

The Demise of the Long-Term Personal Services Contract in the Music Industry: Artistic Freedom Against Company Profit

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"When I fight authority, authority always wins."¹

"Why can't you do it?
Why can't you set your monkey free?"²

I. INTRODUCTION

When George Michael sued Sony to get out of his contract,³ the music industry paid attention.⁴ If he had been successful, his case could have rewritten the rules governing how musicians and record companies deal with each other. At first glance, an English case such as this may seem irrelevant because it is not mandatory authority in the United States (U.S.). However, the indirect repercussions could

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¹ JOHN COUGAR MELLENCAMP, *authority song*, on UH-HUH (Riva Records 1983).

² GEORGE MICHAEL, *Monkey*, on FAITH (CBS Records 1987).

³ Panayiotou v. Sony Music Entertainment (UK) Ltd., 13 Ch. 532 (Ch. 1994).

⁴ The lawsuit has been described as "the most significant legal case ever to hit the music business." Simon Garfield, *The Machine That Ate George Michael*, THE INDEPENDENT (London), Nov. 21, 1992, at 29 (Weekend Title Page).

have been enormous on entertainment law in the U.S.⁵ As the music industry is very much an international business, the law of one country could influence another.

The next case dealing with an artist attempting to break out of his or her contract could occur in the U.S. and be decided along very similar reasoning. Alternatively, a U.S. case could have the opposite holding. Therefore, the music industry should be aware of the factors courts consider in reaching their decisions. It is worthwhile to look at how courts have decided past cases of artists attempting to leave their contracts in order to suggest what courts should do in the future. Layered on top of traditional law dealing with breaches of contract and invalid contracts, the Michael case is a useful illustration of the direction of entertainment contract law.

This Comment explains the different options available to artists in the music industry who wish to break out of their contracts. It also discusses the likely legal ramifications of breaching a contract or attempting to have it declared unenforceable. The factors that courts seem to take into consideration when deciding whether or not to hold such a contract valid are also examined. These factors include the "specialness" of the performer, the extraordinary nature of the services, the performer's experience in contracting and representation (or lack thereof), and whether damages can adequately compensate a record company for the loss of an artist who decides to work for another company.

In addition to enumerating the choices available to artists, this Comment urges courts and legislatures to recognize the personal and professional problems inherent in long-term personal services contracts, and to limit the number of years and/or the number of albums record companies may require of their artist employees. If the radical proposition of sharply limiting the length of contracts is an unacceptable solution, this Comment alternatively recommends that

⁵ Chuck Philips, *Michael's Pact with Sony is Upheld*, L.A. TIMES, June 22, 1994, at F1 ("[I]nsiders predicted that a pro-Michael verdict could have been used as grounds to raise the same issues for artists in U.S. courts."); Garfield, *supra* note 4, ("[I]t was only a matter of time before an artist of Michael's stature brought a case such as this.") (quoting Ed Bicknell, a founder of the International Managers' Forum and manager of the musical group Dire Straits).

courts place a heavier emphasis on the use of damages, to the extent that damages supplant injunctions entirely. Thus, record companies would still have access to a satisfactory remedy in the event that artists break their contracts.

Part II of this Comment has three subdivisions. First, it describes the typical relationship between musicians and their recording companies in a historical context. Next, it summarizes the case law on the subject, focusing on the use of specific enforcement, injunctions, and damages as remedies for breaches of personal services contracts. In some cases, courts have declared the contract invalid and the artist free to go with no remedy available to the company, and the factors influencing these courts' decisions are described. Artists' ability to sue their record companies to have their contracts declared invalid is also mentioned. Part II then delves into the case of *Panayiotou v. Sony Music Entertainment (UK) Ltd.* (hereinafter *Michael v. Sony*). In particular, the reasons why that court held the contract to be not a restraint on trade are considered.

Part III discusses possible solutions to the problems courts have faced when dealing with contracts that are sound, but where courts have felt that the artists should not be subject to injunctions for policy reasons. One of the main reasons not to enjoin artists from working for another company is that entertainment contracts are for personal services. Traditionally, personal services contracts are not subject to specific enforcement because to do so is akin to involuntary servitude, or slavery.⁶ As injunctions may result for all practical purposes in enforcement, courts are dissuaded from using injunctions as a remedy for a breached personal services contract.

The first proposed solution is to continue to emphasize the use of damages rather than enforcement or injunctions. Because injunctions are based on subjective judgments of a performance's value and in reality are simply a circuitous route to specific enforcement, they should no longer be used as a remedy. Damages are more appropriate. It is a reality of the modern music business that

⁶ "Neither slavery nor involuntary servitude . . . shall exist within the United States . . ." U.S. CONST. amend. XIII, § 1; see also *Poultry Producers of S. Cal., Inc. v. Barlow*, 189 Cal. 278 (1922).

an injunction will not prevent popular artists from leaving their record companies. Although the injunction is hypothetically a roundabout method of compelling specific enforcement, it does not usually result in the artist continuing to work for the company bringing the injunction. Instead, injunctions result in the record company having a great deal of extra bargaining power in the artist's exit negotiations. Courts should recognize that by granting injunctions, they do not prevent artists from leaving, but rather shift power to the record companies in negotiations. The artist will still leave, but will have to pay a great deal more to the company holding an injunction "trump card." Courts that wish to effect this power shift should do so directly, by granting damages.

The second, more radical proposed solution is a complete ban on very long, multi-year, multi-album contracts. At this time, the structure of the music industry is very similar to the movie industry as it was in the 1930s. While prohibiting long contracts in the music business may seem somewhat drastic, this solution was used in the movie industry in the 1930s and 1940s with great success. Both industries are peopled by creative artist employees bound by long-term personal services contracts to production houses. Even though there are differences between the two industries (such as the number of people and types of input necessary to create a work) which results in an imperfect analogy, prohibiting long contracts for musicians is a viable alternative to the situation of discontent the music business faces today. Currently, many musicians are disillusioned by the long-term contract system and the industry would benefit if performers did not have to resort to litigation in order to leave a burdensome, unfair contract.⁷ If such a contract were to end in six months to a year, the

⁷ According to one music industry insider, 98% of artists sympathize with George Michael's contract complaints. Garfield, *supra* note 4 (quoting Ed Bicknell). Another authority states that "complaints are typical of artists all over the world of these long-term contracts, because they are signed when the artists don't have any clout or economic power. They become quite onerous to many artists." Dominic Pride, *Michael/Sony Verdict Resounds; Decision Does Not End Issues' Debate*, BILLBOARD, July 2, 1994, at 1 (quoting Don Engel, attorney for Don Henley of the Eagles).

performer could simply wait for it to expire rather than petitioning the courts for relief.⁸

II. THE MUSIC INDUSTRY AND JUDICIAL REMEDIES FOR BROKEN CONTRACTS

A. *Power in the Business: The Industry Reality that Musicians are Usually on Unequal Footing with Record Companies*

Popular music in the United States has always been structured along the same principles that drive any big business. While the surface image is of a teen idol crooning tender love songs to screaming crowds, the reality is agents, recording companies, and publishing houses each scrambling to get the biggest piece of the "pie."⁹ Often the performer is not remotely involved in the business side of the music industry. While this is not always the case,¹⁰ the

⁸ Many other related issues that are important to the music industry are beyond the scope of this Comment. Disputes over ownership of master recordings, publishing rights, and royalty payments are some of the most visible reasons for why musicians become dissatisfied with their record labels. However, the focus here is on what happens after antagonism has set in and the problems in the professional relationship are insurmountable.

Not everyone will publicly admit that sometimes professional relationships are past the point of repair. Even though George Michael had sworn never to record for Sony again, after Sony won the case it issued a statement that "[w]e have great respect for George Michael and his artistry, and look forward to continuing our relationship with him." Adam Dawtre, *Wham! Michael Loses as Court Rules for Sony*, DAILY VARIETY, June 22, 1994, at 1 (News).

Also beyond the scope of this Comment is a related topic, artists' ownership of their creations (e.g., music, art) beyond the confines of copyright law. See Dana L. Burton, Comment, *Artists' Moral Rights: Controversy And The Visual Artists Rights Act*, 48 SMU L. REV. 639 (1995); Edward J. Damich, *The Right of Personality: A Common-Law Basis for the Protection of the Moral Rights of Authors*, 23 GA. L. REV. 1 (1988).

⁹ MARC ELIOT, ROCKONOMICS (1989).

¹⁰ Bobby Darin was one of the most financially successful artists of his time; he had numerous hit records and managed to capitalize on his popularity. By controlling his own publishing, Darin became the first millionaire performer in the

financially savvy performer is the rare exception to the rule. Recording companies and agents have traditionally taken advantage of their artists' ignorance, inexperience, lack of involvement, naiveté and/or lower social status.¹¹

This Comment by no means alleges that record companies have always maligned poor, helpless artists. It also does not imply that any historical problems are ongoing. Rather, it presents a context in which the modern music industry may be viewed.

When modern American popular music first came into being, artists did not receive royalties for recorded performances of their songs. Indeed, the technology of recording sounds was not invented until the end of the nineteenth century.¹² After radios became standard fixtures in middle-class homes, a demand for recorded music developed. Radio stations would play records without giving a thought to paying anyone for the right. It was not until musicians and composers formed ASCAP and its rival, BMI, that performance royalties could realistically be collected.¹³ Money from royalties then became a prime consideration and led to struggles for the copyright ownership of songs.

Publishing companies and record companies in these early days of the industry sometimes took advantage of their artists' ignorance. As royalties were becoming very profitable, the companies did what they could to get ownership of the copyrights to songs. At times this meant paying large lump sums to the artists for songs, with the terms of "take it or leave it." The artists would, more often than not, be thrilled at the large amount of money they were paid, and did not realize that they had signed documents that transferred copyright ownership, which unbeknownst to them, was worth a vast amount

recording industry. *Id.* at 99-101.

¹¹ *Gee v. CBS, Inc.*, 471 F. Supp. 600 (E.D. Pa. 1979).

¹² Thomas Edison's cylinders were the first invention capable of recording sounds, but competition from the United States Gramophone Company's disks led to vinyl becoming the standard format. *ELIOT, supra* note 9, at 14-18.

¹³ ASCAP (the American Society of Composers, Authors and Publishers) and BMI (Broadcast Music, Inc.) are musicians' unions originally designed to insure that royalties would be paid through exclusionary and strike measures. For an interesting look at the politics behind the formation of ASCAP and BMI, see *id.* at 19-26.

more.¹⁴ A more insidious (and illegal) way for companies to gain the copyright was to print the name of the company president directly on the vinyl album and label him or her as "composer" or "songwriter." The name of the actual artist who wrote the song may or may not have been also printed as joint author.¹⁵

Popularity and immense commercial success did not shield later, more sophisticated artists from money, management and contract problems. One of the most successful musical groups of all time, the Beatles, endured some of the most complicated legal problems due to mismanagement which allowed people to take advantage of the band. After a series of inept contract decisions by the band's manager,¹⁶ the group was in financial disarray. Subsequent disagreement within the band as to who should have been the new manager led to fractionation, causing different members of the band to sign different contracts.¹⁷ When the band was finally able to negotiate itself out of various future obligations for new albums, there was nothing left holding the group together, and the Beatles dissolved. However, complications from the assorted contracts that had been signed led to protracted litigation.¹⁸

More recently, many of the small and mid-sized record and music publishing companies in the United States have been purchased by mammoth international corporations which realized the profit

¹⁴ ELIOT, *supra* note 9.

¹⁵ *Id.*

¹⁶ Brian Epstein's management of the Beatles has been described as "hopelessly confused." *Id.* at 135.

¹⁷ While John Lennon was able to persuade the reluctant George Harrison and Ringo Starr to sign a contract with Allen Klein, Paul McCartney insisted that the only effective new manager of the band could be Lee Eastman, his new father-in-law. Lennon's primary motivation was the fact that Klein had deftly managed the Rolling Stones for several years, making some members of that band multi-millionaires, and not shy about gloating about it. In the meantime, the Beatles had lost most of its profits in deals unfavorable to the band, and mismanagement of the band's company, Apple Corps Ltd., which was designed to help struggling musicians be noticed. *Id.* at 153-160.

