview with Michael P. McCready, Music Law Offices (Feb. 1, 2002). Because the initial advance paid to the artist can be fully recouped, the artist essentially "pays for everything." *Id.*

56. *See In re Dillon*, 219 B.R. 781, 786 (Bankr. M.D. Tenn. 1998) (finding that royalties are not exempted from debtor upon bankruptcy decision for debtor). Mechanical Royalties are paid upon the sale of a recording that contains a song written by the artist and will not be denied prior to bankruptcy filing. *Id.*

57. KOHN & KOHN, *supra* note 21, at 653-56.

58. BIEDERMAN, *supra* note 13, at 550. Mechanical royalties are paid to the songwriter for the manufacturing and sale of phonograph records, cassette tapes, compact discs, and downloads. *Id.* at 552.

59. KOHN & KOHN, *supra* note 21, at 653.

60. AL KOHN & BOB KOHN, KOHN ON MUSIC LICENSING 485 (3rd ed. 2000).

61. *Id.*

according to the terms of the license agreement.⁶²

Making up most of the remaining profits of a composition are performance licenses.⁶³ Works under contract are performed in many ways.⁶⁴ The performance of a work may be by the artist, by another musician, in a concert, or in a live broadcast setting.⁶⁵ A performance is any means through which the public is exposed to the songwriter's work.⁶⁶

C. Formation of the Music Contract

Recording contracts and songwriter agreements are signed writings, executed after the exchange of consideration,⁶⁷ that contain many of the terms of other modern business contracts.⁶⁸ However, there are aspects of music contracts and their formation that make them different from other contracts.⁶⁹ The artist or songwriter not only transfers rights to the publisher for the compositions the artist has already written, but also transfers rights to future compositions.⁷⁰

62. KOHN & KOHN, *supra* note 21, at 668-69. Usually, only the copyright owner of a song may give permission for a mechanical license agreement to be issued that gives the publisher less than the statutory rate. *Id.* at 659. The statutory rate is expressed as a number of cents per song for each copy made and distributed. *Id.* at 657. The statutory rate as of January 1, 1996 is "6.6 cents per unit" sold or "1.25 cents per minute of playing time," whichever is greater. *Id.*

63. BIEDERMAN, *supra* note 13, at 553. Performing Rights Societies such as ASCAP and BMI regulate and collect revenues from public performances of the songwriter's works. *Id.* The society then makes an accounting of the revenue generated from this "non-dramatic" performance. *Id.* After a service fee deduction of approximately fifteen percent, the income will be apportioned equally between the publisher and songwriter. *Id.*

64. *Id.* at 553. Public performances include concerts, radio broadcasts, and Internet streaming. *Id.*

65. *Id.*

66. KOHN & KOHN, *supra* note 21, at 868; 17 U.S.C. § 101 (2000).

67. KOHN & KOHN, *supra* note 21, at 105-106. The consideration of a music contract is supplied by the exchange between the publisher and the songwriter. *Id.* The consideration given by the songwriter or artist is tendered in the form of the initial and complete grant of rights. *Id.* at 106. See also BandRadio.com, *supra* note 30, at § 9 (assigning the exclusive rights of the artist within a Recording and Personal Services Agreement). The consideration tendered by the publisher can be found in the advance given to the artist. Cowles, *supra* note 16, at 103.

68. See 1 CORBIN ON CONTRACTS § 1.5, (stating that the legal validity of most informal contracts "depends upon the presence of sufficient consideration given [by the parties] in return for the promise.").

69. McCready, *supra* note 25, paras. 3-4, 6-7, 9-10 & 12.

70. Telephone Interview with Michael P. McCready, Music Law Offices (Feb. 1, 2002). The record label will always require ownership of the sound recordings. *Id.* This will "never change." *Id.*

D. Termination of Contractual Relationships in Music

Upon dissatisfaction with the terms or progress of the agreement, a party to certain contracts may seek termination.⁷¹ The termination of the agreement between an artist and a publisher can occur in many ways. These may include: 1) a decision of the court;⁷² 2) a declaration of bankruptcy;⁷³ or 3) a reversion of rights.⁷⁴

Both artists and publishers can have a contract nullified through a decision of a court.⁷⁵ This action is called rescission.⁷⁶ The court will examine the reasonableness and legitimacy of the complaining party's discontent.⁷⁷ Some of the common assertions by parties seeking to nullify a contract are unconscionability,⁷⁸ undue influence,⁷⁹ and unequal bargaining power at the time of contract formation.⁸⁰ Under modern contract principles, the court's rescission of a music contract, like any contract, can lead to recovery by the aggrieved party of damages equal to the consideration paid or damages in restitution.⁸¹

71. RESTATEMENT (SECOND) OF CONTRACTS § 228 (1979).

72. 13 AM. JUR. 2D *Cancellation of Instruments* § 1 (2000).

73. Collins, *supra* note 12 at para. 1.

74. 3 THOMAS D. SELZ, ENTERTAINMENT LAW: LEGAL CONCEPTS AND BUSINESS PRACTICES § 25.04 (1st ed. 1992).

75. 13 AM. JUR. 2D *Cancellation of Instruments* § 1 (2000). The term "rescission" is one of the names that the court uses in referring to any judicial termination of a contractual instrument. *Id.* Such termination of a contract is distinct from when parties mutually agree to set aside an agreement. *Id.*

76. *Id.* Courts can terminate, cancel, rescind, or nullify a contract or other instrument in order to return the parties to the status quo. *Id.* This may consist of termination of the contract and possibly restitutionary damages. *Id.*

77. 17 AM. JUR. 2D *Contracts* § 649 (1991). There must be a bona fide reason for a party's dissatisfaction. *Id.* In other words, the court will look to the actual existence of dissatisfaction in the contract based on reasonable expectations. RESTATEMENT (SECOND) OF CONTRACTS § 228 (1979).

78. RESTATEMENT (SECOND) OF CONTRACTS § 208 (1979). If a contract, or a term of a contract, is found by the court to be unconscionable, the court may refuse to enforce the entire contract, refuse to enforce the unconscionable term, or may limit the unconscionable term of the contract. *Id.* The unconscionability of a contract will be determined based on its setting, purpose, and effect. *Id.* at cmt. a.

79. 2 AM. JUR. 2D *Adoption* § 102 (1994). Undue influence is often found to be present when it appears that the free agency of another person was taken, and another influenced the person. *Id.*

80. 67 AM. JUR. 2D *Sales* § 237 (1985). Unequal bargaining power is exemplified in agreements between merchants when the terms of the agreement do not reasonably relate to the business risks involved, and are thus considered one-sided enough to force termination of the contract. *Id.* at n.31. Unequal bargaining power is usually equated with procedural unconscionability. *Id.* at n.32.

