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## Restoring the Seven Year Rule in the Music Industry

Kathryn Rosenberg\*

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# Restoring the Seven Year Rule in the Music Industry\*

Kathryn Rosenberg

## Abstract

**INTRODUCTION** The United States boasts a bigger entertainment industry than any other country, with Los Angeles regarded as the entertainment capital of the world. Accounts differ as to the explanation for California's rise to entertainment prominence. One version attributes the flocking to the west coast as a product of Cecil B. DeMille's last-minute location change for *The Squaw Man* in 1914 to Los Angeles; but, by 1910, movies had already been filmed in the area. Another explanation focuses on Thomas Edison, who operated in New York and New Jersey, and exerted a significant amount of control over the industry in its early days because he held many patents on the technologies necessary to make movies. Edison created the Motion Picture Patent Company ("MPPC"), which essentially established a monopoly on all aspects of filmmaking by limiting the sale of necessary items to its members. Producers who did not join the MPPC and pay the associated fees in order to use the technologies would likely be sued for using Edison's technologies. Thus, many early filmmakers decided to leave the east coast for California, where judges were less sympathetic to Edison and the power of his patents. Regardless of the historical explanation, cinema in America took off in popularity, establishing "Hollywood," the neighborhood where movie studios had set up shop, as synonymous with the industry itself. Coincidentally, the birth of the music industry is also owed in part to Edison; his discovery of the phonograph in late 1877 began the cultural phenomenon of recorded music that continues today. Unlike the film industry's Hollywood, no single region became the home of American music, as many major cities had at least one phonograph company to make recordings and many nickelodeons, establishments at which a person could listen to music for a nickel per song. Still, despite the prevalence of popular music genres in many American cities, the "Big Three,"—Sony Music Group ("Sony"), Universal Music Group ("UMG"), and Warner Music Group ("WMG")—represent a large share of the music market; many well-known, though seemingly smaller, regional record labels actually fall under the corporate umbrella of one of these three players. Of these, UMG's headquarters is located in California, and Sony and WMG are both headquartered in New York. Thus, most recording contracts by major labels are signed in, or otherwise made subject to, the laws of California or New York. This Note focuses on the effects of a provision in section 2855 of the California Labor Code. The history of this statute is important to understand the impact the statute has had on the

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\*I would like to thank Professor Aditi Bagchi for her guidance and feedback in developing this Note; the IPLJ XXVI Editorial Board and Staff, especially Elizabeth Walker and Madhundra Sivakumar, for their hard work throughout the editorial process; and most of all, my parents, Marie and Ben, and my sister, Rebecca, for their constant love, support, and willingness to read anything I've ever written since kindergarten.

entertainment industry, but more specifically, the music industry. Section 2855(a) limits the length of time personal service employment contracts may be enforced to a period of seven years, which is why the entire statute is often referred to as the “Seven Year Rule.” It states that a contract for personal service of a “special, unique, unusual, extraordinary, or intellectual character,” like those in the entertainment industry, “cannot be enforced against the employee beyond the term of seven years from the commencement of service under it.” Initially enacted in 1872 as section 1980 of the California Civil Code, the law originally prohibited employers from enforcing contracts of personal service after two years. In 1931, the statute was amended to increase the term to seven years. Finally, six years later, section 1980 was repealed and section 2855 of the Labor Code was enacted, which adopted and streamlined the language of the old provision. For fifty years, section 2855 did not change at all; even now, nearly eighty years later, the Seven Year Rule is an “accepted tenet of entertainment law,” a “given” in contract negotiations. In 1987, however, the California legislature amended the statute to add an additional subsection, which will be the focus of this Note. This music industry-specific amendment, section 2855(b), represents a “carve out” that essentially exempts musicians from protection under the statute. Part I of this Note will explain the legislative history of section 2855 and related lawsuits in order to contextualize the 1987 amendment within the entertainment industry. It will also give a brief background on the nature of recording contracts and explore the typical structure of a deal between musicians and labels. Part II will examine the conflicts between different areas of contract law that arise from the amendment, including the freedom to contract, unconscionability, unjust enrichment, and inequity in bargaining power between parties. Lastly, Part III will outline potential solutions to resolve conflicts created by the law, including two possible amendments to section 2855(b), and repealing section 2855(b) altogether. Ultimately, I argue that the best option for ensuring fair outcomes is repealing section 2855(b) through collective action of recording artists.

**KEYWORDS:** Media, Music Industry, Personal Service Contracts, Section 2855, Recording Contracts, Musician Exemption

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## INTRODUCTION

The United States boasts a bigger entertainment industry than any other country,<sup>1</sup> with Los Angeles regarded as the entertainment capital of the world.<sup>2</sup> Accounts differ as to the explanation for California’s rise to entertainment prominence. One version attributes the flocking to the west coast as a product of Cecil B. DeMille’s last-minute location change for *The Squaw Man* in 1914 to Los Angeles; but, by 1910, movies had already been filmed in the area.<sup>3</sup> Another explanation focuses on Thomas Edison, who operated in New York and New Jersey, and exerted a significant amount of control over the industry in its early days because he held many patents on the technologies necessary to make movies.<sup>4</sup> Edison created the Motion Picture Patent Company (“MPPC”), which essentially established a monopoly on all aspects of filmmaking by limiting the sale of necessary items to its members.<sup>5</sup> Producers who did not join the MPPC and pay the associated fees in order to use the technologies would likely be sued for using Edison’s

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<sup>1</sup> *The Media & Entertainment Industry in the United States*, SELECTUSA, <http://selectusa.commerce.gov/industry-snapshots/media-entertainment-industry-united-states> [<http://perma.cc/DMZ9-6ZLE>] (last visited Oct. 30, 2015) (noting that the United States’ media and entertainment industry comprised of “businesses that produce and distribute motion pictures, television programs and commercials, along with music and audio recordings, radio, games, and publishing.”).

<sup>2</sup> L.A. CTY. ECON. DEV. CORP., *THE ENTERTAINMENT INDUSTRY AND THE LOS ANGELES COUNTY ECONOMY 1* (Nov. 2012), <http://laedc.org/wp-content/uploads/2012/04/EntertainmentinLA.pdf> [<http://perma.cc/DL69-A87S>].

<sup>3</sup> See *The History of the Hollywood Movie Industry*, HISTORY COOPERATIVE (Nov. 12, 2014), <http://historycooperative.org/the-history-of-the-hollywood-movie-industry> [<http://perma.cc/GS32-494H>] [hereinafter *History of Hollywood*].

<sup>4</sup> See Dan Lewis, *Thomas Edison Drove the Film Industry to California*, MENTAL FLOSS (July 16, 2013, 5:00 PM), <http://mentalfloss.com/article/51722/thomas-edison-drove-film-industry-california> [<http://perma.cc/P58F-YES2>].

<sup>5</sup> See *id.*

technologies.<sup>6</sup> Thus, many early filmmakers decided to leave the east coast for California, where judges were less sympathetic to Edison and the power of his patents.<sup>7</sup> Regardless of the historical explanation, cinema in America took off in popularity, establishing “Hollywood,” the neighborhood where movie studios had set up shop, as synonymous with the industry itself.<sup>8</sup>

Coincidentally, the birth of the music industry is also owed in part to Edison; his discovery of the phonograph in late 1877 began the cultural phenomenon of recorded music that continues today.<sup>9</sup> Unlike the film industry’s Hollywood, no single region became the home of American music, as many major cities had at least one phonograph company to make recordings and many *nickelodeons*, establishments at which a person could listen to music for a nickel per song.<sup>10</sup> Still, despite the prevalence of popular music genres in many American cities,<sup>11</sup> the “Big Three,”—Sony Music Group (“Sony”), Universal Music Group (“UMG”), and Warner Music Group (“WMG”)—represent a large share of the music market;<sup>12</sup> many well-known, though seemingly smaller, regional record labels actually fall under the corporate umbrella of one of these three players.<sup>13</sup> Of these, UMG’s headquarters is located in California,<sup>14</sup>

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<sup>6</sup> See *id.*

<sup>7</sup> See *id.*

<sup>8</sup> See *History of Hollywood*, *supra* note 3.

<sup>9</sup> *Thomas Edison and the First Phonograph*, AMERICA’S LIBRARY, [http://www.americaslibrary.gov/jb/recon/jb\\_recon\\_phongrph\\_1.html](http://www.americaslibrary.gov/jb/recon/jb_recon_phongrph_1.html) [<http://perma.cc/AK2K-LZYR>] (last visited Oct. 30, 2015).

<sup>10</sup> See Alex Cosper, *History of Record Labels and the Music Industry*, PLAYLIST RESEARCH, <http://www.playlistresearch.com/recordindustry.htm> [<http://perma.cc/F9Q4-YD53>] (last visited Oct. 30, 2015).

<sup>11</sup> For example, we often associate Nashville as the center of country music, Detroit as the birthplace of Motown, and Seattle as the home to “grunge” rock, to name a few American regions tied to popular music genres. See Richard Florida, *The Geography of America’s Music Scenes*, CITYLAB (Aug. 6, 2012), <http://www.citylab.com/design/2012/08/geography-americas-music-scenes/2709> [<http://perma.cc/6E7B-RWGW>].

<sup>12</sup> As of mid-2014, the Big Three controlled eighty-nine percent of global music sales. See Matt Pollock, *Three Huge Record Labels Are Preparing to Take a Lot of Money From Their Artists*, MIC (July 17, 2014), <http://mic.com/articles/93502/three-huge-record-labels-are-preparing-to-take-a-lot-of-money-from-their-artists> [<http://perma.cc/CUK7-AA92>].

<sup>13</sup> For a complete listing of each of these brands’ subsidiary labels, visit their websites: *Labels*, SONY MUSIC GROUP, <http://www.sonymusic.com/labels> [<http://perma.cc/9UZF-ETZU>] (last visited Oct. 30, 2015); *Our Labels & Brands*, UNIVERSAL MUSIC

and Sony and WMG are both headquartered in New York.<sup>15</sup> Thus, most recording contracts by major labels are signed in, or otherwise made subject to, the laws of California or New York.<sup>16</sup>

This Note focuses on the effects of a provision in section 2855 of the California Labor Code. The history of this statute is important to understand the impact the statute has had on the entertainment industry, but more specifically, the music industry. Section 2855(a) limits the length of time personal service employment contracts may be enforced to a period of seven years, which is why the entire statute is often referred to as the “Seven Year Rule.”<sup>17</sup> It states that a contract for personal service of a “special, unique, unusual, extraordinary, or intellectual character,” like those in the entertainment industry, “cannot be enforced against the employee beyond the term of seven years from the commencement of service under it.”<sup>18</sup>

Initially enacted in 1872 as section 1980 of the California Civil Code, the law originally prohibited employers from enforcing con-

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GROUP, <http://www.universalmusic.com/labels> [<http://perma.cc/V4NV-NHPT>] (last visited Dec. 17, 2015); *Services*, WARNER MUSIC GROUP, <http://www.wmg.com/services#artists-services> [<http://perma.cc/HC9L-VT9U>] (last visited Oct. 30, 2015).