¹⁸ Paul McCartney has been in litigation for more than 20 years attempting to extricate himself from Klein's influence in various tax, copyright, and royalty disputes. *Id.* at 159-60.

potential of popular music.¹⁹ In one of the biggest takeovers, Sony bought CBS Records on November 19, 1987.²⁰ Many have surmised that the electronics hardware giant needed a guaranteed supply of software to insure that its new technology would be used.²¹ Although many of the artists formerly at CBS Records expressed apprehension at the prospect of working for a company that has no history or experience managing artists,²² Sony assured its new employees that it would retain most of the management of CBS Records to insure a smooth transition. Fulfillment of this declaration has been uneven at best.²³

Quite aside from such global management changes, the story of the individual artist in the music industry is remarkably constant. While an unknown performer, the artist rarely has any authority to negotiate when offered his or her first contract. If he or she does not want to make a deal with a record company, there are plenty of other hopefuls who will jump at the chance. It is a take-it-or-leave-it proposition. Later, when that same artist has sold a gold record or two, he or she wants to correct the unbalanced terms of the first contract. The contract can be renegotiated, but the damage has already been done in that all future contracts will use the unbalanced first contract as a baseline. Additionally, much of the revenue from the hit songs of the early records will continue to go to the record companies in the form of royalties and licensing fees, as the terms of first contracts usually specify that the record company owns the

¹⁹ See *infra* note 96.

²⁰ ELIOT, *supra* note 9, at 197.

²¹ Sony had learned its lesson after the failure of its Betamax home VCR machines. As consumers had fewer choices of movies to watch on Beta than with its main competitor, VHS, the Beta technology was quickly rejected and became obsolete. Sony is now attempting to market the "MiniDisc" to play on its new portable CD player, to replace the Sony Walkman, which only plays tapes. To insure the success of the MiniDisc, Sony plans to release its vast catalog of past recordings acquired through CBS Records in the new format. Garfield, *supra* note 4.

²² *Id.*

²³ In a very public move, Sony retained Walter Yetnikoff, who was well known for his effective artistic management. However, Yetnikoff was fired in 1990. *Id.* See also ELIOT, *supra* note 9, at 197-99.

copyright.²⁴ Artists may be able to renegotiate their contracts in order to retain their copyrights of future compositions and recordings, but generally, the only profit they will receive from their early hit songs will be in percentages of first sales. Many artists only succeed in creating one or two hit songs.

What would seem obvious should nevertheless be stated outright. Record company officials are businesspersons. Artists in the music industry usually are not. Qualities valuable to a budding musician such as creativity, inspiration, talent and youthful energy are not going to help a young, inexperienced "next big thing" when faced with an army of record company lawyers, a 30-page contract, and promises of stardom. Any discussion of equal footing of artists with record companies needs to keep in mind that artists are often at an inherent disadvantage. If artists do not surround themselves with savvy managers and advisors from the beginning, they will be at a contractual disadvantage throughout their careers.

B. *Judicial Remedies for Broken Contracts*²⁵

The contracts that are formed between musicians and record companies are usually classified as personal services contracts.²⁶

²⁴ See *Mellencamp v. Riva Music Ltd.*, 698 F. Supp. 1154 (S.D.N.Y. 1988) (suit by rock artist John Mellencamp to recover from his record company copyrights to his songs after his efforts to buy them back for \$3 million failed).

²⁵ Several past law review articles have dealt with the subject of personal services contracts in the music and entertainment industry. See generally, Allen R. Grogan, Note, *Statutory Minimum Compensation and the Granting of Injunctive Relief to Enforce Personal Services Contracts in the Entertainment Industries: The Need for Legislative Reform*, 52 S. CAL. L. REV. 489 (1979); David Tannenbaum, *Enforcement of Personal Services Contracts in the Entertainment Industry*, 42 CAL. L. REV. 18 (1954); Jeffrey B. Light, *The California Injunction Statute and the Music Industry: What Price Injunctive Relief?*, 7 COLUM. J. ART & L. 141 (1982).

²⁶ Many contracts between musicians (or athletes) and recording or management companies contain a negative covenant ensuring the entertainer's exclusivity. At least one court has held that if such a contract is for a specific period of time, then it should be classified as a contract for personal services. If, however, the contract has no time limitation, then it should be considered in light of case law dealing with employment contracts. *Ichiban Records, Inc. v. Rap-A-Lot*

This is because making music is an artistic, highly creative endeavor, and although the relationship has many elements of more traditional employment contracts, the end result—the record—is a personal creation.

An artist who wishes to get out of a long-term, exclusive²⁷ contract with his record company has two main options. The first is to simply break the contract and to make a record for someone else, leaving it to the company to pursue legal action. Remedies available to such record company plaintiffs are orders for specific performance, injunctions preventing the artist from working for another company, and damages. The artist's other option is to sue the record company to have the contract declared unenforceable.²⁸ Artists can sue on several grounds, such as restraint of trade,²⁹ unconscionability,³⁰ unequal bargaining power,³¹ and involuntary servitude.³² The

Records, Inc., No. 01-95-00085-CV, 1995 Tex. App. LEXIS 1739, at *15 (1st Dist., Aug. 1, 1995).

²⁷ This Comment focuses on recording contracts that are multi-year and/or multi-album and have negative covenants restricting the musician from working with other companies. Short-term contracts or non-exclusive contracts are not considered except to the extent advocated as a favorable direction for the music industry.

²⁸ Artist plaintiffs have been more visible and successful in breaking their contracts in Europe than in the United States. See Jan Colley, *Rock Band Freed From 'Unfair' Contract*, PRESS ASS'N NEWSFILE, May 20, 1991, at 1 (Law Court News) (The English rock band, the Stone Roses, was successful in its restraint of trade case against its label, Silvertone Records, and Zomba Music Publishing. The case was tried by the High Court of England and was unpublished and sealed.); John Wilson, *Rock / Sleeve Notes*, THE INDEPENDENT, May 23, 1991, at 26 (Arts Page); Robert Hilburn, *Pop Music: The Roses Bloom Again*, L.A. TIMES, Feb. 5, 1995, at E3. See also Michael Skapinker, *Designer Stubble That Got Burnt; George Michael Lost His Court Battle—But Have Music Companies Won*, FIN. TIMES, June 22, 1994, at 22 (Holly Johnson, the lead singer for the band Frankie Goes to Hollywood, successfully sued Zang Tumb Tuum, his record company, in 1989. The unpublished Court of Appeal decision held the nine-year contract to be unenforceable, as it was "grossly one-sided.").

²⁹ Panayiotou v. Sony Music Entertainment (UK) Ltd., 13 Ch. 532 (Ch. 1994).

³⁰ Buchwald v. Paramount Pictures Corp., No. C 706083, 1990 Cal. App. LEXIS 634 (Cal. App. Dep't Sup. Ct. Jan. 31, 1990).

³¹ See *supra* note 28.

following discussion focuses on remedies available to companies whose artists who have broken their contracts.

1. Involuntary Servitude: A Prohibition Against Specific Enforcement

The United States' constitutional prohibition against involuntary servitude³³ has resulted in courts refusing to order specific performance of contracts for personal services.³⁴ In other words, employers cannot force employees to work for them when the work involves services of a personal nature. This general rule is especially important in situations where the employment contract involves mutual confidence, special knowledge, skill or ability, or the exercise of judgment, discretion, and integrity.³⁵ Recording a music album without a doubt requires all of these qualities. To force someone to remain in the personal service of another is akin to involuntary servitude,³⁶ or slavery.³⁷

Courts have recognized this basic principle for hundreds of years.³⁸ An early example in U.S. law comes from the case of *Arthur v. Oakes*,³⁹ where the court observed:

It would be an invasion of one's natural liberty to compel [an individual] to work for or to remain in the personal service of

³² Rather than a cause of action, involuntary servitude is usually used as an argument for why the contract is unconscionable, unfair, in restraint of trade, or otherwise invalid. Involuntary servitude is also invoked when proscribing specific enforcement.

³³ "Neither slavery nor involuntary servitude . . . shall exist within the United States . . ." U.S. CONST. amend. XIII, § 1.

³⁴ E. ALLAN FARNSWORTH, *CONTRACTS* § 12.7, at 868 (2d ed. 1990); *Foxx v. Williams*, 244 Cal. App. 2d 223, 235 (1966) ("It is a familiar rule that a contract to render personal services cannot be specifically enforced."); *Poultry Producers of S. Cal., Inc. v. Barlow*, 189 Cal. 278, 288 (1922).

³⁵ *Poultry Producers*, 189 Cal. at 288.

³⁶ *Id.*

³⁷ U.S. CONST. amend. XIII, § 1; *see also* *Poultry Producers*, *supra* note 34.

³⁸ *Lumley v. Wagner*, 42 Eng. Rep. 687 (1852); *see infra* Part II.B.2.

³⁹ 63 F. 310 (7th Cir. 1894).

another. One who is placed under such constraint is in a condition of involuntary servitude—a condition which the supreme law of the land declares shall not exist within the United States⁴⁰

A recent case expressed similar sentiment. In *American Broadcasting Cos. v. Wolf*,⁴¹ the court stated:

Courts . . . historically have refused to order an individual to perform a contract for personal services [There is a] compelling reason for not directing the performance of personal services: the Thirteenth Amendment's prohibition of involuntary servitude. It has been strongly suggested that judicial compulsion of services would violate the express command of that amendment For practical, policy and constitutional reasons, therefore, courts continue to decline to affirmatively enforce employment contracts.⁴²

Another reason for the doctrine that contracts for personal services cannot be specifically enforced is that enforcement runs contrary to public policy. It is desirable for the sake of society that contracting parties maintain a spirit of cooperation.⁴³ Forcing an employee to work plainly creates an atmosphere of hostility that is not useful in the workplace. Lastly, it is impossible in a practical sense for judges to enforce specific performance.⁴⁴ At the very least, courts cannot supervise the fulfillment of personal services contracts to verify that they are being performed in the intended manner.⁴⁵

⁴⁰ *Id.* at 317-18.

⁴¹ 52 N.Y.2d 394 (1981).

⁴² *Id.* at 401-02.

⁴³ *Poultry Producers* 189 Cal. at 288-89.

⁴⁴ *Id.* at 289. See also 5A CORBIN ON CONTRACTS § 1204 at 400 (1964) ("An artist does not work well under compulsion, and the court might find it difficult to pass judgment upon the performance rendered.") (as quoted in *Motown Record Corp. v. Brockert*, 160 Cal. App. 3d 123, 137 (1984)).

⁴⁵ One comical example is Monty Python's album entitled "Contractual Obligation." See MONTY PYTHON, MONTY PYTHON'S CONTRACTUAL OBLIGATION ALBUM (Arista 1980).

2. Injunctions

More commonly than requesting specific performance, a company seeking a remedy for a breached personal services contract will ask the court to enjoin the artist from performing for anyone else. However, an injunction can be an indirect means of actually forcing performance of the contract.⁴⁶ In fact, this is the only purpose of an injunction because the plaintiff has nothing else to gain by preventing the employee from working for anyone else.⁴⁷ The plaintiff's main motivation in seeking the order is to force the performer to return to the employer and to fulfill the terms of the contract.⁴⁸ If the performer is enjoined from working for anyone else, then he or she may very well return to the plaintiff/employer in order to continue to earn a living. Wealthy performers who could manage without a paycheck may return to the employer because they cannot afford to remain out of the public's eye for a period of years until the contract expires. To do so would be career suicide.⁴⁹ Some authorities have logically extended this analysis to state that by seeking an injunction, the employer has demonstrated a good faith desire to continue the contract.⁵⁰

The "classic case"⁵¹ illustrating the use of the injunction is *Lumley v. Wagner*.⁵² Johanna Wagner, niece of one of history's

⁴⁶ FARNSWORTH, *supra* note 34, at 855.

⁴⁷ *Beverly Glen Music, Inc. v. Warner Communications, Inc.*, 178 Cal. App. 3d 1142, 1145 (1986).