81. 17 AM. JUR. 2D *Contracts* § 604 (1991). In attempting to restore the parties to the status quo, the injured party is entitled to receive the amount of consideration given in pursuance of the contract. *Id.* The consideration usually exchanged in publishing and recording agreements is the exclusive

A second method of termination, and one seemingly gaining in popularity among well-publicized contractual relationships,⁸² is bankruptcy.⁸³ Like most business or financial relationships, the court may award a bankruptcy judgment to either party, terminating that party's obligations under the contract.⁸⁴ Music contracts are more often terminated through the bankruptcy of the artist.⁸⁵ However, songwriters use bankruptcy more often as a financial tool to terminate an undesirable contract, rather than as a last resort for financial safety.⁸⁶

Publishing rights previously transferred from the artist to the publisher may revert back to the artist.⁸⁷ This reversion is often conditioned upon the publisher's failure to adhere to the terms of the contract.⁸⁸ Reversion also occurs through passage of time as stated by law or by the expiration of the copyright.⁸⁹

right of publication on the part of the artist, and the recoupable advance on the part of the publisher. Telephone Interview with Michael P. McCreedy, Music Law Offices (Feb. 1, 2002). The injured party may also be allowed to receive restitution for the value of what the party has given. 17 AM. JUR. 2D *Contracts* § 604 (1991).

82. Justin Pritchard, *Striking a Chord with Congress*, L.A. TIMES, Aug. 19, 1998, at 8. "Record companies say they are increasingly being confronted by artists who are willing to exchange the stigma of bankruptcy for the chance to scrap a contract and land a more lucrative deal with another studio." *Id.*

83. See 2 COLLIER ON BANKRUPTCY ¶ 301.01 (1996) (listing the different forms of bankruptcy that can be initiated by debtor). Voluntary bankruptcy cases for individuals under the Bankruptcy Code are Chapter 7 (Liquidation), Chapter 11 (Reorganization), and Chapter 13 (Adjustment of Debts of an Individual with Regular Income). *Id.* An individual seeking bankruptcy files a voluntary case. 11 U.S.C. § 301 (2000). *Id.* The filing of a petition with the bankruptcy court commences the case. *Id.*

84. *Id.* at ¶ 727.13, 727-58 (1996). Bankruptcy is designed to discharge the debtor's financial obligations, thus allowing the debtor to start anew. *Id.*

85. Norrell, *supra* note 46, at 452. Artists that have previously filed for bankruptcy to seek relief from creditors include MC Hammer, Toni Braxton, and James Taylor. *Id.* at 453.

86. Collins, *supra* note 12, para. 1. Bankruptcy has been used as a means of quickly settling controversies and acquiring leverage in contract negotiations. Norrell, *supra* note 46, at 445-46.

87. 3 THOMAS D. SELZ, ENTERTAINMENT LAW: LEGAL CONCEPTS AND BUSINESS PRACTICES, § 25.04, at 25-11 (1999). As recognized by Congress, any previously transferred copyright will be eventually returned to the author or the author's successors. *Id.* at 25.11-25.19

88. 4 THOMAS D. SELZ, ENTERTAINMENT LAW: LEGAL CONCEPTS AND BUSINESS PRACTICES, Music 4, Music-47 (1999) (illustrating a Songwriter Agreement as an agreement that transfers the rights to a copyrights, "for ___ years (not more than 40) from the date of this contract or 35 years from the date of the first release of a commercial sound recording of the composition, whichever term ends earlier, unless the contract sooner terminated in accordance with the provisions hereof").

89. See 17 U.S.C. § 203(a)(3)(2000) (stating that the owner of a copyright may terminate the publishing right in the publisher after the passage of thirty-five years from the date that the work is first published, or forty years after the date that the publishing rights are initially granted to the publisher).

An artist's intense desire to obtain a recording contract at the beginning of his or her career often hampers the pursuit of a contract that is legally sound and financially fair.⁹⁰ Increased success leads to dissatisfaction over time.⁹¹ This desire, coupled with the artist's lack of business savvy, makes deviation from usual contract formation and interpretation a necessity.

Entry into any modern business contract can be likened to a four-legged table. One leg represents the party's goals by entering into the contract. The second is the party's confidence that the particular contract will result in the future realization of that goal. The third represents the party's belief in the equality of the bargain. And the fourth is the confidence that the consideration given will be an accurate representation of the party's return. Without any one of the legs, the table is useless. Likewise, without any of these aspects, a contract would surely not be agreed to in a business setting. Musicians and songwriters, though, must enter into agreements without these legs. It seems that the contractual norm in the music industry is that an artist must sit at a legless table. It is this unique situation that calls for a deviation from modern contract interpretation.

II. THE ATTACK ON CONTRACTUAL AGREEMENTS IN MUSIC AND PUBLISHING

While either party to a recording contract may become dissatisfied with the agreement during the term of the contract, it is usually the artist who seeks rescission of the contract or changes in its terms.⁹² There are many arguments that a party can make to nullify a contract, and there are certain recurring complaints about signed contracts.⁹³ The most common goals of dissatisfied artists are to change the terms of their particular contracts, and to reform the music industry standard artist-

See also 3 CAL. LAB. CODE § 2855 (1989) (enacting a California state law that prohibits personal service contracts from extending more than seven years).

90. Norrell, *supra* note 46, at 453. Because of most artists' concerns with making music, it is common for important and well-planned financial decisions to become a second priority. *Id.*

91. Morley, *supra* note 14, paras. 28-30.

92. Norrell, *supra* note 46, at 453. Other artists who sought contract rescission and interpretation include Courtney Love, Billy Joel, and George Michael. Chuck Philips, *Courtney Love Seeks to Rock Record Labels' Contract Policy*, L.A. TIMES, Feb. 28, 2001, available at <http://www.calendarlive.com/1%2C1419%2CL-LATimes-Music-X!ArticleDetail-23226%2C00.htm> (Feb. 28, 2001); see also STAN SOOCHER, THEY FOUGHT THE LAW: ROCK MUSIC GOES TO COURT 21-63 (1999) (following the legal battles of musicians Billy Joel and George Michael).

93. Philips, *supra* note 92, para. 2. According to Courtney Love, the business practices of the major record labels are "unconscionable and unlawful." *Id.*

contract.⁹⁴

A. Rescission of Music Contracts Under Order of the Court

Artists often call upon the doctrine of unconscionability to remedy the inconsistencies in their music contracts.⁹⁵ The doctrine of unconscionability is applied when the bargaining power of either party is grossly unequal to that of the other, and the terms of the contract unreasonably favor the more powerful party.⁹⁶ The doctrine applies both procedurally⁹⁷ and substantively⁹⁸ to the

94. *Id.* at para. 1.

95. See RESTATEMENT (SECOND) OF CONTRACTS § 208 (1979) (describing unconscionability as a reason for the unenforceability of a contract).