<sup>14</sup> Universal Music Group’s corporate headquarters is located in Santa Monica, California. *See Contact Us*, UNIVERSAL MUSIC GROUP, <http://www.universalmusic.com/contact-us> [<http://perma.cc/5XH2-FMES>] (last visited Dec. 17, 2015).

<sup>15</sup> Sony Music Group’s headquarters is located in New York, New York, *see FAQ*, SONY MUSIC GROUP, <http://www.sonymusic.com/faq/#seven> [<http://perma.cc/XJ3K-8Z6L>] (last visited Oct. 30, 2015), as is Warner Music Group’s, *see Culture*, WARNER MUSIC GROUP, <http://www.wmg.com/culture#contact> [<http://perma.cc/7ZMT-YTBX>] (last visited Oct. 30, 2015).

<sup>16</sup> *See* M. WILLIAM KRASILOVSKY & SIDNEY SHEL, *THE BUSINESS OF MUSIC: THE DEFINITIVE GUIDE TO THE MUSIC INDUSTRY* 5 (8th ed. 2000) (noting that even in the case of New York music contracts, major record labels include a “duration provision” that is the same in New York or California).

<sup>17</sup> The statute is also referred to as the “De Haviland Law” after actress Olivia de Havilland (those who refer to the law after Ms. de Havilland often spell her last name the same way as it appears in the case citation: incorrectly), who brought a suit against Warner Brothers to end her exclusive contract with the studio after seven years had lapsed. *See infra* Part I.A.2.

<sup>18</sup> CAL. LAB. CODE § 2855 (2014); *see also* *De Haviland v. Warner Bros. Pictures, Inc.*, 67 Cal. App. 2d 225, 229 (1944) (holding that section 2855’s “seven year” limitation on personal service contracts must be measured in *calendar years*, not in terms of *actual service*) (emphasis added).

tracts of personal service after *two* years.<sup>19</sup> In 1931, the statute was amended to increase the term to *seven* years.<sup>20</sup> Finally, six years later, section 1980 was repealed and section 2855 of the Labor Code was enacted, which adopted and streamlined the language of the old provision.<sup>21</sup> For fifty years, section 2855 did not change at all; even now, nearly eighty years later, the Seven Year Rule is an “accepted tenet of entertainment law,” a “given” in contract negotiations.<sup>22</sup>

In 1987, however, the California legislature amended the statute to add an additional subsection, which will be the focus of this Note. This music industry-specific amendment, section 2855(b), represents a “carve out”<sup>23</sup> that essentially exempts musicians from protection under the statute.<sup>24</sup> Part I of this Note will explain the legislative history of section 2855 and related lawsuits in order to contextualize the 1987 amendment within the entertainment industry. It will also give a brief background on the nature of recording contracts and explore the typical structure of a deal between musicians and labels. Part II will examine the conflicts between different areas of contract law that arise from the amendment, including the freedom to contract, unconscionability, unjust enrichment, and inequity in bargaining power between parties. Lastly, Part III will outline potential solutions to resolve conflicts created by the law, including two possible amendments to section 2855(b), and repealing section 2855(b) altogether. Ultimately, I argue that the best op-

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<sup>19</sup> GREGG B. RAMER, KATTEN MUCHIN ROSENMAN LLP, PERSONAL SERVICE WITH A SMILE: A HISTORY OF CALIFORNIA’S “SEVEN-YEAR” RULE 1 (2013), [http://www.kattenlaw.com/files/48984\\_Spotlight\\_on\\_Entertainment\\_and\\_Media%20Law\\_Personal\\_Service\\_With\\_a%20Smile\\_A\\_History\\_of\\_Californias\\_Seven\\_Year\\_Rule.pdf](http://www.kattenlaw.com/files/48984_Spotlight_on_Entertainment_and_Media%20Law_Personal_Service_With_a%20Smile_A_History_of_Californias_Seven_Year_Rule.pdf) [<http://perma.cc/SLZ5-LZT5>]; see also LAB. § 2855.

<sup>20</sup> See RAMER, *supra* note 19, at 1.

<sup>21</sup> *Id.* at 2.

<sup>22</sup> See Matthew Belloni, *De Havilland Lawsuit Resonates Through Hollywood*, REUTERS (Aug. 23, 2007, 11:10 PM), <http://www.reuters.com/article/2007/08/24/industry-lawsuit-dc-idUSN2329585820070824> [<http://perma.cc/FD7Z-55KF>].

<sup>23</sup> See Sarah Brouillette, *The False Freedom of Rock Stardom*, REVIEWS IN CULTURAL THEORY (Mar. 15, 2013), <http://www.reviewsinculture.com/> [<http://perma.cc/C3AL-97AA>] (reviewing MATT STAHL, UNFREE MASTERS: POPULAR MUSIC AND THE POLITICS OF WORK (2012)).

<sup>24</sup> See *infra* Part II.C.



tion for ensuring fair outcomes is repealing section 2855(b) through collective action of recording artists.

## I. PERSONAL SERVICE CONTRACTS IN CALIFORNIA

### A. *History of Section 2855*

#### 1. Enactment and Early Amendments

In 1872, the California legislature passed section 1980 of the Civil Code, which stated,

A contract to render personal service, other than a contract of apprenticeship . . . cannot be enforced against the employee beyond the term of two years from the commencement of service under it; but if the employee voluntarily continues his service under it beyond that time, the contract may be referred to as affording a presumptive measure of the compensation.<sup>25</sup>

Of course, this early version of section 2855 predates what we know now as Hollywood,<sup>26</sup> however, the desire to limit a term of personal service is perhaps best contextualized in a post-Civil War America.<sup>27</sup> Over the next several decades, the statute adapted to match the burgeoning entertainment industry;<sup>28</sup> in 1931, the statute was amended to include the phrase “special, unique, unusual, extraordinary, or intellectual” in qualifying the kind of personal ser-

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<sup>25</sup> See RAMER, *supra* note 19, at 1.

<sup>26</sup> See Lewis, *supra* note 4; see also *History of Hollywood*, *supra* note 3.

<sup>27</sup> This point is, admittedly, only subtly alluded to in the introduction of Gregg Ramer’s very helpful overview of the history of section 2855. See RAMER, *supra* note 19, at 1.

<sup>28</sup> See *History of Hollywood*, *supra* note 3 (“The 1930’s was considered the Golden Age of Hollywood. A new era in film history began in this decade with the introduction of sound into film, creating new genres such as musicians, documentaries, social statement films, comedies, westerns, and horror movies.”).

vice contract under this law.<sup>29</sup> Six years later, the statute was re-codified and reworded<sup>30</sup> with text that has since been unchanged.<sup>31</sup>

## 2. *De Haviland v. Warner Brothers*

The Seven Year Rule was perhaps most famously tested in 1944 in *De Haviland v. Warner Bros. Pictures, Inc.*<sup>32</sup> In 1936, right in the middle of Hollywood's "studio system" era,<sup>33</sup> a nineteen year-old actress, Olivia de Havilland, signed a seven-year exclusive contract with Warner Brothers Pictures.<sup>34</sup> During this time, studios were highly vertically integrated, enjoyed control over production and distribution, and relied on long-term star contracts to bolster their popularity.<sup>35</sup> By 1943, after amassing critical acclaim and considerable star-power, de Havilland refused a few roles she was offered by Warner Brothers in order to best serve her reputation and career aspirations.<sup>36</sup> For these refusals and other issues (including illness) that arose throughout the course of her seven year contract, she was placed on several suspensions that totaled twenty-five weeks, which Warner Brothers attempted to tack onto the back end of her contract.<sup>37</sup>

De Havilland brought suit against the studio, arguing that her contract could not be enforced past the seven-year mark, and the California Court of Appeals agreed.<sup>38</sup> The court held that "the substitution of years of service for calendar years would work a drastic change of state policy with relation to contracts for personal

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<sup>29</sup> CAL. LAB. CODE § 2855 (2014).

<sup>30</sup> See *De Haviland v. Warner Bros. Pictures, Inc.*, 67 Cal. App. 2d 225, 230 (1944) ("It is clear that section 2855 of the Labor Code is a restatement and continuation of former Civil Code section 1980 and not a new enactment.").

<sup>31</sup> See LAB. § 2855.

<sup>32</sup> 67 Cal. App. 2d at 225.

<sup>33</sup> See *Hollywood Studio System Collection (1913-1948)*, MEDIA HISTORY DIGITAL LIBRARY, <http://mediahistoryproject.org/hollywood> [<http://perma.cc/2XWB-5G7U>] (last visited Oct. 30, 2015).

<sup>34</sup> Matt Stahl, *Employee in a Cage? Olivia de Havilland, Warner Bros. Pictures, and the "Limit Case" of Star Employment*, 12 WARWICK ENT. & SPORTS LAW J. ¶ 1 (2011), <http://www2.warwick.ac.uk/fac/soc/law/elj/eslj/issues/volume12/stahl/> [<http://perma.cc/4UDY-KDU6>].

<sup>35</sup> See *id.* ¶ 6; *Hollywood Studio System Collection (1913-1948)*, *supra* note 33.

<sup>36</sup> See RAMER, *supra* note 19, at 2.

<sup>37</sup> See *De Haviland*, 67 Cal. App. 2d at 228-29.

<sup>38</sup> See *id.* at 232.

services,” and that the phrase “for a term not beyond a period of seven years” does not carry a hidden meaning.<sup>39</sup> The *De Haviland* suit was a “watershed” event in the history of the studio system era, which “questioned the whole system of hiring stars on term contracts” and led to “stars wrestling control of their careers from the studios.”<sup>40</sup>

### 3. The Music Industry Amendments

Following the *De Haviland* ruling, the Seven Year Rule applied uniformly across the entertainment industry’s many subsets until 1987, when the Recording Industry Association of America (“RIAA”) and major record labels successfully lobbied the California legislature to amend section 2855.<sup>41</sup> Prior to the enactment of section 2855(b), recording artists would threaten to invoke the Seven Year Rule in their soon-to-expire record deals, whether or not there remained unproduced records on the contract.<sup>42</sup> Record labels often responded to these threats by renegotiating the existing contract, rather than pursuing litigation, to keep the artist at the label.<sup>43</sup> The RIAA and the labels claimed that recording contracts are unlike other entertainment industry contracts of “unique and special” nature, as they are not historically tied to a time frame so much as to the production and delivery of records.<sup>44</sup> They also argued that record companies make large investments in artists who are unfairly enriched by simply walking away from a contract without producing the agreed-upon number of albums.<sup>45</sup>

The California legislature responded with the introduction of section 2855(b), which has three subsections.<sup>46</sup> Section 2855(b)(1) establishes that the entire amendment pertains to “[a]ny employee

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<sup>39</sup> *Id.*

<sup>40</sup> See Stahl, *supra* note 34, ¶ 44 (internal citations omitted).