⁴⁸ Although this motivation has been seen as primary by many authorities, Light, *supra* note 25; Stevens, *Involuntary Servitude by Injunction*, 6 CORNELL L.Q. 235 (1921); *Beverly Glen*, 178 Cal. App. at 1145, an equally powerful motive may be to force the artist to pay more for the privilege of leaving the contract. See *infra* Part III.A.

⁴⁹ "Kids' tastes change very rapidly. Nobody can afford not to record for years, except Frank Sinatra, of course." Skapinker, *supra* note 28.

⁵⁰ See FARNSWORTH, *supra* note 34, at 868-69 n.22 (citing RESTATEMENT (SECOND) OF CONTRACTS § 367, cmt. c (1981)).

⁵¹ FARNSWORTH, *supra* note 34, at 855.

⁵² 42 Eng. Rep. 687 (1852).

greatest opera composers⁵³ and herself a singer of international renown, agreed to sing at Her Majesty's Theatre in London for three months. She was subsequently persuaded by Frederick Gye to break her contract⁵⁴ and to sing at the Royal Italian Opera instead. Lumley successfully obtained an injunction preventing Wagner from singing for anyone else during the duration of the contract.⁵⁵

It is unlikely that injunctions such as that in *Lumley v. Wagner* will be ordered unless the defendant is already in a position of strength. If an injunction would leave the employee with no other means of support, then a court would be reluctant to grant it.⁵⁶ Some courts are even resistant to any use of injunctions as a remedy to breached personal services contracts.⁵⁷ Nevertheless, if the artist is wealthy, famous, and powerful at the bargaining table, most courts would not consider an injunction to be unfair. Such an artist would not be seen as unduly harmed. The artists with little bargaining power have the most to lose, and consequently, are the least likely to have injunctions enforced against them.⁵⁸

The case of *Motown Record Corp. v. Brockert*⁵⁹ sets forth the rule on the use of injunctions against performers. In *Motown*, singer-songwriter Teena Marie breached the exclusivity clause of her contract

⁵³ German composer Richard Wagner (who died in 1883) authored "The Ring," "Tristan und Isolde," "Tannhäuser," and "Parsifal" among many other works, and an opera house has been built and designed expressly for the performance of his music in Bayreuth, Germany.

⁵⁴ For an interesting treatment on the neglected tort of inducement to breach of contract based in part on *Lumley v. Gye*, see David F. Partlett, *From Victorian Opera to Rock and Rap: Inducement to Breach of Contract in the Music Industry*, 66 TUL. L. REV. 771 (1992).

⁵⁵ Thus, for perhaps the first time, the injunction was used in the context of the personal services contract.

⁵⁶ FARNSWORTH, *supra* note 34, at 868.

⁵⁷ "The . . . doctrine was not warmly embraced . . ." *Motown Record Corp. v. Brockert*, 160 Cal. App. 3d 123 (1984) (quoting *Whitwood Chem. Co. v. Hardman*, 2 Ch. 416 (1891)).

⁵⁸ "There [is] a discernible trend toward enforcing negative covenants against the 'prima donnas' but not the 'spear carriers.'" *Brockert*, 160 Cal. App. 3d at 137 (citing to *Carter v. Ferguson* 12 N.Y.S. 580, 581 (1890)).

⁵⁹ 160 Cal. App. 3d 123 (1984).

with Motown by agreeing to record for another company. Her case turned on the issue of whether or not her contract guaranteed her \$6,000 annually. According to California law, an injunction cannot be granted to prevent the breach of a personal services contract entered into before January 1, 1994, where the contract guarantees less than \$6,000 in compensation, and where the services are not of special, unique, unusual, extraordinary, or intellectual character.⁶⁰ If the contract does not *guarantee* \$6,000, it is irrelevant whether the performer actually earns much more.

To be subject to [injunction], the contract must have as one of its terms a compensation provision providing for payment at the minimum rate of \$6,000 per year. In other words, agreeing to payment of the minimum compensation is not a condition precedent to the granting of injunctive relief; it is a threshold requirement for admission of the contract into the class of contracts subject to injunctive relief under the statute.⁶¹

California's \$6,000 per year minimum compensation requirement is notable because, as originally drafted, the statute would have denied any injunctive relief at all for personal services contracts.⁶² The \$6,000 per year exception was designed to give some relief to companies dealing with powerful performers.⁶³ This is because at the time the statute was written, \$6,000 was more than five times the national wage.⁶⁴ The legislature thus intended to make injunctive relief available against star performers, or "prima donnas,"

⁶⁰ CAL. CIV. CODE § 3423 (Deering 1995) (This version of the statute was not in use at the time of the case, but the relevant portions remain unchanged. The main difference is that contracts entered into after December 31, 1993 are subject to different amounts of guaranteed minimum compensation, depending upon how long the contract has been in effect.).

⁶¹ *Brockert*, 160 Cal. App. 3d at 135 (applying CAL. CIV. CODE § 3423).

⁶² *Id.* at 136.

⁶³ "[A]t the time section 3423 was amended [in 1919] there was a discernible trend toward enforcing negative covenants against the 'prima donnas' but not the 'spear carriers.'" *Id.* at 137.

⁶⁴ In 1919, \$6,000 was equivalent to \$100,000 (as the dollar was valued in 1984). *Id.* at 138.

but not against those less famous and powerful, the "spear carriers."⁶⁵

At the time she signed her contract with Motown, Teena Marie was not a star. This was one of the major reasons why she was not held to be subject to an injunction. The court pointed out that although she had subsequently become very successful, it was her status at the time the contract was signed that was relevant.⁶⁶ In reaching this conclusion, the court distinguished *Lumley v. Wagner* on the basis that, at the time the contract was made, Wagner was already a performer of immense fame and distinction.⁶⁷ Whereas courts were comfortable with the result in Wagner's case, they were reluctant to extend the doctrine of allowing injunctions in personal services contracts any farther.⁶⁸

An important reason why courts are disinclined to expand the *Lumley v. Wagner* exception for "stars" is that such injunctions are a powerful tool of coercion available to companies.⁶⁹ "The threat of a prohibitory injunction may be just as effective as the injunction itself in discouraging the artist from seeking more lucrative employment."⁷⁰ As many artists are not sophisticated businessperson, legal threats could be as effective as legal action. This is brought into even sharper focus by the fact that the statutory minimum compensation requirements are virtually meaningless by the time most cases would come to trial. If the previously unknown artist is unsuccessful, the company will not expend money and resources attempting to obtain an injunction.⁷¹

Two other cases relied upon by *Motown* also emphasize the "prima donna/spear carrier" distinction. Olivia Newton-John had an injunction issued against her after a court held that the \$6,000

⁶⁵ *Brockert*, 160 Cal. App. 3d at 137-38.

⁶⁶ *Id.* at 136. Note that the *Panayiotou v. Sony* court did not agree with this holding; see *infra* nn. 98 & 108 and accompanying text.

⁶⁷ *Lumley v. Wagner*, 42 Eng. Rep. 687 (1852).

⁶⁸ *Brockert*, 160 Cal. App. 3d at 129.

⁶⁹ *Id.* at 139-40.

⁷⁰ *Id.*

⁷¹ *Id.* at 139-40.

statutory minimum requirement did not apply to her situation,⁷² and that she was an international star.⁷³ On the other hand, as comedian Redd Foxx was a "struggling nightclub comic" when he made his contract to record an album, he was held not to fall within the exception.⁷⁴ As a practical matter, therefore, injunctions, are only ordered against "star" performers who are famous, successful and powerful.⁷⁵

Separate from the policy-oriented question of whether a performer has reached star distinction is a statute-based inquiry into what constitutes services of a special character.⁷⁶ Many courts require a showing that the employee's services are unique or extraordinary before an injunction will be ordered.⁷⁷ Cases where an injunction was granted (or even seriously considered) usually involve contracts of athletes or professional entertainers⁷⁸ due to the

⁷² It has been noted by previous commentators that the discrepancy between *Foxx* and *Newton-John* could be explained on the theory that the \$6,000 statutory minimum requirement was to be applied as a limitation on the *class* of contracts of powerful performers. Light, *supra* note 25, at 151-54. However, a more likely interpretation is that the \$6,000 requirement was intended to guarantee *net* profits to the entertainer. *Id.* While this places the *Newton-John* holding into serious tension with *Foxx*, it is clear that courts never intended the minimum wage requirement to benefit powerful artists who did not need its help. Grogan, *supra* note 24, at 513.

⁷³ *Brockert*, 160 Cal. App. 3d at 131 (discussing *MCA Records v. Newton-John*, 90 Cal. App. 3d 18 (1979)).

⁷⁴ *Id.* at 130-31 (discussing *Foxx v. Williams*, 244 Cal. App. 2d 223 (1966)).

⁷⁵ This seems to be the most likely solution, as *Newton-John's* contract did not, in fact, *guarantee* her \$6,000 per year, although in reality she earned far more. See Grogan, *supra* note 25, at 513.

⁷⁶ See generally Tannenbaum, *supra* note 25, at 21-23.

⁷⁷ FARNSWORTH, *supra* note 34, at 865. See also CAL. CIV. CODE § 3423 (Deering 1995) (stating that an injunction can only be granted to prevent breach of a personal services contract "where the promised service is of a special, unique, unusual, extraordinary or intellectual character, which gives it peculiar value, the loss of which cannot be reasonably or adequately compensated in damages in an action at law, the performance of which would not be specifically enforced . . .").

⁷⁸ FARNSWORTH, *supra* note 34, at 868 n.21. One commentator who thoroughly researched the subject also found that injunctions have been issued against actors, acrobats, dancers, minstrel singers, musicians, radio commentators, a theatrical booking agent, baseball players, and a jockey. Tannenbaum, *supra* note

exceptional or unusual talents of some "superstars" of these industries. However, the issue of whether a performer's services are "special" enough to merit injunction is a finding of fact to be determined by the jury (or by the judge in a bench trial).⁷⁹ This can lead to contradictory results.

The inherent possibility of contradiction is exemplified by Anita Baker's case.⁸⁰ A performer as widely known as Baker was held not to be so special as to merit an injunction.⁸¹ As the determination of the "specialness" of a performer's services is a finding of fact for the jury to decide, inconsistency may result. The more widely known and popular the artist, the more likely the jury is to already be familiar with him or her as a public figure. If the jury feels kindly disposed to such a well-known performer, it may well decide to do the performer the favor of finding that his or her services are not nearly "special" enough to qualify for an injunction. If this reasoning were extended to find the contract unenforceable, the artist would be free to walk away from the contract.

Some of the other cases already mentioned also considered the issue of "specialness." *Lumley v. Wagner* is the origin of this line of inquiry, and many cases that came after were distinguished on the ground that unlike the artist at issue, Johanna Wagner was an "exceptional artist."⁸² Additionally, the salary that is paid to the performer can be used to determine whether or not the performance

25, at 21-22.

⁷⁹ The same line of reasoning for why courts will not enforce specific performance of personal service contracts applies to the issue in which judges determine whether a performer's services are "special." Judges have wisely realized that it is a very difficult job to pass judgment on the quality of a performance. *Brockert*, 160 Cal. App. 3d at 137.

⁸⁰ *Beverly Glen Music, Inc. v. Warner Communications, Inc.*, 178 Cal. App. 1142 (1986).

⁸¹ *Id.* at 1145.

⁸² *Brockert*, 160 Cal. App. 3d at 137 (discussing *Lumley v. Wagner*, 42 Eng. Rep. 687 (1852)).

is "special."⁸³ Courts are free to equate a modest fee with a performance that is easily replaceable.

In *Motown*, it was decided that Teena Marie did not fit into the statutory exception of "special" because she was an "unknown" at the time she signed her contract.⁸⁴ The same reasoning allowed Redd Foxx to escape injunction.⁸⁵ Olivia Newton-John was the only performer in this discussion who was enjoined against performing for any other company.⁸⁶ The court in *MCA Records v. Newton-John* declined to discuss whether or not her performances constituted services of a "special" nature. Rather, it made its decision based on the statutory requirement of \$6,000 per year. Although it avoided the question of "specialness," it is feasible that the court was influenced by Newton-John's star quality at the time she signed her contract.⁸⁷ It is no great leap to say that courts are reluctant to assess the "specialness" of a performer's services.