96. *Id.* A contract may be unconscionable based on the overall imbalance of the values exchanged, inherent weaknesses in the bargaining process, or the presence of specific unconscionable terms in the contract. *Id.* at cmt. c. These indicators may show that the agreement involved deception or compulsion, or that the weaker party did not have a meaningful or real choice in the matter. *Id.* Courts may find a contract unconscionable in its formation when: 1) the stronger party believes that the weaker party will not perform the contract; 2) the stronger party has knowledge that the weaker party will not be able to benefit substantially from the contract; or 3) the stronger party knows that the weaker party will be unable to protect his interest by reason of ignorance, illiteracy, or inability to understand the language of the agreement. *Id.* at cmt. d.

97. A contract may be procedurally unconscionable to the artist. *Id.* at cmt. a. Since music contracts are not readily available to an artist, a rejection of a publishing or managerial contractual agreement may completely destroy an artist's opportunity for success in the music business. Collins, *supra* note 12, para. 6. Thus, an artist does not have the same freedom to contract that, for example, a party has in a transaction involving sales of goods. RESTATEMENT (SECOND) OF CONTRACTS § 228 (1979). When agreeing to a contract for sale of a certain good, a buyer knows that he may accept the offer before him, amend it, or seek the necessary supply elsewhere. *Id.* The seller also knows that the buyer has these options, and therefore will conform his dealings to conscionable terms. *Id.* Overall, the bargaining power of the artist-publisher relationship is not equal in weight to that of other contractual relationships. See also Gillman v. Chase Manhattan Bank, 534 N.E.2d 824, 828 (N.Y. 1988) (noting that unconscionability in the procedural aspect of a contract is usually present from the formation of the agreement). Factors that can lead to a finding of procedural unconscionability are: whether deception was employed; whether there was unfair use of fine print in the contract; the level of experience and education of the party claiming unconscionability; and whether a disparity in bargaining power existed. *Id.*

98. Gillman, 534 N.E.2d at 829. Substantive unconscionability enters into a contract's very terms. *Id.* The artist is assigning all of his or her rights to present and future compositions to the publisher, with royalties and profits to be paid to the artist after the publisher's initial advance is recouped. KOHN & KOHN, *supra* note 21, at 109. These assignments can be unfair to the artist in that they bind the artist to the deal of assignment, but do not bind the publisher to use certain resources to market the work. *Id.* In this sense, the contract may be seen as illusory, in addition to being unconscionable, because they do not bind the publisher to affirmative duties. *Id.*

agreement.⁹⁹ Although the concept is amorphous, courts have applied the doctrine to agreements in music.¹⁰⁰ However, it is difficult to state with any amount of certainty when unconscionability is present.¹⁰¹

Perhaps the most well known case attacking a music contract is that of the artist Jim Croce.¹⁰² Croce was an artist, folk singer, and performer.¹⁰³ Croce signed three separate agreements for recording, publishing, and management.¹⁰⁴ Croce and his wife, Ingrid, reviewed these contracts in the presence of a lawyer, Philip Kurnit, who represented the two corporations supplying the three services.¹⁰⁵ Croce did not retain independent counsel.¹⁰⁶ The

99. This concept traditionally acted as an equitable doctrine until its codification in the Uniform Commercial Code. See U.C.C. § 2-302 (1962) (discussing the unconscionable contract or clause). Although Article 2 of the U.C.C. applies to sales of goods, § 2-302 is a concrete and more readable definition of this ethereal concept. *Id.* Many courts set forth definitions of this equitable principle when determining the validity of contract formations. See *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. 1965) (recognizing unconscionability in the formation of a contract if there is some showing of both an "absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.") See also *Weidman v. Tomaselli*, 365 N.Y.S.2d 681, 689 (1975) (stating that, although the concept of unconscionability can be recognized in the Uniform Commercial Code, the Code need not be the basis for unconscionability because "the concept originated in equity.").

100. *Carboni v. Arrospide*, 2 Cal. Rptr. 2d 845, 849 (Cal. Ct. App. 1991). In this contract case, borrower secured a loan for ninety-nine thousand dollars with an attached interest rate of two hundred percent per annum. *Id.* at 846. Borrower had trouble securing another loan, and was under emotional stress because the funds would be used to pay his parents' medical expenses. *Id.* Although the court refused to set a numeric ceiling at which an interest rate is *per se* unconscionable, the court clearly recognized that two hundred percent per year was unacceptably high. *Id.* at 850. See also *Beaver v. Figgie Int'l Corp.*, 849 F.2d 1472 (6th Cir. June 24, 1988) (holding that an indemnity clause in an insurance contract was not unconscionable, but recognizing that the doctrine can be exercised in the event that both substantive and procedural are portions within a contract).

101. SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS, v.15 § 1763A at 214 (Walter H.E. Jaeger ed., 3d ed. 1972). The concept of unconscionability acts against two forms of abuses in contract formation: procedural deficiencies in the formation of the contract, and the substantive contract terms themselves. *Id.* The substantive contract terms that can lead to unconscionability are: 1) contract terms that are invalid on public policy and public interest grounds; 2) the use of "boilerplate" clauses that alter the implications on the party drafting the agreement; 3) fine-print clauses negating reasonable expectations of the non-drafting party; and 4) harsh terms having to do with price disparity. *Id.* at 215.

102. *Croce v. Kurnit*, 565 F. Supp. 884 (S.D.N.Y. 1982).

103. *Id.* at 887. Croce began his music career during college at Villanova University. *Id.* He there met his wife Ingrid, as well as Tommy West, another young artist seeking to begin a career in music. *Id.*

104. *Id.*

105. *Id.* The Croces signed the agreements after meeting with the defendant, Philip Kurnit, who was introduced as "the lawyer" representing the

contracts did not affirmatively obligate the corporations to perform any of the duties usually associated with publishing and recording, including promotion, marketing, and accounting.¹⁰⁷ The corporations' only duties under the contracts were to make payments of six hundred dollars per year to each of the Croces, along with royalty payments upon sales of the recordings.¹⁰⁸

After Jim Croce's death, his widow filed suit against several parties, including Kurnit, the lawyer that represented the corporate entities upon the original signing.¹⁰⁹ Among Ingrid Croce's claims against the corporations and Kurnit were unconscionability¹¹⁰ and breach of fiduciary duty.¹¹¹ In her argument for unconscionability, Croce's widow argued that Croce's signing of the contracts was unfair.¹¹² She also argued that Croce agreed to terms that were extremely one-sided and that lacked decency due to his lack of adequate, individual representation and his ignorance of the industry's business standards.¹¹³ In her breach of duty claim, she further alleged that the publisher and manager owed Croce a duty of fairness, good faith, and loyalty, and that they breached this duty because the publisher actually controlled the management contract.¹¹⁴ The District Court of the Southern District of New York found that, although the contracts

two corporate entities: Cashman, Pistilli & West, a recording company, and Blendingwell Music, Inc., a music publishing and management company. *Id.* Independent counsel did not advise the Croces during any of the negotiations. *Id.*

106. *Id.*

107. *Croce*, 565 F. Supp. at 887.

108. *Id.* The term of the entire contract was seven years. *Id.* However, the corporations had the option to decline continued negotiations by refusing to exercise options in the contracts. *Id.* All rights to music performances and writings were fully granted to the defendants. *Id.* Further, the management's portion of Croce's contract was assignable to another upon Blendingwell's desire. *Id.*

109. *Id.* at 885.