<sup>41</sup> See RAMER, *supra* note 19, at 2–3.

<sup>42</sup> See Chuck Philips, *Lawmakers Take Aim at Music Industry Contracts*, L.A. TIMES (Aug. 8, 2001), <http://articles.latimes.com/2001/aug/08/business/fi-31594> [<http://perma.cc/XGV8-UHJ2>] [hereinafter Philips, *Lawmakers*].

<sup>43</sup> See *id.*

<sup>44</sup> RAMER, *supra* note 19, at 3.

<sup>45</sup> Chuck Philips, *Courtney Love Seeks To Rock Record Labels’ Contract Policy*, L.A. TIMES (Feb. 28, 2001), <http://articles.latimes.com/2001/feb/28/news/mn-31219> [<http://perma.cc/K7MT-5D9P>] [hereinafter Philips, *Courtney Love*].

<sup>46</sup> CAL. LAB. CODE § 2855(b) (2014).

who is a party to a contract to render personal service in the production of phonorecords,” and imposes a written notice requirement for these parties to seek nonenforcement pursuant to section 2855(a), the Seven Year Rule.<sup>47</sup> Section 2855(b)(2) permits the recovery of damages for a breach of contract that occurs during its term, in an action commenced during or after its term.<sup>48</sup> Finally, section 2855(b)(3) states that a if a party seeking nonenforcement “is, or could contractually be, required to render personal service in the production of a specified quantity of the phonorecords and fails to render all of the required service” prior to giving notice, the party “damaged by the failure” is permitted to recover damages for each unproduced record.<sup>49</sup>

With the enactment of the amendment, however, the labels were given clear recourse for remuneration in the event an artist sought to end a contract without producing the agreed-upon number of records.<sup>50</sup> Conversely, the amendment represented a “water[ing] down” of musicians’ ability to invoke the Seven Year Rule, with a “very onerous penalty for exercising rights granted to everyone else under a personal services employment agreement.”<sup>51</sup> Thus, over the past twenty-eight years, musicians and other activists have repeatedly asked the California state assembly to repeal the 1987 amendment.<sup>52</sup>

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<sup>47</sup> *Id.* § 2855(b)(1).

<sup>48</sup> *Id.* § 2855(b)(2).

<sup>49</sup> *Id.* § 2855(b)(3).

<sup>50</sup> *See id.*

<sup>51</sup> William I. Hochberg, *A Guide To Understanding the “How’s” and “Why’s” of Recording Agreements*, in 8-159 ENTERTAINMENT INDUSTRY CONTRACTS ¶ 159.05[3] (Donald C. Farber ed., LexisNexis 2015).

<sup>52</sup> *See, e.g.*, Corey Moss, *Beck, Deftones, Others Rally For Bill That Could Change Recording Contracts*, MTV (Jan. 23, 2002), <http://www.mtv.com/news/1451908/beck-deftones-others-rally-for-bill-that-could-change-recording-contracts/> [<http://perma.cc/4CU9-K4TQ>]; Jennifer Toomey, *California State Assembly Regarding the 7-Year Statute*, FUTURE OF MUSIC COALITION, <https://futureofmusic.org/filing/california-state-assembly-regarding-7-year-statute> [<https://perma.cc/UEU7-TUDM>] (last visited Oct. 30, 2015); Teri Vanhorn, *Courtney Love, Don Henley, LeAnn Rimes Testify on Artists’ Rights*, MTV (Sept. 6, 2001), <http://www.mtv.com/news/1448678/courtney-love-don-henley-leann-rimes-testify-on-artists-rights/> [<http://perma.cc/CX8H-5X23>] (last visited Oct. 30, 2015) (“Courtney Love, Don Henley, and LeAnn Rimes went to California’s State Capitol Building on Wednesday to complain about record-company business practices and ask for legislation to free musicians from long-term contracts.”); *see also* Hochberg, *supra* note 51, ¶ 159.05[3] (“California State Senator Kevin Murray

### B. *Structure of Recording Contracts*

Because the music industry is the only subset of the entertainment field that has a “carve out” exception in section 2855, it is necessary to understand the difference between record deals and other entertainment contracts. Often, actors and actresses work with “soft deals,” yet, where a contract does exist, the majority represent *single picture* agreements that do not run the risk of violating the Seven Year Rule.<sup>53</sup> In the television industry, the rule is even less likely to cause a problem.<sup>54</sup> Television shows that run for longer than seven years are typically very popular among viewers, thus, these actors and actresses have considerable leverage with which to negotiate contracts.<sup>55</sup> Finally, and very importantly, across film and television deals, the relationship between the actors and actresses and the studios or networks is overwhelmingly not an exclusive one.<sup>56</sup>

Thus, musicians’ employment contracts look very different than those formed by their acting peers.<sup>57</sup>

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introduced into the California legislature SB 1249, the purpose of which was to appeal the 1987 amendment. The proposed state legislation was aggressively fought by the record industry, whose efforts were coordinated by the [RIAA]. Although the legislation was stalled, Senator Murray has promised to reintroduce it again and to expand his probe into record industry practices, particularly focusing on royalty accounting and payment practices.”).

<sup>53</sup> Even in major franchises that require actors and actresses to appear in multiple films, section 2855 is typically not implicated: either the films are made within the seven-year timeframe, or the actors and actresses are able to secure highly lucrative compensation that would prevent them from seeking nonenforcement of a contract.

<sup>54</sup> See discussion *infra* note 189; see also Nellie Andreeva, *The Price of Success: Hit Shows Bracing For Cast Exits & Untimely Cancellations*, DEADLINE (Apr. 9, 2015, 2:09 PM), <http://deadline.com/2015/04/cast-members-leaving-shows-renewed-vampire-diaries-1201405965> [<http://perma.cc/WY75-EBRL>] (“Cast contract negotiations are considered a high-class problem as they are associated with hit series that have gone the distance.”).

<sup>55</sup> See RAMER, *supra* note 19, at 4; see also Andreeva, *supra* note 54 (noting the difficulties faced by shows that lose stars after their contracts have ended, and the increased importance of retaining a star who plays a show’s title character).

<sup>56</sup> See, e.g., Susan Murray, *I Know What You Did Last Summer: Sarah Michelle Gellar and Crossover Teen Stardom*, in UNDEAD TV: ESSAYS ON BUFFY THE VAMPIRE SLAYER 51–52 (Elana Levine & Lisa Parks eds., 2007) (discussing the role of film projects in the career of an actor or actress who has achieved fame in television, and noting that “forays into film are particularly alluring to audiences during the summer, when network shows are on hiatus”).

<sup>57</sup> See RAMER, *supra* note 19, at 3.

The fundamental legal principle in any agreement between a recording artist and a record company is a simple copyright transaction: the recording artist who provides the talent and marketability, convey his or her rights in the sound recording of his or her performance to the record company, which provides the production, distribution, and marketing resources and expertise.<sup>58</sup>

The copyright-owning label manufactures and sells the product created by the artist, with whom it shares the revenue, as provided by contract.<sup>59</sup>

It is safe to say that movie studios, television networks, production companies, and record labels all assume some financial risk for their projects. Section 2855(b)(3)'s damages provision only applies to the music industry, however, which seems to represent the California legislature's recognition that the industry's unique structure warranted greater protection for labels, as they "necessarily make 'large investments in an artist's career based primarily on the promise that the act [will] deliver' the contractually stipulated number of albums."<sup>60</sup> Thus, if the musician was permitted to walk away from the deal without producing the agreed-upon number of albums, the record company "would be damaged by not receiving the full value of their 'investment' in the artist."<sup>61</sup>

This investment in the artist is reflected in the recording contract. A record label does assume the financial risk in production, distribution, and marketing,<sup>62</sup> but treats these expenditures as advances to the artist against future royalties.<sup>63</sup> If a record is eventually able to recoup those costs,<sup>64</sup> the artist will earn royalties, as stipulated by the contract; if the record is unable to recoup those

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<sup>58</sup> COREY FIELD & BARRY I. SLOTNICK, ENTERTAINMENT LAW: FORMS & ANALYSIS § 4.12 (2014).

<sup>59</sup> *Id.*

<sup>60</sup> Note, *California Labor Code Section 2855 and Recording Artists' Contracts*, 116 HARV. L. REV. 2632, 2636 (2003) (quoting Philips, *Lawmakers*, *supra* note 42).

<sup>61</sup> RAMER, *supra* note 19, at 3.

<sup>62</sup> See FIELD & SLOTNICK, *supra* note 58, § 4.12.

<sup>63</sup> *Id.*

<sup>64</sup> The contract typically specifies the types and amounts of the record label's "recoupable" costs to be charged against the artist's royalty account. *Id.*

costs, the artist does not have to repay those advances to the label.<sup>65</sup> Thus, unsuccessful records financially harm the labels more than the artists who create them; however, the label also stands to recoup their costs and profit immensely from successful records.

In addition to this basic, industry-wide structure of the recording contract, other important issues include:

- “The scope of exclusive services the artist must provide to the label;”
- “The number of projects or ‘albums’ that must be delivered by the artist pursuant to ‘options’ held by the record company;”
- “The advances payable to the artist for each album;” and
- The royalties the artist will receive and the royalty costs for the producer of the recordings.<sup>66</sup>

These four major issues help to highlight the differences in the interests of the record labels and the artists when disputes under section 2855 arise.

### 1. Scope of Exclusivity

Recording contracts require that the artist produce recordings exclusively for the label.<sup>67</sup> As discussed above in Part I.A.2, *De Haviland* represented a victory for the artist and helped end the period in Hollywood history marked by powerful studios and exclusive actor contracts.<sup>68</sup> During the studio system era, the perception was that the studio “created” the movie stars: “[they] were recruited by the studio’s talent scouts, groomed by the studios, and signed to seven-year contracts.”<sup>69</sup> These contracts required the actor- and actress-employees to participate in social activities and open their lives to the media.<sup>70</sup> After *De Haviland*, actors and actresses were

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<sup>65</sup> *Id.*

<sup>66</sup> *Id.* (formatting altered).

<sup>67</sup> *Id.* § 4.12[1][a]. Non-exclusive contracts are very unusual in the industry and would require a different analysis of the fairness of section 2855(b)’s limitations on musicians.

<sup>68</sup> *See supra* note 40.

<sup>69</sup> DANIEL NIEMEYER, 1950S AMERICAN STYLE: A REFERENCE GUIDE 63 (2013).