3. Damages

In the event that a court decides not to grant an injunction, it may still award damages if it finds that a valid contract did exist and was breached. The amount awarded may be quite substantial depending on the earning power or potential of the performer. In fact, a court is not supposed to even reach the question of whether an injunction is suitable unless the court decides that the company cannot be fairly compensated in any other way.⁸⁸ The current law holds that

⁸³ *Id.* ("The salary agreed to be paid defendant was quite moderate, and indicates that his part was quite ordinary, and manifestly could be easily filled.") (quoting *Dockstader v. Reed*, 106 N.Y.S. 795, 797 (1907)).

⁸⁴ *Id.* at 138.

⁸⁵ *Id.* at 130-31 (discussing *Foxx v. Williams*, 244 Cal. App. 2d 223 (1966)).

⁸⁶ *But cf.* *Paramount Pictures Corp. v. Davis*, 228 Cal. App. 2d 827 (1964); *King Records, Inc. v. Brown*, A.D.2d 593 (1964).

⁸⁷ *Brockert*, 160 Cal. App. 3d at 131 (discussing *MCA Records v. Newton-John*, 90 Cal. App. 3d 18 (1979)).

⁸⁸ "A court will not . . . grant an injunction unless the remedy in damages would be inadequate." FARNSWORTH, *supra* note 34, at 865. *But cf.* Light, *supra* note 25, at 141 ("Injunctions are the only practical remedy to a company with an artist threatening to breach.").

damages are the appropriate remedy against all performers except those very "special" performers who have produced very high revenues for their companies.⁸⁹ This is subject, of course, to a finding of a valid contract.

C. *Michael v. Sony as an Illustration of Problems Endemic to Long-Term Contracts in the Music Industry*

The second option for an artist who wishes to be free of a contract to perform and/or record for a company is to request the court to declare the contract legally unenforceable. Some artists may prefer to petition the courts as plaintiffs, rather than break their contracts and wait for the record companies to pursue them with a lawsuit. In addition to choice of venue, this tactic has the advantage of showing good faith to the court. Historically, some grounds for such a decision have included restraint of trade,⁹⁰ unconscionability,⁹¹ and involuntary servitude.⁹²

⁸⁹ For a more thorough discussion of damages as a remedy, see *infra* Part III.A.

⁹⁰ Panayiotou v. Sony Music Entertainment, 13 Ch. 532 (Ch. 1994).

⁹¹ Michael Skapinker, *Designer Stubble That Got Burnt; George Michael Lost His Court Battle—But Have Music Companies Won*, FIN. TIMES, June 22, 1994, at 22 (Holly Johnson, the lead singer for the band Frankie Goes to Hollywood, successfully sued Zang Tumb Tuum, his record company, in 1989. The unpublished Court of Appeal decision held the nine-year contract to be unenforceable, as it was "grossly one-sided."). See also Jan Colley, *Rock Band Freed from 'Unfair' Contract*, PRESS ASS'N NEWSFILE, May 20, 1991, at 1 (Law Court News) (The High Court in the case of the group The Stone Roses against its record company, Silvertone, found that the band was very much under the influence of its manager, who was inexperienced in contract law. The High Court also found that the manager's attorney was "no match whatsoever" for the attorneys employed by the record company.); Buchwald v. Paramount Pictures, No. C 706083, 1990 Cal. App. LEXIS 634 (Cal. App. Dep't Sup. Ct. Jan. 31, 1990).

⁹² Involuntary servitude is not a cause of action so much as a policy argument directed toward what will happen either if the contract is allowed to stand or if an injunction is granted. See *supra* Part II.B.1.

George Michael's case⁹³ probably involves the most famous musician in the modern era who attempted to break a performing and recording contract.⁹⁴ All the eyes of the industry were upon this case, and the outcome could have radically changed the way the music industry operates.⁹⁵ Since Michael lost his case, the industry is ostensibly back to business as usual. However, a more basic question is why those governed by the U.S. legal system should be concerned with a British case. After all, it has no precedential value and can be regarded as simply an interesting news event to be read about in the entertainment section of the newspaper. One of the answers is that the music industry today is an international, global enterprise. This British decision will at a minimum affect those U.S. companies doing business in the U.K.⁹⁶ Another reason to examine the case is that

⁹³ *Panayiotou v. Sony Music Entertainment (UK) Ltd.*, 13 Ch. 532 (Ch. 1994).

⁹⁴ In earlier times, the case of *Lumley v. Wagner*, 42 Eng. Rep. 687 (1852), was the most prominent example. Michael's case is one of the few to actually be litigated, due to the length of time a trial requires, and the artist being out of the public eye for the duration. See *supra* note 49.

⁹⁵ Donald Passman, *Michael Trial Has No Bearing On U.S. Biz*, BILLBOARD, Aug. 6, 1994, at 6 (hypothetical description of what could have happened if Michael had been successful).

⁹⁶ Actually, as the result of mergers and acquisitions, there are currently six major players in the music industry, only one of which is United States owned. All six "majors" are now international giants. Besides Sony buying CBS Records, discussed in *supra* note 21 and accompanying text,

Holland's Philips N.V. acquired PolyGram, A&M, Mercury and Island. Sony's archrival Matsushita Electrical Industrial Co. bought MCA and Geffen. Britain's Thorn-EMI picked up Capitol and Virgin. And Germany's publishing giant, Bertelsmann Inc., bought the record arm of RCA Corp. U.S.-based Time Warner rounded out the new order of multimedia conglomerates with the 1989 merger of the Time Inc. and Warner Communications empires.

Robert Hilburn & Chuck Philips, *Rock's New World Order*, L.A. TIMES, Nov. 29, 1992, at 7 (Calendar). But see Chuck Phillips, *Indie Epitaph Records is Hoping to Upend the Major Record Companies*, L.A. TIMES, Apr. 5, 1996, at D1 (stating that independently distributed record companies are projected to gain a 20% market share of the music industry by mid-1996, which for the first time would be a larger share than any of the six entertainment giants).

because *Michael v. Sony* lacks precedential value in the U.S., a similar case could arise in the U.S. legal system and could be decided differently.⁹⁷

George Michael's troubles originated in 1982 when, as part of his music group Wham! he signed his first recording contract with Innervision, a subsidiary of CBS. The long-term deal bound Michael (whose real name is Georgios Kyriacos Panayiotou) to an extremely unfavorable financial arrangement.⁹⁸ After Wham!'s successful debut album,⁹⁹ the band filed restraint-of-trade charges against Innervision in 1984. Weeks before the case was to come to trial, CBS offered the band a better deal and the case settled out of court. After Andrew Ridgely left Wham!,¹⁰⁰ CBS exercised its option to continue the contract with Michael as a solo artist.¹⁰¹

Michael's first solo album, "Faith," was enormously successful.¹⁰² Upon Michael's request, CBS renegotiated his deal, improving his financial terms but requiring him to deliver seven more

⁹⁷ This is assuming that another artist will take the chance of challenging his or her contract in the U.S. Michael's case was one of the rare few to reach a trial. Most artists cannot risk their careers by being out of the limelight for the length of time required by a lawsuit. This, combined with the strong-arm tactics used by the record companies, "persuades" most artists to settle out of court. Light, *supra* note 25, at 146. The dearth of caselaw on the subject is almost shocking. Grogan, *supra* note 25, at 491-92. See also *infra* note 166.

⁹⁸ Simon Garfield, *George Michael is No Stranger to Contract Litigation*, TORONTO STAR, Nov. 30, 1992, at B4.

⁹⁹ Wham!'s debut album, "Fantastic" was released in 1982. Adam Dawtrey, *Wham! Michael Loses as Court Rules for Sony*, DAILY VARIETY, June 22, 1994, at 1 (News).

¹⁰⁰ Wham! last performed at Wembley Stadium in June, 1986, and the band split up by the end of that year. In 1988 Ridgely was reportedly living in Monaco and racing cars. Jon Bowermaster, *Michael Unmasked: His New Image is Part of a Real Effort to Claim Musical Respectability*, CHI. TRIB., Sept. 4, 1988, at C4. Ridgely released his solo debut, *Son of Albert* (Columbia), two years later. Parry Gettelman, *Music in the Bin*, ORLANDO SENTINEL TRIB., May 25, 1990, at 21 (Calendar).

¹⁰¹ Garfield, *supra* note 98; Dawtrey, *supra* note 99.

¹⁰² "Faith" has sold 15 million copies worldwide. Chris White, *Sony Blasted by Attorney as Michael's Trial Opens*, BILLBOARD, Oct. 30, 1993, at 8 (Artists & Music).

albums. The new contract bound him to Sony until the year 2003.¹⁰³ In 1988, Sony finalized its purchase of CBS Records, and Michael toured to promote "Faith." His contract, then with Sony, was renegotiated again in 1990 in order to bring his earnings into line with those of comparable stars. When his second album, "Listen Without Prejudice," failed to match the sales of "Faith,"¹⁰⁴ Michael decided to challenge his contract with Sony on grounds of unreasonable restraint of trade.¹⁰⁵ He contended that Sony pressured him to create and record a certain style of music accompanied by heavy video rotation. When he resisted, due to his preference to explore other musical styles and his concern of overexposure, Sony allegedly retaliated by failing to adequately market his recordings and threatening to not release any unacceptable albums, thus "restraining his trade."

Michael's grievances did not stem from financial inequity.¹⁰⁶ Although Michael was earning three to five times less money than his music was making for Sony,¹⁰⁷ he was far from destitute. Because his wealth has been estimated at \$108 million,¹⁰⁸ no court in the world would rule that the terms of his contract were financially

¹⁰³ Jeff Kaye, *Music Industry Eyes on George Michael Suit*, L.A. TIMES, Oct. 8, 1993, at D5.

¹⁰⁴ "Listen Without Prejudice" only sold 5.5 million copies worldwide compared to "Faith's" 15 million. However, in the U.K., where it was heavily promoted, "Listen Without Prejudice" outsold "Faith." White, *supra* note 102. "Listen Without Prejudice" was nevertheless within the top 1% of albums in the U.S. Dominic Pride, *Michael/Sony Verdict Resounds; Decision Does Not End Issues' Debate*, BILLBOARD, July 2, 1994, at 1.

¹⁰⁵ Dawtrey, *supra* at note 99; Michael Skapinker, *Designer Stubble That Got Burnt: George Michael Loses His Court Battle - But Have Music Companies Won*, FIN. TIMES, June 22, 1994, at 22.

¹⁰⁶ The contract was also argued to be unconscionable because of the inequality of royalty rates between Michael and Sony. However, unconscionability was used as a sub-argument to the restraint of trade issue and not on its own merits. Panayiotou v. Sony Music Entertainment (UK) Ltd., 13 Ch. 532 (Ch. 1994).

¹⁰⁷ Various writers have placed the apportionment at 0.69 pence for Michael for every 3.38 pounds for Sony, Simon Garfield, *The Machine That Ate George Michael*, THE INDEPENDENT, Nov. 21, 1992, at 29, or as high as \$0.87 for Michael to \$2.78 for Sony, Kaye, *supra* note 103.

¹⁰⁸ *Michael Appeals Sony 'Slavery'*, DAILY VARIETY, Aug. 9, 1994, at 6.

unconscionable. Rather, he felt that Sony refused to market his albums properly. Michael believed that because Sony did not like his new style, it refused to spend sufficient money to promote "Listen Without Prejudice" to radio stations and to expose it to the buying public. The contract went so far as to allow Sony to shelve any of his albums if it decided that the music is not what it wanted to market. As a result, Sony could insist that Michael's music be in a particular style simply because Sony believed it would be more commercially viable.¹⁰⁹ Sony never refused outright to release his material, but Michael claimed that Sony did soft-pedal two of his albums after the mega-success of "Faith."¹¹⁰

Michael was very clear that his aim was not money, but rather, artistic freedom.¹¹¹ He felt that Sony did not understand the creative aspects of the music business and that it treated musicians as "software" to supplement the success of its huge worldwide music hardware industry.¹¹²

Since the Sony Corporation bought my contract, along with everything else at CBS, I have seen the great American music company that I proudly signed to as a teen-ager become a small part of the production line for a giant electronics corporation, who quite frankly, have [sic] no understanding of the creative process. With CBS, I felt that I was believed in as a long-term artist, whereas Sony appears to see artists as little more than software. Musicians do not come in regimented shapes and sizes, but are

¹⁰⁹ Kaye, *supra* note 103.