110. *Id.* at 892. The obscure nature of the doctrine of unconscionability applies itself readily to music contracts for publishing and recording. *Id.* The majority of publishing and recording agreements formed are between an established company with full resources and an artist that has not yet established their career. Telephone Interview with Michael P. McCready, Music Law Offices (Feb. 1. 2002). Options that are open to one who has been offered a contract include acceptance, amendment of the terms of the contract, and rejection of the offer. *Restatement (Second) of Contracts* §§ 38, 50, 286 (1981). In other words, although a music publisher deals in the language and tools of law and business, the only power that the artist possesses is that of his or her art.

111. *Croce*, 565 F. Supp. at 892.

112. *Id.*

113. *Id.*

114. *Id.* at 893-94. While the management contract served only the artist's interests, Croce's management contract, according to his widow, was "inextricably interwoven" with the publication and promotion of his compositions. *Id.* at 894.

were "hard bargains, signed by an artist without bargaining power, and favored the publishers," they did not "shock the conscience" or differ from industry norms so as to be "unconscionable by their terms."¹¹⁵ The court rejected the unconscionability claim and rejected Croce's claim to rescind the contract based on breach of fiduciary duty.¹¹⁶ The court did find that Kurnit had breached his fiduciary duty by failing to advise the Croces to seek independent counsel, but that fact alone did not require nullification of the contract.¹¹⁷

Another example of an artist seeking rescission of a music contract is *Brown v. Death Row Records*.¹¹⁸ In this case, the United States Bankruptcy Court for the Eastern District of Pennsylvania addressed the unconscionability of the contracts signed between the parties.¹¹⁹ The court recognized that the record company and its counsel approached the artist with contracts of adhesion¹²⁰ that were offered on a "take-it-or-leave-it basis."¹²¹ The court held that ambiguous portions of the contracts should be construed against the defendant drafters.¹²² The court found that when the plaintiff signed the initial agreements, he was young, inexperienced, and nothing more than a musician, untrained in the law and intricacies of contracts.¹²³ The court refused to honor the ambiguous portions of the contracts due to the artist's inexperience and lack of sophistication compared to the corporation. The court recognized that the artist would have been unlikely to sign such an agreement in such a short period of time

115. *Id.* at 893. The *Croce* court applied common contract standards and held that contracts that favor publishers or recording corporations are not inherently unfair. *Id.*

116. *Id.* at 894. The court found that rescission was an inappropriate remedy in the *Croce* case and, like most courts, saw rescission of a contract as an "extraordinary remedy". *Id.* See also 13 AM. JUR. 2D *Cancellation of Instruments* § 5 (2000) (stating that rescission is an "extraordinary remedy," a "harsh remedy not favored by the courts," and a remedy that is left to the discretion of the courts).

117. *Croce*, 565 F. Supp. at 894. Kurnit was ordered to pay the court costs and attorneys' fees expended by Mrs. Croce during the litigation. *Id.*

118. *Brown v. Death Row Records, Inc.*, 219 B.R. 373 (Bankr. E.D. Pa. 1998).

119. *Id.* at 383.

120. See *Farmers Union Grain Terminal Assoc. v. Nelson*, 223 N.W.2d 494, 497 (N.D. 1974) (stating that in a question of contract interpretation, an adhesion contract should be most strongly construed against the party who prepared it, and who had the opportunity to look out for their best interests in the process). These types of contracts should be examined "with special scrutiny by the courts to assure that it is not applied in an unfair or unconscionable manner against the party who did not participate in its drafting." *Id.*

121. *Brown*, 219 B.R. at 382.

122. *Id.*

123. *Id.* at 383.

had he possessed knowledge on the subject.¹²⁴

The different results in *Croce* and *Brown* serve as two examples of the need for a more uniform system of interpretation of music contracts. Although both courts applied the doctrine of unconscionability, each reached a different result.¹²⁵ However, the *Brown* court, unlike the *Croce* court, found the contract unconscionable.¹²⁶ *Brown* and *Croce* both lacked adequate legal and business knowledge, both were inexperienced artists signing their first recording and publishing contracts with a powerful corporation, both were asked to sign contracts without the ability to negotiate amendments or changes, and both were obligated to unfair royalty payments.¹²⁷ However, the *Croce* court held that the contract lacked unconscionability, citing mainly the substantial profit of both parties over the life of the contract, while the *Brown* court nullified the contract based on its unfair formation and the relative unequal bargaining power of the parties upon formation.¹²⁸ Thus, the contracts were approached differently by separate courts: one choosing to determine the fairness of an agreement by taking into account the ends achieved by both parties, and the other examining strictly the formation without regard to the profit produced by the contract.

In *Mellencamp v. Riva Music, Ltd.*, John Mellencamp, a successful recording artist, brought suit against the music publisher that held his composition rights.¹²⁹ Under Mellencamp's theory of relief, the publishing contracts he entered into with the defendants automatically made the publishing company a fiduciary.¹³⁰ Mellencamp claimed that the defendant publishers breached their fiduciary duty to promote his songs using their best efforts.¹³¹ The United States District Court for the Southern District of New York held that while an implied covenant of good faith and fair dealing exists in every contract, Mellencamp's publishing agreement did not rise to the level of a relationship of "trust and confidence."¹³² The court also held that the publisher was not Mellencamp's "trustee" or "fiduciary."¹³³ Although the court held that the contract created a relationship with the defendant publisher, the relationship was purely based on

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*; *Croce*, 565 F. Supp. at 887.

128. *Croce*, 565 F. Supp. at 893.

129. *Mellencamp v. Riva Music, Ltd.*, 698 F. Supp. 1154, 1156 (S.D.N.Y. 1988).

130. *Id.* at 1155.

131. *Id.*

132. *Id.* at 1158.

133. *Id.* The court held that a publisher does not assume fiduciary duties under an exclusive licensing contract. *Id.* at 1159.

business dealings, and was not a fiduciary relationship.¹³⁴ The court in *Mellencamp*, similar to the court in *Croce*, viewed the contract between the parties in the light of common business practices, and based its decision on the overall success of the artist.¹³⁵

In *Bonner v. Westbound Records, Inc.*, a rock music group, The Ohio Players, sought to declare their publishing and recording contracts unenforceable and invalid.¹³⁶ The artists sought to sign an agreement with another record company, Mercury Records, while still under contract with the defendants.¹³⁷ The Circuit Court of Cook County, Illinois held that the contracts with the defendants were void and therefore unenforceable.¹³⁸ At the initial signing of the contract, the defendant company gave the plaintiff musical group four thousand dollars to enter into the agreement.¹³⁹ The Appellate Court of Illinois adhered to contract norms and decided that the payment, regardless of its amount, was sufficient to bind both parties, and thus found the contracts valid.¹⁴⁰ Again, just as in *Croce* and *Brown*, the court refused to view the contract formation any differently than a conventional negotiated by sophisticated parties.