<sup>70</sup> *See id.*

not bound to serve the studio for longer than the maximum term length;<sup>71</sup> because they knew exactly when their contracts were ending, they were able to shop around the industry for better scripts, directors, and projects.<sup>72</sup>

After *De Haviland*, a “free agency” structure began to replace the studio system as actors and actresses gained more power in negotiating employment contracts based on their fair market value.<sup>73</sup> In a free agency market, actors and actresses are not bound to one studio for an extended, long-term contract, but rather, are free to create films with whomever they want.<sup>74</sup> Today, the benefit of this system to the actors and actresses is clear, as they can embark on a project with a clear understanding of its timeline and the preparation and skills required, as well as negotiate their salary or compensation structure based on their market value. They are bound to studios on a project-by-project basis, rather than for a set length of time, and with less limited exclusivity provisions: actors and actresses are typically permitted to engage in other business dealings with other production entities, even while working on another project.<sup>75</sup>

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<sup>71</sup> See *De Haviland v. Warner Bros. Pictures, Inc.*, 67 Cal. App. 2d 225, 231–32 (1944).

<sup>72</sup> WHEELER WINSTON DIXON, *DEATH OF THE MOGULS: THE END OF CLASSICAL HOLLYWOOD* 20 (2012).

<sup>73</sup> See A. Barry Cappello & Troy A. Thielemann, *Challenging the Practices of the Recording Industry*, L.A. LAWYER, May 2002, at 14–19, <http://www.lacba.org/Files/LAL/Vol25No3/1127.pdf> [<http://perma.cc/Z2TJ-MPJJ>].

<sup>74</sup> DIXON, *supra* note 72, at 20.

<sup>75</sup> Both film and television stars face less restrictive employment relationships with their networks and studios than musicians and their labels. Still, when selecting additional television projects, actors and actresses are often limited to appear only on shows on their television show’s network or network’s affiliates. Compare Janet Kinosian, *Academy Awards: For J.K. Simmons of “Whiplash,” the Beat Never Slows*, L.A. TIMES (Feb. 5, 2015, 8:15 AM), <http://www.latimes.com/entertainment/envelope/la-et-mn-en-jk-simmons-academy-awards-20150205-story.html> [<http://perma.cc/8PJ3-338L>] (discussing actor J.K. Simmons’s hectic 2015 award season, which included appearances at many award shows, filming a movie, and hosting *Saturday Night Live*), with Dorothy Pomerantz, *Joel McHale Is a Very Busy Man*, FORBES (May 18, 2011, 10:00 AM), <http://www.forbes.com/2011/05/17/celebrity-100-11-joel-mchale-community-soup-e-nbc-popularity.html> [<http://perma.cc/EG3A-2BNG>] (discussing actor Joel McHale’s starring roles in *Community* and *The Soup*, television shows on NBC Universal networks NBC and E!, respectively, while also appearing in three films and doing standup) and James Hibberd, *ABC Orders Prank Show Inspired by Ellen DeGeneres*, ENT. WEEKLY (Jan. 14, 2015, 12:15 PM), <http://www.ew.com/article/2015/01/14/abc-ellen-degeneres-prank> [<http://perma.cc/8PJ3-338L>].



On the opposite end of the spectrum, a “360 deal” is fully broad in scope; it encompasses everything that an artist can hold rights to and can earn revenue from—including music sales, touring, merchandising, fan-club fees, endorsements, licensing, appearances, and often includes sharing with the artist the publishing rights for compositions recorded under contract.<sup>76</sup> Unlike free agency, where a person has the ability to negotiate with and enter into contracts easily, a 360 deal represents a highly exclusive relationship between label and artist.<sup>77</sup> Music contracts are increasingly closer to 360 deals because of the reduction in traditional album sales from increased online streaming.<sup>78</sup>

Because the Big Three labels have considerable institutional power in the industry,<sup>79</sup> they are able to set standards for the way music contracts are constructed.<sup>80</sup> Artists lack the ability to negotiate a contract with a major record label from scratch and rather simply agree to a variation of the standard contract.<sup>81</sup> This structure of exclusivity both prevents musicians from negotiating short-

cc/L2MA-3VLN] (discussing the launch of an ABC show, *Repeat After Me*, hosted by actress Wendi McLendon-Covey, who appears on another ABC show, *The Goldbergs*).

<sup>76</sup> Ian Brereton, Note and Recent Development, *The Beginning of A New Age?: The Unconscionability of the “360-Degree” Deal*, 27 CARDOZO ARTS & ENT. L.J. 167, 193 (2009).

<sup>77</sup> *See id.*

<sup>78</sup> *See* Michael Arrington, “360” Music Deals Become Mandatory As Labels Prepare For Free Music, TECHCRUNCH (Nov. 8, 2008), <http://techcrunch.com/2008/11/08/360-music-deals-become-mandatory-as-labels-prepare-for-free-music> [<http://perma.cc/V5DJ-H8Y2>].

<sup>79</sup> *See id.* (discussing the evolution of 360 deals from “controversial” and “experimental” to mandatory, as Warner Music Group adopted the model); *see also* Brereton, *supra* note 76, at 178 (noting that even though the then-“Big Four” stronghold on the music industry in the United States had declined, bands and artists were still more likely to achieve commercial success by signing with a major label versus an independent one); Pollock, *supra* note 12.

<sup>80</sup> *See* Brereton, *supra* note 76, at 177–78 (“Even for artists who obtain an attorney, the standard major label recording agreement can span one hundred pages, containing legalese and hidden meanings that demand counsel specializing in music law. Such an agreement is ‘virtually impossible’ for an unrepresented artist to comprehend. Additionally, these contracts endeavor to protect the major labels at all costs.”).

<sup>81</sup> *Id.* at 178, 182 (noting that “[m]any of the principal terms, through repeated usage, have come to constitute non-negotiable industry standards or, at best, negotiable within limits established by the labels over time,” and giving an example of a point that is “negotiable within limits” as the exact royalty percentage the new artist receives as typically between ten and twelve percent of the suggested retail list price).

term contracts with labels based on the artist's market value and protects labels by allowing them to retain control over their artists who are actually successful.<sup>82</sup>

## 2. Term Length; Number of Albums

Another basic industry standard is the term of the agreement: recording contracts contain an "initial contract period" in which the artist must produce "one, or at most, two albums," followed by multiple, successive options for additional albums.<sup>83</sup> The initial contract period allows the label to assess the commercial viability of the artist, and reduces its financial risk by allowing the label not to renew the contract for the option periods.<sup>84</sup> If the label exercises its options, there is no way to determine how long the contract will actually last, as these are measured in both *time* and *product*.<sup>85</sup>

[After the initial contract period, t]he agreement then provides the record company with multiple, successive options that it can exercise in its discretion to cause the artist to record additional product, with each option calling for a limited amount of product such as an additional phonograph record album for the option period so exercised. That product then becomes the "minimum delivery requirement" for that particular option period. Each contract period, whether the initial period or an option period, is generally defined as a period of time consisting of a number of months, usually between seven and eighteen, that follows the delivery of the last record required to be recorded in satisfaction of the minimum delivery requirement for that particular contract period. The actual term of the agreement is defined as the period commencing from the initial

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<sup>82</sup> See Philips, *Lawmakers*, *supra* note 42.

<sup>83</sup> Gary Stiffleman & Bonnie Greenberg, *Exclusive Recording Agreements Between An Artist and A Record Company*, in 8-159 ENTERTAINMENT INDUSTRY CONTRACTS, *supra* note 51, ¶ 159.03[1][a]; see also FIELD & SLOTNICK, *supra* note 58, § 4.12[1][c].

<sup>84</sup> Stiffleman & Greenberg, *supra* note 83, ¶ 159.03[1][a].

<sup>85</sup> *Id.*

period and continuing to the end of the last option period.<sup>86</sup>

Additionally, after the contract is drafted, the label unilaterally has the power to decide whether to exercise any—or all—of these options; the artist is bound to the option periods whether or not doing so remains a beneficial career move.<sup>87</sup> Thus, the artist whose label has exercised these options is obligated to produce the total number of records designated by the initial contract period plus those required by the option periods.<sup>88</sup>

### 3. Advances Payable to Artist Per Album and Recoupable Costs

At the start of the initial contract period and the option periods, record labels pay their artists an advance, which provides both a salary and upfront money for some production costs.<sup>89</sup> Section 3423 of the California Civil Code<sup>90</sup> mandates that labels must guarantee artists certain amounts of money each year under contract in order to bring an action to enjoin the artist in a breach of contract claim, thus, this money is usually incorporated into the advance.<sup>91</sup>

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<sup>86</sup> *Id.*

<sup>87</sup> Kaleena Scamman, *ADR in the Music Industry: Tailoring Dispute Resolution to the Different Stages of the Artist-Label Relationship*, 10 CARDOZO J. CONFLICT RESOL. 269, 281 (2008).

<sup>88</sup> *Id.*; see also FIELD & SLOTNICK, *supra* note 58, § 4.12. Note that the contract specifies the option periods in terms of length of time *and* in delivery requirement. Thus, even if it is not possible to determine exactly how long a contract will last when it is formed, it is somewhat easy to determine if it will be able to be completed in seven years by adding the length of the initial period to the option periods and accounting for industry standards for the rate at which artists can produce albums. See Philips, *Lawmakers*, *supra* note 42; see also *infra* Part II.

<sup>89</sup> See FIELD & SLOTNICK, *supra* note 58, § 4.12[1][f]; Stiffleman & Greenberg, *supra* note 83, ¶ 159.03[1][c]. This money is also referred to as a “recording fund.” Part of the contract negotiations focus on which production costs are recoupable by the label. FIELD & SLOTNICK, *supra* note 58, § 4.12[1][f], [1][n] (noting that certain costs, like the creation of music videos, may be covered up to an amount by the label, with the remainder recoupable against the artist’s royalty account).

<sup>90</sup> CAL. CIV. CODE § 3423 (2014).

<sup>91</sup> Hochberg, *supra* note 51, ¶ 159.05[2][a][ii] (explaining section 3423, known as the “\$9,000 Plus Provision,” which contractually requires a label to guarantee the artist \$9,000 by the end of the first contract year, \$12,000 by the end of the second contract year, \$15,000 by the end of contract years three through seven, in addition to additional stipulated payments in years four through seven).

The advances are usually six-figure sums; however, most of that money is recoupable against the artist's royalties in the future.<sup>92</sup> As far as the artist can control the expenses of producing the album, the artist is incentivized to be cost-efficient because he or she can keep the remaining money as an advance against future royalties.<sup>93</sup> Therefore, after the artist is paid the advance, he or she does not begin to earn royalties until the advance has been earned back.<sup>94</sup> Additionally, although the artist is not typically required to pay the label any amount from the advance that is not earned back in revenue from the album, unsuccessful records can drive artists' royalty accounts into deep deficits.<sup>95</sup> These advances may be used to recoup losses on a "cross-collateral" basis among all master recordings under the contract: the artist's advance for one album may be used to recoup other projects of the artist that were not successful.<sup>96</sup> An artist whose record does not perform well—in terms of sales, touring, licensing, etc.—may not profit at all from the creation of the record, and is either dropped from the label and or left in debt to begin the next project.<sup>97</sup> In sum, each record must be successful enough, at a bare minimum, to recoup the artists' advances from the label in order for the artist to remain financially viable.