¹¹⁰ "Red Hot and Dance," a charity album with three songs by Michael, was alleged to have been "buried" by Sony because it afforded Sony no financial gain; all proceeds went to AIDS research. Garfield, *supra* note 98. Additionally, his second solo album, "Listen Without Prejudice," did not come close to matching the megasuccess of "Faith." White, *supra* note 104. Michael believed that Sony had ineffectively marketed the album in a deliberate "kill" attempt as a punishment for his refusal to make videos or do interviews. Skapinker, *supra* note 105.

¹¹¹ Michael has said that if money were his motivation, he would simply have renegotiated his contract again. Garfield, *supra* note 98.

¹¹² Robert Hilburn & Chuck Philips, *Rock's New World Order*, L.A. TIMES, Nov. 29, 1992, at E7.

individuals who change and evolve together with their audiences. Sony obviously views this as a great inconvenience.¹¹³

The London High Court disagreed with Michael.¹¹⁴ The judge ruled that Michael's 1988 eight-album, 15-year contract did not constitute a restraint of trade. The opinion had three main points. First, the contract was "reasonable and fair."¹¹⁵ As Michael was already a superstar at the time he signed the contract, it was not a situation of a young, inexperienced artist, desperate for a big break, signing a contract without representation.¹¹⁶ The English courts had already shown a willingness to overturn contracts that they felt were fundamentally unfair due to record companies and their attorneys taking advantage of artists' naiveté.¹¹⁷ However, as Michael was represented by some of the best entertainment attorneys in the business at the times of his renegotiations, he did not fit the mold.

Second, because the 1988 contract was based on the 1984 contract, Michael was precluded from challenging the 1988 contract on restraint of trade grounds. As the 1984 contract was a compromise solution to Michael's previous restraint of trade lawsuit against Innervision,¹¹⁸ the court held that Michael had already settled this particular argument against CBS by agreeing to the 1984 contract. Therefore, he could not assert it again against Sony in its new form of the 1988 contract.¹¹⁹

Third, Sony had shown good faith by renegotiating Michael's contract several times.¹²⁰ Sony even advanced money at Michael's

¹¹³ This quote was reproduced in many slightly different variations. Because the press release is no longer available, the above version is spliced together from what was reported, to be as close as possible. Garfield, *supra* note 107; Hilburn & Philips, *supra* note 112; Kaye, *supra* note 103.

¹¹⁴ Panayiotou v. Sony Music Entertainment (UK) Ltd., 13 Ch. 532 (Ch. 1994).

¹¹⁵ *Id.*

¹¹⁶ Dawtrey, *supra* note 99.

¹¹⁷ See *supra* note 91.

¹¹⁸ Dawtrey, *supra* note 99.

¹¹⁹ Panayiotou v. Sony Music Entertainment (UK) Ltd., 13 Ch. 532 (Ch. 1994).

¹²⁰ *Id.*

request.¹²¹ One of these advances could have been what ultimately ended Michael's chances to assert his restraint of trade argument. After successfully renegotiating his contract with Sony in 1990, Michael was informed by his lawyers that his agreement was possibly an unreasonable restraint of trade. Nevertheless, he requested an advance of \$1 million, which Sony paid. Although Michael repaid the \$1 million six months later, the judge ruled that his acceptance of the money affirmed the Sony contract.¹²²

In holding that Michael was well-represented by counsel and was a superstar rather than a naïve young artist during contract renegotiations, the court ignores the fact that Michael was indeed an inexperienced young singer at the time of the signing of his *first* contract in 1982. All the subsequent contracts were hampered by this first contract with Innervision, which was universally agreed to have been a terrible deal for Wham! and Michael.¹²³ Michael began his career with very poor contract terms. Although subsequent contract renegotiations improved Michael's situation, the revisions did not really raise the contract to a fair level. Michael's representatives could only get so many concessions in any one negotiation.

In addition, two other groups with first contracts very similar to Michael's first arrangement were allowed out of their contracts. The English courts held that both Frankie Goes to Hollywood¹²⁴ and the Stone Roses¹²⁵ had been taken advantage of by powerful companies, resulting in inequitable contracts. In the case of the Stone

¹²¹ Dawtrey, *supra* note 99.

¹²² Panayiotou v. Sony Music Entertainment (UK) Ltd., 13 Ch. 532 (Ch. 1994); Dawtrey, *supra* note 99.

¹²³ "Because of the first bad deal, [Michael's] hands have always been tied during negotiations. He always had to agree to terms far less lucrative [than] to those he could get on the open market." Garfield, *supra* note 107 (quoting Dick Leahy, Michael's music publisher and confidant). See also *supra* Part II.A.

¹²⁴ Zang Tumb Tuum Records v. Johnson (Eng. C.A. Ch. July 26, 1989) (unpublished); see *supra* note 91.

¹²⁵ Stone Roses v. Silvertone (High Court of England May 22, 1991) (decision was unpublished and sealed); see *supra* note 91.

Roses, the court went so far as to declare the contract an unjustifiable restraint of trade.¹²⁶

The main difference between these cases and Michael's is that Michael settled his first contract dispute out of court. Succeeding renegotiations resulted in the 1984 contract with CBS Records. *Michael v. Sony* held that by settling and renegotiating, Michael affirmed that there was no restraint of trade. On the other hand, the decision could be read as holding that a restraint of trade argument has to be fully litigated the first time or be waived. This could result in discouraging the artist from settling a case. In any event, although Michael's renegotiations eventually made him a wealthy man,¹²⁷ he may have been better off scrapping the whole deal and starting over in 1984. His renegotiations always related back to the 1982 contract. As reported by the press, Michael stated that he

"was trying to make the best of a bad job." The problem with a recording contract . . . is that when you sign your first one you are stuck with it. "There is no such thing as resignation for an artist in the music industry. Effectively, you sign a piece of paper at the beginning of your career and are expected to live with that decision, good or bad, for the rest of your professional life."¹²⁸

The London High Court could have ruled that long, multi-year, multi-album contracts constitute an unreasonable restraint of trade in general, but it did not even address the issue. By instead focusing only on the merits of Michael's case, the door was left open for another court to decide that contracts for lengthy periods of time are unenforceable.¹²⁹ *Michael v. Sony* did not so much address the weight of the unreasonable restraint of trade issue standing alone as it addressed how the issue is affected by star power. The ultimate message of the case was that because George Michael was a rich and powerful superstar who was well represented by counsel in contract

¹²⁶ Steve Hochman, *Pop Eye: They're Off and Running in the George Michael Derby*, L.A. TIMES, Jan. 24, 1993, at 70 (Calendar).

¹²⁷ Garfield, *supra* note 107 and accompanying text.

¹²⁸ Skapinker, *supra* note 105; Pride, *supra* note 104.

¹²⁹ Skapinker, *supra* note 105.

negotiations, there could not possibly have been restraint of trade.¹³⁰ While this is not an unreasonable assumption, it evades the question of whether or not there *actually* was a restraint of trade.

Additionally, although the court clearly held that Sony had shown good faith throughout the contract negotiations,¹³¹ the court did not discuss the fact that Sony had been involved in only one of the four contracts, the last one. Michael's first contract, in 1982, was with Innervision, a subsidiary of CBS. The 1984 contract with CBS Records was a result of a settlement, and the 1988 renegotiation was also with CBS Records. Sony then bought CBS Records and Michael's contract "along with everything and everyone else at CBS."¹³²

Whereas Michael seemed to have considered CBS Records a "great company" with which he was proud to have been associated,¹³³ he was clearly disappointed by the Sony takeover. The London High Court completely disregarded the fact that most of Michael's professional career was not with Sony. He contracted with CBS Records, and suddenly, for reasons beyond his control, he became tied to a 15-year contract with Sony, a company he did not like and with whom he never agreed to work.¹³⁴ It would seem that this should have been taken into consideration in binding Michael to the contract. Courts could be more lenient about declaring a contract unenforceable when one of the litigants is not an original party to the contract.

As Michael had sworn never to record for Sony again,¹³⁵ the judge in essence said that Michael will record for Sony or not at

¹³⁰ Panayiotou v. Sony Music Entertainment (UK) Ltd., 13 Ch. 532 (Ch. 1994).

¹³¹ *Id.*

¹³² Kaye, *supra* note 103.

¹³³ See *supra* note 113 and accompanying text.

¹³⁴ Michael stated that the decision was "effectively professional slavery." Philips, *supra* note 102.

¹³⁵ Skapinker, *supra* note 105.

all.¹³⁶ This is tantamount to prohibiting a person from earning a living from anyone other than a specified employer.¹³⁷ There was a strong implication that Michael would be enjoined from working for anyone else if he breached his contract. It would have been better if the court had held that no injunction could have been issued against Michael if he chose to record for another company. Instead, as the court held that the contract was enforceable,¹³⁸ very expensive damages or an injunction could have been levied against Michael if he broke his contract.¹³⁹ A better result would have been for the court to have actually considered the restraint of trade issue beyond a determination of Michael's star status.

George Michael, of course, will not have to endure being prohibited from ever working again for anyone other than Sony.¹⁴⁰ He is a valuable enough performer that many other companies are willing to pay millions to buy his contract from Sony. Michael's legal ordeal has ended well for him. Almost exactly one year after the completion of the trial, his contract was bought by Dreamworks for an estimated \$30 to \$40 million,¹⁴¹ plus royalty payments from

¹³⁶ Although Sony issued a press release after the decision stating that it looked forward to continuing its relationship with Michael, Dawtre, *supra* note 8, "[r]ealistically, no one expect[ed] the two parties to work together again" Discussions were already underway regarding how much another record label should pay to get Michael. Skapinker, *supra* note 105; Pride, *supra* note 104.

¹³⁷ The United Kingdom is not governed by United States principles of involuntary servitude or policy reasons behind nonenforcement of personal services contracts. See *supra* Part I. So, to a certain extent, applying U.S. policies to a British case is esoteric. However, this Comment attempts to analyze *Michael v. Sony* in light of the fact that a similar case may well be brought in the U.S., to predict what may happen and to persuade what should take place.

¹³⁸ *Panayiotou v. Sony Music Entertainment (UK) Ltd.*, 13 Ch. (Ch. 1994).

¹³⁹ See *infra* discussion in text on damages, Part III.A.

¹⁴⁰ Many other music companies were eager for the privilege of purchasing Michael's contract. Michael's manager Rob Kahane stated that "[e]very major label has called me saying 'Just want you to know we're interested and would offer a ton of money'" Hochman, *supra* note 126.

¹⁴¹ Adam White & Dominic Pride, *George Michael Arrives at Dreamworks/Virgin; Sony Suit Settled*, BILLBOARD, July 22, 1995, at 1; Alice Rawsthorn, *George Michael to Join Dreamworks: Sony Expected to Release Singer in Deal Worth \$100 Million*, FIN. TIMES, July 4, 1995, at 21.

Michael's next album, possibly bringing Sony's profit as high as \$100 million.¹⁴² It would be very unfortunate, however, if the court took the fact that Michael's contract would almost certainly have been bought by another company into consideration in holding Michael to the contract. Such a decision would basically prevent only non-star performers from being free of restrictive contracts.