The judicial system rarely examines music contracts will uniformity. When determining the validity of music contracts, views range from a comparison of the pre-contract bargaining power of each party to an accounting of the profit made by the artist. This lack of uniformity in interpreting music contracts begs for a consistent method of resolving future formation issues.

B. Bankruptcy: A Backdoor to Rescission

The inconsistent interpretation of music contracts by different

134. *Mellencamp*, 698 F. Supp. at 1159-60.

135. *Id.* at 1155-60. The court examined the fiduciary duty reportedly owed to Mellencamp, state law breach of contract terms, and Statute of Frauds issues, among others. *Id.* at 1156.

136. *Bonner v. Westbound Records, Inc.*, 394 N.E.2d 1303, 1306 (Ill. App. Ct. 1979). Plaintiffs argued that no consideration passed between The Ohio Players and Westbound to bind them to record exclusively for Westbound. *Id.* at 1307. In addition, plaintiffs argued that while The Ohio Players were required to submit a minimum number of compositions to Westbound, the publisher was not required to make any recordings of the submitted songs. *Id.*

137. *Id.* at 1306. Five of The Ohio Players signed an exclusive recording agreement with Mercury in January 1974, after originally signing an exclusive five-year deal with Westbound in March 1972. *Id.*

138. *Id.*

139. *Id.* at 1308. The court held that the payment, although stated as "an advance against royalties," could still be regarded as consideration. *Id.* Since the payment was recoupable by Westbound, but not required to be repaid by The Ohio Players, the court found that the corporation suffered a "legal detriment" and the artist received a "legal advantage." *Id.*

140. *Id.* Under both Michigan and Illinois law, the payment constituted valid consideration. *Id.*

courts is further illustrated in the bankruptcy cases of *In re Watkins* and *Brown v. Death Row Records*, in which the artists sought relief from their contracts using bankruptcy.¹⁴¹ In *Watkins*, the debtors were members of the popular music group "TLC."¹⁴² Two members of TLC originally entered into an exclusive songwriter agreement with Pebbitone Music, Inc., in February 1991.¹⁴³ TLC later became unhappy with the original agreement.¹⁴⁴ While the group experienced enormous commercial success in their work, it remained financially insolvent.¹⁴⁵ The court examined the individual debtors' financial problems, both generally and within the Pebbitone contract, and determined that the debtors should be allowed to submit a reorganization plan in bankruptcy.¹⁴⁶

In *Brown*, the plaintiff entered into a recording contract with defendants.¹⁴⁷ The plaintiff recorded and assisted in the recording of numerous compositions and sought payment of royalties stemming from the work.¹⁴⁸ He claimed that he had not received proper payment due to the defendants' failure to make accurate accountings of the royalties¹⁴⁹ and that the contract provisions were unconscionable.¹⁵⁰ The court awarded the plaintiff-artist royalties.¹⁵¹ In *Brown*, the court examined the theories of bankruptcy, unconscionability, and the fiduciary relationship. The

141. Norrell, *supra* note 46, at 448. The general purpose of bankruptcy provisions is to allow an individual in debt to achieve a "fresh start" by allowing him to discharge his current debt and discharge most of the liabilities that he has to others, with few exceptions. *Id.* Bankruptcy may seem absurd when declared by a successful artist. *Id.* at 453. However, many artists are easily subject to poor financial planning. *Id.* The irony of this situation is that when an artist focuses on making music, their attention is often turned away from their finances. *Id.*; see also Tonya Pendleton, *The Price of Fame Can Be Bankruptcy*, THE RECORD, Apr. 11, 1998, available at 1998 WL 5802158 (stating from an artist's perspective: "You spend your time learning how to make music. You may not be spending time to protect yourself in a business environment.") (quoting Gary Harris, former senior director of A & R Records); *In re Watkins*, 210 B.R. 394 (Bankr. N.D. Ga. 1997); see generally *Brown v. Death Row Records, Inc.*, 219 B.R. 373 (Bankr. E.D. Pa. 1998).

142. *Watkins*, 210 B.R. at 396.

143. *Id.* Debtors *Watkins* and *Lopes* also signed a production agreement with Pebbitone at this time. *Id.* These agreements were amended April 2, 1991 to include all members of TLC. *Id.*

144. *Id.*

145. *Id.*

146. *Id.* at 403.

147. *Brown*, 219 B.R. at 375. The debtor and plaintiff Ricardo E. Brown, also known as "Kurupt," sought to recover unpaid royalties from defendants, Death Row Records, Inc. and Suge Music. *Id.*

148. *Id.* at 377-79.

149. *Id.* at 378-79. The court chose to find the royalties calculated by the plaintiff's expert to be more reliable than those calculated by the defendant's expert. *Id.* at 375. The court found that the net amount due to the artist was \$593,266.50. *Id.* at 387.

150. *Id.* at 383.

151. *Id.* at 386-87.

lack of knowledge and experience on the part of one party, against the abundance of experience and resources of the other, makes the relationship unbalanced and ultimately, unfair.¹⁵²

C. The Battle Continues: Current Dissatisfaction with Contract Formation

With approximately five major recording labels in the industry—and with each label using basically the same boilerplate, adhesion-type contract—an artist has limited choices. The artist must either submit to the proposed deal, or remain unsigned and independent, with little chance of commercial success.¹⁵³ The argument for an overhaul of contract formation and adjudication standards in the music industry is publicly witnessed in the recent suit against Vivendi Universal Music, Inc. brought by recording artist Courtney Love, with the support of numerous other artists.¹⁵⁴ The suit focused on the long-term contracts that major record labels practically force artists to sign, and the relatively low return in royalties that artists receive once they become successful.¹⁵⁵ Love claimed that Vivendi's contracts, as well as those of the entire major label industry, were "unconscionable and unlawful."¹⁵⁶ Love claimed that recording and publishing contracts bind artists exclusively for lengths of time unparalleled in any other industry, including television, film, and sports.¹⁵⁷ Love argued that record companies coerce artists into signing unfair agreements resulting in the artist's sacrifice of ownership of their compositions, and that such contracts are uniform and boilerplate throughout the industry.¹⁵⁸ Thus, an artist has no choice but to sign an unconscionable contract in order to begin recording and marketing.¹⁵⁹ Among the fifteen causes of action in Love's lawsuit was a challenge to the assignment clause of her contract that embodied the publisher's ability to sell her

152. *Id.* at 383

153. *See generally Brown*, 219 B.R. at 382, 383 (illustrating the argument that the contracts were made on a take-it-or-leave-it basis by a recording corporation then to be signed by an artist that was not trained in the law and lacked bargaining power).