#### 4. Artist Royalties and Royalty Costs for Producer of Recordings

Labels pay royalties to the artist based on record sales, calculated either by using the suggested retail list price ("SRLP") of the recordings, or on the net revenue that is actually received by the label.<sup>98</sup> Royalty rates fluctuate throughout an artist's career and can range from 8% to 25% of retail prices.<sup>99</sup> Artists at the beginning

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<sup>92</sup> See ARTIFACT (Sisyphus Corporation 2012) (describing the process by which artists are paid, including 30 Seconds To Mars' \$500,000 advances from EMI that were later recovered against for costs incurred from album production); see also FIELD & SLOTNICK, *supra* note 58, § 4.12.

<sup>93</sup> See FIELD & SLOTNICK, *supra* note 58, § 4.12.

<sup>94</sup> *Id.*

<sup>95</sup> FIELD & SLOTNICK, *supra* note 58, § 4.12[1][f].

<sup>96</sup> See Stiffleman & Greenberg, *supra* note 83, ¶ 159.03[1][c].

<sup>97</sup> See ARTIFACT, *supra* note 92.

<sup>98</sup> See FIELD & SLOTNICK, *supra* note 58, § 4.12[1][i].

<sup>99</sup> See Scamman, *supra* note 87, at 275.

of their careers may sign contracts for relatively low royalty percentages of the SLRP, with the potential for small percentage “bump-ups” for subsequent albums and special incentives for certain sales performance.<sup>100</sup> The calculation of royalties and assessment of a fair rate is further complicated by technological advancements and new methods of music consumption: the popularization of streaming music has ushered in new questions on how to effectively monetize these channels at a good royalty rate.<sup>101</sup>

## II. THE PROBLEM WITH SECTION 2855(b)

Although section 2855(b) was enacted nearly thirty years ago, there is very little case law to predict how California courts would handle disputes between labels and their musicians, as they are often negotiated and not litigated.<sup>102</sup> Circularly, this lack of jurisprudence creates much uncertainty surrounding the potential outcome of litigation, giving the parties, especially the labels, an even clearer benefit to resolve the dispute out of court.<sup>103</sup> Currently, section 2855(b) is problematic for a few reasons: it grants labels the right to recover damages for undelivered albums, but gives no further guidance on how these damages should be calculated;<sup>104</sup> it was enacted on the flawed premise that the music industry, as a whole, would be harmed if labels were not expressly granted this right to recover

<sup>100</sup> See FIELD & SLOTNICK, *supra* note 58, § 4.12[1][i].

<sup>101</sup> See Glenn Peoples, *Music Streaming Now Generates Trillions of Plays—But Are Royalties Keeping Up?*, BILLBOARD (Aug. 13, 2015, 2:39 PM), <http://www.billboard.com/articles/business/6663783/music-streaming-now-generates-trillions-of-plays-but-are-royalties-keeping> [<http://perma.cc/EHZ6-VAMY>].

<sup>102</sup> See, e.g., RAMER, *supra* note 19, at 3 (noting that section 2855(b)(3) seems geared to force settlement); Todd Martens, *30 Seconds to Mars and EMI Make Nice, New Album Due This Fall*, L.A. TIMES BLOG (Apr. 28, 2009, 6:48 PM), [http://latimesblogs.latimes.com/music\\_blog/2009/04/30-seconds-to-mars-and-emi-make-nice-new-album-due-this-fall.html](http://latimesblogs.latimes.com/music_blog/2009/04/30-seconds-to-mars-and-emi-make-nice-new-album-due-this-fall.html) [<http://perma.cc/PK2S-YZPW>] (“It certainly is not fun being in litigation. I would avoid it at all costs.”); Philips, *Courtney Love*, *supra* note 45 (“Earlier possible showdowns over the statute, including cases by Beck, Don Henley and Luther Vandross, were averted when industry attorneys convinced the artists to settle out of court for multimillion-dollar advances.”).

<sup>103</sup> Tracy C. Gardner, Note, *Expanding the Rights of Recording Artists: An Argument to Repeal Section 2855(b) of the California Labor Code*, 72 BROOK. L. REV. 721, 756 (2007) (“Record companies with vast resources may continue to press for settlement in important cases they fear they may lose to keep these issues safe from judicial review.”).

<sup>104</sup> See *infra* Part II.A.

damages;<sup>105</sup> and it unfairly exempts musicians from the long-standing protection of the Seven Year Rule.<sup>106</sup>

*A. Assessment of Damages*

Section 2855(b)(3) grants labels the right to recover damages for each record that is not produced in the event that a recording artist seeks to end his or her contract under the Seven Year Rule.<sup>107</sup> It states:

If a party to a contract described in paragraph (1) [an artist] is, or could contractually be, required to render personal service in the production of a specified quantity of the phonorecords and fails to render all of the required service prior to the date specified in the notice provided in paragraph (1), *the party damaged by the failure shall have the right to recover damages for each phonorecord as to which that party has failed to render service* in an action that, notwithstanding paragraph (2), shall be commenced within 45 days after the date specified in the notice.<sup>108</sup>

Commentators agree that identifying the criteria to determine damages in a breach of contract action under section 2855(b)(3) is problematic:

[W]hat *are* the damages? The actual money that the record company is out of pocket with respect to the undelivered records? The record companies don't want that; they probably haven't spent anything, yet. Lost profits from the undelivered records? Lost profits are notoriously hard to quantify. Obviously, undelivered records by bona fide stars theoretically could mean millions in lost profits.<sup>109</sup>

These vague terms, like “actual money” spent or “lost profits,” are inherently theoretical when determining the value of a

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<sup>105</sup> See *infra* Part II.B.

<sup>106</sup> See *infra* Part II.C.

<sup>107</sup> CAL. LAB. CODE § 2855(b)(3) (2014).

<sup>108</sup> *Id.* (emphasis added).

<sup>109</sup> RAMER, *supra* note 19, at 3.

record that has not yet been produced, marketed, distributed, and sold.<sup>110</sup> Section 2855(b)(3) “seems uniquely geared to forcing settlement,”<sup>111</sup> failing to specify any method or guidance for calculating these damages.

A 2008 dispute between 30 Seconds to Mars (“30STM”) and their label, EMI,<sup>112</sup> highlights this problem.<sup>113</sup> Directed by the band’s front man, film star Jared Leto, the 2014 documentary *Artifact* chronicled the band’s production of their third album,<sup>114</sup> as they grew more and more entrenched in legal battles with EMI that appeared on-track to see the inside of a courtroom.<sup>115</sup> Unhappy with EMI, the band had attempted to leave the label, based on their belief that their 1999 contract was no longer enforceable as it was beyond the seven-year threshold.<sup>116</sup> Although the band was allegedly in “millions of dollars of debt” to the label, EMI sued 30STM for thirty million dollars, pursuant to section 2855(b)(3), as the band had three undelivered albums remaining on its contract.<sup>117</sup> Neither the band nor the label had the ability to review previous decisions of California courts to predict the possible outcome of the case, weigh the costs and benefits of litigation, or whether the label even had standing to sue under section 2855(b)(3).<sup>118</sup> Further, the band believed EMI was using the lawsuit as intimidation to keep them tethered to their contract, claiming millions of dollars in damages the label knew 30STM simply could not pay.<sup>119</sup>

30STM eventually settled the matter with the label in an undisclosed renegotiated agreement and released the album *This Is War*

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<sup>110</sup> See Philips, *Courtney Love*, *supra* note 45; see *infra* Part III.A.2.

<sup>111</sup> See RAMER, *supra* note 19, at 3.

<sup>112</sup> EMI is no longer an independent record label, and has since been acquired by Sony. See Ben Sisario, *Sony Closes Its Acquisition of EMI Music Publishing*, N.Y. TIMES (June 29, 2012, 9:08 AM), <http://mediadecoder.blogs.nytimes.com/2012/06/29/passing-final-hurdle-sonys-deal-for-emi-publishing-is-approved-by-u-s> [<http://perma.cc/F3K8-M2K6>].

<sup>113</sup> Natalie Robehmed, *Jared Leto Wages War On The Music Industry*, FORBES (Dec. 4, 2013, 12:01 PM), <http://www.forbes.com/sites/nalierobehmed/2013/12/04/jared-letto-wages-war-on-the-music-industry> [<http://perma.cc/Y7WN-EQ65>].

<sup>114</sup> The album is appropriately titled *This is War*.

<sup>115</sup> See ARTIFACT, *supra* note 92.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*; see also CAL. LAB. CODE § 2855(b)(3) (2014).

<sup>119</sup> ARTIFACT, *supra* note 92.

with EMI.<sup>120</sup> Still, in the final seconds of *Artifact*, the band states they have “never been paid for the sales of any of their albums,” but that the label continues to claim the band was in debt to them.<sup>121</sup>

*Artifact* illustrates the narrative of these contractual disputes: the musician or band provides notice to the label as required by section 2855(b)(1), then the label responds with a lawsuit claiming millions of dollars for any unproduced records remaining on contract, which, in turn, initiates negotiation of the parties to settle.<sup>122</sup> Labels have the statutory right to recover damages to limit financial loss caused by unfulfilled, but promised, album delivery.<sup>123</sup> However, with no further specification or statutory limitation on damages, the labels can file multi-million dollar lawsuits against bands whose finances they closely control.

#### B. *The Reality of the Music Industry*<sup>124</sup>

In lobbying for the 1987 amendment, the RIAA argued that artists would be unfairly enriched if they could simply walk away after a time period without producing the agreed-upon number of albums.<sup>125</sup> The labels claimed they bared the financial risk in signing, promoting, and marketing their musicians, thus, they argued that without protection against artists who wanted to jump ship without fulfilling their contractual duties, they would be detrimentally

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<sup>120</sup> *Id.*; see also Martens, *supra* note 102.

<sup>121</sup> See ARTIFACT, *supra* note 92.

<sup>122</sup> See *id.*

<sup>123</sup> See LAB. § 2855(b)(3); *supra* discussion Part I.B.

<sup>124</sup> This Note focuses the discussion of the “reality” of the music industry on the feasibility on completing a standard contract within a seven-year frame, in order to concentrate analysis on the fairness of section 2855(b) and the Seven Year Rule. An entirely separate Note could focus on the technological advances in music in the past thirty years to further justify that section 2855(b) needs reform. For example, in 1987, CDs were the new, popular method of music distribution, which made record companies with existing libraries of songs very lucrative businesses. See Gardner, *supra* note 103, at 747. Although the process of creating an album, from start to finish, is very different in 2015 than it was thirty years ago, the industry’s business practices have been slow to change: recording contracts are still structured as if the physical distribution of music, through CDs or records, is the primary delivery method to consumers. See Stiffleman & Greenberg, *supra* note 83, ¶ 159.03[2][d].