Although the judge discusses Sony's good faith at length,¹⁴³ Michael's good faith is not mentioned. Michael had two choices: he could have broken his contract outright and let Sony file suit against him, or he could have done what he did—institute proceedings to break free of his contract. Instead of wronging Sony, Michael chose to assert that Sony had wronged him. Tactically, this seemed like a good idea in light of the English court system's willingness to find personal services contracts in the entertainment industry unconscionable.¹⁴⁴ In retrospect, however, it may have been wiser to break the contract and let Sony sue him. If such a hypothetical case had been litigated in the United States, Michael would have stood a good chance of merely being forced to pay Sony damages. This is particularly true given U.S. courts' reluctance to place value judgments on a performance's "specialness."¹⁴⁵

As previously noted, the holding in *Michael v. Sony* has no direct impact on U.S. law. However, the indirect influence could be important.¹⁴⁶ Some have speculated that record companies will now

¹⁴² Dreamworks was created in 1994 as a result of collaboration among Steven Spielberg, Jeffrey Katzenberg, and David Geffen. Rawsthorn, *supra* note 141. After escaping from his 15-year contract with Sony, Michael insisted that as a condition of his new contract that he be bound for no more than two albums. Dreamworks risks losing a great deal of money if Michael does choose to leave. Leslie Adler, *Interview—Leahy Says George Michael Sees Freedom*, CANADIAN FIN. REP., July 13, 1995, at 1; White & Pride, *supra* note 141.

¹⁴³ Panayiotou v. Sony Music Entertainment (UK) Ltd., 13 Ch. 532 (Ch. 1994).

¹⁴⁴ See *supra* note 91.

¹⁴⁵ See *supra* discussion of use of injunctions, Part II.B.2.

¹⁴⁶ If Michael had been successful, attorneys in the U.S. probably would have used the decision as grounds to raise the same issues in U.S. courts. Kaye, *supra* note 103; Philips, *supra* note 134; Pride, *supra* note 104.

push their artists to accept less favorable contract terms,¹⁴⁷ with the blessing of the courts. Others feel that Sony erred badly in its treatment of Michael, and this case should never have reached the stage where litigation was necessary.¹⁴⁸ It is undisputed that the decision was good for record companies worldwide. In fact, stock values for many record companies increased right after the decision came down.¹⁴⁹ Nevertheless, experts still consider the law on the subject to be "evolving."¹⁵⁰ Therefore, it is too soon to draw any clear conclusions from the case.

III. SOLUTIONS

There is no simple solution to what should happen when the relationship between a musician and a record company goes awry. There are four possible conclusions a court could reach in deciding a breach of contract case. First, the court could order specific enforcement. Second, an injunction could be issued. Third, damages could be assessed. Fourth, the artist could be declared free to go. The first three are possibilities when the court holds that a valid, enforceable contract exists. The fourth results from the court's

¹⁴⁷ Pride, *supra* note 104.

¹⁴⁸ "If music companies cannot get on with their successful artists any longer, some executives believe they should consider ending their relationship. To reach this point is widely seen as a failure. To go further and engage in a widely-publicized acrimonious legal battle is regarded by many as worse." Skapinker, *supra* note 105.

¹⁴⁹ See Dawtrey, *supra* note 99 ("Record company stock prices shot upwards on news of the ruling."); *Amsterdam Shares Firmer, Off Highs, Lifted by Bonds in Quiet Midsession Trade*, AFX NEWS, June 22, 1994, at 1 (Markets; Stocks) ("PolyGram was up 0.80 at 75, still benefitting from yesterday's news that . . . George Michael lost his court case against Sony . . ."); *Stock Market Round-Up 2*, EXTEL EXAMINER, July 7, 1994, at 1 (London Stock Exchange; Reports) ("Thorn EMI rose 28p . . . with investors unconcerned that George Michael had decided to appeal against the judgment in the Sony case."); but see *Nikkei Weaker on Dollar's Low Against Yen*, FIN. TIMES, June 23, 1994, at 39 (World Stock Markets) ("Sony, in spite of its legal victory in the George Michael case in England, fell ¥90 . . .").

¹⁵⁰ Skapinker, *supra* note 105 (quoting Rupert Perry, UK chief executive of EMI Music and chairman of the British Phonographic Industry Trade Association).

conclusion that the contract is unenforceable. It has already been established that courts are not allowed to order specific enforcement in the context of personal services contracts.¹⁵¹ The following discussion seeks to persuade that injunctions are an equally inappropriate remedy in this context.

In the past, it seems that the third option of damages has rarely been used. Sometimes the artists have been completely freed from their contracts,¹⁵² while other times the company's contract with the artist has been affirmed, resulting in an injunction.¹⁵³ The factors considered to be important in the courts' decisions have included "specialness" of the performer, star power, how young or inexperienced the performer was at the time the contract was signed, adequacy of representation, good faith of the record company, policies of avoiding involuntary servitude, and whether the artist's actions seemed to have affirmed the contract.

All these factors are important, and it is reassuring to see that courts have taken care to consider them. However, the courts do not have to make a choice between ordering injunctions on one hand and declaring contracts unenforceable on the other. Courts could find contracts to be valid and enforceable and still refuse to order an injunction. If a contract is breached, damages should be assessed. Injunctions could be deemed unnecessary. A basic tenet of law is that injunctions are only appropriate when damages are an inadequate remedy.¹⁵⁴ However, no authority explains exactly why damages would be insufficient. Indeed, extremely expensive damages that no artist could pay could have the same result as an injunction.

One important way to improve relations between artists and companies would be to avoid the courts altogether. As already noted,

¹⁵¹ See *supra* Part II.B.1.

¹⁵² *Beverly Glen Music, Inc. v. Warner Communications, Inc.*, 178 Cal. App. 3d 1142 (1986) (Anita Baker); *Motown Record Corp. v. Brockert*, 160 Cal. App. 3d 123 (1984) (Teena Marie); *Foxx v. Williams*, 244 Cal. App. 2d 223 (1966) (Redd Foxx); see also *supra* note 91.

¹⁵³ *MCA Records, Inc. v. Newton-John*, 90 Cal. App. 3d 18 (1979) (Olivia Newton-John). See also *Panayiotou v. Sony Music Entertainment (UK) Ltd.*, 13 Ch. 532 (Ch. 1994); *supra* Part II.B.2.

¹⁵⁴ E. ALLAN FARNSWORTH, *CONTRACTS* 856 (2d ed. 1990).

to have either the artist or the company bring a case to litigation is viewed by those in the music business as a failure by the record company.¹⁵⁵ However, some in the industry believe that nothing will change without litigation,¹⁵⁶ or at least arbitration.¹⁵⁷

This Comment proposes two possible solutions to the problem of how to adequately uphold personal services contracts without the use of specific enforcement or injunctions. The first is to encourage the use damages rather than injunctions. The second is more radical: the courts should find that multi-year, multi-album contracts are unenforceable because they promote involuntary servitude. In backing up this proposal, a comparison is made to the restructuring of the movie industry in the 1930s and 1940s.

¹⁵⁵ See *supra* note 148.

¹⁵⁶ Dominic Pride, *Michael/Sony Verdict Resounds; Decision Does Not End Issues' Debate*, BILLBOARD, July 2, 1994, at 1.

Damage Management's Ed Bicknell says he believes that action through a united body such as the International Managers Forum would not be able to resolve these grievances. "There are a lot of issues which artists are still very unhappy about, but I don't believe that anything will ever happen unless it's a consequence of litigation," Bicknell says.

¹⁵⁷ As tantalizing a solution as is arbitration within the industry, it is beyond the scope of this Comment, which is only attempting to discuss the legal ramifications of artists who attempt to break their contracts. Other important issues that will not be discussed here are artists' (non)ownership of their masters, and artists' royalty rights. Ownership of masters was one of Michael's grievances which was not discussed in the court's opinion. Sony owned the copyrights to Michael's recordings and kept the master tapes. Sean O'Neill, *George Michael's Cash Blues; In 5 Years, the Star Made £16m but Sony's Cut was £95m*, DAILY TELEGRAPH, Oct. 19, 1993, at 5; see also generally *Mellencamp v. Riva Music Ltd.*, 698 F. Supp. 1154 (S.D.N.Y. 1988).

For an extensive treatment of the history of artists' royalty and copyright rights, see MARC ELIOT, ROCKONOMICS (1989). See generally *Mellencamp v. Riva Music Ltd.*, 698 F. Supp. 1154 (S.D.N.Y. 1988); *Gee v. CBS*, 471 F. Supp. 600 (E.D. Pa. 1979); *Fantasy, Inc. v. Fogerty*, 984 F.2d 1524 (9th Cir. 1993).

A. *Damages Are The Only Appropriate Remedy When The Contract Is Enforceable*

Courts considering cases in the music industry have taken two approaches to artists who "want out" of their contracts. Sometimes the contract is declared to be valid, and the artist is either forced to remain with the company or is enjoined from working for anyone else. On the other hand, sometimes the contract is declared unenforceable and the artist is free to go. Damages seem to have been neglected as a remedy in personal services contracts, even though courts have been urged to employ injunctions only when damages are an inadequate remedy.¹⁵⁸

Instead of this all-or-nothing approach, damages, as traditionally used in contract law, could be employed when the contract is enforceable. Contracts that are clearly unconscionable¹⁵⁹ or otherwise illegal should still be declared unenforceable. Artists in cases such as those involving the Stone Roses¹⁶⁰ or Teena Marie¹⁶¹ have been and should be entirely free to go. Other situations involve artists with valid contracts who wish to leave their employers. Courts would not have the option of enjoining artists from breaching their contracts, but could make it financially difficult to do so. The artists could be allowed to seek employment elsewhere, but would be required to pay damages according to established contract law.

¹⁵⁸ FARNSWORTH, *supra* note 154, at 856.

¹⁵⁹ Unconscionability. A doctrine under which courts may deny enforcement of unfair or oppressive contracts . . . because of substantive abuses relating to the terms of the contract, such as terms which violate reasonable expectations of parties or which involve gross disparities in price

Basic test of "unconscionability" of contract is whether under circumstances existing at time of making contract and in light of general commercial background . . . , clauses involved are so one-sided as to oppress or unfairly surprise party. . . . Unconscionability is generally recognized to include an absence of meaningful choice on the part of one of the parties, to . . . contract terms which are unreasonably favorable to the other party. HENRY CAMPBELL BLACK, *DELUXE BLACK'S LAW DICTIONARY* 1524 (6th ed., 1990).

¹⁶⁰ See *supra* note 91.

¹⁶¹ *Motown Record Corp. v. Brockert*, 160 Cal. App. 3d 123 (1984).

Damage awards would increase with the relative value of an artist to the record company.

In a case such as George Michael's, there were many valid reasons why the court held the contract to be enforceable. Michael was inexperienced at the time he signed the first contract, and that first contract could very well have been held to be unenforceable as an invalid restraint of trade. However, Michael settled out of court and subsequently renegotiated several times, assisted by the best representation available. Additionally, although for several years he was compensated at a rate less than his star stature called for, this problem was rectified by 1990. Nevertheless, his relationship with Sony had deteriorated to the point where Michael refused ever to record for that company again.¹⁶² The court had a difficult decision to make, and it chose to err on the side of conservatism.

Instead of effectively enforcing a personal services contract, the court should have held that Michael was free to leave, but that to do so he would have to pay Sony a fair price for the loss of his services. Michael himself stated that his lawsuit was not about money.¹⁶³ Clearly, however, it would be naïvé to take this statement at face value. If the damage award had been set high enough, it would have had the same effect as an injunction. By seeking to have his contract declared unenforceable, Michael probably was attempting to regain his artistic freedom at a price somewhat less than it would cost to "buy off" the injunction. Indeed, even before the court issued its opinion in this case, it was clear that some other record company would endeavor to buy his contract from Sony.¹⁶⁴ The decision of the court did not affect Michael's future, only Sony's asking price.

The reality of the music business is that powerful artists who refuse to work for their record companies will most likely have their contracts sold to another company.¹⁶⁵ A court may be fully aware of this when deciding between issuing an injunction or requiring

¹⁶² Michael Skapinker, *Designer Stubble That Got Burnt: George Michael Loses His Court Battle - But Have Music Companies Won*, FIN. TIMES, June 22, 1994, at 22.

¹⁶³ See *supra* note 111.

¹⁶⁴ See *supra* notes 141-142 and accompanying text.

¹⁶⁵ *Id.*

assessment of damages. If the court is unsympathetic to artists who breach their contracts, it may order the artist enjoined from working from anyone else. Such a decision would not be based on the "specialness" of the performer, but as a way of giving extra negotiating power to the record company in the sale of the contract. After all, the company could always play its "trump card" and hold the artist to the contract. This probably would not happen, because the company would make no money while the artist refuses to produce any music for the company, but the threat of enforcing the injunction could very well increase the sale price of the artist's contract.