154. Philips, *supra* note 92. The suit is filed against Vivendi Universal, the world's largest record conglomerate seeking remedy for the business tactics of all the major record labels. *Id.*

155. *Id.* The unfairness Love claimed in her suit is described by Peter Paterno, an attorney who represents musicians such as Metallica and Dr. Dre, as follows: "[r]ecord labels operate on the premise that because they take such a large financial risk and have such a low rate of success that they have the right to maximize their return when they do score a hit. So the terms are stacked against the artist." *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. Philips, *supra* note 92.

contract, thus rendering it invalid. The suit also framed a challenge to the California Law allowing record labels to receive damages from any artist seeking rescission of their contract.¹⁶⁰

The number of artists seeking rescission and adjustment in music contracts grows each year, and as the amount of revenue in the music industry increases, so does the need for the courts to become more consistent in their examination of these contracts and their formation.¹⁶¹ As artists increasingly oppose the unfairness and inequity in music contract formation, there is a possibility that new artists will have more control over their artistic futures. Both the artists and labels must agree that these contracts need to be treated differently due to their departures from modern business contracts. The inconsistency of court decisions makes it difficult, if not impossible, for an artist to feel comfortable with most of his or her contractual obligations. Courts may look at many aspects, including the circumstances surrounding the formation of the contract, the knowledge of the artist at signing, the artist's success compared to economic norms of the business world, and sometimes, only the terms of the agreement.¹⁶² With both entertainment revenues and recording companies becoming larger, measures need to be taken to ensure that artists lacking adequate representation and knowledge do not enter into these contracts.¹⁶³ The courts should implement a new system of adjudication to decide the fairness of these contracts.

III. MAPPING OUT THE CONFUSING CROSSROADS: ALTERNATIVE MEANS OF FORMING MUSIC AGREEMENTS AND RESOLVING DISPUTES

Any time that parties enter into a legal agreement, there is a possibility that the connection will lead to dissatisfaction. Typical problems associated with music contract formation can be placed into two general groups. In the first group are those contracts formed under conditions of unequal bargaining power.¹⁶⁴ The

160. *Id.*

161. Global Media Corporate Relations Home Page, Company Profile: Black Dragon Entertainment, Inc. at <http://www.gmcr.net/bldgprofile.htm> (last visited Nov. 11, 2001). Although a few large corporations dominate the recording industry, there are about one thousand five hundred recording companies in the United States. *Id.* The music industry creates \$40.5 billion in revenues each year. *Id.*

162. *Croce*, 565 F. Supp. at 893; *Brown*, 219 B.R. at 383.

163. Telephone Interview with Michael P. McCready, Music Law Offices (Feb. 1, 2002). The record industry, in general, has been very exploitative toward artists. *Id.* In 1998, domestic wholesale markets of audio and video products "grew from 470.7 million units at midyear 1997 to 502.5 million units in 1998." Recording Industry of America Home Page, 1998 Midyear Market Report on U.S. Recorded Music Shipments, at <http://www.riaa.com/MD-US-3b-98-Mid.cfm> (last visited Nov. 11, 2001).

164. See *supra* notes 12-14 and accompanying text (discussing how there is an unequal bargaining power between the parties).

second group consists of contracts that have so increased in value that the substances of the original agreement has changed, and consequently, the parties' original intentions have been devalued.¹⁶⁵ The application of three alternative methods of contract formation and resolution would be valuable, and have an immediate impact on the industry. These are standard form contracts, mediation, and arbitration provisions.

A. *The Standard Form Contract: How More Boilerplate Language Would Actually Decrease Dissatisfaction*

The standard form contract facilitates the formation of many modern contracts.¹⁶⁶ Many industries have already adopted standard form contracts and, as a result, have decreased the possibility of contract dissatisfaction.¹⁶⁷ A standard form contract, in its simplest form, is a contract that is uniform by its terms when offered to another party and thus not negotiable.¹⁶⁸

The standard form contract has several benefits. First, new artists could become familiar with just one basic contract and could concern themselves only with the very few flexible terms to be added to the form. This would decrease the chance that unsatisfactory terms would go unnoticed upon entering into an agreement.¹⁶⁹ Second, the standard forms would be negotiated and

165. *Supra* notes 19, 28, 31, 34-6, 40, 42, & 47 and accompanying text.

166. 1 BERNARD E. WITKIN, WITKIN SUMMARY OF CALIFORNIA LAW § 126 (9th ed., 1987). Under California law, for example, the standard form fire insurance contract contains clauses that affect the standard form liability of the insurer. *Id.*; see generally Gary D. Spivey, Annotation, *Application of Parol Evidence Rule in Action on Contract for Architect's Services*, 69 A.L.R.3d 1353 (2001) (analyzing standard form contracts that are used in the architectural industry). It is a general rule of law that if parties have deliberately put their agreement into a written form instrument, the court will interpret the writing as being the complete extent of the agreement. *Id.* It is arguable that standard form music contracts would make the music industry more uniform.

167. J. H. Tigges, Annotation, *Time Period for Bringing Action on Standard Form Fire Insurance Policy Provided for by Statute, as Running from Time of Fire (When Loss Occurs) or From Time Loss is Payable*, 95 A.L.R.2d 1023 (1964). The insurance industry has instituted standard form contracts in areas of fire insurance policies. *Id.*

168. William T. Vukowich, *Lawyers and the Standard Form Contract System: A Model Rule That Should Have Been*, 6 GEO. J. LEGAL ETHICS 799, 800 (1993). Regardless of a business's relative power within the market in which it operates, individuals who deal with these businesses cannot bargain over terms in a standard form contract. *Id.* at 800-01. In this way, standard form contracts can be differentiated from adhesion contracts. *Id.* at 800.

169. See generally *Cate v. Dover Corp.*, 790 S.W.2d 559, 560 (Tex. 1990). (noting the argument for the use of standard form contracts in music can be different from those found in many other areas of the law and business). In this case, a warranty for the sale of goods was seen as non-negotiable. *Id.* While the consumer was held to have been deceived by the disclaimer language in the contract, a single consumer offered a bill of sale by a large

agreed to with the help of industry management, artists, and artist's representatives, bringing more uniformity in the industry. Third, music publishers and recording companies would be restricted in their power to vary the contract.

The standard form contract prohibits negotiation of its terms.¹⁷⁰ This de-emphasizes the increased resourcefulness of a corporation as compared to the artist.¹⁷¹ In this way, the establishment of a uniform contract used by all publishers and recording companies upon signing new artists would assist in balancing the unequal bargaining power that is the cause of much artist.¹⁷²

In order for a standard form contract to work among parties in the music industry, the contract form itself cannot be chosen by only one of the parties to the agreement.¹⁷³ This would instead force the non-drafting party into an adhesion contract.¹⁷⁴ Both publishers and artists would need the assistance of trade organizations.¹⁷⁵ If the goal is to level the playing field for the parties to a music contract, it would be counterproductive for either one of the parties to decide what the standard form is, or for the stronger party to choose the form under the guise of mutuality.¹⁷⁶

company is distinguishable from a member of an industry that would be familiar with the contract's provisions. *Id.* at 561-62. In other words, a standard form publishing agreement, for example, would be easily recognizable to an artist who knew what to expect upon entry into such an agreement.