<sup>125</sup> See Philips, *Lawmakers*, *supra* note 42.



harmed.<sup>126</sup> Finally, they argued that the Seven Year Rule, in the context of the music industry, did not recognize that record companies made “large investments in an artist’s career based primarily on the promise that the act would deliver a certain number of albums under the contract—typically seven recordings,” but that the labels “don’t earn money on successful artists until after the fourth album.”<sup>127</sup> In practice, however, it is very unlikely that a label would exercise its options on an artist who is not successful by the second album.<sup>128</sup>

Artists who seek nonenforcement of their contract deals under section 2855(a) often note that it is not possible to produce the number of albums designated by contract within seven years.<sup>129</sup> Given that an album “cycle,” the “overall period encompassing the creation and release of an album, including the subsequent touring and promotion,” generally takes two to three years, contracts for five to seven albums can take well over a decade to complete.<sup>130</sup> Even if an artist *wanted* to produce an album per year for seven years in order to complete her contractual obligations within seven years, the label is ultimately the decision-maker in scheduling these releases.<sup>131</sup> Yet, there is no limit on the number of options a label can include in a recording contract, thus, a label is free to include upwards of five option periods, fully knowing the contract could never be completed within the seven year frame.<sup>132</sup> Although artists are, of course, free to enter into recording contracts, labels have much more industry-knowledge than new artists signing their first-ever recording deal, who have very little experience and al-

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<sup>126</sup> See *supra* Part I.A.3; see also Philips, *Courtney Love*, *supra* note 45.

<sup>127</sup> See Philips, *Lawmakers*, *supra* note 42.

<sup>128</sup> *Id.*

<sup>129</sup> See, e.g., Vanhorn, *supra* note 52 (quoting Courtney Love—“I don’t care what the [industry] says to you today; they lied to you . . . I cannot make seven albums in seven years. They will not let me.”—and LeAnn Rimes—“At 12, I was thrilled to sign my contract with Curb Records . . . just turned 19 last month, and if I record at a rate of one album every two years, which is the industry average, I will be 35 before the contract is over.”).

<sup>130</sup> FIELD & SLOTNICK, *supra* note 58, § 4.12[1][c].

<sup>131</sup> Vanhorn, *supra* note 52.

<sup>132</sup> See *id.*

most no bargaining power or control over the working relationship.<sup>133</sup>

*C. The Seven Year Rule, De Haviland, and Unconscionability*

Before the amendment, California courts applied the Seven Year Rule to personal service contracts in the music industry.<sup>134</sup> When artists neared the end of the seven years on their contracts, they would threaten to leave the label; the labels, fearful of losing successful artists, would renegotiate these contracts.<sup>135</sup> This imbalance of power seemed to weigh entirely in favor of the artists; however, an artist who is still under contract near the end of the seven years has almost certainly been a financial success for the label.<sup>136</sup> As the label alone decides whether to exercise the options after the initial contract period, and often decides to drop artists who are unsuccessful,<sup>137</sup> those who are able to exert leverage near the end of a seven-year contract are comparatively few.<sup>138</sup> Labels have an interest in keeping their successful artists under contract, just as Warner Brothers had an interest in retaining rising star Olivia de Havilland for another six months.<sup>139</sup> By holding that the Seven Year Rule was unequivocally measured in calendar years and not actual service, the court ensured that studios could not find ways around section 2855.<sup>140</sup>

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<sup>133</sup> According to Dexter Holland of the band The Offspring, recording artists sign these contracts in good faith, fully intending to honor them. But the record companies know from experience that it is highly unlikely artists will be able to fulfill their requirements due to the demands they place on the artists, including touring, video shoots, and other marketing chores. *See Moss, supra* note 52.

<sup>134</sup> *Id.*

<sup>135</sup> *See Philips, Lawmakers, supra* note 42.

<sup>136</sup> *Id.* (“Although companies do spend vast sums of money signing and marketing unknown acts, it’s the rare label that holds on to an act that isn’t successful by its second album.”).

<sup>137</sup> *See Scamman, supra* note 87, at 274.

<sup>138</sup> Just as many more albums are released each year than are considered “successful,” many more artists are signed to labels that never amass popular or critical acclaim. *See, e.g.,* Chuck Philips, *Recording Stars Challenge Music Labels’ Business Practices*, L.A. TIMES (Mar. 29, 2001), <http://articles.latimes.com/2001/mar/29/news/mn-44202> [<http://perma.cc/6NNG-Q25C>] [hereinafter Philips, *Recording Stars*].

<sup>139</sup> *See generally* De Haviland v. Warner Bros. Pictures, Inc., 67 Cal. App. 2d 225 (1944).

<sup>140</sup> *Id.* at 231–34.

The “unjust enrichment” reasoning behind the 1987 amendment is analogous to the argument that Warner Brothers “discovered” Ms. de Havilland and produced movies that made her famous. They found her roles and financially backed her projects. They were a pivotal player in her success. Still, the court found, they were not entitled to bind her to service for an indefinite length of time.<sup>141</sup> Even though the studio had made apparent investments, financial and otherwise, in her career, that investment did not entitle Warner Brothers to lengthen her seven-year contract.<sup>142</sup> The California legislature originally enacted section 2855 (and earlier, section 1980 of the Civil Code)<sup>143</sup> “to protect against involuntary servitude in the form of unconscionable employment agreements.”<sup>144</sup> Yet, the California legislature essentially sanctioned involuntary servitude with the passage of section 2855(b): artists are forced to continue working for their labels indefinitely,<sup>145</sup> because any future profits made under a new label for the unproduced albums on the original contract would be owed to the old label as damages.<sup>146</sup> It is, of course, highly unlikely that a new label will sign an artist whose profits are owed to a different label.

Musicians believe the amendment “plainly discriminates” against artists in their industry, as “recording contracts” are the only named exception in the statute.<sup>147</sup> In opposing the 1987 amendment, the “artistic community was extremely upset . . . as it saw its rights under the seven year rule watered down” by such a potentially large penalty.<sup>148</sup> Because the threat of monetary damag-

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<sup>141</sup> *Id.* at 233–34.

<sup>142</sup> *Id.*

<sup>143</sup> *See supra* Part I.

<sup>144</sup> Gardner, *supra* note 103, at 727 (citing Revella Cook, *The Impact of Digital Distribution on the Duration of Recording Contracts*, 6 VAND. J. ENT. L. & PRAC. 40, 42 (2003)); *see also* Omar Anorga, Note, *Music Contracts Have Musicians Playing in the Key of Unconscionability*, 24 WHITTIER L. REV. 739, 747 (2003).

<sup>145</sup> The “indefiniteness” of this contract term relates to the length of time only, as the contract *would* end definitely when the final album on the contract was delivered.

<sup>146</sup> *See* Cappello & Thielemann, *supra* note 73, at 19.

<sup>147</sup> *See* Toomey, *supra* note 52; *see also* CAL. LAB. CODE. § 2855(b) (2014).

<sup>148</sup> Hochberg, *supra* note 51, ¶ 159.05[2][a][vii]; *see also* Philips, *Lawmakers*, *supra* note 42 (“It’s unfathomable to me how the record companies were able to secure an exemption to single out one class of people, namely musical artists, to be unprotected by California labor law,” [singer Don] Henley said. ‘How can everybody else be protected but us?’”).

es is enough to keep an artist tethered to the contract, musicians argue that the statute promotes unconscionable contracts that essentially leave the artist no other option, financially, but to perform.<sup>149</sup>

### III. FIXING THE MUSICIAN EXEMPTION

Currently, the wording of section 2855(b) is vague and ambiguous. Without judicial review, there is little guidance for interpreting exactly *how* to calculate the damages it entitles labels to receive. Through reform, the California legislature could protect both the record labels from unjust enrichment when lucrative artists reap the benefits of label management, and allow musicians to seek nonenforcement of a contract that has been unfairly constructed to keep them under the label's control for longer than the Seven Year Rule allows. However, it is worth noting that each of these potential solutions is only possible through collective action of artists and other music industry players. A push in 2001–2002 showed signs of momentum towards repealing section 2855(b) and securing other improvements for musicians, including the exploration of forming a labor union for recording artists,<sup>150</sup> however, these efforts ultimately failed.<sup>151</sup>

#### A. Amend Section 2855(b)

##### 1. Limitations at Contract Formation

Without considering the feasibility for parties to fulfill contractual obligations within the seven-year timeframe, the California legislature took away the protections of the Seven Year Rule for musicians by inserting monetary penalties.<sup>152</sup> One potential amendment

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<sup>149</sup> See Cappello & Thielemann, *supra* note 73, at 16 (“Recording artists have alleged that the industry’s position imposes involuntary servitude, which exists when the victim has ‘no available choice but to work or be subject to legal sanction.’”) (quoting *United States v. Kozminski*, 487 U.S. 931, 942–43 (1988)).

<sup>150</sup> See Philips, *Recording Stars*, *supra* note 138.

<sup>151</sup> Chuck Philips, *Bill on Free Agency for Artists Dies*, L.A. TIMES (Aug. 16, 2002), <http://articles.latimes.com/2002/aug/16/business/fi-7year16> [<http://perma.cc/KGW2-8MPV>] [hereinafter Philips, *Bill on Free Agency*].

<sup>152</sup> See Vanhorn, *supra* note 52.

to section 2855(b) could include a limit on the total number of albums number *or* number of option terms permitted in a recording contract. The current section 2855(b)(3) does not limit the number of records the parties can contract for, however, it gives the labels free range to collect damages for all records that are unproduced when an artist seeks to end the relationship, even after the seven year limit has lapsed.<sup>153</sup>

One possible way to limit the length of the contract term during contract formation would be to institute a “maximum album” provision, prohibiting contracting above a set number of albums within the seven-year period that are simply not feasible to produce.<sup>154</sup> Imposing a limitation on the total number of albums required in a contract to three or four total albums would “allow recording artists’ contracts to operate better within the bounds of section 2855.”<sup>155</sup> A maximum number of contractually required albums would address the music industry’s concerns in lobbying for amendment in continuing to provide the opportunity to recover damages for unproduced albums, however, it would also make the “artist’s delivery of all the contractual albums a reasonable expectation.”<sup>156</sup>

Although the inclusion of an upper limit on the number of albums would certainly lead to more realistic contracts, this solution is not ideal. First, it is likely a shortsighted fix: there is no way to predict that the future sale of music will be predicated on album production, the way it is today. If the industry dictates a different dominant method of music delivery (for example, perhaps only with the creation and release of singles, rather than entire albums), the law will be slow to adapt and will create additional contract formation issues. Further, a limitation based on the industry right now will fail to account for differences in production that occur in the future; if artists and labels are able to produce albums more quickly, or if the industry emphasis on touring continues to in-

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<sup>153</sup> See *supra* Part II.B.

<sup>154</sup> See Note, *supra* note 60, at 2650–52 (suggesting a reduction in the number of contractually required albums so the artist and label have a more realistic possibility of performing the contract’s terms).

<sup>155</sup> *Id.* at 2652.

<sup>156</sup> *Id.*

crease and lengthens the average time between albums, the provision would be of very little help. Additionally, the insertion of a “maximum album” provision requires the legislature to play expert in a field in which it likely knows very little. It would likely be very difficult for the legislature to decide the exact number for a statutory limit simply by weighing competing testimony and information, as mere trends in the industry are not inclusive of *all* musicians and their labels’ agreements.