Conversely, in a damages determination, courts would make a judgment on how much the contract is worth to the record company, and decide how much an artist should have to pay for the privilege of leaving. The traditional contract principles of certainty and foreseeability would be used. The court would have to make a calculation of the future worth of a contract as accurately as could be foreseen. The record company would put on evidence such as past record sales, increasing rates of sales, critics' record reviews and predictions of popularity, plans for future touring and the revenue gained or lost by touring, testimony about the quality and marketability of partially completed songs and albums, stability and longevity of the group, and in the case of solo artists, health of the individual.

While the above list could help a court to assess the worth of an artist's contract, it is important to note that nothing in the music business can be predicted with certainty. A hit record in the past does not guarantee massive record sales in the future.¹⁶⁶ Often, artists have one hit song and then fade into obscurity. A popular group with many successful albums could have passed its creative peak. Unforeseeable personality or substance abuse problems could surface. However, while it is not possible to determine the *abstract* worth of

¹⁶⁶ In George Michael's case, many in the industry suggested that his lengthy absence during his self-imposed exile would be an insurmountable obstacle to his regaining the worldwide popularity he enjoyed in 1988. "One music manager said that [his five-year absence] would be the end of George Michael's career." Skapinker, *supra* note 162.

a contract with any certainty, actual offers made by other record companies to buy the artist's contract could show what knowledgeable people in the music business believe the *market* worth to be. Expert testimony could also be useful to gauge the contract's value.

Successful, extremely valuable artists will likely have their new record company pay for their contracts.¹⁶⁷ Although this fact should not be considered when a court is deciding between an injunction and damages, courts could use this in calculating the value of the contract. Successful artists are not going to buy their own contracts. On the other hand, as minor artists will quite possibly be on their own, looking for a new label, courts should not set the damages amount at more than those artists can pay as individuals.

One potential problem with this approach is that currently, record companies let commercially unsuccessful artists leave without hindrance.¹⁶⁸ Record companies have no qualms in allowing artists who make no money for the companies out of their contracts. If a new court policy allows companies to collect even small sums from such artists who want to leave, this would be a burden on a group of artists least able to shoulder it. Therefore, there should perhaps be a minimum level of success required before any damages at all could be awarded to the company.

There is a possible problem in allowing a jury to set the amount of damages, because as previously noted, the more famous and popular the performer, the more likely it is a jury will find for the performer. This could lead to an inconsistency—the more powerful the star, the less money the jury will award in damages. Although not a perfect answer, unreasonably small damage awards can be appealed in light of evidence about the market value of a contract.

It is important to recognize that determining the value of an artist's contract is not synonymous with judging artistic merit. Courts

¹⁶⁷ See *supra* notes 139-41 and accompanying text.

¹⁶⁸ *Motown Record Corp. v. Brockert*, 160 Cal. App. 3d 123, 140 (1984) ("If the artist was not already [fairly successful], the artist's worth to the company would not justify the expense of litigating the case.").

have been extremely unwilling to judge a performer's quality.¹⁶⁹ Damages would clearly be based on the market value of an artist's contract, and not on personal opinions about an artist's creative worth.¹⁷⁰

B. *Prohibit Multi-Year/Multi-Album Contracts*

A total cessation of the use of lengthy personal services contracts for performers in the music industry is, at once, the most extreme solution and possibly the most effective. Although the court in *Michael v. Sony* could have reached this decision, it did not even consider it. Courts are very reluctant to place restrictions on the ability of parties to contract with one another. However, the validity of some such limitations, already in existence, has been upheld if the rules are designed to protect the public from its own imprudence. If a legislature decided that it was in the best interests of all for the length of personal service contracts to be restricted, it has the authority to mandate it.

One such example is a case invoking a California statute prohibiting personal services contracts longer than seven years.¹⁷¹ That statute¹⁷² was held to be generally beneficial to the public interest even though it conferred an advantage only upon a specific

¹⁶⁹ *Id.* at 137 ("A fundamental reason why courts will not order specific performance of personal services contracts is because such an order would impose on the courts a difficult job of enforcement and of passing judgment upon the quality of performance.").

¹⁷⁰ The distinction is actually not so cleanly drawn. An assessment of the market worth of an artist's contract will necessarily include evidence about the quality of the artist's performances. This evidence, however, must still be tied to an economic interest—making money for the record company. While artistic quality will be a part of the calculations, it cannot be a factor in its own right.

¹⁷¹ *De Haviland v. Warner Bros. Pictures, Inc.*, 67 Cal. App. 2d 225 (1944) (interpreting CAL. LAB. CODE § 2855).

¹⁷² "A contract to render personal service . . . may not be enforced against the employee beyond seven years from the commencement of service under it." *Id.* at 230 (quoting CAL. LAB. CODE § 2855 (as existed in 1937)). See also CAL. CIV. CODE § 3423 (Deering 1995); *supra* note 60 and accompanying text.

group of employees—those in personal services contracts.¹⁷³ Additionally, it was held that the employee could not waive the restriction limiting contracts to seven years by either agreement or conduct.¹⁷⁴ If the employee could waive the restriction, the statute would accomplish nothing. By extrapolation, if legislatures are free to restrict personal services contracts to seven years, courts must also have authority to uphold restrictions of an even shorter term, if it were shown to be in the public's interest.

The record companies assert that long-term contracts are necessary to nurture and support new talent.¹⁷⁵ Time and exposure to creative new ideas is very important to inexperienced artists. Record companies have the resources and the luxury of waiting to allow artists time to grow into their full potential. In addition, from a more practical standpoint, the companies must be allowed to recoup their investment. Numerous new bands and artists are signed each year, and only a few are successful. The record companies must rely on the successes of those few to subsidize giving the opportunity for success to many.¹⁷⁶ If the companies had to be prepared to lose a successful artist or band at the very moment it started to make money for the label, very few would take a risk on new talent. The record labels would only invest money and resources into artists who seemed very likely to be a commercial success. As a result, the record

¹⁷³ *De Haviland*, 67 Cal. App. 2d at 235.

¹⁷⁴ *Id.* at 237.

It could scarcely have been the intention of the Legislature to protect employees from the consequences of their improvident contracts and still leave them free to throw away the benefits conferred upon them. The limitation of the life of personal service contracts and the employee's rights thereunder could not be waived.

¹⁷⁵ Robert Hilburn & Chuck Philips, *Rock's New World Order*, L.A. TIMES, Nov. 29, 1992, at E7 (quoting Michael P. Schulhof, chairman of Sony Music Entertainment).

¹⁷⁶ Jeff Kaye, *Music Industry Eyes on George Michael Suit*, L.A. TIMES, Oct. 8, 1993, at D5.

companies argue, much of the new music released would become too mainstream and predictable.¹⁷⁷

However, others in the industry deny that the length of contracts is an issue anymore.¹⁷⁸ Although it may be generally true that contracts are shorter now than in the past,¹⁷⁹ this is no help to the artist who falls into the exception. The majority of artists in the music industry would still like to see a requirement that their contracts not be onerously long.¹⁸⁰

The strongest argument that the artists have in their favor is that oppressive contracts violate the constitutional prohibition against involuntary servitude. As performers' contracts are for services of a personal nature, they cannot be specifically enforced.¹⁸¹ Artists could reason that, as their contracts are not subject to specific enforcement, it only makes sense that the contracts not be made for an extended time span. Otherwise, they are currently vulnerable to an injunction, which would have the same practical effect as specific enforcement.¹⁸² Because most music industry contracts are for many years, the artists would be prohibited from working for any other employer for a very long time. Most employment situations change with time. If the circumstances become intolerable to the performer, there should be an escape, a pressure valve.

When a personal services contract in the music industry becomes unduly oppressive, it resembles involuntary servitude.¹⁸³ Most artists are contractually prohibited from working for other record labels. This demonstrates the "exclusivity" record companies have with their artists, almost as if the companies "owned" the artists'

¹⁷⁷ Simon Garfield, *George Michael is No Stranger to Contract Litigation*, TORONTO STAR, Nov. 30, 1992, at B4 (quoting Ed Bicknell, manager for Dire Straits).

¹⁷⁸ Pride, *supra* note 156 (asserting that the number of years of most contracts in the music business has already come down on its own).

¹⁷⁹ *Id.*

¹⁸⁰ See ELIOT, *supra* note 9.

¹⁸¹ See *supra* Part II.B.1.

¹⁸² *Id.*

¹⁸³ Poultry Producers of S. Cal., Inc. v. Barlow, 189 Cal. 278, 288 (1922); see also *supra* Part II.B.1.

services. In addition, the contracts remain static in the face of changing conditions. One example of this is that George Michael made a contract with CBS Records, but found himself obliged to work for Sony.¹⁸⁴ Sony "bought" Michael's services when it acquired his contract by purchasing CBS Records. If a contract is inflexible while circumstances change, it is best if the contract is not for a very long period of time.

The record companies have ready answers to challenges based on the grounds of involuntary servitude. In the first place, specific enforcement is never going to be ordered. No artist will be forced to work against his or her will. The most that will happen is that the artist will be enjoined against working for anyone else or will have to pay damages for the breach. Next, these contracts are made voluntarily. Artist who do not like the terms of a proposed contract are free to reject them and contract with another company. A contract does not constitute involuntary servitude if entered into with free will. Additionally, many artists are well represented by counsel in contract negotiations. Sophisticated artists do not need any extra help to protect their rights.

Lastly, the existing case law on the subject supports the companies' position. Especially in the U.S., courts are reluctant to allow parties out of their contracts.¹⁸⁵ Although the English courts are more willing to change contracts for equity's sake,¹⁸⁶ a rare similar case in the U.S. is *Buchwald v. Paramount Pictures, Corp.*,¹⁸⁷ where the parties' unequal bargaining power was found to have resulted in an unconscionable contract. However, Buchwald's success has been tempered by an as yet unresolved appeal, and there have not been many beleaguered plaintiffs following in his stead.¹⁸⁸

¹⁸⁴ See *supra* note 113 and accompanying quote in text.

¹⁸⁵ Donald Passman, *Michael Trial Has No Bearing On U.S. Biz*, BILLBOARD, Aug. 6, 1994, at 6.

¹⁸⁶ See *Stone Roses v. Silvertone* (High Court of England May 22, 1991) (decision was unpublished and sealed); see also *Zang Tumb Tuum Records v. Johnson* (Eng. C.A. Ch. July 26, 1989) (unpublished); *supra* note 91.

¹⁸⁷ No. C 706083, 1990 Cal. App. LEXIS 634 (Cal. App. Dep't Sup. Ct. Jan. 31, 1990).

¹⁸⁸ Passman, *supra* note 185.

Despite these obstacles, however, the artists' arguments should prevail and there should be a limitation on the length of time or number of albums a contract may require.¹⁸⁹ Most of the record companies' protestations do not apply when the artist signs his first contract as a young, inexperienced, star-struck hopeful. Courts and legislatures could protect these artists from an industry that is not designed with the artists' interests in mind. Artists new to the business really do not have many alternatives. The choice is to sign the oppressive contract or to forgo a career in the music industry. The contracts offered by different record labels have little variation. At best, an artist can hope to renegotiate later, after gaining some success and the corresponding bargaining power.¹⁹⁰

There is a strong correlation between the current structure of the music industry and the past framework of the film industry. In the 1930s and '40s, movie studios contracted with actors for lengthy periods of time. This changed when California's "seven-year statute" was used to invalidate contracts in the film industry for any term longer than that.¹⁹¹ Essentially, when Olivia De Havilland was freed from her long-term contract with Warner Brothers,¹⁹² the movie studio system broke up. The studios of the 1940s predicted that the movie industry would be unable to survive.¹⁹³

Making the same contentions the record companies now use, the movie industry argued that it could not afford to promote new talent and invest in actors unless it was guaranteed to receive a financial return after the actors became successful.¹⁹⁴ Their

¹⁸⁹ This Comment does not espouse an exact limitation on the number of years or of albums, but rather, contends that, in general, music industry contracts are too long. The film industry has settled on contracts lasting no more than two or three projects. George Michael's new contract with Dreamworks is for two albums. See *supra* note 142 and accompanying text. These are examples of more suitable lengths for contracts in the music business, and it is urged that the industry follows similar guidelines.