170. *Id.*

171. Vukowich, *supra* note 168, at 800-01.

172. *See supra* notes 53-56 and accompanying text.

173. Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1174, 1177-78 (1983). Standard form contracts that have been utilized by both parties in their negotiations will usually not raise a question of adhesion. *Id.* at 1177. However, the discussion of adhesion contracts often has a core in the standard form of contracts. *Id.* at 1176-7. The case against the standard form is made when one of the parties to the agreement uses their unequal bargaining power in order to force another party to adhere to a contract over which the forcing party had constructive control. *Id.*

174. *Id.* at 1176. "The use of the standard form contracts grows from the organization and practices of the large, hierarchical firms that set the tone of modern commerce." *Id.*

175. *See* A DICTIONARY OF ARBITRATION AND ITS TERMS 224-225 (Katharine Seide ed. 1970) (discussing how many trade organizations maintain their own arbitration facilities, panels of arbitrators, and formal rules for arbitration of disputes within the industry).

176. Rakoff, *supra* note 173, at 1177. It is often the "adhering party" that is not likely to read the provisions of the standard form contract before signing, and would likely misunderstand the terms if they read them. *Id.* at 1179. However, when a form contract is used throughout an industry, a party forced to adhere might actually understand the terms of a contract prior to even contemplating the agreement. *Id.* Therefore, the use of the standard form might alleviate an artist's fears of overreaching and the lack of

Therefore, standard form contracts and provisions, although often laboriously created, would balance the bargaining power of the parties to a music contract. The non-negotiable provisions, when originally created in a balanced setting, would allow both parties to foresee, and prepare for, the contract negotiations. After being carefully drafted and even periodically modified with the consent of both artists and publishers, standard form contracts will incorporate the full resources of both parties, even when the artist does not foresee a need for prudent handling of a musical contractual relationship.

B. The Referee in the Studio: Increased Mediation Possibilities in Music Contract Disputes

A method of dispute resolution that is quickly gaining acceptance is mediation.¹⁷⁷ Mediation is best described as an assisted means of negotiation between parties.¹⁷⁸ Both parties agree to enlist a neutral third party to help reach a mutually acceptable agreement.¹⁷⁹ In essence, a mediator is a facilitator of discussions, who helps the two parties explore possible areas where they can reach agreements, thus avoiding litigation.¹⁸⁰ Parties agreeing to mediate usually remain in until they reach a mutually acceptable decision, or until they can make no further progress.¹⁸¹

uniformity. *Id.* In practice, all parties involved will have input into the drafting. *Id.* Instead of balancing the bargaining power of the parties during each individual contract negotiation, the parties will be constructively represented during the drafting.

177. GARY GOODPASTER, A GUIDE TO NEGOTIATION AND MEDIATION 204 (1997). Many aspects of contract law have utilized mediation as the preferred method of resolving disputes. *Id.* Although mediation is technically non-binding on the parties, courts have mandated mediation in settling disputes arising from "divorce, family relations, landlord-tenant, and consumer cases." *Id.* Communities have also instituted mediation in order to relieve court dockets of small cases and low-level disputes, and it has been utilized by industries such as insurance and consumer merchandising. *Id.*

178. 4 AM. JUR. 2D *Alternative Dispute Resolution* § 16 (1995).

179. SARAH R. COLE, ET AL., MEDIATION: LAW, POLICY, PRACTICE § 1.1 (2d ed. 2001). Mediators are not otherwise involved in the controversy before them. *Id.* Mediation can be distinguished from other methods of dispute resolution by its consensual character — both parties usually agree to mediate. *Id.*

180. See GOODPASTER, *supra* note 177, at 204. "The assumption . . . is that a third party will be able to alter the power and social dynamics of the conflict relationship by influencing the beliefs and behaviors of individual parties, by providing knowledge or information, or by using a more effective negotiation process . . ." *Id.* (quoting CHRISTOPHER W. MOORE, THE MEDIATION PROCESS 16 (1996)).

181. See MARGARET C. JASPER, THE LAW OF ALTERNATIVE DISPUTE RESOLUTION, 21 (2d ed. 2000) (stating that since parties to mediation agree to participate, they usually are cooperative and enter into the negotiations in good faith).

Many industries use mediation as a tool for dispute resolution, and have done so for many years.¹⁸² However, the decisions of mediators do not bind the parties.¹⁸³ Still, mediation can be attractive to parties seeking a more cost-effective means of resolving contract disputes, or allowing a facilitator more familiar with the intricate workings of the industry to analyze the dispute.¹⁸⁴

The power struggle between the artist and the publisher can cause these disputes.¹⁸⁵ What starts as an opportunity to have one's music disseminated can quickly turn into dissatisfaction with time and increased success.¹⁸⁶ Mediation can be a very attractive means of dispute resolution to artists as well as publishers and recorders of music. Assuming both parties recognize mediation alternatives as available and legitimate, artists would most likely enjoy the cost effectiveness that mediation would bring.¹⁸⁷ Further, the ability for disputes to be negotiated without the formality of courtroom litigation would make artists less intimidated by the financial resources of many record companies, as well as force publishers to be more aware of dissatisfaction when it can be readily voiced.¹⁸⁸

Mediation's positive effects on contract negotiations can be coupled with the use of standard form contracts by including a mediation clause in the publishing agreement.¹⁸⁹ A mediator who is familiar with the industry and each party's place in it, can

182. See GOODPASTER, *supra* note 177, at 204 (describing the various industries that use mediation). See also JASPER, *supra* note 181, at 21 (recognizing "domestic relations, contracts, securities, consumer complaints, construction claims, and labor-management relations" as areas using mediation).

183. See JASPER, *supra* note 181, at 21 (noting "[t]he mediator does not issue a binding decision, but rather assists the opposing parties in resolving their own dispute, which resolution may then be formalized in a written agreement.").

184. See *Id.* (stating that "[p]arties generally save money through reduced legal costs and less staff time."). "Mediators have been carefully chosen for their knowledge and experience." *Id.* at 22.

185. See *e.g.* GOODPASTER, *supra* note 177, at 205 (describing situations in which disputes may arise).

186. See *supra* notes 53-56 and accompanying text (discussing the costs to recording artists and royalties to which they are entitled).