Another option is a limitation on the number of total option periods in a contract. If the legislature imposed a limit on these options to enable them to more reasonably be completed within seven years, artists would be able to end their contractual obligations sooner and reenter the market as free agents. Still, much like the potential problems created by a “maximum album” provision, a “maximum options” provision would likely be problematic. A legislature-created statutory maximum could stifle the industry, lessen the freedom of these parties to create contracts, and force legal solutions to future problems based on current information.

## 2. Define “Damages”

As discussed above in Part II.A, section 2855(b) does not define the “damages” it allows the label to recover for “each phonorecord” the artist under contract fails to deliver.<sup>157</sup> Given that this number is incredibly speculative, labels are able to set the amount of damages using whatever calculation is most advantageous. Thus, labels often seek damages in the form of lost profits, based on the “expected profits on the additional albums that artists have neither delivered nor created,”<sup>158</sup> often a much higher number than the actual loss incurred in financing the artist’s career.<sup>159</sup> Although labels claim that the loss of profit is appropriate given the investment in the artist and the financial necessity for the label to recover on

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<sup>157</sup> CAL. LAB. CODE § 2855(b)(3) (2014).

<sup>158</sup> Cappello & Thielemann, *supra* note 73, at 17.

<sup>159</sup> This is a logical conclusion based on the fact that the label would not wish to keep an artist long-term if the artist was not profitable. Therefore, it is highly unlikely that the label’s costs associated with that artist outweigh the potential revenue it seeks to generate from that artist.

the potentially lucrative unproduced albums,<sup>160</sup> it is often impossible to calculate a justifiable figure upon which to base an estimate. The following example of Alanis Morissette illustrates the difficulty in predicting album sales for an artist:

[W]hat if [she] left her label after seven years and still owed the company four albums? It's unclear whether the company would be allowed to base the value of damages on her 30-million selling hit, "Jagged Little Pill," or her follow-up, "Supposed Former Infatuation Junkie," which sold just 2 million copies.<sup>161</sup>

Even if an artist has a sizeable sales track record from which to base an estimate of future earnings, the growing popularity of streaming services makes reasonable predictions of album sales increasingly difficult.<sup>162</sup> California law requires that the process of computing damages be "reasonable." Without a justifiable way to determine how to estimate the potential lost profit from unproduced albums, "[t]he process of estimating lost profits would therefore be unreasonably speculative."<sup>163</sup>

Although "lost profits" does not seem to yield a reasonable calculation of damages, actual damages, or "actual artist investment," which might include only the advances paid to the artist and other recoupable expenditures incurred by the label,<sup>164</sup> is not much better. If artists are liable for paying back the recoupable costs of making their album, they will find themselves in the same situation they are currently in: tethered to contracts because they

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<sup>160</sup> See Note, *supra* note 60, at 2646 ("A small number of successful albums fuel the record industry, both making it profitable and allowing companies to invest in new artists.").

<sup>161</sup> See Philips, *Lawmakers*, *supra* note 42.

<sup>162</sup> Through streaming services and Internet radio, consumers are *listening* to music all the time: in the first half of 2015, listeners streamed over 1.03 trillion songs. See Peoples, *supra* note 101 (citing *Data to Date: The Rapid Rise of Social and Streaming*, NEXT BIG SOUND, <https://www.nextbigsound.com/industryreport/2015summer> [<http://perma.cc/M9EH-AZ39>] (last visited Nov. 9, 2015)). The massive popularity of streaming services highlights the need to monetize these streams at appropriate royalty rates, which is a slowly-evolving process. See *id.*

<sup>163</sup> See Note, *supra* note 60, at 2646.

<sup>164</sup> *Id.* at 2647–48.

are unable to crawl out of debt. The artist is in no better a position to determine the potential success of an album than the label is; artists do not often *know* they are creating and recording an album that will not sell any more than a label *knows* it is marketing and promoting a flop. As the parties embark on that risk together, it is unfair to penalize the artist alone for an album that does not recoup its production expenses, as these costs alone are typically prohibitively high enough to keep the artist (whose album has not generated enough royalties to be profitable, given the artist's position) bound to the label.

A fair damage award would only allow the label to recover for advances paid or costs incurred for an album that was never recorded.<sup>165</sup> In this scenario, an artist would be responsible for repaying money given to produce an album that was not delivered. Although this option may also leave artists without recourse to leave the label, depending on the artist's finances, it produces a more equitable outcome. Labels will be protected against spending money on projects whose revenue they will lose, and artists will not be able to keep money for a project they wish to take elsewhere.<sup>166</sup> By limiting damages only to advances and costs for the *undelivered* albums, the amendment would not likely retain its current power to allow labels to threaten expensive, time consuming, and intimidating lawsuits.<sup>167</sup> Thus, the legislature must use language in section 2855(b)(3) to specify that "the party damaged by the failure shall have the right to recover damages for each phonorecord as to which that party has failed to render service" *no greater than the actual costs incurred in production of the undelivered phonorecords.*

#### B. Repeal Section 2855(b)

Over the past twenty-five years, artists have unsuccessfully attempted to lobby the California legislature to repeal section 2855(b)

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<sup>165</sup> See *id.* at 2847–48.

<sup>166</sup> See *id.* Additionally, this limit will address the concerns of a spokesperson for the RIAA, who stated in 2001, when the amendment was gaining significant challengers: "There is not going to be sympathy for [artists] when they take multimillion-dollar advances from the companies and then just walk away before they fulfill the obligations in their contracts." See Philips, *Lawmakers*, *supra* note 42.

<sup>167</sup> See ARTIFACT, *supra* note 92.



to eliminate the music industry amendments.<sup>168</sup> The California legislature held hearings in 2001 to reexamine the issue and drafted Senate Bill 1246 to repeal the amendment, however, it was dropped the following year at the request of the artists' representatives and would not likely have passed.<sup>169</sup> The legislature instructed the artists' representatives to reach a compromise on the bill with the major record labels, but compromise was never reached and the California legislature has not revisited the issue.<sup>170</sup>

Observers of these movements have made convincing arguments to repeal section 2855(b) in order to grant musicians the same protection as other artists in the entertainment field:

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

Of course, an artist should not be able to just walk away from a contractual agreement—it would be disastrous for a company to lose the millions it invested in a new artist . . . [but artists] are simply asking that they be treated like every other creative artist that is subject to the Seven Year Statute.<sup>171</sup>

Advocates of repeal argue that the elimination of section 2855(b) would reinstate a system of free agency in the music industry.<sup>172</sup> Without a damages provision specifically targeting the music

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<sup>168</sup> See, e.g., Philips, *Recording Stars*, *supra* note 138 (describing a wave of activism by recording artists in the early 2000s: exploring the possibility of a labor union, lobbying Congress to look into business practices of major labels, and a Courtney Love lawsuit seeking non-enforcement of her contract); Vanhorn, *supra* note 52.

<sup>169</sup> See Philips, *Bill on Free Agency*, *supra* note 151.

<sup>170</sup> *Id.*

<sup>171</sup> See Gardner, *supra* note 103, at 756.

<sup>172</sup> *Id.*

industry, recording artists would “enjoy[] the same rights as all other citizens,” and “there would be a reasonable opportunity for them to receive fair-market compensation for their services.”<sup>173</sup>

Further, others argue that repealing the amendment would encourage the industry to adapt its practices to reflect new trends and technology: without the monetary leverage that section 2855(b)(3) provides labels, “[t]he industry’s business model is going to have to change . . . [the labels are] going to have to be more judicious in signing new artists, cut down on the expensive videos and other marketing costs, and they’re going to have to rethink signing way too many megastars.”<sup>174</sup> Adherents to this argument believe that labels will be forced to enter into contracts more carefully, potentially reducing labels’ ability to take chances on the many unprofitable artists by relying on their superstars to make up the difference, as currently only a very small number of a label’s acts are actually profitable.<sup>175</sup> Although successful artists would likely view this change as positive, label executives warn that it would decrease opportunities for new entrants and would harm the industry as a whole: “companies would have no incentive to underwrite the risky enterprise” in which only a small number of albums actually turn a profit.<sup>176</sup>

This argument seems outdated in a world where recording artists have an opportunity to gain fans and popularity without the assistance (both in expertise and money) of a major label. Although

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<sup>173</sup> Cappello & Thielemann, *supra* note 73, at 19.

<sup>174</sup> Greg Kot, *You Say You Want A Revolution*, CHI. TRIB. (Feb. 24, 2002), [http://articles.chicagotribune.com/2002-02-24/news/0202240354\\_1\\_recording-artists-coalition-recording-industry-universal-music-group](http://articles.chicagotribune.com/2002-02-24/news/0202240354_1_recording-artists-coalition-recording-industry-universal-music-group) [<http://perma.cc/4XVS-T6M7>] (quoting Michael Nathanson, a music analyst).

<sup>175</sup> See, e.g., Gardner, *supra* note 103, at 734 (“Because of the high failure rate of released albums, record companies absorb great losses on most albums . . .”) (citing *Hearings Before the Senate Select Committee on the Entertainment Industry*, 2001 Leg., Reg. Sess. (Cal. 2001) (testimony of Ann Chaitovitz, Director of Sound Recordings, AFTRA)); Note, *supra* note 60, at 2645 (“[T]here is a greater than ninety-percent chance that any given artist’s release will be unprofitable.”); Toomey, *supra* note 52 (“[T]he music industry in America is fundamentally broken. In 1999, less than 1 percent of the total number of albums released sold more than 10,000 copies.”) (citing David Segal, *They Sell Songs the Whole World Sings: Mass Merchants Offer Convenience, Less Choice*, WASH. POST (Feb. 21, 2001), <http://www.highbeam.com/doc/1P2-419720.html> [<http://perma.cc/7W8G-NLXU>]).

<sup>176</sup> See Philips, *Recording Stars*, *supra* note 138.

it may be true that labels in the past “ha[d] to invest \$750,000 to \$1 million per act” before they knew if they would make a profit,<sup>177</sup> there exist other avenues and mediums now that may assist labels in determining whether an act will be successful before he or she is signed. As younger fan bases access music more and more easily over the Internet, channels like YouTube have become more and more important. Take, for example, pop star Justin Bieber: although recent antics may make him easier to discount, he has sold millions of records<sup>178</sup> and is the epitome of a new age star, backed by social media and tech-savvy fans.<sup>179</sup> Yet, he didn’t go to open mic nights or send tapes to labels, hoping to be found; at twelve, Bieber began uploading videos of himself on YouTube, and as they became more and more popular on the site, industry professionals sought *him* out—not the other way around.<sup>180</sup> As hopeful producers engaged in a bidding war to win him to their labels,<sup>181</sup> Bieber’s establishment on social media sites like YouTube gave him credibility that made investing in him a less risky endeavor.