¹⁹⁰ Clearly, renegotiation was an unsatisfactory solution for George Michael.
¹⁹¹ *De Havilland v. Warner Bros. Pictures, Inc.*, 67 Cal. App. 2d 225 (1944).

¹⁹² *Id.* at 234.

¹⁹³ Passman, *supra* note 185.

¹⁹⁴ *Id.*

concerns proved ill-founded because, undoubtedly, the movie industry has not disintegrated. It has simply changed. A writer or director now only contracts for a two or three project deal, whereas artists in the music industry still may be signed for ten albums or twenty years.¹⁹⁵

The many similarities of the music and movie businesses create a basis for asserting that contracts between artists and companies should be subject to the same standards in both industries. In other words, just as the film industry no longer demands long contracts and exclusivity of its artists, nor should the music industry. One similarity is that artists in both businesses perform personal service contracts of employment. Granted, there are many non-artistic types of jobs that are also classified as personal services.¹⁹⁶ However, both actors and musicians are artists who sell their performances. Although they work in different mediums, artists in both industries have very similar occupations.

Conversely, one difference between the two businesses is that oral contracts are common in the movie industry, but not so widely used in the music business. This, however, could be changing. Although movie deals have often been made on the strength of an oral agreement, these contracts have usually not been challenged if broken. The case of *Main Line Pictures v. Basinger*¹⁹⁷ could change that. The court in *Main Line* decided that Kim Basinger was bound by an oral contract to appear in the film "Boxing Helena." Basinger's withdrawal from the film caused the small movie studio great losses, and the large jury award sent Basinger into bankruptcy.¹⁹⁸ Although the case is of great interest to the entertainment industry due to its

¹⁹⁵ Garfield, *supra* note 177.

¹⁹⁶ Fitzpatrick v. Michael, 177 Md. 248, 258 (1939) (listing other occupations that are also classified as personal services, such as nurse, chauffeur, companion, guardian, and housekeeper).

¹⁹⁷ No. BC031180 (Cal. Ct. App. 1994) (unpublished) (published in its entirety in *California Appeals Court Reverses \$8.9 Million Judgment Against Kim Basinger in "Boxing Helena" Breach of Contract Case, Because Faulty Jury Instruction Failed to Distinguish Between the Actress and Her Loan Out Corporation*, 16 ENT. L. REP.. 6 (Nov. 1994)).

¹⁹⁸ *Id.*

precedential value as to what constitutes a binding contract,¹⁹⁹ the appeals court marked its decision "Not to be Published." *Main Line's* influence is therefore uncertain. The case was reversed on appeal, but the reason for the reversal was not central to the question of whether a binding contract existed.²⁰⁰

Main Line can be contrasted with *Mellencamp v. Riva Music*,²⁰¹ in which John Cougar Mellencamp was unable to enforce an oral agreement against his record company. Mellencamp alleged that during a luncheon business discussion, a contract was reached whereby Riva would return to him ownership of the copyrights to his songs, for which he would pay \$3 million. The court disagreed, holding that the language of the written instrument prepared after the verbal agreement (and handshake) indicated that no contract had been established.²⁰²

This pair of cases illustrates how similar contract law is becoming for the music and movie industries. In the movie business, oral contracts are common, but have generally been unenforceable.

¹⁹⁹ *Id.*

²⁰⁰ The case was reversed due to an error in the jury instructions. The jury was instructed to decide if Basinger "and/or" her loan-out corporation, Mighty Wind, had entered, then breached a contract with Main Line. Main Line had never attempted to prove that Mighty Wind was an alter ego of Basinger, although the trial court found as a matter of law that there was no separation between the two. The appellate court held that in the absence of alter ego findings, Mighty Wind and Basinger were not synonymous. Therefore, the instructions lead to an ambiguous verdict. The contract could have been entered into by Basinger alone, by Mighty Wind alone, or by both. *Id.*

[A] reversal is required when a verdict is hopelessly ambiguous or contains an incorrect statement of the law which probably confused and misled the jury. We do not interpret the ambiguous verdict of a jury when it cannot be determined from the verdict which party is to be found liable.

Id. at 11 (citations omitted). See also Michael I. Rudell, *Ambiguous Instructions Cause Reversal of 'Basinger' Decision*, N.Y.L.J., Oct. 28, 1994, at 3.

²⁰¹ 698 F. Supp. 1154 (S.D.N.Y. 1988).

²⁰² *Id.* at 1162. The court's main reason for its decision was that key provisions to the agreement were still in negotiation at the time the written contract was drafted. Also important was the fact that copyrights can only be transferred by a document in writing. Copyright Act, 17 U.S.C. § 204(a) (1976).

Main Line suggests that this may no longer be the case,²⁰³ and that the movie industry will have to begin to recognize oral contracts' validity regardless of industry practice. In the music industry, complicated written contracts are the norm. An oral discussion would be evaluated under traditional contract law to determine whether a contract had been formed.²⁰⁴ *Mellencamp* holds that this may be ascertained by assessing the written document executed later. In this way both the music and the movie industries are falling more in line with standard contract doctrine regarding oral agreements.

Returning to the original premise, this Comment encourages prohibition of burdensome long-term contracts in the music industry, just as they have been in the movie business, due to problems intrinsic to long-term personal services contracts and the similarity of such contracts to involuntary servitude. There are some problems with this solution that must be addressed. First, movies and record albums are inherently different. Movies usually involve many more people than do records. A record can be made by a much smaller group of people. In its most basic form, an album can be created by one artist or a band and recorded into its raw form. More people are involved as the music is refined, produced and marketed, but the actual creation of the work can be accomplished by a relative few.

Movies, on the other hand, require many people to be involved before the creation of the work can even begin. There must be writers, producers, directors, casting agents, actors, costume and set designers, technical crews, and managers. Actors are only one part of a large team that creates the work. This necessitates more advance

²⁰³ No. BC031180 (Cal. Ct. App. 1994) (unpublished) (published in its entirety in *California Appeals Court Reverses \$8.9 million judgment against Kim Basinger in "Boxing Helena" Breach Of Contract Case, Because Faulty Jury Instruction Failed To Distinguish Between The Actress And Her Loan Out Corporation*, 16 ENT. L. REP. 6 (Nov. 1994)).

²⁰⁴ An oral agreement can be held to be an enforceable contract if there has been a "meeting of the minds." The parties must reach an agreement and both must have the same understanding what they are agreeing to, and the agreement must reach a certain level of specificity. See *Berg Agency v. Sleepworld-Willingboro, Inc.*, 136 N.J. Super. 369 (1975); see also *Arnold Palmer Golf Co. v. Fuqua Industries, Inc.*, 541 F.2d 584 (6th Cir. 1976).

planning for films. Alternatively, albums can be the result of improvisational jam sessions. While most records are not created in this way, it is a useful illustration of a basic difference between the two media.

Another important difference is that musicians automatically own the copyrights to their work.²⁰⁵ The copyright defaults to the musician who created the work, yet musicians commonly relinquish their copyrights in exchange for a royalty percentage and the record companies' resources in marketing and distribution.²⁰⁶ Actors, on the other hand, usually do not hold copyrights in their performances. Instead, the studio owns the copyright of a film. Actors do not even normally receive royalties from their films unless they are powerful enough to have worked out a special arrangement with the studio.

Although the differences between the two businesses makes a perfect correspondence impossible, the movie industry's policy of short-term contracts could have many positive effects if applied to the music industry. One beneficial consequence would be that record companies would likely stop giving large monetary advances to musicians before an album is released. Currently, musicians live off the generosity of their record companies while they are making an album, with the understanding that they will repay the money when the album is successful. If the album is not successful, the musicians are in debt to the company. More money is advanced to make another album which, with luck, will be successful enough to pay off the debt from the first.²⁰⁷ It is a vicious cycle for musicians who never break through into commercial prosperity.

If the system were altered so that record companies did not advance money to musicians before the album began to be successful, many would protest. It would be argued that musicians cannot work a "day job" while at the same time try to produce a record. Nevertheless, this is exactly what actors do who have not yet

²⁰⁵ Copyright Act, 17 U.S.C. § 201(a) (1976).

²⁰⁶ See *Panayiotou v. Sony Music Entertainment (UK) Ltd.*, 13 Ch. 532 (Ch. 1994); *Mellencamp v. Riva Music Ltd.*, 698 F. Supp. 1154 (S.D.N.Y. 1988); *Fantasy, Inc. v. Fogerty*, 984 F.2d 1524 (9th Cir. 1993).

²⁰⁷ See MARC ELIOT, *ROCKONOMICS* (1989).

succeeded in their field. Granted, struggling actors are very similar to struggling musicians. However, the musicians who are in danger of becoming beholden to the record companies are those who have had enough success to be "signed" to a record label, but have not yet had much commercial success. These are the musicians who should still be supporting themselves until the album they create begins to reap financial rewards.

Along these same lines, such a system would prevent young, inexperienced musicians from getting in over their heads. Many musicians who show the promise of talent are signed to record labels and showered with the trappings of stardom before they are actually successful.²⁰⁸ Worse is the situation where a new musician or band puts out a great song and is catapulted into instant fame. Besides the money that the single or album makes, the record company may pour money into the new star's coffers as an advance on the next album. When the next album fails to do as well as the first, the artist is suddenly in debt to the record company and under contract for six more albums. Young, inexperienced artists may not be able to handle the pressure, and after a year or two of spinning wheels, the company may be glad to let the musician go and cut its losses.²⁰⁹ Ever wonder what happened to all those "one-hit-wonders?" The above scenario is the likely answer.

On the other hand, some would argue that society has been greatly enriched by those musicians who only had one exceptional song to offer. If the system were changed so that musicians had to support themselves after being signed, but before their music was profitable, the music culture would be deprived of the gems that can only be produced in this way. In replying to this, it is true that some great songs may never be created. However, the benefit of not discarding musicians after their fifteen minutes of fame are over more than counterbalances the cost of losing some music.²¹⁰ Plus, if

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ Surely there will be artists who would gladly take one moment in the sun over nothing. Under a system that limits the length of music contracts and/or prohibits the use of injunctions, these artists could probably still receive a one-album contract with an independent recording company and have their time to shine.

musicians are allowed to move freely among record companies, as actors do among studios, the increased creative freedom will possibly result in the production of more quality songs.

IV. CONCLUSION

The policy discussion of Part III overlays the legal arguments of Part II that the music industry would benefit by having shorter contracts. In summary, artists in the music industry are contracting for personal services. If an artist refuses to perform, specific enforcement is not a legal option for record companies because to force a person to work is the same thing as involuntary servitude, or slavery. According to the current state of the law, injunctions are the preferred remedy of the courts when the artist's services meet certain standards of "specialness." Usually, this means that if the artist is a star performer, the record company can prevent him or her from working for a competitor while the contract is running. For performers of lesser distinction, damages are considered an appropriate remedy.

While injunctions are not equivalent to specific enforcement, the result is often the same. The performer is forced to work for the employer record company or not work at all. In cases where the contract extends for ten or twenty years, this is a strong proposition indeed. For this reason, injunctions should be abandoned as a remedy for breached personal services contracts. Injunctions are simply too much like enforcement to be a fair solution. Instead, damages are urged as an excellent method of providing justice to all.

In addition to a heavier reliance on damages, the length of contracts should be greatly reduced. The music industry today mirrors the structure of film studios in the 1930s. Just as long contracts in the movie business are no longer considered appropriate, lengthy and burdensome contracts are dinosaurs in the music industry. These relics should be discarded in favor of short-term deals that offer artists greater freedom. As a big business that has overcome changes more drastic than courts requiring shorter contracts, the music industry is far too strong not to survive. Perhaps relationships between the artists and the record companies will begin to be founded

on mutual respect and a desire to work together. The impossible should not be expected. It would be enough if more artists in the music industry become satisfied with their employment situations or have the ability to change to another record company if the need arises.