187. See JASPER, *supra* note 181, at 21 (stating the advantages to mediation).

188. See GOODPASTER, *supra* note 177, at 206 (showing how mediation can be useful). Although the process can help each side "negotiate competitively" for "maximum gain," there may also be mistrust on both sides. *Id.*

189. COLE, ET AL., *supra* note 179, at § 6.1. Mediation clauses are designed to encourage negotiation and avoid litigation or binding arbitration. *Id.* Mediation clauses included in a contract will essentially force the parties to attempt a resolution as an adherence to the whole of the contract itself, rather than desire to participate in the process. *Id.*

better diagnose the problems plaguing music contracts.¹⁹⁰

C. *The Mandatory Handshake: Arbitration as an Effective Method of Settling Disputes of the Music Contract*

A solution that may be best fitted to the disputes that arise after the signing of publishing agreements and recording contracts is mandatory, binding arbitration.¹⁹¹ In arbitration, “an impartial third party . . . listens to both sides of the dispute and issues a binding decision.”¹⁹² Voluntary entry into arbitration is the most frequently used method of arbitration in settling contract disputes.¹⁹³ Much like mediation, arbitration is beneficial because it reduces costs, avoids litigation, and generally expedites the resolution of disputes.¹⁹⁴ In this way, arbitration lends itself well to the music industry because it can balance the unequal resources and weight of the parties.¹⁹⁵

The Federal Arbitration Act is the governing body of law enforcing the validity of arbitration provisions.¹⁹⁶ Many organizations, including the American Arbitration Association, provide standardized rules for carrying out arbitration.¹⁹⁷

Parties who voluntarily agree to subject their dispute to arbitration must also agree that the decision of the arbitrator will be as binding as a decision from a court of law.¹⁹⁸ Arbitration provisions included as clauses in contracts are also binding, and these clauses make arbitration the only available method of dispute resolution under the contract.¹⁹⁹ Once agreed to, a party

190. See JASPER, *supra* note 181, at 22-23 (noting that the choice of a mediator with experience in the related field can be “crucial” to success in resolution of the case).

191. See *id.* at 9 (introducing the arbitration process).

192. *Id.*

193. *Id.*

194. *Id.*

195. NANCY F. ATLAS, ET AL., ALTERNATIVE DISPUTE RESOLUTION: THE LITIGATOR’S HANDBOOK, 9 (ABA 2000).

196. 9 U.S.C. § 1 *et seq.* (2000). When a contract contains an arbitration provision that is agreed upon by both parties, the provision will be valid and enforceable. 9 U.S.C. § 2 (2000).

197. American Arbitration Association Home Page, at www.adr.org (last visited Aug. 4, 2002). Aside from the rules that have been established for arbitration procedures by the AAA, “[numerous] public and private organizations will supply rules and neutrals.” ATLAS ET. AL, *supra* note 195, at 9.

198. See ROBERT COULSON, BUSINESS ARBITRATION – WHAT YOU NEED TO KNOW, 28 (3d. ed. 1987) (stating each party in an arbitration proceeding will usually have agreed to be bound by the arbitrator’s award prior to commencing the arbitration process).

199. JASPER, *supra* note 181, at 10. An arbitration clause in a contract will bind the parties who sign the contract. *Id.* Thus, all disputes concerning a contract that contains an arbitration clause will automatically be submitted to an arbitrator. *Id.* Only contracts in which the arbitration clause is itself

can avoid arbitration only if a court determines that the arbitration clause *itself* is unconscionable.²⁰⁰ Thus, even arguments that speak to the unconscionability of the entire contract will be decided by the arbitrator.²⁰¹ Further, a decision by an arbitrator will only be overturned on very narrow grounds.²⁰²

One of the most useful aspects of arbitration is that an industry may formulate its own rules for the negotiation of its disputes.²⁰³ The music industry may tailor its arbitration to specific industry norms that are absent in the current review of music contracts.²⁰⁴ For example, the parties to arbitration may choose their own discovery methods or evidentiary rules for the arbitration process.²⁰⁵

Every exclusive songwriter agreement and recording contract that is presented to an artist should include an arbitration agreement.²⁰⁶ The exigencies of the music industry require special knowledge and procedures.²⁰⁷ It is impossible for a court to grasp such knowledge due to the wide array of cases the court hears each year.²⁰⁸ Arbitration will put artists on equal footing with publishers and record labels, and courts will no longer lump music contracts with other business contracts, subjecting them to the same standards of review.

Using fairly common legal practices, the formation of music contracts, and the parties' satisfaction during the contract term, music contracts can be made simpler and more efficient. The implementation of mandatory standard form contracts for publishing and recording would allow artists to utilize the

defective may be disputed before a court. *Id.*

200. Claims of fraud in the inducement of a contract containing an arbitration clause will be submitted to arbitration for review. *Prima Paint v. Flood*, 388 U.S. 395, 399-400 (1967). Only when the arbitration clause is itself unconscionable will a court review the claim. *Id.* at 403.

201. *Id.* at 399-400.

202. See COULSON, *supra* note 198, at 171 (citing the rules for vacating an arbitration award as set forth by the Uniform Arbitration Act). An arbitrator's decision is usually only overturned if it is clear that the arbitrator did not use applicable or valid law in his or her decision, or that the decision was procured by fraud or corruption. *Id.*

203. ATLAS, ET AL., *supra* note 195, at 9.

204. *Id.*

205. JASPER, *supra* note 181, at 9-10.

206. See *supra* notes 17-50 and accompanying text (giving background on the formation of the songwriter/publisher relationship and the formation of the agreements and contracts between them).

207. Telephone Interview with Michael P. McCready, Music Law Offices (Feb. 1, 2001).

208. JASPER, *supra* note 181, at 22. Much like mediation, arbitrators are not judges. *Id.* The arbitrator is either selected by the parties or by an association acting in conjunction with the parties. ARBITRATION: COMMERCIAL DISPUTES, INSURANCE, AND TORT CLAIMS, 2 (Alan I. Widiss ed. 1979).

strength of more established artists and their increased bargaining power without having to negotiate an entire agreement with publishers and labels that have become increasingly more powerful in recent years. An expectation of mediation when disagreements first arise would facilitate a better understanding of each party's position and an avoidance of costly and inconsistent court decisions. Mandatory arbitration will infuse knowledge of the music industry into decisions concerning the validity and fairness of these contracts. If all of these possibilities are utilized, dissatisfaction can be avoided during formation and interpretation of these contracts will reflect more industry wisdom and organization.

CONCLUSION

The need for change in music contract formation and interpretation arises from the unique circumstances under which artists are sometimes unwillingly thrust into roles of financial and legal analysts when entering into agreements with record companies.²⁰⁹ The music industry grows larger and more powerful each year, and songwriters and performers quickly change from artists to businesspeople with the twist of the radio dial.²¹⁰ Hopes of platinum album sales and VH1 Behind the Music Specials often make artists reluctant to turn down an opportunity, even an unfair agreement. Thus, the current status of music industry contracts is in need of change. This is both necessary and realistic.

Composition ownership and publication rights are integral, not only to the widespread distribution of music, but also to the enjoyment of every true fan. The interpretation of the legal methods that accomplish these goals should reflect the fairness that is the cornerstone of the American system of adjudication. With the addition of some well-known legal tools, common in the law, but new to music, an artist can once again take center stage, avoid bitter disputes, and be free to strum his guitar at the crossroads in the afternoon sun.

209. See Pendleton, *supra* note 141 (discussing the financial responsibilities that come with being a musician in the recording industry).

210. See *supra* notes 102-40, and accompanying text (discussing unconscionability of some recording contracts and the business of musicians).