Additionally, artists have other opportunities today through alternate career paths. Lennon and Maisy Stella, now sixteen and twelve years old, respectively, are Canadian sisters who also gained fame on YouTube.<sup>182</sup> After posting a cover of Robyn’s “Call Your Girlfriend” in May 2012, the video “went viral,” and that fall, the

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<sup>177</sup> *Id.*

<sup>178</sup> Glenn Peoples, *Justin Bieber’s “Baby” With New Steaming Data Beats Out Elton John For RIAA’s Top Platinum Single of All Time*, BILLBOARD (May 17, 2013, 11:26 AM), <http://www.billboard.com/biz/articles/news/digital-and-mobile/1562681/justin-biebers-baby-with-new-streaming-data-beats-out> [<http://perma.cc/84QC-CJXX>].

<sup>179</sup> As of October 2015, Justin Bieber has over 68 million followers on Twitter, *see* Justin Bieber (@JustinBieber), TWITTER, <https://twitter.com/justinbieber> [<http://perma.cc/NLP8-WRDS>] (last visited Nov. 1, 2015), and over 40 million followers on Instagram, *see* Justin Bieber (@JustinBieber), INSTAGRAM, <https://instagram.com/justinbieber> [<http://perma.cc/3KRQ-5ZCL>] (last visited Nov. 1, 2015). His fans are called “Beliebers” and often mobilize on social media sites, namely Twitter, to support and promote him. *See* NEVER SAY NEVER (Paramount Pictures 2011).

<sup>180</sup> Desiree Adib, *Pop Star Justin Bieber Is on the Brink of Superstardom*, ABCNEWS (Nov. 14, 2009), <http://abcnews.go.com/GMA/Weekend/teen-pop-star-justin-bieber-discovered-youtube/story?id=9068403> [<http://perma.cc/8R9C-BTQ8>].

<sup>181</sup> *Id.*

<sup>182</sup> *See* Lesley Goldberg, “Nashville” First Look: Meet the Stella Sisters (Exclusive Photos), HOLLYWOOD REP. (Sept. 12, 2011, 1:15 PM), <http://www.hollywoodreporter.com/live-feed/nashville-lennon-maisy-stella-connie-britton-369879> [<http://perma.cc/X4SW-25TZ>].

girls began to appear on the ABC drama “Nashville.”<sup>183</sup> Although it may be easy to assume the video landed the girls the role, they were actually cast before the video was posted; because they are Canadian, they needed to establish a portfolio for their visas, and the millions of views on the video allowed them to earn these visas more easily.<sup>184</sup> Despite their growing fan base, the girls are currently unsigned by a label and are releasing music through the show’s soundtracks.<sup>185</sup>

The Stella sisters join a number of actors and actresses starring in musical shows and movies, whose recording careers launch through soundtrack and compilation records, rather than through typical recording contracts.<sup>186</sup> Thus, with more extensive opportunities to predict the potential success of a musician’s career in a digitally dominated marketplace with evidence of that performer’s pre-label success on sites like YouTube, Vevo, SoundCloud, and others, labels can continue to take “risks” on new artists, as these risks can be more sophisticatedly calculated.<sup>187</sup> Still, even if acquiring,

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<sup>183</sup> See Jaimie Etkin, *Lennon And Maisy Stella Talk “Nashville,” Connie Britton, Sisterly Bonding, Fashion And More*, HUFFINGTON POST (Oct. 19, 2012, 9:15 AM), [http://www.huffingtonpost.com/2012/10/17/lennon-and-maisy-stella-nashville\\_n\\_1975186.html](http://www.huffingtonpost.com/2012/10/17/lennon-and-maisy-stella-nashville_n_1975186.html) [<http://perma.cc/MW4N-4JCZ>].

<sup>184</sup> “Nashville” Duo Lennon & Maisy Talk TV Stardom, *Writing New Music And Trying to Make Friends At School*, MUSIC TIMES (Dec. 5, 2014, 12:47 PM), <http://www.musictimes.com/articles/18253/20141205/nashville-duo-lennon-maisey-talk-tv-stardom-writing-new-music-youtube-viral-call-your-girlfriend-christmas-coming-home.htm> [<http://perma.cc/P5U3-5GYF>].

<sup>185</sup> See *Nashville Soundtrack*, BIG MACH. LABEL GRP., <http://www.bigmachine-labelgroup.com/artist/nashville-soundtrack> [<http://perma.cc/J4ME-XL4C>] (last visited Oct. 30, 2015).

<sup>186</sup> See, e.g., Keith Caulfield, *Rewinding the Charts: In 2006, “High School Musical” Started Something New*, BILLBOARD (Mar. 11, 2015, 10:05 AM), <http://www.billboard.com/articles/columns/chart-beat/6494765/rewinding-the-charts-in-2006-high-school-musical-started> [<http://perma.cc/32MB-3JBE>] (discussing the effect of 2006 Disney Channel movie *High School Musical* on the career of its star, and on subsequent music-centric shows, like Disney’s *Hannah Montana* and Fox’s *Glee*); Ed Masley, *For “Glee” fans, the Journey is Worth it for Launch of Live Tour*, USATODAY (May 17, 2010, 10:24 PM), [http://usatoday30.usatoday.com/life/music/reviews/2010-05-16-gleeonline17\\_N.htm](http://usatoday30.usatoday.com/life/music/reviews/2010-05-16-gleeonline17_N.htm) [<http://perma.cc/3SDM-LQ3E>] (reviewing the launch of a national concert tour of *Glee*, featuring the cast of the show).

<sup>187</sup> Despite the problematic effects of streaming on album sales and royalty collection, see *supra* note 162, the advent of streaming services, Internet radio, and social media has created additional avenues through which an artist may reach consumers. See *Data to Date*, *supra* note 162. Companies like Next Big Thing analyze “music analytics” by

marketing, producing, and promoting music of new talent remains as difficult as it ever was, the law should not protect the label at the expense of the artist. Labels have always employed strategies for predicting a new artist's potential success, and plenty of hopeful musicians go unsigned each year. Therefore, the legislature should not consider it a detriment that labels may take fewer risks on unknown musicians, but rather, as a positive of repeal: if labels are not guaranteed to keep their best-selling artists for an indefinite length of time, they will be forced to scout new talent more wisely. As Courtney Love pointed out in 2001: "How do the guys running these labels get away with a 95% failure rate that would be totally unacceptable in any other type of business?"<sup>188</sup>

Although there may be an element of unjust enrichment for artists who gain popularity and financial success with a label and then leave it, no other industry's employers are protected from this possibility. If they were, every employer that hires an entry-level employee who eventually achieves promotion within the company, as a result of his or her job training and experience, could sue the employee for damages for the "investment" made in training, or "future earnings" that employee might generate for the company.<sup>189</sup>

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tracking an artist's popularity on social media sites, the number of times an artist's song or video is played on streaming services, and the number of views on an artist's Wikipedia page. *Id.* The availability of this data represents a major strategic benefit to "music makers, labels and marketers looking for data and insights about artists and their fans." See *About Next Big Sound*, NEXT BIG SOUND, <https://www.nextbigsound.com/about> [<http://perma.cc/7YQ6-VV5B>] (last visited Nov. 9, 2015).

<sup>188</sup> Philips, *Recording Stars*, *supra* note 138.

<sup>189</sup> Consider an entertainment-industry specific example: take an actor or actress who becomes famous by working on a television show. The contract might include option periods that extend beyond the seven-year timeframe. If the producers of the show were able, in the same way as labels in the music industry, to recover damages for any "undelivered" seasons, these actors and actresses would likely be forced to continue to appear on the show, lest they be sued for the predicted future losses sustained by the producers by ending the performer's contract. In this scenario, it would be incredibly difficult to calculate the potential loss to the producers from the star's absence. Would the show decrease in popularity? Could they prove the show's declining ratings are attributable to the star's absence? What if the show continues for many years, as the NBC medical drama *E.R.* lasted fifteen seasons? See *About ER & Cast Bios*, NBC, <http://www.nbc.com/er/about> [<http://perma.cc/A3GR-ZC2X>] (last visited Oct. 30, 2015). The television industry is an interesting comparison to the music industry, as the artists in both enjoy starkly opposite levels of bargaining power. TV stars of popular shows have *considerable* leverage, likely because they are not easily replaceable. In fact, the

Rather, labels, like employers in other industries, would need to focus on their relationships with their artist-employees to encourage them to continue the business relationship. Additionally, artists would be free to renegotiate a new contract with their label as the contract neared the end of the term, but the label would need to pay according to their value in the market.<sup>190</sup> The production of each album remains a financial risk, even for well-established musicians,<sup>191</sup> and labels who develop positive and personal relationships and seek to renegotiate their star musicians' contracts would almost certainly have an advantage in the free market over other labels.

Without section 2855(b), artists would be free to leave and work with others after the term is over, and labels would be forced to create contracts that can feasibly be produced in the time frame. Further, even without section 2855(b), the law would continue to protect the labels in the event an artist does not fulfill, or reasonably attempt to fulfill, his or her obligations: if an artist is required to deliver three albums on a schedule set by the contract, but fails to do so within seven years at his or her own fault, the label retains the ability to sue the artist on a bad faith breach of contract claim.

## CONCLUSION

Repealing section 2855(b) is the most effective way to balance in bargaining power in music industry contract negotiations, and to restore the rights under section 2855(a), the Seven Year Rule, that

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stars of the ABC comedy *Modern Family* had so much bargaining power, they *incorrectly* claimed their contracts were illegal and void simply because their contracts contained option periods that *could have* extended their terms beyond seven years. See RAMER, *supra* note 19, at 4. Still, perhaps seeking to avoid prolonged legal trouble, the network renegotiated these contracts within days and the lawsuit was withdrawn. *Id.* Of course, the fact that a contract *could* last beyond seven years does not make the contract illegal and void; rather, after the seven years has ended, a party is permitted to seek non-enforcement of it. See *id.* at 3–4; see also CAL. LAB. CODE § 2855(a) (2014).

<sup>190</sup> See Cappello & Thielemann, *supra* note 73, at 19. *But see* RAMER, *supra* note 19, at 4–5 (noting that a renegotiation contract, beyond the seven year mark, should have a “lag” day in which the artist is technically not under contract at all, as that day would restart the seven year stopwatch and would allow the artist the freedom to sign elsewhere if he or she so chooses).

<sup>191</sup> See *supra* note 161 and accompanying example of Alanis Morissette’s album sales.

musicians lost in 1987. It is unlikely, however, that artists will see section 2855(b) repealed without strong collective action. Lobbying the California legislature as a unit and testifying on exact contract terms, compensation, and industry practices can present a convincing argument for repeal. Without unity, however, artists will see these actions dismantled, as they did in 2002.<sup>192</sup> Thus, artists may be better served by focusing efforts first on the establishment of a union, guild, or other professional association, allowing artists to bargain collectively and more effectively against unfair statutes that enable unconscionable contract enforcement.

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<sup>192</sup> See *supra* text accompanying note 169.